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When Freedom Prevents Vindication: Why the Heck Rule Should Not Bar a Prisoner's § 1983 Action in *Deemer v. Beard*

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WHEN FREEDOM PREVENTS VINDICATION: WHY THE *HECK* RULE SHOULD NOT BAR A PRISONER'S § 1983 ACTION IN *DEEMER v. BEARD*

Abstract: In 2014, in *Deemer v. Beard*, the U.S. Court of Appeals for the Third Circuit held that the *Heck v. Humphrey* rule required all plaintiffs seeking damages for unconstitutional conviction under § 1983 to demonstrate that the criminal proceeding in question terminated in their favor. This decision defies a majority of circuit courts, which have held that there exists an exception to *Heck* if the plaintiff does not have other federal means of redress. In its decision, the Third Circuit aligned itself with three other appellate courts that did not take a plaintiff's lack of access to other means of federal relief into consideration. Although these circuit courts have correctly adhered to binding U.S. Supreme Court precedent, doing so places an unfair burden upon a plaintiff's ability to challenge an unconstitutional conviction. This Comment contends that the U.S. Supreme Court should settle the *Heck* circuit split and allow such an exception to the *Heck* rule to meet the underlying principles of § 1983.

INTRODUCTION

Under 42 U.S.C. § 1983, a plaintiff can bring a claim against the state for the unconstitutional deprivation of rights.¹ Plaintiffs can challenge a conviction or sentence by using § 1983 to hold state actors accountable in a federal forum for violating federally protected rights.² Although the U.S. Supreme Court has often interpreted the language of § 1983 broadly, it has also set limitations on this cause of action in specific situations.³ In 1994, in *Heck v. Humphrey*, the U.S. Supreme Court created a favorable termination requirement to restrict the ability of convicted plaintiffs to challenge their incarceration using § 1983, known as “the *Heck* rule.”⁴ This decision prevented

¹ 42 U.S.C. § 1983 (2006).

² *Heck v. Humphrey*, 512 U.S. 477, 480, 502 (1994) (Souter, J., concurring). Section 1983 protects inmates against unconstitutional treatment. *Id.* at 480. By providing a federal forum, § 1983 removes possible state court bias when a plaintiff is challenging the actions of the state. *See id.* at 501 (Souter, J., concurring).

³ *Id.* at 486–87 (majority opinion) (placing a favorable termination restriction on § 1983 alleging unconstitutional conviction or imprisonment); *id.* at 491 (Thomas, J., concurring) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)) (referring to § 1983 as a “general” and expansive statute).

⁴ *Id.* at 489 (majority opinion); *see id.* at 492 (Souter, J., concurring). To achieve a favorable termination, the plaintiff's challenged conviction must have been “reversed on direct appeal, ex-

certain plaintiffs from the possibility of a federal remedy against state actors for an infringement of constitutional rights.⁵ Thus, § 1983 became unavailable to the individuals it was intended to protect.⁶

In 2014, in *Deemer v. Beard*, the U.S. Court of Appeals for the Third Circuit applied the *Heck* rule to a plaintiff who had exhausted his options for state and federal remedy because his release rendered those avenues moot.⁷ Although the Third Circuit and three other circuit courts have maintained this approach, the other seven circuit courts have held that *Heck* does not apply when a plaintiff has exhausted his options and has no other forum for recourse.⁸

This Comment argues that, although the Supreme Court has denied reviewing *Deemer*, it must resolve the circuit split soon and allow an exception to the *Heck* rule because it is a denial of constitutional rights to impose the *Heck* rule on prisoners who do not have another forum to seek redress through no fault of their own.⁹ Part I of this Comment details the Supreme

punged 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." *Id.* at 486–87 (majority opinion). Essentially the plaintiff must show that, in some previous manner, his conviction was erroneous. *See id.* at 487.

⁵ *Id.* at 489.

⁶ *See id.* at 500–01 (Souter, J. concurring) (stating that insulating federal courts from claims that clearly fall under § 1983 defeats to the statute's purpose); *see also* *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) ("If a petitioner is unable to obtain habeas relief—at least where this inability is not due to the petitioner's own lack of diligence—it would be unjust to place his claim for relief beyond the scope of § 1983 where 'exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas.'" (quoting *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring))); *Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008) ("[T]he sweeping breadth, 'high purposes,' and 'unique[ness]' of § 1983 would be compromised in an unprincipled manner if it could not be applied here." (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985))).

⁷ *Deemer v. Beard (Deemer II)*, 557 F. App'x 162, 164, 167 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 50 (2014). The plaintiff's state court appeals and habeas corpus claim were rendered moot due to his release from prison. *Id.* at 164. The court held that he could not seek damages by alleging an unconstitutional prolonging of his confinement under § 1983 because his conviction had not been previously overturned. *See id.* at 163.

⁸ *Id.* at 165, 166 (determining the *Heck* rule applied universally and rejecting the exception adopted by seven other circuit courts). The First, Third, Fifth, and Eighth Circuits have applied the *Heck* rule even if the plaintiff cannot bring a habeas corpus claim. *See Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Gilles v. Davis*, 427 F.3d 197, 209–10 (3d Cir. 2005); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam); *Figueroa v. Rivera*, 147 F.3d 77, 80, 81 n.3 (1st Cir. 1998). The Second, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have allowed for an exception to *Heck* when the plaintiff had no other federal forum. *See Burd v. Sessler*, 702 F.3d 429, 435 n.3 (7th Cir. 2012); *Cohen*, 621 F.3d at 1316; *Wilson*, 535 F.3d at 267–68; *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289, 1301–02 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

⁹ *See Heck*, 512 U.S. at 489; *id.* at 500 (Souter, J., concurring); *infra* notes 15–85 and accompanying text; *see also Deemer II*, 557 F. App'x at 167 (Rendell, J., concurring) ("I believe that the

Court's decision in *Heck* and reviews the facts and procedural history of *Deemer*.¹⁰ Part II discusses the circuit split and the rationale used by different circuit courts to justify their decision to apply or not apply the *Heck* rule to released inmates.¹¹ Lastly, Part III argues that the even though the Court declined to review the Third Circuit's ruling in *Deemer*, it should address the issues *Deemer* raises soon because, in the interim, circuit courts are bound by binding precedent that goes against the goals of § 1983.¹² This will prevent further infringement upon the very rights § 1983 protects and stop circuit courts from undermining *Heck* on its behalf.¹³

I. THE *HECK* RULE AND ITS APPLICABILITY TO INMATES SEEKING SECTION 1983 DAMAGES

Lower courts have struggled on whether or not the *Heck* rule applies if a plaintiff has no other recourse for relief.¹⁴ Section A of Part I addresses the U.S. Supreme Court's ruling in *Heck* and the impact of restricting plaintiffs from using §1983 to recover damages for unconstitutional convictions.¹⁵ Section B of Part I addresses how the U.S. Court of Appeals for the Third Circuit applied the *Heck* rule in *Deemer*.¹⁶

A. The Heck Rule Requires Plaintiffs to Show a Favorable Termination on Their Conviction to Have a Cause of Action Under 42 U.S.C. § 1983

In *Heck*, the Supreme Court held that, in order for a plaintiff to bring a damages claim for an unconstitutional conviction under § 1983, the sentence needs to be "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called

principles that animated the Supreme Court's opinion in *Heck* should lead to a different result, were the court to consider the issue anew in the fact pattern before us." The *Heck* rule should not apply when plaintiffs have appropriately sought state or federal relief but are denied those opportunities as a result of their release. *See Deemer II*, 557 F. App'x at 168 (Rendell, J., concurring). Liberty is a fundamental concept in the U.S. Constitution. *See generally* U.S. CONST. pmb1. (outlining the fundamental ideas protected by the United States Constitution). Prisoners often challenge their imprisonment by claiming that they were deprived of due process rights as well as other constitutional protections. *See, e.g., Deemer II*, 557 F. App'x at 164 (concerning *Deemer*'s contentions that the state violated his Eighth and Fourteenth Amendment rights); *Gilles*, 427 F.3d at 203 (concerning *Gilles*'s contentions that the state violated his First Amendment rights).

¹⁰ *See infra* notes 14–43 and accompanying text.

¹¹ *See infra* notes 45–67 and accompanying text.

¹² *See infra* notes 68–85 and accompanying text.

¹³ *See infra* notes 68–85 and accompanying text.

¹⁴ *See infra* notes 25–43 and accompanying text (describing how the Third Circuit dealt with the issue in *Deemer*); *see also infra* notes 47–67 and accompanying text (discussing the circuit split in interpretation of the *Heck* rule).

¹⁵ *See infra* notes 17–24 and accompanying text.

¹⁶ *See infra* notes 25–43 and accompanying text.

into question by a federal court's issuance of a writ of habeas corpus."¹⁷ Accordingly, a plaintiff cannot bring a § 1983 claim if the sentence has not been nullified favorably in one of the aforementioned circumstances.¹⁸

To reach this conclusion, the Court examined the required elements in malicious prosecution actions, which it considered the closest equivalent to an unconstitutional conviction claim.¹⁹ To avoid parallel litigation, plaintiffs in malicious prosecution suits must show that the criminal proceeding under review ended in their favor.²⁰ This favorable termination requirement prevents plaintiffs from using a civil suit to make a "collateral attack" against his sentence.²¹ Thus, applying this reasoning, the Supreme Court established the *Heck* rule: courts were required to dismiss a § 1983 cause of action for damages unless the plaintiff's sentence was previously invalidated.²² This applied even to a plaintiff that had used every possible avenue of state and federal

¹⁷ 42 U.S.C. § 1983 (2006); *Heck*, 512 U.S. at 486–87; see Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 320–21 (2010) ("Section 1983 provides a cause of action to persons claiming that one acting under color of state law violated their constitutional rights."). A prisoner has a federal forum to challenge a conviction through a writ of habeas corpus. See BLACK'S LAW DICTIONARY 825 (10th ed. 2014) ("A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal"); see also Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 770 (2013) (citing *Habeas Relief for State Prisoners*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 872, 872–73 (2008)) (describing a writ of habeas corpus).

¹⁸ See *Heck*, 512 U.S. at 486–87.

¹⁹ *Id.* at 483, 484 (citing *Memphis Comty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)) ("[U]nlike the related cause of action for false arrest or imprisonment, [malicious prosecution] permits damages for confinement imposed pursuant to legal process.").

²⁰ *Id.* at 484 (citing *Carpenter v. Nutter*, 59 P. 301 (Cal. 1899)); W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 874 (5th ed. 1984); 8 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 28:5, at 24 (1991). If an individual brought a civil suit against the state while defending a criminal case, this would constitute parallel litigation. *Heck*, 512 U.S. at 484. The civil and criminal court would both be determining probable cause and guilt. *Id.* This created the possibility of contradictory results where an individual won the civil case and received damages despite being convicted in the criminal case. See *id.*

²¹ *Heck*, 512 U.S. at 484 (citing SPEISER ET AL., *supra* note 20, § 28:5, at 24) (regarding a criminal defendant's ability to use a civil suit to attack his criminal prosecution). A collateral attack is an attack on a judgment in a proceeding other than a direct appeal. BLACK'S LAW DICTIONARY, *supra* note 17, at 318.

²² See *Heck*, 512 U.S. at 487 ("[T]he 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").

resolution.²³ The Supreme Court's 1998 decision in *Spencer v. Kemna* questioned this expansive reach in several concurring and dissenting opinions.²⁴

B. The Third Circuit's Application of the Heck Rule in Deemer v. Beard

James Deemer brought suit pursuant to § 1983 against the former secretary of the Pennsylvania Department of Corrections and other individuals involved in prolonging his incarceration.²⁵ He alleged his imprisonment was extended for a year and a day beyond the expiration of his sentence.²⁶

In 2007, Deemer was granted parole by the Pennsylvania Board of Probation and Parole ("Parole Board").²⁷ A few months later, he was arrested and charged in New Jersey for a separate drug violation that was eventually dismissed.²⁸ Following his return to Pennsylvania, the Parole Board gave Deemer the maximum sentence on his conviction by adding on the days he did not serve before his parole release.²⁹ Deemer appealed the decision, arguing that his incarceration in New Jersey should be credited towards his remaining sentence.³⁰ The Commonwealth Court of Pennsylvania dismissed Deemer's appeal because it was still pending after his release in June 2010.³¹ Deemer had also petitioned for a writ of habeas corpus in the Schuylkill County Court of Common Pleas, which similarly became moot once his sentence ended.³²

²³ *Id.* at 489. Justice Scalia emphasized the expansiveness of the *Heck* rule by refuting Justice Souter's concurrence that the *Heck* rule should not be applicable to released convicts that had no habeas corpus rights. *See id.* at 490 n.10.

²⁴ *See, e.g.*, 523 U.S. at 20–21 (Souter, J., concurring) (stating the need to limit the *Heck* rule's application for prisoners without habeas corpus access); *id.* at 21 (Ginsburg, J., concurring) (same); *id.* at 25 n.8 (Stevens, J., dissenting) (same).

²⁵ *See Deemer II*, 557 F. App'x at 164.

²⁶ *See id.*

²⁷ *Id.* at 163. Deemer had a two-to-six year sentence. *Id.* At the time of his release on parole, he had 489 days left on his conviction of two counts of retail theft. *Id.* A condition of Deemer's parole, which he violated subsequently, required his enrollment in a drug treatment program. *Id.* After Deemer violated his parole, the Parole Board issued a warrant for his arrest. *Id.*

²⁸ *Id.*; Complaint at 3–4, *Deemer v. Beard (Deemer I)*, No. 1:CV-12-1143, 2013 WL 1149307 (M.D. Pa. Mar. 19, 2013), *aff'd*, 557 F. App'x 162 (3d Cir.), *cert. denied*, 135 S. Ct. 50 (2014). Deemer was incarcerated in the Warren County prison in New Jersey for 366 days before he was transferred back to Pennsylvania. *Deemer II*, 557 F. App'x at 163. The Parole Board did not take Deemer's detainment in Warren County of 366 days into consideration when determining his new release date of June 17, 2010. *Id.*

²⁹ *Deemer II*, 557 F. App'x at 163.

³⁰ *Deemer I*, 2013 WL 1149307, at *2.

³¹ *Deemer II*, 557 F. App'x at 164. Previously, the Parole Board had rejected Deemer's petition for an administrative review on December 18, 2009. *Id.* Deemer had completed his sentence before his appeal on his conviction reached the Commonwealth Court of Pennsylvania. *See id.*

³² *Id.*; Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 2, *Deemer I*, 2013 WL 1149307 (No. 1:12-CV-1143) [hereinafter Plaintiff's Opposition to Defendant's Motion to Dismiss].

Following his discharge, Deemer sought monetary damages by filing a § 1983 complaint against several defendants with the Middle District of Pennsylvania.³³ He contended that the Parole Board infringed upon his constitutional rights under the Eighth and Fourteenth Amendment by extending his sentence beyond the maximum time the court of conviction had issued.³⁴ The defendants moved to dismiss the case, arguing that the *Heck* rule prevented Deemer's claim from moving forward.³⁵ Deemer reasoned that *Heck* did not apply to his challenge because of his diligence in pursuing all other possible avenues of relief before finally resorting to filing suit against defendants.³⁶ The district court did not find Deemer's response persuasive.³⁷ It cited the U.S. Court of Appeals for the Third Circuit's decision in *Williams v. Consovoy* in 2006 as precedent to apply the *Heck* rule even if Deemer had no other forum for remedy due to the mootness of his case.³⁸

In Deemer's appeal to the Third Circuit, the court upheld the existing precedent it set in *Williams* and affirmed the district court's decision.³⁹ The court reiterated its stance that the *Heck* rule applied equally in all § 1983 claims, even to plaintiffs who do not have a habeas corpus remedy.⁴⁰

Although the concurrences and dissent in *Spencer* challenged the use of the *Heck* rule in this situation, they did not sway the Third Circuit's interpre-

³³ *Deemer I*, 2013 WL 1149307, at *1. His suit named several officials and employees of the Pennsylvania Department of Corrections and members and officers of the Parole Board. *Id.*

³⁴ *Deemer II*, 557 F. App'x at 164; see U.S. CONST. amends. VIII, XIV. Deemer insisted that the 366 days he spent detained in New Jersey should be counted towards his sentence. See *Deemer II*, 557 F. App'x at 164. In addition to an infringement of rights under the U.S. Constitution, Deemer also alleged the Parole Board's actions violated Pennsylvania law. *Id.*

³⁵ See Brief in Support of Motion to Dismiss at 3–4, *Deemer I*, 2013 WL 1149307 (No. 1:CV-12-1143) (citing *Heck*, 512 U.S. at 486–87) (stating that Deemer's conviction has not "been expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of writ of habeas corpus"). Defendants also noted that the *Heck* rule applies to claims regarding parole board decisions that lead to improper incarcerations. *Id.* at 2 (citing *Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006)).

³⁶ *Deemer I*, 2013 WL 1149307, at *1. This included an appeal to the Parole Board, an appeal to the Commonwealth Court of Pennsylvania, and a petition for state habeas corpus relief. Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 32, at 2. The former was rejected and the latter two were dismissed as moot. *Deemer II*, 557 F. App'x at 164; Plaintiff's Opposition to Defendant's Motion to Dismiss, *supra* note 32, at 2 (outlining the case's procedural history).

³⁷ *Deemer I*, 2013 WL 1149307, at *1.

³⁸ See *id.* at *3 (citing *Williams*, 453 F.3d 177–78); see also *Williams*, 453 F.3d at 178 (declining to hold that the *Heck* rule did not apply to § 1983 plaintiffs who were no longer in custody).

³⁹ *Deemer II*, 557 F. App'x at 166; see *Williams*, 453 F.3d at 178. The U.S. Court of Appeals for the Third Circuit also cited its decision in 2005 in *Gilles*, which interpreted and applied the *Heck* rule in the same manner as *Williams*. See *Deemer II*, 557 F. App'x at 166; see also *Gilles*, 427 F.3d at 210 (holding that questions of habeas corpus availability does not effect the applicability of the *Heck* rule).

⁴⁰ See *Deemer II*, 557 F. App'x at 166.

tation.⁴¹ Even if the five justices in *Spencer* meant to establish precedent for reinterpreting the *Heck* rule, the Third Circuit rejected the idea of using a non-majority opinion to overrule the Court's decision in *Heck*.⁴² Deemer subsequently filed a petition for a writ of certiorari to the Supreme Court that was denied.⁴³

II. THE CIRCUIT COURT SPLIT REGARDING THE INTERPRETATION OF THE *HECK* RULE

Circuits are conflicted on the interpretation of the U.S. Supreme Court's ruling in 1994 in *Heck v. Humphrey* and whether there exists an exception to the *Heck* rule for plaintiffs with no other means of relief.⁴⁴ Section A discusses Justice Souter's concurrence in *Heck* and the Supreme Court's application of the *Heck* rule in 1998 in *Spencer v. Kemna*.⁴⁵ Section B discusses the circuit split regarding the interpretation of the *Heck* rule after *Spencer*.⁴⁶

A. Justice Souter's Concurrence in Heck v. Humphrey and its Reemergence in Spencer v. Kemna

In *Spencer*, the Supreme Court discussed the application of the precedent it set in *Heck*.⁴⁷ In concurring and dissenting opinions, five justices adopted the reasoning from Justice Souter's *Heck* concurrence.⁴⁸

⁴¹ See *id.* (quoting *Gilles*, 427 F.3d at 209–10); see also *Spencer*, 523 U.S. at 20–21 (Souter, J., concurring) (explaining that it's important to interpret and restrict the majority opinion in *Heck* to prisoners without habeas corpus access); *Spencer*, 523 U.S. at 21 (Ginsburg, J., concurring) (same); *Spencer*, 523 U.S. at 25 n.8 (Stevens, J., dissenting) (agreeing with Justice Souter's view that the plaintiff was not barred by the *Heck* rule against bringing suit under § 1983).

⁴² *Deemer II*, 557 F. App'x at 166.

⁴³ See *Deemer v. Beard (Deemer III)*, 135 S. Ct. 50, 50 (2014); Petition for a Writ of Certiorari, *Deemer II*, 557 F. App'x 162 (No. 13-1153).

⁴⁴ See *infra* notes 47–67 and accompanying text.

⁴⁵ See *infra* notes 47–56 and accompanying text.

⁴⁶ See *infra* notes 57–67 and accompanying text.

⁴⁷ See *Spencer v. Kemna*, 523 U.S. 1, 17 (1998); see also *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (establishing a favorable termination requirement for plaintiffs seeking to use § 1983 to challenge their conviction).

⁴⁸ See *Spencer*, 523 U.S. at 17; *id.* at 21 (Souter, J., concurring); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting); see also *Heck*, 512 U.S. at 500, 501 (Souter, J., concurring) (asserting that there should be an exception to the *Heck* rule if the plaintiff has no access to habeas corpus relief due to his release because the very purpose of § 1983 is to “interpose the federal courts between the States and the people”); *Deemer v. Beard (Deemer II)*, 557 F. App'x 162, 165 (3d Cir. 2014) (acknowledging the potential interpretation of the *Heck* rule based upon the *Spencer* plurality), *cert. denied*, 135 S. Ct. 50 (2014). The plaintiff in *Spencer* argued that the *Heck* rule would prevent him from seeking damages under § 1983 because he did not incur a favorable termination of his sentence. *Spencer*, 523 U.S. at 19. He asserted that his habeas corpus claim was not moot because *Heck* would prevent any other avenue for federal redress against the state's unconstitutional revocation of his parole. See *id.*

In Justice Souter's concurrence in *Heck*, he worried how *Heck*'s favorable termination rule would apply when there is no intersection between § 1983 and the habeas corpus statute.⁴⁹ Those in state custody have an available remedy through habeas corpus for due process, but those who are not in custody do not have the option of invoking federal habeas jurisdiction.⁵⁰ Without a writ of habeas corpus, the only way a plaintiff can challenge the constitutionality of their conviction in a federal forum is by bringing a cause of action under § 1983.⁵¹ Justice Souter suggested that the Court could not prevent plaintiffs that are not in state custody from bringing a claim using § 1983 because it goes against the congressional intent behind the statute.⁵² He concluded that the applicability of the habeas corpus statute should be an important consideration when determining whether *Heck*'s limitations on § 1983 apply to the facts of a case.⁵³

In his concurrence in *Spencer*, Justice Souter once more emphasized the importance of limiting the application of the *Heck* rule to only inmates that are pursuing damages for unconstitutional convictions through a § 1983 action.⁵⁴ Following a prisoner's release, a moot habeas corpus claim should not prevent relief under § 1983.⁵⁵ Overall five justices supported Justice Souter's

⁴⁹ See *Heck*, 512 U.S. at 500 (Souter, J., concurring) (referring to "individuals not 'in custody' for habeas purposes" and released prisoners who are unable to bring habeas corpus claims).

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.* at 501 (citing *Wyatt v. Cole*, 504 U.S. 158, 158 (1992)); *Civil Suits for Violations of Civil Rights: Hearing and Markups Before the Subcomm. on Judiciary, Manpower, & Educ. and the Comm. on the D.C. H.R.*, 96th Cong. 2 (1979) (statement of Rep. Romano L. Mazzoli, Chairman, Subcomm. on Judiciary, Manpower, & Educ.) ("[T]he citizens of all the States of the Union . . . should not have to rely upon local courts for adjudication of their Constitutional grievances against local authorities."). Justice Souter provided an example of a "former slave framed by Ku Klux Klan-controlled law-enforcement . . . and convicted by a Klan-controlled state court . . . [who didn't have] proof of unconstitutionality until after his release from state custody." *Heck*, 512 U.S. at 501–02. The *Heck* rule would prevent him from seeking remedy via a § 1983 action unless he convinced a biased state court that his conviction was unlawful. See *id.* at 502. The unfair result and inability of the plaintiff to reach a federal forum is the opposite of what § 1983 sought to achieve. See *id.* Justice Souter went on to posit that Congress did not intend to deny individuals who were fined unconstitutionally or those who discovered evidence of unconstitutional state action following release from prison from accessing § 1983 protections. See *id.*

⁵³ See *Heck*, 512 U.S. at 503 (Souter, J., concurring) ("I would not cast doubt on the ability of an individual unaffected by the habeas [corpus] statute to take advantage of the broad reach of § 1983.").

⁵⁴ See *Spencer*, 523 U.S. at 20 (Souter, J., concurring). Justice Souter further implied that this should be the interpretation of the majority opinion in *Heck*. See *id.*

⁵⁵ See *id.* at 21 (Souter, J., concurring). Furthermore, Justice Ruth Bader Ginsburg's concurrence reiterated that the state of the law should be in line with Justice Souter's reasoning. *Id.* at 21 (Ginsburg, J., concurring). Likewise, Justice John Paul Stevens supported Justice Souter's reasoning that those without access to federal habeas jurisdiction should be allowed to file for damages using § 1983. *Id.* at 25 n.8 (Stevens, J., dissenting).

interpretation of the *Heck* rule in *Spencer*, which resulted in the circuit split that followed.⁵⁶

B. How Circuit Courts Interpreted the Heck Rule After the Plurality Opinion in Spencer v. Kemna

As the U.S. Court of Appeals for the Third Circuit indicated in *Deemer v. Beard*, circuit courts are split on their interpretations of the *Heck* decision.⁵⁷ The lack of a majority following *Spencer* left the question regarding the parameters of the *Heck* rule's scope unresolved.⁵⁸ As a result, circuit courts diverged in their application of *Heck*'s favorable termination requirement.⁵⁹ The Second, Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits interpret *Heck* in accordance with Justice Souter's concurrence, considering the *Spencer* plurality to be informative of the Court's ruling in *Heck*.⁶⁰ These

⁵⁶ See *id.* at 19–21 (Souter, J., concurring); *id.* at 21 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting); see also *Deemer II*, 557 F. App'x at 165, 166 (discussing how seven Courts of Appeals have cited *Spencer* in their decision and apply Justice Souter's interpretation but the four other Courts of Appeals have decided to create an exception to *Heck*'s favorable termination requirement).

⁵⁷ See *Deemer II*, 557 F. App'x at 165, 166; *infra* notes 59–67 (discussing the divergence in circuit interpretation of the *Heck* rule after the Court's decision in *Spencer*).

⁵⁸ See *Deemer II*, 557 F. App'x at 165, 166. See generally *Spencer*, 523 U.S. at 1 (resolving the application of the *Heck* rule through a plurality opinion as opposed to a consensus between a majority of justices).

⁵⁹ See *Deemer II*, 557 F. App'x. The concurrences and dissent of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer could be synthesized together and viewed as a plurality opinion indicative of the Court's intended interpretation of its *Heck* holding. See *id.* On the other hand, following *Spencer*, there has not been a majority opinion that definitively upholds the viewpoints in Justice Souter's concurrence in *Heck* leaving circuit courts uncertain on the applicability of the *Spencer* plurality. See *id.* at 166–67.

⁶⁰ See *Heck*, 512 U.S. at 489; *Deemer II*, at 165; see also *Burd v. Sessler*, 702 F.3d 429, 435 n.3 (7th Cir. 2012) (“The Supreme Court has not specified, in a majority holding, whether *Heck* applies where habeas corpus relief is unavailable, although five Justices in one opinion expressed their views that it should not . . . [thus, the Seventh Circuit] follow[s its] previous opinions in this regard.” (citation omitted)); *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) (opting to follow “the reasoning of the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits that [the court is] free to follow the five-Justice plurality’s approach in *Spencer* on this unsettled question of law”); *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir. 2008) (“[W]ith no directly applicable precedent upon which to rely . . . [the Fourth Circuit believes] that the reasoning employed by the plurality in *Spencer* must prevail . . . where an individual would be left without any access to federal court if his § 1983 claim was barred.”); *Powers v. Hamilton Cnty. Pub. Defender Comm’n*, 501 F.3d 592, 602–03 (6th Cir. 2007) (“Casting *Spencer* aside is something we decline to do.”); *Harden v. Pataki*, 320 F.3d 1289, 1301–02 (11th Cir. 2003) (“[A] claim filed pursuant to . . . § 1983 seeking damages and declaratory relief for the violation of a state prisoner’s federally protected extradition rights . . . is not barred by *Heck*, where the specific allegations . . . [involve failure] to provide . . . [a] habeas corpus hearing”); *Nonnette v. Small*, 316 F.3d 872, 876–77 (9th Cir. 2002) (“Informed as we are by the opinions in *Spencer*, we conclude that *Heck* does not preclude [the plaintiff’s] § 1983 action.”); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (“*Spencer* concurrences and dissent ‘revealed that five justices hold the view that, where federal

courts consider their implementation of Justice Souter's interpretation in *Spencer* as "rule refinement."⁶¹ *Spencer* did not definitively limit the *Heck* rule, but *Heck* also did not set a binding precedent on plaintiffs without access to habeas corpus because it did not involve an analogous fact pattern.⁶²

Moreover, these courts justify following the five-justice plurality in *Spencer* by finding that Justice Souter's interpretation was more in line with the principles that promulgated 42 U.S.C. § 1983.⁶³ The circuits reason that an imposition of the *Heck* rule on inmates who were not eligible to seek habeas corpus goes against Congressional intent to use § 1983 to provide plaintiffs with a federal remedy for unconstitutional state actions.⁶⁴

The four remaining circuit courts, including the Third Circuit in *Deemer*, interpret *Heck*'s favorable termination requirement as universal.⁶⁵ They con-

habeas corpus is not available to address certain constitutional wrongs, §1983 must be,' [thus] we conclude that [the plaintiff's] § 1983 claim must be allowed to proceed." (quoting *Jenkins v. Haurbert*, 179 F.3d 19, 26 (2d Cir. 1999)).

⁶¹ See, e.g., *Cohen*, 621 F.3d at 1316 ("We are instead persuaded by the reasoning of the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits that we are free to follow the five-Justice plurality's approach in *Spencer* on this unsettled question of law."); *Powers*, 501 F.3d at 601–02 (stating that sister circuits who do not apply the *Spencer* plurality have mistakenly equated "ordinary rule refinement" with ignoring precedent); *Nonnette*, 316 F.3d at 876, 877 (using *Spencer* to interpret *Heck* because *Spencer* has a more analogous fact pattern with a prisoner who had completed his term).

⁶² See *Powers*, 501 F.3d at 601–02. *Heck* did not explicitly provide instructions on whether favorable termination was required for plaintiffs who could not seek habeas corpus relief due to their release. See *id.* at 603. Furthermore, *Spencer* was more informative on the Court's views of the applicability of the *Heck* rule on plaintiffs who were already released from jail and could not seek habeas corpus remedies. See *Nonnette*, 316 F.3d at 876 (noting that *Heck* involved an incarcerated plaintiff whereas *Spencer* concerned a released plaintiff).

⁶³ See *Cohen*, 621 F.3d at 1316 (citing *Wilson*, 535 F.3d at 268); see also H.R. REP. NO. 96-548, at 2 (1979) (regarding the legislature's intent to use § 1983 to provide plaintiffs with a civil remedy to challenge their convictions in a federal forum).

⁶⁴ See *Wilson*, 535 F.3d at 268; see also *Cohen*, 621 F.3d at 1316 (agreeing with the Fourth Circuit's reasoning in *Wilson* that the purposes of § 1983 favored an exception to the *Heck* rule when federal habeas corpus was not available by no fault of the plaintiff). A broad reading of the *Heck* rule goes against the purposes of § 1983 by closing the possibility of a federal remedy for the denial of the fundamental right to liberty. See *Wilson*, 535 F.3d at 268 (citing *Wilson v. Garcia*, 471 U.S. 261, 272 (1985)). Freedom is one of the most important rights and should not be revoked without the ability to seek redress in federal court. See *id.*

⁶⁵ *Deemer II*, 557 F. App'x at 166 ("[The Third Circuit] along with three other Courts of Appeals have declined to follow the concurring and dissenting opinions in *Spencer*."); see, e.g., *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) ("Absent a decision of the Court that explicitly overrules what we understand to be the holding of *Heck* . . . we decline to depart from that rule."); *Williams v. Consovoy*, 453 F.3d 173, 177–78 (3d Cir. 2006) ("[B]ecause the Supreme Court had not squarely held post-*Heck* that the favorable-termination rule does not apply to defendants no longer in custody, we declined in *Gilles* to extend the rule of *Heck*, and likewise decline to extend it here." (citation omitted)); *Gilles v. Davis*, 427 F.3d 197, 209–10 (3d Cir. 2005) ("[*Spencer*'s plurality] opinions do not affect our conclusion that *Heck* applies to Petit's claims."); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam) ("[W]e decline to announce for the Supreme Court that it has overruled one of its decisions."); *Figueroa v. Rivera*, 147 F.3d

clude that *Heck* was a restriction on even those without access to habeas corpus from filing a § 1983 damages claim and that reinterpreting *Heck* based upon the *Spencer* plurality violated clearly set precedent.⁶⁶ These appellate courts maintain that the *Spencer* plurality did not supersede the Court's decision in *Heck*.⁶⁷

III. THE SUPREME COURT SHOULD CUT BACK ON THE *HECK* RULE SO IT ONLY APPLIES TO THOSE WITH HABEAS CORPUS ACCESS

Freedom is a fundamental right of the U.S. Constitution and revoking a prisoner's ability to challenge his conviction in a federal forum goes against the objectives of § 1983.⁶⁸ If the U.S. Supreme Court continues to deny review of the circuit split over the interpretation of its 1994 ruling in *Heck v. Humphrey*, numerous plaintiffs will remain unable to seek relief for unconstitutional imprisonment.⁶⁹ Furthermore, for purposes of judicial consistency, the Court must address this disagreement among the circuits.⁷⁰ The Court's

77, 81 & n.3 (1st Cir. 1998) ("The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncement in its subsequent decisions, and to leave the Court 'the prerogative of overruling its own decisions.'" (citation omitted)); see also *Cohen*, 621 F.3d at 1315 (discussing the Third Circuit's alignment with the First, Fifth, and Eighth Circuits on this question); *Powers*, 501 F.3d at 602 (reiterating *Cohen*'s acknowledgment of the agreement between First, Third, Fifth, and Eighth Circuits on interpreting *Heck*).

⁶⁶ See *Deemer II*, 557 F. App'x at 166; *Figueroa*, 147 F.3d at 81 n.3; see also *Powers*, 501 F.3d at 602 (citing *Figueroa*, 147 F.3d at 81) (disagreeing with the viewpoints of the First Circuit that it was bound by U.S. Supreme Court precedent to apply *Heck* to plaintiffs without any other federal recourse).

⁶⁷ See *Deemer II*, 557 F. App'x at 167; *Randell*, 227 F.3d at 301; see also *Gilles*, 427 F.3d at 210 (finding that *Heck* has not been undermined by *Spencer*).

⁶⁸ See *Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008) (stating § 1983 is meant to give plaintiffs a 'uniquely federal remedy' against state actors for unconstitutional incursions); see also H.R. REP. NO. 96-548, at 2 (1979) (discussing congressional intent behind § 1983).

⁶⁹ See *Deemer v. Beard (Deemer II)*, 557 F. App'x 162, 168 (3d Cir. 2014) (Rendell, J., concurring) (postulating that released plaintiffs like *Deemer* will be left without federal recourse absent § 1983), *cert. denied*, 135 S. Ct. 50 (2014); Brief for the National Ass'n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 4, *Deemer II*, 557 F. App'x 162 (No. 13-1153) [hereinafter Brief of NACDL] (stating that the Third Circuit's interpretation of *Heck* will "leave a considerable number of individuals without any recourse for a violation of their constitutional rights"); Aaron M. Gallardo, *Cohen v. Longshore: Determining Whether the Heck Favorable-Termination Requirement Applies to Plaintiffs Lacking Habeas Corpus Relief Under 42 U.S.C. § 1983*, 34 AM. J. TRIAL ADVOC. 725, 729 (2011) ("Strict application of the Heck favorable-termination requirement would prevent relief to those whose Constitutional rights have been violated, but without the means for habeas relief." (citing *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring))).

⁷⁰ See Note, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 875 (2008) (stating that the divide between the circuits requires the Court to clarify the boundaries of the Heck rule); see also *Deemer II*, 557 F. App'x at 168 (Rendell, J., concurring) (arguing that the Court's reconsideration of *Heck*'s application upon *Deemer*'s facts will likely lead to a different

denial of Deemer's petition for certiorari implies the Court approves of the circuits undermining and ignoring existing precedent.⁷¹ The Court must move expeditiously to grant certiorari on the issue because in the interim, lower courts are—or ought to be—bound by clear precedent that counteracts the intended uses of § 1983.⁷²

Plaintiffs seeking to challenge the constitutionality of a conviction using § 1983 should not be required to show favorable termination, if, through no fault of their own, there is no legal recourse via other state or federal forums.⁷³ In 1994, in *Heck v. Humphrey*, the Supreme Court adopted the *Heck* rule to prevent prisoners from challenging their conviction through civil means after exhausting their ability to appeal in criminal court.⁷⁴ There, the Court was concerned about potential discrepancies when a plaintiff's previous conviction had not been favorably terminated; however, these concerns become irrelevant once an inmate was released.⁷⁵ Despite this, the *Heck* rule still applied to those who were not in state custody and did not have any other

result); Gallardo, *supra* note 69, at 726 (referring to the difficult question of applying *Heck* to plaintiffs without habeas remedy).

⁷¹ See Michelle M. Berry et al., *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299, 320 (2008) ("A plurality opinion generally cannot overrule prior precedent." (citing Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 347 (2005))); see also *Deemer II*, 557 F. App'x at 165, 167 (citations omitted) (referring to seven Courts of Appeals that have used *Spencer's* "cobbled-together majority of justices" to justify not applying the *Heck* rule to plaintiffs who do not have any other federal remedy). See generally *Deemer v. Beard (Deemer III)*, 135 S. Ct. 50, 50 (2014) (indicating the U.S. Supreme Court's denial of Deemer's petition for certiorari). But see Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 169 (2009) (referring to the U.S. Supreme Court's decision in *Marks v. United States* that "a fragmented Court . . . with no single rationale" still sets a binding precedent that "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds" (quoting 430 U.S. 188, 193 (1977))).

⁷² See H.R. REP. NO. 96-548, at 2 (1979) (referring to the legislature's intent to provide plaintiffs with a federal forum to challenge unconstitutional convictions).

⁷³ See Gallardo, *supra* note 69, at 729 (noting that, although allowing a plaintiff who has no other federal forum access to § 1983 might "contravene the core holding of *Heck*," it does not conflict with the Court's rationale in *Heck*); see also *Deemer II*, 557 F. App'x at 168 (Rendell, J., concurring) (stating that fairness requires a limitation on the *Heck* rule's applicability to those without habeas corpus remedy and reiterating the importance of this consideration because fairness is an important principle behind § 1983).

⁷⁴ See 512 U.S. 477, 484, 486 (1994).

⁷⁵ See Gallardo, *supra* note 69, at 729 (arguing that the Court's concerns in *Heck* regarding a plaintiff receiving contradictory judgments based on two laws does not exist if the prisoner does not have access to habeas corpus); see also *Heck*, 512 U.S. at 486 (stating that § 1983 is not an appropriate vehicle to challenge criminal convictions); *Deemer II*, 557 F. App'x at 167 (Rendell, J., concurring) (citing *Heck*, 512 U.S. at 484–85) (alluding to plaintiffs determined to be lawfully imprisoned but also allowed to receive damages via civil litigation for wrongful incarceration).

means of receiving federal relief.⁷⁶ By not explicitly reinterpreting *Heck* to exclude this group of potential plaintiffs, the Court has unfairly denied many individuals an opportunity for vindication over violations of their constitutional rights.⁷⁷ A continuation of this interpretation lets *Heck* limit § 1983 in a way that counteracts its purpose to remedy the state's unconstitutional infringements.⁷⁸

For the reasons detailed above, the Supreme Court must address this circuit split and should reinterpret *Heck* to exclude those plaintiffs who are not in state custody.⁷⁹ Nonetheless, until the Court has explicitly done so, rules of precedent requires circuit courts to apply the majority interpretation in *Heck*.⁸⁰ Allowing circuits to reinterpret Supreme Court decisions by piecing together concurrences and dissents authorizes the circumvention of set precedent.⁸¹ The U.S. Court of Appeals for the Third Circuit correctly concluded in

⁷⁶ See Note, *supra* note 70, at 875 (citing *Dible v. Scholl*, 410 F. Supp. 2d 807, 820–22 (N.D. Iowa 2006)) (stating that circuits have determined because *Heck* was not overruled by *Spencer*, it applies to all cases where a plaintiff is challenging the validity of a conviction); see also *Deemer II*, 557 F. App'x at 167. State remedies often become moot due to the long-winded review procedures. Brief of NACDL, *supra* note 69, at 4. Due to timing, most prisoners do not have the opportunity to file a habeas corpus petition. *Id.* at 5. Even prisoners who manage to bring habeas corpus claims often end up with their cases mooted upon release. *Id.* at 4–5.

⁷⁷ See Note, *supra* note 70, at 885–86 (citing *Figueroa v. Rivera*, 147 F.3d 77, 80–81 (1st Cir. 1998) (mentioning that even circuits ruling to uphold *Heck* strictly acknowledge an application of the favorable termination requirement in all cases constituted a “fundamental unfairness”); see also *Deemer II*, 557 F. App'x at 166, 168 (Rendell, J., concurring) (stating that fairness required a released prisoner who without habeas corpus relief to be permitted to file for § 1983 damages). The plaintiff would have no way of collaterally attacking the state's criminal conviction via § 1983 post-release. Brief of NACDL, *supra* note 69, at 5, 14 (citing *Peralta v. Vasquez*, 476 F.3d 98, 104 (2d Cir. 2006) (referring to the implementation of *Heck*'s favorable termination as preventative against prisoners using § 1983 instead of a habeas corpus claim to challenge a conviction)).

⁷⁸ See Brief of NACDL, *supra* note 69, at 6. As previously stated, the majority of circuits have used this reasoning to adopt the *Spencer* plurality. *E.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1316 (10th Cir. 2010) (holding that the *Spencer* plurality's interpretation of *Heck* is “more just and more in accordance with the purpose of § 1983”); *Wilson*, 535 F.3d at 268 (stating that § 1983's “high purposes” would be compromised without following the *Spencer* plurality's interpretation of the *Heck* rule); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007) (holding that the circuit courts that adopted Justice Souter's *Heck* and *Spencer* concurrences “have the better-reasoned view” and Powers should not be impeded from his § 1983 claim when he has no other avenue to “federal review of asserted deprivations of federal rights [as a] habeas-ineligible plaintiff[]”).

⁷⁹ See *infra* notes 68–78 and accompanying text (outlining the goals of § 1983 and arguing that *Heck* rule should exclude certain plaintiffs to meet those objectives).

⁸⁰ See *Deemer II*, 557 F. App'x at 166, 168 (Rendell, J., concurring) (citing the seven circuit courts that have adopted the *Spencer* approach); see also *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that “[i]f a precedent of his Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls, leaving to this Court the prerogative of overruling its own decisions.” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))).

⁸¹ See *Berry*, *supra* note 71, at 320 (noting that some plurality opinions are “a source of ongoing confusion and uncertainty that seriously undermines our system of precedent”); Linda Novak,

Deemer that appellate courts do not have the power to supersede precedent established by the Supreme Court.⁸² The plurality opinion in the Supreme Court's decision in *Spencer v. Kemna* in 1998 is not enough to overturn the clearly established interpretation of the *Heck* rule.⁸³ Until the Court reinterprets the perimeters of *Heck*, appellate courts do not have the authority to restrict the applicability of the *Heck* rule.⁸⁴ It is important for the Court to prevent further disregard for the explicit precedent from *Heck* and address the circuit split by creating a limitation on *Heck* rule.⁸⁵

CONCLUSION

To promote the principles that gave rise to § 1983, plaintiffs should have the ability to bring a damages claim when they do not have access to habeas relief. Therefore, the U.S. Supreme Court should have reversed the Third Circuit's decision in *Deemer v. Beard* in 2014. If the Court continues to ignore the circuit split over the interpretation of the *Heck v. Humphrey* rule, it will be allowing circuits violate set precedent. In the interim, lower courts should be complying with the binding precedent the Court set in *Heck*. It is necessary for the Court to create an exception to its holding in *Heck* when a plaintiff has no other state or federal remedy.

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Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 770–71 (1980) (explaining that when lower courts find it difficult to discern a coherent majority rationale, it can lead courts to uphold a combination of two or more minority rationales as authoritative); see also *Figueroa*, 147 F.3d at 81 n.3 (requiring lower federal courts to follow “[the Supreme Court’s] directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions”) (citing *Agostini*, 521 U.S. at 237)).

⁸² See *Berry*, *supra* note 71, at 320 (“A plurality opinion generally cannot overrule prior precedent.”). *Contra Powers*, 501 F.3d at 602 (referring to the reworking of precedent as “rule refining”).

⁸³ See *Deemer II*, 557 F. App'x at 167 (reiterating that the *Spencer* plurality did not overturn *Heck*); see also *Spencer*, 523 U.S. at 21 (Souter, J., concurring) (arguing that the *Heck* rule should not apply if a plaintiff has no other access to a federal forum through no fault of his own); *id.* at 21 (Ginsburg, J., concurring) (expressing her agreement with Justice Souter's viewpoint); *id.* at 25 n.8 (Stevens, J., dissenting) (echoing his agreement with Justice Souter's *Heck* concurrence).

⁸⁴ See *Deemer II*, 557 F. App'x at 168 (Rendell, J., concurring). The concurrences and dissents in *Spencer* do not negate *Heck*'s favorable termination requirement. See *id.* This is evident because Scalia addresses Justice Souter's concerns by finding that favorable termination is still relevant even if a criminal is no longer incarcerated. See *Heck*, 512 U.S. at 490 n.10.

⁸⁵ See *Wilson*, 535 F.3d at 267 (stating that courts of appeals do not have directly applicable precedent regarding the dilemma of whether to apply *Heck* when a plaintiff does not have access to habeas corpus relief and citing *Spencer* as potential support for both sides of the circuit split).