IN THE

Supreme Court of the United States

FRANK A. SKINNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and BUREAU OF PRISONS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prisoner's federal damages claims challenging disciplinary segregation and the loss of visitation rights and commissary privileges resulting from certain alleged prisoner misconduct -- claims that otherwise could proceed without exhaustion of habeas remedies -- nonetheless must be dismissed in favor of habeas because prison officials also chose to revoke good-time credits based on the same incident, and any challenge to the revocation of good-time credits would lie exclusively in habeas.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

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The opinion of the court of appeals (*see* Petitioner's Appendix ("Pet. App.") 1a-18a) is reported at 584 F.3d 1093. The order of the court of appeals denying petitioner's petition for rehearing *en banc* (*see* Pet. App. 40a-41a) is not reported. The relevant opinions of the district court (*id.* at 19a-24a, 25a-29a, 30a-39a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. Petitioner timely filed a petition for rehearing *en banc*. The court of appeals denied the petition for rehearing *en banc* on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of statutory provisions involved in the case is set out in the accompanying appendix.

STATEMENT

This case raises a question that two Justices of this Court previously have found cert-worthy -- namely, the extent to which prisoners must proceed exclusively in habeas when their civil claims "include challenges to the conditions, as well as to the length or duration, of confinement." *Bressman v. Farrier,* 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari). The court of appeals in this case, joining the Eighth Circuit, held that even challenges to the conditions of confinement (such as placement in segregation and limitations on various daily privileges)

must be pursued through habeas if prison officials teamed with that punishment the revocation of good-time credits. The Second, Seventh, and Eleventh Circuits have reached a contrary view, concluding that to deem habeas exclusive in such circumstances impermissibly would encourage prison officials to include the revocation of good-time credits with any other punishment they parcel out, simply to insulate their actions with respect to the other discipline from civil attack. In light of the conflict in the circuits, and because the court of appeals' decision ultimately is in tension with decisions of this Court and the issue presented has important jurisprudential and practical implications, the Court should grant the petition for certiorari.

1. Petitioner Frank A. Skinner is a federal prisoner who was, at the times relevant to this case, housed in a Bureau of Prisons ("BOP") facility in Atlanta, Georgia. *See* Pet. App. 2a. In November 2001, staff at the facility searched Skinner's cell and found a white powder. *See id.* Thereafter, on January 28, 2002, the BOP conducted an internal disciplinary hearing, at which Skinner testified that the white powder was "Tide washing powder." *Id.* at 2a-3a. The hearing officer, however, rejected that testimony, instead siding with the staff's position, supposedly proven by BOP drug test results, that the white powder was cocaine. *See id.* at 3a; Appendix of Ct.-Appointed Amicus Curiae in Ct. of Appeals ("C.A. App.") A27, A31, A155. The hearing officer imposed "mixed" sanctions on Skinner for the alleged possession of cocaine -- that is, punishment affecting both the conditions of his confinement and the duration of his confinement. With respect to the former, the hearing officer imposed punishment of 60 days of disciplinary segregation, the denial of visita-

tion rights for a year, and the denial of commissary privileges for 180 days; as to the duration of his confinement, the hearing officer revoked 40 days of good-time credits. *See* Pet. App. 3a.

Just after the November 2001 search of Skinner's cell, and several weeks before the disciplinary hearing, the BOP had referred the matter to the Federal Bureau of Investigation ("FBI") for potential criminal prosecution. *See id.*; C.A. App. A30. On February 12, 2002 (*i.e.*, after the disciplinary hearing), the FBI issued a letter to the BOP that it was declining to prosecute Skinner, particularly given that it believed the incident, at a minimum, could not "result in a criminal prosecution of greater penal consequences than which can be imposed by the BOP administrative remedies and actions." C.A. App. A159.

In July 2002, Skinner filed a Freedom of Information Act request with the FBI, seeking information associated with the FBI's investigation. *See* Pet. App. 3a. The FBI found 18 pages of material responsive to his request, but withheld production until it could be reviewed by the BOP. *See id.* A month later, the BOP released the material to Skinner. *See id.* One of the documents was the referral form that the BOP had sent to the FBI. *See id.*; C.A. App. A30. The form contained a typed paragraph stating that chemical tests conducted by the BOP indicated the white powder in Skinner's cell was cocaine. *See* Pet. App. 3a; C.A. App. A30. Below that paragraph was the following handwritten notation: "Actually laundry detergent." C.A. App. A30; *see* Pet. App. 3a-4a. Though the record does not reveal who made the notation, Skinner contends that it was the FBI; indeed, the

handwriting in which the notation is made appears at least superficially to match the handwriting of the FBI official who initialed the form elsewhere. *See* Pet. App. 4a; C.A. App. A30; *see generally* Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals at 9. The form, with the "Actually laundry detergent" notation, is marked in handwriting with the date "1/17/02" -- *i.e.*, a date prior to the disciplinary hearing. C.A. App. A30. Nonetheless, the form was not included in the file that the BOP hearing officer considered in the disciplinary proceeding. *See id.* at A155; *see also* Pet. App. 4a.

2. In August 2004, Skinner filed a *pro se* complaint in the U.S. District Court for the District of Columbia, seeking, in part, damages for violations of the Privacy Act, 5 U.S.C. § 552a. *See* C.A. App. A26-A29. As pertinent here, the Privacy Act requires federal agencies to ensure that any records used in "making any determination about any individual" are "maintain[ed] . . . with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." *Id.* § 552a(e)(5). Section 552a(g)(1)(C) permits an individual to bring a civil action against an agency if the agency "fails to maintain any record concerning [the] individual with such accuracy, relevance, timeliness, and completeness" and "consequently a determination is made which is adverse to the individual." *Id.* § 552a(g)(1)(C). If the court in the civil action finds that the agency "acted in a manner which was intentional or willful," the United States is liable for "actual damages sustained by the individual as a result of" the agency's failure properly to maintain the record. *Id.* § 552a(g)(4)(A). Distilling these statutory provisions, the D.C. Circuit has held that, "to make out a claim for

damages, a 'plaintiff must allege: inaccurate records, agency intent, proximate causation, and an "adverse determination."'" Pet. App. 8a (quoting *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002)).

In support of his damages claims, Skinner alleged that the BOP "deliberately" created a "fals[e]" and incomplete record upon which the "Disciplinary Hearing Officer" relied. C.A. App. A155. In particular, as the court of appeals summarized it, "Skinner assert[ed] that [the] 'BOP fabricated its drug test results' and 'purposefully excluded the [allegedly exculpatory] Referral Form from [his] records in order to retaliate against or otherwise punish him' for an assault complaint he had filed against a prison guard." Pet. App. 13a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals, and citing Compl. and Pls.' Mot. in D. Ct. to Alter of Amend D. Ct. Judg.).

In his prayer for relief in the complaint, Skinner requested "[d]amages for placement in segregation on November 27, 2001 thr[ough] March 26, 2002 [of] ([$]1,000.00 a month x 5 months) $5,000 dollars actual damages." C.A. App. A28. He also sought "[d]amages for adverse effect in record determining custody, classification, job, quarter assignment and los[s] of forty (40) days good conduct credits not less than $5,000." *Id.* In addition, he requested "fines" totaling "$10,000 . . . against the United States as well as litigation costs and Attorney fees." *Id.* at A28-A29. Accordingly, Skinner sought "a total of $20,000 . . . for intentional or willful acts in this Action." *Id.* at A29. Skinner did not seek restoration of the lost good-time credits.

3. In the district court proceedings, the BOP moved to dismiss Skinner's complaint on the grounds that the BOP supposedly had exempted itself from the provisions of the Privacy Act requiring accurate record keeping and thus could not be sued here for damages for the use of inaccurate records. *See* Pet. App. 4a. In this respect, the Privacy Act does authorize an agency to exempt itself, through notice and comment rulemaking, from aspects of the Privacy Act. *See* 5 U.S.C. § 552a(j). The BOP also asserted that Skinner had failed to exhaust administrative remedies. *See* Pet. App. 5a. Finally, in a single footnote, the BOP raised the prospect of habeas being an exclusive remedy and "'reserve[d] the right to brief [the habeas] point at some later stage of the litigation if such stage should come to pass.'" *Id.* at 17a (court of appeals quoting BOP Br. in D. Ct.).

The district court dismissed the complaint on the grounds that the BOP had exempted itself from the accurate-recordkeeping provisions of the Privacy Act. *See* Pet. App. 21a-24a. In moving for dismissal, however, the BOP had not explained to the district court that the relevant BOP exemption regulations did not become effective until well after the January 2001 disciplinary hearing at issue in Skinner's complaint -- namely, not until August 2002. *See* 28 C.F.R. § 16.97(j); *Privacy Act of 1974: Implementation*, 67 Fed. Reg. 51,754 (Aug. 9, 2002). Because Skinner believed that the district court had impermissibly applied the BOP's exemption regulations retroactively to him, he moved to alter or amend the district court's judgment, though after he had also filed a notice of appeal to the D.C. Circuit. *See* C.A. App. A155-A157. The district court then indicated that it was "inclined

to grant" Skinner's motion (having converted it to a motion under Fed. R. Civ. P. 60(b) because it was filed outside of the time for filing a motion to alter or amend a judgment under Fed. R. Civ. P. 59); but the district court added that it could not do so, because the notice of appeal divested the district court of jurisdiction. Pet. App. 28a.

4. On appeal, the D.C. Circuit initially held the matter in abeyance and requested a ruling from the district court on Skinner's motion to alter or amend the judgment. The district court then issued another ruling, but did not address the retroactivity of the BOP's exemption regulations. Instead, the district court denied Skinner's motion to alter or amend the judgment on the grounds that there purportedly was insufficient evidence (though no discovery had been taken) to support a claim that the BOP had intentionally used inaccurate or incomplete records to make a determination adverse to Skinner. Pet. App. 37a-39a. The district court nowhere addressed the referral form to the FBI containing the words "Actually laundry detergent" or the form's absence from the decisional file considered by the hearing officer in the January 2002 disciplinary proceeding.

In its decision on the merits, the D.C. Circuit affirmed the district court's dismissal of Skinner's complaint. It did so on a ground not addressed by the district court: the exclusivity of habeas. The court of appeals first began by summarizing this Court's and its own decisions regarding the exclusivity of habeas versus civil remedies invoked by prisoners. It noted that, under the precedents, "'[c]hallenges to the validity of any confinement or to particulars affecting its

duration are the province of habeas corpus'"; "[i]f success in a 'damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.'" Pet. App. 11a (quoting *Muhammad v. Close*, 540 U.S. 749, 750, 751 (2004) (per curiam)). Invoking those principles, the court of appeals concluded that Skinner's Privacy Act claims for damages must exclusively proceed first through habeas because, "[i]f Skinner were to succeed in demonstrating that BOP intentionally or willfully maintained and acted upon a false record of drug possession, 'plainly the recision of good time would have to be overturned, thus accelerating [Skinner's] release.'" *Id.* at 13a (quoting *Razzoli v. Bur. of Prisons*, 230 F.3d 371, 374 (D.C. Cir. 2000)).

The court of appeals then addressed Skinner's contention "that, even if his claim for damages for loss of good time must first proceed in habeas, the same is not true of his claims for 'damages for other, separate disciplinary harms.'" Pet. App. 14a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals). Rejecting Skinner's argument, the court said:

> [A]lthough those other punishments -- namely, disciplinary segregation and the loss of visitation rights and commissary privileges -- did not affect the length of Skinner's incarceration, they are not 'separate' from the punishment that did. As Skinner's complaint avers, all of his punishments resulted from the same "Incorrect Information" in his file -- and from the same finding of guilt at

> the same hearing on the basis of that information. Compl. at 1. . . . [B]ecause recovery for the "other, separate disciplinary harms" depends on overturning the adverse determination that also led to his loss of good-time credits, if Skinner were to win damages for the former, he would necessarily have demonstrated the invalidity of the latter.

Pet. App. 14a-15a (footnote omitted). Accordingly, because the court of appeals believed "that the good time, segregation, and commissary sanctions were all based on the same finding that Skinner possessed cocaine rather than detergent," even the claims challenging sanctions having no effect on the duration of his custody were "not cognizable unless Skinner first secures relief through a writ of habeas corpus." *Id.* at 15a n.6, 18a.

Finally, the court of appeals rejected Skinner's argument that a damages claim concerning the non-durational punishment could be resolved favorably without "'*necessarily* imply[ing] the invalidity of the deprivation of his good-time credits' as well." *Id.* at 11a (quoting *Edwards v. Balisok*, 520 U.S. 641, 646-47 (1997)) (emphasis added). Skinner had asserted that, "[h]ad the hearing officer seen the [referral] form"--leading the hearing officer to believe there was a dispute in drug testing results between the BOP and the FBI -- "that might have been enough to keep him from ordering Skinner held in segregation [*i.e.*, potentially the harshest of the punishments], even if not enough to prevent him from revoking Skinner's good-time credits." *Id.* at 15a. But the court of appeals held otherwise, emphasizing that, to succeed in obtaining

damages for the segregation, "Skinner must show that BOP *intentionally or willfully* kept the allegedly exculpatory FBI form out of his disciplinary hearing." *Id.* (emphasis in original). Such "a showing," in the court's view, inevitably must also result in invalidation of the loss of good-time credits. *Id.* at 15a-16a. The court added that, even if success on the damages claim for the segregation would not "necessarily imply" the invalidity of the loss of good time, it was enough under its own precedents that the "'non-habeas claim would have *a merely probabilistic* impact on the duration of custody.'" *Id.* at 16a n.7 (quoting *Razzoli*, 230 F.3d at 373) (emphasis added).

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision Conflicts with the Decisions of Other Circuits

The question in this case concerns the demarcation between habeas remedies and civil claims in prisoner situations, a subject matter explored in a now lengthy line of this Court's decisions dealing with state prisoners seeking relief under 42 U.S.C. § 1983. *E.g.*, *Wilkinson v. Dotson*, 544 U.S. 74 (2005); *Muhammad v. Close*, 540 U.S. 749 (2004) (per curiam); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

"These cases, taken together, indicate" that a prisoner's civil action "is barred . . . -- no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) -- if success in that action would *necessarily* demonstrate the inva-

lidity of *confinement or its duration*." *Wilkinson*, 544 U.S. at 81-82 (emphasis altered). Stated differently, "[t]hroughout the legal journey [beginning with] . . . *Preiser*," the Court has insisted that "state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement -- either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody." *Id.* at 81 (emphasis removed). Notably, three of the decisions in which the Court found § 1983 claims in some measure barred by habeas involved challenges to prison disciplinary proceedings that had resulted in the revocation of earlier-earned good-time credits, since success on the claims would have meant, or necessarily implied, a shorter prison stay. *See Balisok*, 520 U.S. at 643; *Wolff*, 418 U.S. at 555; *Preiser*, 411 U.S. at 476.

At the same time, the Court has emphasized that a prisoner *can* pursue civil remedies, irrespective of habeas, to contest the lawfulness of "prison disciplinary proceedings in the absence of any implication going to the fact or duration of [the] underlying sentence." *Muhammad*, 540 U.S. at 754. While "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus, . . . requests for relief turning on circumstances of confinement may be presented in a § 1983 action." *Id.* at 750. Thus, the Court in *Muhammad* allowed a § 1983 action to go forward, where the prisoner sought damages for allegedly being placed unlawfully in "detention and deprived of privileges for 30 days as penalties for insolence." *Id.* at 753; *see also Wilkinson*, 544 U.S. at 82 (permitting § 1983 challenge

to state parole board procedures that would lead to "new [parole] eligibility review," as opposed to "immediate release" or "a shorter stay in prison").

Among, however, the questions "left open" in the Court's jurisprudence on habeas's exclusivity -- and at issue in this case -- is "whether, where disciplinary proceedings result in sanctions that affect both the conditions of confinement as well as its duration, a prisoner can proceed separately with a [civil] . . . claim with respect to the parts of his punishment affecting only the conditions of confinement." *Peralta v. Vasquez*, 467 F.3d 98, 103 (2d Cir. 2006). As commentators have put it:

> There is . . . the problem of mixed claims. What if a disciplinary hearing, which is allegedly procedurally inadequate, leads to the imposition of both a sanction with durational implications and a sanction without durational implications? For example, a prisoner might be placed in more restrictive confinement conditions and deprived of accumulated good-time credits. The former, if imposed alone, would be cognizable under § 1983 because it does not trigger *Heck* [*v. Humphrey, supra*] at all. The problem is that prevailing in a procedural challenge to the hearing that imposed restrictive confinement necessarily implies that the other penalty -- the deprivation of good-time credits, which is clearly within the *Heck* bar -- is also invalid.

Nancy J. King & Suzanna Sherry, *Habeas Corpus and State Sentencing Reform: A Story of Unintended Con-*

sequences, 58 Duke L.J. 1, 33 (Oct. 2008) ["King & Sherry"].

On the issue of mixed claims, the courts of appeals "have come to different conclusions." *Id.* at 34. On one end of the spectrum is the D.C. Circuit, as reflected in this case. Skinner, through his civil claims, sought damages for unlawful segregation and for loss of privileges *as well as* for the loss of good-time credits. Although all of the punishments, except for the loss of good-time credits, "did not affect the length of Skinner's incarceration," the court of appeals found his civil claims relating to the non-durational punishments unactionable because "recovery for the 'other, separate disciplinary harms' depends on overturning the adverse determination that also led to his loss of good-time credits." Pet. App. 14a, 15a (quoting Br. of Ct.-Appointed Amicus Curiae in Ct. of Appeals). Likewise, the Eighth Circuit has concluded that a § 1983 action is barred where the prisoner challenges prison "disciplinary action, resulting in the forfeiture of good-time credits *and* disciplinary segregation." *Bressman v. Farrier*, 900 F.2d 1305, 1308 (8th Cir. 1990); *accord Offett v. Solem*, 823 F.2d 1256, 1260 (8th Cir. 1987).

In the middle of the spectrum is the Second Circuit. In *Peralta v. Vasquez*, 467 F.3d 98 (2d Cir. 2006), the prisoner challenged in a § 1983 action the constitutionality of a disciplinary proceeding that had resulted in "a penalty of five years of confinement in the Special Housing Unit . . ., five years loss of packages, commissary, and telephone privileges, and five years loss of good-time credits." *Id.* at 100. Judge Calabresi, writing for the court, noted at the outset that the *Preiser* line of cases plainly mandated the exhaustion of ha-

beas remedies -- what he termed a "'favorable termination requirement'" -- prior to disputing in a civil action "a sanction that affects the duration of [a prisoner's] sentence, such as the deprivation of good-time credits." *Id.* But he also emphasized that it "is not clear" what should occur "in 'mixed sanctions' cases." *Id.*

Ultimately, Judge Calabresi devised what has since been described as an "ingenious solution" (King & Sherry, 58 Duke L.J. at 34) to "this open question." *Peralta*, 467 F.3d at 100. The Second Circuit in *Peralta* held that, in a mixed sanctions case, "a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated [through habeas], proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement"; however, the court added the caveat that the prisoner "may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his confinement." *Id.* That agreement would need to be made "formally" on the record, so that "judicial estoppel" would thereafter attach to the prisoner's agreement. *Id.* at 105-06.

In reaching that result, the Second Circuit was convinced that "unfortunate incentives" would accompany a blanket rule against pursuing civil claims with respect to the non-durational aspects of a mixed sanctions case (such as the rule adopted by the D.C. Circuit here and the Eighth Circuit). *Id.* at 106 n.8. "[T]he rule advanced by the defendants, which, absent favorable termination, would ban a § 1983 action whenever a disciplinary proceeding resulted in the

extension of confinement as well as a change in confinement conditions, would create the incentive to include as part of every instance of prisoner punishment a sanction that affected the duration of the prisoner's sentence -- even if it would just be the loss of one day's worth of good-time credit." *Id.* Yet, the court did not unqualifiedly endorse the § 1983 claim (*i.e.*, allow it without a waiver of future challenges to durational aspects of the punishment) because, otherwise, if the "prisoner prevails in his § 1983, conditions of confinement, action, he may, seek to estop the state, collaterally, from defending the sanctions affecting length of imprisonment" -- a consequence that the Second Circuit deemed inconsistent with *Preiser* and its progeny. *Id.* at 105.

On the other end of the spectrum from the D.C. Circuit and the Eighth Circuit are the Seventh and Eleventh Circuits, both of which have authorized, without the restriction put in place by the Second Circuit in *Peralta*, civil challenges to non-durational aspects of punishment resulting from disciplinary proceedings that also led to the revocation of good-time credits. In *Viens v. Daniels*, 871 F.2d 1328 (7th Cir. 1989), state prisoners challenged in a § 1983 action a disciplinary proceeding in which prison officials "revoked 360 days of each plaintiffs' good time credits, ordered plaintiffs placed in disciplinary segregation for 360 days and demoted the plaintiffs from 'A' grade to 'C' grade for 360 days," which resulted in them losing their prison jobs. *Id.* at 1330.

The *Viens* court permitted declaratory, injunctive, and damages claims to proceed without the exhaustion of habeas remedies, because the state officials, "as the

outcome of the hearings challenged here, imposed substantial discipline on the plaintiffs apart from the revocation of good time." *Id.* Though any effort to "seek restoration of good time" was barred, the § 1983 claims "otherwise" could proceed. *Id.* The court recognized that a favorable ruling in the § 1983 case might "act as collateral estoppel in a later habeas corpus proceeding seeking restoration of good time," but nonetheless authorized the § 1983 claim because, "under the collateral estoppel standard [pressed by the defendants,] the state could insulate every imposition of discipline from attack under section 1983 by simply revoking one hour, or one day of good time as part of every punishment it imposed." *Id.* at 1330, 1333. The court did, however, emphasize that the punishments, other than the revocation of good-time credits, must be "substantial" so that prisoners cannot be seen as "challeng[ing] these sanctions merely as a pretext to attack[ing] the revocation of good time." *Id.* at 1334; *accord id.* at 1336 (Ripple, J., concurring) ("[T]he Adjustment Committee imposed substantial discipline on the plaintiffs apart from the revocation of good time. This action therefore is *primarily* a challenge to the conditions of confinement, not its duration . . . .") (emphasis added).[1]

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[1] There may be some question whether dueling standards exist in the Seventh Circuit in mixed sanctions cases. Notwithstanding *Viens*, a subsequent panel of the Seventh Circuit -- in a case in which the prisoner actually pursued habeas rather than § 1983 -- held that habeas was the exclusive remedy for asserting that "Indiana violated the due process clause of the fourteenth amendment when it placed him in disciplinary segregation and reduced his

Like the Seventh Circuit in *Viens*, the Eleventh Circuit has not relegated solely to habeas a challenge to disciplinary proceedings that led both to durational and non-durational punishments. *See Gwin v. Snow*, 870 F.2d 616 (11th Cir. 1989). In *Gwin*, a prisoner alleged in a § 1983 action that a prison disciplinary board "practiced racial discrimination" in its decision-making, resulting in both a denial of parole and a denial of "a compassionate leave when his mother died." *Id.* at 618. Though the Eleventh Circuit said the lower court "properly dismissed Gwin's challenge to his denial of parole" in light of *Preiser*, it held that Gwin could bring his "claim challenging the denial of compassionate leave" without "exhausting state [habeas] remedies." *Id.* at 620, 624, 619. The latter claim, "if successful, will not lessen the duration of his sentence by one day." *Id.* at 624.

In sum, then, the courts of appeals have adopted divergent approaches on the exclusivity of habeas in

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credit-earning class." *Montgomery v. Anderson*, 262 F.3d 641, 643 (7th Cir. 2001). Though the court held that the prisoner "cannot use § 1983 to challenge his segregation," it addressed the point perfunctorily in a few sentences. *Id.* Moreover, had the *Montgomery* panel actually intended to depart from *Viens*, circuit rules required the panel to note in the opinion both the departure and that the opinion had been circulated to the full court preliminarily for review, neither of which are, in fact, noted in the *Montgomery* decision. *See* Seventh Cir. R. 40(e). Such a situation "counsels in favor of construing [*Viens*] to mean what it says, rather than attributing to [*Montgomery*] a repudiation of existing authority both silent and sweeping." *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 891 (7th Cir. 1996).

mixed cases. Had Skinner's case arisen in the Second Circuit, the courts would have permitted him to pursue in a civil case a damages claim challenging his segregation and loss of prison privileges, so long as he formally renounced any effort ever to challenge the loss of good-time credits. Had his case arisen in the Seventh or Eleventh Circuits, he could have pursued the civil case even without any such renunciation, particularly because the punishment he faced other than the loss of good time was substantial. Because his case instead arose in the D.C. Circuit (and likewise if it had arisen in the Eighth Circuit), his civil claims were altogether foreclosed. To resolve the serious conflict in the circuits, the Court should grant the petition for certiorari.

B. The Court of Appeals' Decision Is in Tension with This Court's Decisions

The D.C. Circuit's decision also is, on the merits, at odds with this Court's decisions, further bolstering the case for granting the petition. First of all, *Preiser* addressed, albeit in *dictum*, the exact situation presented in this case and came to a conclusion opposite to the court of appeals. In *Preiser*, the Court added the following footnote near the end of its opinion:

> If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from *simultaneously litigating in federal court, under*

> *§ 1983, his claim relating to the conditions of his confinement.*

Preiser, 411 U.S. at 499 n.14 (emphasis added); *see also id.* at 510 (Brennan, J., dissenting) ("the Court today . . . holds that insofar as a prisoner's claim relates to good-time credits, he is required to exhaust state remedies; but he is not precluded from simultaneously litigating in federal court, under § 1983, his claim for monetary damages or an injunction against continued segregation").

To be sure, both the Second Circuit in *Peralta* and the D.C. Circuit in this case appeared to believe that this Court's decisions subsequent to *Preiser* created the greatest potential obstacle to a straightforward allowance for civil challenges to the non-durational punishments in mixed cases -- most notably, *Heck* and *Balisok* and those decisions' emphasis that habeas bars a § 1983 claim if success under § 1983 would *necessarily imply* speedier release, including the invalidity of the revocation of good-time credits. *See Peralta*, 467 F.3d at 105; Pet. App. 13a-14a. Hence, while *Preiser* may not provide the final answer on the question of how to treat mixed cases, the D.C. Circuit's adoption of an approach categorically opposite to the one espoused in *Preiser*, at a minimum, casts serious doubt on its decision in this case.

Next, the court of appeals' decision is in tension with *Wolff v. McDonnell*, 418 U.S. 539 (1974). Indeed, in its lengthy analysis of the Court's precedents on habeas exclusivity, the court of appeals mentioned all of the decisions in the *Preiser* line, except *Wolff*. Yet, *Wolff* is the decision most analogous to Skinner's circumstances, and the Court in *Wolff* did permit some § 1983

claims to go forward, notwithstanding that it, at the same time, found a § 1983 claim seeking restoration of good-time credits barred by habeas.

In *Wolff*, state prisoners brought a § 1983 action challenging the revocation of good-time credits by means of disciplinary procedures that they alleged did not comport with constitutional due process. They also sought a declaration that the disciplinary procedures were invalid, and they raised a "damages claim [that] . . . required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious [official] misconduct." 418 U.S. at 554. The Court held that "only an injunction restoring good time improperly taken is foreclosed." *Id.* at 555. "[A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; . . . neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." *Id.*

Wolff thus holds that a civil claim for declaratory and damages relief *may be* allowable to challenge the legality of a disciplinary proceeding, even if good-time credits were revoked as part of that disciplinary proceeding (though the actual restoration of the good-time credits is precluded). On its face, that holding is compatible with Skinner's position that he can raise a civil claim seeking damages for his segregation and loss of prison privileges, even if he cannot seek restoration of (or damages for) the loss of good-time credits.

Admittedly, the Court later in *Balisok* construed *Wolff* as a case where "the nature of the challenge to the procedures" was such that a ruling in favor of the

Wolff prisoner on the declaratory and damages claims would not necessarily "'call into question the lawfulness of the plaintiff's continuing confinement [*i.e.*, the loss of good time credits].'" *Balisok*, 520 U.S. at 645-46 (quoting *Heck*, 512 U.S. at 482-83). For instance, even if the procedures used by prison officials to deny good-time credits in *Wolff* violated due process, use of constitutionally valid procedures might likewise have resulted in the prisoner losing good-time credits for the misconduct there investigated, making relief on the declaratory and damages claims in *Wolff* not an *inevitable* barometer of the validity of the deprivation of good-time credits. Seizing on *Balisok*, the D.C. Circuit in Skinner's case said that his challenge to his disciplinary proceeding was in the nature of "'a biased hearing officer . . . dishonestly suppress[ing] evidence of innocence'" (with the evidence being the referral form to the FBI stating "Actually laundry detergent"). Pet. App. 13a (quoting *Balisok*, 520 U.S. at 647). If Skinner were to succeed in showing the bias of the hearing officer so as to win his Privacy Act damages claims associated with his segregation and loss of privileges, "plainly the recision of good time would have to be overturned, thus accelerating [Skinner's] release." *Id.* (internal quotation marks omitted).

But this was a misreading of Skinner's allegations. Skinner did not aver that the hearing officer was biased, but that the bias was on the part of the staff responsible for searching his cell, investigating what was found there, and compiling the evidence for the hearing officer. *See* C.A. App. A155 (Skinner arguing that "[s]anctions by the . . . Disciplinary Hearing Officer['s] reasonable reliance o[n] information provided" to him "cannot immunize an agency from the Privacy

Act consequences of employing other individuals who (allegedly) deliberately falsify records"). Were Skinner to prove the staff's bias in the course of winning his damages claims for segregation and the loss of prison privileges, his victory would not *necessarily* call into question the validity of the revocation of good time credits. If Skinner showed that the prison staff intentionally excluded the referral form from the records presented to the hearing officer, and if the hearing officer had in reality had that referral form before him, the hearing officer still conceivably might have revoked the good-time credits. In those circumstances, the hearing officer would have had before him divergent evidence (namely, staff testimony that the white powder was cocaine, and an FBI referral form saying differently), which may have led him to impose the less harsh punishment of revoking good-time credits, while not sending Skinner into lengthy segregation.[2]

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[2] Of course, were the Court in this case on the merits to adopt an approach similar to those used by the Second, Seventh, and Eleventh Circuits in mixed cases -- so that a prisoner could bring a civil claim with respect to non-durational harm even when the result would undermine the validity of durational harm -- then there would be no need for Skinner to show that a win on his non-durational claims would not necessarily call into doubt the revocation of good-time credits. Our points here are only that, first, it is consistent with this Court's current precedents (such as *Wolff*) for a prisoner to pursue civil claims relating to a single disciplinary proceeding that led to durational and non-durational sanctions so long as success on the non-durational claims would not necessarily imply the invalidity of the durational sanction and, second, success on Skinner's

Still, even with a proper application of *Wolff*, the court of appeals likely would still have affirmed the district court's dismissal of all of Skinner's Privacy Act claims. That is because the court would then have applied its own precedents for dealing with federal prisoners, as opposed to the state prisoner involved in *Wolff*. In a case whose continuing application has spawned criticism within the circuit, the D.C. Circuit has limited to *state prisoners* this Court's rule that habeas bars a damages claim only when success on the damages claim would *necessarily* imply a shorter confinement. *Razzoli v. Bureau of Prisons*, 230 F.3d 371, 375 (D.C. Cir. 2000); *cf. Davis v. Fed. Bureau of Prisons*, 334 Fed. Appx. 332, 333 (D.C. Cir. 2009) (Griffith, J., concurring) (criticizing *Razzoli*), *pet. for cert. filed* Feb. 1, 2010, No. 09-8894. Instead, because of the D.C. Circuit's historical view that habeas is available for federal prisoners anytime the grievance merely "implicates" the duration of confinement or involves just an alleged "unlawful term or condition of custody," *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 808, 809 n.4 (D.C. Cir. 1988) (*en banc*), the court in *Razzoli* ruled that habeas is exclusive "even when a non-habeas claim would have a merely probabilistic impact on the duration of custody." *Razzoli*, 230 F.3d at 373; *accord id.* at 375 ("*Preiser* . . . require[s] habeas for a federal prisoner's attack on a parole eligibility decision, reversal of which would merely give him a *chance* at earlier parole.") (emphasis in original).

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damages claims for segregation and loss of privileges would not necessarily cast doubt on the loss of good-time credits.

Based on *Razzoli*, the court of appeals would have held that, even if (reminiscent of *Wolff*) success on the damages claims contesting the segregation and loss-of-privileges sanctions would not *necessarily* imply the invalidity of the loss of good-time credits, it *probably* would undermine the validity of the loss of those credits; and the court would then have -- on that basis -- relegated all of Skinner's claims to habeas. In fact, the court warned that it would have invoked *Razzoli* but for its view that, in reality, "Skinner's success in a damages action would *necessarily* imply the invalidity of the revocation of his good-time credits." Pet. App. 16a n.7 (emphasis added).

Defeating Skinner's claims on the basis of *Razzoli* is no less problematic than is ignoring the symmetry between this case and *Wolff*. *Razzoli*'s "probabilistic" standard derives from *Chatman-Bey*, and *Chatman-Bey* held that habeas is the exclusive remedy for challenging the procedures for determining mere parole *eligibility* (not actual release), a view that this Court roundly rejected in *Wilkinson*, 544 U.S. at 81. *See Davis*, 334 Fed. Appx. at 333 (Griffith, J., concurring). Further, as Justice Scalia noted in his concurrence in *Wilkinson*, the "scope of permissible relief" in habeas is the same for federal and state prisoners, thus undercutting any argument that a more robust habeas-channeling rule should apply to federal prisoners due to a supposedly broader availability of habeas relief. *Wilkinson*, 544 U.S. at 87 (Scalia, J., concurring).

In the end, the D.C. Circuit's decision in this case is at odds with *Preiser*, *Wolff*, and *Wilkinson*. Given that tension, and in light of the conflict in the circuits over habeas's exclusivity in mixed sanctions situations, the

Court should grant the petition for certiorari in this case.

C. The Issue Presented in This Case Is an Important One Warranting the Court's Review

The issue presented in this case is both legally and practically significant. As a jurisprudential matter, "jurists frequently [have] bemoan[ed] the difficulties and frustrations they encounter in attempting to solve *Preiser* puzzles." Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 87-88 (1988); *see also* King & Sherry, 58 Duke L. J. at 3. One such puzzle has been how to deal with mixed sanctions cases. Not only have, as already mentioned, the courts of appeals divided on the topic, but Justices of this Court have recognized previously the necessity for the Court to provide direction on the extent of habeas's exclusivity where claims challenge both the conditions of confinement and the duration of custody. *See Bressman v. Farrier,* 498 U.S. 1126, 1128 (1991) (White & O'Connor, J.J., dissenting from denial of certiorari); *see also Preiser*, 411 U.S. at 508 (Brennan, J. dissenting) ("It should be plain enough that serious difficulties will arise whenever a prisoner seeks to attack in a single proceeding both the conditions of his confinement and the deprivation of good-time credits."). While the Court provided initial direction with the *dictum* in *Preiser*, the Court's subsequent decisions in, in particular, *Heck* and *Balisok* have clouded the picture. The Court should, with this case, settle a long-simmering question.

In so doing, the Court would also be resolving an issue with enormous practical significance for the prison population. Just as a matter of litigation, prisoners are faced potentially with litigating the preliminary question of the appropriate forum for their dispute in every instance where they challenge a disciplinary proceeding that resulted in durational and non-durational punishment. They "often have to cope with these questions without even minimal assistance of counsel." *Preiser*, 411 U.S. at 512 (Brennan, J., dissenting). The Court's resolution of habeas's application in mixed sanctions cases would help erase the preliminary issue and thereby ease the litigation burdens for prisoners, as well as for the officials named as defendants and for the courts otherwise faced with resolving the issue.

Moreover, as the Second Circuit in *Peralta* and the Seventh Circuit in *Viens* observed, prison officials (at least in some circuits) currently have incentive artificially to add the revocation of good-time credits any time they punish a prisoner, so as to limit the possibility of a § 1983, Privacy Act, or other civil attack. *Accord Preiser*, 411 U.S. at 508-09 (Brennan, J., dissenting) (rule disallowing § 1983 challenge to non-durational harm in mixed case "creates an undeniable, and in all likelihood irresistible, incentive for state prison officials to defeat the jurisdiction of the federal courts by adding the deprivation of good-time credits to whatever other punishment is imposed"). The Court should grant the petition in this case, reverse the D.C. Circuit's decision, and end the prospect of such "gaming of the system."

Finally, a grant of certiorari in this case would allow the Court, for the first time, to review application of the habeas-channeling rule in connection with *federal* prisoners. Because of its decision in *Razzoli*, the D.C. Circuit (the venue for many federal prisoner claims) has, amidst growing dissent within the circuit, established separate standards for state and federal prisoners: state prisoners may sue civilly, rather than just in habeas, so long as their civil claims do not necessarily call into question the fact or duration of their confinement; but federal prisoners must proceed exclusively in habeas whenever there is *a chance* or a *probability* that a civil claim they otherwise might bring would affect the fact or duration of their confinement. This distinction is "incorrect" (*Davis*, 334 Fed. Appx. at 333 (Griffith, J., concurring)); at a minimum, the Court should determine the appropriateness of such dual tracks, before still another *Preiser* puzzle becomes even more perplexing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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