No. 10-1343

In The
Supreme Court of the United States

ZOLTAN SZAJER AND HELENE SZAJER,

Petitioners,

v.

CITY OF LOS ANGELES, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

CAC has a strong interest in ensuring access to justice, particularly via civil actions that the founding generation deemed crucial to preserving liberty and preventing government overreaching. Because constitutional history suggests that civil lawsuits, like the Szajers' Section 1983 action, were considered an important complement to the Constitution's textual protections against unlawful searches and seizures, CAC urges the Court to clarify to what extent its ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), bars such actions.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari raises an important question that strikes at the core of the Constitution's protections against unlawful searches and seizures: under what circumstances may the subject of an allegedly unlawful search or seizure bring a civil action to hold the offending law enforcement officers or agency responsible? This is a question that has sharply divided the circuits, and the passage of time since the Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), has seen a deepening of this circuit split rather than its resolution. The issue has percolated in the lower courts for an ample amount of time—there is now plainly a need for the Court to clarify the reach of *Heck*'s bar on civil actions that "necessarily" undermine a valid, outstanding criminal conviction (i.e., a conviction that has not been overturned or expunged through habeas or other appropriate proceedings). Because of the important role envisioned by the drafters of the Constitution for civil actions in securing the fundamental right of the people to be free from unlawful government searches and seizures, the Court should grant the Petition and provide guidance to the lower courts.

In the founding era, English common law relied on civil damages actions to compensate for and deter unlawful searches and seizures. "An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was 'reasonable.'" *California v. Acevedo*, 500 U.S. 565, 581 (1991)

(Scalia, J., concurring) (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-1180 (1991); *Huckle v. Money,* 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763)). The Constitution's framers strengthened the common law's protection against government overreaching by expressly declaring in the Fourth Amendment that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The Constitution's protection of this right was central to the preservation of liberty, but was no legal innovation: as Justice Story notes in his commentaries on the Constitution, the Fourth Amendment is "indispensible to the full enjoyment of the rights of personal security, personal liberty, and private property," but it is nonetheless "little more than the affirmance of a great constitutional doctrine of the common law." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1895, at 748 (1833).

Thus, from the founders' perspective, the right of the people to be secure in their persons and property was fundamentally linked to common law civil damages actions used to enforce that right. This link might not be exclusive or inextricable—other means of compensation and deterrence, such as the exclusionary rule, have been used to enforce Fourth Amendment rights—but the Court should carefully consider the framers' design before jurisprudential doctrines, such as the *Heck* bar, further erode the tie between Fourth Amendment violations and civil damages actions.

The text, history, and structure of the Constitution demonstrate that civil liability is a vital mechanism to secure the Fourth Amendment's guarantee against unreasonable searches and seizures. At the founding, this recourse took the form of the common law tort of trespass, and the Reconstruction Congress extended it in the form of Section 1983, which the Szajers' seek to use in this case to remedy their alleged constitutional injury. The Petition for Certiorari presents the Court with an opportunity to clarify the narrow circumstances under which Section 1983 actions and other civil remedies that are used to seek redress for allegedly unconstitutional searches or seizures are barred by *Heck*. *Amicus* urges the Court to grant review.

ARGUMENT

The Court Should Grant Review To Resolve The Deep Circuit Split Regarding The Extent To Which *Heck* Bars Civil Actions, Which Were Viewed By The Founders As Essential To Securing The Right Against Unlawful Searches and Seizures.

The federal courts of appeals are squarely split on the question of when a claimant may press a claim of constitutional injury under 42 U.S.C. § 1983 in cases where the claimant has not obtained relief from a relevant criminal conviction. *See* Pet. 19-27. The split stems from sharply divergent interpretations of this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), in which the Court held, as a general rule, that Section 1983

claims cannot be pursued if the success of the action would necessarily imply the invalidity of the relevant conviction. *Heck*, 512 U.S. at 486-87. As discussed above in the Summary and below in Section B, because the drafters of the Constitution considered civil remedies an essential complement to the textual protections against unlawful searches and seizures, this Court should clarify the narrow circumstances in which civil damages remedies are available for alleged constitutional violations.

A. The Petition Presents An Ideal Opportunity For The Court To Clarify *Heck*'s Reach.

The Petition represents an appropriate vehicle for clarification of the *Heck* bar on civil remedies, in a case where one of the claims of constitutional injury—an alleged warrantless search and seizure—has no relationship to the plaintiffs' conviction for an offense based on evidence that was found *after* a warrant issued.

As described in the Petition, the Szajers owned and operated "L.A. Guns," a legally licensed retail firearm store in the City of West Hollywood, California. *See* Pet. at 7; App. to Pet. for Cert. 2-5. After a sting operation in which a confidential law enforcement informant sold or attempted to sell several illegal firearms to the Szajers, police officers raided the Szajers' gun store. App. to Pet. for Cert. 2-5. In their Section 1983 action, the Szajers claim that they were then handcuffed to chairs and watched as officers searched their

business—cabinets, drawers, and shelves—without a search warrant. Pet. at 8; App. to Pet. for Cert. 73 (Szajers' Opening Br., 9th Cir.), 118 (Szajers' Reply Br., 9th Cir., citing deposition testimony of Helene Szajer), 119 (Reply Br., citing Plaintiffs' Separate Statement of Controverted Material Facts, filed in the district court). After approximately four hours, the police obtained a warrant to search the Szajers' business and two homes; during the search of the Szajers' residence pursuant to this warrant, officers found an illegal pistol. App to Pet. for Cert. 4-5. The Szajers pleaded no contest to possession of this illegal pistol, and the charges based on evidence found at their business were dismissed. *See* App. to Pet. for Cert. 5.

Amicus submits that the Ninth Circuit erred when it found that all of the Szajers' claims necessarily imply the invalidity of the Szajers' conviction for possession of the pistol found in their home, pursuant to a search warrant, and affirmed summary judgment based on *Heck*. In rejecting Petitioners' claim "that *Heck* is inapplicable here because they are challenging only the search of their gun shop, not their conviction for possession of the unregistered weapon found in their home," the Ninth Circuit concluded that "the searches of their residence and gun shop were based on the *same* search warrant." App. to Pet. for Cert. 10-11 (emphasis in original). However, the Ninth Circuit overlooked or ignored the aspect of the Szajers' Section 1983 claim that alleges a *warrantless* search of their business prior to the issuance of the warrant. As the Ninth Circuit's opinion itself

reflects, App. to Pet. for Cert. 11, the warrantless search of the Szajers' gun shop that allegedly took place immediately after the undercover sting operation did not serve as a basis for the warrant that was ultimately obtained and which led to the discovery of the illegal pistol found in Petitioners' residence. *See also* App. to Pet. for Cert. 16 (noting, in the order granting summary judgment, the three incidents used to establish probable cause for the search warrant, none of which were based on the alleged warrantless search).[2] Nothing in the search warrant and supporting affidavit describes evidence obtained from the store after the sting operation—except for the guns the informant brought in as part of the sting—as a basis for the warrant. App. to Pet. for Cert. 127-41. Thus, the Szajers' claims related to the alleged warrantless search and seizure on the premises of their business cannot possibly undermine their conviction for the possession of an illegal firearm found in their home after the police obtained a warrant.

Accordingly, this case presents a clear opportunity for the Court to clarify the circumstances under which Fourth Amendment injuries may be the basis for civil damages actions despite *Heck*'s bar on Section 1983 actions in which

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[2] The Szajers pressed a separate claim below that the searches conducted pursuant to the warrant were unlawful because the warrant was based on stale information. S*ee, e.g.*, App. to Pet. for Cert. 120 ("It is clear from the affidavit in support of the search warrant that the information was in fact stale . . . ."). *Amicus* takes no position on the propriety of barring litigation of the "stale information" claim under *Heck*.

"a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487.

B. The Question Presented Is Constitutionally Important Because The Founders Considered Civil Remedies Crucial To Enforcing Constitutional Rights, Especially The Right To Be Free From Unlawful Government Searches And Seizures.

At the time of the ratification of the Fourth Amendment, our Nation's founders understood its protection against unreasonable searches and seizures to be enforceable primarily through civil damages actions.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. As Justice Story noted in his commentaries on the Constitution, the Fourth Amendment is "indispensible to the full enjoyment of the rights of personal security, personal liberty, and private property," but it is nonetheless "little more than the affirmance of a great constitutional doctrine of the common law." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1895, at 748 (1833). Where a search was conducted

unlawfully or unreasonably, background common law principles protected citizens' property and privacy through a civil action of trespass. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 68-70 (1998); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785-86 (1994); David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 253 ("Civil damages were the remedy for Fourth Amendment violations.").

The Fourth Amendment bolsters the people's common law rights against unlawful searches and seizures as a form of trespass, for which an official is liable, by protecting that right—and related rights, such as due process of law and the right to a civil jury in certain cases—directly in the Constitution's text. Indeed, when the importance of civil remedies to the framers of the Bill of Rights is taken into account, the key relationships among the Fourth Amendment and its neighbor procedural guarantees in the Bill of Rights are clear.

For example, there is a deep structural connection with the Seventh Amendment's preservation of "the right to trial by jury" in civil suits. U.S. CONST. amend. VII. An individual who suffered an unlawful search or seizure could hale the offending official into court and demand justification before a panel of fellow citizens. Jury trials served as a democratic check against arbitrary government and functioned as "the grand bulwark of [English] liberties," 4 WILLIAM

BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *349. After the founding, this mechanism deterred unlawful searches and seizures with the threat of civil damages. AMAR, BILL OF RIGHTS, at 70. The textual harmony between the Fourth and Seventh Amendments resonates in a comparison of the Fourth Amendment to James Madison's original proposed text for the Seventh Amendment: "In suits at common law . . . the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834). *See* AMAR, BILL OF RIGHTS, at 73. Citizens were secure in their rights under the Fourth Amendment because they could pursue an action for trespass, and this remedy rested in the hands of local jurors.

The history of the ratification of the Constitution and the Bill of Rights confirm that the principal remedy under the Fourth Amendment was civil liability. [3]

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[3] Professor Amar provides a prominent and influential account of the Fourth Amendment, but his picture is also controversial on a number of fronts—for example, his criticisms, based on text and history, of the exclusionary rule. *See generally* Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L.J. 2281 (1998). But no serious scholar denies the accuracy of the observation that the Fourth Amendment's principal remedy at the time of its ratification and beyond was a common law action in trespass. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997). Because the Szajers' claim that their business was

In debating the merits of the Constitution and advocating for many protections that would ultimately be ratified in the Bill of Rights, Anti-Federalists expressly made the link between jury trials, damages actions, and deterring government overreaching:

> [N]o remedy has been yet found equal to the task of deterring and curbing the insolence of office, but a jury—it has become an invariable maxim of English juries, to give ruinous damages whenever an officer has deviated from the rigid letter of the law, or been guilty of an unnecessary act of insolence or oppression.

Essays by a Farmer (I), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981).

Another Anti-Federalist essayist continued the theme, noting that "in such cases a trial by jury would be our safest resource, heavy damages would at once punish the offender, and deter others from

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unconstitutionally searched without a warrant is unrelated to their conviction for possession of a firearm found in their residence pursuant to a search warrant, the efficacy of the exclusionary rule as a method of deterrence as opposed to civil remedies does not need to be reached here. Suffice it to say that, to the extent the Court limits the application of the exclusionary rule, the importance of civil remedies, such as those envisioned by the founders, grows.

committing the same." *Essay of a Democratic Federalist*, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, at 61. Substantive protections against unlawful searches and seizures were to be secured by the right to trial by jury, the "refuge . . . to shelter us from the iron hand of arbitrary power." *Id*. *See also Genuine Information of Luther Martin*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, at 70 (highlighting the connection between substantive rights and the structural guarantee of trial by jury, calling it a "palladium of liberty . . . with the loss of which, the loss of our freedom may be dated") (emphasis omitted).

Even though the Anti-Federalists opposed the ratification of the Constitution, their objections pertaining to what would become the Bill of Rights are of particular interpretive import. It was compromise along this dimension, with the understanding that a Bill of Rights was imminent, that smoothed the passage of our founding document. AMAR, BILL OF RIGHTS, at 144. Both the Federalists and Anti-Federalists generally agreed on the link between what would become the Fourth Amendment and enforcement through civil liability.

Two historical episodes provided the basis for this sentiment and forged the founding generation's conception of civil liability as the protection against unlawful searches and seizures. The first was the famous case of *Wilkes v. Wood*, 19 Howell's State Trials 1153 (C. P. 1763), 98 Eng. Rep. 489. Wilkes, a member of Parliament, published a pamphlet critical of the King, who then issued a general

warrant for his arrest that also authorized a roving search of Wilkes's and his supporters' personal papers and property. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. at 772. Wilkes sued under trespass, and, after an extended disquisition by his attorneys on the rights and duties of jurors, he received "a king's ransom in damages." AMAR, BILL OF RIGHTS, at 70. This result was a cause for celebration throughout the colonies, and it ensconced the notion that jury trials would protect the people against unlawful searches and seizures.

The second episode was Paxton's case, where a group of Massachusetts merchants challenged the renewal of a writ of assistance in 1761. Writs of assistance were a kind of general warrant that granted customs agents almost unbounded authority. *See* Steinberg, 42 SAN DIEGO L. REV. at 260. James Otis, a local attorney whose oration was recorded by a young John Adams, thundered that "[i]t is impossible to devise a more outrageous and unlimited instrument of tyranny . . . . It is a power, that places the liberty of every man in the hands of every petty officer." JAMES OTIS'S SPEECH ON THE WRITS OF ASSISTANCE (1761) *in* AMERICAN HISTORY LEAFLETS 16 (Albert Bushnell Hart & Edward Channing eds., 1906). The writ was directed not merely at officials, but incumbent on "every subject in the King's dominion"—even worse, "[a] man is accountable to no person for his doings." *Id*. The King's servants could invade any house at their discretion, and "whether they break through malice or revenge, no man, no court, can inquire." *Id*. at 17. Again, the principal complaint was that

these limitless warrants deprived citizens of any mechanism to hold officials to account—they could not hale them into court and demand their rightful remedy for an unlawful trespass. This animating spirit informed the framing of the Fourth Amendment. As the young John Adams noted, "Mr. Otis' oration . . . breathed into this nation the breath of life." *Id.* at 28.

In sum, when the Fourth Amendment was ratified, its promise to protect citizens from unreasonable searches and seizures was backed by the common law remedy of a civil action in trespass. This mechanism reflected a foundational commitment to the institution of civil jury trials and ensured both corrective justice and effective deterrence against future incursions.

During the Reconstruction of the Republic after the Civil War, the passage of the Fourteenth Amendment only deepened and extended the importance of civil liability in preventing unlawful searches and seizures. The Fourteenth Amendment's commitment to racial equality cast a new light on the guarantee against unreasonable searches and seizures. Indeed, the slave states "had grossly offended this privacy—of slaves, of free blacks, of resident southern antislavery whites, and of visiting northern abolitionist whites—in countless ways." AMAR, BILL OF RIGHTS, at 267. *See* Charles Sumner, U.S. Senator, Speech on Our Present Anti-Slavery Duties (Oct. 3, 1850), *in* SUMNER, 2 ORATIONS AND SPEECHES 401 (1850) (declaring the Fugitive Slave Act unconstitutional because it violated the rights to be free from

unreasonable seizures, to obtain due process of law, and to have access to a jury in suits at common law where the value in controversy shall exceed twenty dollars).

Not only did common law liability persist, but the founders of the Reconstruction era also deepened citizens' legal arsenal for civil recourse with the passage of 42 U.S.C. § 1983. Also known as the Ku Klux Klan Act when it passed in 1871, this legislation sought to provide civil remedies for state violations of federal law, in order to stem the tide of violence sweeping through the Southern states. But although Section 1983 was born in a moment of crisis, its scope is wide and its purpose is to give effect to federal civil rights for all. According to Representative Shellabarger, the law "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution." App. to CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871).

Because of the important role envisioned by the Constitution's framers for civil actions in securing the fundamental right of the people to be free from unlawful government searches—both at the time the Bill of Rights was ratified and when those protections were applied to the States via the ratification of the Fourteenth Amendment—*amicus* urges the Court to grant review to clarify the availability of such civil remedies.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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