

No. 06-1307

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**In the Supreme Court of the United States**

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ROBERT A. JONES, Assistant Deputy Superintendent  
of Program Services, and DONALD SELSKY,  
Director, Special Housing/Inmate Disciplinary Programs,  
*Petitioners,*

v.

JOSE PERALTA  
*Respondent.*

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

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether *Heck v. Humphrey*, 512 U.S. 477 (1994), and its progeny bar a suit under 42 U.S.C. § 1983 challenging a prison disciplinary proceeding that resulted in both a loss of good time credits and a change in the conditions of confinement if the prisoner expressly executes an enforceable waiver of any and all claims that would affect the fact or duration of his confinement.

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## COUNTERSTATEMENT OF THE CASE

In this case, respondent was subject to a prison disciplinary proceeding that resulted in the imposition of sanctions that affected both the length and the conditions of his confinement. New York state courts dismissed respondent's due process challenge to the disciplinary proceeding, evidently for failure to pay a filing fee. Respondent then brought this suit in federal court under 42 U.S.C. § 1983, seeking damages for the change in the conditions of his confinement. Relying on *Heck v. Humphrey*, 512 U.S. 477 (1994), petitioners moved to dismiss the claim, arguing that success on the merits necessarily would lead to a reduction in respondent's sentence. The Second Circuit rejected petitioners' argument, holding that respondent may proceed with his suit if he is willing to waive all current and future challenges to the duration of his confinement. The Second Circuit remanded the case for a determination whether respondent would agree to such a waiver and, if so, to structure an appropriate waiver.

This case does not warrant review. There is no conflict in the circuits; in fact, the Second Circuit is the *only* court to have addressed the question whether the *Heck* doctrine precludes a Section 1983 suit by a prisoner who waives any challenge to the fact or length of confinement. Moreover, the Second Circuit's answer to that question was correct: this Court's decisions applying the *Heck* principle, including recent precedent that was faithfully applied by the court below, establish that *Heck*'s preclusive rule has no effect when the prisoner's suit will not necessarily affect the length of confinement. That certainly is the situation in a case where, as the Second Circuit contemplated here, the prisoner irrevocably and enforceably disclaims any challenge to his or her sentence. And compelling prudential concerns – including the interlocutory nature of the proceeding, uncertainty about whether a waiver will in fact be executed on remand (and, if it is, what it will say), and material ambiguities in the record – make this case an unsuitable vehicle with which to review

the question presented. The petition therefore should be denied.

**1. Prison Disciplinary Proceedings.** In 1998, respondent was accused of conspiring to injure another inmate at Fishkill Correctional Facility. Following a brief, one-hour proceeding, respondent was found guilty of violating prison rules. Pet. App. 18a. Respondent maintains that prior to and during his disciplinary hearing, he was prevented from obtaining or reviewing a range of key evidence – including logs that would have demonstrated that he was not at the location alleged during the event in question – and that he was denied an impartial hearing. Resp. App. 3a-5a, 18a-20a.<sup>1</sup> Respondent also states that he was prevented from confronting some of the important evidence against him. *Id.* at 5a.

At the conclusion of the hearing, respondent was sentenced to five years of lost good time credit and five years each of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. Pet. App. 18a. Respondent filed a timely administrative appeal. Without opinion or explanation, the appeal board reduced respondent's sentence to two years of lost good time credit and two years of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. *Id.* at 18a-19a.

**2. State Court Proceedings.** In October 1998, respondent filed an Article 78 petition and motion for an order to show cause in the New York Supreme Court for Dutchess County against prison officials at the Fishkill Correctional Facility. Actions taken by agencies and officers of state and local government in New York – including prison proceedings – are properly challenged in state court through Article 78 petitions. N.Y. C.P.L.R. §§ 7801 & 7803 (McKinney 1998). The motion for an order to show cause averred that

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<sup>1</sup> “Resp. App.” refers to the appendix to this brief.



respondent had been denied due process of law. Specifically, respondent claimed that a prison counselor that was assigned to assist with his defense failed to provide him with requested evidence that was necessary for his defense; he also alleged that petitioner Jones, who served as the hearing officer, was unfair and partial in conducting the hearing.

The record does not clearly indicate how the case proceeded in state court after respondent filed his motion to show cause and an accompanying motion to proceed as a poor person.<sup>2</sup> According to the allegations in respondent's federal complaint, which must be accepted as true at this point in the proceeding, the state trial court granted respondent's motion to proceed as a poor person, but then declined to waive the filing fee, Resp. App. 6a, and dismissed the case for failure to perfect.<sup>3</sup> Soon thereafter, the state supreme court transferred the case to the Appellate Division, Second Department. *Ibid.* It appears that in June 1999, respondent filed another motion to proceed as a poor person during his appeal. *Id.* at 25a. Nevertheless, on February 15, 2000, the

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<sup>2</sup> So far as we have been able to determine, respondent's original Article 78 file has been lost by the New York court system. Hence many of the facts and dates relating to the state court suit are unverifiable. The Dutchess County clerk's office informs us that respondent's file was never returned to it following respondent's original transfer of the case to the Appellate Division. The clerk's office for the Appellate Division, Second Department, reports that it transferred the file back to Dutchess County. Neither office has been able to locate the file, although the Dutchess County clerk's office has provided a copy of the order dismissing respondent's case, along with several hundred others.

<sup>3</sup> Although respondent alleges that the fee was \$250, Resp. App. 6a, New York law in effect at the time that respondent filed his Article 78 action indicates the fee was actually \$165. See 1990 N.Y. Sess. Laws ch. 190, § 260 (McKinney). The district court, however, stated that the fee was \$200. Pet. App. 21a.

Appellate Division again dismissed the case for failure to perfect. Respondent next appealed to the New York Court of Appeals; according to the Dutchess County clerk's office, that court dismissed the case for failure to perfect shortly thereafter. According to the complaint, respondent was never given an opportunity to proceed with his Article 78 motion without paying the filing fee.

**3. Federal Court Proceedings.** Having been foreclosed from pursuing his constitutional claims in state court, in November 2000 respondent filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Pet. 1. Pursuant to an order of the district court dated April 16, 2001, respondent filed an amended complaint on June 11, 2001. Pet. App. 24a.

In his amended complaint, respondent alleged with respect to his disciplinary hearing that (1) the prison counselor provided inadequate assistance by refusing to procure certain evidence for respondent's defense; (2) petitioner Jones, the hearing officer, had been biased, unfair, and partial throughout the disciplinary proceeding; and (3) on appeal, petitioner Selsky, the director of inmate disciplinary programs who issued the final determination, decided that respondent was innocent but, rather than expunging his record as required by law, merely reduced respondent's sentence. Resp. App. 6a.<sup>4</sup>

Petitioners moved to dismiss, arguing that the entire complaint was barred by *Heck*. Pet. App. 4a-5a. Respondent opposed the motion, maintaining that he should be allowed to proceed because he was not seeking damages for the loss of

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<sup>4</sup> Respondent further alleged that his Article 78 state court proceeding was deficient and brought a claim against certain judges and court clerks, arguing that they denied him access to the New York state court system. Resp. App. 6a-7a. The district court dismissed these claims on immunity grounds. Pet. App. 24a-27a. Respondent did not appeal this dismissal to the Second Circuit. *Id.* at 4a n.1.

good time, but only for the restrictive confinement. Pet. App. 5a, 20a. The district court dismissed the complaint. *Id.* at 18a-23a.

The court of appeals reversed. Pet. App. 1a-17a. Relying on its prior decision in *Jenkins v. Haubert*, 179 F.3d 19, 21 (2d Cir. 1999), the court first concluded that “*Heck* does not preclude a [Section] 1983 claim aimed at sanctions that did not affect the length of confinement.” Pet. App. 10a. The court explained:

We conclude \* \* \* that the purpose of the Heck favorable termination requirement is to prevent prisoners from using [Section] 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement, and that punishments related to their term of imprisonment, or the procedures that led to them (if the procedural defect at issue was critical to the imposition of the punishment), must be attacked through a habeas petition. But the favorable termination requirement is not intended to compel a prisoner to demonstrate that a sanction he seeks to challenge, or the procedure that led to it, has been invalidated before he can proceed under [Section] 1983 when that sanction does not affect his term of confinement.

Pet. App. 11a.

Under this principle, the court concluded, a prisoner may challenge the constitutionality of proceedings that lead to “mixed sanctions” – those affecting both the length and conditions of confinement – only if the prisoner permanently waives *all* challenges to the length of confinement:

We today hold that a prisoner subject to such mixed sanctions can proceed separately, under [Section] 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, *but that he can only do so*

*if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.* In other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit.

Pet. App. 12a-13a (emphasis in original). The court added that such a waiver would be enforceable as a matter of judicial estoppel if a prisoner who chose to forgo a challenge to the length of confinement subsequently sought to renege on his abandonment of the claim. *Id.* at 14a-15a.

The Second Circuit remanded the case to the district court to determine whether respondent would formally agree to waive all claims relating to the length of confinement. The court subsequently denied a petition for rehearing or rehearing en banc without dissent. Pet. App. 28a-30a.

#### **REASONS FOR DENYING THE PETITION**

This case presents neither a question warranting review nor – to the extent that the question presented is thought to merit consideration – an appropriate vehicle for addressing it. Notwithstanding petitioners’ assertion of a conflict in the circuits, only the Second Circuit has addressed the question presented here: whether a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he irrevocably waives any claims with respect to the length of his confinement. Moreover, the decisions relied upon by petitioners to support the supposed conflict all predate this Court’s most recent clarifications of the relevant legal rules, which make clear that the Second Circuit’s decision is fully in line with this Court’s precedent. See *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Muhammad v. Close*, 540 U.S. 749 (2004). If there is any doubt on this point, the Court

should await further consideration of the issue by the lower courts before itself confronting the question presented.

Finally, the fact that litigation is ongoing in the instant case provides a prudential basis for denial of the petition for certiorari. In the first place, the case may become moot after remand; it is possible, for example, that respondent ultimately will choose not to disclaim a challenge to the length of his confinement, which would preclude pursuit of his Section 1983 claim at this time. Moreover, the case may be mooted by settlement or a disposition on other grounds. Additionally, because no waiver has yet been executed in this case, the Court would be unable to review the adequacy of the waiver's terms or the relevance of particular terms to application of the *Heck* doctrine. Denial of the petition is therefore plainly warranted.

#### **I. THERE IS NO CIRCUIT CONFLICT ON THE QUESTION PRESENTED.**

1. The Second Circuit is the first and, thus far, the only court to set out a procedure applying the principle that follows directly from this Court's precedent: a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he "forever [abandons] any and all claims he has with respect to the sanctions that affected the length of his imprisonment." Pet. App. 3a. In arguing to the contrary, petitioners cite only three decisions issued over the span of thirteen years since this Court decided *Heck*, each of which predates this Court's two most recent relevant cases, *Wilkinson* and *Muhammad*. See Pet. 8-10, citing *Post v. Gilmore*, 111 F.3d 556 (7th Cir. 1997) (per curiam); *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996); *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995), *vacated and remanded*, 520 U.S. 1238 (1997), *on remand*, 122 F.3d 39 (9th Cir. 1997). But none of these decisions addresses the question presented in this case: whether *Heck* bars a prisoner from using Section 1983 to seek damages with respect to the

conditions of his confinement when resolution of the Section 1983 action will have *no* effect on the duration of confinement because the prisoner has expressly and enforceably waived any claim relating to the length of his sentence.

In *Sheldon v. Hundley*, for instance, prison officials charged the defendant with verbal abuse. Sheldon filed a Section 1983 suit seeking money damages for both the loss of good time credits and a change in the conditions of his confinement. The Eighth Circuit dismissed his Section 1983 claim and required him to pursue a habeas remedy. The court explained that if “success on the merits of *a particular* [Section] 1983 claim would *necessarily* imply the invalidity of a disciplinary result lengthening the plaintiff’s prison sentence, *Heck* requires favorable termination of the action in an authorized state tribunal or a federal habeas court, even if the claim is for damages rather than earlier release.” 83 F.3d at 233 (emphasis added). At no point, however, did the *Sheldon* court consider, let alone decide, whether the plaintiff could have pursued a Section 1983 action for damages with respect *only* to the conditions of his confinement if he had executed an enforceable waiver of his right to pursue a reversal of the denial of his good time credits.

Petitioners also mistakenly claim that two decisions of the Seventh Circuit conflict with the decision below. In *Post v. Gilmore*, the Seventh Circuit considered a situation in which plaintiff Post lost good time credits and was subjected to solitary confinement following a prison disciplinary determination. Post filed both a habeas petition with respect to his lost good time credits and a Section 1983 complaint with respect to his solitary confinement. Relying on *Heck*, the court concluded that the two suits must be “adjudicated in sequence – and the sequence should begin with the [Section] 2254 claim.” 111 F.3d at 557. The court never considered whether Post could have proceeded with his Section 1983 suit if he had agreed to seek only damages and to abandon his habeas proceeding, waiving “forever any and all claims he

has with respect to the sanctions that affected the length of his imprisonment.” Pet. App. 3a. See also *Montgomery v. Anderson*, 262 F.3d 641 (7th Cir. 2001) (holding that a prisoner must pursue habeas relief before Section 1983 damages, without considering whether the plaintiff could have proceeded with his Section 1983 suit if he waived relief for his lost good time credits).

Finally, petitioners inaccurately claim that the Ninth Circuit’s opinion in *Gotcher v. Wood* conflicts with the decision below. In the initial proceedings in that case, the plaintiff brought a Section 1983 claim seeking damages both for the loss of good time credits and for a change in the conditions of his confinement. The Ninth Circuit first held that the plaintiff could pursue his Section 1983 suit as filed. 66 F.3d 1097 (9th Cir. 1995). Washington State filed a petition for certiorari, and this Court summarily vacated and remanded the case for reconsideration in light of *Edwards v. Balisok*, 520 U.S. 641 (1997). *Wood v. Gotcher*, 520 U.S. 1238 (1997). On remand, the Ninth Circuit summarily concluded “that *Edwards* forecloses Gotcher’s entire compensatory claim under 42 U.S.C. § 1983.” 122 F.3d at 39. But like the Seventh and Eighth Circuits, the Ninth Circuit never considered or addressed the question presented in this case: whether the plaintiff could have pursued his Section 1983 claim for damages arising *only* from the conditions of his imprisonment if he had permanently abandoned *all* claims relating to the sanction that affected the length of confinement.

2. Because only the Second Circuit has addressed the question presented here, this Court should await further consideration of the issue by the lower courts before itself confronting the question. Members of the Court have often noted that it is “desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). Allowing the lower courts “to serve as labora-

ories in which the issue receives further study before it is addressed by this Court” will increase “the likelihood that the issue will be resolved correctly.” *Brown v. Texas*, 522 U.S. 940 (1997) (Stevens, J., respecting denial of certiorari, joined by Souter, Ginsberg, and Breyer, JJ.) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari, joined by Blackmun and Powell, JJ.)). That is especially so in this case, because additional experience could cast considerable light on several significant, unresolved issues related to the Second Circuit’s holding, including questions as to the scope and enforceability of the proposed waivers and the willingness of prisoners actually to exercise the waiver option.

The importance of percolation in the instant case is accentuated by the fact that the opinions of the Seventh, Eighth, and Ninth Circuits upon which petitioners rely all predate this Court’s most recent rulings on the interplay between habeas review and Section 1983. Notably, the Second Circuit relied extensively on *Muhammad v. Close*: “As the *Muhammad* Court explained, ‘*Heck*’s requirement to resort to state litigation and federal habeas before [Section] 1983 is not \* \* \* implicated by a prisoner’s challenge that *threatens no consequence for his conviction or the duration of his sentence*. There is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case \* \* \*.’” Pet. App. 11a-12a (emphasis added; alterations in original; quoting *Muhammad*, 540 U.S. at 751-52). Moreover, in *Wilkinson v. Dotson*, the Court further explained that when “victory for the prisoners [does not] *necessarily* [mean] immediate release or a shorter period of incarceration,” *Heck* is no bar to a Section 1983 suit. *Wilkinson*, 544 U.S. at 80 (emphasis added).

Because all three allegedly conflicting decisions predate this Court’s holdings in *Wilkinson* and *Muhammad*, they could not have taken into account either the full range of this Court’s relevant precedent or the Second Circuit’s own anal-



ysis relying on that precedent. And it surely would be useful for the Court to have the views of other courts of appeals on the question whether – as plainly seems to be the case – this Court’s more recent holdings support the approach taken below. Further percolation of the question presented, in light of *Wilkinson* and *Muhammad*, is therefore appropriate.

## **II. THE DECISION BELOW PROPERLY APPLIES THIS COURT’S PRECEDENT.**

Not only have no other courts squarely addressed the question presented, but the Second Circuit’s approach to “mixed sanctions” cases fully accords with this Court’s *Heck* jurisprudence. When a prison disciplinary proceeding affects both length and conditions of confinement, the decision below allows Section 1983 suits to proceed only when the prisoner irrevocably waives his or her right to pursue any and all challenges to the sanctions affecting the length of confinement. Pet. App. 12a-13a. Under the Second Circuit’s rule, a prisoner who agrees to such a waiver is not only precluded from challenging the length of confinement through Section 1983, but is also barred from pursuing a subsequent similar claim through state or federal habeas. Because the Second Circuit prohibits Section 1983 suits from affecting length of confinement, its approach is consistent with *Heck* and its progeny. Contrary to petitioners’ claim, moreover, such waivers of claims are frequently employed in litigation generally and prison litigation specifically, and present no danger to prison safety or the administration of justice.

1. It is settled that if a plaintiff’s success in a Section 1983 suit “would necessarily imply the invalidity of his conviction or sentence,” the plaintiff first “must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. At the same time, the Court

has made clear that, if a Section 1983 suit will not affect the length of a prisoner's confinement, the action may proceed. *Ibid.* And as the Court has clarified recently, if success in a Section 1983 suit would not “necessarily spell speedier release,” the claim does not “lie[] at ‘the core of habeas corpus’” and is not barred by *Heck*. *Wilkinson*, 544 U.S. at 82 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). “*Heck*’s requirement to resort to state litigation and federal habeas before [Section] 1983 is not \* \* \* implicated by a prisoner’s challenge that *threatens no consequence* for his conviction or duration of his sentence.” *Muhammad*, 540 U.S. at 751 (emphasis added).

This conclusion flows from this Court’s decision in *Edwards v. Balisok*: “[T]he Court [in *Balisok*] held the prisoner’s suit *Heck*-barred not because it sought nullification of the disciplinary procedures but rather because nullification of the disciplinary procedures would lead *necessarily* to restoration of good-time credits and hence the shortening of the prisoner’s sentence.” *Wilkinson*, 544 U.S. at 84 (emphasis added). Under the Second Circuit’s waiver rule, a plaintiff proceeding with a Section 1983 claim in a “mixed sanctions” case would, by force of his waiver, necessarily *not* threaten any consequence to those sanctions affecting the fact or duration of his confinement.

Petitioners’ selective reading of *Wilkinson* distorts the meaning of this Court’s line of precedent following *Heck*. Ignoring the core holding of *Wilkinson* that “[Section] 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner,” 544 U.S. at 81 (emphasis in original), petitioners contend that the Court should be concerned with what a plaintiff’s claims “would, if accepted, demonstrate.” Pet. 12. But *Wilkinson* clearly expresses a concern, not for what success on a Section 1983 claim might “demonstrate” in the abstract, but for whether success would grant relief “where a state prisoner requests present or future re-

lease.” 544 U.S. at 81. In *Wilkinson*, the challenge to state parole procedures was cognizable under Section 1983 because, given the discretionary nature of parole decisions, success in the suit would “not mean immediate release from confinement or a shorter stay in prison \* \* \*.” *Id.* at 82. That is, because a challenge to the parole system would not “necessarily spell speedier release,” the claim did not “lie[] at ‘the core of habeas corpus.’” *Ibid.* (quoting *Preiser*, 411 U.S. at 489).

Likewise, in *Muhammad v. Close*, the Court allowed a prisoner to seek damages for special detention that was imposed prior to his disciplinary proceeding. Because the prisoner had been acquitted of the charge that led to his special detention, the Court reasoned that the Section 1983 suit could proceed because it “threaten[ed] no consequence for his conviction or duration of his sentence.” 540 U.S. at 751.<sup>5</sup> Once again, the Court’s concern in *Muhammad* was for the practical consequences of success on the merits in the Section 1983 action.

Insofar as it has no consequence for the fact or duration of respondent’s confinement, the Second Circuit’s holding in the instant case thus conforms with this Court’s precedent. To challenge a prison proceeding that results in a mixed outcome affecting both length and conditions of confinement, “the prisoner must abandon, not just for now, but also in any future proceedings, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit.” Pet. App. 13a. Once the prisoner has permanently waived any challenge to the length of his or her confinement, success on the claims raised in the Section 1983 suit would have no

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<sup>5</sup> In *Muhammad*, the Court noted specifically that the prisoner had amended his complaint to omit claims that the state argued implicated habeas-type relief, 540 U.S. at 753, which is consistent with the Second Circuit’s waiver approach here.

bearing on the fact or length of his or her confinement. Like the plaintiff in *Wilkinson*, respondent does not “seek[] an injunction ordering his immediate or speedier release into the community.” *Wilkinson*, 544 U.S. at 82.

This Court’s holdings from *Heck* through *Wilkinson* thus focus on the practical effects of a Section 1983 suit. Where success in the suit would necessarily alter the length of confinement, a suit is barred by *Heck*. When a prisoner waives any and all challenges to an extension of the length of confinement resulting from a prison disciplinary proceeding, *Heck* is not implicated. The Second Circuit therefore properly applied this Court’s precedent.

2. There is nothing novel in the Second Circuit’s analysis: it follows from the practice, long accepted by courts, of permitting and enforcing tactical litigation decisions that result in the irrevocable waiver of certain claims. Rather than being a departure from established practice, the Second Circuit’s holding thus relies on fundamental principles of waiver and estoppel that are essential to many aspects of federal litigation.

For example, federal habeas corpus requires exhaustion of claims in state court. 28 U.S.C. § 2254. When a prisoner files a petition for a writ of habeas corpus that contains both exhausted and unexhausted claims, he must either seek a stay of his petition while exhausting all claims – an option that is often unavailable (see *Rhines v. Weber*, 544 U.S. 269 (2005)) – or proceed immediately with the exhausted claims by forever waiving relief as to his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509, 520 (1982). See also *Rhines*, 544 U.S. at 278 (same). See, e.g., *Andrew v. Vare*, 04-cv-00695, 2007 WL 766332, at \*3 (D. Nev. Mar. 8, 2007) (stating that the petitioner could elect to “submit a sworn declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and proceed only on the exhausted claims”); *Fernandez v. Cattell*, 06-cv-281, 2006 WL 2690076, at \*3

(D.N.H. Sept. 16, 2006) (stating that the plaintiff “has the option of foregoing his unexhausted claims and requesting that the Court proceed promptly with consideration of his sole exhausted claim,” but only if he “waive[s] ever having his other issues considered by this Court”).

This habeas exhaust-or-waive rule operates much like the Second Circuit’s Section 1983 waiver rule: to proceed with a Section 1983 suit seeking damages for a disciplinary proceeding that resulted in mixed sanctions, the prisoner must forever waive all claims with respect to the sanctions relating to length of confinement. Otherwise, his entire claim must be dismissed.

Waiver of claims and causes of action are commonplace in other areas of the law as well. In the context of criminal plea agreements, for instance, individuals routinely waive the right to pursue certain claims with respect to appeals. Courts just as routinely enforce such plea agreements and appeal waivers. See, e.g., *United States v. Novosel*, 481 F.3d 1288 (10th Cir. 2007) (enforcing an appeal waiver in a plea agreement by dismissing the appeal). Likewise, parties who reach settlement agreements in civil suits often also include waivers as to further litigation. Courts routinely uphold such waivers. See, e.g., *Johnson v. Flowers*, 2007 WL 959421 (6th Cir. Apr. 2, 2007) (applying judicial estoppel to prevent a plaintiff from bringing a claim she agreed to waive in a prior settlement agreement). Indeed, some waivers are implicit in the pleadings; for example, basic principles of claim preclusion hold that “a suit for injunctive relief precludes a second suit on the same cause of action for damages.” 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* 2d § 4410 (2007). The Second Circuit’s holding, which would condition a prisoner’s right to proceed with a Section 1983 suit challenging mixed sanctions on a waiver of habeas-related claims, is thus well-grounded in long-established law and litigation practice.

3. Petitioner's argument, Pet. 15-16, that state law would preclude a prisoner from waiving entitlement to early release is plainly mistaken. Petitioners assert that "[u]nder state law, [the New York State Department of Correctional Services] must expunge a disciplinary determination that has been judicially or administratively annulled, and neither it nor any other state agency may rely on it for any purpose." Pet. 15. But the cases cited by petitioner in support of this assertion in fact demonstrate the opposite.

In *Garrett v. Coughlin*, 516 N.Y.S.2d 796 (1987), for instance, the court stated that expungement is just one "available remedy" or form of "appropriate relief" following the annulment of an adverse judgment. *Id.* at 797. It is neither an indispensable nor *sua sponte* remedy. A court may, in its discretion, opt not to order expungement. *Ibid.* Following success on the merits, a prisoner may seek a mandamus order requiring expungement in an Article 78 proceeding, but the court will offer relief only when the refusal to expunge was "arbitrary and capricious." *Ibid.* And if a plaintiff were to waive expungement as a condition of proceeding with his Section 1983 suit, a court's refusal to order expungement surely would be neither arbitrary nor capricious.

For this same reason, *Matter of Blanche v. Travis*, 760 N.Y.S.2d 919 (App. Div. 2003), and *Matter of Davidson v. Coughlin*, 546 N.Y.S.2d 247 (App. Div. 1989), are equally unavailing for petitioners. Because a prisoner invoking the Second Circuit's procedure will have waived his or her right to challenge the fact or length of confinement, any Article 78, habeas, or other proceeding seeking shortened confinement for the same grounds as adjudicated in the Section 1983 suit would be strictly barred.

4. As the Second Circuit properly observed, its ruling is also essential to prohibit prison authorities from insulating disciplinary proceedings from Section 1983 review. Pet. App. 16a n.8. If petitioners were correct and a prisoner could

never challenge “mixed sanctions” through Section 1983 suits – even when the prisoner disavows any relief affecting the length of confinement – prison administrators would have a strong incentive *always* to impose “mixed sanctions” when adjudicating punishment through prison disciplinary proceedings. That would allow prison officials to postpone, and often effectively to preclude, the use of Section 1983 suits to challenge prison disciplinary proceedings. In many cases, that would foreclose access to an important vehicle for the enforcement of federal rights. See *Muhammad*, 540 U.S. 752 n.1 (“The assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in *Preiser* \* \* \* that such a prisoner subject to ‘additional and unconstitutional restraints’ might have a habeas claim independent of [Section] 1983.”). See also *Sandin v. Conner*, 515 U.S. 472, 476 (1995) (Section 1983 action brought to challenge disciplinary hearing resulting in punitive confinement).

Moreover, as the Court stated earlier this Term, the fact that district courts must deal with large numbers of prisoner cases does not permit the imposition of special procedural rules that are not supported by law. *Jones v. Bock*, 127 S. Ct. 910, 926 (2007). Congress has dictated a method for dealing with the “outsized share of [prisoner] filings” in federal district courts – the Prison Litigation Reform Act (PLRA). *Id.* at 914. The PLRA contains both an exhaustion provision designed to resolve complaints before they become lawsuits, 42 U.S.C. § 1997e(a), and screening provisions intended to speed dismissal of frivolous claims, 28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B); 42 U.S.C. § 1997 e(c)(1).

Further, as a practical matter, the Second Circuit rule will not produce the “massive increase in filings [that will] inundate the federal courts” foreseen by petitioners. Pet. 18. First, the number of disciplinary cases involving sanctions

severe enough to trigger due process concerns will be small (see *Sandin*, 515 U.S. at 484), and the category of disciplinary cases involving mixed sanctions will be limited – unless, as discussed above, prison officials begin to impose confinement sanctions in all cases for the purpose of avoiding federal review, a result the Court should not countenance. Second, the number of cases in which a prisoner will execute a waiver of the sort authorized by the Second Circuit will be limited for the simple reason that many prisoners value their freedom more than a damages award. Such prisoners are unlikely to pursue a Section 1983 suit when it requires a permanent waiver of claims that could reduce the length of their confinement. Third, following the PLRA, prisoners who file Section 1983 suits must pay filing fees, 28 U.S.C. § 1915, and have limited ability to recover attorney’s fees, 42 U.S.C. § 1997e(d); these requirements discourage insubstantial suits.

Finally, petitioners’ unsupported assertion that the Second Circuit’s rule “would have a serious negative effect on prison security,” Pet. 15, is without merit. A prisoner who expressly waives his claims as to fact and length of confinement so as to pursue a conditions-of-confinement claim will have *voluntarily* surrendered the possibility of restored good time credits. There is no reason to assume that the prison population will resent implementation of an agreement freely and knowingly entered into by a prisoner so as to gain a tactical benefit in litigation. In any event, these individuals will create no more a threat to security than any other prisoner who believes himself or herself wrongfully accused, convicted, or detained.

### **III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.**

Finally, several features of this case make it a poor vehicle for addressing whether a prisoner may pursue a Section 1983 suit when he or she irrevocably waives relief with re-



spect to sanctions affecting the duration of confinement. To the extent that the issue presented by the petition holds any interest, the Court should defer addressing it until presented with a suitable case.

1. First, litigation is ongoing in this case and there are several crucial points that remain to be resolved on remand from the Second Circuit's decision. Indeed, because the Second Circuit has remanded the case to determine whether respondent is willing to waive claims relating to the length of his sentence, there exists a real chance that this case will become moot. For instance, following remand to the district court, respondent and petitioners may agree to settle the case with respect to the conditions-of-confinement sanctions. Alternately, depending upon the precise scope and terms of the required waiver, respondent may choose not to waive and instead elect to renew an Article 78 petition in New York state court or pursue some other means of seeking relief relating to the length of his confinement. Further, the question presented may become moot if, following remand, the case is dismissed on alternative grounds such as qualified immunity or an adverse ruling on the merits.

2. Additionally, the Court should not address the question presented in the abstract. Rather, it should have before it an executed waiver. The precise content and form of any given waiver may be relevant to the Court's decision because the Court ultimately may affirm the Second Circuit's authorization of a waiver but wish to ensure that the waiver is consistent with the Court's recent decisions regarding the favorable-termination rule. Without the benefit of a specific waiver in the record, this case presents an unsuitable vehicle for reviewing the Second Circuit's rule.

3. Further, the factual record of respondent's state-court proceeding is both unclear and unusual. The Second Circuit, reviewing the record, indicated that respondent exhausted his appeals within the prison and then filed an Article 78 petition

in New York Supreme Court challenging the prison proceeding. Pet. App. 4a. Although the state-court judge granted leave to file as a poor person, respondent alleges that the court declined to waive the filing fee. *Ibid.* When respondent was unable to pay the fee, his case was dismissed and his appeal to the New York Court of Appeals denied. *Ibid.* The State describes this outcome, if it occurred, as an “anomaly,” Pet. 3 n.3, because New York law allows a prisoner suit to proceed even if the plaintiff is unable to pay the filing fees. N.Y. C.P.L.R. § 1101(f)(1), (2). Here, it is unclear why the appellate court dismissed the action after granting respondent leave to proceed as a poor person. As a result, it is unclear whether respondent may re-file his Article 78 petition.

This confusion in the factual record – exacerbated by the fact that the case file evidently was lost while being transferred from the appellate division to the state trial court – may implicate an important legal question that has not been resolved by this Court: whether the unavailability of habeas relief allows a prisoner to proceed with a Section 1983 claim that would otherwise be barred by *Heck*.<sup>6</sup> As recognized in *Monroe v. Pape*, 365 U.S. 167, 173 (1961), one of the principal purposes served by Section 1983 is providing “a federal remedy where the state remedy, though adequate in theory, is not available in practice.” See also *Zinermon v. Burch*, 494 U.S. 113, 124 (1990) (reiterating the same). Here, through what petitioners call an “anomaly,” no remedy was practi-

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<sup>6</sup> Although the Second Circuit indicated that respondent did not challenge the district court’s conclusion that “‘plaintiff’s inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceeding’” (Pet. App. 6a n.4) – that is, his inability “to pay the required filing fee” (*id.* at 22a) – this complex question cannot be so easily dismissed on the basis of pro se briefing and an incomplete factual record.

cally available to respondent in state court.<sup>7</sup> In this setting, it is not clear whether a federal habeas remedy is available to respondent.

This Court, however, has never resolved whether a prisoner who may not be eligible for federal habeas may bring a claim through Section 1983 that would otherwise be barred by *Heck*. Compare *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring) (“Individuals without recourse to the habeas statute because they are not ‘in custody’ (people merely fined or whose sentences have been fully served, for example) fit within [Section] 1983’s ‘broad reach.’”) with *Wilkinson*, 544 U.S. at 87-88 (Scalia, J., concurring) (“[A] prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, §§ 2244(a), (b), (d), cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under [Section] 1983.”). See also *Muhammad v. Close*, 540 U.S. at 752 n.2 (case presented “no occasion” to address the question whether “unavailability of habeas for other reasons may also dispense with the *Heck* requirement.”). That the present case may implicate this disputed

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<sup>7</sup> Under state law, the state court should have dismissed respondent’s Article 78 proceeding without prejudice for failure to perfect. See, e.g., *Arbisser v. Gelbelman*, 660 N.Y.S.2d 133 (App. Div. 1997) (explaining that when a plaintiff fails to file the required index fee, the action will be “deemed dismissed without prejudice” under New York law). Given the ambiguity of the disposition in this case, it is unclear whether respondent could proceed under 28 U.S.C. § 2254, which states that a habeas petition may not be granted “if [the prisoner] has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c). Although respondent technically had the “right” to refile his Article 78 suit, he did not have the means to pay the now-\$190 index fee, which the court had previously declined to waive.

question – on a record leaving considerable doubt about the treatment of respondent’s state habeas claim and the current availability of state habeas relief (in the event such relief is not waived by respondent) – will complicate this Court’s review of the question presented and provides another basis for denying the petition.

\* \* \* \*

This case presents an issue that has been addressed by only one court of appeals, on a record that is incomplete and in some respects ambiguous; this Court should deny the petition so that other lower courts have an opportunity to consider the Second Circuit’s waiver rule. Additionally, the approach taken by the Second Circuit is fully consistent with this Court’s precedents. Finally, to the extent that the issue presented is of interest, the Court should defer review until presented with a case that presents the issue cleanly.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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