No. 22-50998

In the United States Court of Appeals for the Fifth Circuit

ERMA WILSON,

Plaintiff-Appellant,

v.

MIDLAND COUNTY, TEXAS; WELDON (RALPH) PETTY JR., SUED IN HIS INDIVIDUAL CAPACITY; ALBERT SCHORRE, JR., SUED IN HIS INDIVIDUAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, No. 7:22-cv-85,
Honorable David Counts

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: March 21, 2024

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION

Years after Erma Wilson completed a suspended sentence for a crime she maintains she did not commit, she learned that one of her prosecutors was, at the very same time he prosecuted her, also moonlighting for the judge who presided over her case. Wilson brought an action under Section 1983 to redress this obvious violation of her right to due process.

Bound by this Court's decision in *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000) (per curiam), the court below dismissed Wilson's case. According to *Randell*,

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Appellant consents to the filing of this brief. Appellees Midland County and Weldon (Ralph) Petty, Jr., oppose it. Counsel for Albert Schorre, Jr., did not respond to *amicus*'s request for consent. A motion is filed herewith.

the Supreme Court "unequivocally held" in *Heck v. Humphrey*, 512 U.S. 477 (1994), that whenever the success of a plaintiff's Section 1983 claim would necessarily imply the invalidity of his conviction, he must demonstrate a favorable termination of the criminal proceedings against him. *Randell*, 227 F.3d at 301.

But that is a serious overreading of *Heck*. In *Heck*, the Court considered a Section 1983 claim brought by a "state prisoner"—an individual who was then serving a fifteen-year sentence for voluntary manslaughter and whose appeal of that conviction was still pending. 512 U.S. at 478. In that context, the Court borrowed the favorable-termination element from the tort of malicious prosecution in order to preclude "collateral attack[s] on the conviction through the vehicle of a civil suit," *id.* at 484 (quotation marks omitted), and prevent civil plaintiffs from skirting the exhaustion requirements of the federal habeas corpus statute, *id.* at 480-81.

Contrary to *Randell*, *Heck*'s holding did not reach non-custodial plaintiffs like Wilson. With the exception of dicta in one footnote that had no bearing on the case then before the Court, *Heck* did not address whether imposition of that common law element would be appropriate—or would even make sense—when the plaintiff has *no other vehicle* available to challenge his or her conviction in federal court, making the favorable-termination rule "impossible as a matter of law for [the plaintiff] to satisfy." *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring). Such is the case here. Because federal habeas corpus relief is only available to detained

individuals, *see* 28 U.S.C. § 2254, Wilson had no access to that remedy. For her, it was Section 1983 or nothing. And this Court's decision in *Randell* left her with nothing.

That result is at odds with the text and history of Section 1983, and it eviscerates "[t]he due process guarantee that 'no man can be a judge in his own case,'" *Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016). This Court should overrule *Randell* and hold that Wilson's Section 1983 claim can proceed.

In the wake of the Civil War, as Southern state officials continued to trample upon the rights of formerly enslaved people and their allies, the 42nd Congress enacted Section 1983, providing a right to sue "[e]very person" who under color of state law deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Among the abuses this landmark statute was enacted to combat were those effectuated by corrupt state courts, which were notoriously "unable or unwilling to check the evil" of violence and discrimination against African Americans and Unionists across the South. Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (Rep. Stoughton). As the Supreme Court has put it, during a time when "state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights," Congress enacted Section 1983 to create "a uniquely federal remedy against incursions under

the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239-40 (1972).

Allowing a tort rule adopted in the context of a materially distinct plaintiff's claim to wholly deprive Wilson and other non-custodial plaintiffs of a federal forum to vindicate their constitutional rights is at odds with this critical history. The 42nd Congress designed Section 1983 to be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963), giving federal courts a "paramount role" as the guardians of "constitutional rights," *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). In this case, imposition of the favorable-termination requirement does not just undermine that "paramount role" for federal courts; it completely eliminates it.

The favorable-termination rule also eviscerates the very constitutional right that Wilson seeks to vindicate in this case: the right to a fair trial before an impartial adjudicator promised by the Fourteenth Amendment's Due Process Clause. That is especially problematic in light of recent Supreme Court precedent. Though *Heck* adhered to the principle that common law rules should be borrowed only when they are "consistent with 'the values and purposes of the constitutional right at issue,'" *Thompson v. Clark*, 596 U.S. 36, 43 (2022) (quoting *Manuel v. City of Joliet*, 580 U.S. 356, 370 (2017)), since *Heck* was decided—indeed, since *Randell* was decided—the Supreme Court has been increasingly clear that when construing

Section 1983 claims, courts should tailor procedural rules to the federal interests at stake. Indeed, the Court has essentially created a two-step process for ensuring respect for those interests: "first look to the elements of the most analogous tort as of 1871 when § 1983 was enacted," and then ensure that adoption of those elements "is consistent with 'the values and purposes of the constitutional right at issue.'" *Id.* (quoting *Manuel*, 580 U.S. at 370).

Here, imposing a favorable-termination requirement on Wilson would deeply undermine the dual purposes of the right to a fair trial—ensuring that justice is served in reality and that the "probability" or appearance of injustice does not undermine our "free society['s]" concept of ordered liberty. *In re Murchison*, 349 U.S. 133, 136-37 (1955). For one thing, identifying corruption in a state judicial proceeding is not always an easy task, and in many cases, impropriety will come to light long after the plaintiff has served her sentence and the time to file a direct appeal or habeas petition has passed, depriving the plaintiff of *any* forum—state or federal—in which to vindicate her due process right.

Moreover, even if the plaintiff somehow retains access to a state forum through "the vagaries of state law," *Nance v. Ward*, 597 U.S. 159, 172 (2022), that is insufficient. The risk of state courts failing to do justice is heightened when the allegation pressed is that *state courts themselves* violated the Constitution by depriving a person of a fair trial. Thus, the preservation of a federal forum is

especially critical where, as here, a plaintiff's Section 1983 lawsuit impugns the state judiciary.

Finally, the Supreme Court has held that the right to due process is so "absolute" that (in an exception to standard federal procedure) even plaintiffs who have incurred no actual damages may pursue Section 1983 suits to vindicate their right to due process. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Id.*

The imposition of a favorable-termination rule that deprives a due-process plaintiff—even one who suffered grave injury—of a federal remedy clashes with these principles. It relegates the right to due process to second-class status, in contravention of Supreme Court precedent. To respect that right, and the plan of the 42nd Congress that enacted Section 1983 to enforce it, this Court should overrule *Randell* and reverse.

ARGUMENT

I. Imposing a Favorable-Termination Rule on Non-Custodial Plaintiffs Is at Odds with the Text and History of Section 1983.

Section 1983 was enacted "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*, 407 U.S. at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

Passed as part of the Civil Rights Act of 1871 "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," Pub. L. No. 42-22, 17 Stat. 13, the law reflects Congress's commitment to the promise of the Reconstruction Amendments. When it became clear that, notwithstanding those Amendments, state officials in the Reconstruction South were letting abuses of formerly enslaved people and their allies go unchecked, and perpetuating such abuses themselves, Congress passed the 1871 Act to provide a right to sue "[e]very person" who under color of state law deprives another person of "any rights, privileges, or immunities secured by the Constitution," 42 U.S.C. § 1983. The statute thus "interpose[s] the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 503 (1982) (quoting *Mitchum*, 407 U.S. at 242).

A. Passed to Create a Remedy for Injustices Wrought by Corrupt State Judiciaries Across the South, Section 1983 Established Federal Courts as the Chief Guardians of the People's Constitutional Rights.

During the Reconstruction years, Congress was especially concerned with "the maladministration of justice in the South," particularly corrupt state courts that failed to "administer[] justice fairly and impartially." Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 989, 998 (1983). Even before the Civil Rights Act of 1871, Congress enacted various laws to serve as a check on state judiciaries.

These laws were passed primarily in response to Southern states' refusal to treat all their citizens equally, including through enactment of the "Black Codes," passed by Southern States after the Civil War "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019). Many of the Black Codes "embodied express racial classifications," but "others, such as those penalizing vagrancy, were facially neutral" and relied upon selective enforcement and biased state judges to "resurrect[] the incidents of slavery." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 387 (1982).

Among the laws that Congress passed in response to the Black Codes was Section 1983's predecessor statute, the Civil Rights Act of 1866. The 1866 Act guaranteed "such citizens, of every race and color . . . full and equal benefit of all laws and proceedings for the security of person and property," while permitting them to be subject to "like punishment, pains, and penalties, and to none other." An Act to Protect All Persons in the United States in Their Civil Rights and Liberties, and Furnish the Means of Their Vindication, § 1, Pub. L. No. 39-26, 14 Stat. 27 (1866). Unlike Section 1983, which creates a civil remedy, the 1866 Act provided for criminal penalties if these measures were violated. *See id.* § 2. It also designated federal courts as the *exclusive* forum for "all crimes and offences committed against the provisions of this act," establishing the primacy of the federal judiciary for guarding against constitutional violations. *Id.* § 3.

Opponents of these provisions objected primarily to the Act's targeted oversight of state criminal justice systems, including its subjection of state court judges to federal prosecution for acts taken from the bench. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1154 (1866) (Rep. Eldridge) (asserting that the bill would "affix a penalty to the decision which the judge of a State court may make in the exercise of the judicial function"). Yet the majority in Congress was unmoved by these concerns. They recognized that, as one proponent of the bill put it, "a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may be and *ought to be* punished." *Id.* at 1758 (Sen. Trumbull) (emphasis added). In the end, the Civil Rights Act of 1866 passed overwhelmingly in Congress over President Johnson's veto. Zeigler, *supra*, at 1001.

In 1871, following reports of continued violence against African Americans and the refusal of Southern states to take this breakdown of justice seriously, the 42nd Congress considered an additional Civil Rights Act. As it debated this legislation, Congress heard about problems infecting almost every aspect of state criminal justice systems. *See Monroe v. Pape*, 365 U.S. 167, 174 (1961) ("The debates are replete with references to the lawless conditions existing in the South in 1871."); *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (Congressional "members were not unaware that certain members of the judiciary

were implicated in the state of affairs which [Section 1983] was intended to rectify.").

For instance, Congress received reports that, "as the result of Klan intimidation, and perhaps empathy," Gene R. Nichol, Jr., *Federalism, State Courts, and Section 1983*, 73 Va. L. Rev. 959, 974 (1987), local courts were "under the control of those who are wholly inimical to the impartial administration of law and equity," Cong. Globe, 42d Cong., 1st Sess. 394 (1871) (Rep. Rainey), and "unable or unwilling to check the evil," *id.* at 321 (Rep. Stoughton). Senator Pratt complained that the "the arm of justice is paralyzed" and "punishment has not been inflicted in a single case of the hundreds of outrages which have occurred." *Id.* at 505. Senator Morton concluded that "the States do not protect the rights of the people; . . . State courts are powerless to redress these wrongs, [leaving] large classes of people . . . without legal remedy in the courts of the States." *Id.* at app. 252. And Senator Osborn noted that "[i]f the state courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all." *Id.* at 653.

Other supporters of the Act went even further, noting that "not only were local judiciaries 'impotent,'" Nichol, *supra*, at 975 (quoting Cong. Globe, 42d Cong., 1st Sess. 459 (Rep. Coburn)), but many were also "in league with the Klan," *id.* Representative Beatty described Southern judges who openly accepted bribes from

Klansmen, Cong. Globe, 42d Cong., 1st Sess. 429, and Representative Rainey explained that local judges were "secretly in sympathy with the very evil against which we are striving," *id.* at app. 394; *see also, e.g.*, *id.* at 186 (Rep. Platt) (decrying local judges who "are made little kings, with almost despotic powers to carry out the partisan demands of the Legislature which elected them—powers which, almost without exception, have been exercised against Republicans without regard to law or justice").

Whether through passive refusal to enforce federal law or active complicity with those intent on undermining Reconstruction, state courts had wholly abdicated their responsibility to enforce the Constitution, making it imperative that Congress "enact the laws necessary for the protection of citizens of the United States." *Id.* at 653 (Sen. Osborn); *see Monroe*, 365 U.S. at 174 (explaining that the 1871 legislation was prompted not by "the unavailability of state remedies," but by "the failure of certain States to enforce the laws with an equal hand"). President Grant agreed that "the power to correct these evils is beyond the control of State authorities," and he recommended that Congress pass "such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States." *Id.* at 173. That is exactly what Congress did, enacting a remarkably broad remedy that provided a cause of action in law or equity against "any person" who, "under color of any law, statute, ordinance, regulation, custom,

or usage of any State," deprived another of "any rights, privileges, or immunities secured by the Constitution of the United States . . . any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983).

Essential to the remedial goals of that provision were the twin principles that exceptions to liability would be construed narrowly, while the remedy itself would be construed broadly. The statute's text imposed no procedural limitations on plaintiffs, nor did it exempt any state actors from liability. As one member of the 42nd Congress put it, "whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be done under State law or State regulation, *shall not be exempt from responsibility* to the party injured when he brings suit for redress." Cong. Globe, 42d Cong., 1st Sess. app. 310 (Rep. Maynard) (emphasis added). And members of the 42nd Congress also made clear that the Act's text would be "liberally and beneficently construed," as a law "in aid of the preservation of human liberty and human rights," *id.* at app. 68 (Rep. Shellabarger).

In sum, Section 1983, with its unqualified text and broad remedial purpose, was universally understood to empower the federal courts to play an active role in

guarding against corrupt state judiciaries and ensuring that those who suffered at the hands of state actors had access to a federal remedy. Imposing a procedural limitation on non-custodial plaintiffs that wholly deprives them of a federal remedy for constitutional violations would be at odds with this history and would undermine Section 1983, as the next Section discusses.

B. Depriving Non-Custodial Plaintiffs of a Federal Forum to Vindicate Their Constitutional Rights Fundamentally Undermines Section 1983.

As Appellant convincingly explains, *see* Br. 7-16, and the panel opinion recognized, *see Wilson v. Midland County*, 89 F.4th 446, 456-57 (5th Cir. 2023), the Supreme Court's holding in *Heck v. Humphrey* applies only to "state prisoners," a term *Heck* uses repeatedly throughout the opinion. *See, e.g.*, *Heck*, 512 U.S. at 478 (opening with the statement that "[t]his case presents the question whether a *state prisoner* may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983" (emphasis added)); *id.* at 487 (describing the Court's "hold[ing]" as applying "when a *state prisoner* seeks damages in a § 1983 suit" (emphasis added)).

Randell's conclusion that *Heck* "unequivocally held" that its favorable-termination rule applies to non-custodial plaintiffs, *Randell*, 227 F.3d at 301, is thus a grievous overreading of a "footnote [that] concerns a subject that had not been briefed by the parties, that did not matter to the disposition of Heck's claim, and that

the majority thought would not matter to anyone, ever," *Savory v. Cannon*, 947 F.3d 409, 432 (7th Cir. 2020) (Easterbrook, J., dissenting). Indeed, since *Randell* was decided, the Supreme Court itself has made clear that *Heck* did not "settle" whether non-custodial plaintiffs are subject to its favorable-termination rule. *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004) (per curiam).

The only way to "settle" that issue in accordance with the text, history, and purpose of Section 1983 is to read *Heck* as limited to incarcerated plaintiffs—that is, the "state prisoners" the opinion repeatedly referenced. As described above, the 42nd Congress enacted Section 1983 "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights." *Patsy*, 457 U.S. at 504 (quoting Cong. Globe, 42d Cong., 1st Sess. 376 (1871) (Rep. Lowe)). The goal was to create a path for these individuals to "access . . . the federal courts" because state courts in the South were at best failing to protect federal rights, and at worst working in concert with Klansmen to undermine them. *Id.*

As applied to individuals in state custody—individuals like the state prisoner before the Court in *Heck*—*Heck*'s favorable-termination rule does not cut off all access to a federal remedy, but instead *reconciles* two distinct remedies under federal law. The rule requires prisoners challenging the validity of their incarceration or sentence to first seek a writ of habeas corpus under 28 U.S.C. § 2254, thus preventing

them from using Section 1983 to skirt the federal habeas statute's exhaustion requirements. *See Heck*, 512 U.S. at 480-81. In some cases, a custodial plaintiff's writ of habeas corpus may be denied, rendering any potential Section 1983 claim "not cognizable under that provision," *Heck*, 512 U.S. at 481, but that plaintiff will at least have had an opportunity to challenge the constitutionality of his or her state conviction in a *federal* forum.

The calculus changes, however, for plaintiffs who are not incarcerated. Those individuals *cannot* seek a writ of habeas corpus in federal court. They are categorically barred from doing so because the federal habeas corpus statute applies only to "person[s] in custody." 28 U.S.C. § 2254. The result is a class of plaintiffs like Erma Wilson who may very well have valid claims against state actors for violating their constitutional rights, but who have no access to a federal forum to vindicate them, in direct contravention of Section 1983's clear textual command that "[e]very person" who, under color of state law, deprives another person of "any rights, privileges, or immunities secured by the Constitution" shall be subject to suit in a federal court. 42 U.S.C. § 1983.

II. In Cases Like This One, Imposing a Favorable-Termination Rule on Non-Custodial Plaintiffs Eviscerates the Constitutional Right to Due Process.

A. The Supreme Court Requires that Procedural Rules in Section 1983 Cases Be Tailored to the Particular Federal Constitutional Right at Stake.

As the history described above makes clear, "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The statute "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) (emphasis added), that would be "supplementary to any remedy any State might have," *McNeese*, 373 U.S. at 672. Regardless of what protections state tort law might offer, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was necessary." *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983); *see* Cong. Globe, 42d Cong., 1st Sess. 370 (1871) ("life, liberty, and property require *new* guarantees for their security" (emphasis added)).

"The coverage of the statute is thus broader than the pre-existing common law of torts," despite Congress's expectation that its gaps would be construed in light of "well settled" common law principles. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). Indeed, it is "the purest coincidence" when a constitutional safeguard redressable under Section 1983 resembles a right recognized at common law. *Rehberg v. Paulk*,

566 U.S. 356, 366 (2012) (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). And because Section 1983 reaches constitutional violations "that do not correspond to any previously known tort," *id.*, "any analogies to those causes of action are bound to be imperfect," *Owens v. Okure*, 488 U.S. 235, 248-49 (1989) (quotation marks omitted).

Common law principles, therefore, "are meant to guide rather than to control the definition of § 1983 claims, serving more as a source of inspired examples than of prefabricated components." *Manuel*, 580 U.S. at 370 (quotation marks omitted). The "precise contours" of a Section 1983 claim should not be "slavishly derived from the often arcane rules of the common law," *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), but rather "should be tailored to the interests protected by the particular right in question," *Carey*, 435 U.S. at 259. When "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 580 U.S. at 370; *cf. Heck*, 512 U.S. at 483 (describing tort law as an "appropriate *starting point* for the inquiry under § 1983" (emphasis added) (quoting *Carey*, 435 U.S. at 257-58)).

Moreover, since *Heck* and this Court's decision in *Randell*, the Supreme Court has made increasingly clear that the elements and procedural rules of Section 1983 claims must be tailored to the federal right at stake.

For instance, in *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court addressed the accrual rules for Fourth Amendment claims alleging an unconstitutional arrest without a warrant. Analogizing these claims to the common law tort of false arrest—because the gist of both claims is "detention without legal process," *id.* at 389—the Court borrowed that tort's "distinctive rule" of accrual, which delays onset of the statute of limitations until the false imprisonment ends. *Id.* Postponing accrual, the Court explained, responds to "the reality that the victim may not be able to sue while he is still imprisoned." *Id.* Thus, even though the plaintiff in *Wallace* "could have filed suit as soon as the allegedly wrongful arrest occurred," the Court declined to impose "the standard rule" for accrual, substituting instead "a refinement" that was tailored "'to claims of the type considered here.'" *Id.* at 388 (quotation marks omitted).

In *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), the Court similarly tailored common law rules to the constitutional right at issue: First Amendment claims for retaliatory arrest. Such claims, the Court said, pose a difficult "causal inquiry" because "protected speech is often a legitimate consideration when deciding whether to make an arrest," and because retaliatory motives are "easy to allege and hard to disprove." *Id.* at 1723-24, 1725 (quotation marks omitted). To shield police officers from litigating dubious claims, the Court held that plaintiffs must allege and prove the absence of probable cause to arrest them—a rule borrowed from nineteenth-

century tort law. *Id.* at 1727. But because police officers today have more power to make warrantless arrests for minor crimes than in the nineteenth century, heightening the threat of abuse, the Court departed from the common law rule by creating an exception for some claims, ensuring that officers may not "exploit the arrest power as a means of suppressing speech." *Id.* (quoting *Lozman v. City of Riviera Beach*, 585 U.S. 87, 99 (2018)).

The Court applied the same method in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), which addressed the accrual date for a claim that a prosecutor used fabricated evidence against a person in criminal proceedings. *Id.* at 2154-55. Noting that the analysis "begins with identifying the specific constitutional right alleged to have been infringed," the Court assumed that the Fourteenth Amendment's Due Process Clause includes a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." *Id.* at 2155 (quotation marks omitted). The Court then held that a fabricated-evidence claim accrues only once the criminal proceedings have "ended in the defendant's favor." *Id.* at 2158. Otherwise, these defendants would have to sue their prosecutors while criminal proceedings were still ongoing, forcing them into "an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them," *id.*, with the latter option inevitably risking "parallel litigation and conflicting judgments," *id.* at 2160. Avoiding that dilemma by delaying the

accrual of claims was consistent with the values and purposes of the due process right at issue. *Id.*

Finally, in *Thompson v. Clark*, the Court doubled down on the importance of tailoring procedural rules in Section 1983 cases to the specific right at stake, essentially creating a two-step process: courts should "first look to the elements of the most analogous tort as of 1871 when § 1983 was enacted," and then ensure that adoption of those elements "is consistent with 'the values and purposes of the constitutional right at issue.'" 596 U.S. at 43 (quoting *Manuel*, 580 U.S. at 370).

Applying these two steps to Thompson's Fourth Amendment claim against police officers who caused him to be seized without probable cause by initiating baseless criminal proceedings, the Court determined that the most analogous tort was malicious prosecution, and that such tort claims historically required a plaintiff to demonstrate merely that his prosecution ended without a conviction, not an affirmative indication of innocence, such as an acquittal. *Id.* at 49. The Court then went on to assess whether such a rule was consistent with the nature of the Fourth Amendment right at stake. Concluding that it was, the Court explained that whether a person was unreasonably seized pursuant to legal process "does not logically depend on whether the prosecutor or court explained why the prosecution was dismissed." *Id.* at 48. And so "the individual's ability to seek redress for a wrongful

prosecution cannot reasonably turn on th[is] fortuity" in the context of the Fourth Amendment. *Id.*

If the Supreme Court were faced today with the issue presented in this case—whether *Heck*'s favorable-termination rule extends to non-custodial plaintiffs—the Court would apply this two-step process. Because Wilson's constitutional claim differs significantly from the claims put forth in *Heck*, the Court would "first look to the elements of the most analogous tort as of 1871." *Thompson*, 596 U.S. at 43; *see id.* (describing that method as "this Court's practice"); *Wallace*, 549 U.S. at 388-90 (determining that the plaintiff's claim more closely resembled false imprisonment than malicious prosecution and therefore was governed by different procedural rules than the claims in *Heck*). And even if the most analogous tort included a favorable-termination element, the Court would not borrow that element for the Section 1983 claim unless "doing so [was] consistent with the values and purposes of the constitutional right at issue." *Thompson*, 596 U.S. at 43 (quotation marks omitted).

In short, the Supreme Court would not simply apply *Heck* to Wilson's case without analyzing how doing so would affect her specific due process claim—the right to a fair trial under the Fourteenth Amendment's Due Process Clause. And as the next section explains, imposing a favorable-termination rule on non-custodial plaintiffs would eviscerate the values and purposes of that right.

B. Imposition of a Favorable-Termination Rule Is Inconsistent with the Values and Purposes of the Due Process Clause, Including the Guarantee of a Fair Trial Before an Impartial Adjudicator.

The right to a fair trial with an impartial adjudicator is at the core of the Fifth and Fourteenth Amendment's guarantees that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; *see id.* amend. XIV § 1. Dating back to English common law, the right to unbiased judicial proceedings was enshrined in state constitutions even before the framing of our Constitution's Bill of Rights. *See, e.g.*, Md. Const. of 1776, art. XXX ("[T]he independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people."); Mass. Decl. Rts. of 1780, art. XXIX (describing "the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit"). Article III's guarantee of life tenure for federal judges further implemented this principle, *see* U.S. Const. art. III § 1, and by the time the Fifth Amendment was added to the Constitution, the idea that "[n]o man is allowed to be a judge in his own cause," *The Federalist No. 10*, at 79 (James Madison) (Clinton Rossiter ed., 1961), was firmly established as a central tenet of our justice system.

Yet as described earlier, it became clear during Reconstruction that further protections were needed to guard against the maladministration of justice in the South in the wake of the Civil War, which meant that neither formerly enslaved

people nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (1866) (Rep. Bingham); *id.* at 1263 (Rep. Broomall). The answer was a due process clause directed against the states in the Fourteenth Amendment, and ultimately, the enactment of Section 1983 to enforce it.

Consistent with this history, the Supreme Court has repeatedly emphasized that the Due Process Clause guarantees a fair trial, requiring structural protections that ensure all courts of law "hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). This is true even in absence of "actual bias," *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986), because "to perform its high function in the best way 'justice must satisfy the appearance of justice,'" *Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Following from these principles, the Court has expressly held that the guarantee of a fair trial precludes a person who made "critical decision[s]" in the prosecution of a case from "sitting in judgment" in that same case. *Williams*, 579 U.S. at 9.

Wilson's allegations here—that Ralph Petty advised the prosecutors who made key decisions in her case while also advising the judge presiding over it and secretly drafting important rulings adverse to Wilson—thus go to the core of the due process guarantee. As the Supreme Court has explained, when a person like Petty works both sides of the bench, "a serious question arises as to whether [he], even

with the most diligent effort, could set aside any personal interest in the outcome." *Id.* There is also a strong possibility that Petty's "'own personal knowledge and impression' of the case, acquired through his . . . role in the prosecution, may [have] carr[ied] far more weight with the judge than the parties' arguments to the court." *Id.* at 9-10 (quoting *Murchison*, 349 U.S. at 138). And regardless of whether Petty harbored any subjective bias, "the probability of actual bias on the part of the judge or decisionmaker [was] too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As the Supreme Court has said, "the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Williams*, 579 U.S. at 15.

The Fourteenth Amendment's Due Process Clause and Section 1983 promise Wilson a remedy. Due process and the right to a fair trial would be meaningless if an impossible-to-meet procedural hurdle wholly deprived her of access to a federal forum. Far from being "tailored to the interests protected by" the Fourteenth Amendment's Due Process Clause, *Carey*, 435 U.S. at 259, application of *Heck*'s favorable-termination rule to this case would render due process an empty promise.

Three additional points further demonstrate just how severely the favorable-termination rule undermines the right to due process for non-custodial plaintiffs.

First, in many cases, corruption in a state court will come to light so late that applying the favorable-termination rule will not only deprive a plaintiff of a federal

forum, but any forum at all because the time to file a direct appeal in state court will have long passed, and just like § 2254, the state habeas statute will offer no relief to a non-detained individual. The result will be no remedy whatsoever. Supreme Court precedent does not support that extreme result. To the contrary, the Court has made clear that the vindication of constitutional rights under Section 1983 is so important that plaintiffs should not be forced to choose between letting their claims expire and suing "the very person who is in the midst of prosecuting them." *McDonough*, 139 S. Ct. at 2158. Still less should they be cut off from relief entirely.

Second, even though some states permit habeas claims by non-detained individuals, *cf. Nance*, 597 U.S. at 173 (finding it "strange to read such state-by-state discrepancies into our understanding of how § 1983 and the habeas statute apply to federal constitutional claims"), access to a state forum would not suffice in the eyes of the Reconstruction Framers who crafted the Fourteenth Amendment and enacted Section 1983 to enforce it. State courts during Reconstruction could not be trusted to protect constitutional rights. And the risk of the failure of state courts to do justice is at its pinnacle when the allegation pressed is that *state courts themselves* violated the Constitution by depriving a person of a fair trial. The fundamental conflict of interest that arises from a state judiciary passing judgment on fellow members of the state judiciary was not lost on the Reconstruction Framers. The answer: access to

federal courts to vindicate the Due Process Clause and the right to a fair trial that it guarantees.

Third, the Supreme Court has made clear that access to courts to enforce the right to due process is especially critical, given "the importance to organized society that . . . due process be observed." *Carey*, 435 U.S. at 266 (citing *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971); *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). For this reason, the Court held that the right to procedural due process is so "absolute" that "the denial of procedural due process [is] actionable for nominal damages without proof of actual injury." *Id.* That point bears repeating: even when a plaintiff has suffered *no* actual damages from the deprivation of her due process rights, she still is entitled to vindicate those rights in a court of law under Supreme Court precedent because of "the importance to organized society that . . . due process be observed." *Id.* Certainly, then, tailoring the procedural rules governing claims like Wilson's to the nature of the right to due process should not result in an arbitrary rule, "slavishly derived from . . . the common law," *Anderson*, 483 U.S. at 645, that deprives a Section 1983 plaintiff like Wilson of a federal forum—and potentially *any* forum whatsoever—to vindicate that right.

In sum, the right to a fair trial by an impartial adjudicator at the core of the Fourteenth Amendment's Due Process Clause becomes a hollow promise upon

application of *Heck*'s favorable-termination rule to non-custodial plaintiffs like Wilson. *Heck* does not demand this injustice, and the text and history of Section 1983 and the Fourteenth Amendment preclude it.

CONCLUSION

For the foregoing reasons, this Court should overrule its decision in *Randell*, and the decision of the court below should be reversed.

Respectfully submitted,

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Dated: March 21, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on March 21, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 21st day of March, 2024.

/s/ Brianne J. Gorod
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Executed this 21st day of March, 2024.

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