NO. 19-756

In the
Supreme Court of the United States

LOUIS TAYLOR,

Petitioner,

v.

COUNTY OF PIMA; CITY OF TUCSON,

Respondents.

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

BRIEF IN OPPOSITION BY RESPONDENT PIMA COUNTY

NANCY JANE DAVIS
Counsel of Record
PIMA COUNTY
ATTORNEY'S OFFICE
32 N. Stone, Ste. 2100
Tucson, AZ 85701
(520) 724-4070
nancy.davis@pcao.pima.gov

Counsel for Pima County

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QUESTION PRESENTED

Whether the Court should review this case involving "highly unusual circumstances" where, *inter alia*, petitioner's first question presented was neither pressed nor passed on before the panel below, and petitioner's second question presented is not one on which the courts of appeals are divided.

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INTRODUCTION

In 1972, a jury found petitioner guilty of 28 counts of felony murder for starting a deadly fire. Over 40 years later, citing supposed advances in fire-investigation techniques, petitioner sought state post-conviction relief. The state vigorously disputed petitioner's entitlement to relief. In 2013, petitioner and the state reached an agreement: rather than have to prove his entitlement to post-conviction relief, petitioner agreed to plead no contest to 28 counts of felony murder with a sentence of time served, in exchange for the state's agreement to immediate release and acknowledgment that if the court found the updated fire-investigation techniques constituted newly discovered evidence, it could not retry him given the passage of time and destruction of evidence. Represented by highly competent counsel, petitioner abandoned his other claims of post-conviction relief (including actual innocence) and affirmed in court that he accepted this mutually beneficial agreement, was entering into it "knowingly, voluntarily, and intelligently," and had not been "threatened or forced" into it.

Without challenging that 2013 conviction and sentence, petitioner then sued respondents under 42 U.S.C. § 1983, claiming constitutional violations and demanding damages for his 42 years of incarceration. The district court allowed most of his § 1983 claims to proceed but denied his incarceration-based damages claim because, under *Heck v. Humphrey*, 512 U.S. 477 (1994), success on that claim would have called into question petitioner's valid 2013 plea, conviction, and sentence, which fully supported the period of

incarceration for which he sought damages. In a series of "highly unusual circumstances," Pet.App.7a, the district court certified that issue and others for interlocutory appeal; the Ninth Circuit rejected immediate appeal of that issue but accepted the County's request for immediate appeal of an immunity-related issue; and the Ninth Circuit, after full briefing and oral argument on the issue over which it granted immediate appeal, retroactively granted interlocutory review of the incarceration-based damages issue, ultimately agreeing with other courts of appeals that, under *Heck*, petitioner's 2013 conviction and sentence barred him from recovering incarceration-related damages.

Petitioner now asks this Court to review two questions. The first—whether an antecedent exception to *Heck* (the so-called *Spencer* exception) exists and applies here—was never pressed or passed on before the panel below. Petitioner raised it in the district court, but then failed to preserve it on appeal, and the Ninth Circuit lacked jurisdiction over it regardless. In any event, this case does not implicate that question or the overstated, alleged circuit split; petitioner is wrong on the merits; and petitioner does not contend that the issue is one of such importance that certiorari is warranted.

Petitioner's second question—whether *Heck* bars incarceration-damages for a former prisoner released on a time served sentence entered pursuant to an unchallenged no contest plea and conviction—was raised below, but only on partial briefing and without oral argument given the unusual procedural posture. Furthermore, this question does not remotely

implicate a circuit split. And as the unbroken line of precedent reflects, the Ninth Circuit's decision was plainly correct. This issue also is not one of such exceptional, recurring importance to merit this Court's review.

In apparent recognition that this case does not meet this Court's criteria for certiorari, petitioner resorts to distraction and diversion. He conflates the two questions presented in an attempt to paper over the weaknesses in each. He mischaracterizes the record in an attempt to paint himself as "demonstrably innocent" and "irreversibly wronged" when neither has been established. And he accuses respondents of "coercive" tactics that resulted in an "impossible" choice, despite previously affirming that he accepted his plea knowingly, voluntarily, and intelligently and was not threatened or coerced into doing so. Petitioner's flawed and misguided petition for certiorari should be denied.

STATEMENT OF THE CASE

A. Petitioner's 1972 Conviction and Sentence.

In 1972, a jury convicted petitioner of 28 counts of felony murder for starting a deadly fire at a Tucson hotel. Among other things, petitioner was placed at the scene by multiple witnesses; had five books of matches on him; gave inconsistent statements as to why he was at the hotel; repeatedly changed his story about other people starting the fire; and volunteered that it was "'awful that someone would set a fire like that,'" before anyone knew that the fire was the

product of arson. ER120-21. Petitioner was tried, convicted, and sentenced to life imprisonment.[1]

Petitioner unsuccessfully pursued direct appeal. Among other things, the Arizona Supreme Court rejected petitioner's claims of prosecutorial misconduct, false testimony, and insufficient evidence. *See State v. Taylor*, 537 P.2d 938 (Ariz. 1975). Petitioner also unsuccessfully sought state post-conviction relief and federal habeas relief. *See Cardwell v. Taylor*, 461 U.S. 571 (1983) (*per curiam*).

B. Petitioner's 2013 No-Contest Plea, Conviction, and Sentence.

In 2012, petitioner filed another state petition for post-conviction relief. Pet.App.2a; ER52-114. Petitioner invoked a report by the Arson Review Committee (ARC)—a panel established by the Innocence Project—concluding that fire-investigation methods used in 1972 were no longer valid and the fire's cause could not be determined. ER123. The Pima County Attorney asked the Tucson Fire Department to conduct its own independent review. *Id.* Given the passage of time and inability to examine the scene, the Tucson Fire Department concluded that it was no longer possible to determine the fire's cause. *Id.* The State's original expert, who continues to practice arson investigation, testified that, based on

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[1] Space precludes a response to all of petitioner's record mischaracterizations, *see* Pet.5-8, but one example is illustrative. Petitioner asserts that he "was attending a Christmas party in the hotel when the fire started." Pet.5-6. True—but only because he had put on a busboy's jacket to steal drinks; in reality, he was not an invited party guest. ER118, 121.

his experience then and since, he continues to believe that the fire was intentionally set. *Id.*

In 2013, petitioner and the state reached an agreement. In exchange for the state's stipulation that the post-conviction court "may find" that the fire-investigation advances constitute newly discovered evidence, petitioner agreed to "enter a plea of no contest" for 28 counts of felony murder and a sentence of time served. ER131.

During the plea hearing, the state's prosecutor stated that if post-conviction proceedings continued, the state would present "significant … evidence" that the fire was intentionally set, while petitioner would present findings that the fire's cause was indeterminable. ER171-72. The state added that if the court were to find "that this was, in fact, legally, newly discovered evidence," then a new trial could not proceed "given the passage of time, the destruction of evidence, and the death of many of the witnesses." ER172. But if the court found that "this was not newly discovered evidence," then petitioner could obtain "no relief." *Id.* Because both sides had "something to gain" and "something to lose," the parties agreed to "the entering of a no contest plea." ER171-72. The state reiterated its belief that, based on the evidence and testimony, petitioner "was, in fact, guilty of these crimes." ER172-73. The state submitted a memorandum detailing the factual basis for petitioner's no-contest plea. ER118-25. The trial court found that the plea was factually supported and incorporated the memorandum into its findings in adjudicating petitioner guilty on all counts. ER173.

For his part, petitioner—represented by nine prominent private attorneys, including a former Chief Justice of the Arizona Supreme Court—did not contest that "the prosecution would be able to offer into evidence" what the state had described, but stated that petitioner would "dispute" such evidence. ER173. Petitioner's counsel made no objection to the factual basis set forth in the memorandum, but merely noted that petitioner "maintain[s] his innocence, and the no contest plea allows him to do so." ER139, 154-55, 173.

The court found that petitioner "knowingly, voluntarily, and intelligently" entered "a plea of no contest to the charges set forth in the plea agreement." ER139-40. The court determined that it was "in the interest of justice to accept the plea in achieving finality," and it sentenced petitioner to "time served on each of th[e] counts" as to which he had pleaded no contest. ER173, 175. Petitioner was immediately released. ER174-75.

C. Petitioner's § 1983 Claim.

Following his release, petitioner filed suit against respondents in state court under 42 U.S.C. § 1983. As to the County, petitioner alleged municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for customs or practices of racial discrimination; inadequate training of employees; and failure to terminate prosecutors in deliberate indifference to the constitutional rights of criminal defendants. Pet.App.78a. Petitioner alleged that he was "wrongly charged in December, 1970 with multiple counts of homicide" and "wrongly convicted of those crimes," resulting in "42 years" in prison. *See* ER2-24. Petitioner did not challenge any aspect of his

2013 plea agreement—including his 2013 conviction or sentence.

The City of Tucson, without County objection, removed to federal court and both respondents moved to dismiss. The district court dismissed five of petitioner's six counts but permitted petitioner's claim of deliberate indifference to constitutional rights to proceed. The district court also addressed both respondents' contention that petitioner's claims were barred by *Heck*. The court acknowledged that petitioner's claims would "be *Heck*-barred if success ... would necessarily imply the invalidity of his outstanding 2013 convictions." Pet.App.88a. But citing *Spencer v. Kemna*, 523 U.S. 1 (1998) (Souter, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting), and *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), the court noted that the Ninth Circuit "has found an exception to *Heck* where a plaintiff is unable to pursue habeas relief … because he has been released from incarceration," Pet.App.91a, and applied it in this case. Pet.App.93a.

The County moved for reconsideration, arguing that the district court's holding was inconsistent with a recent Ninth Circuit decision, *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015). In *Lyall*, the Ninth Circuit noted that it has "recognized" the "narrow exception" set forth in *Spencer* and *Nonnette*. *Id.* at 1192. Nevertheless, without overruling *Nonnette* or addressing the *Spencer* "exception," the Ninth Circuit held that, on the facts of the case before it, *Heck* barred a §1983 claim. The district court found *Lyall* instructive and withdrew the portion of its

previous order "finding that an exception to *Heck* applies in this case." Pet.App.70a.

Petitioner filed an amended complaint, adding more allegations to support his previously-dismissed counts. Petitioner again alleged that as a result of respondents' conduct, he was "wrongly charged in December, 1970 with multiple counts of homicide" and "wrongly convicted of those crimes," resulting in "42 years" in prison. ER219-250. Petitioner again did not challenge his 2013 plea, convictions, or sentence. Respondents again moved to dismiss.

On March 16, 2017, the district court granted in part and denied in part the motions to dismiss. The court noted that given its previous determination that the *Spencer* "exception" was not applicable, it "must now apply *Heck* in analyzing the § 1983 claims." Pet.App.50a. The court held that *Heck* "bars [petitioner] from premising his claims on the alleged constitutional injuries of being wrongfully charged, convicted, and imprisoned," but "does not bar [petitioner] from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions." Pet.App.53a. The court accordingly concluded that *Heck* did not "require[] dismissal of Counts One through Six of [petitioner's] SAC to the extent that those claims are construed as alleging that" petitioner's constitutional rights "were violated during his original trial proceedings by" the non-disclosure of supposedly exculpatory evidence, the hiring of a purportedly prejudiced expert, and the use of allegedly false testimony from two informants. Pet.App.60a-61a. On that basis, the court held that five of

petitioner's six claims could proceed. *Id.* The court also held that, while *Heck* barred petitioner from recovering "compensatory damages for the time he spent incarcerated" given his 2013 plea, convictions, and time-served sentence, petitioner could still "establish non-incarceration-based compensatory damages." Pet.App.24a, 30a. Finally, the court rejected Pima County's argument that it was entitled to Eleventh Amendment immunity because the 1972 prosecution was undertaken on behalf of the state. Pet.App.63a-65a.

Petitioner sought reconsideration of the court's holding that he could not recover incarceration-related compensatory damages, which the court denied. Pet.App.38a. The court did, however, grant the parties' joint request for interlocutory review under 28 U.S.C. § 1292(b), certifying the following three questions: (1) "Is Plaintiff barred from obtaining incarceration-based compensatory damages in light of his outstanding 2013 convictions and sentence?"; (2) "Is Defendant Pima County entitled to Eleventh Amendment immunity on the grounds that the State of Arizona, rather than Pima County, prosecuted Plaintiff?"; and (3) "Has Plaintiff met the pleading requirements for asserting *Monell* claims?" Pet.App.38a.

D. The Interlocutory Appeal to the Ninth Circuit.

All three parties petitioned the Ninth Circuit to accept an interlocutory appeal. The motions panel denied the petitions. ER366. Nevertheless, it construed the County's request "as a timely notice of interlocutory appeal from the district court's denial of

the County of Pima's motion to dismiss based on Eleventh Amendment immunity," which, the panel concluded, independently gave the court jurisdiction under the collateral-order doctrine to address the Eleventh Amendment issue. ER367; Pet.App.3a. The Ninth Circuit directed the district court to "process as an appeal" its March 16 order "denying the County of Pima's motion to dismiss based on Eleventh Amendment immunity." ER367.

Accordingly, the parties proceeded to brief the limited Eleventh Amendment appeal permitted by the Ninth Circuit. Pima County's opening and reply briefs were devoted almost entirely to the Eleventh Amendment issue. In his response brief, petitioner improperly attempted to argue whether *Heck* bars incarceration-related damages; even then, he did not address whether the *Spencer* exception applied.

Before oral argument, the Ninth Circuit directed the parties to address: (1) whether Pima County was asserting immunity from liability or suit; and (2) whether the appellate court lacked interlocutory appellate jurisdiction over petitioner's *Monell* claims. Circuit.Dkt.30. At oral argument, the County addressed the Eleventh Amendment issue. Petitioner continued to press his *Heck* argument, though even that improper argument was confined to whether *Heck* barred incarceration-related damages, not whether the *Spencer* exception to *Heck* applied.

Over a month *after* oral argument, the Ninth Circuit ordered "simultaneous supplemental briefs not exceeding 15 pages" on "whether [petitioner's] incarceration damage claim is barred by *Heck v. Humphrey*." Circuit.Dkt.33. The order did not

mention the *Spencer* exception. *See id.* In their supplemental briefs, the parties addressed only whether *Heck* barred incarceration-related damages; they did not address whether the *Spencer* exception applied.

The Ninth Circuit affirmed. In a decision by Judge Graber, the court first held that it did not have appellate jurisdiction over the Eleventh Amendment question after all. Because the court concluded Pima County was "asserting *only* immunity from liability," not from suit, and the County's "asserted immunity from liability can be vindicated fully after final judgment," the "collateral-order doctrine does not apply here." Pet.App.7a.

Next, citing the "rare" and "highly unusual circumstances" of this case, the Ninth Circuit retroactively granted § 1292 interlocutory review of the district court's ruling that *Heck* barred petitioner's claim for incarceration-related damages. Pet.App.7a-8a. The court then proceeded to address only that narrow question presented; it did not address whether the *Spencer* exception to *Heck* applied.

The court held that *Heck* did not bar a challenge to petitioner's now-vacated 1972 conviction or resulting sentence. Citing decisions from the First and Second Circuits, the court stated that it "agree[d] with the analyses and conclusions of our sister circuits" in holding that "[a] plaintiff in a § 1983 action may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence." Pet.App.11a. Because "all of the time that [petitioner] served in prison is supported by the valid 2013 state-court

judgment," Pet.App.9a, petitioner could not obtain incarceration-related damages.

Judge Graber concurred in her own opinion to provide additional reasons why the Ninth Circuit "wrongly exercised jurisdiction over an interlocutory appeal" in this case. Pet.App.12a (Graber, J., concurring).

Senior Judge Schroeder dissented. Citing pre-*Heck* precedent from this Court, she opined that "our law is not that unjust" as to bar petitioner from recovering wrongful-incarceration damages. Pet.App.19a (Schroeder, J., dissenting).

Petitioner sought en banc rehearing. For the first time before the Ninth Circuit, petitioner argued that the *Spencer* "exception" to *Heck* applied. The County separately sought en banc review on its immunity issue. The Ninth Circuit denied rehearing. Pet.App.98a-99a.

REASONS FOR DENYING THE PETITION

I. Petitioner's first question presented, regarding the existence and applicability of the so-called *Spencer* exception, does not warrant review. First and foremost, this question was not pressed or passed on before the panel below. This Court typically does not review such questions, a practice that applies with especial force here given the issue's complexity and the fact that the Ninth Circuit lacked jurisdiction over it based on petitioner's failure to raise it. Second, although petitioner claims a deep and intractable circuit split, the reality is that most circuits have rejected the *Spencer* exception, several others have unsettled law, and the handful that have gestured toward accepting it have subsequently either qualified

that acceptance or rejected it en banc. Furthermore, this case does not implicate the question presented or any alleged split. Here, petitioner did in fact seek federal habeas review of the only conviction he currently challenges—the 1972 conviction. Petitioner argues only that he lacked an opportunity to challenge his 2013 conviction through habeas, which is irrelevant because he is not actually challenging it. Third, additional vehicle problems exist because the petition comes in an interlocutory posture and the County may be entitled to Eleventh Amendment immunity at the end of the day. Fourth, petitioner is wrong on the merits. *Heck* explicitly extended its favorable-termination rule to convicted criminals who are no longer incarcerated, and that holding is not undercut by the cobbled-together concurring and dissenting opinions in *Spencer*, especially where petitioner actually sought habeas review of the only conviction he currently challenges. Finally, as demonstrated by this Court's denials of petitions raising this issue, the question is not sufficiently important to warrant review—and petitioner does not argue otherwise.

II. Petitioner's second question presented, concerning whether he is entitled to incarceration-related damages notwithstanding *Heck*, likewise does not warrant review. First, because of the tortured procedural path of this case, the panel did not have the benefit of full briefing or oral argument on the issue. Second, the alleged circuit split on this issue is wholly illusory. While four courts of appeals have squarely addressed and rejected petitioner's position, not one has accepted it. The decisions cited by petitioner supposedly staking out the opposite side of the split do

not involve the issue or circumstances here. Third, the decision below was correct. Petitioner concedes that he is not challenging his 2013 conviction, and that indisputably valid conviction fully supports the incarceration for which petitioner now demands damages. Petitioner's arguments to the contrary are uniformly unavailing, and his approach would undercut plea bargaining. Fourth, the question is not of sufficient, recurring importance to warrant review. Indeed, petitioner identifies only a handful of recent cases purportedly implicating the issue. The petition should be denied.

I. The Court Should Deny Review Of Petitioner's First Question Presented.

A. Petitioner Did Not Timely Raise the *Spencer* Exception Before the Ninth Circuit, Which Did Not Pass on the Question.

Petitioner's first question presented asks the Court to resolve an alleged circuit split over the existence of the so-called *Spencer* exception to *Heck*—*i.e.*, the proposition that the limitations announced in *Heck* are categorically inapplicable to "a former prisoner who lacked an opportunity to challenge his conviction through federal habeas while incarcerated." Pet.i; *see also* Pet.13-15. The Court should deny review of this question for several reasons, but principally because it was neither pressed in nor passed on by the panel below and is not squarely presented here anyway.

This Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, the Court's "traditional rule" is that it

will address a question presented in a petition for certiorari only "if it was pressed in or passed on by the Court of Appeals." *United States v. Wells*, 519 U.S. 482, 488 (1997) (brackets omitted); *Cutter*, 544 U.S. at 718 n.7 (declining to consider issues "not addressed by the Court of Appeals"); *United States v. Williams*, 504 U.S. 36, 41 (1992). The Court has applied this rule where an issue was raised in and addressed by the district court but not the court of appeals. *See Cutter*, 544 at 718 n.7.

Here, the existence and scope of the *Spencer* exception was pressed in and passed on by the district court, which ultimately held that the exception was inapplicable here. Pet.App.70a. But petitioner never pressed this issue before the Ninth Circuit panel—not in initial briefing, at oral argument, or in supplemental briefing.[2] Likewise, the panel did not mention, much less pass on, the issue—not in its order preceding oral argument, at oral argument itself, in the supplemental briefing order, or its decision. *See* pp.10-12, *supra*.

Only at the petition for rehearing stage did petitioner resuscitate and press the *Spencer* exception. Circuit.Dkt.52. But this Court's "traditional practice" is "to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of

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[2] Petitioner's supplemental brief cited *Spencer* once in reviewing the procedural history. *See* Circuit.Dkt.40. But petitioner did not further mention this issue, much less argue that the *Spencer* exception exists and applies here. Indeed, petitioner's supplemental brief was premised on the proposition that the *Spencer* exception did *not* apply.

certiorari); *see also Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 163-64 (1932); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919). That practice is understandable: not only is such a claim likely forfeited below, *see, e.g.*, *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1149 (9th Cir. 2016), but petitions for rehearing seldom meaningfully explore an issue's merits, instead addressing purported decisional conflicts or the issue's importance. Further, when rehearing is denied, as here, the court of appeals does not address the merits at all. Accordingly, petitioner's first question presented is not appropriate for certiorari.

Petitioner may argue, in reply, that it was futile for him to have raised this issue before the Ninth Circuit panel given Ninth Circuit precedent—specifically, the *Lyall* decision that the district court cited in granting respondents' motion for reconsideration. But even when a party considers an argument futile given controlling precedent, that party must still *preserve* the issue in order to have that precedent overruled or abrogated. *See, e.g.*, *United States v. Rios-Barboza*, 58 Fed. Appx. 746, 747 (9th Cir. 2003). In any event, petitioner could have sought to distinguish *Lyall* before the Ninth Circuit—just as he did in the district court, where he argued that *Lyall* was "inapposite," D.Ariz.Dkt.68, and just as he did in his petition for rehearing, where he did not seek to have *Lyall* overruled or abrogated (as one would expect if it were futile to raise the *Spencer* exception before the panel), but argued that its "limitation on relief does not apply here," Circuit.Dkt.52.

In sum, petitioner's first question presented was neither pressed in nor passed upon by the panel below,

which lacked jurisdiction to address it regardless. The Court should deny review on this basis alone.

B. The Alleged Circuit Split Is Overstated And Not Implicated Here.

1. Petitioner asks this Court to resolve an alleged circuit split over whether the so-called *Spencer* exception to *Heck*'s favorable termination requirement exists. But petitioner overstates the supposed circuit split. For example, while petitioner argues that the Eleventh Circuit has "aligned itself" with circuits that have accepted the *Spencer* exception, Pet.16, the Eleventh Circuit recently stated that "[t]his circuit has not definitively answered the question," *Topa v. Melendez*, 739 F. App'x 516, 519 n.2 (11th Cir. 2018) (citing cases). Similarly, subsequent to *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008), the Fourth Circuit qualified its prior acceptance of the *Spencer* exception. *See Griffin v. Balt. Police Dept.*, 804 F.3d 692, 696 (4th Cir. 2015) (explaining that "the *Heck* exception does not extend to just any petitioner who, by virtue of no longer being in custody, cannot seek habeas relief"). And the Sixth Circuit, subsequent to *Powers v. Hamilton County Public Defender Commission*, 501 F.3d 592 (6th Cir. 2007), criticized *Powers* because "[i]t seems clear that Justice Souter's ruminations in his concurring opinion in *Spencer* were *dicta*," *Harrison v. Michigan*, 722 F.3d 768, 773 n.1 (6th Cir. 2013), thus indicating that it may, in an appropriate case, overrule *Powers* en banc.

Indeed, the Seventh Circuit did exactly that in a recent decision, *Savory v. Cannon*, 947 F.3d 409 (7th Cir. 2020) (en banc). As petitioner notes, in *Burd v. Sessler*, 702 F.3d 429 (7th Cir. 2012), the Seventh

Circuit had previously "follow[ed] the approach taken by Justice Souter's *Spencer* concurrence." Pet.19. In *Savory*, however, the Seventh Circuit, sitting en banc, rejected the *Spencer* exception. *Savory*, 947 F.3d at 428. *Savory* powerfully demonstrates that even a panel decision squarely adopting the *Spencer* exception may not be a circuit's final word on the issue.

Savory also increases to six the number of courts of appeals that, by petitioner's own account, have rejected the *Spencer* exception, rendering the split even more lopsided and undeserving of this Court's review. And even petitioner's characterization of the circuits going against him is fuzzy, underscoring that the split is less clear-cut than presented. For example, although petitioner includes the Ninth Circuit in that bucket, he admits that the Ninth Circuit has not actually rejected the *Spencer* exception but instead applied it in some circumstances and not in others. Pet.17-18, 19. Petitioner also acknowledges that Second Circuit law is similarly unsettled. Pet.18-19.

Thus, although petitioner contends that "the Circuits are sharply and intractably divided" on this question, Pet.19, the reality is that most circuits have rejected the *Spencer* exception, several circuits have unsettled law, and the handful of circuits that have gestured toward accepting the proposition have either qualified that acceptance or rejected it en banc—the very opposite of "intractabl[e]." Importantly, no circuit has embraced the *Spencer* exception en banc. Further percolation is warranted to determine whether a sharper circuit split actually develops or,

instead, any differences among the circuits dissipate through opinions like the Seventh Circuit's in *Savory*.

2. Furthermore, any split that may exist is not implicated here. None of the decisions cited by petitioner did so under circumstances analogous to this case—namely, where federal habeas is unavailable only with respect to a conviction the former prisoner is not challenging and where the prisoner actually did file unsuccessful habeas challenges to the conviction he is challenging. For example, the Fourth Circuit's decision in *Wilson* involved the allegation that the Virginia Department of Corrections improperly extended the plaintiff's sentence. *See* 535 F.3d at 263. Unlike here, that sentence had not been vacated pursuant to a plea deal, nor had the plaintiff been released under a sentence for time served. *See id.* Similarly, the Sixth Circuit's decision in *Powers* did not involve a plaintiff whose sentence had been vacated pursuant to a plea, or who had been released under a time-served sentence. *See* 501 F.3d at 592. Likewise, in neither *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010), nor *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003), had plaintiffs' convictions been vacated.

Even more significant, the plaintiffs in the foregoing cases were permitted to bring § 1983 claims because they were supposedly unable to seek federal habeas relief. Here, however, petitioner not only had access to federal habeas corpus but *actually availed himself* of that remedy for the *conviction and sentence actually challenged*. Thus, while petitioner argues that "[i]t is beyond dispute" that he "lacked an opportunity to challenge his 2013 plea and sentence

through habeas" because he was released the day his 2013 plea was entered, Pet.20, that is irrelevant because petitioner *is not challenging* "his 2013 plea and sentence." *See* Pet.App.9a (panel noting that petitioner "does not challenge his 2013 'no contest' pleas or sentence"). Petitioner has repeatedly maintained that he is challenging *only* his 1972 conviction and sentence—a conviction and sentence as to which he *did* seek federal habeas relief. *See* pp.3-4, 6-8 *supra*. In short, petitioner is mixing apples and oranges in an attempt to shoehorn himself into the alleged *Spencer* exception.

C. Additional Vehicle Issues Warrant Denial.

Further vehicle problems counsel against certiorari. First, the petition comes to this Court in an interlocutory posture because the district court allowed five out of six of petitioner's § 1983 claims—including *every* claim against respondent Pima County—to proceed. The court also held that while petitioner could not recover incarceration-related damages, he may be able to "establish non-incarceration-based compensatory damages." Pet.App.65a; p.9, *supra*.

Second, it remains to be determined whether Pima County is entitled to Eleventh Amendment immunity from liability on the basis that the prosecutor alleged to have violated petitioner's constitutional rights was acting on behalf of the state. Although the Ninth Circuit initially exercised interlocutory review over the County's Eleventh Amendment argument, it ultimately declined to resolve that issue because it concluded the County was

"asserting *only* immunity from liability," not suit. Pet.App.7a. The court noted that "[t]he County's asserted immunity from liability can be vindicated fully after final judgment." *Id.* Because the County may well be immune from any damages to which petitioner might ultimately be entitled, this case is a poor vehicle for resolving whether an exception to *Heck* exists to allow petitioner to seek those damages in the first place.

D. Petitioner is Incorrect on the Merits.

Petitioner is also wrong on the merits. *See* Pet.26-29. *Heck*'s limitation on § 1983 claims applies even when a plaintiff is no longer in custody, particularly in the unusual circumstances presented here.

Heck articulated the "favorable-termination" requirement: "[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment," a § 1983 plaintiff "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. The requirement applies if "success in [the] action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

In *Heck*, the Court, in an opinion by Justice Scalia, expressly extended its holding to individuals no longer imprisoned, stating 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." 512 U.S. at 490 n.10 (citations omitted). This comment was in direct response to Justice Souter's concurrence, joined by three other Justices, which argued that *Heck*'s limitation does not extend to "individuals not 'in custody' for habeas purposes," and who could not "invoke federal habeas jurisdiction" before their release. *Id.* at 500 (Souter, J., concurring). Justice Souter's view did not convince either Justice Scalia or the Court.

Petitioner nonetheless argues that "five Members of this Court correctly concluded in *Spencer* that *Heck* does not apply to a prisoner … who has been released from prison and who lacked an opportunity to raise his claims through habeas." Pet.26-27. Specifically, petitioner invokes Justice Souter's concurrence for four Justices in *Spencer*, and Justice Stevens's dissent in *Spencer*. Pet.14. But this sort of vote-counting from *dicta* in separate opinions "may not overrule majority opinions." *Savory*, 947 F.3d at 421. Justice Souter did not write for the Court in either *Heck* or *Spencer* and footnote 10 of Justice Scalia's majority opinion was part of the Court's holding and "ma[de] clear how broadly [the Court] intended its holding to apply." *Id.* at 422.[3]

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[3] Petitioner cites *Muhammad v. Close*, 540 U.S. 749 (2004) (*per curiam*), in arguing that this Court has "made clear that it has not yet 'settle[d] the issue.'" Pet.28. But *Muhammad* was a *per curiam* summary reversal concluding that *Heck* did not apply for a different reason—namely, that petitioner's suit "threatens no consequence for his conviction or the duration of his sentence." *Muhammad*, 540 U.S. at 751. A footnote opaquely commented that "[m]embers of the Court have expressed the view that

Petitioner argues that the favorable-termination rule is inapplicable here because it "serves simply to avoid a conflict between § 1983 and the habeas statute." Pet.27. But *Heck* was based not just on this principle but on the compelling policy of avoiding collateral attacks on state-court convictions. *Heck*, 512 U.S. at 484-85. As the Seventh Circuit explained, the favorable-termination requirement "avoids parallel litigation over the issues of probable cause and guilt, and precludes the possibility … of conflicting judgments arising out of the same transaction." *Savory*, 947 F.3d at 421 (citing *Heck*, 512 U.S. at 485-86).

This Court's recent decision in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), is instructive. Because the plaintiff in that case had been acquitted, there was no possible collision between habeas and § 1983. Yet the Court cited the favorable-termination rule as being "rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." *Id.* at 2156-57. These fundamental principles do not dissipate simply because a convicted individual is no longer incarcerated.

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unavailability of habeas for other reasons may also dispense with the *Heck* requirement," and added that "[t]his case is no occasion to settle the issue." *Id.* at 752 n.2. Members of the Court have expressed that view, but only in separate opinions, and some of those Justices joined the *per curiam* in *Muhammad*. The diplomacy embodied in *Muhammad* is hardly sufficient to indicate that *Heck*'s footnote 10 somehow no longer controls.

E. The Question Is Not of Sufficient Importance.

Finally, petitioner's first question presented is not sufficiently important to warrant this Court's review. Notably, petitioner does not even argue otherwise. Although he contends in a heading that "the questions presented are of enormous practical importance," Pet.32 (capitalization altered), petitioner's ensuing "importance" argument focuses entirely on his *second* question presented, not the first.

Petitioner's silence is well-taken, for the first question presented is not of such exceptional, recurring importance that certiorari is warranted. To begin with, the question arises only in a very limited set of circumstances: when a prisoner brings a § 1983 claim challenging his conviction or sentence after the completion of his sentence and the defendant purportedly could not have sought federal habeas relief during his sentence for reasons beyond his control. The universe of individuals these circumstances encompass is extraordinarily small. Even defendants with a brief sentence can avail themselves of habeas before their release, and a properly filed habeas petition remains valid notwithstanding the plaintiff's release from custody so long as there are collateral consequences, as is often the case. *See Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). In recognition of the relative unimportance of this question, this Court has denied review of cases presenting the issue. *See e.g., Newmy v. Johnson*, 574 U.S. 1047 (2014); *Gause v. Haile*, 574 U.S. 824 (2014).

II. The Court Should Deny Review Of Petitioner's Second Question Presented.

A. The Question Presented Was Inadequately Explored in the Court of Appeals.

Petitioner's second question presented asks "[w]hether *Heck* bars a plaintiff from recovering damages for his period of incarceration if the plaintiff's conviction has been vacated and he has been released from prison pursuant to a plea of 'no contest' to time served." Pet.i. Unlike petitioner's first question presented, his second question was at least pressed in and passed on by the Ninth Circuit panel. But even then, the "rare" and "highly unusual" set of procedural circumstances of the appeal, Pet.App.7a, caused this issue to be addressed in a belated and limited fashion. The Ninth Circuit motions panel denied petitioner's request for interlocutory review of this issue and permitted interlocutory review only of the County's Eleventh Amendment issue. As a result, the parties' merits briefing focused on that issue (though petitioner improperly devoted several pages of his response brief to the incarceration-damages issue).

Only after oral argument did the panel ask the parties to brief the incarceration-damages issue. And even then, the panel requested simultaneous fifteen-page briefs, with no opportunity for response. The court conducted no oral argument on the issue, and its opinion offered only a short discussion of the issue. This limited treatment does not provide the robust examination and analysis that this Court typically expects in cases that it reviews. If the Court were ever to grant certiorari on this question, it should wait for

a case in which the merits were fully debated in the court of appeals, including through full briefing and oral argument. If petitioner is correct in asserting that "[t]he case law is now replete with examples of such pleas" entered into by "many jurisdictions," a more suitable case should present in the near future. Pet.33.[4]

B. The Alleged Circuit Split Is Illusory.

Petitioner argues that there is a 4-2 circuit split over his second question presented, but the split is illusory. Petitioner is correct that four circuits—the First, Second, Fifth, and now the Ninth—have held that *Heck* "bars a plaintiff from recovering damages for his period of incarceration if the plaintiff's conviction has been vacated and he has been released from prison pursuant to a plea of 'no contest' to time served." Pet.i; *see also* Pet.21-23 (discussing cases). But no court of appeals has held to the contrary, or anything close to it.

Attempting to manufacture a split, petitioner first invokes the Third Circuit's decision in *Geness v. Cox*, 902 F.3d 344 (3d Cir. 2018). But that decision is far afield from the issue or circumstances here. *Geness* examined whether the favorable-termination requirement is satisfied "when charges are formally abandoned by way of" a *nolle prosequi* order that did not, on its face, "indicate [defendant's] innocence." *Id.* at 356. The Third Circuit merely held that a court

[4] As with the first question presented, the second question presented also suffers from the vehicle problems of the petition's interlocutory posture and the County's potential Eleventh Amendment immunity from liability. *See* pp.20-21, *supra*.

evaluating whether there was a favorable termination of an earlier conviction or sentence, must "look beyond the four corners of [an] order" and "conduct a fact-based inquiry." *Id.* The court concluded that the facts giving rise to the order in that case indicated that there was a "favorable termination" of the charges against the plaintiff. *Id.* Unlike here, *Geness* did not involve a conviction based on a no-contest plea (or even a plea), a time-served sentence, earlier and later convictions and sentences, or anything else material to the decisions by the four circuits that have held that *Heck* bars claims like petitioner's. Indeed, *Geness* did not even cite *Heck*. *Geness* thus does not remotely suggest that, in the Third Circuit, petitioner would "have been eligible for recovery" notwithstanding *Heck*. Pet.25.[5]

The Seventh Circuit's decision in *Lopez v. City of Chicago*, 464 F.3d 711 (7th Cir. 2006), is equally inapposite. Like *Geness*, *Lopez* does not mention *Heck* and does not involve a conviction arising out of guilty or no-contest plea, a time-served sentence, or earlier and later convictions and sentences. Instead, *Lopez* held that, on the merits of his claim for unconstitutional duration of confinement, a § 1983 plaintiff was entitled to judgment as a matter of law

[5] Petitioner's other Third Circuit case, *Bronowicz v. Allegheny County*, 804 F.3d 338 (3d Cir. 2015), is equally unavailing. There, the court held that the favorable-termination requirement can be met without the vacating court explicitly declaring that a prior judgment was "illegal," so long as the "totality of the circumstances surrounding the prior proceedings reflect a favorable outcome for the plaintiff." *Id.* at 345-47. Like *Geness*, *Bronowicz* did not involve a no-contest conviction, a plea, or a time-served sentence.

because he was detained without a warrant or probable-cause hearing past the constitutional maximum of 48 hours. *Id.* at 721-22. Petitioner points to language in which the court observed that the plaintiff "could recover compensatory damages for the unlawful duration of his confinement" despite "stipulat[ing] there was probable cause to arrest him." Pet.24 (quoting *Lopez*, 464 F.3d at 722). But the court was simply explaining that the stipulation regarding the arrest was insufficient to hold that the plaintiff could not recover any compensatory damages for the excessive confinement, given the evidence of "physical and mental injuries" that could have been avoided absent the unconstitutional confinement. *Lopez*, 464 F.3d at 722.

In short, the Third and Seventh Circuit decisions that petitioner cites to gin up a circuit split have nothing to do with the second question presented here. They do not involve prior convictions that have been vacated pursuant to a later conviction based on a no-contest plea; they do not involve time-served sentences pursuant to such convictions; and they do not address whether *Heck* bars plaintiffs from recovering incarceration-related damages in such circumstances. Petitioner is thus forced to invoke district court decisions he claims demonstrate the split. Pet.23-25. District court decisions, of course, seldom provide a basis for this Court to grant certiorari. Regardless, the decisions cited by petitioner merely apply the unremarkable and inapposite principles set forth in *Geness* and *Lopez*. None implicates petitioner's second question or suggests that even one court anywhere in the country has taken a position contrary to the

unanimous view of the First, Second, Fifth, and Ninth Circuits on this issue.

C. The Decision Below Was Correct.

1. The Ninth Circuit—and every other court to address the question—correctly held that a § 1983 plaintiff "may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence." Pet.App.11a. As the court explained, because petitioner's 1972 conviction was vacated, *Heck* poses no bar to a challenge to that conviction or the resulting sentence. But because petitioner's 2013 conviction and sentence are indisputably valid, *Heck* bars a § 1983 claim that "would necessarily imply the invalidity" of that conviction or sentence. 512 U.S. at 487. Recognizing this limitation, petitioner has conceded that he is only challenging his 1972 conviction and sentence, and not his 2013 conviction or sentence. *See* Pet.App.9a; pp.7-8, 13, *supra*.

The problem for petitioner is that, as the Ninth Circuit observed, "all of the time that [petitioner] served in prison," and for which he seeks incarceration-related damages, "is supported by the valid 2013" judgment in which the state court accepted the no-contest plea—an agreement supported by specific facts and findings of guilt—and sentenced petitioner to time served. Pet.App.9a. Therefore, "[a]s a matter of law," petitioner's valid 2013 conviction—which he does not, and cannot, challenge—"caused the entire period of his incarceration." *Id*. And "when a valid, unchallenged conviction and sentence"—here, the 2013 conviction and sentence—"justify the plaintiff's period of imprisonment, then the plaintiff

cannot prove that the challenged conviction and sentence"—here, the 1972 conviction and sentence—"caused his imprisonment and any resulting damages." Pet.App.10a; *see also Olsen v. Correiro*, 189 F.3d 52, 70 (1st Cir. 1999) (holding that § 1983 plaintiff "is not free to question the finality of his valid imprisonment by an action for incarceration-based damages"); *Poventud v. City of New York*, 750 F.3d 121, 135 (2d Cir. 2014) (finding *Olsen* "analogous and instructive" and holding that § 1983 plaintiff "cannot seek to collect damages for the time that he served pursuant to his plea agreement").

2. Petitioner resists this straightforward conclusion with three unavailing arguments. First, he challenges the notion that his 2013 conviction could have been the "sole legal cause" of his incarceration, because an "after-the-fact event" cannot have caused a "preceding injury." Pet.29-30. But this ignores the particular nature of the time-served sentence to which petitioner agreed, which is necessarily backwards-looking and is independently supported by the 2013 conviction. *Cf. Olsen*, 189 F.3d at 66-70 (examining causation principles in materially identical circumstances).

Second, petitioner contends that he "has established 'favorable termination' under *Heck*" because the state "determined it 'would be unable to proceed with a retrial, and the convictions would not stand.'" Pet.30. This assertion fails twice over. For one, it does not advance the ball for petitioner. There is no dispute that the district court concluded petitioner had satisfied the favorable-termination rule as to his 1972 conviction and sentence. And whether

petitioner has satisfied the favorable-termination rule as to his 2013 conviction and sentence is irrelevant because petitioner *is not challenging* them. Even if petitioner were, he could not establish "favorable termination," for "as to the validity of the sentence rendered, a [no-contest] plea is the equivalent of a guilty plea." *Olsen*, 189 F.3d at 68 (citing *North Carolina v. Alford*, 400 U.S. 25, 35 n.8 (1970)); *cf. Poventud*, 750 F.3d at 130-31 (noting that a "termination is not favorable … if the charge is withdrawn or the prosecution abandoned pursuant to a compromise").

For another, although petitioner insists that the County "determined it 'would be unable to proceed with a retrial, and the convictions would not stand,'" the County did no such thing. The state made this statement not because of petitioner's actual innocence (which the state vigorously disputed), but because of the difficulty with a retrial given the passage of time and loss of other evidence if the state were to lose the novel legal issue over newly discovered evidence. Pet.30; *see Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977) ("[A] collateral attack may be made many years after the conviction when it may be impossible, as a practical matter, to conduct a retrial"). Furthermore, the statement was offered as part of the agreement that allowed petitioner to plead no-contest, accept time served, and obtain immediate release. Petitioner cannot accept the benefit of his agreement regarding a retrial, yet escape its consequences (a no-contest plea, an adjudication of guilt, and a sentence of time served). *See Olsen*, 189 F.3d at 69 (explaining that plaintiff "now attempts to enforce a bargain that is quite different from the bargain society offered him").

Third, petitioner contends that in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), this Court "imposed limits on the enforceability of 'release-dismissal agreements,' under which 'a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges.'" Pet.31 (quoting 480 U.S. at 389, 392). Petitioner maintains that his 2013 plea agreement "is a release-dismissal agreement in all but name." *Id.* But petitioner mischaracterizes *Rumery*, which *upheld* enforcement of a "release-dismissal agreement" and rejected precisely the sort of "*per se* rule" against enforcement that petitioner seeks for plaintiffs in his situation. 480 U.S. at 392, 398. Furthermore, petitioner's 2013 plea agreement is hardly "a release-dismissal agreement in all but name." Among other critical differences, petitioner's plea was "concluded under some form of judicial supervision," which Justice O'Connor—who provided the fifth vote in *Rumery*—stated would have made *Rumery* an even "easier case." *Id.* at 403 (O'Connor, J., concurring in part and concurring in the judgment).

Moreover, like the plaintiff in *Rumery*, petitioner made a "voluntary decision to enter [his] agreement," aided by "experienced" counsel. *Id.* at 394; *see also* ER139-40 (district court finding that petitioner "knowingly, voluntarily, and intelligently" entered his plea). Because petitioner "voluntarily" entered into the plea agreement and never challenged its factual basis, judgment of guilt, and accompanying sentence, the "public interest" is "no reason to hold [that] agreement invalid." *Id.* And the "benefits of the agreement to [petitioner] are obvious," *id.*: he gained immediate release from prison and the ability to

"maintain his innocence," ER173, without having to prove that he was actually entitled to relief, much less actually innocent—which the state was prepared to dispute vigorously. *See* pp.4-6, *supra*.[6]

Petitioner repeatedly insists that he was the subject of "coercive" tactics, faced an "impossible choice," and had "no real choice but to accept" his agreement to plead no-contest and time served. Pet.1, 4, 9, 31, 33. As an initial matter, there is no evidence of "coercive" tactics in this case. There is "no evidence of prosecutorial misconduct" in the procurement of petitioner's plea agreement, *Rumery*, 480 U.S. at 398, which petitioner admitted to entering "knowingly, voluntarily, and intelligently." ER139-40. Indeed, petitioner affirmed in court that "no one has threatened or forced [him] to take this agreement." ER164. Nor was petitioner presented with an "impossible choice." Petitioner had two choices, each with advantages and disadvantages: immediate release without having to prove entitlement to post-conviction relief, while accepting a no-contest plea and

[6] To that end, petitioner's repeated assertions that he was "wrongfully incarcerated," "demonstrably innocent," "grievously and irreversibly wronged," and so forth, *see* Pet.1, 13, are all based on allegations that remain unproven, are contradicted by the record, and are steadfastly disputed by the County in this action and by the State in the criminal proceeding. The *only* basis for petitioner's insistence that he is "demonstrably innocent" is the statement that the state would "be unable to proceed with a retrial" if the recent arson reports legally constituted "newly discovered evidence." ER124, 155-56, 172; Pet.8. But as explained, that statement simply reflected the passage of time—not an admission of innocence—and the state only made it as part of, and in support of, the agreement with petitioner in which he pled no contest to grave criminal charges. *See* pp.4-6, *supra*.

time served; or declining the plea and time served but having to prove entitlement to post-conviction relief to a neutral judge while remaining imprisoned. *See Olsen*, 189 F.3d at 69 (explaining how no-contest pleas "are of benefit to defendants"). Petitioner's options were not materially different from those of any criminal defendant—including older defendants—every day in the plea-bargaining process. Just as those defendants are not coerced or given an impossible choice, neither was petitioner.

Petitioner's approach runs counter to "the established policy of enforcing plea bargains." *Olsen*, 189 F.3d at 69. Plea bargaining is an "important component[] of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971) (describing the "[d]isposition of charges after plea discussions" as "not only an essential part of the process but a highly desirable part for many reasons"). This Court "has several times recognized the benefits of plea bargaining to the defendant as well as to the State." *Corbitt v. New Jersey*, 439 U.S. 212, 222 n.12 (1978).

The "advantages" of plea bargaining, however, "can be secured … only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge*, 431 U.S. at 71. Here, petitioner pleaded no contest "as part of a plea bargain with the prosecution," but "he now attempts to enforce a bargain that is quite different from the bargain society offered him." *Olsen*, 189 F.3d at 69-70. To allow petitioner now "to call into question, through a civil jury's award of damages for incarceration, the legal validity of [his] unimpeached

criminal sentence would lead to inconsistency and an undermining of the criminal process." *Id.* at 69. Furthermore, permitting plaintiffs to challenge pleas to which they voluntarily agreed and seek civil damages "would undermine the availability of [no contest] pleas," for if such pleas come "with the prospect of continuing litigation and a possible damages awards, prosecutors will not agree" to them, making such pleas "less available to defendants." *Id.*

D. The Question Is Not of Sufficient Importance.

Finally, petitioner's second question presented is not of such recurring, exceptional importance to warrant certiorari. Decisions by courts of appeals rejecting petitioner's argument have been on the books for over twenty years. *See Olsen*, 189 F.3d at 52; *Pete v. Metcalf*, 8 F.3d 214 (5th Cir. 1993). Yet petitioner can identify only a handful of cases involving purportedly similar circumstances, Pet.33-34, indicating that—like petitioner's first question presented—this issue implicates only a very small universe of § 1983 claimants. Moreover, petitioner admits that these decisions have largely arisen "in just the last few years," *id.*, which, if anything, militates in favor of further percolation, particularly given the absence of a circuit split.

Furthermore, these recent decisions underscore that, as noted—and as is the case here—§ 1983 claims routinely proceed even if plaintiffs are unable specifically to obtain incarceration-related damages. *See, e.g.*, *Rosales-Martinez v. Palmer*, 2017 WL 3710068, at *5 (D. Nev. Aug. 28, 2017) (holding that two of three § 1983 claims "are not barred by *Heck*");

pp.8-9, *supra*. Indeed, citing the decision below, the Ninth Circuit recently held that § 1983 plaintiffs may "recover damages if the convictions underlying their claims were vacated pursuant to a settlement agreement." *Roberts v. City of Fairbanks*, ___ F.3d ___, 2020 WL 356959, at *2 (9th Cir. Jan. 22, 2020). The case law thus provides even more reason to decline review of this splitless, narrow issue on which the Ninth Circuit was clearly correct.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

NANCY JANE DAVIS
Counsel of Record
PIMA COUNTY
ATTORNEY'S OFFICE
32 N. Stone, Ste. 2100
Tucson, AZ 85701
(520) 724-4070
nancy.davis@pcao.pima.gov

Counsel for Pima County

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