No. 10-1343 APR 28 2011

In The

Supreme Court of the United States

ZOLTAN SZAJER; HELENE SZAJER,

Petitioners,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since this Court decided *Heck v. Humphrey*, 512 U.S. 477 (1994), a circuit split has developed over the meaning of language in footnote seven of that case. The Ninth Circuit essentially held in the case presented here for review that *Heck* bars all § 1983 actions based on illegal search or seizure claims if there is still an outstanding conviction. The Seventh Circuit and others have held that these same claims can go forward, which appears consistent with this Court's previous directions.

The question presented is:

Whether a 42 U.S.C. § 1983 civil rights action based on a Fourth Amendment illegal search or seizure claim can proceed where the claimant has not been relieved of the conviction, but where neither the § 1983 claim, nor the damages sought, necessarily implies the invalidity of, nor arises out of, the conviction.

PARTIES TO THE PROCEEDING

Petitioners in *Szajer v. City of Los Angeles*, 632 F.3d 607 (9th Cir. 2011) include the natural persons Zoltan "Ted" Szajer and Helene Szajer.

Respondents include City of Los Angeles; Los Angeles Police Department; Los Angeles Chief of Police William Bratton; Los Angeles Police Detective Michael Mersereau; Los Angeles Police Detective R. Tompkins; Los Angeles Police Detective Yadon and Los Angeles Police Detective Conrado.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit below is reported at 632 F.3d 607 (9th Cir. 2011). A copy of that opinion is at Appendix, App. 1-12. The opinion of the District Court for the Central District of California is cited at *Szajer v. City of Los Angeles*, No. 2:07-CV-07433 (C.D. Cal. Nov. 12, 2008). A copy of that opinion is at App. 13-33.

JURISDICTION

On February 11, 2011, the Ninth Circuit Court of Appeals rendered judgment affirming the District Court's Order granting summary judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTE

U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A stark and express split of circuit opinion exists regarding how *Heck*'s now infamous footnote seven (hereafter "Footnote Seven") should be interpreted. This split has generated substantial legal scholarship and appears to be a result of each circuit's interpretation of the word "necessarily." The Ninth Circuit's approach in the case presented here for review seems to directly *contradict* this Court's recent decision in *Skinner v. Switzer*, 131 S.Ct. 1298 (2011).

As it stands now, a convicted claimant's ability to litigate a 42 U.S.C. § 1983 ("§ 1983") action depends on their geography. The Ninth Circuit has adopted what amounts to a blanket bar of all § 1983 actions arising from illegal searches or seizures where the claimant has failed to obtain relief from the conviction. The Ninth Circuit's rule arises from

its interpretation of this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court held that as a general rule, claimants cannot bring § 1983 actions if doing so would necessarily imply the invalidity of the conviction.

The Seventh Circuit has led other circuits in adopting a contrary rule, one that allows § 1983 actions for illegal searches or seizures even where the claimant has not obtained relief from the conviction, to proceed forward in almost all circumstances.

This Court's recent precedent seems to confirm the Seventh Circuit's approach. In the case presented here for review, the Ninth Circuit maintains its apparently contrary position.

Here, Petitioners Ted Szajer and his wife Helene were subject to an unwarranted search and seizure and faced criminal prosecution. For various reasons, rather than challenge the unlawful search and seizure in the criminal case, they entered into a plea bargain and pled no contest to a single count of alleged illegal possession of a particular firearm. Their plea resulted in probation. They subsequently filed a § 1983 action to recover damages for the illegal seizure of firearms and property that was both unrelated to their conviction, and to the warrant used to seize the particular firearm which formed the basis of the count to which they later pled.

Because they live in California, the Ninth Circuit essentially bars the Szajers, and others with illegal search and seizure claims, from further litigating

§ 1983 claims and from showing why the damages sought do not arise from their conviction, and from showing why their lawsuit does not necessarily imply the invalidity of their conviction.

With the various interpretations and applications of the word "necessarily," it is unfair that a claimant's ability to seek damages for constitutional violations is dictated by geography.

A. The *Heck v. Humphrey* Decision

In 1994, this Court dealt with an inmate's ability to bring a § 1983 claim prior to the reversal of his conviction. The petitioner, Roy Heck, was convicted of voluntary manslaughter. While his appeal was pending, Heck filed a § 1983 claim alleging the police and other state actors conducted an "arbitrary investigation" that included the illegal destruction of evidence of an exculpatory nature. Both the federal district court and the Seventh Circuit Court of Appeals dismissed the § 1983 Complaint because it was seen as a collateral attack on the legality of his conviction.

This Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state

> tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Heck, 512 U.S. at 486-87 (emphasis in original) (citation and footnote omitted).

Heck further explained its rule:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.

Id. at 487 (emphasis in original).

In Footnote Seven of its opinion, *Heck* set forth an example under which its rule barring § 1983 actions might not apply to instances of illegal searches and seizures:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced

> evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.

Id. at 487 n.7 (emphasis in original) (quotations omitted).

This Court thus left the question of when a § 1983 claim based on an illegal search or seizure would "necessarily imply the invalidity of the conviction" to district courts. This open question has led to the current circuit split. Footnote Seven's example has resulted in different interpretations and applications of *Heck*, primarily because of how each circuit interprets the word "necessarily."

Some circuits have applied a broad interpretation of when a § 1983 claim for illegal search or seizure necessarily attacks the underlying criminal conviction. The Ninth Circuit, among others, essentially holds that illegal search and seizure claims potentially *always* imply the invalidity of the conviction, thus leading to that circuit's series of decisions effectively barring all § 1983 actions based on an illegal search or seizure where a conviction still stands.

Other circuits, like the Seventh Circuit, apply a very narrow interpretation of when a § 1983 claim for illegal search and seizure necessarily implies the

invalidity of the conviction. Claimants in the Ninth Circuit seeking damages for an illegal search and seizure will thereby be denied relief, while claimants seeking relief in the Seventh Circuit will be allowed to proceed, even in instances potentially broader than those contemplated in *Heck*.

B. Statement of Facts

Petitioners, Ted Szajer and his wife Helene, were owners and operators of "LA Guns" a legally licensed retail firearm store that operated in the City of West Hollywood, California. (App. 14).

On November 17, 2005, acting pursuant to information obtained from two confidential informants, the Los Angeles Police Department (LAPD) conducted a sting operation at the Szajers' gun store to determine whether the Szajers were illegally buying or selling firearms. (App. 4-15).

At approximately 3:30 p.m., a confidential informant was sent into the store and attempted to sell 14 firearms. Mr. Szajer recognized that purchasing one of the firearms would be illegal and refused to buy it. (App. 15). When the informant refused to take it back, Mr. Szajer told him he would turn it over to the police himself. (App. 14). Mr. Szajer purchased the other firearms believing them all to be legal. (App. 15). Mr. Szajer also immediately called the police to request a Deputy Sheriff come to the store to retrieve the one illegal firearm. (App. 4).

Within minutes of the sting's conclusion, and while Mr. Szajer was still on the phone with the police reporting the illegal firearm, officers raided the store. (App. 14-15). For at least four hours, the Szajers were handcuffed to chairs and watched as officers searched the business while a search warrant was being obtained. The officers searched cabinets, drawers, and shelves (App. 73), seized legally possessed handguns, rifles, shotguns, firearm accessories, and office equipment, and tore off and discarded legally required registration paperwork from firearms that were then seized (App. 37). All of this was done without a search warrant. (App. 73).

At 10:00 p.m. that evening, more than six hours after the sting and subsequent search and seizure from the store occurred, a search warrant was finally issued. It authorized the search of the Szajers' residence, vacation home, and gun store. (App. 17). Only three incidents were cited in the affidavit in support of the warrant: two interviews from confidential informants, and a description of the sting earlier that day. (App. 6-17). Neither the subsequent search of the store, nor the property seized or any information learned as a result of the four-hour search and seizures of property from the gun store was included in the warrant's affidavit, (App. 16-17) and in fact made no mention of the warantless search and seizures from the store after the sting operation. (App. 16-17, 119-121).

After the search warrant was finally obtained, each of the three separate properties listed in the warrant were simultaneously searched that same night. (App. 18). It was during the separate search of the Szajers' *home* that police discovered an allegedly unlawful H&K semiautomatic pistol. Possession of that specific firearm formed the basis for Count 8 of the 13 alleged felony violations with which the Szajers were initially charged. (App. 5).

The Szajers pled no contest to Count 8 of the criminal complaint, i.e., the unlawful possession of the H&K pistol found at the home, and were sentenced to probation. (App. 5). All of the other counts involving materials found at the Szajers' store, whether during the four-hour warrantless search, or during the subsequent searches that occurred *after* the warrant was issued, were dismissed. (App. 101). Thus, of the 13 criminal counts relating to illegal possession of firearms, it was only the firearm found in their *home* that formed the basis for the count to which the Szajers pled and were convicted.

The police never returned the property and firearms seized during the four-hour warrantless search. (App. 75). Because they engaged in a warrantless search and seizure of property at the Szajers' store that was neither included in the warrant leading to the search of their home, and unrelated to the basis for the count they pled to, the Szajers sought damages against the City under § 1983.

C. District Court Proceedings and Court of Appeals Decision

The Szajers First-Amended Complaint against the City of Los Angeles, *et al.*, was filed on February 25, 2008 and alleged (1) Illegal Seizure, and (2) Failure to Train and Supervise.

The district court denied the City's Federal Rules of Civil Procedure, Rule 12(b)(6) motion, finding that there were significant allegations of an illegal search and seizure that was conducted by the City. In particular the district court noted that "Defendants have not presented any declarations that demonstrate the search warrant and affidavit at issue in this case relate to the search, seizure, and ultimate criminal prosecution ... Nor is there any evidence that the same search warrant formed the basis for the searches at both Plaintiffs' business establishment and their personal residence." (App. 42-43).

The district court subsequently granted the City's summary judgment motion finding that, notwithstanding the credible allegations of an illegal search and seizure, the Ninth Circuit's precedent interpreting *Heck* barred the Szajers' claims of illegal search and seizure as an impermissible collateral attack on their convictions. (App. 30-31, 33).

The court of appeals affirmed the district court's grant of summary judgment, upholding the conclusion that the Szajers' illegal search and seizure claims were barred, as a favorable judgment for the Szajers

would necessarily imply the invalidity of their convictions. (App. 11-12).

As support for its holding, the court of appeals cited *Heck* and its own precedent interpreting *Heck*, concluding that *Heck* barred the Szajers' § 1983 illegal search and seizure claim. The court stated that "the searches of their residence and gun shop were based on the *same* search warrant and supporting affidavit." (App. 11) (emphasis in original). "[T]heir civil claims necessarily challenge the validity of the undercover operation and in doing so imply that there was no probable cause to search for weapons." (App. 11). No mention of the four-hour warrantless search however, was included in either the District Order or the *Szajer* opinion.

The court of appeals also expressly noted that there was a split of authority between the Ninth Circuit and the Seventh Circuit, but "decline[d] to take up the Szajers' invitation to follow the Seventh Circuit's approach because this Court must follow its own precedent." (App. 10).

The court of appeals noted the blanket rule adopted in its circuit barring all Fourth Amendment claims where the underlying conviction has not been overturned:

> Although footnote seven left open the question of the applicability of *Heck* to Fourth Amendment claims, this Court has since answered that question affirmatively. *See*, *e.g.*, *Whitaker v. Garcetti*, 486 F.3d 572, 583-84

> (9th Cir. 2007); *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000), overruled in part on other grounds by *Wallace v. Kato*, 549 U.S. 384, 393-94, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

(App. 9) (citations in original).

Relying on its own precedent, the court of appeals held that all §1983 illegal search or seizure claims are barred by *Heck* absent relief from the conviction. (App. 10-12). And with only a cursory examination of the underlying facts, coupled with a conflated view of the search at issue, concluding that *Heck* barred the Szajers' claims was a foregone conclusion.

REASONS FOR GRANTING CERTIORARI

Granting certiorari is appropriate when there is a conflict between a court of appeals decision and a decision of this Court. Sup. Ct. R. 10(c).

Review by this Court is also appropriate when a circuit split exists, as one does here. Sup. Ct. R. 10(a).

Moreover, if a court of appeals decision below predates a conflicting decision by this Court, this Court may grant certiorari and reverse the judgment summarily on the authority of its own intervening decision. *Helvering v. Wiese*, 292 U.S. 614 (1934). Or the Court may grant certiorari, vacate the decision

below, and remand for reconsideration in the light of the recent decision.

I. THE NINTH CIRCUIT CONFLICTS WITH THIS COURT'S RECENT RULING IN HOW THE WORD "NECESSARILY" IS INTERPRETED AND APPLIED IN *SKINNER* AND A CIRCUIT SPLIT EXISTS IN HOW *HECK* IS INTERPRETED AND THEREFORE APPLIED

A. The Ninth Circuit's Approach Directly Conflicts With This Court's Recent Ruling

Szajer was issued February 11, 2011. On March 7, 2011 in *Skinner v. Switzer*, 131 S.Ct. 1289, 1298 (2011), this Court appears to have sanctioned the Seventh Circuit's interpretation of the word "necessarily" by overturning the Fifth Circuit's approach by explaining that even if Skinner's § 1983 suit for DNA testing were successful, a favorable judgment would still not "necessarily imply" the invalidity of his conviction. This Court therefore held that a convicted state prisoner who had been sentenced to death for three murders was permitted to assert a § 1983 civil rights claim for the state's failure to allow him to seek DNA testing of crime-scene evidence, and even though he was still in custody. On direct appeal, his conviction and sentence were upheld. Six years after his conviction, Texas enacted a statute which permitted prisoners to gain post-conviction DNA testing in limited circumstances. The petitioner moved twice in state court to invoke the Texas statute for testing of untested biological evidence but both motions were denied.

The petitioner thereafter filed a federal action for injunctive relief under § 1983 against the Texas District Attorney, alleging Texas violated his Fourteenth Amendment right to due process by refusing to provide for the DNA testing he requested. Despite having his complaint dismissed by the district court because his action was not brought under a writ of habeas corpus, and having that decision affirmed by the United States Court of Appeals for the Fifth Circuit, this Court granted certiorari and reversed the Fifth Circuit's judgment.

This Court stated:

> Success in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction. While test results might prove exculpatory . . . results might prove inconclusive or they might further incriminate Skinner. See *Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.' ").

Id. (citation in original).

Like *Skinner* where DNA testing would not "necessarily imply" the petitioner's conviction or custody was invalid, the Szajers' § 1983 action would not "necessarily imply" that their convictions were invalid either. Treating Skinner's "custody" analogously to a conviction, this Court therefore disagreed that Skinner's § 1983 suit would "necessarily impl[y] the unlawfulness of the State's custody." *Id.* at 1293 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005)).

Significantly, and as will be more fully explained below, *Skinner* was from the Fifth Circuit, a circuit that for purposes of the current circuit split, agrees with the Ninth Circuit's position and was overturned by this Court. Without this Court's intervention, the Ninth Circuit will persist in its view despite this Court's recent clarification that the Seventh Circuit's position is the correct view.

B. The Word "Necessarily" Needs Clarification

It bears repeating that *Heck* was concerned with whether *preliminarily* a § 1983 claim should be allowed to *proceed* – not whether it would be successful on the merits. The circuit split comes down to each circuit's interpretation and application of the word "necessarily," a word this Court carefully included in its holding. The different treatment of § 1983 illegal search or seizure claims by the circuits must be resolved by this Court and can be accomplished with a clarification of *Heck*'s meaning of the word "necessarily" in Footnote Seven. It is unfortunate and anathema to the intent behind the enactment of § 1983 that a claimant's ability to seek damages for constitutional violations is dictated by geography. *See* Paul D. Vink, *The Emergence of Divergence: The Federal Court's Struggle to Apply Heck v. Humphrey to § 1983 Claims for Illegal Searches*, 35 Ind. L. Rev. 1085, 1086 (2002).

Justice Souter recognized this disparity between the potential application of *Heck* by the circuits and Congress' intent in enacting § 1983. In his concurrence in *Heck* he warned that the strict application of the rule against collateral attacks on convictions would work contrary to Congress' intent:

> [R]eading § 1983 to exclude claims from federal court would run counter to "§ 1983's history" and defeat the statute's "purpose." Consider the case of a former slave framed by Ku Klux Klan-controlled law-enforcement officers and convicted by a Klan-controlled state court of, for example, raping a white woman; and suppose that the unjustly convicted defendant did not (and could not) discover the proof of unconstitutionality until after his release from state custody. If it were correct to say that § 1983 independently requires a person not in custody to establish the prior invalidation of his conviction, it would have been equally right to tell the former slave that he could not seek federal relief even against the law-enforcement officers who framed him unless he first managed to convince the state courts that his conviction was unlawful. . . .
>
> Nor do I see any policy reflected in a congressional enactment that would justify denying to an individual today federal damages (a significantly less disruptive remedy than an order compelling release from custody) merely because he was unconstitutionally fined by a State, or to a person who discovers

> after his release from prison that, for example, state officials deliberately withheld exculpatory material. And absent such a statutory policy, surely the common law can give us no authority to narrow the "broad language" of § 1983, which speaks of deprivations of "any" constitutional rights, privileges, or immunities, by "[e]very" person acting under color of state law, and to which "we have given full effect [by] recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'"

Heck, 512 U.S. at 501-02 (Souter, J., concurring) (citations omitted).

Justice Souter's warning is particularly apt, considering how post-*Heck* decisions have led to uneven access to § 1983 remedies.

In a 2004 decision, this Court further attempted to address its use of the word "necessarily" in *Heck*, stating:

> Although damages are not an available habeas remedy, we have previously concluded that a § 1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. *Heck v. Humphrey*, 512 U.S. 477, 487,

> 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997). This "favorable termination" requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute. *Muhammad*, 540 U.S., at 751, 124 S.Ct. 1303 (2004). Even so, we were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "necessarily imply that the plaintiff's conviction was unlawful." 512 U.S., at 487, n. 7, 114 S.Ct. 2364 (noting doctrines such as inevitable discovery, independent source, and harmless error). *To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination – suits that could otherwise have gone forward had the plaintiff not been convicted.*

Nelson v. Campbell, 541 U.S. 637, 646-47 (2004) (emphasis added).

Finally, as stated above in *Skinner,* this Court again drew attention to the proper interpretation of

the word "necessarily" as it appeared to sanction the Seventh Circuit's interpretation of this word by stating that even if Skinner were successful in his § 1983 action, a favorable judgment would not "necessarily imply" the invalidity of his conviction. *Skinner*, 131 S.Ct. at 1298.

C. An Acknowledged Circuit Split Exists in the Interpretation and Application of *Heck v. Humphrey*

The Ninth Circuit has acknowledged that "[t]here is a split in the circuits as to how *Heck*'s footnote seven should be interpreted." *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000).

Szajer is the most recent decision to acknowledge that the various federal circuit courts have adopted at least two divergent positions on § 1983 illegal search or seizure claims:

> The Seventh Circuit read [sic] footnote seven to mean that 1983 claims based on Fourth Amendment violations may proceed because *Heck* simply does not bar such claims. *See Copus* [*v. City of Edgerton*], 151 F.3d 646, 648-49 (7th Cir. 1998). These holdings, however, are in direct conflict with Ninth Circuit precedent. *See Whitaker*, 486 F.3d at 583-84.

(App. 10) (citations in original).

> The Supreme Court left open the question whether *Heck*'s bar applies to Fourth Amendment violations. *See Heck*, 512 U.S. at

> 487 n.7 ("[A] suit for damages attributable to an allegedly unreasonable search *may* lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." (emphasis added)).

Whitaker v. Garcetti, 486 F.3d 572, 583 (9th Cir. 2007).

Other federal courts have also noted the current circuit split:

> [T]he Seventh Circuit continues to allow a Fourth Amendment exception to this [favorable termination] rule. . . .
>
> . . .
>
> The Seventh Circuit misreads *Heck*. The fact that a Fourth Amendment violation may not necessarily *cause* an illegal conviction does not lessen the requirement that a plaintiff show that a conviction was invalid as an element of *constitutional injury.*

Schilling v. White, 58 F.3d 1081, 1086 (6th Cir. 1995) (emphasis in original).

> Federal courts have interpreted this footnote in two different ways. Certain courts read this language to create a general exception to the doctrine of Heck for Fourth Amendment unreasonable—search claims brought against state officials under § 1983. . . .
>
> . . . .

> This court read the footnote in Heck as clearly rejecting the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under 1983.

Shamaeizadeh v. Cunigan, 182 F.3d 391, 395-96 (6th Cir. 1999) (noting its disagreement with the Seventh Circuit), *abrogated on other grounds by Eidson v. State of Tennessee Dept. of Children's Services*, 510 F.3d 631 (6th Cir. 2007), *cert. denied*, 528 U.S. 1021 (1999). *See also Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (holding that success on false arrest claim would "necessarily imply" that conviction for disturbing the peace was invalid as not based on probable cause); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (*Heck* bars civil rights claims "when a § 1983 plaintiff's success on a claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence"); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam) (stating that "a claim of unlawful arrest, standing alone, does not *necessarily* implicate the validity of a criminal prosecution following the arrest," but staying the civil action until the criminal prosecution was completed (emphasis in original)).

D. The Different Circuit Courts' Opinions

1. The Second, Fifth, Sixth, and Ninth Circuits' Interpretation of *Heck*

The Second, Fifth, Sixth and Ninth Circuits impliedly treat Footnote Seven of *Heck* as dicta. They characterize it as merely an example of a § 1983 claim that could be allowed to proceed as long as it does not impugn the validity of the conviction. But these circuits have essentially found that as a preliminary matter Fourth Amendment illegal search or seizure claims will *always* "necessarily" imply the invalidity of the conviction, so they bar all such claims unless the underlying conviction has been nullified. *See Whitaker v. Garcetti*, 486 F.3d 572 (9th Cir. 2007); *Harvey,* 210 F.3d at 1015; *Schilling,* 58 F.3d at 1086; *Mackey*, 47 F.3d at 746; *Woods v. Candela*, 47 F.3d 545 (2d Cir. 1995) (per curiam), *cert. denied*, 516 U.S. 808 (1995). *See also Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995) (finding that false arrest claim in a § 1983 action required a finding of acquittal before a cause of action would accrue, similar to the requirements of a malicious prosecution claim); *Cabrera*, 159 F.3d at 380 (acquittal needed to bring false arrest and Fourth Amendment claims under § 1983); *Ballenger v. Owens*, 352 F.3d 842, 846 (4th Cir. 2003) ("[w]hen evidence derived from an illegal search would have to be suppressed in a criminal case if the judgment in the § 1983 claim were to be applied to the criminal case and the suppression would *necessarily* invalidate the criminal conviction, the stated principle of *Heck*

would apply, and the § 1983 claim would have to be dismissed").

2. The Seventh, Eighth, Tenth, and Eleventh Circuits' Interpretation of *Heck*

The Seventh, Eighth, Tenth, and Eleventh Circuits take the position that Footnote Seven creates an exception to the general bar articulated in *Heck* and allows essentially *all* § 1983 claims based on an alleged illegal search or seizure to proceed, despite the existence of a still-outstanding conviction, because such claims will not *necessarily* imply that the conviction is invalid.

Thus, for example, the Ninth Circuit takes the approach that no cases may proceed as "all" illegal search or seizure claims necessarily attack the underlying conviction, while the Seventh Circuit takes the opposite approach. The Seventh Circuit's rationale relies on the idea that at the pleading stage the possibility always exists that doctrines like inevitable discovery might apply to avoid necessarily implying the invalidity of the conviction. Whether the "all" approach favored by some circuits is the correct interpretation of Footnote Seven, the "nothing" approach more correctly interprets *Heck*, or whether some approach in between "all" or "nothing" should be adopted, it is clear that the current "all" or "nothing" difference between the various circuits is a substantial split of opinion that should be reconciled.

The leading Seventh Circuit case of *Copus v. City of Edgerton*, 151 F.3d 646 (7th Cir. 1998), illustrates the Seventh Circuit's position that no § 1983 claims based on illegal search and seizures "necessarily" imply an underlying conviction's invalidity. In *Copus*, the plaintiff was convicted for possession of illegal weapons after police searched his home without a warrant. Copus filed a § 1983 claim based on the alleged illegal search and subsequent seizure of his weapons at his home. On appeal from the district's dismissal under *Heck*, the Seventh Circuit reversed the district court and concluded that "*Heck* does not bar a claim such as Copus" because "Fourth Amendment claims for unlawful searches . . . do not necessarily imply a conviction is invalid, *so in all cases* these claims can go forward." *Id.* at 647-48 (emphasis added).

The Seventh Circuit reasoned that "a search can be unlawful but the conviction entirely proper, or the reverse." *Id.* at 649 (quoting *Gonzales v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998)). Thus, according to the Seventh Circuit, *Heck* did not require that Copus' illegal search and seizure claims be dismissed because even if his § 1983 claim was successful, under all circumstances it would not "'necessarily' . . . impugn the validity of his conviction." *Id.*

The Eighth, Tenth and Eleventh circuits likewise agree that Footnote Seven creates a general exception to *Heck* for § 1983 illegal search or seizure claims. *See, e.g., Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (holding that "[b]ecause harmless error

analysis is applicable to the admission at trial of coerced confessions, judgment in favor of Simmons on this § 1983 action challenging his confession will not *necessarily* demonstrate the invalidity of his conviction" (emphasis in original)); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (holding that *Heck* did not bar Datz's § 1983 unlawful search claim "because, even if the pertinent search did violate the Federal Constitution, Datz's conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error"); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553 (10th Cir. 1999).

E. The Circuit Split Seems to Be a Result of Viewing "Convictions" Differently

Convictions come about as a result of many different factors. (*See* Vink, *supra*, at 1105). Some convictions are the result of an actual finding of guilt through a trial, whereas most come from plea bargains where merits are never actually argued – or at least not to the level that a "conviction" suggests to the layperson. In other words, for courts to logically declare that illegal search claims will not, as a preliminary matter, "necessarily" imply the invalidity of a conviction, these courts also inevitably must acknowledge the difference between the *admissibility* of evidence versus whether that same evidence was obtained legally. *Copus*, 151 F.3d at 648.

So whereas the Seventh Circuit and its adherents' holdings contemplate that convictions may (and often are) made up of separate and different searches, seizures, evidence, etc., the Ninth Circuit and its adherents appear to view a conviction as an indivisible package – a sort of sum of *all* of its parts, regardless of whether any of those "parts" were unlawful. Under this approach, if there is still an outstanding *conviction* (regardless of how it was obtained, whether by an actual finding of guilt, plea, one search or another) then any challenge to *any* of the underlying searches or seizures *will* necessarily imply the invalidity of the conviction as a whole.

Consequently, in order to proceed with a § 1983 claim based on the same allegations that would be permissible in the Seventh Circuit, a claimant in the Ninth Circuit must essentially prove that the conviction *itself*, as a whole, is unlawful. Requiring the plaintiff to prove the invalidity of the conviction as a whole however, is an entirely different and more onerous burden than demonstrating that the § 1983 action will not "necessarily" imply the invalidity of the conviction. Nor is that what *Heck* requires as evidenced by this Court in *Skinner*.

Yet despite this Court emphasizing that its use of the term "necessarily" was not meant to foreclose a particular class of suits (like those based upon Fourth Amendment illegal search or seizure claims) and suggesting that an analysis of whether the § 1983 action in a particular claimant's circumstance necessarily constitutes a collateral attack on a conviction

must occur, the Ninth Circuit and others following *Nelson* nonetheless have continued to apply their overly restrictive rule barring § 1983 claims. *See, e.g.*, *Whitaker*, 486 F.3d at 583-84; *Harvey*, 210 F.3d at 1015.

II. THE ISSUE IN CONFLICT IS RECURRING AND OF GREAT PRACTICAL IMPORTANCE

This Court has referred repeatedly in its opinions to the fact that certiorari was granted "to resolve disagreement among the courts of appeals on a question of national importance," *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003), to review a "narrow but recurring question on which courts of appeals have divided," *Clay v. United States*, 537 U.S. 522, 524 (2003), or "[b]ecause of the importance of the question presented and the conflict of opinion on the constitutional issue involved. . . ." *Fuller v. Oregon*, 417 U.S. 40, 42 (1974).

More significantly, there now appears to be a direct conflict between the Ninth Circuit's approach and a decision of this Court.

A. The Important Purpose of § 1983 Claims

Originally drafted as part of the 1871 Civil Rights Act following the Civil War, § 1983 was to provide a civil remedy for minorities victimized by state actors acting at the behest of the Ku Klux Klan. *See Heck*, 512 U.S. at 501. Section 1983 created a

means for all citizens to recover damages if it is proven that a state actor violated a constitutional right by failing or refusing to enforce state law. It "was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

Moreover, it is well-recognized in this Court's jurisprudence that § 1983 claims are still an important tool for convicts to address the terms of their confinement, or for members of the public to address civil rights violations. *See Heck*, 512 U.S. at 480.

Heck itself recognizes that § 1983 claims are an important tool for addressing grievous injuries by state actors acting under color of authority. "This case lies at the intersection of the two most fertile sources of federal-court prisoner litigation – the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254. Both of these provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck*, 512 U.S. at 480 (citation omitted).

Justice Souter's concurrence in *Heck* highlighted the importance of § 1983 claims by observing that this Court has refused to allow "even well-settled common-law rules into § 1983 "'if [the statute's] history or purpose counsel against applying [such rules] in § 1983 actions.'" *Heck*, 512 U.S. at 492

(quoting *Wyatt v. Coal*, 504 U.S. 158, 164 (1992)). Justice Souter further highlighted the import of § 1983 claims by noting that their "very purpose" is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Heck*, 512 U.S. at 501 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

Finally, Justice Souter explained, "surely the common law can give us no authority to narrow the 'broad language' of § 1983, which speaks of deprivations of 'any' constitutional rights, privileges, or immunities, by '[e]very' person acting under color of state law, and to which 'we have given full effect [by] recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.'" *Heck*, 512 U.S. at 502 (quoting *Dennis v. Higgins*, 498 U.S. 439, 443, 445 (1991)). Because this aspect of the *Heck* decision – what § 1983 claims may necessarily be precluded by *Heck* – squarely implicates the breadth of the public's access to tools for redressing injuries to their basic rights; the public importance of resolving this issue is not a matter of happenstance or mere convenience.

B. The Issue Has Generated Substantial Legal Scholarship

The inconsistent circuit treatment of § 1983 claims based on Fourth Amendment illegal search or seizure violations is well-recognized and has generated substantial legal scholarship. The article by

Vink, *supra*, at 1089, explained that *Heck*'s Footnote Seven is responsible for the current rift in the circuit courts as it has caused disagreement about the proper application of the *Heck* holding to § 1983 claims for illegal searches and seizures.

Another article, John Stanfield Buford, *When the Heck Does This Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 Wash. & Lee L. Rev. 1493, 1499 (2001) explained:

> In footnote seven of the [*Heck*] opinion, the Court offered a § 1983 action for damages from an illegal search as an illustrative example of a claim that might not imply the invalidity of a conviction. The U.S. Circuit Courts of Appeals are badly divided over the proper interpretation of this footnote, with one group holding that the footnote allows immediate accrual of all illegal search claims, and the opposing group requiring a case-by-case examination of the plaintiff's claim before allowing accrual. (footnotes omitted).

Another article, Michael Rowan, *Leaving No Stone Unturned: Using RICO As A Remedy for Police Misconduct*, 31 Fla. St. U. L. Rev. 231, 248 (2003) noted that "Heck has been the downfall of many § 1983 claims and has likely kept many more from ever being brought." (footnotes omitted). And another, Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil*

Rights Plaintiffs, 32 U. Mich. J.L. Reform 49, 91 (1998) contends that although this Court in *Heck* attempted to clarify when a suit to vindicate the deprivation of constitutional rights by state officials should proceed under § 1983, instead "it further complicated the existing scheme [and] . . . did not provide much guidance for lower courts on this issue."

An issue that has generated this much academic commentary is particularly ripe for this Court's review.

C. Claimants in Different Jurisdictions Continue to be Treated Disparately

Severe disparities between the ability of claimants to seek redress for civil rights injuries, based on nothing more than a particular claimant's location are disfavored. Such disparities currently exist, and make this case ripe for this Court's review. *See*, *e.g.*, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (certiorari granted where the circuits disagreed on the proper application of federal habeas corpus statute "[b]ecause uniformity among federal courts is important on questions of this order").

This Court has allowed this issue to develop among the circuits by denying certiorari to earlier appeals. *See*, *e.g.*, *Shamaeizadeh*, 182 F.3d 391, and *Candela*, 47 F.3d 545, perhaps anticipating that the circuit conflict would resolve itself over time, without the need for further "gentle guidance" from this Court. But that, unfortunately, has not happened. In

light of the continuing, frequent, and disparate treatment of claimants seeking relief under § 1983 for claims arising out of illegal searches or seizures, and the havoc caused by such inconsistent treatment, as underscored by the amount of legal commentaries generated, it is time for this Court to resolve the split among the circuits. The important constitutional rights at stake, coupled with this Court's desire for consistency and finality, warrant a resolution of this split in favor of the Seventh Circuit line of cases. *See Heck*, 512 U.S. at 485 (expressing desire to account for consistency, finality, and federalism).

This issue is also not likely to be resolved in future cases. The circuits are not only going to continue to follow their own precedent, but, as mentioned above, will continue to disagree with one another absent clear direction from this Court.

D. Appearance of Inconsistency to the Public

Several courts are concerned that conflicting approaches may convey an impression to the public of inconsistent verdicts between the civil and criminal court systems. *See, e.g.*, *Harvey*, 210 F.3d at 1015 (indicating that embracing the Ninth Circuit's position "will avoid the potential for inconsistent determinations on the legality of a search and seizure in the civil and criminal cases and will therefore fulfill the *Heck* Court's objectives of preserving consistency and finality"). The judiciary's legitimacy is derived in

part from how the public perceives it, and as it stands now, the public may be confused or disillusioned by what appears to be inconsistent jurisprudence.

Public confusion over disparate treatment in different jurisdictions also undermines the public's confidence in the justice system. The Ninth Circuit's position inevitably leaves without a remedy some § 1983 claimants whose constitutional rights have been violated. This is especially the case when the "conviction" is merely a result of evidence being obtained by overzealous police and prosecutors who argue it was "used" for the conviction – regardless of whether it actually was, or whether such seizure was lawful.

Finally, the appearance that citizens from one jurisdiction are not getting the same treatment regarding alleged civil rights violations as citizens from another jurisdiction raises an additional inconsistency that undermines the judiciary in the eyes of the public.

E. Corrupting Effect on the Just Administration of Plea Bargaining

Under the Ninth Circuit's approach, once defendants are advised that a conviction forecloses any future civil claim for essentially any illegal search and seizure, defendants will have stronger incentives to file motions to suppress evidence and forgo plea bargains lest their plea bar a future right to recover damages for state violations of their civil rights.

Conversely, police in particular, and to a lesser extent prosecutors, will feel pressured to obtain a conviction in order to foreclose the possibility of a subsequent civil rights action being filed against police or municipal entities. Perversely, this would be especially true in cases involving police officers who have violated a defendant's civil rights. Those officers will have an incentive to push for a conviction so that their wrongdoing cannot be brought to light in a subsequent civil case. The more egregious the civil rights violation, the greater the incentive to bury it by securing a conviction.

Such an outcome is contrary to the just administration of case settlement, and to the preferences of this Court.

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. *Properly administered*, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

Santobello v. New York, 404 U.S. 257, 260 (1971) (emphasis added).

The *Szajer* opinion will discourage the otherwise efficient and just disposition of cases through properly administered plea bargaining in state and federal courts in the Ninth Circuit.

F. Some Circuits Illogically Treat All Convictions Similarly No Matter How They Were Obtained

The Ninth Circuit's "bar all" approach to its interpretation of *Heck* fails to acknowledge that convictions often differ in character and are treated differently depending on how they were obtained. The Ninth Circuit's treatment of all convictions as the same, or as one indivisible linear package for purposes of barring subsequent § 1983 actions under *Heck* overlooks the practical reality that different jurisdictions treat convictions differently. For example, California has several different methods for obtaining a "conviction," each of which have different effects on subsequent actions in state civil proceedings.

In California, a *nolo contendere* plea allows pleas without a stipulation to the facts, and still allows a claimant to proceed with a civil claim without the conviction being used against the claimant. Cal. Penal Code § 1016(3) (West 2010). A "West" plea is one made specifically without stipulating to the facts. *See People v. West*, 3 Cal.3d 595, 613 (1970). Thus, a California criminal defendant can be "convicted" of a crime that was solely the result of a plea bargain, i.e., only tangentially related to the actual crime, and which will be inadmissible in any subsequent civil action.

The type of conviction will also affect its evidentiary value in a subsequent civil proceeding. For example in California, misdemeanor convictions are

inadmissible in any subsequent civil action unless such conviction tends to call into question the veracity of the convicted. *See* Cal. Evid. Code § 787 (West 2009); *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal.2d 157, 162 (1948). California also allows certain convictions to later be expunged upon completion of probation terms. *See* Cal. Penal Code § 1203.4 (West 2010).

Although California treats convictions in vastly different ways based upon the type of crime and the method used to obtain the conviction, the Ninth Circuit, in applying California convictions to federal cases, fails to account for these differences in any way. Thus by applying a blanket bar to § 1983 relief, the Ninth Circuit and other circuits unreasonably treat the Szajers' plea to probation as the same type of conviction as a finding of guilt by a jury.

G. Different Statutes of Limitations Triggers

One last effect of the split between the circuits is that it leads to different and potentially confusing limitations calculations in different circuits. This Court said in *Wallace v. Kato*, 127 S.Ct. 1091, 1098 (2007), that *Heck* does not delay the accrual of an otherwise complete and present cause of action when a judgment in the plaintiff's favor "would impugn an anticipated future conviction." But the different interpretations of *Heck*'s Footnote Seven nonetheless lead to different starting points for periods of limitations. For example the Seventh Circuit, which allows

§ 1983 illegal search claims while convictions still stand, starts the clock when the alleged illegal search happens. *See Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (making the claimant in the Seventh Circuit having to be especially aware of his Fourth Amendment violation for purposes of knowing how much time he has to bring his § 1983 claim), while the Ninth Circuit holds that the statute of limitations does not begin until the conviction has been invalidated in some way.

III. THE DECISION BELOW IS INCORRECT AND SQUARELY PRESENTS THE CIRCUIT CONFLICT FOR THIS COURT'S RESOLUTION

A. The Courts Below Improperly Conflated the Illegal Search of the Store as Being Inextricably Intertwined With the Warrant and Subsequent Search of the House

Szajer squarely presents to this Court the unreasonable effect of the circuit split. It is also the most direct example of how the Ninth Circuit's misinterpretation of Footnote Seven has barred a § 1983 claim that would not "necessarily" imply the invalidity of the conviction.

Significantly, the Szajers' § 1983 action would have done just the opposite because it sought to recover damages for the illegally seized firearms and property from their store that were not even used to secure the warrant that led to their conviction. The

Ninth Circuit improperly characterized the nature of the sting, the warrantless search, and the subsequent search pursuant to the warrant, conflating the sting with the subsequent warrantless search of the store:

> The November 17 undercover operation was the only basis for finding probable cause to search both the gun shop and residence. Yet, the Szajers failed to challenge the search. Just as in *Whitaker*, if the Szajers prevailed on their Section 1983 claim, it would necessarily imply the invalidity of their state court convictions. Their civil claims necessarily challenge the validity of the undercover operation and in doing so imply that there was no probable cause to search for weapons.

(App. 11).

The State admitted that not only were charges stemming from the warrantless search of the business dismissed, but that the conviction at issue is specifically based on the weapon found at the house, not at the Szajers' store. (App. 19). The State also acknowledged that the warrant leading to the search of the house was not based on the search of the business, but on the "weapons transaction," i.e., the sting that preceded the illegal search and seizure. (App. 100).

The Szajers can therefore fully litigate the fact that the officers seized weapons without a warrant and failed to return those weapons, without ever attacking the warrant or the subsequent search of their home. The taking of the Szajers' weapons had

no effect on the issuance of the warrant as those events were not listed in the affidavit supporting the warrant. Again, it was the warrant authorizing the home search that lead to the firearm upon which the Szajers were convicted.

In other words, the warrantless search and seizure at the Szajers' store was not causally-related or used to support the warrant leading to the later home search that ended in the convictions. Because the warrantless search and seizure of the weapons was not relied upon to obtain a conviction, the risk of an "inconsistent judgment" does not exist where it can be clearly pointed out that the judgment/conviction relates to one search, and the § 1983 action relates to a separate, independent one. *See Harvey*, 210 F.3d at 1015.

B. Incorrect Precedent Interpreting "Necessarily" Barred the Lower Courts From Properly Analyzing Whether the Szajers' § 1983 Claim Necessarily Implied the Invalidity of Their Conviction

Although the Szajers' claims for damages were from a warrantless search that was inconsequential to their conviction, the lower courts' decisions nonetheless concluded the § 1983 claims constituted a collateral attack on the convictions, and so were barred. These foregone conclusions were mandated by the Ninth Circuit's precedent barring all such claims.

In short, although the Ninth Circuit did a cursory and incorrect assessment of the effect of the warrantless seizure of the weapons on the Szajers' § 1983 claims, the Ninth Circuit's conclusion that the Szajers' claims would be barred was a foregone conclusion. This is because, as was explained in *Szajer*, the Ninth Circuit bars § 1983 claims based upon Fourth Amendment illegal search or seizure claims where the underlying conviction has not been overturned:

> Although footnote seven left open the question of the applicability of *Heck* to Fourth Amendment claims, this Court has since answered that question affirmatively. *See, e.g.*, *Whitaker v. Garcetti*, 486 F.3d 572, 583-84 (9th Cir. 2007); *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000), overruled in part on other grounds by *Wallace v. Kato*, 549 U.S. 384, 393-94, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).
>
> . . .
>
> Accordingly, § 1983 claims premised on alleged Fourth Amendment violations are not entirely exempt from the *Heck* analysis, as the Szajers suggest.

(App. 9).

In sum, the lower courts' analysis began with the incorrect premise that if the Szajers' claims touched at all upon their conviction, their claims would be barred by *Heck*. Because there was an outstanding conviction (regardless of how it was obtained, whether

by an actual finding of guilt, plea, one search or another) then *any* challenge to *any* of the underlying searches or seizures *necessarily* implies invalidity of the conviction as a whole – regardless of the lack of any causal connection that might conceivably bring the validity of the conviction into question. *See* Vink, *supra*, at 1105.

In stark contrast to the fact-determinative flexible policy suggested in *Heck*'s Footnote Seven (and employed in the Seventh Circuit and elsewhere), the Ninth Circuit's policy is akin to a "zero tolerance," blocking all § 1983 claims from claimants whose conviction, however tenuously related, still stands. This results in a gross injustice for claimants like the Szajers and others who happen to be in the Ninth Circuit's jurisdiction.

CONCLUSION

The Szajers brought a § 1983 claim for damages resulting from the warrantless search and seizure of property from their business. Nothing from that warrantless search and seizure was used in any manner to get a warrant that led to the discovery of the H&K pistol in their home that formed the basis for their conviction. Yet, because the conviction still stood, the Ninth Circuit barred the claim even though the Szajers' claim would almost certainly have had no impact whatsoever on the validity of the conviction.

Had the Szajers' lived in the Seventh, Eighth, Tenth, or Eleventh Circuit, their § 1983 claims against the City would be being litigated today. If the Ninth Circuit's interpretation of Footnote Seven in *Heck* were not as broad as the Seventh, Eighth, Tenth, and Eleventh Circuits' interpretation, but nonetheless attempted to be faithful to Footnote Seven, then the Szajers would *likely* be litigating their claims against the City in a California federal district court today.

This gross injustice seems to be the exact sort of exception that Footnote Seven in *Heck* contemplated.

This Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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