**CASE NO. 21-2166**

In The

# United States Court of Appeals

## For The Fourth Circuit

**CAROLINA YOUTH ACTION PROJECT, et al.,**

***Plaintiffs-Appellees***

**v.**

**ALAN WILSON,**

***Defendant- Appellant.***

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION**
*Case No. 2:16-cv-2794-CWH*

# BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**DISCLOSURE STATEMENT**

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2166 Caption: Carolina Youth Action Project, et al., v. Alan Wilson

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National Police Accountability Project
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Trisha S. Pande Date: 3/23/2022

Counsel for: National Police Accountability Project

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**



**OTHER AUTHORITIES**

## INTEREST OF AMICUS CURIAE[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately six hundred attorney members practicing in every region of the United States, including a number of members who represent clients who have been falsely arrested or wrongfully convicted.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients. The ability to obtain make-whole remedies is

[1] Pursuant to Federal Rule of Appellate Procedure 29, amicus curiae states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than amicus curiae, their members, or their counsel contributed money intended to fund preparing or submitting this brief. All parties consented to the National Police Accountability Project's participation as amicus curiae in this case.

essential to an effective civil rights enforcement regime and comports with Section 1983's broad purpose.

## INTRODUCTION

Appellees brought this Section 1983 action to challenge vague South Carolina statutes that criminalize a broad range of typical—and constitutional—behavior of students in schools. Appellees brought the case on behalf of all South Carolina youth who have been charged for violating the statutes and had their speech chilled due to fear of violating the law. Thousands of South Carolina students have been subject to arrest, prosecution, and other criminal penalties as a result of the challenged statutes.

Given the broad harms caused by the statutes, the District Court ordered class-wide equitable relief, including the expungement of all convictions under the statute. Class-wide expungements were both necessary to effectuate the broad remedial goals of Section 1983 and well within the District Court's authority to fashion equitable remedies. Because the relief ordered is appropriate, this Court should reject appellants' arguments against the relief.

## SUMMARY OF THE ARGUMENT

42 U.S.C. § 1983 ("Section 1983") empowers federal courts to order broad equitable remedies to make whole victims of civil rights violations and correct

systemic abuses of constitutional rights. This authority exists even where federal remedies supplement or supplant state court relief. Indeed, the very purpose of Section 1983 was to provide victims of civil rights abuses with an alternative forum to vindicate their federally protected rights.

Additionally, federal district courts have flexibility to design systemwide relief tailored to the harm created by an unconstitutional act under Section 1983's remedial scheme as well as the Constitution's protections. Federal courts have regularly exercised this authority by issuing detailed operational orders that spell out how state and local governments should fix past violations and prevent future ones, including orders for expungements.

Expungements are the only way a court can fulfill Section 1983's remedial purpose and truly provide injured parties relief from an unconstitutional arrest or conviction. The stigma of an arrest or conviction can have a lasting adverse impact on a person's future opportunities and quality of life. Accordingly, federal district courts have consistently ordered expungement as a remedy for both individuals and groups who were subject to a false arrest or wrongful conviction. Expungement is particularly appropriate in the present case where those seeking relief were not incarcerated and thus the state has no strong countervailing interest in maintaining final records.

## ARGUMENT

### I. Courts Have Broad Authority to Fashion Equitable Remedies in Section 1983 Cases.

Our system of civil liberty protections is premised on the notion that constitutional rights have a corresponding remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("the very essence of civil liberty lies in the right of the individual to claim the protection of the laws whenever he receives an injury . . . it will certainly cease to observe this high appellation if the laws furnish no remedy for the violation of a vested legal right."). Accordingly, federal courts have latitude to design remedies in equity "to make good the wrong done." *Franklin v. Gwinnet Cty. Pub. Sch.* 503 U.S. 60, 65-66 (1992); *Hutto v. Finney*, 437 U.S. 678, 687 n. 9 (1978) ("Once invoked, 'the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.'") (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977)).

The Supreme Court has refrained from imposing substantive bright-line restrictions on the of lower courts' remedial authority since the redress necessary to make plaintiffs whole varies depending on the specific harm of the case. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 31 (1971) ("In seeking to define the scope of remedial power of courts . . . words are poor instruments to convey the sense of basic fairness inherent in equity. Substance, not semantics, must govern, and we have sought to suggest the nature of limitations without

frustrating the appropriate scope of equity"); *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 460 (6th Cir. 2004) ("[t]he scope of the remedy must be no broader and no narrower than necessary to redress the injury shown"). The authority of federal district courts to conceive and order equitable relief in Section 1983 cases is essential to effectuate the statute's broad remedial purpose and ensure litigants are not at the mercy of the state actors to cure the effects of their misconduct.

### A. The Purpose of Section 1983 Litigation is to Ensure Plaintiffs Have Broad Remedies Against the Harms Caused by State Governments.

Section 1983 explicitly provides for equitable relief in cases to vindicate constitutional violations. 42 U.S.C. § 1983 (2022) (noting a defendant "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"). The framers of Section 1983 recognized that conventional damage awards would be inadequate to redress pervasive civil rights violations and accordingly intended for federal courts to have "virtually every possible remedy" at their disposal. *See* Donald H. Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L.J. 987, 1000, 1020 (1983) (summarizing the remarks of Senators describing the need for expansive authority to intervene in the day-to-day workings of state justice systems); *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S.

658, 700–701 (1978) ("[T]here can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.").

The 1871 Congress was particularly skeptical of the capacity of states to address ongoing and prospective harms absent a federal court order compelling reform. *See Patsy v. Bd. of Regents of State of Florida*, 457 U.S. 496, 505 (1982) ("Congress [] enacted Section 1983 . . . because it 'belie[ved] that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights.'") (quoting *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. at 685). Thus, the authority of federal courts to interpose in state affairs was an intended feature rather than a bug of Section 1983's remedial scheme. *Heck v. Humphrey*, 512 U.S. 477, 501 (1994) (Souter, J. concurring) (the purpose of §1983 is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights.").

Appellant argues that the District Court's order was inappropriate in part because it undermines South Carolina's existing statutory process for expungement. Br. at 52. However, an independent federal remedy in equity is precisely the type of relief that Section 1983 was intended to provide. *See* Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and

Fees § 1.4 (2d ed. 1991) (noting that "the federal § 1983 remedy is independent of and 'supplementary to' any available state law remedies."). Indeed, forcing class members to seek a remedy for their unconstitutional arrests and convictions from the same legal system that facilitated the violation of their rights is inconsistent with Section 1983's purpose.

Additionally, South Carolina's expungement statute would deny relief to many members of the subclass who were injured by the challenged laws. In particular, the statute only permits expungement of convictions or guilty pleas, leaving students who were taken into custody but not charged without a remedy for the harmful impacts of being arrested. S.C. Code Ann. § 17-22-910 (B). Moreover, expungements of juvenile records are only available for individuals 18 years old and older who have had no other past convictions. S.C. Code Ann. § 63-19-250. The state's statutory procedure would also be cost prohibitive for some subclass members given the fees necessary to avail oneself to relief. S.C. Code Ann. § 17-22-940.

Regardless, even if expungements were more accessible under the existing statutory process, it is not in the interest of equity to require a person convicted under an unconstitutional statute to take on the burden and costs of removing an illegal arrest, charge, or conviction from their record. Nor does it comport with the maxims of equity to make injured parties seek piecemeal relief by petitioning. *See*

Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1654 n. 200 (1997) ("[the equitable] maxim required that all relevant parties be brought before the court so that the injunctive decree could finally resolve the matter."); *McGowan v. Parish*, 237 U.S. 285, 296 (1915) ("a court of equity ought to do justice completely, and not by halves . . . once properly in a court of equity for any purpose will ordinarily be retained for all purposes").

### B. Systemwide Equitable Remedies Are Squarely within A Federal Court's Authority and Essential to the Meaningful Enforcement of Civil Rights.

A federal court's authority to impose a broad affirmative mandate correcting systemic civil rights violations lies in the Constitution as well as Section 1983. Robert E. Easton, *The Dual Role of Structural Injunction*, 99 Yale L. J. 1983, 1983 n.1 (1990) (an expansive structural injunction "finds its justification in the more open-ended constitutional provisions, such as the equal protection or due process clauses"); Dewey Roscoe Jones, *Federal Court Remedies: The Creative Use of Potential Remedies Can Produce Institutional Change*, 27 How. L. J. 879 (1984) (citing Section 1983's broad remedial purpose as source of court's authority to issue broad injunctions).

The appropriateness of equitable relief does not turn on any specific action directed, but on whether the remedies are appropriately tailored to the constitutional violation at issue. *Califano v. Yamaski*, 442 U.S. 682, 702 (1979);

*Roe v. U.S. Dep't of Def.*, 947 F.3d 207, 231 (4th Cir. 2020). Absent an existing remedy that is sufficient in scope and impact to redress a civil rights violation, courts are empowered to create one. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. Calif. L. Rev. 289, 293-94, 305-11 (1995) ("Where Congress has failed to provide adequate remedies, or any remedies at all, against unconstitutional actions by the political branches, the courts must step in and ensure that such remedies exist.").

Class-wide and system-wide remedial orders with specific directives have consistently been upheld as a proper exercise of a district court's general remedial power. *See e.g.*, *Swann. v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15 (school integration order); *Johnson v. Levine*, 588 F.2d 1378, 1381 (4th Cir. 1978) (en banc) (upholding class-wide injunction ordering steps to eliminate overcrowding and medical care deficiencies); *Odonnell v. Harris Cty.*, 882 F.3d 528 (5th Cir. 2018) (affirming many of the directives ordered to alleviate constitutional violations in Harris County's cash bail system); *see also* Karla Gossenbacher, *Implementing Structural Injunctions: Getting A Remedy When Local Officials Resist*, 80 Geo. L.J. 2227, 2228-29 (1992).

It is not uncommon for district courts to issue orders requiring states to take specific actions on behalf of a large class of people to cure constitutional harms. For example, courts have entered detailed orders dictating the distance between

urinals in bathrooms and specific processes for medical record retention. *See Pugh v. Locke*, 406 F. Supp. 318, 334 (M.D. Ala. 1976) (determining the number of feet of urinal trough for each prisoner); *Wyatt v. Stickney*, 334 F. Supp. 373, 387 (M.D. Ala. 1972) (dictating medical record maintenance protocols that should be used by mental health institution).

Here, the District Court's order requiring appellant to expunge plaintiffs' disciplinary records arising under unconstitutional statutes was tailored to the harm inflicted and wholly appropriate. Appellants do not and cannot cite to any specific authority to the contrary. Thus, the order must be affirmed.

## II. There Is No Substitute for The Ordered Remedy of Expungement for Plaintiffs Who Were Harmed by The Unconstitutional Statutes.

### A. The Harms Associated with Arrest, Prosecution, and Conviction Persist Even if a Court Holds That They are Unconstitutional.

The harmful impacts of contact with the criminal legal system are vast and severe. *See Carafas v. Lavallee*, 391 U.S. 234, 237 (1969) (holding individual's release from prison "clear[ly]" did not moot his habeas petition because he was still enduring ongoing collateral consequences of his conviction); *see also* Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 Stan. J. C.R. & C.L. 237 (2015). Once an individual has a criminal record, they are vulnerable to loss of current employment and future employment opportunities. Gabriel Chin, *The New Civil Death: Rethinking*

*Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1791 (2012). Criminal records—including those for minor, non-violent offenses—also render individuals ineligible for government-subsidized housing. 42 U.S.C. § 13661 (2013) (granting authority to deny an application for public housing based on evidence of criminal activity); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 567-68 (2005). For non-citizens, "[d]eportation is now often a virtually automatic consequence" of conviction, including convictions for "minor state misdemeanor[s]." Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. Int'l L. & Com. Reg. 639, 652 (2004). Criminal records also regularly lead to loss of parental rights. Chin, *supra*, at 1791.

The negative consequences of contact with the criminal legal system arise as early as the moment an individual is arrested. *See* Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 811 (2015) ("[T]he fact of an arrest itself—not only a subsequent conviction— . . . triggers a regulatory decision, such as deportation, eviction, loss of a professional license, or loss of custody."). While awaiting arraignment, individuals do "not have a criminal complaint that describes the circumstances of the arrest," leaving them with "limited ability to demonstrate . . . that the charges are minor or unjustified." *Id*. at 853. Many employers receive

automatic notifications when their employees are arrested, and some choose to suspend or terminate arrested employees immediately. *Id*. at 812. Similarly, the U.S. Department of Housing and Urban Development "allow[s] P[ublic] H[ousing] A[uthorities] to reject applicants based solely on arrest records even if the charges were ultimately dropped, and many do just that." Carey, *supra*, at 566. Arrests can also trigger deportation proceedings, as immigration officials use arrest records to prioritize noncitizens for deportation. *See Secure Communities*, U.S. Immigration and Customs Enforcement, http://www.ice.gov/secure_communities.

These collateral consequences persist even if the underlying arrest or conviction is ultimately deemed unlawful. Because "police departments and others may widely disseminate criminal records, including arrests that did not result in conviction," an individual's arrest record may haunt them long after criminal charges are dropped. Jain, *supra*, at 823. *See also* James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 207-10 (2008) (referring to arrests as "negative curriculum vitae"). For example, courts have noted that "[o]pportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, *even if followed by acquittal or complete exoneration of the charges involved*." *Menard v. Mitchell*, 430 F.2d 486, 490 (D.C. Cir. 1970) (emphasis added); *see also Paul v. Davis*, 424 U.S. 693, 733

n.17 (1976) (Brennan, J., dissenting); *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977). In addition to these ongoing material harms, individuals with criminal records face "substantial" stigma, even after acquittal or exoneration. *Menard*, 430 F.2d at 490; *see also* Eugene Scalia, *Police Witness Immunity Under Section 1983*, 56 U. Chi. L. Rev. 1433, 1441 (1989) (noting damage to reputation was recognized as a harm to be remedied in common law malicious prosecution actions).

Expungement is the only remedy sufficient to stop and prevent the ongoing harms of an unlawful arrest or conviction. Expungement can help make the wrongfully arrested and convicted whole again by ensuring the same employment prospects, access to public benefits, and other rights they would have had their constitutional rights never been violated.

### B. Courts Have Consistently Recognized That Expungement is An Appropriate Remedy for Unconstitutional Arrests, Prosecutions, and Convictions.

Federal courts have long recognized they have "inherent equitable powers" to grant expungements where justice so requires. *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977). *See also Woodall v. Pettibone*, 465 F.2d 49, 52 (4th Cir. 1972); *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973); *Menard v. Mitchell*, 430 F.2d 486, 494-95 (D.C. Cir. 1970); *Hughes v. Rizzo*, 282 F. Supp. 881, 885 (E.D. Pa. 1968); *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D.

Mich. 1971). When wrongful arrests or prosecutions seriously violate constitutional rights, the court "can and must . . . do all within its power to eradicate the effect of the unlawful prosecutions" through expungement. *United States v. McLeod*, 385 F.2d 734, 750 (5th Cir. 1967).

When determining whether to grant expungement, courts "balanc[e] . . . the interests of the defendants and the state" and consider "the extent and nature of the burden of the unconstitutional conviction." *Woodall*, 465 F.2d at 52-53. Courts have found that equitable circumstances warranting expungement "most clearly exist in cases where the underlying arrest or conviction was unlawful and/or unconstitutional, government misconduct is alleged, *or the statute on which the arrest was based is subsequently found unconstitutional*." *United States v. McKnight*, 33 F. Supp. 3d 577, 584 (D. Md. 2014) (emphasis added). For example, the court in *Kowall* expunged petitioner's criminal records after determining his conviction for failure to report for induction into the military was unconstitutional. 53 F.R.D. at 212.

The court's considerations are no different when class-wide expungement is requested. Federal courts have granted class-wide expungement in prior cases. *See, e.g.*, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968). For example, the court in *Hughes* granted expungement to a class of plaintiffs who were arrested during two suspicionless

mass raids targeting "hippies" conducted by the Philadelphia Police Department. 282 F. Supp. at 883. And in *McLeod*, the U.S. Court of Appeals for the Fifth Circuit granted class-wide expungement to plaintiffs who were arrested while registering Black voters during the summer of 1963. 385 F.2d at 734. The arrests in *McLeod* were conducted by various sheriffs on three separate occasions, but the court found that each arrest was made for the same unconstitutional purpose—to harass and intimidate Black voters. *Id*. at 741-43. The court expunged the arrest records of the entire plaintiff class to ensure "that as far as possible the persons who were [unconstitutionally] prosecuted . . . [we]re placed in the position in which they would have stood had the [government] not acted unlawfully." *Id.* at 749.

Despite Appellant's argument to the contrary, these cases do not turn on whether the plaintiffs in the class were arrested en masse. *See* App. Br. at 56 n. 13. Although the plaintiffs in *Hughes* were arrested as part of two coordinated raids, *see* 282 F. Supp. at 883, the plaintiffs in *McCleod* were arrested by various officers and on separate occasions, *see* 385 F.2d at 742. Class-wide expungement was granted in *McCleod* and *Hughes* because the entire plaintiff class experienced the same constitutional violation as a result of the state's unlawful arrests, not because the plaintiffs were arrested at the same time and place as one another. *See id*.

The balance of interests weighs heavily in favor of granting expungement to the class of plaintiffs in this case. Appellant relies on several inapposite cases to support its assertion that expungement is inappropriate here. *See* App. Br. at 53, 54. In one of the cases Appellant cites, *Knox v. United States*, the court considered and rejected the petitioner's request for expungement following his unsuccessful motion to suppress evidence. No. 9:07-1792-HMH-GCK, 2008 U.S. Dist. LEXIS 119099, at *6, *31 (D.S.C. May 2, 2008). The second case that Appellant relies upon, *United States v. Mettetal*, held that the petitioner was not eligible for expungement simply because his conviction was vacated after a court determined his arrest lacked probable cause. 714 F. App'x 230, 235–36 (4th Cir. 2017). But the arrests and convictions at issue here do not concern the ordinary questions of reasonable suspicion and probable cause that *Knox* and *Mettetal* did. Rather, plaintiffs' petition for expungement arises under extraordinary circumstances.

Here, as in *Kowall*, the statutes underlying plaintiffs' arrests and convictions are unconstitutional. *See Kowall*, 53 F.R.D. at 216. Even the *Knox* court explicitly recognized arrests and convictions made under unconstitutional laws as "extraordinary circumstances" warranting expungement. *Knox*, 2008 U.S. Dist. LEXIS 119099 at *20. Because the underlying statutes are unconstitutional, the state does not have any "legitimate investigatory need" for the criminal records. *Kowall*, 53 F.R.D. at 216. Additionally, "the extent and nature of the burden of the

unconstitutional conviction[s]" and arrests also warrant expungement. *Woodall*, 465 F.2d at 52–53.

As discussed above in Section II.A, the collateral consequences of arrests and convictions—including those that are later deemed unlawful—are ongoing and severe. In this case, as in *McCleod*, the fact that the plaintiffs challenge the state's conduct as a class rather than as individual plaintiffs does not provide cover for the state's unconstitutional arrests and prosecutions. *See* 385 F.2d at 750. Rather, when, as here, an entire plaintiff class experiences the same constitutional violation as a result of the state's unlawful conduct, the court "can and must" provide class-wide relief through expungement. *Id*.

### C. There Are No Strong Countervailing Concerns Cautioning Against Granting Expungement as A Remedy For § 1983 Plaintiffs Who Have Not Spent Time In Custody For State Convictions.

While concerns for judicial economy and finality may counsel against granting expungement in § 1983 suits brought by incarcerated individuals, those concerns do not apply here, where plaintiffs have never spent any time in state custody. *See Heck v. Humphrey*, 512 U.S. at 500 (Souter, J., concurring) (noting the broad sweep of the Court's holding in *Heck* needlessly seems to constrain "individuals not 'in custody' for habeas purposes . . . who were merely fined . . . or who have completed short terms of imprisonment, probation, or parole"—

individuals who do not implicate finality and judicial economy concerns—from seeking § 1983 relief).

First, any concerns about the strain on limited judicial resources are unfounded in the context of challenges to unconstitutional arrests or convictions for minor offenses. Although federal courts receive thousands of habeas petitions from incarcerated individuals serving long sentences for serious offenses, it is unlikely that federal courts will see similar numbers of § 1983 suits challenging misdemeanor convictions that only result in non-custodial punishment. *See* Emery G. Lee, *Federal Rights, Federal Forum: Section 1983 Challenges to State Convictions in Federal Court*, 51 Case W. Res. 353, 393 (2000). Moreover, because individuals convicted of minor offenses are not held in state custody, they are not able to file writs of habeas corpus to secure a federal forum to adjudicate claims of unconstitutional arrest, prosecution, or conviction. *See Heck*, 512 U.S. at 500 (Souter, J., concurring). Providing a federal forum to these individuals through § 1983 suit is not a waste of finite judicial resources, but the fulfillment of § 1983's very purpose. *See id*. *See also* Lee, *supra*, at 394.

Second, convictions for minor offenses that result in mere fines or diversion do not implicate the same finality concerns that convictions accompanied by incarceration do. Although states rely on the finality of state court criminal convictions to continue incarcerating individuals serving custodial sentences, there

are no similar "'reliance' concerns . . . at issue with fine-only sanctions or other forms of non-custodial punishment." Lee, *supra*, at 396. Once an individual has paid the fine or participated in the diversion program attendant to their minor conviction, "[t]he state's concerns with finality have . . . been fully satisfied as the punishment has been fully meted out." *Id.* Accordingly, there is no countervailing state interest in keeping these minor convictions in their records, and expungement should be granted.

In sum, expungement is the proper remedy for the extraordinary constitutional violation plaintiffs have suffered in this case. The criminal records from the state's unconstitutional conduct will forever impede plaintiffs' employment opportunities, housing prospects, and more should the Court fail to grant expungement. By granting expungement, the Court would follow in a long line of precedent supporting expungement of arrests and prosecutions made under criminal statutes subsequently deemed unconstitutional. Finally, state interests in finality of judgment and judicial economy, which may apply in felony cases involving incarceration, do not apply here, where the sentences were minor and non-custodial.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in plaintiff's brief, this Court should uphold the district court's order granting summary judgement for

plaintiffs, certifying the class under Rule 23(b)(2), and expunging class members' records.

Respectfully submitted this the 23rd day of March, 2022.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the applicable type-volume limit and typeface requirements. Excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains 4,374 words, and has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 23, 2022

/s/ Trisha Pande
Trisha Pande

*Counsel for Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on March 23, 2022.

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Dated: March 23, 2022.

/s/ Trisha Pande
Trisha Pande

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# APPEARANCE OF COUNSEL FORM

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**THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO.** 21-2166 as

☐ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☑ Pro Bono ☐ Government

COUNSEL FOR: National Police Accountability Project

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

Trisha Pande
(signature)

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|---|---|
| Trisha Pande<br>Name (printed or typed) | 919-942-5200<br>Voice Phone |
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1/28/2020 SCC