No. ____

IN THE

Supreme Court of the United States

MARIE HENRY, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor

Petitioner,

v.

CITY OF MT. DORA, et al.

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court's decision in *Heck* v. *Humphrey* bars actions under 42 U.S.C. § 1983 when the writ of *habeas corpus* was not available as a federal constitutional collateral attack on a state criminal conviction, as six circuits have held, or whether *Heck* bars actions under 42 U.S.C. § 1983 regardless of *habeas corpus* availability, as the Eleventh Circuit held here, and four other circuits have held.

2. Whether a juvenile adjudication noting a violation of a criminal statute constitutes a criminal conviction triggering the *Heck* v. *Humphrey* bar when state law expressly states that juvenile adjudications are not criminal convictions, and juveniles are not afforded basic constitutional protections required for criminal proceedings.

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Marie Henry, as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor. Petitioner was the plaintiff and appellant below.

The following parties are the Respondents, and were defendants and appellees below: City of Mt. Dora, a municipal corporation and political subdivision of the State of Florida; Brett Livingston in both individual and official capacities; and Ivelisse Severance in both individual and official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marie Henry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced at App. 1a. The United States District Court for the Middle District of Florida's final order dismissing the case with prejudice is unreported and is reproduced at App. 34a. The district court's order dismissing Henry's 42 U.S.C. § 1983 action against the Officers is unreported and reproduced at App. 3a.

JURISDICTION

Henry timely appealed the district court's February 27, 2015 final order dismissing the case on Monday, March 30, 2015. The United States Court of Appeals for the Eleventh Circuit entered judgment on May 31, 2017. On August 2, 2017, the Eleventh Circuit denied a timely petition for rehearing *en banc*. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

TITLE 42—THE PUBLIC HEALTH AND WELFARE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FLORIDA STATUTES

§ 985.35 Adjudicatory hearings; withheld adjudications; orders of adjudication

***

(6) Except as the term "conviction" is used in chapter 322, and except for use in a subsequent proceeding under this chapter, an adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication; nor shall that adjudication operate to impose upon the child any of the civil disabilities ordinarily imposed by or resulting from conviction or to disqualify or prejudice the child in any civil service application or appointment, with the exception of the use of records of proceedings under this chapter as provided in s. 985.045(4).

INTRODUCTION

The circuits are divided on whether this Court's decision in *Heck* v. *Humphrey* bars actions under 42

U.S.C. § 1983 when the writ of *habeas corpus* was not available as a collateral attack on a state criminal judgment. Six circuits have answered the question "yes," and, after sixteen months of deliberation, the Eleventh Circuit here joined the four circuits that answered the question "no." This conflict arises from disagreement over the proper scope of the Court's ruling in *Heck*. There, relying on the fact that the petitioner had not successfully pursued the available remedy of a writ of *habeas corpus* to redress his federal constitutional complaints regarding his purported unlawful arrest, the Court ruled that he could not raise a claim under § 1983. In concurrence, Justice Souter stated that the *Heck* bar would not have applied had *habeas* not been available. In response, Justice Scalia wrote in a footnote that the *Heck* bar would apply regardless of whether a convicted criminal was still incarcerated.

Four years later, in *Spencer* v. *Kemna*, five Justices supported Justice Souter's opinion in *Heck*. In concurrence, Justice Ginsburg noted that she had "joined the Court's opinion in *Heck*," but had since "come to agree with Justice Souter's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' . . . fit within § 1983's 'broad reach.'" Now, nearly twenty years have passed, and the Court has offered no further guidance. Six circuits decided not to extend *Heck* to cases in which *habeas* is unavailable based on the facts and reasoning of *Heck*, as well as Justice Souter's concurrence in *Heck*, and the opinions in *Spencer*. Here, the Eleventh Circuit joined four others that extended the *Heck* bar to cases with no *habeas* right based on Justice Scalia's dictum, adopted by a majority of the Court in *Heck*.

This case presents the appropriate vehicle to resolve this question. Below, the respondents did not dispute on the merits that M.E. Henry-Robinson was unconstitutionally stopped and unconstitutionally arrested without probable cause. The only question was whether her subsequent "withheld adjudication" in juvenile proceedings that erroneously stated she violated a Florida statute foreclosed her § 1983 claim under *Heck*. And the state actors' conduct here is a perfect example of why Congress created a federal remedy to protect citizens from actions by state officials that are corrupt or indifferent to federal constitutional rights. The writ should issue to resolve this question, and create uniform law on when § 1983 claims can be redressed after a state court finding of criminal conduct.

The fact that M.E. was a juvenile also presents the question of whether a juvenile adjudication noting a violation of a criminal statute constitutes a criminal conviction triggering the *Heck* v. *Humphrey* bar when state law expressly states that juvenile adjudications are not criminal convictions, and juveniles are not afforded basic constitutional protections required for criminal proceedings. The Eleventh Circuit's ruling endangers the ability of juveniles—our country's most vulnerable population—to remedy violations of their constitutional rights.

Moreover, the decision elevates a state juvenile ruling that is not supported by basic constitutional protections to the status of a criminal conviction. Without a right to a jury trial, M.E. was denied *ever* having an opportunity to address the respondents' constitutional violations to a jury of ordinary citizens empaneled as a vital part of our justice system. For these reasons, the Court should grant the petition,

and rule that M.E. has a statutory right to pursue her claims under § 1983.

STATEMENT OF THE CASE

A. Officers Livingston And Severance Stop M.E., A Black Female, After Receiving A 911 Call Regarding Black Males Throwing Rocks At A Building.

In 2009, Mt. Dora Police Officers responded to a 911 call complaining that "10-12 black male" juveniles were throwing rocks at a building. Appellate Appendix ("AA") 11. Responding Officers Brett Livingston and Ivelisse Severance (the "Officers") observed a group of children, including M.E.H.-R. ("M.E."), a thirteen-year-old black female, walking on Halloween night. AA 81. When the Officers stopped the children, they were nowhere near the building where rocks were allegedly being thrown, nor had M.E. ever been to the building. AA 11. Although the Officers never personally investigated the scene at the building and never observed children throwing rocks, they nonetheless stopped and questioned M.E. and her friends about the reported rock-throwing incident. *Id.* M.E. and her friends responded that they had no knowledge of anyone throwing rocks. *Id.*

Deputy Gregory, a responding officer from the Lake County Sheriff's Office, had briefly investigated the scene and determined that neither M.E. nor any of the girls with her were involved in the "rock throwing" or any other criminal activity. *Id.* With discovery, plaintiff expects to establish that Deputy Gregory told Officers Livingston and Severance that the girls were not involved. However, Officer Livingston told the children they were "not free to leave,"

and ordered M.E. to give him her name and address. AA 12.

B. The Officers Arrest M.E. When She Refuses To Provide Her Name And Address.

M.E. hesitated to provide her name and address out of fear that the Officers were collecting her information to place into a criminal database. AA 12. After M.E. expressly refused to provide that information, Officer Livingston grabbed her and shoved her onto the ground, bruising and scraping M.E.'s hands and legs. *Id.* As Officer Livingston threw M.E. to the ground, M.E.'s top came down, publicly exposing her breast. AA 81. Officer Severance refused M.E.'s pleas to pull up her shirt, saying, "You shouldn't have come outside dressed like that." AA 12. M.E. was forced to remain with her top down while Officer Livingston arrested M.E. for resisting an officer without violence in violation of Fla. Stat. § 843.02. AA 81. M.E. had not committed a crime under that or any other statute. AA 12. Nonetheless, the Officers transported M.E. to the Mt. Dora Police Department in handcuffs, searched, photographed, fingerprinted, and interro-gated her without an attorney or parent present, kept her confined for hours, and refused her requests to call a parent. *Id.* M.E.'s mother had to call 911 to locate her daughter. *Id.*

C. The Juvenile Court Orders A Withheld Adjudication For M.E..

The Lake County Juvenile Division of Florida's Fifth Judicial Circuit disposed of M.E.'s charge of obstructing an officer without violence and withheld adjudication. AA 81. Juvenile adjudications are not criminal proceedings under Florida state law. *See*

Fla. Stat. § 985.35(6) (2017). Florida law defines juvenile adjudications as separate and distinct from adult criminal convictions. "[A]n adjudication of delinquency by a court with respect to any child . . . shall not be deemed a conviction . . . ." *Id.* And neither an adjudication of delinquency nor a withheld adjudication "constitute[s] a 'finding of guilt.'" *State* v. *Menuto*, 912 So. 2d 603, 607 (Fla. Dist. Ct. App. 2005) (citing *Walker* v. *State*, 880 So. 2d 1262, 1264 (Fla. Dist. Ct. App. 2004)). Indeed, they could not constitute criminal convictions—the Florida juvenile system does not afford basic constitutional rights required for criminal proceedings, like a right to a jury. Fla. Stat. § 985.35(2). The court issued one year of probation, 25 hours of community service, and over $100 in fines. AA 48-49. Additionally, the court required M.E. to participate in counseling, write a letter of apology to the law enforcement officers, and obey a 6:00 p.m. curfew for 60 days. *Id.*

M.E. appealed the conditions of withheld adjudication imposed by the juvenile court, but the Florida Fifth District Court of Appeal Juvenile Division affirmed. *M.H.-R.* v. *State of Florida*, 61 So. 3d 483 (Fla. Dist. Ct. App. 2011). However, that court remanded the case for a new disposition hearing regarding inconsistencies between the juvenile court's oral pronouncement and its written order regarding the length of M.E.'s curfew and probationary periods. *Id.*

D. M.E.'s Mother Sues On M.E.'s Behalf.

Petitioner Marie L. Henry filed the underlying lawsuit as parent, for and on behalf of M.E. Henry-Robinson, a minor, in the Middle District of Florida alleging, among other things, deprivation of civil

rights under the Fourth, Fifth, and Fourteenth Amendments under 42 U.S.C. § 1983.

The City moved to dismiss the complaint, and the court granted the motion in part, dismissing claims alleging false arrest under § 1983 against the Officers. AA 107. The court adopted the Officers' argument that M.E.'s § 1983 claim was a prohibited collateral attack on her withheld juvenile adjudication, which the court equated to a criminal conviction, under *Heck* v. *Humphrey*, 512 U.S. 477 (1994). AA 107.

The Officers did not argue that the facts alleged by M.E. gave rise to actual or arguable probable cause to arrest M.E.; rather, the Officers asserted qualified immunity on the ground that M.E.'s juvenile adjudication constituted conclusive proof that the Officers had probable cause to arrest M.E.. AA 102-03. The district court agreed with the Officers, and ruled that the Officers were entitled to qualified immunity on M.E.'s unlawful arrest claim. *Id.* However, the court noted that persuasive authority exists on each side of the issue regarding whether a conviction serves as conclusive proof of probable cause for the purposes of qualified immunity under *Heck*. AA 103. The remaining claims ultimately were dismissed as well. App. 34a.

M.E. appealed the district court's dismissal of the unconstitutional arrest claims. App. 3a. After briefing, argument, and sixteen months of deliberation, the United States Court of Appeals for the Eleventh Circuit issued an unpublished *per curiam* disposition consisting of only six sentences. App. 1a. The Eleventh Circuit, without any explanation, found "no reversible error" in the district court's holding that the unavailability of federal *habeas* review did not

preclude the application of *Heck* to bar M.E.'s § 1983 claim. App. 2a. On August 2, 2017, the Eleventh Circuit denied a petition for rehearing *en banc*. App. 35a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON WHETHER *HECK* BARS A § 1983 SUIT WHEN *HABEAS* RELIEF IS UNAVAILABLE.

The courts of appeals are intractably divided on whether *Heck* v. *Humphrey* applies to cases in which *habeas* relief was unavailable. *Heck* concerned a § 1983 lawsuit for malicious prosecution brought by a state prisoner who was serving a 15-year manslaughter sentence. 512 U.S. 477, 478-79 (1994). Heck filed his federal lawsuit while his manslaughter conviction was still pending on direct appeal in state court. *Id.* The Court affirmed dismissal of Heck's suit, holding that such an action would be a collateral attack "implicat[ing] the legality of his conviction." *Id.* at 479. The Court further held that

> when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated . . . or impugned by the grant of a writ of habeas corpus.

Id. at 487-89. The Court further noted that the case "lies at the intersection of the two most fertile sources of federal-court prisoner litigation— . . . § 1983, and the federal habeas corpus statute." *Id.* at 480. The

Court held in *Heck*, therefore, that a plaintiff cannot successfully pursue a § 1983 action that challenges a state criminal conviction after failing to successfully challenge that conviction by pursuing an available writ of *habeas corpus*. And a proper analysis under *Heck* thus asks whether a plaintiff's § 1983 action would (1) collaterally attack a conviction (2) that could have been impugned by a writ of *habeas corpus*.

In concurrence, Justice Souter plainly expressed that plaintiffs who lacked access to *habeas*, unlike Heck, would not be barred from vindicating their federal civil rights in a federal forum. *Id.* at 500 (Souter, J., concurring and joined by Blackmun, J., Stevens, J., and O'Connor, J.). Such an outcome would "run counter to § 1983's history and defeat the statute's purpose." *Id.* at 501.

Later, in *Spencer* v. *Kemna*, four Justices joined Justice Souter, agreeing that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." 523 U.S. 1, 21 (1998) (Souter, J., concurring and joined by O'Connor, J., Ginsburg, J., and Breyer, J., along with Stevens, J., dissenting).

After *Heck* and *Spencer*, the circuits have split regarding the application of *Heck* to bar the § 1983 claims of individuals who never had access to *habeas* relief. On one hand, six circuits have found that *Heck* and *Spencer* establish that a claimant may pursue relief under § 1983 when the claimant could not pursue federal *habeas* relief. On the other hand, five circuits have extended *Heck* to apply to all § 1983

claims, regardless of whether the claimant had access to federal *habeas* relief.

A. The Second, Fourth, Sixth, Seventh, Ninth, And Tenth Circuits Hold That *Heck* Does Not Apply Absent The Availability Of *Habeas* Relief.

A majority of Circuits that have decided the question—the Second, Fourth, Sixth, Seventh, Ninth, and Tenth—have held that *Heck* v. *Humphrey* does not bar § 1983 claims when the plaintiff never had access to *habeas* relief.

In *Huang* v. *Johnson*, the Second Circuit held that a juvenile's § 1983 claim could proceed after the juvenile's release from custody, because he did not have access to *habeas* to redress the violation of his constitutional rights. 251 F.3d 65, 75 (2d Cir. 2001). The juvenile's mother brought a federal civil rights action on his behalf, alleging false imprisonment and seeking damages for the violation of his liberty. *Id.* at 68-69. The juvenile could not vindicate his rights through *habeas* because he had been released from custody. *Id.* at 75. Relying on the *Spencer* plurality, the Second Circuit held that "where federal habeas corpus is not available to address constitutional wrongs, § 1983 must be." *Id.* (quoting *Jenkins* v. *Haubert*, 179 F.3d 19, 26 (2d Cir. 1999)).

In *Wilson* v. *Johnson*, the Fourth Circuit also followed the plurality in *Spencer* and held that *Heck* did not bar a former prisoner's § 1983 claim because, without access to habeas relief, Wilson would not have any access to federal court to assert his constitutional rights. 535 F.3d 262, 267-68 (4th Cir. 2008). Wilson, a former prisoner, brought a § 1983 claim alleging wrongful imprisonment after the Virginia Depart-

ment of Corrections extended his sentence. *Id.* at 263-64. Although Wilson filed grievances with the prison administration while he was still in custody to dispute his extended imprisonment, the Department of Corrections did not take any action to resolve Wilson's complaint. *Id.* at 263. Following his release, Wilson filed a § 1983 claim, seeking damages for the extension to his sentence. *Id.* at 264. The Fourth Circuit analyzed this circuit split, acknowledging that

> [f]our circuits regard the five justice plurality in *Spencer* as dicta, and continue to interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met. On the other hand, five circuits have held that the *Spencer* plurality's view allows a plaintiff to obtain relief under § 1983 when it is no longer possible to meet the favorable termination requirement via a habeas action.

Id. at 267 (footnote omitted).

Ultimately, the Fourth Circuit held that "the reasoning employed by the plurality in *Spencer* must prevail in a case, like Wilson's, where an individual would be left without any access to federal court if his § 1983 claim was barred." *Id.* at 267-68. "Quite simply," it held, "we do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court." *Id.* at 268.

In *Powers* v. *Hamilton County Public Defender Commission*, the Sixth Circuit also held that *Heck's* favorable-termination requirement cannot be imposed against § 1983 plaintiffs who do not have access to *habeas* to vindicate their federal rights. 501

F.3d 592, 603 (6th Cir. 2007). There, a former prisoner filed a § 1983 class action suit, alleging that a policy of the county public defender's office violated his constitutional rights. *Id.* at 597. Because Powers was only incarcerated for one day, he never had access to *habeas* relief. *Id.* at 601. The Sixth Circuit also wrestled with this circuit split, acknowledging that four circuits "have held that § 1983 claimants must comply with *Heck's* favorable-termination requirement even if habeas relief was unavailable to them. These courts have reasoned that to recognize an exception to *Heck* along the lines sketched by Justice Souter would amount to an impermissible deviation from Supreme Court precedent." *Id.* at 602. However, the Sixth Circuit ultimately disagreed with those circuits, reasoning that

> [t]he *Heck* Court was not confronted with a factual scenario like Powers's, in which the § 1983 claimant has no recourse in habeas and thus cannot have his conviction or sentence set aside by federal court. The plaintiff in *Heck* was still incarcerated and so could have sought habeas relief. Thus, adopting Justice Souter's rationale does not amount to a failure to follow *Heck* where *Heck* offered no binding guidance on the application of the favorable-termination requirement to the circumstances here.

Id. at 602-03. The Sixth Circuit concluded that someone in Powers's situation, who as a matter of law never had access to *habeas* relief, is "precisely the kind of situation that Justice Souter had in mind when he argued in *Heck* and *Spencer* that the favorable-termination requirement could not be deployed to foreclose federal review of asserted

deprivations of federal rights by habeas-ineligible plaintiffs." *Id.* at 603. Accordingly, the Sixth Circuit held that *Heck* did not bar Powers's § 1983 claim. *Id.*

In *DeWalt* v. *Carter*, the Seventh Circuit also held that the unavailability of federal *habeas* relief does not preclude a prisoner from bringing a § 1983 action. 224 F.3d 607, 618 (7th Cir. 2000). DeWalt, a prisoner, filed a grievance against correctional employees, challenging conditions of his confinement and alleging violations of his constitutional rights while he was in custody. *Id.* at 609-10. Because DeWalt was only challenging a condition of his confinement, not the fact or duration of his confinement, *habeas* relief was unavailable to him. *Id.* at 617. Confronting the reasoning in *Heck*, Justice Souter's concurrence in *Heck*, and the *Spencer* plurality, the Seventh Circuit was "hesitant to apply the *Heck* rule in such a way as would contravene the pronouncement of five sitting Justices." *Id.* at 616-17. "*Spencer* reveal[s] that five justices now hold the view that a § 1983 action must be available to challenge constitutional wrongs where federal habeas is not available." *Id.* at 617. The Seventh Circuit also acknowledged the plain language of § 1983, which does not require the plaintiff to exhaust state remedies before bringing a cause of action. *Id.* at 614. After considering these factors, it concluded that "[i]n the absence of binding Supreme Court precedent, and in light of the guidance offered by the concurrences in *Heck* and *Spencer* . . . [and] [b]ecause federal habeas relief is not available to Mr. DeWalt, the language of § 1983 . . . dictate[s] that he be able to proceed." *Id.* at 617.

In *Cohen* v. *Longshore*, the Tenth Circuit held that *Heck* does not bar a petitioner who has no available remedy in *habeas* from pursuing a § 1983

claim. 621 F.3d 1311, 1317 (10th Cir. 2010). Cohen, an immigration detainee, brought a civil rights action alleging false imprisonment. *Id.* at 1312. He did not have access to *habeas* relief because Immigration and Customs Enforcement transferred him out of custody. *Id.* at 1315. The Tenth Circuit acknowledged that the circuits are divided on the question of whether the favorable-termination requirement from *Heck* applies when the plaintiff lacks a remedy through *habeas*. *Id.* It noted the reasoning that the other circuits have used when applying the *Heck* bar to petitioners without *habeas*: that "*Heck* must be applied according to the broad language of its holding unless and until the Supreme Court explicitly holds otherwise." *Id.* at 1316. The Tenth Circuit ultimately disagreed with those circuits, reasoning that because "*Heck* involved a petitioner who was still incarcerated, we are not persuaded that *Heck* must be applied to petitioners without a habeas remedy." *Id.* Therefore, the Tenth Circuit was "persuaded by the reasoning of the [other circuits] that [they were] free to follow the five-Justice plurality's approach in *Spencer* on this unsettled question of law." *Id.*

In *Nonnette* v. *Small*, the Ninth Circuit held that *Heck* did not bar a parolee's § 1983 claim when he could not access *habeas* relief. 316 F.3d 872, 877 (9th Cir. 2002). Nonnette, a parolee, alleged that prison officials violated his constitutional rights when they miscalculated his prison sentence. *Id.* at 874. He brought his § 1983 action following his release from prison while he was on parole. *Id.* Had he brought a *habeas* petition at that time, the court would have dismissed it as moot. *Id.* at 875-76. The Ninth Circuit admitted that, arguably, the language in *Heck* suggests that the underlying conviction must be

overturned, as a prerequisite for proceeding with any § 1983 claim. *Id.* at 876. However, the Ninth Circuit noted, *Heck* dealt with a prisoner who was still incarcerated, and thus had access to a *habeas* remedy. *Id.* "*Spencer*, on the other hand, dealt with a prisoner who had completed his term," which caused his *habeas* petition to be dismissed as moot. *Id.* The Ninth Circuit expressed confusion, stating that the "answer is not entirely clear under *Heck* and its progeny," but ultimately concluded that this difference was critical, and the parolee could proceed with his § 1983 claim. *Id.* at 876-77.

B. The First, Third, Fifth, Eighth, And Eleventh Circuits Hold That *Heck* Is An Absolute Bar To § 1983 Claims After Conviction, Even When The Plaintiff Does Not Have Access To *Habeas* Relief.

In contrast, in *Randell* v. *Johnson*, the Fifth Circuit held that a former prisoner's § 1983 suit alleging unconstitutional confinement was barred under *Heck*. 227 F.3d 300, 300-01 (5th Cir. 2000) (per curiam). The *pro se* plaintiff could not file a *habeas* petition to redress his grievances in federal court because he was no longer in custody. *Id.* at 301. The Fifth Circuit wrestled with how to proceed in light of the *Spencer* plurality, which indicated that "the Supreme Court—if presented with the question—would relax *Heck's* universal favorable termination requirement for plaintiffs who have no procedural vehicle to challenge their conviction." *Id.* However, the Fifth Circuit ultimately broadened *Heck*'s holding. It "declin[ed] to announce for the Supreme Court that is has overruled one of its decisions," and concluded that *Heck* barred Randell's § 1983 claim. *Id.*

In *Entzi* v. *Redmann*, the Eighth Circuit also extended *Heck* to bar a former prisoner's § 1983 suit. 485 F.3d 998, 1003 (8th Cir. 2007). Entzi filed his § 1983 suit after his release from custody and while he was on supervised probation. *See id.* at 1000-01, 1003. His claim challenged his loss of performance-based sentence-reduction credits. *Id.* at 1003. In support of his complaint, Entzi cited the *Spencer* plurality, arguing that as a former prisoner without access to *habeas*, he was not required to satisfy *Heck*'s favorable termination requirement. *Id.* The Eighth Circuit acknowledged that Entzi was not eligible for *habeas* relief, but concluded, "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." *Id.*

In *Gilles* v. *Davis*, the Third Circuit held that *Heck* barred a § 1983 claim brought by a plaintiff who did not have access to *habeas* because he resolved the charges against him by entering into a rehabilitation program. 427 F.3d 197, 209 (3d Cir. 2005). Petit, a member of a campus ministry group, was arrested, released from custody later that day, and entered into the state's accelerated rehabilitative program, which allows for the expungement of one's record upon successful completion. *Id.* at 202. After successfully graduating from the rehabilitative program, Petit brought a § 1983 suit seeking damages. *Id.* at 208-09. The Third Circuit recognized the concurring and dissenting opinions in *Spencer*, which questioned the applicability of *Heck* to plaintiffs such as this one, who had no recourse under *habeas*. *Id.* at 209-10. But the Third Circuit wrote that it "doubt[ed] that *Heck* has been undermined," and barred the § 1983 from proceeding. *Id.* at 210.

In *Figuero* v. *Rivera*, the First Circuit held that *Heck* barred a § 1983 suit brought by the family members of Jesus Rios, who died while he was in custody and attempting to impugn his conviction via a petition for a writ of *habeas corpus*. 147 F.3d 77, 80-81 (1st Cir. 1998). After his death, Rios's family brought a § 1983 suit alleging wrongful conviction and failure to provide Rios with adequate medical care during his incarceration. *Id.* at 80. The family argued that a strict application of its interpretation of *Heck* would be fundamentally unfair, because Rios was attempting to impugn his conviction when his own premature death intervened. *Id.* at 80-81. The First Circuit grappled with this dilemma, acknowledging that "this plaint strikes a responsive chord," but ultimately held that allowing the § 1983 claim to proceed would run afoul of *Heck*. *Id.* at 81. It so held while it was "mindful that dicta from . . . *Spencer* v. *Kemna* may cast doubt on the universality of *Heck*'s 'favorable-termination' requirement." *Id.* at 81 n.3. Nonetheless, the First Circuit emphasized, "The Court . . . has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions.' We obey this admonition." *Id.* (citations omitted).

Finally, in this case, after briefing, argument, and then sixteen months of deliberation, the Eleventh Circuit affirmed the district court, which held that the unavailability of federal *habeas* review does not preclude the application of the *Heck* bar. App. 2a, 23a-24a. The district court so held while specifically noting that Eleventh Circuit precedent is not clear on

this issue.[1] App. 18a-23a. The Eleventh Circuit affirmed in a *per curiam*, unpublished disposition that consisted of merely six sentences. App. 2a.

C. The Majority Of Circuits Are Correct That The *Heck* Bar Does Not Apply When The Plaintiff Does Not Have Access To *Habeas* Relief.

The unavailability of *habeas* relief renders the *Heck* doctrine inapplicable. Heck filed his § 1983 claim while he was incarcerated, and thus had access to *habeas*. *Heck* v. *Humphrey*, 512 U.S. 477, 478-79 (1994). *Heck* plainly states that its holding applied because the plaintiff had a criminal conviction that could have been impugned by a writ of *habeas corpus*. *See id.* at 480. Justice Souter emphasized this in his concurrence, stating that

> the proper resolution of this case . . . is to construe § 1983 in light of the habeas statute and its explicit policy of exhaustion. I would not cast doubt on the ability of an individual unaffected by the habeas statue to take advantage of the broad reach of § 1983.

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[1] As the District Court noted, in each case where the Eleventh Circuit has held that plaintiff's § 1983 claims are not barred by *Heck* and the plaintiff did not have access to *habeas* relief, the plaintiff's § 1983 claim would not necessarily imply the invalidity of their conviction or sentence. *Morrow* v. *Federal Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010) ("[W]e do not understand *Heck's* rule to extend to a case like this one: where . . . Plaintiff's action—even if decided in his favor—in no way implies the invalidity of his conviction."); *Harden* v. *Pataki*, 320 F.3d 1289, 1296-98 (11th Cir. 2003).

Id. at 503 (Souter, J., concurring). Subsequently, in *Spencer*, four Justices joined Justice Souter, reiterating that

> *Heck* did not hold that a released prisoner . . . is out of court on a § 1983 claim . . . .
>
> . . . .
>
> The better view, then, is that a former prisoner, no longer 'in custody', may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy the favorable-termination requirement *that it would be impossible as a matter of law for him to satisfy*.

523 U.S. 1, 19-21 (1998) (Souter, J., concurring and joined by O'Connor, J., Ginsburg, J., and Breyer, J. along with Stevens, J., dissenting) (emphasis added).

Justice Ginsburg noted in concurrence, "I have come to agree with Justice Souter's reasoning: Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within § 1983's 'broach reach.'" *Id.* at 21 (Ginsburg, J., concurring).

As the majority of circuits have held, the goal of *Heck*—protecting state criminal judgements from a *second* collateral attack based on violations of federal constitutional rights, after the first attack has failed—is inapplicable here, where *habeas* is categorically unavailable. Thus, in holding that *Heck* bars § 1983 claims even for plaintiffs who lack access to *habeas* relief, the minority of circuits impermissibly extended *Heck*.

Moreover, the minority circuits did not suggest that it is just to deny these plaintiffs any avenue of collateral attack. Rather, they have barred these § 1983 claims only because they believe that they are obeying the Supreme Court's admonition to "leave to the Court the 'prerogative of overruling its own decisions'" in an area where they believe this Court has spoken. *Figueroa* v. *Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998); *see also Gilles* v. *Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (quoting *Figueroa*, 147 F.3d at 81 n.3.); *Randell* v. *Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) (per curiam) (quoting *Figueroa*, 147 F.3d at 81 n.3.). But this interpretation of *Heck* contravenes § 1983's purpose: to secure the role of the federal government as a guarantor of constitutional rights when the states fail to do so. *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972). As such, it is antithetical to the very objective of § 1983 that five circuits have now closed the doors of the federal courts to plaintiffs based solely on the decisions of state actors.

II. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE.

A. Permitting 42 U.S.C. § 1983 Actions To Proceed When *Habeas* Is Not Available As A Collateral Attack On A State Judgment Is Consistent With Congress's Intent Of Securing A Federal Right In Federal Courts To Enforce The Fourteenth Amendment.

This case presents an important question regarding the availability of a federal right in federal courts to enforce the Fourteenth Amendment. The issue of whether *Heck* bars § 1983 claims for *habeas*-ineligible individuals is of critical importance because

it comes up in every single regional circuit. And it impacts a diverse array of people: the immigration detainees transferred out of ICE custody, *Cohen* v. *Longshore*, 621 F.3d 1311 (10th Cir. 2010); the citizens never incarcerated long enough to have access to *habeas*, *Powers* v. *Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592 (6th Cir. 2007); the prisoners who die awaiting *habeas* relief, *Figueroa* v. *Rivera*, 147 F.3d 77 (1st Cir. 1998); the former prisoners out on parole, *Nonnette* v. *Small*, 316 F.3d 872 (9th Cir. 2002); the individuals participating in alternative rehabilitation programs, *Gilles* v. *Davis*, 427 F.3d 197 (3d Cir. 2005); and, of course, juveniles like M.E., our country's most vulnerable population, App 2a; *Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

In circuits applying the *Heck* bar to deny § 1983 relief to these various groups of people, the practice runs contrary to the history and purpose of § 1983. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

Congress first enacted § 1983 as Section 1 of the Ku Klux Klan Act of April 20, 1871, during Reconstruction. *Monroe* v. *Pape*, 365 U.S. 167, 171 (1961) (citing 17 Stat. 13). This Act was Congress's response to an extensive, 588-page report detailing the activities of the Klan following the Civil War and the failures of Southern States to ensure all citizens were afforded "equal protection of the laws and the free enjoyment of the rights and liberties secured to

them by the Constitution." S. Rep. No. 42-1, at 1 (1871). Congress "was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." *Mitchum*, 407 U.S. at 242.

Thus, Congress specifically created "a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe*, 365 U.S. at 180. As this Court has previously recognized, "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum*, 407 U.S. at 239.

Since 1871, § 1983 has been a critical tool for protection against state action that was corrupt or indifferent to federal constitutional rights in the civil rights movement, *see, e.g.*, *Monroe*, 365 U.S. at 171-72 (holding that Congress intended § 1983 to give a remedy to people who were deprived of constitutional rights by state officials abusing their positions of power), and in other instances of police misconduct, *see, e.g.*, *Allen* v. *City of Los Angeles*, 92 F.3d 842 (9th Cir. 1996) (noting Rodney King's successful § 1983 claim against the police officers who brutally beat him). Indeed, obvious cases of liability have been successful in the majority circuits when they could not have been brought in the minority circuits. *See, e.g.*, *Campbell* v. *Beckley Police Dep't*, 390 F. App'x 246,

248 (4th Cir. 2010) (concluding that *Heck* did not bar a former prisoner's § 1983 claim and reversing the district court's grant of summary judgment); *Boone* v. *City of Los Angeles*, No. LA CV12-09301 JAK (CWx), 2013 WL 12136800, at *3 (C.D. Cal. Sept. 25, 2013) (holding *Heck* did not bar plaintiff's § 1983 claims because she was not in custody and therefore could not obtain *habeas* relief, and because her infraction could not be expunged); *Diaz-Bernal* v. *Myers*, 758 F. Supp. 2d 106, 127 (D. Conn. 2010) (holding that Fourth Amendment claims brought by aliens subjected to an immigration raid were not barred by *Heck* because plaintiffs only challenged the circumstances leading to their detention, not the detention itself); *Ballinger* v. *City of Lebanon*, No. 1:07-CV-00256, 2008 WL 4279583, at *5 (S.D. Ohio Sept. 18, 2008) (concluding *Heck* did not bar plaintiff's § 1983 claim because plaintiff had no way to obtain *habeas* review during his forty-five day incarceration).

Through § 1983 and many other efforts, people have made significant progress against state corruption and indifference to federal constitutional rights, but these problems still exist, and § 1983 should remain a bulwark against them. That is evident in the individual cases noted above, in this case, and in broader trends. The Department of Justice's *Investigation of the Ferguson Police Department* provides empirical evidence demonstrating that civil rights violations continue to disproportionately impact minorities. Dep't of Justice, *Investigation of the Ferguson Police Department* (2015).[2] African-Americans represent 67% of

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[2] Available at https://www.justice.gov/sites/ default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_

Ferguson's population. *Id.* at 4. Yet, from 2011 to 2013, Ferguson's Police Department ("FPD") brought "94% of all Failure to Comply charges; 92% of all Resisting Arrest charges; . . . and 89% of all Failure to Obey charges" against African Americans. *Id.* at 67. From 2012 to 2014, "African Americans accounted for 85% of FPD's traffic stops, 90% of FPD's citations, and 93% of FPD's arrests . . . ." *Id.* at 62. Moreover, "Nearly 90% of documented force used by FPD officers was used against African Americans." *Id.* at 5.

The Department of Justice concluded that "the discriminatory effects of Ferguson's conduct are driven at least in part by discriminatory intent in violation of the Fourteenth Amendment." *Id.* This manner of policing had produced "a pattern of stops without reasonable suspicion and arrests without probable cause in violation of the Fourth Amendment; infringement on free expression, as well as retaliation for protected expression, in violation of the First Amendment; and excessive force in violation of the Fourth Amendment." *Id.* at 2-3. Section 1983 should provide a remedy for the individuals whose rights were violated by FPD's unconstitutional policing practices. However, the availability of that remedy is not guaranteed because Ferguson is within one of the five circuits that have held that *Heck* bars § 1983 claims for *habeas*-ineligible individuals. *See Entzi* v. *Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007).

Congress's intent, as embodied in § 1983's express language, should not be abandoned through judicial abstention regardless of the progress that has been

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made. This is the precise concern Justice Souter expressed in his concurrence in *Heck*:

> Consider the case of a former slave framed by Ku Klux Klan-controlled law-enforcement officers and convicted by a Klan-controlled state court of, for example, raping a white woman; and suppose that the unjustly convicted defendant did not (and could not) discover the proof of unconstitutionality until after his release from state custody. If it were correct to say that § 1983 independently requires a person not in custody to establish the prior invalidation of his conviction, it would have been equally right to tell the former slave that he could not seek federal relief even against the law-enforcement officers who framed him unless he first managed to convince the state courts that his conviction was unlawful. That would be a result hard indeed to reconcile either with the purpose of § 1983 or with the origins of what was "popularly known as the Ku Klux Act," the statute having been enacted in part out of concern that many state courts were "in league with those who were bent upon abrogation of federally protected rights."

Heck v. *Humphrey*, 512 U.S. 477, 501–02 (1994) (Souter, J., concurring) (first quoting *Collins* v. *Hardyman,* 341 U.S. 651, 657 (1951); and then quoting *Mitchum* v. *Foster,* 407 U.S. 225, 240 (1972)).

Justice Souter's concern rings true today. The confusion in the circuits has slammed the door on an individual's only federal forum for vindicating certain constitutional rights in twenty states, including

Florida. Now, M.E. has been denied the opportunity to challenge an arrest for which the City and Officers have not even asserted they had probable cause in this litigation.

Here, the Officers decided to stop M.E. and her friends based on race. After receiving a 911 call about a group of black boys, the Officers stopped any group of black juveniles—M.E. and her friends, a group of black girls. This is precisely the sort of situation Congress intended § 1983 to remedy. Congress also intended the availability of compensation under § 1983 to prevent the sort of callous behavior and subsequent indifference to federal constitutional rights demonstrated by the Officers in M.E.'s case. But under the minority circuits' reasoning, the Officers and the City are insulated by the decision of a state juvenile system that was, at best, erroneous and meager in its analysis of the issue. That clearly runs contrary to the purpose and express scope of § 1983, and the Court should grant the petition so that it can clarify that § 1983 remains a protection against all state failures to safeguard federal constitutional rights when those failures cannot be tested via a petition for a writ of *habeas corpus*.

B. Permitting 42 U.S.C. § 1983 Actions To Proceed Following A Juvenile Adjudication Noting A Violation Of A Criminal Statute Protects A Vulnerable Population That Is Not Afforded The Basic Constitutional Protections Required For Criminal Proceedings.

This case also presents an important question regarding the ability of juveniles to vindicate their constitutional rights in federal courts following

juvenile adjudications noting violations of criminal statutes. Resolving this question is critical because the issue of whether a juvenile adjudication noting a violation of a criminal statute constitutes a criminal conviction triggering the *Heck* bar impacts children—our country's most vulnerable population. This question has serious implications for the more than 974,000 juveniles across the country who have cases referred to juvenile courts each year. C. Puzzanchera & S. Hockenberry, *National Disproportionate Minority Contact Databook*, Off. Juv. Just. & Delinq. Prevention (2017).[3]

The Court's decision in *Heck* did not address juvenile adjudications. Rather, the Court's decision only addressed the availability of § 1983 relief for an adult with a criminal conviction and access to *habeas*. Critically, juvenile adjudications are not criminal convictions. Nor are juvenile adjudications even "the functional equivalent of a 'conviction' or sentence," App. 13a, because the juvenile and criminal justice systems vastly differ from one another in purpose, procedures, and consequences.

Our juvenile justice system deliberately accounts for the vulnerability of children. States established separate justice systems for juveniles to serve the unique purpose of rehabilitation—an intentional departure from the punitive purpose of the criminal justice system. *See In re Gault*, 387 U.S. 1, 14-15 (1967). These differing goals yield sharply different results and procedures from criminal trials.

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[3] Available at https://www.ojjdp.gov/ojstatbb/dmcdb/asp/display.asp?display_in=1

By statute, juvenile adjudications do not "operate to impose upon the child any of the *civil disabilities* ordinarily imposed by or resulting from conviction." Fla. Stat. § 985.35(6) (2017) (emphasis added); *see also, e.g.*, Ala. Code § 12-15-220(a) (2017); Ga. Code Ann. § 15-11-606 (2017); Mo. Ann. Stat. § 211.271(1) (2017); 42 Pa. Cons. Stat. § 6354(a) (2017); R.I. Gen. Laws § 14-1-40(a) (2017). The *Heck* doctrine undeniably functions as a civil disability when it blocks an adult prisoner's § 1983 lawsuit where the lawsuit would imply an invalid conviction. Accordingly, because juvenile adjudications do not impose any civil disabilities, *Heck* should not bar a juvenile's § 1983 claim.

Also by statute, juvenile adjudications are not criminal convictions in Florida and many other states. Fla. Stat. § 985.35(6) (2017); *see also, e.g.*, Ala. Code § 12-15-220(a); Del. Code Ann. tit. 10, § 1009(h) (2017); Ga. Code Ann. § 15-11-606; Me. Stat. tit. 15, § 3310(6) (2017); Mo. Ann. Stat. § 211.271(1); 42 Pa. Cons. Stat. § 6354(a); R.I. Gen. Laws § 14-1-40; *State* v. *Brown*, 879 So.2d 1276, 1289 (La. 2004).

Of course, the juvenile systems many states have adopted *cannot* provide criminal convictions because they lack the many constitutional protections afforded to adults accused of crimes. Because juvenile adjudications do not treat juveniles as criminals and do not result in criminal convictions, this Court has not required juvenile proceedings to "conform with all of the requirements of a criminal trial or even the usual administrative hearing". *Kent* v. *United States*, 383 U.S. 541, 562 (1966).

Accordingly, a juvenile can be detained prior to trial on a vague "serious risk" standard. *Schall* v.

Martin, 467 U.S. 253, 256-57 (1984). Juveniles have no right to bail. *See, e.g.*, *State* v. *M.L.C.*, 933 P.2d 380, 386 (Utah 1997); *Estes* v. *Hopp*, 438 P.2d 205, 209 (Wash. 1968). Juveniles also have no right to a jury trial. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 545 (1971). Moreover, juvenile proceedings can be closed to the public. *See id.* at 529. *Contra In re Oliver*, 333 U.S. 257, 270 (1948) ("[T]he guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.").

This court has justified the denial of these basic constitutional protections in juvenile adjudications by relying on the juvenile justice system's rehabilitative design and goals. *See, e.g.*, *McKeiver*, 403 U.S. at 545 ("There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.").

It thus contravenes basic constitutional principles to allow these rulings to foreclose relief in the same way a criminal conviction does. Extending *Heck* to bar § 1983 actions when they would call a juvenile tribunal's decision into question would mean that a litigant *never* has the opportunity to even present the constitutional question to a jury in states that deny juveniles a jury trial right.

Notably, the availability of a remedy to vindicate a juvenile's fundamental rights under § 1983 now depends on where the juvenile lives. Five circuits have jeopardized juveniles' only means of vindicating their constitutional rights in federal court. Thus,

juveniles in twenty states may no longer have access to a § 1983 remedy if a juvenile tribunal makes a factual finding that she violated the law. If M.E. had only lived in the Southern District of New York, rather than the Middle District of Florida, she would have had a means to vindicate her constitutional rights. *See Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (holding that the juvenile's § 1983 claim was not barred under *Heck* because he never had access to *habeas*). This disparity is antithetical to §1983's purpose of extending equal protection of the laws to ensure that no matter where someone lives, they have an avenue for relief.

Thus, it is of the utmost importance that this Court address whether federal courts can treat a juvenile adjudication as "the functional equivalent of a 'conviction' or sentence," triggering the *Heck* bar when state law expressly states that juvenile adjudications are not criminal convictions and juveniles are not afforded basic constitutional protections. App. 13a.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11351

D.C. Docket No. 5:13-cv-00528-JSM-PRL

MARIE HENRY,
as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor,

Plaintiff - Appellant,

versus

CITY OF MT. DORA, a municipal corporation and political subdivision of the State of Florida,
BRETT LIVINGSTON, individually and in his official capacity,
L. SEVERANCE, individually and in her official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(May 31, 2017)

Before HULL, JULIE CARNES, and BARKSDALE,* Circuit Judges.

PER CURIAM:

Plaintiff Marie Henry sued the City of Mt. Dora and police officers Brett Livingston and L. Severance on behalf of her minor daughter pursuant to 42 U.S.C. § 1983. Among other things, plaintiff alleged that these officers had arrested her minor daughter without probable cause in violation of the latter's constitutional rights. The officers moved to dismiss these false arrest claims, and the district court granted the motion. Plaintiff has appealed the district court's judgment dismissing these false arrest claims.

Having heard oral argument and carefully reviewed the record, we find no reversible error in the district court's order dismissing plaintiff's § 1983 false arrest claims against the above officers. We therefore **AFFIRM** the district court's order of dismissal.

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* Honorable Rhesa H. Barksdale, United States Circuit Judge for the Fifth Circuit, sitting by designation

APPENDIX B

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA OCALA DIVISION

MARIE L. HENRY, as guardian, parent, next of kin, and for and on behalf of M.E. HENRY-ROBINSON, a minor,

Plaintiff,

v. Case No: 5:13-cv-528-Oc-30PRL

CITY OF MT. DORA, et al.,
Defendants.
__________________________________/

ORDER

THIS CAUSE comes before the Court upon Defendants Brett Livingston and Ivelisse Severance's *Renewed* Motion to Dismiss Counts II through V and Count VII of Plaintiff's Complaint (Doc. 26), and Plaintiff's response in opposition thereto (Doc. 27). The Court, having reviewed the applicable pleadings, and being otherwise fully advised in the premises, concludes that the motion to dismiss should be granted in part and denied in part.

BACKGROUND

I. Factual Background

On October 31, 2009, the Mt. Dora Police Department received an emergency call complaining that several juveniles were throwing rocks at a building in the downtown area. Officer Brett

Livingston and Officer Ivelisse Severance (collectively, the "Officers") responded to the area, and Officer Livingston observed a group of juveniles, including minor M.E., walking downtown.[1] Officer Livingston stopped M.E. and the other juveniles to question them about the alleged incident. M.E. responded that she did not participate in the incident and had no knowledge of it. Officer Livingston then asked M.E. for her name and address, which Plaintiff contends was for the purpose of collecting information for a database. M.E. refused to provide this information to Officer Livingston. Plaintiff alleges that Officer Livingston then grabbed M.E., threw her to the ground, and arrested her for resisting an officer without violence in violation of § 843.02, Florida Statutes (2009). M.E.'s top was pulled down during the arrest exposing her breasts, and when M.E. asked Officer Severance to fix it, she refused.[2]

Thereafter, on May 21, 2010, the state court issued an order of adjudication and disposition in M.E.'s juvenile delinquency case withholding adjudication of delinquency on the charge of obstructing an officer without violence. (Doc. 34, Ex. B).[3] The state court

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[1] Plaintiff contends that M.E. was "nowhere near the building," but the complaint does not describe M.E.'s proximity to the area in question. (Doc. 1 at 3).

[2] In considering a motion to dismiss, a court must accept the factual allegations of the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *See Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007). Accordingly, these facts were gleaned from Plaintiff's complaint (Doc. 1) and do not constitute findings of fact.

[3] In considering a motion to dismiss, the Court may take judicial notice of public records without converting the motion to dismiss into a motion for summary judgment. *Universal Express, Inc.* v.

found that M.E. committed the offense of resisting an officer without violence and sentenced her to one-year probation, which required that M.E. complete and comply with various conditions. (*Id.*).

II. Procedural History

On October 25, 2013, Plaintiff Marie L. Henry initiated this action on behalf of her minor daughter, M.E., arising from M.E.'s arrest on October 31, 2009. (Doc. 1). Plaintiff alleges various claims against the City of Mt. Dora (the "City") and the Officers in their individual and official capacities, including claims under 28 U.S.C. § 1983 for (1) deprivation of civil rights under the Fourth and Fourteenth Amendments against the City (Count I); and (2) deprivation of civil rights under the Fourth, Fifth, and Fourteenth Amendments against the Officers (Counts II & III). Plaintiff also raises state law claims for (1) false arrest and false imprisonment against the Officers and the City (Counts IV-VI); (2) assault and battery against Officer Livingston and the City (Counts VII & VIII); and (3) negligent training and supervision against the City (Count IX). As relief, Plaintiff seeks compensatory damages, punitive damages, where applicable, costs, and attorney's fees.

The City filed an answer to the complaint on December 10, 2013, (Doc. 8) and filed an amended

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U.S. SEC, 177 Fed. App'x 52, 53 (11th Cir. 2006) (per curiam) (citing *Bryant* v. *Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999); *Stahl* v. *U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir 2003)). At this stage of the proceedings, the Court will take judicial notice of the Order of Adjudication and Disposition issued by the state court in M.E.'s juvenile proceedings (Doc. 34, Ex. B), but it will not take judicial notice of the facts as alleged in the arrest records (Doc. 34, Ex. A).

answer on December 17, 2013 (Doc. 11). The Officers filed a motion to dismiss Counts II through V and Count VII of Plaintiff's complaint on December 27, 2013. (Doc. 13). Plaintiff then filed a motion seeking to strike the motion to dismiss because the motion attached confidential records from M.E.'s juvenile proceedings that were not properly redacted. (Doc. 19). The Court granted the motion to strike, permitting the Officers an opportunity to renew their motion to dismiss and to either attach appropriately redacted confidential records or to file the records under seal. (Doc. 24). The Officers filed their renewed motion to dismiss on April 28, 2014, and filed M.E.'s confidential records under seal. (Docs. 26, 34).

Currently before the Court is the Officers' renewed motion to dismiss. (Doc. 26). By their motion, the Officers contend that (1) Counts II through V should be dismissed to the extent that those counts allege claims for false arrest because the claims are barred by the principles established in *Heck* v. *Humphrey*, 512 U.S. 477 (1994); (2) Counts IV and V for false arrest/false imprisonment under state law should be dismissed because Plaintiff's claims for false arrest are barred under Florida law;[4] (3) Counts II and III should be dismissed to the extent those counts allege claims for false arrest under § 1983 because the Officers are entitled to qualified immunity; (4) Counts II through V should be dismissed to the extent those counts allege claims against the Officers in their

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[4] The Officers conflate their argument for dismissal of Plaintiff's state law claims for false arrest and false imprisonment with their argument for dismissal of Plaintiff's § 1983 claims for false arrest. However, the Court concludes that it is more appropriate to address the § 1983 claims and state law claims separately.

official capacities because those claims are duplicative of the claims alleged against the City; and (5) Count VII should be dismissed to the extent it alleges a claim for assault because it fails to state a claim upon which relief could be granted.

STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. In considering a motion to dismiss under Rule 12(b)(6), a court must accept the factual allegations of the complaint as true and evaluate all inferences derived from those facts in the light most favorable to the plaintiff. *See Erickson*, 551 U.S. at 94. Conclusory allegations, unwarranted factual deductions, or legal conclusions masquerading as facts, however, are not entitled to the assumption of truth. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009); *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

ANALYSIS

I. Whether Plaintiff's claims for false arrest are barred by *Heck* v. *Humphrey*.

First, Defendants contend that Plaintiff's claims for false arrest under § 1983 and Florida law (Counts II-V) are barred by the *Heck* doctrine as espoused in *Heck* v. *Humphrey*, 512 U.S. 477.[5] In *Heck*, an Indiana state prisoner who was serving a fifteen-year sentence for voluntary manslaughter filed a § 1983 action against county prosecutors and a state police

[5] To the extent Counts II and III raise claims for excessive force under § 1983, the Officers do not argue that such claims would be barred by *Heck*. (Doc. 26). Accordingly, the Court does not address whether Plaintiff's claims for excessive force under § 1983 would be *Heck* barred.

investigator alleging that his manslaughter conviction violated his constitutional rights. *Id.* The district court dismissed the prisoner's action because the issues it raised "implicated the legality of his confinement," and the Seventh Circuit affirmed. *Id.* at 479. The Supreme Court affirmed dismissal of the prisoner's § 1983 claims and held that his claims were barred because

> to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, then the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff the

> action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 486-87. In reaching this conclusion, the Court stated "[w]e 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, just as it has always applied to actions for malicious prosecution." *Id.* at 486. *Heck*'s holding can be distilled into three main inquiries: (1) whether there is an underlying conviction or sentence; (2) whether a judgment in favor of the plaintiff would necessarily imply the invalidity of the conviction or sentence; and (3) whether the underlying conviction or sentence has been invalidated or otherwise favorably terminated.

1. Underlying Conviction or Sentence

Plaintiff asserts that the Officers' contention that *Heck* applies to Plaintiff's claims for false arrest fails on the first inquiry because the order of adjudication withholding adjudication of delinquency does not constitute a "conviction" for purposes of *Heck*. The Court disagrees.

Plaintiff is correct in asserting that pursuant to applicable Florida law, an adjudication of delinquency, or in M.E.'s case a withholding of adjudication of delinquency,[6] is not considered a

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[6] Nevertheless, because the difference between the two are irrelevant for the purposes of this discussion, to alleviate verbosity, the Court will refer to M.E.'s order of adjudication withholding adjudication of delinquency as the "juvenile adjudication." *See Florida* v. *Menuto*, 912 So. 2d 603, 607 (Fla. 2d DCA 2005) (explaining that the difference between

"conviction" and is also not considered a finding of "guilt" as those concepts are understood in the criminal law context. *See* § 985.35(6), Fla. Stat. ("[A]n adjudication of delinquency by a court with respect to any child who has committed a delinquent act or violation of law shall not be deemed a conviction; nor shall the child be deemed to have been found guilty or to be a criminal by reason of that adjudication."). Rather, if a state court in Florida finds that a juvenile committed a delinquent act or violation of the law, the court is empowered to either withhold adjudication of delinquency or enter an adjudication of delinquency. § 985.35(4)-(5). Both options, however, indicate that the state court found that the juvenile committed a delinquent act or violation of the law. *See Menuto*, 912 So. 2d at 607.

Although an issue of first impression in this circuit, a majority of courts that have directly considered whether the *Heck* doctrine applies to juvenile delinquency adjudications have concluded that *Heck* applies, such that it could bar a juvenile's claims under § 1983 if the remaining elements of the *Heck* doctrine are met.[7] *See Morris* v. *City of Detroit*,

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withholding adjudication of delinquency and an adjudication of delinquency is the power it confers upon the court to impose a more restrictive disposition).

[7] Plaintiff argues that citation to these authorities is unpersuasive because Florida's juvenile justice system is solely predicated upon Florida statutes; thus, Plaintiff contends that reliance on case law discussing the laws of other states is improper. (Doc. 27 at 7-8). But Florida's juvenile justice system, while a product of Florida statutory law, is not unique in purpose or application from the juvenile justice systems of other states. To the extent the juvenile justice systems of other states are

211 Fed. App'x 409, 411 (6th Cir. 2006); *Grande* v. *Keansburg Borough*, No. 12-1968(JAP), 2013 WL 2933794, at *6 (D. N.J. June 13, 2013); *Dominguez*, 2011 WL 4543901, at *2-3;[8] *but see Johnson* v. *Bd. of Sch. Comm'rs of the City of Ind.*, No. 1:09-cv-574-WTL-TAB, 2010 WL 3927753, at *3 (S.D. Ind. Oct. 1, 2010) (finding that *Heck* did not apply to a juvenile adjudication of delinquency because under Indiana law a juvenile adjudication did not amount to a conviction).

Moreover, application of *Heck* to juvenile adjudications preserves an underlying purpose of the *Heck* doctrine—to avoid potentially conflicting resolutions arising out of the same set of facts. *See Heck*, 512 U.S. at 486 (comparing a claim challenging the lawfulness of a conviction or sentence under § 1983 to a common-law claim for malicious prosecution and recognizing "a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction" (internal citation

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similar to the juvenile justice system of Florida, these cases remain persuasive authority. For example, Arizona law similarly provides that a juvenile adjudication "shall not be deemed a conviction of crime," A.R.S. § 8-207(A), yet the District Court for the District of Arizona found that the *Heck* doctrine applied to juvenile adjudications. *See Dominguez* v. *Shaw*, No. CV 10-01173-PHX-FJM, 2011 WL 4543901, at *2-3 (D. Ariz. Sept. 30, 2011)

[8] Several other courts have applied the *Heck* bar to § 1983 claims related to juvenile adjudications without directly addressing whether the *Heck* bar is applicable to juvenile adjudications. *See Adkins* v. *Johnson*, 482 Fed. App'x 318, 319-20 (6th Cir. 2012); *Fenwick* v. *United States*, 926 F. Supp. 2d 201, 220-21 (D.C. 2013); *Knight* v. *Thomas*, No. 1:06-CV-95-TS, 2008 WL 1957905, at *8-10 (N.D. Ind. May 2, 2008); *Michaels* v. *City of Vermillion*, 539 F. Supp. 2d 975, 991 (N.D. Ohio 2008).

and quotation marks omitted)); *see also McClish* v. *Nugent*, 483 F.3d 1231, 1250 (11th Cir. 2007) (noting that the *Heck* doctrine "is designed . . . to avoid the problem inherent in two potentially conflicting resolutions arising out of the same set of events by foreclosing collateral attacks on convictions through the vehicle of a § 1983 suit"); *Abella* v. *Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) (noting that the purpose of the *Heck* doctrine was "to limit the opportunities for collateral attack on state court convictions because such collateral attacks undermine the finality of criminal proceedings and may create conflicting resolutions of issues"). Here, even though adjudication of delinquency was withheld, the state court found that M.E. violated § 843.02, Fla. Stat., and imposed sanctions. (Doc. 34, Ex. B). If this Court concludes that Plaintiff's § 1983 claims for false arrest would necessarily imply the invalidity of M.E.'s juvenile adjudication, then a judgment in favor of Plaintiff on the false arrest claims would conflict with the findings of the state court.[9] By applying *Heck* to M.E.'s juvenile adjudication, the Court would avoid the potential outcome of conflicting resolutions.

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[9] Plaintiff contends that *Heck* is inapplicable to her because the sole purpose of *Heck* was to prevent prisoners from using § 1983 as a means of circumventing the requirements for habeas relief. (Doc. 27 at 10). Plaintiff is correct in her assertion that *Heck* addressed the "intersection of . . . § 1983[] and the federal habeas corpus statute, 28 U.S.C. § 2254." *Heck*, 512 U.S. at 480. Yet, Plaintiff fails to recognize that while *Heck* intended to address that very issue, the holding in *Heck* also took into account the goal of "avoid[ing] parallel litigation over the issues of probable cause and guilt." *Id.* at 484 (internal citations and quotation marks omitted).

Also, application of the *Heck* doctrine to juvenile adjudications would not undermine the rehabilitative nature of the juvenile justice system in Florida.[10] It does not indicate that a juvenile is considered a criminal or guilty for purposes of criminal law and is not a punitive measure. Rather, application of the *Heck* doctrine is a procedural mechanism that circumscribes the civil actions a juvenile can initiate under § 1983 to redress alleged constitutional wrongs committed by state actors related to a juvenile adjudication.

Accordingly, for the foregoing reasons, the Court concludes that the *Heck* doctrine applies to juvenile adjudications, such that for the purposes of the *Heck* bar, an adjudication of delinquency (or withholding adjudication of delinquency) is the functional equivalent of a "conviction" or sentence. Thus, the first inquiry of the *Heck* analysis is satisfied.

2. Invalidity of the Conviction or Sentence

Next, the Court must consider whether a judgment in favor of Plaintiff would necessarily imply the invalidity of M.E.'s juvenile adjudication. In making this determination, "the court must look both to the claims raised under § 1983 and to the specific offenses for which the § 1983 claimant was convicted." *Hughes* v. *Lott*, 350 F.3d 1157, 1161 n.2 (11th Cir. 2003).

The state court found that M.E. committed the act of resisting an officer without violence in violation of § 843.02, Fla. Stat., which provides, "Whoever shall resist, obstruct, or oppose any officer . . . in the

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10 "[T]he ultimate aim of juvenile proceedings is to rehabilitate." *Menuto*, 912 So. 2d at 607 (citing *P.W.G.* v. *Florida*, 702 So. 2d 488, 491 (Fla. 1997); § 985.02, Fla. Stat. (2002)).

execution of legal process or in the *lawful execution of any legal duty*, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree." (Emphasis added.). To prove that M.E. committed the offense of resisting an officer without violence, the state was required to show that (1) the Officers were engaged in the lawful execution of a legal duty; and (2) the actions of M.E. obstructed, resisted, or opposed the Officers in the performance of that duty. *See V.L.* v. *State*, 790 So. 2d 1140, 1142 (Fla. 5th DCA 2001).

Here, Plaintiff alleges claims for false arrest arguing that the Officers originally lacked reasonable suspicion to detain M.E. and, later, lacked probable cause to arrest her. (Doc. 1). "An arrest without a warrant and lacking probable cause violates the Constitution and can underpin a § 1983 [false arrest] claim, but the existence of probable cause at the time of arrest is an absolute bar to a subsequent constitutional challenge to the arrest." *Brown* v. *City of Huntsville*, 608 F.3d 724, 734 (11th Cir. 2010); *see also Marx* v. *Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir. 1990). Thus, Plaintiff's claims for false arrest will turn upon whether reasonable suspicion existed to detain M.E. and probable cause existed to arrest M.E.

However, a finding that the Officers lacked reasonable suspicion to detain M.E. or probable cause to arrest her would necessarily imply the invalidity of the juvenile adjudication. *See Quinlan* v. *City of Pensacola*, 449 Fed. App'x 867, 870 (11th Cir. 2011). If the Officers lacked reasonable suspicion to detain M.E. and probable cause to arrest her, then her juvenile adjudication for violating § 843.02, Fla. Stat., would be impugned because such a finding would

negate the element that the Officers were engaged in the *lawful* execution of a legal duty. Accordingly, success on Plaintiff's claims for false arrest would necessarily imply the invalidity of her juvenile adjudication such that the second inquiry of the *Heck* analysis has been satisfied.

3. Favorable Termination

As to the third inquiry, no evidence has been presented, and Plaintiff does not contend, that M.E.'s juvenile adjudication has been reversed on direct appeal, expunged, declared invalid by a state tribunal authorized to make such determination, or called into question by a writ of habeas corpus. Accordingly, Plaintiff cannot satisfy the favorable-termination requirement that would preclude application of the *Heck* bar.

4. Availability of Habeas Relief

Finally, the Court recognizes that the *Heck* analysis may entail a fourth inquiry—whether the plaintiff had access to habeas relief. Relying on *Heck*'s progeny, Plaintiff contends that her false-arrest claims are not *Heck* barred because M.E. does not have access to federal habeas relief. (Doc. 27 at 13).[11] In his concurring opinion in *Heck*, Justice Souter noted his concern that the opinion of the Court could be interpreted as risking the rights of individuals who

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[11] Although Plaintiff cites this proposition, she does not explain in what way M.E. is precluded from seeking federal habeas relief. Neither party specifically addressed whether M.E. could pursue federal habeas relief. Nevertheless, for the purposes of this discussion, the Court assumes that M.E. does not have access to federal habeas relief.

do not have access to federal habeas relief, such as those who were only fined or who completed short terms of imprisonment, because those individuals would be barred from vindicating their federal civil rights in a federal forum through the only avenue that would be available to them—§ 1983. *Heck*, 512 U.S. at 500 (Souter, J., concurring). Justice Souter concluded that such a denial would be impermissible because it would "run counter to '§ 1983's history' and defeat the statute's 'purpose.'" *Id.* at 501. In response to Justice Souter's concern, Justice Scalia stated, "[w]e think the principle barring collateral attacks [on criminal convictions]—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10.

Subsequently, in *Spencer* v. *Kemna*, 523 U.S. 1 (1998), the Supreme Court addressed whether a habeas petition filed by an inmate no longer in custody presented a case or controversy under Article III, § 2 of the Constitution. The petitioner wished to challenge his parole revocation and filed a petition for a writ of habeas corpus, but his sentence expired before the district court could consider the petition on the merits. *Id.* at 5-6. The district court dismissed his petition as moot. *Id.* The petitioner appealed, arguing, in part, that because *Heck* "would foreclose him from pursuing a damages action under [§ 1983] unless he can establish the invalidity of his parole revocation, his action to establish the invalidity [of his parole revocation] cannot be moot." *Id.* at 17. The Court stated that "[t]his [argument] is a great non sequitur, unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be

available." *Id.* However, a majority of the Justices (four concurring and one dissenting) agreed that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Spencer*, 523 U.S. at 21 (Souter, J., concurring).

Based on the tension created by Justice Souter's concurring opinion in *Heck* and the "plurality" of *Spencer*, a circuit split has developed regarding the application of *Heck* to individuals who file claims under § 1983 and who do not have access to habeas relief, such as those who are no longer in custody due to the expiration of their sentences. On one hand, four circuits have declined to follow the concurring and dissenting opinions of *Spencer*, and have found that *Heck* applies to all § 1983 claimants regardless of whether the claimant has access to federal habeas relief.[12] But at least six circuits have found that the *Spencer* plurality permits a claimant to pursue relief under § 1983 when the claimant cannot pursue federal habeas relief.[13]

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[12] These circuits have declined to follow *Spencer* on the ground that *Heck* constitutes directly applicable precedent that has not been overruled or qualified by the Supreme Court. *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); *Figueroa* v. *Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998).

[13] *See Burd* v. *Sessler*, 702 F.3d 429, 435-36 (7th Cir. 2012); *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

Eleventh Circuit precedent is not entirely clear on this issue. The Eleventh Circuit first addressed the *Spencer* plurality in *Harden* v. *Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003), in considering the applicability of the *Heck* bar to an individual challenging unconstitutional extradition procedures under § 1983. *Id.* The Eleventh Circuit concluded that the plaintiff's § 1983 claims were not barred by *Heck*. In reaching this conclusion, the court first found that *Heck* did not apply to the plaintiff's § 1983 claims challenging the procedural defects of his extradition because the challenge would not impugn the plaintiff's conviction or sentence. *Id.* at 1296-98. Second, the court stated that "because federal habeas corpus is not available to a person extradited in violation of his or her federally protected rights, even where the extradition itself was illegal, § 1983 must be. If it were not, a claim for relief brought by a person already extradited would be placed beyond the scope of § 1983, when exactly the same claim could be redressed if brought by a person to be, but not yet, extradited." *Id.* at 1299 (citing *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring)).

The Eleventh Circuit similarly examined this issue in dicta from *Abusaid* v. *Hillsborough County Board*

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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." (internal citations and quotation marks omitted)); *Wilson* v. *Johnson*, 535 F.3d 262, 267-68 (4th Cir. 2008); *Powers* v. *Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 602-03 (6th Cir. 2007) (concluding that *Heck* does not constitute directly applicable precedent in a situation where habeas relief is unavailable because the plaintiff in *Heck* had access to habeas relief); *Nonnette* v. *Small*, 316 F.3d 872, 876-77 (9th Cir. 2002); *Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

of County Commissioners, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005). In *Abusaid*, a night-club owner was charged and convicted of violating an ordinance regulating "rave" or "dance halls," and was sentenced to eighteen months' probation. *Id.* at 1301. The owner subsequently sued the county, the county fire marshal, the county sheriff's office, and the board of county commissioners under § 1983, arguing that the ordinance was unconstitutional. *Id.* at 1302. The district court dismissed the owner's claims as barred by the Eleventh Amendment, and the Eleventh Circuit reversed. *Id.* at 1317. Although the court decided the case on Eleventh Amendment immunity grounds, it sua sponte raised the issue of whether the owner's claims would be barred by the *Heck* doctrine. *Id.* at 1316 n.9. The court stated that if "habeas relief is not available to [the plaintiff], . . . he *may* be entitled to bring a § 1983 suit." *Id.* (emphasis added). Nevertheless, the court concluded that whether *Heck* applied was a fact-intensive inquiry that would be better resolved by the district court upon a proper motion by one of the parties.

On remand, the district court found that, at the time the owner initiated his § 1983 action, he was no longer on probation or "in custody," and, therefore, habeas relief was unavailable to him. *Abusaid* v. *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 637 F. Supp. 2d 1002, 1018 (M.D. Fla. 2007). The district court then concluded that to the extent the owner's claims would necessarily imply the invalidity of his underlying convictions, his claims were barred by the *Heck* doctrine because the doctrine had not been

expressly overruled or qualified by the Supreme Court. *Id.* at 1019. The owner did not appeal.[14]

At first blush, the Eleventh Circuit's discussion of the *Heck* doctrine in *Harden* and *Abusaid* appears to indicate that the court is inclined to follow the *Spencer* plurality. However, in *Vickers* v. *Donahue*, 137 Fed. App'x 285, 289 (11th Cir. 2005), an unpublished opinion,[15] the Eleventh Circuit stated that "we have not explicitly ruled on whether a plaintiff who has no federal habeas remedy available to him may proceed under § 1983 despite the fact that success on the merits would undermine the validity of [his or her conviction or sentence]." In *Vickers*, the plaintiff was arrested following allegations that he violated the terms of his community control, and he was subsequently sentenced to nine months' imprisonment. *Id.* at 286. After serving his sentence, the plaintiff initiated a § 1983 action against several officers, alleging various claims, including a claim for malicious and false arrest. *Id.* at 287. Although the plaintiff no longer had access to habeas relief, the district court dismissed his claim for malicious and false arrest as barred by *Heck*, and the Eleventh Circuit affirmed. *Id.* at 290. The Eleventh Circuit concluded that it need not consider whether the unavailability of habeas relief prevented application

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[14] This Court notes that a ruling in favor of the owner on remand under *Heck* would have essentially allowed the owner to purposefully circumvent the *Heck* bar by waiting to pursue his civil claims until his eighteen-month probationary period expired.

[15] Under the Rules of the Eleventh Circuit, "unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2.

of the *Heck* bar because (1) the plaintiff could have appealed the revocation order, and, thus, he was not without a remedy to seek post-conviction relief, and (2) the plaintiff's § 1983 claim would imply the invalidity of the order of revocation. *Id.* at 289-90. Thus, the Eleventh Circuit held that the *Heck* bar applied to the plaintiff's § 1983 claim for malicious and false arrest "despite the unavailability of habeas relief." *Id.* at 290.

Next, in *McClish* v. *Nugent*, 483 F.3d 1231, the Eleventh Circuit examined the applicability of the *Heck* doctrine to a § 1983 plaintiff who was charged with a crime, but the charge was later dismissed for successful completion of a pretrial intervention program ("PTI"). The district court concluded that the plaintiff's claim was *Heck* barred because dismissal of his charge for participation in PTI was not a favorable termination. *Id.* at 1251. The Eleventh Circuit reversed, holding that *Heck* did not apply because the plaintiff was never convicted of a crime; thus, there was no need to satisfy the favorable-termination requirement. *Id.* The court further stated that even if *Heck* applied, the plaintiff "correctly cites to *Abusaid* . . . for the proposition that the Supreme Court has apparently receded from the idea that *Heck*'s favorable-termination requirement also applies to non-incarcerated individuals." *Id.* at 1251 n.19.

In another unpublished opinion, *Christy* v. *Sheriff of Palm Beach County*, 288 Fed. App'x 658 (11th Cir. 2008), the Eleventh Circuit upheld the district court's dismissal of a plaintiff's claims under § 1983 as barred by *Heck*. First, the court stated that if the plaintiff prevailed on the claims, it would necessarily imply the invalidity of his conviction. *Id.* at 666. The plaintiff argued that *Heck* did not apply to his claims because

habeas relief was unavailable to him, but the court rejected that argument stating that, "we have expressly declined to consider that issue in an opinion where the § 1983 action is otherwise barred under *Heck*."[16] *Id.*

The Eleventh Circuit opinions that have considered this issue and found that the plaintiff's claims were not barred by *Heck* have not addressed a situation analogous to the instant case where the plaintiff is both no longer in custody (i.e., habeas relief is unavailable) *and* the plaintiff's § 1983 claims would impugn his or her conviction or sentence. Rather, in each case where the Eleventh Circuit found that a plaintiff's claims were not barred by *Heck* and the plaintiff did not have access to habeas relief, the plaintiff's claims did not necessarily imply the invalidity of his or her conviction or sentence. *See Morrow*, 610 F.3d 1271; *Harden*, 320 F.3d 1289. In contrast, in each case where the Eleventh Circuit found that the unavailability of habeas relief would not preclude application of the *Heck* bar, the plaintiff's claims necessarily implied the invalidity of

[16] In *Johnson* v. *Greaves*, 366 Fed. App'x 976, 978 (11th Cir. 2010), the Eleventh Circuit upheld application of the *Heck* bar, rejecting plaintiff's contention "that the [district] court was required to consider the availability of habeas relief before determining that his case was barred by *Heck*." However, in *Morrow* v. *Federal Bureau of Prisons*, 610 F.3d 1271, 1272 (11th Cir. 2010), the Eleventh Circuit stated "we do not understand *Heck's* rule to extend to a case like this one: where Plaintiff is not in custody *and* where Plaintiff's action—even if decided in his favor—in no way implies the invalidity of his conviction or the sentence imposed by his conviction." (Emphasis added.).

a conviction.[17] *See Vickers*, 137 Fed. App'x 285; *Christy*, 288 Fed. App'x 658.

Thus, as to Plaintiff's claims for false arrest, the Court concludes that the unavailability of federal habeas review does not preclude application of the *Heck* doctrine. First, as discussed above, Plaintiff's claims for false arrest would necessarily imply the invalidity of the order of adjudication issued by the state court. *See Vickers*, 137 Fed. App'x at 289-90; *Christy*, 288 Fed. App'x at 665-66. And, second, federal habeas relief was not the only means by which M.E. could challenge her juvenile adjudication and disposition and thus receive a favorable termination. *See Domotor*, 630 F. Supp. 2d at 1380. M.E. could have appealed the order of adjudication or sought habeas relief through state avenues. *See* § 985.534, Fla. Stat. (allowing a juvenile to appeal a final order of the court under the Juvenile Justice Act, §§ 985.01-807, Fla. Stat.); *see also T.P.H.* v. *State*, 739 So. 2d

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[17] The district courts that have grappled with the unwieldy precedent in this area have reached the same conclusion. *See Baer* v. *Sapp*, No. 5:11cv248/MP/CJK, 2011 WL 9154681, at *6 (N.D. Fla. Dec. 29, 2011) (report and recommendation), *adopted by Baer* v. *Abel*, No. 5:11-cv- 00248-MP-CJK, 2012 WL 4466349 (N.D. Fla. Sept. 26, 2012); *Thro* v. *Bagwell*, No. 5:08cv120/RS/EMT, 2011 WL 3925040, at *6 (N.D. Fla. Aug. 9, 2011) (report and recommendation), *adopted by* 2011 WL 3925031 (N.D. Fla. Sept. 7, 2011); *Gray* v. *Kinsey*, No. 3:09cv324/LAC/MD, 2009 WL 2634205, at *8-9 (N.D. Fla. Aug. 25, 2009) (report and recommendation), *adopted by* 2009 WL 3157687 (N.D. Fla. Sept. 28, 2009); *Domotor* v. *Wennet*, 630 F. Supp. 2d 1368, 1380 (S.D. Fla. 2009), *affirmed*, 356 Fed. App'x 316 (11th Cir. 2009); *Abusaid*, 637 F. Supp. 2d at 1017-19; *Bilal* v. *City of Pensacola*, No. 3:05CV366 LAC/MD, 2006 WL 173692, at *6 (N.D. Fla. Jan. 24, 2006) (adopting report and recommendation).

1180, 1181 (Fla. 4th DCA 1999) (stating that a juvenile has a "constitutional right to appeal his [or her] adjudication of delinquency, disposition, and order of restitution"); *J.E.P.* v. *State*, 130 So. 3d 764, 765 (Fla. 2d DCA 2014) (stating that a petition for habeas corpus is the appropriate avenue for seeking postdisposition relief in juvenile cases).

5. Application of *Heck* to Plaintiff's Claims

Because Plaintiff's juvenile adjudication is equivalent to a conviction for *Heck* purposes, to the extent Plaintiff seeks damages under § 1983 for false arrest in Counts II and III, such claims are barred by *Heck*. Nevertheless, Plaintiff also raises claims for excessive force in Counts II and III, which the Officers do not contend are *Heck* barred. Accordingly, Counts II and III may proceed on this theory.

As to the Officers' contention that Plaintiff's state law claims for false arrest and false imprisonment are barred by *Heck* (Doc. 26 at 4, 9), the Court declines to consider whether state law claims are within the scope of the *Heck* doctrine because, as discussed in more detail below, Plaintiff's state law claims for false arrest and false imprisonment are due to be dismissed on other grounds.

II. Whether Plaintiff's state law claims for false arrest and false imprisonment are barred by the existence of probable cause.

The Officers argue that Plaintiff's state law claims for false arrest and false imprisonment (Counts IV and V) should be dismissed because M.E.'s adjudication of delinquency establishes probable cause for her arrest such that her state law claims for false arrest are barred. (Doc. 26 at 3, 9). Under Florida

law, the existence of probable cause is an absolute bar to a claim of false arrest. *See Bolanos* v. *Metro. Dade Cnty.*, 677 So. 2d 1005, 1005 (Fla. 3d DCA 1996); *see also Von Stein* v. *Brescher*, 904 F.2d 572, 584 n.19 (11th Cir. 1990). And "in the absence of fraud, prejudice, or any other corrupt means, a conviction is [a] sufficient determination of the element of probable cause," such that a claim for false arrest will be foreclosed. *Carter* v. *City of St. Petersburg*, 319 So. 2d 602, 604 (Fla. 2d DCA 1975); *see also Behm* v. *Campbell*, 925 So. 2d 1070, 1072 (Fla. 5th DCA 2006); *Moody* v. *City of Key West*, 805 So. 2d 1018, 1021 (Fla. 3d DCA 2001). Plaintiff does not allege that the juvenile adjudication was the product of fraud, prejudice, or other corrupt means.[18] Because M.E. was found to have violated § 843.02, Fla. Stat., by the juvenile court, under Florida law, probable cause for her arrest is conclusively established. Accordingly, Plaintiff's state law claims for false arrest and false imprisonment cannot succeed and should be dismissed.

III. Whether the Officers are entitled to qualified immunity on Plaintiff's § 1983 claims for false arrest.

Next, the Officers contend that M.E.'s claims for false arrest under § 1983 (Counts II and III) should be dismissed because the Officers are entitled to qualified immunity.[19] (Doc. 26 at 9-10). "The defense

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18 In fact, Plaintiff merely argues that the state law claims for false arrest and false imprisonment should not be dismissed because the Florida Constitution provides for greater protection against unreasonable searches and seizures. (Doc. 27 at 6-7). The Court fails to see how this contention is relevant to the arguments proffered by the Officers.

19 Again, the Officers do not argue that they are entitled to

of qualified immunity completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Cottone* v. *Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (internal citations and quotation marks omitted). To be entitled to qualified immunity, the government official must first prove that he or she was acting within his or her realm of discretionary authority. *Vinyard* v. *Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Here, Plaintiff does not dispute, and it is clear from the complaint, that the Officers were engaging in a discretionary function in investigating a claim of criminal mischief and in effectuating an arrest.

"Once a defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity." *Cottone*, 326 F.3d at 1358. To overcome qualified immunity, Plaintiff must satisfy a two-prong test. *See Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Plaintiff must show (1) that the Officers violated a constitutional right, and (2) the constitutional right violated was clearly established at the time of the alleged violation. *Id.* In other words, "[i]f, assuming the plaintiff's allegations were true, no such right would have been violated, the analysis is complete. However, if a constitutional violation can be made out on the plaintiff's facts, we then must determine whether, at the time of the arrest, every

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qualified immunity as to Plaintiff's claims for excessive force. Accordingly, the discussion is limited to the portions of Counts II and III alleging false arrest.

objectively reasonable officer would have realized the acts violated already clearly established federal law." *Davis* v. *Williams*, 451 F.3d 759, 762 (11th Cir. 2006).

With regard to a claim of false arrest, "[a] warrantless arrest without probable cause violates the Constitution and provides a basis for a section 1983 claim." *Kingsland* v. *City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). However, an action for an impermissible arrest is barred if probable cause existed at the time of arrest. *Wood* v. *Kesler*, 323 F.3d 872, 878 (11th Cir. 2003). An arrest is supported by probable cause when it is objectively reasonable based on the totality of the circumstances. *Rankin* v. *Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). It is well settled that "'[e]ven law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.'" *Wood*, 323 F.3d at 878 (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991)). The Eleventh Circuit frames this inquiry as whether an officer had "arguable probable cause." *Montoute* v. *Carr*, 114 F.3d 181, 184 (11th Cir. 1997). Because only arguable probable cause is needed, "the inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed." *Id.* at 184.

Plaintiff argues that the Officers lacked reasonable suspicion to first detain M.E. and subsequently lacked probable cause to arrest her. According to Plaintiff, at the time Officer Livingston stopped M.E., M.E. was not in close proximity to the building where the criminal mischief occurred, and Officer Livingston had already been informed by another officer that M.E. and the group she was with

was not involved in the criminal mischief the Officers were investigating. (Doc. 1 at 3). Officer Livingston instructed M.E. that she was not free to leave and requested that she provide her name and address. (*Id.* at 4). M.E. refused to provide her name and address, at which point she avers that Officer Livingston grabbed her, threw her to the ground, and arrested her for resisting an officer without violence.[20] (*Id.*). Based on the facts as alleged by Plaintiff, it was not objectively reasonable for the Officers to detain M.E. or to arrest her, and, therefore, the Officers lacked reasonable suspicion and arguable probable cause.

However, the Officers do not argue that the facts as alleged by Plaintiff give rise to actual, or even arguable probable cause, to arrest M.E. Rather, similar to the Officers' argument regarding Plaintiff's state law claims for false arrest, the Officers contend that M.E.'s juvenile adjudication constitutes conclusive proof that the Officers had probable cause to arrest M.E, and, therefore, the Officers are entitled to qualified immunity. (Doc. 26 at 3). Persuasive authority exists on each side of this issue.[21] The Court

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[20] As expected, the Officers' account of the situation differed from that of M.E.'s (Doc. 34, Ex. A); however, for the purposes of determining whether the Officers are entitled to qualified immunity at the motion to dismiss stage, the Court accepts M.E.'s account of events, although lacking in detail.

[21] *Compare Epstein* v. *Toys-R-Us Del., Inc.*, 277 F. Supp. 2d 1266, 1274-75 (S.D. Fla. 2003), *aff'd sub nom.*, 116 Fed. App'x 241 (11th Cir. 2004) (concluding that probable cause for an arrest was conclusively established by the plaintiff's conviction for the purposes of qualified immunity); *with Colosimo* v. *City of Port Orange*, No. 604CV1491ORL31DAB, 2005 WL 1421294, at *4-5 (M.D. Fla. June 16, 2005) (rejecting defendant's argument that a conviction was conclusive proof of probable cause and finding that probable cause should be determined by facts in the officer's

concludes that M.E.'s adjudication of delinquency constitutes conclusive proof of probable cause. In *Colosimo*, the Court found that a conviction could not support a finding of probable cause on qualified immunity because the conviction could be based on facts that arose after the arrest. *Colosimo*, 2005 WL 1421294, at *4-5. The reasoning in *Colosimo*, however, is not applicable to the facts of this case. M.E. committed the offense in the Officers' presence and the facts that support her adjudication of delinquency are the same facts that would support a finding of probable cause for her arrest. And, as an element of the offense of resisting an officer without violence, the state court had to find that the Officers were engaged in a lawful execution of a duty. Such a finding would necessarily entail a finding that the Officers had probable cause to arrest M.E. Thus, M.E.'s juvenile adjudication is evidence that probable cause existed to arrest M.E., and the Officers are entitled to qualified immunity on Plaintiff's claims for false arrest under § 1983. *See Abdullah* v. *City of Jacksonville*, No. 3:04-cv-667-J-32TEM, 2006 WL 2789137, at *6 (M.D. Fla. Sept. 26, 2006) (finding that a conviction "illustrate[d] as a matter of law that there existed arguable probable cause for the arrest").

Because the Officers are entitled to qualified immunity as to Plaintiff's claims for false arrest under § 1983, Counts II and III are also due to be dismissed

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knowledge at the time of arrest and should not be determined on a post hoc basis); *see also Brown* v. *Willey*, 391 F.3d 968, 969 (8th Cir. 2004) (holding that a state court conviction was conclusive proof of probable cause, and, therefore, the plaintiffs' claim for false arrest was barred).

on this ground to the extent they allege claims for false arrest.[22]

IV. Whether Plaintiff's official capacity claims against the Officers are duplicative of her claims against the City.

The Officers contend that Counts II through V should be dismissed to the extent they seek redress against the Officers in their official capacities because those claims amount to claims against the City and are merely duplicative of claims already alleged in the complaint. (Doc. 26 at 10). Plaintiff clarifies in her response to the motion to dismiss that she is only asserting claims against the Officers in their official capacities under Counts IV and V for false arrest and false imprisonment under state law. (Doc. 27 at 20). The Court has already determined that Plaintiff's state law claims for false arrest and false imprisonment are due to be dismissed. Accordingly, whether the state law claims against the Officers in their official capacities are duplicative of claims alleged against the City is now moot.

V. Whether Plaintiff fails to state a claim for assault against Officer Livingston.

Finally, Officer Livingston argues that Plaintiff's claim for assault (Count VII) should be dismissed because it fails to state a claim upon which relief could be granted.[23] (Doc. 26 at 11). Under Florida law, "[a]n 'assault' is an intentional, unlawful offer of corporal

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[22] Counts II and III may proceed to the extent they allege claims for excessive force under § 1983.

[23] Count VII alleges claims for both assault and battery, but the Officers only challenge Count VII as to Plaintiff's claim for assault. (Doc. 26 at 11).

injury to another by force, or exertion of force directed toward another under such circumstances as to create a reasonable fear of imminent peril." *Sullivan* v. *Atl. Fed. Sav. & Loan Assoc.*, 454 So. 2d 52, 54 (Fla. 4th DCA 1984).

To prove her claim for assault, Plaintiff "need not plead specific facts for *every* element." *Snow* v. *DirecTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006). Rather, Plaintiff must provide "either direct or inferential allegations respecting all *material* elements of a cause of action." *Id.*; *see also Roe* v. *Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) ("[A]t a minimum, notice pleading requires that a complaint contain inferential allegations from which [the court] can identify each of the material elements necessary to sustain a recovery under some viable legal theory."). Officer Livingston argues that Plaintiff's claim for assault fails because Plaintiff did not specifically allege a well-founded fear of imminent violence. (Doc. 26 at 11). Plaintiff counters that the facts as alleged allow for the reasonable inference that M.E. had a well-founded fear of imminent violence. (Doc. 27 at 19).

Because Plaintiff alleged that Officer Livingston forcibly grabbed M.E. and threw her to the ground, at the motion to dismiss stage, the facts as alleged provide an adequate basis to infer that M.E. experienced a well-founded fear of imminent violence. Thus, Plaintiff has alleged sufficient facts to establish a prima facie claim for assault, and the Officers are not entitled to dismissal of this claim.

As an additional matter, because the Court has concluded that M.E.'s arrest was based upon probable cause, Plaintiff's claim for assault and battery against

Officer Livingston may only survive to the extent it constitutes a claim for the use of excessive force. Under Florida law, "police officers are entitled to a presumption of good faith in regard to the use of force applied during a lawful arrest, and officers are only liable for damage where the force used is 'clearly excessive.'" *Davis* v. *Williams,* 451 F.3d 759, 768 (11th Cir.2006) (quoting *City of Miami* v. *Sanders,* 672 So. 2d 46, 47 (Fla. 3d DCA 1996)). "If an officer uses excessive force, 'the ordinarily protected use of force is transformed into a battery.'" *Id.* (quoting *Sanders*, 672 So. 2d at 47 (internal punctuation omitted)).[24]

CONCLUSION

Accordingly, it is therefore **ORDERED AND ADJUDGED** that:

1. Defendants Brett Livingston and Ivelisse Severance's *Renewed* Motion to Dismiss Counts II through V and Count VII of Plaintiff's Complaint (Doc. 26) is GRANTED in part and DENIED in part, as follows:

A. The motion is GRANTED to the extent:

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[24] Florida law does not recognize a separate claim of "excessive force." *See McDermott* v. *Brevard Cnty. Sheriff's Office*, No. 6:07-cv-150-Orl-31KRS, 2007 WL 788377, at *4 (M.D. Fla. Mar. 14, 2007) (finding that the plaintiff stated a cause of action under Florida law for excessive force through the vehicle of a claim for assault and battery). Rather, a claim for excessive force in Florida is generally plead as a battery or an assault and battery, and is premised upon an officer's use of force above and beyond that needed to effect an arrest. *See Sanders*, 672 So. 2d at 47. Nevertheless, a claim for assault and battery premised upon the use of excessive force is essentially the state-law counterpart to a § 1983 excessive force claim.

i. Count II is DISMISSED with respect to Plaintiff's allegations of false arrest under § 1983 against Officer Livingston but may proceed on the remaining grounds raised;

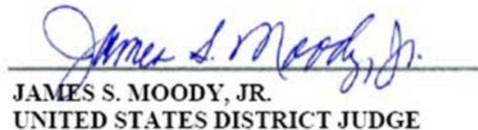
ii. Count III is DISMISSED with respect to Plaintiff's allegations of false arrest under § 1983 against Officer Severance but may proceed on the remaining grounds raised;

iii. Count IV is DISMISSED in its entirety; and

iv. Count V is DISMISSED in its entirety.

B. The motion is DENIED to the extent the Officers seek dismissal of the remaining grounds of Counts II and III and Count VII.

DONE AND ORDERED at Tampa, Florida on this 10th day of November, 2014.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

<u>Copies furnished to</u>:
Counsel/Parties of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MARIE L. HENRY,
Plaintiff,

v. Case No: 5:13-cv-528-Oc-30PRL

CITY OF MT. DORA, BRETT LIVINGSTON and L. SEVERANCE,
Defendants.

ORDER OF DISMISSAL

Before the Court is the Stipulation of Dismissal With Prejudice Pursuant to Rule 41(a)(1)(A)(ii), Federal Rules of Civil Procedure (Dkt. #61). Upon review and consideration, it is

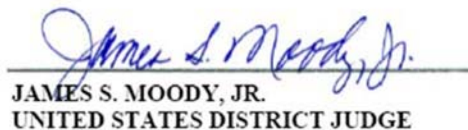
ORDERED AND ADJUDGED as follows:

1. This cause is dismissed with prejudice, each party to bear their own attorney's fees and costs.

2. All pending motions are denied as moot.

3. The Clerk is directed to close this case.

DONE and **ORDERED** in Tampa, Florida, this 27th day of February, 2015.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11351

MARIE HENRY,
as guardian, parent, next of kin, and for and on behalf of M.E. Henry-Robinson, a minor,

Plaintiff - Appellant,

versus

CITY OF MT. DORA, a municipal corporation and political subdivision of the State of Florida,
BRETT LIVINGSTON, individually and in his official capacity,
L. SEVERANCE, individually and in her official capacity,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR REHEARING AND PEITTION(S) FOR REHEARING EN BANC

BEFORE: HULL, JULIE CARNES, and BARKSDALE,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

ORD-42

[August 2, 2017]

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* Honorable Rhesa H. Barksdale, United States Circuit Judge for the Fifth Circuit, sitting by designation