No. 18-35938

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARVIN ROBERTS, EUGENE VENT, KEVIN PEASE,
and GEORGE FRESE,

Plaintiffs-Appellants,

v.

CITY OF FAIRBANKS, JAMES GEIER, CLIFFORD AARON RING,
CHRIS NOLAN, and DAVE KENDRICK,

Defendants-Appellees.

Appeal from the United States District Court for the District of Alaska
No. 4:17-CV-0035—HRH

BRIEF OF THE INNOCENCE NETWORK, THE AMERICAN CIVIL LIBERTIES UNION, and the ACLU OF ALASKA FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL OF THE DECISION BELOW

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CORPORATE DISCLOSURE STATEMENT

Amici curiae American Civil Liberties Union (ACLU), and ACLU Foundation of Alaska are non-profit organizations and not publically held companies or entities. Therefore, they have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock. The Innocence Network is an association of organizations and not a corporation.

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INTEREST OF AMICI CURIAE

Amici curiae are post-conviction and civil rights organizations practicing in federal and state criminal and civil courts within the Ninth Circuit and throughout the United States.

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to individuals who may have been wrongfully convicted. The 68 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Italy, the Netherlands, New Zealand, the United Kingdom, and Taiwan.[1] The Innocence Network and its members are also dedicated to improving

[1] The member organizations include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Duke Center for Criminal Justice and Professional Responsibility, Exoneration Initiative, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Hawai`i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Project, Innocence Project Argentina, Innocence Project Brazil, Innocence Project at University of Virginia School of Law, Innocence Project London, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Israel Public Defender, Italy Innocence Project, Indiana University McKinney School of Law Wrongful Conviction Clinic, Justicia Reinvindicada (Puerto Rico Innocence Project), Korey Wise Innocence Project at the University of Colorado Law School, Loyola Law School Project for the Innocent, Michigan

the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. The knowledge and experience of the Innocence Network informs its perspective that the ruling below if affirmed would deny a federal forum for vindication of federal constitutional rights that is necessary to achieve justice for the wrongly convicted and to deter and prevent these injustices from happening in the future.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil-rights laws. Founded nearly 100 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of

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Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New Mexico Innocence and Justice Project at the University of New Mexico School of Law, New York Law School Post Conviction Innocence Clinic, Northern California Innocence Project, Office of the Ohio Public Defender- Wrongful Conviction Project, Ohio Innocence Project, Oregon Innocence Project, Pennsylvania Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

constitutional rights, both as direct counsel and as amicus curiae. Through its Criminal Law Reform Project, the ACLU engages in nationwide litigation and advocacy to enforce and protect the rights of people accused of crimes.

The ACLU of Alaska Foundation is an Alaska non-profit corporation dedicated to advancing civil liberties in Alaska; it is an affiliate of the American Civil Liberties Union. Like the national organization, the ACLU of Alaska Foundation has a long-time interest in the rights of prisoners, who often have no other representation, including the rights of those who were wrongfully treated by the police and other officials and who seek redress for themselves and accountability for official misconduct. The members and supporters of the ACLU of Alaska Foundation include individuals statewide who seek to ensure that they and their family members and friends receive fair and just treatment in the courts.

The Innocence Network, the American Civil Liberties Union, and the ACLU of Alaska Foundation have a keen interest in ensuring wrongfully convicted individuals, like the four plaintiffs in this suit, have an effective means of (1) seeking exoneration from charges that they were wrongfully convicted of; and (2) having a forum to hold public officials accountable for violating their federal constitutional rights in securing their wrongful convictions.[2]

[2] No party, party's counsel, or person—other than *amici* and their counsel—authored any part or contributed money to fund preparation or submission of this brief. In addition, all counsel consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Marvin Roberts, Eugene Vent, Kevin Pease, and George Frese (the Fairbanks Four) collectively spent more than 70 years imprisoned for crimes they did not commit. Their wrongful convictions were obtained as a result of staggering police misconduct. The court below dismissed these civil rights actions by finding that *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes suit despite the fact that Plaintiffs' convictions have been vacated. *Heck*'s bar to suit for those who stand convicted and seek to challenge that conviction has never been interpreted to impose an additional hurdle beyond the vacatur of a conviction—a particularly extreme step in a situation where the indictments have been entirely dismissed. As a consequence, if affirmed, the decision below has the potential to upend decades of practice and the precedent of this Court and others.

To reach its outlier decision, the District Court treated the "release-dismissal agreement" (RDA) the Fairbanks Four obtained at the time their convictions were vacated as precluding them from suing the police officers and City responsible for their wrongful convictions. The District Court reached this decision despite the Supreme Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), which requires courts to treat such agreements with suspicion due to their potential for misuse and coercive nature that is inconsistent with federal law that places a high value on constitutional rights.

The RDA in this case is an extreme iteration of something that, even in the best of circumstances, is fundamentally suspect. There can be no doubt that the RDA relied upon below is harmful not just to the wrongfully convicted but to society as a whole. In addition to placing the wrongfully convicted in an impossible position, the RDA attempts to prevent officials from being held accountable for their misconduct, leaving such actors undeterred in future cases. Because this result cannot stand, the decision below should be reversed.

ARGUMENT

I. RELEASE-DISMISSAL AGREEMENTS PURPORTING TO DEPRIVE THE WRONGFULLY CONVICTED OF A FEDERAL REMEDY FOR VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS ARE INHERENTLY COERCIVE AND, INDEPENDENTLY, HARMFUL TO THE PUBLIC INTEREST

Post-conviction representation on behalf of the wrongfully convicted frequently involves years of investigation, forensic testing, and litigation in numerous courts. Throughout that process, the prosecution has overwhelming influence in determining the manner and speed in which post-conviction litigation on behalf of the innocent is resolved. For example, the prosecution's decision to oppose a motion for DNA or other forensic testing can lead to months, if not years, of litigation all while the wrongfully convicted remain imprisoned, even if that objection is eventually overruled. There are also a variety of procedural hurdles, obstacles to discovery, high standards for obtaining post-conviction relief, and

other barriers to success that innocent prisoners seeking exoneration face, resulting in an arduous battle. *See, e.g.*, 28 U.S.C. § 2254 (d) (setting forth an exacting standard for obtaining federal habeas relief that allows federal courts to find constitutional violations but nonetheless leave an unconstitutional conviction intact); ALASKA STAT. ANN. § 12.72.020 (setting forth a number of procedural barriers to post-conviction relief, and requiring, among other things, petitioners to prove innocence claims by clear and convincing evidence).

As a result, prosecutors can use the prospect of obtaining freedom as a compelling method for resolving post-conviction applications entirely on the prosecution's terms. Such influence is particularly strong due to the fact that, in many circumstances, prosecutors can prolong the detention of the innocent, even *after* powerful evidence of their innocence or other evidence that undermines the conviction has been discovered and presented to a judicial tribunal. Prosecutors "effectively have the power to grant exonerations by joining a defendant's motion to vacate a conviction and then dismissing the charges." NAT'L REG. EXONERATIONS, EXONERATIONS IN 2017, 20 (2018), available at https://tinyurl.com/ya5mktxb. The flipside, however, is that prosecutors have substantial power to delay or prevent an exoneration through the fact and manner of their opposition.

These practical realities correspond with the Supreme Court's appropriate and deep suspicion about release-dismissal agreements that include provisions purporting to require, as a cost of freedom, inmates to give up their right to seek to vindicate their civil rights after they have been liberated. *See Town of Newton v. Rumery*, 480 U.S. 386 (1987). The problem inherent in such arrangements, given the severe power imbalance between prosecutors and criminal defendants, is that they impose a "risk that public officials will use . . . criminal prosecution to suppress civil rights claims." *Lynch v. City of Alhambra*, 880 F.2d 1122, 1127 (9th Cir. 1989); *see also Rumery*, 480 U.S. at 400 (O'Connor, J., concurring in part and in the judgment) ("The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole." (citation omitted)); *id.* at 394, (plurality opinion) (addressing the concern that criminal charges will be used against criminal defendants making civil rights claims against police); Erin P. Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331, 350-51 (1993) (explaining that release-dismissal agreements are "inherently coercive," stemming from "the unequal position of the prosecutor and the defendant, and the "systematic inequality of bargaining power" (citing PETER LOW & JOHN C. JEFFERIES, JR., CIVIL RIGHTS ACTIONS 429 (1988)).

These risks have borne out empirically. *See Lynch*, 880 F.2d at 1127 (citing Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 869-71 (1988); *e.g.*, *Coughlen v. Coots*, 5 F.3d 970, 975 (6th Cir.1993) (holding enforcement of a release may not be in the public interest where there is substantial evidence of police misconduct).

An RDA is valid only if it was entered knowingly, voluntarily, and intelligently, and if its enforcement will not harm the public interest. *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390 (9th Cir. 1991). Given the procedural posture, it must be accepted as true as a matter of law that the RDA here does not meet these standards, as Plaintiffs have explained. Dkt. 8, at 16.

As a matter of practice, and in light of the experience of *amici* in litigating such cases, the RDA in the Fairbanks Four case is one of the most disturbing—and truly extreme—versions of an RDA of which *amici* are aware. In particular, the RDA came *after* the true perpetrator to the crimes confessed (and did so under oath multiple times), *after* two years of litigation in state court, and *after* the conclusion of a five-week evidentiary hearing that not only established the innocence of the Fairbanks Four but also revealed evidence of police misconduct. *Id.* at 9, 11-14.

A particularly egregious fact, unaddressed below, is that Mr. Roberts, Mr. Vent, Mr. Pease, and Mr. Frese were not afforded independent choices; *all four* of

them were required to sign the agreement or the vacatur and dismissal would not apply to *any* of them. ER 360-61. In addition, the RDA presented to Plaintiffs did not just purport to prevent them from suing the prosecutors—like the RDA in *Rumery* itself—but further sought to extend complete immunity the police officers whose misconduct had just been revealed in the hearing.[3] The RDA also followed the vow of prosecutors to appeal any relief granted, a process that could lead to years of additional wrongful imprisonment on top of the anticipated eight or nine months it would take to obtain a judicial ruling. *Id.* at 12.

The presentation of an RDA in exchange for freedom is not something that, even in the best cases, defendants have much leverage to negotiate. *See Lynch*, 880 F.2d at 1127 ("A risk-averse civil rights plaintiff will have little choice but to give up his civil claim if the officials demand a release of civil liability."); Bartholomy, *supra*, at 334 (prisoners offered an RDA, even those with meritorious civil rights

[3] The fact that prosecutors are generally provided broad protections from potential civil liability in the form of absolute immunity, *Imbler v. Pachtman*, 424 U.S. 409 (1976), further underscores that the real "beneficiaries" of the RDA in this were the City of Fairbanks and police (who collectively bear the responsibility for the misconduct that caused the wrongful conviction of four men). To bless the outrageous and unjust RDA here would be to allow prosecutors to shield bad actors—effectively extending absolute immunity to police officers who already have robust qualified immunity, *see White v. Pauly*, 137 S. Ct. 548, 551-52 (2017), and to municipalities, who have no immunity but can only be liable when their municipal policies were the moving force behind a constitutional violation. *Owen v. City of Indep., Mo.*, 445 U.S. 622, 650-51 (1980). Clearly, doing so would not only permit a great injustice in this case, but is contrary to the public interest in vindicating constitutional rights for society as a whole.

claims, often "feel they have little choice and, realistically, they do have minimal bargaining power"). But, this is not the best case; it is the opposite, particularly in light of the "all or nothing" RDA and other circumstances that amplified Plaintiffs' lack of bargaining power. In the end, the circumstances in this case make clear that the offer made to Plaintiffs to sign an RDA in exchange for their freedom was an offer they simply could not meaningfully resist.

Further confirmation of the coercive and impermissible nature of the RDA and circumstances in this case can be found in other constitutional doctrines that recognize state actors cannot use false choices to compel citizens to give up their constitutional rights. For example, the "doctrine of unconstitutional conditions . . . provides that the government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right." *In re Dyer*, 175 Wn.2d 186, 203, 283 P.3d 1103, 1111 (2012) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and *United States v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006)).

Likewise, promises of freedom or other sorts of leniency are likewise recognized as coercive in the context of an interrogation and cannot be used to compel speech protected by the Fifth Amendment. *See United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981) (confessions cannot be obtained via direct or implied promises due to their coercive nature). Such promises are inherently coercive because they undermine free and rational choice, and that is in the best of

circumstances. *See, e.g.*, Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. L. & SOC. SCI. 193, 203 (2008) (discussing the psychological factors related to how promises or even suggestions of leniency coercively impact decision-making); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1118 (1997) (discussing the role of suggestions of leniency on coercing false confessions from innocent suspects). Both of these doctrines are equally applicable here and illustrative of the coercive nature of the RDA presented to the Fairbanks Four.

In short, the RDA in this case is coercive because it puts before the innocent a terrible choice: litigate meritorious post-conviction claims to completion, which could take years, and spend the entire time in prison, or give up the right to sue and lose the chance to ever be compensated for the abuse endured. The Court should explicitly rule that agreement is contrary to public interest and that it cannot serve as a bar to giving the Fairbanks Four their opportunity to seek a measure of justice.

II. THE DISTRICT COURT'S *HECK V. HUMPHREY* REASONING CONTRADICTS THE REALITIES OF HOW POST-CONVICTION CLAIMS ARE RESOLVED, TO THE DETRIMENT OF THE CRIMINAL JUSTICE SYSTEM AND SUBVERSION OF CONSTITUTIONAL RIGHTS

The Supreme Court decided *Heck v. Humphrey*, 512 U.S. 447 (1994), nearly 25 years ago. Since that time, and before, *amici* have worked on both sides of the coin—in criminal courts representing defendants and in federal courts representing

plaintiffs—in cases like this one. The District Court's reasoning threatens to upend decades of law, based upon a misunderstanding of how post-conviction litigation works in the real world. Thus, while this brief does not repeat the persuasive discussion of *Heck* in Plaintiffs' opening brief, this section explains, from the perspective of experience, why the District Court's conclusion that vacatur of Plaintiffs' convictions was insufficient to lift *Heck*'s barrier to suit makes little sense and contradicts with well-established practice.

A. Experience Illustrates That Removal of the *Heck*-bar does Not Require any Substantive Judicial Finding

As stated, *amici* have extensive experience litigating claims of wrongful conviction in direct appeals and post-conviction proceedings. The District Court's decision, somewhat vaguely, suggests that, to lift the *Heck*-bar, a state court must not just vacate the conviction, but also must affirmatively make a finding, either of (1) "actual innocence" or (2) some sort of "invalidation" (though what "invalidation" meant to the court below is entirely unclear and undefined). The suggestion, upon which the District Court based its decision, is erroneous.

In practice, there has never been a requirement that a tribunal specifically find for a post-conviction petitioner on an "actual innocence" claim (assuming the state has a freestanding actual innocence claim) or instead make a finding of "invalidation" after the conviction no longer exists and charges have been dropped. This happens for many reasons, three categories of which are addressed here.

First, the judicial tribunal does not rule substantively on the validity of the conviction in any way at all. This happens all of the time. It is not uncommon for the prosecution to agree to vacate a conviction and dismiss charges in light of compelling evidence without requiring the court to rule on the merits of a person's pending post-conviction pleading at all, let alone on a specific claim. In many instances, charges have been dismissed merely after the result of exculpatory forensic testing. Or, after the filing of a motion for a new trial, post-conviction application, or other analogous state-law procedure, the state might evaluate the evidence and dismiss the charges at that time. In other cases, and often after *years* of litigation, the state may come to dismiss the charges on the eve of an evidentiary hearing or during its course. And, as here, the prosecution may elect to seek dismissal of charges after a lengthy hearing has occurred but before a judicial officer has ruled on the post-conviction pleading.

There is no bar to suit under *Heck* when convictions are vacated in this manner. The case of Roberto Almodovar provides a useful example. There, on appeal from the dismissal of his post-conviction petition, an Illinois Court of Appeals granted Mr. Almodovar an evidentiary hearing to present newly discovered evidence that a corrupt Chicago officer, Detective Reynaldo Guevara had suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *People v. Almodovar*, 2013 IL App. (1st) 101476, ¶¶2-3. On remand, the matter

proceeded to a lengthy evidentiary hearing. Mr. Almodovar was not exonerated until some four years later when, during the pendency of the hearing, the prosecution moved to vacate the conviction and dropped the charges. Nat'l Reg. Exonerations, *Roberto Almodovar*, https://tinyurl.com/ybpyb8fq. Voluntary dismissal of the charges by the prosecutor was sufficient for Mr. Almodovar to pursue a § 1983 claim against the City of Chicago. *Id*.

Beyond practice, there are very strong reasons to reject the the notion that convictions are not sufficiently vacated for the purposes of *Heck* without a judicial finding (either of "innocence" or some sort of "invalidation") when the State moves to dismiss charges or an agreed or stipulated order is entered. Mutual resolution of claims is an integral part of conserving resources, judicial economy and, ultimately, in improving the criminal justice system. Putting aside the use of coercive RDAs like the one here (which should be "off the table"), criminal defendants involved in post-conviction litigation have a strong incentive to cooperate with prosecutors to voluntarily vacate a conviction, which can frequently come through some form of agreement without either side conceding the correctness of the other's position. Post-conviction proceedings frequently take years to complete, often involve expenditures of judicial resources, and frequently hinge upon collaboration between prosecutors and defense attorneys to efficiently dispose of a post-conviction case. In contrast to that practice, the reasoning of the

court below actually *discourages* resolution through agreed motions to dismiss, stipulated findings of dismissal, etc., and instead could incentivize both the wrongfully convicted and prosecutors to remain at odds (with the former in prison) even where all agree a conviction should be vacated.

Encouraging litigation, rather than resolution through dismissal is contrary to the manner in which many convictions are overturned: via cooperation of prosecutors and defense attorneys, rather than adversarial litigation. Most significantly, many prosecutors' offices have recently adopted some form of "conviction integrity unit" (CIU), which is most often "a division of a prosecutorial office that works to prevent, identify, and correct . . . convictions." EXONERATIONS IN 2017, *supra*, at 2. As of 2017, there were 33 CIUs, more than six times the number that existed in 2011. In 2017, CIUs were involved in overturning 42 cases, bringing the total number of cases where CIUs participated in vacating convictions between 2003 and 2017 to 269. *Id.* at 2, 11. The fact that defendants' whose convictions were vacated either via CIU or other motion without a substantive judicial finding face no bar to suit under *Heck* is beyond established. Many of these 269 individuals—like those whose convictions were vacated even without CIU review—have brought civil suits without *Heck* being a barrier to their suits.

Second, are cases where a judicial tribunal reaches the merits of pending post-conviction litigation when vacating a conviction and ordering a new trial.

Practice confirms that the *basis* for so doing is irrelevant as far as it concerns the effect on whether the previously convicted are entitled to pursue a subsequent civil rights action. They are permitted to do so. That a judge grants post-conviction relief—even for those who are indisputably innocent—does not mean that the court will make an innocence finding. And, that fact often has nothing to do with innocence. For example, alongside newly discovered evidence of innocence, a petitioner can present evidence of ineffective assistance of counsel, of a *Brady* violation, or point to changes and developments in forensic science (e.g., in arson cases where new science may indicate no crime was committed).[4] Because the result will be the same regardless—a conviction is vacated and a new trial ordered—a state court need not address every single basis for relief and is entitled to, and often encouraged, to rule on the basis that demands the fewest resources. *Cf. Almodovar*, 2013 IL App. (1st) 101476, ¶77 (declining to address actual innocence claim after remanding on a *Brady* issue).

[4] Two further reasons state courts do not necessarily reach an "innocence" issue when resolving post-conviction claims bear mention. First, most post-conviction statutes and law make the inquiry in a post-conviction proceeding retrospective and focused upon the evidence that was presented in the original proceedings. As a result, in determining whether new evidence, *Brady* material, or something else warrants relief courts are not necessarily tasked with ruling on innocence *per se*; they focus on the elements of the claims before them. Second, many states, and the federal regime, leave the question of freestanding innocence to a separate (often quasi-civil) proceeding. *See, e.g.*, 28 U.S.C. § 2513 (federal certificate of innocence statute); KAN. STAT. ANN. 60-5004 (Kansas certificate of innocence statute); 4.100 REVISED CODE WASHINGTON *et seq*. (setting forth Washington State's civil regime for a declaration of innocence).

Third, and finally, to the extent that the district court's decision seemed to create either an "innocence" or "invalidation" prerequisite to lifting the *Heck* bar, such a requirement is contrary to (1) the law, and (2) defies comprehension. Vacating a conviction means exactly that: the person is no longer convicted. This is what the Supreme Court said in *Heck* and following cases by equating the lack of invalidation with an "outstanding criminal judgment." *Heck*, 512 U.S. at 487; *see Wallace v. Kato*, 549 U.S. 384, 393 (2007) (affirming this language); *Wilkinson v. Dotson*, 544 U.S. 74, 80 (2005).

The "invalidation" requirement also makes no sense. For *amici* as experienced litigators, the idea that our clients would need to then prove "invalidation" after having their conviction vacated and charges is not something that has a basis in procedure. In the criminal context, after obtaining relief that vacates a conviction, and particularly where the charges have been dismissed, the notion that defense counsel would need to take some further step to "invalidate" a conviction that no longer exists is not a concept or notion that has any basis in the realities on the ground. Once the conviction is vacated, there is nothing left to "invalidate"; that step has already occurred. The same is true on the civil side: the vacatur of the conviction, especially when coupled with the release of the client and dismissals of all charges, is universally seen as sufficient to lift any *Heck*-bar,

because without an extant conviction there is left to trigger the delayed accrual that happens when the *Heck*-bar to suit is removed.

B. Experience Teaches That the District Court's Reading of *Heck* is Fundamentally Flawed

Consistent with the foregoing, there are myriad situations in which convictions are vacated without a substantive finding of innocence or "invalidation" (again, whatever that means) but that nonetheless led to meritorious § 1983 claims completely unimpeded by *Heck*'s bar to suit. Laurence Adams, whose murder convictions were overturned on the basis of *Brady* violations and ineffective assistance, subsequently filed a § 1983 suit that ended in a substantial settlement. Nat'l Reg. Exonerations, *Laurence Adams*, https://tinyurl.com/y75bvkf8. In the same vein, Obie Anthony's murder convictions were vacated on the basis of a *Brady* violation and ineffective assistance of counsel. Mr. Anthony's § 1983 suit proceeded through discovery to a substantial settlement. Nat'l Reg. Exonerations, *Obie Anthony*, https://tinyurl.com/y9fgqwjc. The convictions and subsequent § 1983 suits of Art Tobias and Jamal Trulove are in the same category: both had their convictions overturned on the basis of the violation of a constitutional right and subsequently brought suit without being barred by *Heck*. *See In re Art T.,* 234 Cal. App. 4th 335 (2015) (overturning conviction based upon violation of Fifth Amendment right in an interrogation with no finding of innocence), *Tobias v. City of Los Angeles*, No.

17-1076 DSF (C.D. Cal, Sept. 17, 2018), Dkt. 170 (order denying motions for summary judgment and ordering a trial for several § 1983 claims); *see also People v. Trulove*, 2014 WL 36469, at *14-*16 (Cal. Court App. 2014) (vacating conviction on the basis of ineffective assistance of counsel); *Trulove. v. City and County of San Francisco*, 2018 WL 3429113 (July 16, 2018) (refusing to vacate jury verdict to Mr. Trulove after his success at trial on his § 1983 claims).

Without any fanfare, this Court has encountered numerous instances of § 1983 claims involving claims of wrongful convictions without any notion of a "*Heck* bar" or inquiry into *why* the conviction was vacated, and without ever imposing any innocence or invalidation prerequisite to bringing suit. *See, e.g.*, *Crowe v. Cty. of San Diego*, 608 F.3d 406, 417 (9th Cir. 2010) (addressing meritorious § 1983 suit on behalf of juveniles whose convictions were vacated by DNA testing and charges were eventually dropped without reference to "innocence" or "invalidation"). In fact, this Court's precedent has repudiated the notion that a finding of "innocence" or "invalidity" (beyond the fact of vacatur) is required. *See Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014) (plaintiff allowed to pursue § 1983 suit when conviction was vacated due to constitutional violation even though, without the constitutional error, he was convicted at retrial); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014) (claims accrued at the time the conviction was vacated despite additional evidence of guilt).

The District Court's reasoning—however interpreted—is thus contrary to practice and the law of this Circuit. Instead, the mine-run of cases where convictions are vacated do *not* involve a judicial finding of "innocence" or "invalidation" beyond the fact that the conviction was vacated. Practice and precedent are clear: Once the conviction is vacated, there is no bar to a civil suit.

III. THE DISTRICT COURT'S DECISION SERVES TO UNDERMINE CIVIL RIGHTS LITIGATION, WH ICH IS INSTRUMENTAL IN PROMPTING REFORM, OBTAINING JUSTICE FOR OTHERS, AND DETERRING FURTHER MISCONDUCT

A. Civil Rights Enforcement Is Needed To Deter Official Misconduct, Which Has Contributed To Many Wrongful Convictions

Both the Supreme Court and this Court have recognized the important values served by civil rights actions pursuant to 42 U.S.C. § 1983. The core purpose of the Civil Rights Act is "to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed in the authority of state law." *Owen v. City of Indep., Mo.*, 445 U.S. 622, 650-51 (1980) (internal quotation marks and citations omitted). Section 1983 is "an express federal remedy" to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id*. (internal quotation marks and citations omitted).

The Supreme Court has emphasized that having a remedy for Fourteenth Amendment violations is critical for upholding the constitutional guarantees given to individuals. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Id*. at 651. Put differently, "the purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus,* 435 U.S. 247, 254-57 (1978)).

Knowing they may be held liable for misconduct in wrongful conviction cases leads municipalities, states, and other entities that "may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52. The prospect of § 1983 liability encourages municipalities to "institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights," which are particularly important when wrongful convictions are the result of "the interactive behavior of several government officials," such as a city, its police officers, and its prosecutors. *Id*.

As civil rights plaintiffs, the Fairbanks Four are not pursuing vindication of their federal constitutional rights for themselves alone "but also as a 'private attorney general'" whose suit also seeks to protects important civil rights for all, a "policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402 (1968).

Unfortunately, official misconduct is has led to the wrongful conviction of thousands of innocent individuals. According to the National Registry of Exonerations, the definitive database collecting such statistics, since 1989 there have been 2,365 exonerations in the United States, with over 20,700 years lost due to wrongful imprisonment. Of this figure, 1,260 of these cases (or 53%), involved some form of official misconduct, and account for more than 13,200 years lost due to wrongful imprisonment. NAT'L REG. EXONERATIONS, EXONERATIONS IN THE UNITED STATES, https://tinyurl.com/jo85y77. In 2017 alone, 84% of exonerations related to homicides involved some form of official misconduct. EXONERATIONS IN 2017, *supra*, at 2. Given these figures and the importance of § 1983 litigation, this Court should avoid sanctioning a decision that would undermine these values

B. Civil Rights Litigation Has Been Powerful in Causing Reform, Exposing Misconduct, and Exonerating the Innocent

Meritorious § 1983 claims can have a powerful impact beyond the suits themselves in helping to spur prospective reform, uncover patterns of error and misconduct, and even identify the actual perpetrators. Brandon L. Garrett,

Innocence, Harmless Error, and Federal Wrongful Conviction Law, 2005 WIS. L. REV. 35, 101-02 (2005) (discussing the role of § 1983 suits in uncovering and preventing police misconduct that "predictably causes . . . wrongful convictions").

A growing body of academic work confirms that § 1983 has borne out its deterrent purposes, managing to "police the police" more effectively than available alternatives. *See, e.g.*, Joanna C. Schwartz, *What Police Learn from Lawsuits,* 33 CARDOZO L. REV. 841 (2012) (noting that the relative comprehensiveness of constitutional tort suits relative to civilian complaints and use-of-force reports rendered the former more effective tools in spurring reforms aimed at protecting constitutional rights); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 B.Y.U. L. REV. 1443, 1487 (2000) (finding damages remedies imposed via constitutional tort suits have a greater deterrent effect on police misconduct than the exclusionary rule).

Section 1983 litigation in cases like this one has led to substantive reforms aimed at preventing wrongful convictions, an immeasurable public interest. Take for example the case of Michael Green, who was exonerated by DNA evidence after spending 13 years wrongly imprisoned for a rape he did not commit. Litigation thereafter confirmed that Mr. Green's conviction was based on deeply flawed forensic evidence. Mr. Green should have been excluded as a suspect at the

time of his initial prosecution; instead, the Cleveland criminalist falsely claimed that hair comparison and blood-type evidence were highly incriminating. In settling Mr. Green's civil suit, Cleveland agreed to conduct an audit of its forensic laboratory. This audit, in turn, led to the exoneration of two more men. The criminalist—who had remained on the job after Mr. Green's exoneration and the prosecution of the real perpetrator—was fired several months after the settlement of Mr. Green's case. The Innocence Project, *Michael Green,* https://tinyurl.com/y7ofqmap.

As noted above, Obie Anthony's conviction was vacated due in part to a *Brady* violation. The prosecution withheld information that a witness in Mr. Anthony's case had received a deal in an unrelated case. Mr. Anthony subsequently brought and settled a § 1983 claim against the County of Los Angeles. *See* Stephen Ceasar, *Los Angeles Pays $8 Million to Settle Wrongful Imprisonment Lawsuit*, L.A. TIMES (Apr. 13, 2015), available at https://tinyurl.com/ya6oa6va. Included with the settlement was a requirement the County implement a system for keeping track of witnesses and related plea bargaining across cases to prevent future *Brady* violations. The County has implemented such a plan. *See* Exhibit 1.

Settlements in civil rights cases involving false confessions have also led to reforms in interrogations, including in particular commitments to video record

interrogations. In Detroit, Eddie Joe Lloyd, served 17 years in prison for a 1984 rape and murder he did not commit. The conviction was based upon a false confession that was the result of an interrogation of Mr. Lloyd while he was involuntarily committed in a psychiatric hospital. Post-conviction DNA testing proved Mr. Lloyd's innocence. In the lawsuit that followed, Detroit settled the case at the conclusion of discovery, and also agreed to begin videotaping interrogations in homicide and other serious felony cases to prevent similar tragedies. *See* Jeremy W. Peters, *Wrongful Conviction Prompts Detroit Police to Videotape Certain Interrogations,* N.Y. TIMES (April 11, 2006), available at https://www.nytimes.com/2006/04/11/us/11detroit.html.

An additional public benefit derived from § 1983 litigation in wrongful conviction cases is the fact civil discovery can unearth evidence of misconduct that later can be used as the basis for overturning similar unconstitutionally-obtained convictions. For example, Juan Johnson had been wrongfully convicted and imprisoned for more than 12 years and was exonerated on the basis of police misconduct related to a corrupt Chicago Detective, Reynaldo Guevara. Nat'l Reg. Exonerations, *Juan Johnson*, https://tinyurl.com/y7ylxnzr. Eventually, Mr. Johnson won a substantial jury verdict after evidence that Detective Guevara had procured eyewitness identifications by coercive means resulted in vacation of his conviction. In the aftermath, other criminal defendants have *successfully* pointed to the fact of

Mr. Johnson's meritorious suit, and the misconduct uncovered therein, in seeking to obtain their own exonerations. *Almodovar*, 2013 IL App (1st) 101476, ¶¶ 54-55.

To date, nineteen criminal defendants have had their convictions related to Detective Guevara overturned. *See generally* Melissa Segura, *A Chicago Cop is Accused of Framing 51 People for Murder. Now, the Fight for Justice*, Buzzfeed.com (April 4, 2017), https://tinyurl.com/ycetph4s; Larry Yellen, *Nineteenth Inmate Exonerated in Case of Notorious Chicago Police Detective*, Fox32.com (Jan. 16, 2019), available at https://tinyurl.com/y897dqfj. One such criminal defendant turned civil-rights plaintiff, Jacques Rivera, took his § 1983 suit to trial against Detective Guevara and others last year, where a jury awarded him a substantial jury verdict, and found that the City's policies were the moving force behind the constitutional violations. *Rivera v. Guevara*, 319 F. Supp. 3d 1004 (N.D. Ill. 2018) (ruling on summary judgment, setting the case for trial); Sam Charles, *Jury gives $17M to Man Falsely Imprisoned for Murder in Case Tied to Tainted Cop*, CHI. SUN TIMES (June 29, 2018).

Analogously, Nate Fields spent more than two decades in prison for murders he did not commit. After his conviction was overturned on the basis of a *Brady* violation, and after he was acquitted at a retrial, Mr. Fields brought suit. *Fields v. City of Chicago*, No. 10 C 1168, 2018 WL 253716, at *1 (N.D. Ill. 2018). The discovery in that lawsuit led Mr. Fields to uncover a basement full of files, hidden

at a Chicago Police station, some of which included exculpatory evidence that was not provided to prosecutors (or criminal defense attorneys) in other cases. *See, e.g.*, *Fields v. City of Chicago*, No. 10 C 1168, 2015 WL 13578989, at *5 (N.D. Ill. Apr. 7, 2015) (discussing Mr. Fields' entitlement to conduct *Monell* discovery concerning the basement files); *Fields*, 2018 WL 253716, at *11 (denying new trial motion with respect to the *Monell* verdict concerning the basement files); Jason Meisner, *Old Police 'Street Files' Raise Question: Did Chicago Cops Hide Evidence?*, CHI. TRIB. (Feb. 13, 2016) (describing the discovery of nearly 500 files in a basement and the efforts to review them and provide them to criminal defendants). The discovery of these "basement files," led to other the post-conviction relief of other individuals, like Norman McIntosh whose charges were eventually dropped. *See* Jason Meisner, *Inmate for 15 Years Freed After Conviction Tossed in Chicago Killing*, CHI. TRIB. (Oct. 4, 2016) ("McIntosh's murder case was identified as one of hundreds of so-called "street files" found in old filing cabinets in the basement of the Area Central police station, files that are now at the center of a federal lawsuit alleging police routinely buried information about homicide investigations that could have helped defense attorneys prepare for trial.").

Finally, § 1983 litigation in wrongful conviction cases can also lead to the discovery of the true perpetrator of the crime. In the Wisconsin case of Robert Lee

Stinson, his civil suit led to the discovery of the true perpetrator who eventually confessed to the crimes and was convicted. Nat'l Reg. Exonerations, *Robert Stinson* (Aug. 21, 2017), https://tinyurl.com/y7klllng.

Part of the reason that § 1983 suits are such powerful tools in exposing police misconduct and paving the way for other unlawfully-obtained convictions to be overturned is the fact that civil discovery tools available under the Federal Rules of Civil Procedure are far greater than those afforded to convicted inmates. Depending on the law of the jurisdiction (even when represented by counsel), convicted inmates have limited tools for investigation. The upshot, in the experience of *amici* who practice in the Ninth Circuit and nationally, is that civil suits frequently reveal in short order vast discovery that post-conviction litigators attempted but failed to obtain even over the course of many years. The District Court's decision has deprived the Fairbanks Four of this important tool, a detriment not only to Mr. Roberts, Mr. Vent, Mr. Pease, and Mr. Frese, but also a great loss for the broader community who stand to gain from the enforcement of their civil rights as "private attorneys general."

C. Section 1983 Litigation Is Often The Only Mechanism Available to Compensate The Unlawfully Convicted

Many victims of wrongful conviction rely primarily on § 1983 claims for compensation due to the absence of other compensation vehicles in their states. Eighteen states have not passed statutory compensation schemes providing redress for the wrongfully convicted. Of the nine states in the Ninth Circuit, five (Arizona, Idaho, Nevada, Oregon, and, importantly, Alaska) have not enacted a compensation regime. The Innocence Project, *Compensating the Wrongfully Convicted*, https://tinyurl.com/y8lrweyq. Thus, for the Fairbanks Four, pursuing this § 1983 action is the *only* possible avenue for obtaining getting any sort of remedy for the miscarriage of justice they have had to endure.

However, even in states that have such compensation statutes on the books, the substance and scope of those statutes are limited. For example, victims of wrongful conviction in Montana can recover only if their exonerations are based on DNA evidence. MONT. CODE ANN. § 53-1-214. Once that requirement is met, recovery consists solely of educational aid to be used at a Montana school. *Id.*

States that do provide some form of financial compensation often limit recovery to an amount that pales in comparison to what anyone might think could even attempt to make the wrongfully convicted claimant “whole” for their years imprisoned. For example, Wisconsin’s statute compensates the wrongfully convicted $5,000 per year of incarceration, but caps recovery at $25,000. WIS.

STAT. § 775.05 (1913). In New Hampshire, claims for the wrongfully convicted are "limited to an award not to exceed $20,000." N.H. REV. STAT § 541-B:14 (II). In effect, these sorts of limits mean that those who spend more time wrongfully imprisoned are, on a relative level, given less compensation. *See, e.g.*, 705 ILL. REV. STAT. 505/1 *et seq*. (creating a sliding scale for years of imprisonment but setting forth a cap of around $200,000 for any wrongfully convicted individual who has served more than 14 years); 51 OKL. ST. § 154 ($175,000 cap).

Importantly, these are no-fault statutes. Even pursuing these limited avenues of state compensation does not provide an opportunity for public examination of potential constitutional violations that led to the wrongful conviction. In fact, in overturned convictions involving police misconduct, the state can argue that such misconduct is irrelevant to the statutory inquiry.

In the end, for the Fairbanks Four and others similarly situated, if upheld, the District Court's rationale stands to ensure that they have no potential remedy for the violation of their constitutional rights. Undermining the substantive value of those rights in fundamental ways. Such a miscarriage of justice must be avoided.

CONCLUSION

For the foregoing reasons, this Court should reverse the dismissal of Plaintiffs' claims, and allow their important civil rights suits to proceed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B), 29(d), and Circuit Rule 32-1, because this brief is XX words in length (under half of the 14,000 word permitted by Circuit Rule), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), type style requirements of Federal Rule of Appellate Procedure 32(a)(6) and Circuit Rule 32(b) because this brief has been prepared in Times New Roman typeface, 14-point font, using Microsoft Word 2010.

/s/ David B. Owens