No. 19-1380

In The
Supreme Court of the United States

TERRY LYNN OLSON,

Petitioner,

v.

JANIS AMATUZIO, FORMER WRIGHT COUNTY MEDICAL EXAMINER, TOM ROY, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, JOAN FABIAN, FORMER COMMISSIONER, AND MINNESOTA DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT AMATUZIO

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I. Introduction

This Court should deny petitioner Terry Lynn Olson's ("Olson") petition for a writ of certiorari for four reasons: three legal, and the last practical. First, addressing the *Heck*-exception issue presented would require this Court to engage in "first view," not "review," because the Eighth Circuit did not address the issue. Second, there is no error to correct, as the dismissal of Olson's Section 1983 claim was consistent with *Heck*'s letter and no-collateral-attack spirit. Third, although Olson has identified *a* circuit split, resolving it would not benefit Olson because *no* circuit has concluded that persons, like Olson, may avoid *Heck*'s favorable-treatment requirement when, as here, the reason why habeas is no longer available was the Section 1983 plaintiff's choice. Resolving the split, on these facts, would be an advisory opinion, of no benefit to Olson. Fourth, practically speaking, even if this Court accepted review and reversed, Olson's Section 1983 claim against respondent Janis Amatuzio, Former Wright County Medical Examiner ("Amatuzio"), would likely be dismissed on remand, based on the law of the case.

Amatuzio[1] respectfully asks this Court to deny Olson's petition for a writ of certiorari.

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[1] Amatuzio is represented by separate counsel from the other respondent-defendants: Tom Roy, (former) Commissioner, Minnesota Department of Corrections ("Roy") and Joan Fabian, former Commissioner, Minnesota Department of Corrections ("Fabian").

II. Question Presented—Qualified

Olson states the question presented as:

> Whether a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is barred by *Heck* from pursuing a Section 1983 claim challenging the validity or duration of his incarceration.

(Petition at i.)

Olson argues that the "majority" side of a 6-5 circuit split answers the question presented with a no. (*Id.*) However, while he is right that 5 circuits recognize no *Heck* exception, no more than 3 answer the question presented (or similar questions) with an unqualified "no." (*See*, *infra*, Section IV.C.) Contrary to Olson's petition, the matter is an open question in the Second Circuit; the Ninth Circuit recognizes a uniquely narrow *Heck* exception (for matters like good-time credits); and the Eleventh Circuit's latest word on the subject is an (unpublished) no-*Heck* exceptions decision (although its caselaw has been mixed). (*See*, *infra*, Section IV.C.) In short, Olson is not arguing for the majority position.

Moreover, even if this Court answered the question "no," Olson still would not prevail. (*See*, *infra*, Section IV.C.) This is not a case where habeas is unavailable to Olson due to forces beyond his control. This is a case where habeas is unavailable because Olson chose to abandon habeas and instead pursue a no-fault-admitted-by-the-State stipulation for his release. (*See*, *infra*, Part III.) No circuit permits a Section

1983 plaintiff to bypass *Heck*'s favorable-treatment requirement where habeas became unavailable due to the plaintiff's choice to abandon habeas.

In short, answering the question as Olson urges would not help Olson. It would be no more than an advisory opinion.

III. Statement of the Case

Olson's incarceration in Minnesota state prison for second- and third-degree murder lasted for almost nine years: from October 2007 to September 2016. (29a, 31a.)[2] During that time, Olson filed a habeas petition (15a)—after previously directly appealing (unsuccessfully), *State v. Olson*, No. A08-0084, 2009 WL 2147262 (Minn. Ct. App. July 21, 2009), *review denied* (Minn. Oct. 20, 2009), and twice postconviction petitioning (unsuccessfully), *Olson v. State*, No. A11-696, 2012 WL 254485 (Minn. Ct. App. Jan. 30, 2012), *review denied* (Minn. Nov. 17, 2015); *Olson v. State*, No. A14-1632, 2015 WL 4877691, at *1 (Minn. Ct. App. Aug. 17, 2015), *review denied* (Minn. Nov. 17, 2015). The federal Minnesota district court denied Olson's habeas petition without prejudice because the petition presented "both exhausted and unexhausted claims," and gave Olson 30 days to amend to eliminate the unexhausted claims. (15a.)

Instead of filing an amended habeas petition, Olson entered two stipulations with the Minnesota

[2] All references to ##a are to Olson's appendix.

Wright County Attorney's Office. In the first, Wright County agreed to a reduction in Olson's sentence, through a Conditional Writ of Habeas Corpus, but, therein, made clear that it did "not admit any fault or wrongdoing in the original sentence." (31a-32a.) Pursuant to the Conditional Writ, the Wright County district court resentenced and released Olson. (29a.) In the second stipulation, the parties agreed to vacation of the Conditional Writ, and that "the allegations asserted in this proceeding can be denied with prejudice." (29a.) Based on that stipulation, the federal district court vacated the Conditional Writ. (16a.)

In January 2018, Olson sued Amatuzio and the other defendant-respondents. (16a, 34a.) Olson asserted 42 U.S.C. § 1983 claims against all defendants. (59a-66a.) Olson based the Section 1983 claim against Amatuzio on her allegedly violating his right to Substantive Due Process. (59a-60a.) Olson also asserted negligence against only Amatuzio. (60a-61a.) Olson claimed that Amatuzio, in 2005, in her capacity as the Wright County Medical Examiner, wrongly changed the classification of Jeffrey Hammill's 1979 death from "undetermined" to "homicide." (34a-35a, 38a, 43a.) Olson alleges that Amatuzio's testimony at his 2007 trial "was a direct and proximate cause of Olson's subsequent conviction and related damages." (47a.)[3]

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[3] Several reasons required dismissal of Olson's negligence and Section 1983 claims against Amatuzio, of which *Heck* was just one (as to the Section 1983 claim). (*See* ECF Doc. 24.) Among them, negligence requires a legal duty. *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 581-82 (Minn. 2012). Absent from

In granting Rule 12 dismissal of all claims, the Minnesota federal district court addressed the question presented in a cursory footnote, rejecting Olson's argument for a *Heck* exception as foreclosed by existing Eighth Circuit caselaw: *Newmy v. Johnson*, 758 F.3d 1008, 1011-12 (8th Cir. 2014) and *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007). (22a n.5.) The court dismissed the Section 1983 claims because it rejected Olson's argument that the stipulated-for, later-vacated, Conditional Writ satisfied *Heck*'s favorable-treatment requirement. (18a-22a.) The court also dismissed the negligence claim against Amatuzio as barred by a six-year statute of limitations, and rejected Olson's fraudulent-concealment tolling argument. (22a-25a.)

On appeal, the Eighth Circuit affirmed dismissal of all claims. It did not address or mention the question presented. It affirmed dismissal of the Section 1983 claims for essentially the reasons of the district court. (4a-5a.) It did the same for the negligence claim. (5a-9a.)

Minnesota law is any indication that a medical examiner has a tort duty to specific individuals. Rather, she is a "public official," Minn. Stat. § 390.005, subd. 3, whose "primary purpose is . . . to serve the public by determining how people die," *State v. Beecroft*, 813 N.W.2d 814, 834 (Minn. 2012). *See also Krizek v. Queens Med. Ctr.*, No. CV 18-00293 JMS-WRP, 2019 WL 6255469, at *4 (D. Haw. Nov. 22, 2019) ("[T]he court rejects Plaintiff's argument that the Medical Examiner's duty to society at large applies to individual members of the public by proxy." (quotation omitted)).

IV. Four reasons warrant denying Olson's petition for a writ of certiorari.

A. Addressing the question presented would require this Court to engage in "first view," not "review," because the Eighth Circuit did not address the issue.

"Ordinarily, [this Court does] not decide in the first instance issues not decided below." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quotation omitted). That is because "this Court normally proceeds as a court of review, not of first view." *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019) (quotation omitted).

Here, the issue Olson asks this Court to review was not addressed by the Eighth Circuit in the appealed-from decision. (1a-9a). The district court touched on it, but rejected it in a footnote, as controlled by Eighth Circuit caselaw. (22a n.5.) And the Eighth Circuit was, as Olson acknowledges, "completely silent as to the circuit split and Petitioner's alternative argument that *Heck* should not apply in these circumstances." (Petition at 19.)

This Court's long-standing practice is to decline to address issues not first addressed in the appealed-from decision (*see*, *e.g.*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020) ("The Second Circuit did not address these arguments, and, for that reason, neither shall we." (quotation omitted)); *Haymond*, 139 S. Ct. at 2385 (Tenth Circuit)), even when the issue was

presented to the appealed-from court, as in *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005), for example.

It may be that the Eighth Circuit, albeit silent on the issue, decided without comment to follow its past decisions, under which it has rejected the existence of any *Heck* exception for persons "no longer incarcerated." *Marlowe v. Fabian*, 676 F.3d 743, 747 (8th Cir. 2012) (citing *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007)); *see Newmy v. Johnson*, 758 F.3d 1008, 1011-12 (8th Cir. 2014). But those past decisions are not the subject of Olson's petition for certiorari review. *Olson v. Amatuzio et al.* is—and is silent on the issue. Even if we treated the appealed-from decision as implicitly following the past decisions, it supplied no rationale for this Court to review. An implied decision without a rationale is not well-postured for this Court's review. *See United States v. Sperry Corp.*, 493 U.S. 52, 66 (1989) (opting not to reach issue, noting "we would benefit from the views of the Court of Appeals"); *see also Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017) (opting not to resolve an issue due in part to "the lack of a reasoned conclusion on this question from the Court of Appeals").

Amatuzio respectfully asks this Court to deny Olson's petition for a writ of certiorari.

B. The Eighth Circuit's affirmation of the dismissal of Olson's Section 1983 claims was consistent with *Heck*'s letter and no-collateral-attack spirit, unchanged by *Spencer*.

The Eighth Circuit's application of *Heck*'s favorable-treatment requirement to Olson—even though no longer incarcerated—was consistent with the letter and no-collateral-attack spirit of that requirement, which *Spencer* did not change. Quite simply, there is no error to correct.

1. The Letter and Spirit of *Heck*'s Favorable-Treatment Requirement

In *Heck*, this Court spoke plainly:

> [W]hen 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.

Heck v. Humphrey, 512 U.S. 477, 487 (1994).[4]

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[4] This Court elaborated in its holding, in no uncertain terms:

> We hold that, in order 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

Olson does not contend that a Section 1983 judgment in his favor against Amatuzio would not "necessarily imply the invalidity of his conviction or sentence." To the contrary, in his petition, he makes clear that his Section 1983 claim is that his incarceration was unconstitutional and unlawful. (Petition at 10, 17, 20-21.)

Nor does Olson argue that his conviction or sentence has been invalidated. Rather, he argues that the favorable-treatment requirement does not—or should not—apply when "habeas relief is unavailable to the Section 1983 plaintiff." (Petition at i, 2, 12.) He argues that this Court did not in *Heck* "expressly address whether the favorable-termination rule applies in [such] circumstances." (Petition at 23.) But *Heck did* address this issue, and rejected Olson's argument (which Justice Souter's concurrence had urged), in footnote 10. Footnote 10 is not mentioned in Olson's petition.

As stated in footnote 10, "the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity

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> 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.

Heck, 512 U.S. at 486-87 (footnote omitted).

that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10. Footnote 10 was this Court's reasoned rejection of an argument raised by Justice Souter's concurrence: that the Court should abandon the no collateral-attack-on-a-conviction's-validity principle in cases "involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Id.*

Footnote 10 was no stray comment. Rather, its conclusion flowed naturally from the Court's core rationale, stated in the body of the opinion, in support of the Court's holding. That is, "[t]his Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack." *Id.* at 484-85 (collecting cases). The "similar concerns" reference was to malicious-prosecution law, which "provides the closest analogy to claims of the type considered here because . . . it permits damages for confinement imposed pursuant to legal process." *Id.* at 484. An element of such claims "is termination of the prior criminal proceeding in favor of the accused." *Id.* "[T]o permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." *Id.* (quotation omitted); *see also Nelson v. Campbell*, 541 U.S. 637, 646-47 (2004) ("This 'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying

with the procedural limitations of the federal habeas statute.").[5]

Perhaps Olson's silence as to footnote 10 means that he dismisses it as mere dicta, given that it addressed *Heck*'s application to not-incarcerated persons, whereas Heck appears to have been in prison when the opinion was issued. *Heck*, 512 U.S. at 478. It is not mere dicta. Rather—on its face—it reflects the Court's reasoned application of the rationale underlying the stated-without-exceptions *Heck* rule. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66-67 (1996) ("We adhere in this case, however, not to mere *obiter dicta*, but rather to the well-established rationale upon which the Court based the results of its earlier decisions."). Even if footnote 10 never existed, its conclusion would be compelled by *Heck*'s holding and no-collateral-attack rationale.

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[5] Through a truncated quotation, Olson points to *Nelson* as expressing a concern about "cut[ting] off potentially valid damages actions as to which a plaintiff might never obtain favorable termination." *Nelson*, 541 U.S. at 647, *quoted at* Petition at 24. Olson suggests that this quotation supports his position. But he neglects the context, in two ways. First, this Court was expressing that concern in support of *Heck*'s requirement that, for *Heck* to be triggered, the Section 1983 claim must "necessarily" imply the invalidity of a conviction or sentence. *Nelson*, 541 U.S. at 646-47. Olson does not argue that his Section 1983 claim would not necessarily imply such invalidity. Second, this Court, in the remainder of the quoted sentence, stated, "—suits that could otherwise have gone forward had the plaintiff not been convicted." *Id.* at 647. Again, the Court's focus was on the "necessarily" implied component.

"As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Cnty. of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part, dissenting in part), *quoted with approval in Seminole Tribe*, 517 U.S. at 67. As Justice Stevens observed in analogous circumstances, "[v]irtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases." *Carey v. Musladin*, 549 U.S. 70, 79 (2006) (Stevens, J., concurring). "It is quite wrong to invite state-court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case." *Id.*; *see also Kappos v. Hyatt*, 566 U.S. 431, 443 (2012) ("Although that discussion was not strictly necessary to *Butterworth*'s holding it was also not the kind of ill-considered dicta that we are inclined to ignore."). Similarly, *Heck* announced a new rule, and included explanatory language in footnote 10. *See Heck*, 512 U.S. at 490 n.10. It would be wrong to treat the contents of footnote 10 as mere dicta.[6]

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[6] Moreover, even if the contents of footnote 10 were "technically dicta," they are entitled to "greater weight," given that they reflected a majority of this Court "unquestionably reject[ing]" the position advocated for by Justice Souter (and now by Olson). *See Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 489-90 (1986) (O'Connor, J., concurring in part, dissenting in part), *cited with approval in Seminole Tribe*, 517 U.S. at 67.

Olson does not argue that his Section 1983 claims are not a collateral attack on his conviction or sentence; to the contrary, he argues that his incarceration was unconstitutional and unlawful. (Petition at 10, 17, 20.) He seems to argue that this sort of collateral attack is not the sort of collateral attack with which *Heck* was concerned. Rather, he argues, the collateral attacks with which *Heck* was concerned were only those made "when state and federal remedies . . . remain available." (*See* Petition at 2.) But that limitation is nowhere in *Heck*. The collateral attacks with which *Heck* was concerned were any that would, if successful, "necessarily imply the invalidity of [Olson's] conviction or sentence." *See Heck*, 512 U.S. at 487.

In a further attempt to narrowly cabin *Heck*, Olson (mistakenly) depicts "[t]he purpose of *Heck*'s favorable-termination rule" as being "to reconcile two potentially conflicting statutes: Section 1983 and the federal habeas statute." (Petition at 12.) From there, he reasons, "in a case like this one, where habeas is unavailable through no lack of diligence, there is no possibility of conflict. Favorable termination is not required in such circumstances." (Petition at 12.)

But that argument founders on three points: *Heck*'s purpose; *Heck*'s breadth; and—not to be missed—this case's facts. Habeas *was* available to Olson, which he pursued, but later abandoned.

As to the purpose of *Heck*'s favorable-treatment requirement, it was as stated above: to prevent collateral attacks on convictions and sentences via Section 1983.

This Court derived the rule from malicious-prosecution law not "to reconcile two potentially conflicting statutes" (*see* Petition at 12), but rather because Section 1983 "creates a species of tort liability," and common-law tort rules "provide the appropriate starting point for the inquiry under § 1983." *Heck*, 512 U.S. at 483 (quotations omitted). "[Section] 1983, which borrowed general tort principles, was not meant to permit such collateral attack." *Id.* at 486 n.4. The *Heck* majority did not need to reconcile any potential conflict between Section 1983 and the habeas statute because "[a] claim for damages [that, if successful, would necessarily imply invalidity of] a conviction or sentence that has *not* been . . . invalidated is not cognizable under § 1983." *Id.* at 487. That was Justice Souter's view of the majority approach as well. *Id.* at 492 (Souter, J., concurring).

As to *Heck*'s breadth, nowhere does habeas availability limit the holding, or no-collateral-attack rationale. A Section 1983 claim that necessarily implies the invalidity of a conviction or sentence would be a collateral attack on the conviction or sentence, irrespective of whether (or for how long) habeas was available to the Section 1983 plaintiff.

Yes, Justice Souter's four-justice concurrence argued that the opinion's favorable-treatment requirement should be read more narrowly, as not applying to persons who were "fined"; "completed short terms of imprisonment, probation, or parole"; or "discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Id.* at 500 (Souter, J., concurring). But the majority rejected that

view in footnote 10. *Id.* at 490 n.10. Moreover, implicit in Justice Souter's view is a belief rejected—in one specific form—in footnote 10, *id.* at 490 n.10, and later, more generally, by the eight-justice majority in *Spencer*: "that a § 1983 action for damages must always and everywhere be available." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

As to the facts, to call this a case in which "habeas is unavailable through no lack of diligence" (*see* Petition at 12), is not accurate—or is, at least, misleading. Olson appears to draw the "diligence" language from the Tenth Circuit's approach to *Heck*: "[a] plaintiff's inability to obtain habeas relief lifts the Heck bar only if that 'inability is not due to the petitioner's own lack of diligence.'" *Carbajal v. Hotsenpiller*, 524 F. App'x 425, 428 (10th Cir. 2013) (quoting *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010)). Amatuzio addresses the Tenth Circuit's approach and others in the following section. For now, suffice it to say that, although the Tenth Circuit speaks in terms of lack of diligence, it appears to be more focused on lack of fault. It has never addressed whether *Heck*'s favorable-treatment requirement would apply to a person who, like Olson, although no longer in prison, had almost nine years of incarceration; filed a habeas petition; could have filed a second habeas petition; but instead chose to negotiate a no-fault-by-the-State stipulation for his release. (*See*, *supra*, Part III.) The Tenth Circuit would be reticent to extend its no-lack-of-diligence *Heck* exception in that way. *Cf. Johnson v. Pottawotomie Tribal Police Dep't*, 411 F. App'x 195, 200 (10th Cir. 2011) (affirming

dismissal of Section 1983 claim as *Heck* barred when the plaintiff was attempting to "seek relief through a § 1983 complaint as an end-run around the appeal waiver in his plea agreement").

Indeed, Olson's circumstances place him beyond the scope of any concerns raised by Justice Souter in his *Heck* concurrence. Olson was sentenced to 40 years, not "fined" or given a "short term[ ]," and served almost nine years in prison. (*Supra*, § III.) *See Heck*, 512 U.S. at 500 (Souter, J., concurring). He does not claim to have "discover[ed] (through no fault of [his] own) a constitutional violation *after* full expiration of their sentences." *See Heck*, 512 U.S. at 500 (emphasis added). On the contrary, in the Complaint, he admits that he discovered the basis for his claims against Amatuzio more than four years before his September 2016 release: "Amatuzio's January 18, 2012 affidavit was the first time Olson discovered [her] wrongful and negligent actions." (35a ¶2; 48a ¶43.) Indeed, he litigated an aspect of that claim through his second (unsuccessful) post-conviction-relief petition. *See Olson*, 2015 WL 4877691, at *2, *5 (rejecting Olson's ineffective-assistance-of-counsel argument that he based on alleged failure to adequately investigate and prepare for Amatuzio's testimony regarding her reason for changing manner of death on Hammill's death certificate). Nor has he alleged that he failed to discover the basis for his claims against the other respondent-defendants until after his release. (*See* 34a-67a.)

2. Nothing in *Spencer* changed *Heck*.

Olson argues that, in *Spencer v. Kemna*, 523 U.S. 1 (1998), "five Justices, in three separate opinions, expressed the view that *Heck*'s favorable-treatment rule does not apply to individuals who are not presently incarcerated and therefore do not have access to federal habeas." (Petition at 3.) *Spencer* is immaterial to this analysis for four reasons.

First, nothing in *Spencer*'s eight-justice majority cast doubt on or limited *Heck*'s favorable-treatment requirement. At issue was not a Section 1983 claim, but whether Spencer's petition for a writ of habeas corpus seeking to invalidate his parole was moot, given the fact that he had "completed the entire term of imprisonment underlying the parole revocation." *Spencer*, 523 U.S. at 3. It was not moot because his sentence had already expired and no collateral consequences urged by Spencer satisfied the majority. *Id.* at 7, 14-15. *Heck* came up because Spencer argued that his habeas action could not be moot because *Heck* "would foreclose him from pursuing a damages action under [Section] 1983, unless he can establish the invalidity of his parole revocation." *Id.* at 17. But the Court rejected this contention, reasoning that "[t]his 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.*; *see also Heck*, 512 U.S. at 490 n.10.

Second, the existence of that controlling majority opinion leaves no room for a *Marks* rule,[7] built from *Spencer*'s three non-majority opinions. (Olson does not argue that *Marks* applies.) *Marks* applies only "[w]hen there is no majority opinion." *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). The *Spencer* justices were not fragmented in rejecting Spencer's *Heck*-related no-mootness argument. Seven other justices joined Justice Scalia's majority opinion. *Spencer*, 523 U.S. at 2. Justice Souter's four-justice concurrence "join[ed] the Court's opinion as well as the judgment . . . for an added reason that the Court [did] not reach." *Spencer*, 523 U.S. at 18-19 (Souter, J., concurring). Justice Ginsburg's one-justice concurrence "join[ed] both the Court's opinion and Justice SOUTER's concurring opinion in this case." *Spencer*, 523 U.S. at 22 (Ginsburg, J., concurring). And Justice Stevens' one-justice dissent, in a footnote, agreed with Justice Souter's *Spencer* concurrence. *Spencer*, 523 U.S. at 25 (Stevens, J., dissenting).

Third, the non-majority *Spencer* opinions could do no more than cast doubt on *Heck*'s favorable-treatment requirement. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of

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[7] "According to *Marks*, when 'a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Ramos v. Louisiana*, 140 S. Ct. 1390, 1403 (2020) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation omitted)).

Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

Fourth, the non-majority *Spencer* opinions did not cast doubt on whether Heck's favorable-treatment requirement *applies to someone in Olson's circumstances*. As argued above, Justice Souter's *Heck* concurrence appeared centrally—if not exclusively—concerned with the person who, through no fault of that person, was deprived of the opportunity to seek habeas relief, either because the person was only fined, incarcerated for a short time, or did not learn until after release of the basis for a habeas claim. (*See*, *supra*, Section IV.B.1.) Olson is in no such circumstance.

That is relevant because the three non-majority opinions in *Spencer* appeared intent on going no further (or, at least, not much further) than Justice Souter's *Heck* concurrence. Justice Stevens' dissent merely endorsed the view of Justice Souter's *Spencer* concurrence. *Spencer*, 523 U.S. at 25 (Stevens, J., dissenting). Justice Ginsburg's concurrence joined Justice Souter's *Spencer* concurrence, and cited with approval his *Heck* concurrence. *Id.* at 21-22. Although Justice Ginsburg referred without qualification to persons "whose sentences have been fully served," Justice Souter's *Heck* concurrence referred to persons "*who discover (through no fault of their own) a constitutional violation* after full expiration of their sentences." *Heck*, 512 U.S. at 500 (Souter, J., concurring) (emphasis added). Justice Ginsburg did not include Justice

Souter's *Heck* qualifier, but did not appear interested in going further than Justice Souter.

And, in the opening of Justice Souter's *Spencer* concurrence, he harkened back to *Heck*, pointing to a reason "which I spoke to while concurring in a prior case" and "reasons explained in my *Heck* concurrence." *Spencer*, 523 U.S. at 18-19 (Souter, J., concurring). Later, he does use unqualified language, such as, "[a]fter a prisoner's release, the habeas statute and its exhaustion requirement have nothing to do with his right to any relief." *Id.* at 21.

But "[i]t seems unlikely that Justice Souter intended to carve out a broad *Heck* exception for all former prisoners." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007). "The motivating concern in the *Spencer* [concurrence] *dicta* was that circumstances *beyond the control of a criminal defendant* might deprive him of the opportunity to challenge a federal constitutional violation in federal court. Poventud is not such a person." *Poventud v. City of New York*, 750 F.3d 121, 164 (2d Cir. 2014) (emphasis added); *see Teichmann v. New York*, 769 F.3d 821, 830 (2d Cir. 2014) (Livingston, J., concurring) ("[W]hat *does* remain an open question, even in this Circuit, is perhaps even more difficult: whether *Heck* bars § 1983 suits when the plaintiff has intentionally defaulted his habeas claims. I know of no circuit cases that allow § 1983 claims to proceed in such circumstances, and some have suggested they cannot.").

As a matter of law, and of fact, *Spencer* is immaterial to the issue of whether *Heck*'s favorable-treatment requirement applies to and bars Olson's Section 1983 claims. It does.

There is no error to correct.

Amatuzio respectfully asks this Court to deny Olson's petition for a writ of certiorari.

C. Resolving the circuit split on which Olson relies would not benefit Olson, and would require this Court to impermissibly issue an advisory opinion.

Amatuzio does not deny that Olson has seized on *a* circuit split. But, even if this Court resolved that split as Olson requests, it would be of no benefit to Olson. That is because, notwithstanding there being *a* split, *no* circuit holds that persons in Olson's circumstances may maintain a Section 1983 claim otherwise barred by *Heck*. That is because the reason habeas relief is no longer available to Olson is because of his own choice to abandon that remedy, and opt instead to pursue a no-fault-admitted-by-the-State stipulation for release from prison. *No* circuit holds that such circumstances warrant a *Heck* exception.

Olson points to Section 1983 plaintiffs who—unlike him—were merely fined, had short sentences, or did not discover the basis for a constitutional violation until after release. (Petition at 11-12.) But none of those persons or circumstances is presented by this

case. Even if this Court granted the petition, it would not be at liberty to issue an advisory opinion to resolve a circuit split that, regardless of the outcome, would not benefit Olson. "This Court is powerless to decide a case if its decision 'cannot affect the rights of the litigants in the case before it.'" *Collins v. Porter*, 328 U.S. 46, 48 (1946) (quoting *St. Pierre v. United States*, 319 U.S. 41, 42-43 (1943)); *cf. St. Pierre*, 319 U.S. at 42-43 (concluding that case was "moot" when petitioner had already served his sentence, and reversal could not undo the penalty). In other words, "[t]his Court is without power to give advisory opinions." *Alabama State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters & Joiners of Am. v. McAdory*, 325 U.S. 450, 461 (1945) (collecting cases). Relatedly, "[i]t has long been its considered practice not to decide abstract, hypothetical or contingent questions." *Id.* (collecting cases).

Olson argues that six Circuits do not apply *Heck*'s favorable-treatment requirement when habeas is unavailable. (Petition at 15.) As a preliminary matter, Amatuzio disputes Olson's unqualified inclusion of the Second, Ninth, and Eleventh Circuits in that group. The latest controlling word from the Second Circuit (*Poventud*, *en banc*) is that this is an open issue in that Circuit.[8] The Ninth Circuit recognizes only an

[8] Olson cites *Huang* (Petition at 15), in which the Second Circuit concluded that *Heck* did not bar the plaintiff's Section 1983 claim, reasoning that the plaintiff had "no habeas remedy because he has long since been released from OCFS custody." *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001). But, in *Poventud*, the *en banc* Second Circuit (without citing *Huang*) concluded that the

extremely narrow *Heck* exception (applicable to loss of good-time credits, revocation of parole, or similar matters).[9] And the latest word from the Eleventh Circuit (*Reilly*, 2019, *cert. denied*) is that no favorable-treatment exception exists.[10]

Second Circuit's position on the split remained an open question: "There is no need to choose a side in this split because the narrow exception articulated by Justice Souter would be inapplicable here in any event." *Poventud*, 750 F.3d at 164. And, later in *Teichmann*, Judge Calabresi stated in a concurrence—citing *Huang* and other Second Circuit cases—that "[t]he law in this Circuit, however, holds—whether correctly or not—that *Heck* does not bar § 1983 claims when habeas is unavailable, at least so long as the unavailability was not intentionally caused by the plaintiff." *Teichmann*, 769 F.3d at 829-30 (Calabresi, J., concurring). "Because of [the] lack of clarity, district courts within the Second Circuit have reached different conclusions as to whether a claimant may bring a section 1983 damages claim when the claimant is no longer in custody or otherwise cannot bring a habeas action." *Opperisano v. P.O. Jones*, 286 F. Supp. 3d 450, 458 (E.D.N.Y. 2018) (collecting cases).

[9] Olson cites *Nonnette* (Petition at 15), in which the Ninth Circuit concluded that, in light of the *Spencer* "opinions," *Heck* did not bar the plaintiff's Section 1983 action. *See Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002). But the Ninth Circuit has "limited *Nonnette* in recent years." *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674 (2019). "*Nonnette's* relief from *Heck* affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters, not challenges to an underlying conviction." *Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 (9th Cir. 2015) (quotation marks omitted) (quoting *Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006) (quoting *Nonnette*, 316 F.3d at 878 n.7)).

[10] Olson cites *Harden* (Petition at 15), in which the Eleventh Circuit concluded that, "because federal habeas corpus is not available to a person extradited in violation of his or her federally

Regardless, all six of the circuits that Olson identifies make clear that persons in his circumstances—for whom habeas became unavailable due only to the former inmate's choice—are not exempt or would not be exempted from *Heck*'s favorable-treatment requirement:

1. **Second Circuit:** "The motivating concern in the *Spencer* [concurrence] *dicta* was that circumstances *beyond the control of a criminal defendant* might deprive him of the opportunity to challenge a federal constitutional violation in federal court. Poventud is not such a person." *Poventud*, 750 F.3d at 164 (emphasis added); *see also Teichmann*, 769 F.3d at 829-30 (Calabresi, J., concurring)

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protected rights, even where the extradition itself was illegal, § 1983 must be." *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003). But the Eleventh Circuit has since clarified that, although *Harden* concluded that the *Spencer* concurrences and dissent cast doubt on *Heck*, that was not the basis for *Harden*. Rather, *Harden* "turned on our holding that 'extradition procedures, even if they violate federal rights, have no bearing, direct or implied, on the underlying guilt or innocence of the person extradited.' " *Vickers v. Donahue*, 137 F. App'x 285, 289 (11th Cir. 2005) (quoting *Harden*, 320 F.3d at 1297). Later, the Eleventh Circuit described the issue as an open question. *Topa v. Melendez*, 739 F. App'x 516, 519 (11th Cir. 2018); *Abusaid v. Hillsborough Cnty.*, 405 F.3d 1298, 1315 n.9 (11th Cir. 2005). And—significantly—in its most recent word on the issue, it concluded (in an unpublished opinion) that "Justice Souter's concurring opinion in *Spencer* did not overturn *Heck*'s bar on § 1983 actions, and noting that neither the Supreme Court nor this Court has applied the exception described in Justice Souter's concurrence in a published opinion." *Reilly v. Herrera*, 729 F. App'x 760, 763 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 799 (2019), *reh'g denied*, 139 S. Ct. 1309 (2019).

("The law in this Circuit, however, holds—whether correctly or not—that *Heck* does not bar § 1983 claims when habeas is unavailable, at least so long as the unavailability was not intentionally caused by the plaintiff.").

2. **Fourth Circuit:** "Together, *Covey* and *Wilson* delineate the Heck bar's narrow exception. A would-be plaintiff who is no longer in custody may bring a § 1983 claim undermining the validity of a prior conviction *only if he lacked access to federal habeas corpus while in custody*." *Griffin v. Baltimore Police Dep't*, 804 F.3d 692, 697 (4th Cir. 2015) (emphasis added).

3. **Sixth Circuit:** "What is dispositive in Powers's situation is not that he is no longer incarcerated, but that his term of incarceration—one day—was too short to enable him to seek habeas relief." *Powers*, 501 F.3d at 601, *discussed in Harrison v. Michigan*, 722 F.3d 768, 774 n.1 (6th Cir. 2013) ("*Powers* sharply limits the applicability of Justice Souter's 'holding' to cases involving prisoners who could not, as a matter of law, seek habeas relief. *Spencer* thus has no bearing on this case.").

4. **Ninth Circuit:** "Guerrero cannot now use his 'failure timely to pursue habeas remedies' as a shield against the implications of *Heck*." *Guerrero v. Gates*, 442 F.3d 697, 705 (9th Cir. 2006) (quoting *Cunningham v. Gates*, 312 F.3d 1148, 1154 n.3 (9th Cir. 2002), *as amended on denial of reh'g* (Jan. 14, 2003)). "His failure

timely to achieve habeas relief is self-imposed. Thus, as in *Cunningham*, though habeas relief for Guerrero may be 'impossible as a matter of law,' we decline to extend the relaxation of *Heck's* requirements." *Id.* (quoting *Cunningham*, 312 F.3d at 1154 n.3).

5. **Tenth Circuit:** "A plaintiff's inability to obtain habeas relief lifts the Heck bar only if that 'inability is not due to the petitioner's own lack of diligence.'" *Carbajal*, 524 F. App'x at 428 (quoting *Cohen*, 621 F.3d at 1317); *see*, *e.g.*, *Boles v. Newth*, 479 F. App'x 836, 843 (10th Cir. 2012) (not resolving the issue but noting that the plaintiff "would have trouble on the diligence part since the Parole Board action he complains of occurred in April 2008, and Mr. Boles was not released from confinement until February 25, 2010. During that period he apparently found time to sue Ms. Oaks, and the State Parole Board unsuccessfully in state court" (citation omitted)); *Griffin v. Hickenlooper*, No. 12-CV-01379-BNB, 2012 WL 3962703, at *3 (D. Colo. Sept. 10, 2012) (Section 1983 claim *Heck* barred when "no indication that [the plaintiff] was unable to challenge the allegedly illegal parole hold during the fourteen-month period he alleges he was subjected to the allegedly illegal parole hold").

Moreover, the Seventh Circuit likewise limited its recognition of a *Heck* exception—before it recently

changed course and concluded that no *Heck* exception exists, in *Savory*[11]:

> Permitting a plaintiff who ignored his opportunity to seek collateral relief while incarcerated to skirt the *Heck* bar simply by waiting to bring a § 1983 claim until habeas is no longer available undermines *Heck* and is a far cry from the concerns, as we understand them, of the concurring Justices in *Spencer* for those individuals who were precluded by a legal impediment from bringing an action for collateral relief.

Burd v. Sessler, 702 F.3d 429, 436 (7th Cir. 2012), *abrogated by Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020).

As for the remaining six circuits, five—as Olson acknowledges (Petition at 17)—apply *Heck*'s plain text to conclude that no exception exists to the favorable-treatment requirement for a person who is no longer incarcerated or who was never incarcerated: the First,[12]

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[11] *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020). *Savory* is the subject of a parallel petition for certiorari review. https://www.supremecourt.gov/DocketPDF/19/19-1360/145045/20200605170252944_Cannon%20PFC.pdf.

[12] *See Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998) ("The *Heck* Court ruled in no uncertain terms that when a section 1983 claimant seeks 'to recover damages for allegedly unconstitutional conviction or imprisonment,' he '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.' " (quoting *Heck*, 512 U.S. at 486-87)).

Third,[13] Fifth,[14] Seventh,[15] and Eighth.[16] The D.C. Circuit has not weighed in.[17]

None of the nine articles cited by Olson (Petition at 14-15) support the proposition that a Section 1983 plaintiff in Olson's circumstances—for whom habeas is not available due to the plaintiff's choice to abandon efforts to seek habeas relief—is not subject to *Heck*'s

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[13] *See Deemer v. Beard*, 557 F. App'x 162, 164 (3d Cir. 2014) ("*Heck* . . . impose[d] a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence.").

[14] *See Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000) ("[T]he [*Heck*] Court unequivocally held that unless an authorized tribunal or executive body has overturned or otherwise invalidated the plaintiff's conviction, his claim 'is not cognizable under [section] 1983.'" (quoting *Heck*, 512 U.S. at 487)), *followed in Black v. Hathaway*, 616 F. App'x 650, 653 (5th Cir. 2015).

[15] *See Savory*, 947 F.3d at 430 ("*Heck* controls the outcome where a section 1983 claim implies the invalidity of the conviction or the sentence, regardless of the availability of habeas relief.").

[16] *See Entzi*, 485 F.3d at 1003 ("The opinion in *Heck* rejected the proposition urged by Entzi. The Court said that 'the principle barring collateral attacks—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.'" (quoting *Heck*, 512 U.S. at 490 n.10)), *followed in Newmy*, 758 F.3d at 1011-12; *see Marlowe*, 676 F.3d at 747.

[17] *See Judd v. U.S. Dep't of Justice*, No. 1:19-CV-02620 (TNM), 2020 WL 1905149, at *3 (D.D.C. Apr. 17, 2020), *appeal filed* (May 21, 2020); *Molina-Aviles v. D.C.*, 797 F. Supp. 2d 1, 6 n.5 (D.D.C. 2011).

favorable-treatment requirement. Of the two that came closest, one was a 2002 article by a relatively recent law-school graduate, issued before most circuit courts had weighed in on what to do with *Spencer*. *Heck v. Humphrey After Spencer v. Kemna*, 28 New Eng. J. on Crim. & Civ. Confinement 1, 4, 25 n.a1 (2002). The other was issued 12 years ago, *Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 Harv. L. Rev. 868, 889 (2008), and did not engage with or mention the no-fault-of-the-Section-1983-plaintiff qualifier that, today, all circuits applying a *Heck* exception recognize.

As for the remaining seven:

1. Two note and do not critique the no-fault-of-the-Section-1983-plaintiff qualifier to the *Heck* exception recognized by some circuit courts. Alice Huang, *When Freedom Prevents Vindication: Why the Heck Rule Should Not Bar A Prisoner's § 1983 Action in Deemer v. Beard*, 56 B.C.L. Rev. E-Supplement 65, 66 (2015); John P. Collins, *Has All Heck Broken Loose? Examining Heck's Favorable-Termination Requirement in the Second Circuit After Poventud v. City of New York*, 42 Fordham Urb. L.J. 451, 477 (2014).

2. One does not weigh in on the split, noting that "[a] discussion of this circuit split is beyond the scope of this paper." Claire Mueller, *The Poventud Population: Why § 1983 Plaintiffs Who Plead or Are Reconvicted After A Constitutionally Deficient Conviction Is Vacated*

Should Not Be Barred by Heck, 34 Rev. Litig. 563, 576, 607 n.73 (2015).

3. One expressly states it is not addressing the split, but rather "the fact that an even more peripheral plaintiff, one whose federal claim would not necessarily undermine another party's state conviction, may also be Heck barred from federal court." Lyndon Bradshaw, *The Heck Conundrum: Why Federal Courts Should Not Overextend the Heck v. Humphrey Preclusion Doctrine*, 2014 B.Y.U. L. Rev. 185, 187 (2014).

4. One is just a case update, which agrees that the Tenth Circuit decision that recognized a *Heck* exception in that Circuit (*Cohen*) "may contravene the core holding of Heck." Aaron M. Gallardo, *Cohen v. Longshore: Determining Whether the Heck Favorable-Determination Requirement Applies to Plaintiffs Lacking Habeas Relief Under 42 U.S.C. § 1983*, 34 Am. J. Trial Advoc. 725, 729 (2011).

5. One includes some arguably unintended broad language, but cites to caselaw that recognize a qualified *Heck* exception that looks to the Section 1983 plaintiff's role in habeas becoming unavailable, and did not argue that this qualifier should not apply. Tyler Eubank, *A Prisoner's Dilemma: The Eighth Circuit's Application of Heck v. Humphrey to Released Prisoners*, 42 Mitchell Hamline L. Rev. 603, 616 & nn.72-73 (2016).

6. One argues for only a limited "equitable" exception to the favorable-treatment requirement

> "when state actors withheld exculpatory evidence from the plaintiff material to his underlying conviction, and such is not discovered until after the exhaustion of available remedies in the state criminal appeals process." Thomas Stephen Schneidau, *Favorable Termination After Freedom: Why Heck's Rule Should Reign, Within Reason*, 70 La. L. Rev. 647, 682 (2010).

In short, there is *a* circuit split. But, even if resolved in Olson's favor, it would not result in him prevailing in this appeal. Prevailing in this appeal would require this Court to recognize a *Heck* exception that *no* circuit has recognized. Recognizing the *Heck* exception for which Olson advocates would not warrant reversing dismissal of his Section 1983 claims, and recognizing a *Heck* exception broad enough to do so would be unsupported by any prevailing circuit view.

Amatuzio respectfully asks this Court to deny Olson's petition for a writ of certiorari.

D. Even if this Court reviewed and reversed, the law of the case would likely require dismissal of Olson's Section 1983 claim against Amatuzio on remand.

Because the district court dismissed Olson's Section 1983 claims as *Heck* barred, it declined to reach "alternative arguments for dismissal." (22a.) There were numerous such arguments. If this Court reviewed and reversed in Olson's favor, a remand would be required for the district court to address whether the

alternative arguments bar the Section 1983 claims. As to the Section 1983 claim against Amatuzio, the law-of-the-case doctrine would likely bar it, based on the same statute of limitations that the district court concluded barred the negligence claim against Amatuzio.

"The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016) (quotations omitted). "A court has the power to revisit prior decisions of its own . . . court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quotation omitted).

In district court, Amatuzio argued that Olson's claims against her—Section 1983 violation and negligence—both accrued in 2007, when Olson was allegedly wrongfully convicted (Doc. 24 at 4-6.) Amatuzio argued that the six-year statute of limitations barred the negligence claim, and the two-year statute of limitations barred the Section 1983 claim. (*Id.*) In opposition, Olson argued that the applicable statute of limitations for the Section 1983 claim was six years, and that fraudulent concealment tolled any accrual—he did not otherwise contest 2007 as the accrual date. (Doc. 28 at 12-16.) The district court concluded that the six-year statute of limitations barred Olson's negligence claim (22a-25a), and the Eighth Circuit

affirmed (5a-9a). Even if, on remand, the district court concluded that the six-year statute of limitations applied to the Section 1983 claim, the same rationale that required dismissal of the negligence claim would—as the law of the case—require dismissal of the Section 1983 claim. Olson did not dispute Amatuzio's argument that the Section 1983 claim against Amatuzio accrued in 2007, and the district court has already rejected Olson's fraudulent-concealment argument for tolling.

Even if Olson prevailed in this appeal, the law of the case would require dismissal of his Section 1983 claim against Amatuzio in any remand.

V. Conclusion

Amatuzio respectfully asks this Court to deny Olson's petition for a writ of certiorari.

Dated: July 16, 2020

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