No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: COUNTY OF PIMA, a body politic; CITY OF TUCSON, a body politic,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, Tucson,

Respondent,

NINA ALLEY,
as Guardian and Conservator for and on behalf of Louis Taylor, a single man,

Real Party in Interest.

On Petition for a Writ of Mandamus to the United States District Court for the District of Arizona, No. 4:15-cv-00152-TUC

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This Petition presents a straightforward jurisdictional question—can a person challenge the validity of their outstanding state court convictions in a federal civil lawsuit brought under 42 U.S.C. § 1983? The Supreme Court and this Court have answered that question—decisively—no. Congress has instructed that such challenges can *only* be made in a habeas corpus proceeding under 28 U.S.C. § 2254. *See*, *e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005); *Heck v. Humphrey*, 512 U.S. 477, 480–81 (1994); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *Nettles v. Grounds*, 830 F.3d 922, 933 (9th Cir. 2016); *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 (9th Cir. 2015).

The Respondent ("District Court") in this case devised a work-around to that jurisdictional bar. The District Court ruled that it can adjudicate the propriety of 28 outstanding state court convictions in this § 1983 civil action through its equitable authority to expunge criminal records. That ruling is manifestly wrong. It not only exceeds congressional authority and defies binding precedent prohibiting such challenges, but it improperly extends a court's equitable power to expunge criminal *records* to outstanding criminal *convictions*, an extension that this Court has expressly denounced—*because of* the jurisdictional bar. *See United States v. Crowell*, 374 F.3d 790, 797 (9th Cir. 2004); *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000).

If the District Court's ruling is allowed to stand, criminal defendants with outstanding convictions can circumvent habeas corpus and other post-conviction remedies and directly and contemporaneously challenge their convictions and seek damages under the guise of expunction. In other words, they have a sliding back door to a *Heck* bar, a prospect that will undoubtedly unleash a flurry of § 1983 expungement claims. And unless this Court issues a writ of mandamus now, Petitioners will be forced to defend 28 convictions—dating back to 1972—and exposed to incarceration-based damages in a civil trial that should not be happening. Delaying any appeal until after that trial is not feasible. The Court should grant the Petition, reinforce a federal court's authoritative boundaries, and direct the District Court to dismiss the Real Party's challenge to his outstanding state court convictions.

STATEMENT OF THE CASE

The Court is undoubtedly familiar with Louis Taylor. In 1972, he was convicted of 28 counts of first-degree murder (arson) for setting ablaze the Pioneer International Hotel in Tucson, Arizona. (Exhibit 1.) The December 19, 1970 fire was an unimaginable tragedy. Twenty-nine people died from smoke inhalation, burns, or jumping to their death. Entire families were killed in the fire, including children. Many of the victims were from Mexico who had come to stay in downtown Tucson to Christmas shop. It has been called the "worst day in Tucson history," resulting in the "largest single loss of life in the City's history." (Dkt. 886 at 2.)

After hearing 34 days of evidence—including Taylor's inculpatory statements and actions—a jury found him guilty on all counts. (Ex. 1; Exhibit 2, ¶¶ 32–557.) *See also In re Anonymous, Juv. Ct. No. 6358-4*, 484 P.2d 235, 240–41 (Ariz. App. 1971) (affirming probable cause finding). The state court sentenced him to life in prison. (Ex. 1.) Taylor's post-conviction challenges, in both state and federal court, were denied. *See State v. Taylor*, 537 P.2d 938 (Ariz. 1975) ("*Taylor I*"); *Taylor v. Arizona*, 424 U.S. 921 (1976) ("*Taylor II*"); *Taylor v. Cardwell*, No. CIV 76-734 PHX–CAM (D. Ariz. Feb. 18, 1977) ("*Taylor III*"); *Taylor v. Cardwell*, 579 F.2d 1380 (9th Cir. 1978) ("*Taylor IV*"); *Taylor v. Cardwell*, CIV 78-277-TUC (D. Ariz. May 18, 1981) ("*Taylor V*"); *Taylor v. Cardwell*, No. 81-5570 (9th Cir. Sept. 15, 1982) ("*Taylor VI*"); *Cardwell v. Taylor*, 461 U.S. 571 (1983) ("*Taylor VII*"); *Taylor v. Cardwell*, No. 81-5570 (9th Cir. Apr. 30, 1984) ("*Taylor VIII*").[1] The Arizona Supreme Court held that there was "substantial evidence to uphold the verdict," *Taylor I*, 537 P.2d at 949, and a federal district judge determined that "due process was afforded [Taylor] in all stages of the proceedings," (Ex. 3).

In October 2012, Taylor sought further post-conviction relief in state court, alleging both newly discovered evidence of his innocence and prosecutorial misconduct at his 1972 trial, including *Brady* violations and suborning false

[1] The unpublished decisions at *Taylor III*, *Taylor V*, *Taylor VI*, and *Taylor VIII* are attached as Exhibits 3, 4, 5, and 6, respectively.

testimony. (Exhibit 7.) The State disputed Taylor's allegations and continued to believe that Taylor was guilty beyond a reasonable doubt, but to avoid the risk of a retrial and maintain the integrity of the jury's verdicts it offered Taylor a plea agreement, whereby the original 1972 convictions would be vacated, Taylor would plead no-contest to the same 28 charges, and he would be sentenced to time served. (Exhibits 8, 9.)

Taylor agreed, the trial judge accepted the plea after finding a sufficient factual basis to support it, and Taylor was immediately released from prison. (Exhibits 10, 11, 12.) Under Arizona law, Taylor's 2013 plea agreement is a conviction and an admission of guilt on all 28 charges. *See In re Lazcano*, 222 P.3d 896, 898, ¶ 7 (Ariz. 2010) ("Arizona law defines a conviction as a determination of guilt by verdict, finding, or the acceptance of a guilty or no contest plea …. [A] no contest plea qualifies as a conviction because like a guilty plea, a plea of no contest is an admission of guilt for the purposes of the case.") (cleaned up).

Two years later, in January 2015, Taylor filed this civil damages action, pursuant to § 1983, against Petitioners Pima County and the City of Tucson, alleging that his 1972 convictions were unconstitutional. (Exhibit 13.)[2] Early in the

[2] In May 2023, the District Court granted Taylor's request to substitute his conservator and guardian, Nina Alley, as the plaintiff in this action. (Exhibit 14.) For consistency, the Petition will refer to Taylor throughout.

litigation, the District Court ruled that, under *Heck v. Humphrey* and *Lyall v. City of Los Angeles*, Taylor was "*Heck*-barred from challenging the validity of his outstanding 2013 convictions" and further barred from recovering incarceration-based damages for the 42 years he was in prison. (Exhibits 15, 16, 17.) But it certified the issue—whether "Plaintiff [is] barred from obtaining incarceration-based compensatory damages in light of his outstanding 2013 convictions and sentence"—to this Court pursuant to 28 U.S.C. § 1292(b). (Exhibit 18.) This Court affirmed, holding that, because Taylor's 2013 convictions "remain[] valid," the *Heck* bar remains in-tact and he cannot recover incarceration-based damages:

> Here, Taylor's 1972 jury conviction has been vacated by the state court, so *Heck* poses no bar to a challenge to that conviction or the resulting sentence. But Taylor's 2013 conviction, following his plea of no contest, remains valid. Accordingly, Taylor may not state a § 1983 claim if a judgment in his favor would necessarily imply the invalidity of his 2013 conviction or sentence. As the district court summarized, "*Heck* does not bar [Taylor] from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions." Recognizing that limitation, Taylor stresses that "he challenges his 1972 prosecution, convictions and sentence and does not challenge his 2013 'no contest' pleas or *sentence*." (Emphasis added.)
>
> Taylor alleges that his 1972 conviction and resulting sentence were plagued by constitutional violations and that those errors initially caused his incarceration. Critically, however, all of the time that Taylor served in prison is supported by the valid 2013 state-court judgment. The state court accepted the plea agreement and sentenced Taylor to time served. For that reason, even if Taylor

> proves constitutional violations concerning the 1972 conviction, he cannot establish that the 1972 conviction caused any incarceration-related damages. As a matter of law, the 2013 conviction caused the entire period of his incarceration. … Taylor's valid 2013 conviction and sentence are the sole legal causes of his incarceration; he cannot recover damages for wrongful incarceration.

Taylor v. Cty. of Pima, 913 F.3d 930, 936 (9th Cir. 2019), *reh'g denied*, 933 F.3d 1191, *cert. denied*, 140 S. Ct. 2508 (2020) ("*Taylor IX*") (emphasis added). The Court added that, despite Taylor's factual allegations, it "cannot disregard the limitations imposed by Congress and the Supreme Court on the scope of § 1983 actions." *Id*.

In response to that holding, Taylor requested the District Court to amend his § 1983 complaint to add a request for equitable relief—to "expung[e] Taylor's April 2013 'no contest' pleas and convictions as unconstitutional and thus, invalid." (Exhibit 19.) He alleged that he was coerced into accepting the plea, and that the State only offered it to create the *Heck* bar and insulate Pima County from damages.[3] (*Id*.)

[3] When Taylor accepted the plea, he was represented by 14 attorneys (including a former Arizona Supreme Court justice and a former Arizona Court of Appeals judge). (Ex. 7.) His attorneys agreed that there was a sufficient factual basis for the plea, that the plea agreement was "in the best interests of [Taylor]," and that Taylor "understands the terms of conditions," and the state court found that Taylor "knowingly, voluntarily, and intelligently" accepted the plea. (Ex. 10, 11, 12.) One of Taylor's criminal attorneys represents him in this civil action. (*Compare* Ex. 7, *with* Ex. 13.) At his 2021 deposition, Taylor testified that he did not regret taking the

The District Court permitted the amendment (Exhibit 20), ruling that § 1983 authorizes expungement of state court *convictions* in "unusual or extreme cases" and that this case qualified. (Exhibit 21 at 8–9, relying on *Shipp v Todd*, 568 F.2d 133 (9th Cir. 1978); *see also* Exhibit 22 at 5.) The District Court posited that, "[i]f the [State] required [Taylor] to accept a no-contest plea for the purpose of creating a *Heck* bar to § 1983 liability, [it] is concerned that such conduct undermines the fairness and integrity of the justice system." (Ex. 21 at 9; *see also* Ex. 22 at 6 ["Here, the factual allegations of the TAC, accepted as true for purposes of Rule 12(b)(6), raise a reasonable inference that the [State] leveraged [Taylor's] incarceration on an existing sentence in order to coerce him into pleading no-contest to charges unprovable at a re-trial, potentially for the purpose of avoiding a civil damages judgment for wrongful conviction."].)

Following discovery, Petitioners sought summary judgment on the expungement claim, arguing, in part, that § 1983 does not authorize a federal district court to expunge outstanding state court convictions. (Exhibit 23 at 28 n.7; Exhibit 24 at 12–14.) The District Court again ruled that § 1983 confers such authority and that "[i]f a jury makes factual findings rendering *Shipp* expungement appropriate, the *Heck* bar in this case will be lifted, and Taylor will no longer be precluded from

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plea because he "didn't want to stay another minute, another hour, another day. … [T]hat's the fastest way to get out." (Dkt. 341-2 at 130.)

seeking incarceration-based damages."[4] (Exhibit 25 at 20, 27–28, relying on *Shipp*.) In addition to finding genuine issues of material fact on the expungement claim, the court determined there were issues of fact on most of Taylor's damages claims challenging his 1972 convictions.[5] (Ex. 25.)

A jury trial is now set to begin on April 22, 2024. (Exhibit 26.) As a result of the District Court's rulings, a jury will be determining not only whether Taylor's vacated 1972 convictions were unconstitutional, but also whether: (1) Taylor's valid 2013 convictions are unconstitutional; and, if so, (2) the extent of Taylor's incarceration-based damages.[6] (Ex. 25.) In other words, the jury will be deciding allegations of constitutional improprieties in both the 1972 *and* 2013 convictions all at once, even though his 2013 convictions "remain[] valid" and *Heck* bars recovery for incarceration-based damages stemming from his 1972 convictions.[7] If the

[4] Petitioners disagree that the allegations underlying Taylor's expungement claim can ever amount to a constitutional violation warranting expungement or that there is any evidence supporting them. (Ex. 23, 24.)

[5] Some of these claims were adjudicated adversely to Taylor in his state post-conviction and federal habeas corpus proceedings, but the District Court ruled that they have no preclusive effect and therefore Taylor can argue the issues anew to the jury. (Ex. 25 at 32–34.) Petitioners disagree with that ruling.

[6] Nearly all the material witnesses to the 1972 prosecution are deceased, including the prosecutors, the trial judge, and fact witnesses.

[7] Although the 1972 and 2013 prosecutions were conducted by the Pima County Attorney's Office "on behalf of the State," A.R.S. § 11-532(A)(1), the District Court ruled that Pima County can be held liable for the State's alleged actions under *Monell v. Department of Social Services of City of New York*, 436 U.S.

expungement claim is dismissed, as it should be, the *Heck* bar remains in place and, at a minimum, Taylor cannot recover incarceration-based damages in this § 1983 civil action.[8]

RELIEF SOUGHT

Petitioners respectfully request that this Court issue a writ of mandamus directing the District Court to dismiss Taylor's expungement claim with prejudice. *See* 28 U.S.C. § 1651 ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

ISSUE PRESENTED

Whether a federal district court can expunge an outstanding state court conviction in an action brought under 42 U.S.C. § 1983?

REASONS A WRIT SHOULD ISSUE

As discussed below, the standard for mandamus relief is satisfied in this case. A writ should be issued.

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658 (1978), and is not entitled to Eleventh Amendment or prosecutorial immunity. (Ex. 25 at 29–32 & n.22.) Pima County disagrees with that ruling.

[8] The District Court ruled that Taylor could still recover non-incarceration-related damages resulting from his 1972 convictions, notwithstanding *Heck*, but did not specify what those damages could be. (Ex. 16.) Petitioners disagree with that ruling. Nonetheless, Taylor did not produce evidence of any non-incarceration-related damages during discovery. (Dkt. 341-2 at 160–162.)

I. The Standard for Mandamus Relief.

In determining whether a writ of mandamus should issue, this Court considers the five factors outlined in *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977)—namely, whether:

> (1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules, and (5) the order raises new and important problems, or issues of law of first impression.

Cole v. U.S. Dist. Ct. for Dist. of Idaho, 366 F.3d 813, 817 (9th Cir. 2004). These "guidelines" "are not meant to supplant reasoned and independent analysis by appellate courts," *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 994 (9th Cir. 2004) (quoting *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984)), and "should not be mechanically applied," *Cole*, 366 F.3d at 817. "Not every factor need be present at once," *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1146 (9th Cir. 2005), and, "[i]n fact, 'rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable,'" *Special Invs.*, 360 F.3d at 994 (quoting *Bauman*, 557 F.2d at 655). "In the final analysis, the decision of whether to issue the writ lies within [the Court's] discretion." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011).

II. A Writ of Mandamus Is Appropriate Here.

A. The District Court Clearly Erred When It Ruled That It Can Expunge Taylor's Outstanding State Court Convictions in this § 1983 Civil Lawsuit.

Petitioners begin with the third *Bauman* factor because it is the "most important" one. *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 373 (9th Cir. 2002). Clear error exists if the Court has a "definite and firm conviction that a mistake has been committed." *Cohen v. U.S. Dist. Ct. for N. Dist. of California*, 586 F.3d 703, 708 (9th Cir. 2009). The District Court clearly erred here.

1. Challenges to State Court Convictions Cannot Be Entertained in § 1983 Actions.

In *Preiser v. Rodriguez*, the Supreme Court held that a person cannot challenge the validity of his state court conviction in a § 1983 lawsuit. 411 U.S. at 484–500. Rather, the "sole federal remedy is a writ of habeas corpus" under § 2254. *Id*. at 500. The Court's reasoning was simple and sensible. Whereas "exhaustion is not a prerequisite to an action under § 1983," *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982), in subsequently enacting § 2254, "Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief" from a state court conviction, and "[i]t would wholly frustrate explicit congressional intent to hold that [a person] could evade this

requirement by the simple expedient of putting a different label on their pleadings." *Id*. at 489–90.[9]

Thus, a district court must dismiss a claim brought in a § 1983 suit that challenges an outstanding state court conviction. That bar applies regardless of whether the person is seeking "equitable relief," *id*. at 494, or damages, *see Heck*, 512 U.S. at 486 ("We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."). *See also Wilkinson*, 544 U.S. at 81–82 ("[A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration."); *Sperl v. Deukmejian*, 642 F.2d 1154, 1154 (9th Cir. 1981) ("Declaratory relief is not available in federal court to attack a state criminal conviction.").

[9] The Supreme Court noted that exhaustion "avoid[s] the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." *Preiser*, 411 U.S. at 490.

The Ninth Circuit has emphasized this jurisdictional bar in recent years. *See Nettles*, 830 F.3d at 933 ("[H]abeas corpus is the exclusive remedy to attack the legality of the conviction."); *Lyall*, 807 F.3d at 1192 (holding that § 1983 is "not an alternative forum for challenging [a plaintiff's] conviction").

That should have been the end of the matter. Taylor's expungement claim is a direct attack on his outstanding 2013 convictions. If he succeeds, it would not just "imply the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487; it *would* invalidate both his convictions and sentence, which this Court recognized "remain[] valid," *Taylor IX*, 913 F.3d at 936. Under *Preiser* and its progeny, the District Court was required to dismiss that claim.[10]

2. A Federal Court Does Not Have the Authority to Expunge an Outstanding State Court Conviction in a § 1983 Action.

The District Court circumvented this bar by invoking its equitable expungement power and this Court's decision in *Shipp*. It shouldn't have.

In *Shipp*, a former state prisoner filed a § 1983 action against a state court clerk and requested "to have the district court declare [his] state conviction invalid

[10] That Taylor is no longer in prison does not change this analysis. *See Duke v. Gastelo*, 64 F.4th 1088, 1097 n.7 (9th Cir. 2023) ("[O]ur precedent recogniz[es] the presumption that collateral consequences arise from any criminal conviction.") (citation omitted); *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997) ("A petition for habeas corpus is not moot if adverse collateral consequences continue to flow from the underlying conviction."); *see also Spencer v. Kemna*, 523 U.S. 1, 7–12 (1998). Taylor agrees, and the District Court found, that collateral consequences are attendant to his 2013 convictions. (Ex. 19 at 78–80; Ex. 21 at 8.)

on federal constitutional grounds and for a mandatory injunction directing [the clerk] to expunge the judgment of conviction from the court records." 568 F.3d at 133. The district court "dismissed the action for failure to state a claim for relief," but this Court reversed and remanded, holding:

> Although appellant has served the sentences imposed for his burglary convictions, the maintenance of his criminal records continues to operate to his detriment. *Wilson v. Webster*, 467 F.2d 1282, 1283-84 (9th Cir. 1972); *Bilick v. Dudley*, 356 F. Supp. 945, 950-52 (S.D.N.Y.1973). "It is established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights." *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976); *Wilson*, 467 F.2d at 1283-84. Accordingly, we remand to the district court for a determination of the question of expungement.[1]
>
> [1] The power to order expungement of a state arrest record is a narrow one and should be reserved for unusual or extreme cases, for example, "where the arrest itself was an unlawful one, or where the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional." *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975).

Id. at 133–34 & n.1 (emphasis added).

Thus, although the plaintiff *sought* to have his records *and convictions* expunged, the Court recognized only the inherent equitable "power to expunge criminal *records*" in a § 1983 action. *Id*. at 134 (emphasis added); *see also id*. at 133 ("[T]he maintenance of his criminal *records* continues to operate to his detriment.") (emphasis added); *id*. at 134 n.1 ("The power to order expungement of

a state arrest *record* ….") (emphasis added). The Court did not recognize the power to expunge a *conviction* in a § 1983 action, much less declare the plaintiff's convictions invalid or expunge them. *See also Hanson v. Cir. Ct. of First Jud. Cir. of Illinois*, 591 F.2d 404, 410 n.12 (7th Cir. 1979) ("The court's brief opinion in *Shipp* does not discuss the relationship between section 1983 and federal habeas corpus."); *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *14 (D. Ariz. Mar. 27, 2017) ("While it does not appear that the plaintiff's conviction [in *Shipp*] had previously been found invalid, the Ninth Circuit expressed no opinion as to whether expungement [of his conviction] was available."). It simply remanded "for a determination of the question of expungement." *Shipp*, 568 F.3d at 133. When read in context, it could only have remanded for a determination of the question of expungement of Shipp's "criminal records."

Indeed, all the cases *Shipp* cited to support the equitable power of expungement involved a request to expunge *records* of dismissed charges or already invalidated convictions, not outstanding valid convictions. *See McMains*, 540 F.2d at 388 ("In August 1975 McMains submitted a letter to the district court requesting that the record of his ["set aside"] conviction be expunged."); *Linn*, 513 F.2d at 926 ("Linn then filed in the criminal proceeding in which he had been thus acquitted a motion requesting the trial court to expunge, remove and destroy the record of his

arrest."); *Wilson*, 467 F.2d at 1283 ("[P]laintiffs sought an order from the court directing the state officials to cancel the arrest records of all the members of the class who had been acquitted of criminal charges or against whom such charges had been dismissed."); *Bilick*, 356 F. Supp. at 946 ("Plaintiffs also seek an injunction directing defendants to expunge all records of the arrests [that resulted in dismissed charges].") None of them involved or suggested the expungement of an outstanding conviction.

In response to that critical distinction—expungement of records versus expungement of convictions—the District Court insisted that "[s]ubsequent cases applying *Shipp* have affirmed federal courts' inherent power to expunge convictions" and therefore permit expungement of convictions in a § 1983 action when there is a "concomitant damages request." (Ex. 21 at 7–8; Ex. 22 at 5.) But the two cases it cited—*Maurer v. Los Angeles County Sheriff's Department*, 691 F.2d 434 (9th Cir. 1982), and *United States v. Smith*, 940 F.2d 395 (9th Cir. 1991)—do not support, and in fact contradict, that contention. (Ex. 21 at 7–8.)

In *Maurer*, after the plaintiff was "acquitted" of criminal charges, he filed a § 1983 action against the arresting officers seeking damages. 691 F.2d at 435. He also sought "a declaratory judgment that his arrest was invalid on federal constitutional grounds and a permanent injunction prohibiting the dissemination of his arrest *record*." *Id.* (emphasis added). The district court dismissed the declaratory

judgment claim as barred by the statute of limitations, and it dismissed the injunctive (expungement) claim because the plaintiff had alternative state law remedies. *Id*. at 435–36. This Court reversed the dismissal of both claims. *Id*. at 438. On the expungement claim, the Court restated the proposition that "federal courts have inherent equitable power to order 'the expungement of local arrest *records* as an appropriate remedy in the wake of police action in violation of constitutional rights.'" *Id*. at 437 (quoting *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973)) (emphasis added).[11] It reversed the dismissal because exhaustion is not a prerequisite to a § 1983 claim (and the plaintiff did not have alternative state remedies anyways).[12] *Id*. at 437. Thus, *Maurer* reaffirmed only the equitable power to expunge criminal *records* and did not involve an *outstanding* criminal conviction, much less recognize the authority to expunge one.

[11] Like *Maurer*, *Sullivan* involved "the expungement of all arrest records." 478 F.2d at 944.

[12] The Court did not hold, as the District Court believed, that "expungement is an appropriate remedy for actions violating constitutional rights … if the plaintiff 'has no adequate remedy under state law for his claim.'" (Ex. 21 at 8.) The Court in *Maurer* simply disagreed with the district court's conclusions that (1) exhaustion of state remedies is a prerequisite to a § 1983 claim, and (2) state remedies were unavailable to the plaintiff. 691 F.2d at 437. Nonetheless, Taylor acknowledged that he had an adequate state law remedy to challenge his 2013 convictions, but he did not pursue it (Dkt. 126), despite publicly attacking those convictions (for the same reasons he alleges in this § 1983 action) just a few days after he was released from prison. (*See* Dkt. 896-1, Ex. 23.)

Smith was not a § 1983 action. *See United States v. Smith*, 745 F. Supp. 1553, 1554 (C.D. Cal. 1990). In that case, an individual was convicted of a federal crime, placed on probation, and, upon the expiration of his probation, he mailed a letter to the judge in his criminal case "asking that his criminal *record* be expunged." *Id.* at 1554–55 (emphasis added). The judge granted his request ("The Defendant's *record* is hereby expunged."), finding that his case was "appropriate for expungement of the *record*" because the individual "has atoned for his sins and should be able to go back to the good life he led and would lead again." *Id.* at 1555–56 (emphasis added). This Court reversed. Citing *Shipp* and *Maurer*, it stated that it has previously "sanctioned the remedy of expunction of criminal *records* in civil rights cases involving unconstitutional state convictions" (even though, as discussed above, *Shipp* involved only an *allegation* of an unconstitutional conviction and *Maurer* did not involve an outstanding conviction). *Id.* at 396. It then assumed, for purposes of the case, that the same equitable expungement authority exists when the record involves a federal conviction, and vacated the expungement order because the proffered reasons were not "sufficient to outweigh the government's interest in maintaining criminal *records*." *Id.* (emphasis added). The Court did not sanction

the expungement of, or recognize the equitable authority to expunge, the underlying criminal conviction.[13]

Thus, neither *Shipp* nor *Maurer* nor *Smith* support the notion that a federal court has the equitable authority to expunge an outstanding state court *conviction* in a § 1983 action. They recognize *only* the authority to expunge criminal *records*. But in this § 1983 action, the District Court *is* entertaining Taylor's request to expunge his outstanding state court convictions. *Preiser* clearly deprives the district court of such jurisdiction and *Shipp* does not create a loophole. *See Sumner*, 226 F.3d at 1010 ("The power of federal courts may not be expanded by judicial decree. For a federal court to have subject matter jurisdiction to hear an independent action there must be some statutory or constitutional basis for its jurisdiction.") (internal quotations and citation omitted).

The District Court's attempt to deploy expunction as a basis to vacate an outstanding conviction has also been squarely rejected by this Court. In *United States v. Crowell*, the criminal defendant, like Taylor, pleaded no-contest to a criminal charge and, 11 years later, she "filed a motion in her original criminal case to expunge her conviction," alleging, like Taylor, that there were constitutional

[13] *Sumner* effectively overruled *Smith* to the extent that it recognized that record expungement can rest on equitable grounds. 226 F.3d at 1014; *see generally Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379–80 (1994).

infirmities underlying her plea. 374 F.3d at 791–92. This Court presented and answered the question like this: "This case presents the question whether a person convicted of a crime may collaterally attack her conviction by moving to expunge the records of her conviction. We hold that she cannot." 374 F.3d at 791.

In rejecting the jurisdictional basis for such a claim, the Court first described the purpose and effect of expungement and how it differed from a vacatur:

> "Expunge" (to erase) and "vacate" (to nullify or to cancel) denote very different actions by the court. When a court vacates a conviction, it sets aside or nullifies the conviction and its attendant legal disabilities; the court does not necessarily attempt to erase the fact of the conviction. In contrast, a defendant who seeks expungement requests the judicial editing of history. Although "expungement" may mean different things in different states, in general when a defendant moves to expunge records, she asks that the court destroy or seal the records of the fact of the defendant's conviction and not the conviction itself. Accordingly, expungement, without more, does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty.

Id. at 792 (internal quotations and citations omitted). It then acknowledged a court's "inherent authority to expunge criminal *records* in appropriate and extraordinary cases" but noted that the defendant (Crowell) sought something fundamentally different: "Crowell has used her motion for expungement as a post-conviction vehicle to challenge collaterally the lawfulness of her *conviction*. Crowell asks,

effectively, that we vacate her *conviction* in order to expunge her records." *Id*. at 793–94 (emphasis added).

The Court then flatly rejected that end-run around Congress' jurisdictional guardrails, including a writ of habeas corpus and other statutory schemes that authorize challenges to an outstanding conviction:

> Were we to hold that Crowell may challenge the lawfulness of her conviction through a motion for expungement, we would usurp Congress's power to control the terms on which petitioners may challenge their convictions. … [W]e conclude that Crowell cannot use a motion for expungement to make an "end-run" around recognized post-conviction remedies, such as habeas corpus, coram nobis, and audita querela, or others that Congress may create. Having been lawfully convicted, if Crowell wishes to expunge the records of her conviction, she must first obtain a judgment that her conviction was unlawful. … Crowell may not employ a motion for expungement as a substitute for an appropriate post-conviction challenge to her conviction.

Id. at 794–97 (internal citations omitted).

Since *Crowell*, district courts have consistently rebuffed requests to expunge outstanding state court convictions in § 1983 actions, including in the District of Arizona. *See*, *e.g.*, *Moreno v. Saavedra*, No. CIV 17-432-TUC-CKJ, 2019 WL 2296594, at *6 (D. Ariz. May 30, 2019); *Puente Arizona*, 2017 WL 1133012, at *13–17. The District Court, however, did not and is allowing Taylor to challenge his outstanding 2013 convictions in this § 1983 action, in defiance of *Preiser*, *Heck*, *Crowell*, and Congress' directives.

The District Court buttressed its reliance on *Shipp* with an equitable concern: foreclosing expungement of Taylor's 2013 convictions in this § 1983 action "would be equivalent to concluding that the judiciary is impotent when faced with clever but unethical prosecutorial tactics that undermine the interests of justice." (Ex. 25 at 27.) But this Court in *Sumner* rejected the notion that a "district court has the power to expunge a record of a valid arrest and conviction solely for equitable considerations." 226 F.3d at 1014.

Moreover, the judiciary is not powerless to protect against unlawfully procured convictions. As the Court in *Crowell* recognized, there are numerous state and federal remedial vehicles available, including habeas corpus proceedings. Taylor has pursued most of them over the last 50 years and, in fact, he is seeking post-conviction relief from his 2013 convictions in state court *right now*. (Exhibit 27.) The question is not *if* there is a judicial remedy. The question is whether the court in which the claim is brought has jurisdiction to provide the relief requested. A court cannot wield power that Congress has not conferred, no matter the allegations. *See Badgerow v. Walters*, 596 U.S. 1, 11 (2022) ("[F]ederal district courts may not exercise jurisdiction absent a statutory basis … [a]nd the jurisdiction Congress confers may not be expanded by judicial decree.") (internal quotations and citation omitted); *Taylor IX*, 913 F.3d at 936 (holding that, notwithstanding "Taylor's serious allegations of unconstitutional actions … we cannot disregard the

limitations imposed by Congress and the Supreme Court on the scope of § 1983 actions"). Unfortunately, that is what the District Court did here, despite originally recognizing that Taylor is "*Heck*-barred from challenging the validity of his outstanding 2013 convictions."[14] (Ex. 16 at 3.)

B. A Direct Appeal Is Not Feasible and Petitioners Will Be Damaged in a Way Not Correctable in a Direct Appeal.

"The first *Bauman* factor highlights the need for mandamus to be used only when no other realistic alternative is (or was) available to a petitioner." *Cole*, 366 F.3d at 817. "The second *Bauman* factor is similar but focuses on whether the harm to the petitioners cannot be corrected on a direct appeal." *In re Mersho*, 6 F.4th 891,

[14] The District Court's concern ignores the fact that Taylor did not have to accept the 2013 plea, and it assumes that simply offering the plea was unethical. Taylor could have rejected the plea and pursued his petition to the end. Taylor also could have challenged his no-contest plea in a post-conviction proceeding. He did neither, opting instead for immediate release from prison and a § 1983 lawsuit seeking civil damages. Petitioners maintain there was nothing unconstitutional, much less improper, about the State's plea offer. But this § 1983 action is not the forum to decide that question. Indeed, the State is not even a defendant, nor could it be. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (a state is not a "person" for purposes of § 1983); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (Eleventh Amendment immunity bars suit against a state "regardless of the nature of the relief sought"). This further illustrates why a civil action under § 1983 is an inappropriate vehicle to challenge an outstanding state court criminal conviction, and that mandamus relief is necessary to protect Petitioners from having to defend Taylor's outstanding convictions. Further adding to the impropriety, the District Court ruled that, even though Pima County is the proper defendant in this § 1983 action on the expungement claim, Taylor is not required to show that it had a custom or practice of inducing unconstitutional plea agreements, i.e., *Monell* liability. (Ex. 25 at 21 n.16.)

902 (9th Cir. 2021). The second factor "also consider[s] the substantial costs imposed on the public interest." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1158 (9th Cir. 2010). "These factors are usually considered together." *Mersho*, 6 F.4th at 902.

Petitioners previously requested the District Court to certify the *Shipp* expungement issue for interlocutory appeal pursuant to § 1292(b), but the District Court denied that request. (Ex. 22 at 7.) And although a direct appeal is technically available, it is not feasible and will not cure all the harms that a trial will inflict. For instance, Taylor's expungement claim is based on his allegation that the State coerced him into accepting the 2013 plea to create a *Heck* bar. Taylor contends that that allegation is supported by his allegation that, in 2022, Pima County and its counsel dissuaded the Pima County Attorney from filing a motion to vacate his 2013 convictions (to preserve the *Heck* bar). (Ex. 25 at 25–27.) The District Court agreed that "[a] reasonable jury could … find … that if financial considerations led the Pima County Attorney to decline to exonerate Taylor in 2022, they also likely played a role in the Pima County Attorney's decision to" offer Taylor his no-contest plea in 2013.[15] (*Id*. at 27.) As a result, Taylor has listed Pima County's counsel as a trial

[15] Petitioners dispute Taylor's allegations that Pima County or its counsel did anything improper or influenced the Pima County Attorney's decision not to take action on Taylor's 2013 convictions. (Dkt. 837.) Indeed, the County Attorney denied these allegations herself under oath. (Dkt. 838, ¶¶ 92–105.) Petitioners also disagree that any actions or beliefs by the Pima County Board of Supervisors or the Pima County Attorney in 2022 have any relevance to the actions or beliefs of the Pima County Board of Supervisors or the Pima County Attorney in 2013 (or made their

witness in their proposed Joint Pretrial Statement. Thus, if the expungement claim is allowed to proceed, it is possible that Pima County's counsel may need to withdraw. *See* Ariz. R. Sup. Ct. 42, ER 3.7(a) (with some exceptions, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"). "[A] lost choice of counsel cannot be adequately remedied through means other than mandamus and the resultant harm is not correctable on appeal." *Cohen*, 586 F.3d at 710; *see also Christensen v. U.S. Dist. Ct. for Cent. Dist. of California*, 844 F.2d 694, 697 (9th Cir. 1988) (disqualification of trial counsel is not correctable on appeal).

Curing the error described herein may also come too late. The allegations in this case date back to 1970. Many key witnesses to the 1972 prosecution are deceased, including the trial judge, the prosecutors, the parties' original experts, and many Tucson police officers and firefighters. The District Court has authorized trial depositions for at least two witnesses due to their age and/or health. (Dkt. 313, 899.) The trial set for April 2024 will currently try the damages claims and the expungement claim together. If the expungement claim is not dismissed until after trial, a new trial will need to be held due to the prejudice resulting from trying all claims together. That new trial will likely not happen for several years, potentially

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actions more "likely"). The Pima County Attorney in 2022 (Laura Conover) was not the Pima County Attorney in 2013 (Barbara LaWall).

resulting in the loss of more witnesses and additional prejudice to Petitioners. All parties deserve finality sooner rather than later. So do the citizens of Pima County and Tucson. *See Perry*, 591 F.3d at 1158 (consideration should be given to the costs imposed on the public).

Finally, if the expungement claim proceeds to trial and the jury finds expungement of the 2013 convictions appropriate, the plea agreement "become[s] void and the parties to the plea agreement shall return to the positions they were in before executing the plea agreement." (Ex. 11 at 8.) That means, at the moment the 2013 convictions are expunged, Taylor's 1972 convictions should be automatically reinstated, which should then impose a bar on his challenge to those convictions. *Heck*, 512 U.S. at 487. But also at that moment, Taylor will not be incarcerated and possibly holding a damages judgment that he should not be entitled to. This conundrum will continue until the direct appeal concludes and the only way Petitioners can avoid enforcement of any judgment is by securing a costly supersedeas bond. All this harm cannot be undone if corrected after the trial.

C. The Petition Raises New and Important Problems.

"The fourth factor looks to whether the case involves an 'oft-repeated error,' while the fifth factor considers whether the petition raises new and important problems or issues of first impression." *Mersho*, 6 F.4th at 903 (citation omitted). "The fourth and fifth factors are rarely present at the same time." *In re Kirkland*, 75

F.4th 1030, 1051 (9th Cir. 2023); *see also San Jose Mercury News, Inc. v. U.S. Dist. Ct.--N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("[T]he fourth and fifth *Bauman* factors are often mutually exclusive."). As discussed above, the District Court appears to be alone in deploying its expungement power to vacate an outstanding state court conviction.

However, its ruling provides a blueprint for other convicted individuals to follow and for other district courts to potentially adopt. For litigious inmates currently in custody, it is yet another lawsuit to initiate and explore (without fear of receiving a "strike," *see* 28 U.S.C. § 1915(g)), further inundating courts with § 1983 lawsuits. Indeed, anyone with an outstanding conviction—incarcerated or not—can attempt to do what Taylor has done here. That is a "new and important problem," *Mersho*, 6 F.4th at 903, that the Court should head off now. To the extent the District Court's ruling technically slips between *Heck* and *Crowell*, it is a novel issue that should not escape immediate address. As it stands now, the ruling emasculates *Heck*, ignores *Crowell*, and self-prescribes jurisdiction.

CONCLUSION

For these reasons, at least three, if not four, *Bauman* factors weigh heavily in favor of granting this Petition for Writ of Mandamus. The Court should do so and issue a writ directing the District Court to dismiss Taylor's expungement claim with prejudice.

RESPECTFULLY SUBMITTED this 16th day of February, 2024.

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STATEMENT OF RELATED CASES

Currently pending in the Ninth Circuit Court of Appeals is *Taylor v. County of Pima, et al.*, No. 23-15110, which is an appeal from an interlocutory seal order issued by the same Respondent judge here.

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

This Petition for Writ of Mandamus, comprised of 7069 words, does not exceed 7,800 words or 30 pages, excluding items exempted by FRAP 21(a)(2)(C). The Petition's type size and typeface (14 point and proportionally spaced Times New Roman) complies with FRAP 32(a) and 32(c)(2).

RESPECTFULLY SUBMITTED this 16th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. I further certify that I mailed and/or emailed a copy of the foregoing on this date to the Respondent judge and counsel for all parties.

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Description of Documents: PETITION FOR WRIT OF MANDAMUS

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