APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-60566

GABRIEL OLIVIER,

Plaintiff—Appellant,

versus

CITY OF BRANDON, MISSISSIPPI;
WILLIAM A. THOMPSON, *individually and in his official capacity as Chief of Police for Brandon Police Department*,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:21-CV-636

Aug. 25, 2023

Before WIENER, GRAVES, and DOUGLAS, *Circuit Judges*.

DANA M. DOUGLAS, *Circuit Judge*:[*]

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court established a bar against 42 U.S.C. § 1983 claims that necessarily imply the invalidity of the plaintiff's criminal conviction. The question presented is whether *Heck* also precludes injunctive relief

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

against future enforcement of an allegedly unconstitutional ordinance. Under the unusual circumstances here, we conclude that it does.

Gabriel Olivier pleaded guilty to violating a local ordinance that redirected protests around an amphitheater to a designated area during live events. He brought this § 1983 action, seeking to recover damages and to enjoin the ordinance under the First and Fourteenth Amendments. In *Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998) (en banc), we extended *Heck* to bar such relief.

Yet Olivier does not directly challenge *Clarke*. Instead, he seeks to distinguish it on grounds that we have long rejected. He thus leaves us with two options: either follow *Clarke* or create an extraordinary exception to our precedent. Choosing the former, we AFFIRM the district court's dismissal of Olivier's claims.

I.

Olivier is an evangelical Christian who often preaches in public. He seeks to "impart[ ] . . . [the] message that everyone sins and deserves eternal damnation but [for] Jesus Christ." He also protests "sins he believes are relevant for the community," like abortion, and what he describes as "whore[ness]," "drunk[enness]," and "fornicat[ion]." *Olivier v. City of Brandon*, No. 3:21-cv-00636-HTW-LGI, 2022 U.S. Dist. LEXIS 196233, at *7 (S.D. Miss. Sept. 23, 2022). To spread his views, Olivier uses signs and loudspeakers, and frequents high-traffic areas with many pedestrians.

One such area is the Brandon Amphitheater. Owned by the City of Brandon, Mississippi, the Amphitheater hosts live events for crowds of up to 8,500 people. Olivier alleges that, between 2018 and 2019,

he visited the Amphitheater five or six times to evangelize.

In 2019, the City passed an ordinance (Section 50-45 of the Brandon Code of Ordinances—"the Ordinance") to reduce traffic around the Amphitheater during live events. The Ordinance redirects "protests" and "demonstrations" to a designated protest area three hours before an event, and one hour after. It also bans the use of loudspeakers that are "clearly audible more than 100 feet" from the protest area and requires all signs to be handheld. The Ordinance states that these restrictions apply "regardless of the content and/or expression" of the protest.

In May 2021, Olivier visited the Amphitheater with friends and family during a live concert to evangelize. He was stopped by the City's chief of police, William Thompson, who handed him a copy of the Ordinance and ordered him to go to the protest area. Though Olivier first complied, he later returned, believing the protest area was too isolated for attendees to hear his messages. He was then charged with violating the Ordinance.

Olivier pleaded *nolo contendere* (no contest) in municipal court. He received a suspended sentence of ten days' imprisonment and a fine. Olivier paid the fine but did not appeal his conviction.

Olivier then sued the City and Chief Thompson under § 1983, claiming the Ordinance violated the First and Fourteenth Amendments. He sought damages and also moved for a preliminary and permanent injunction to enjoin the City from enforcing the Ordinance. Defendants then moved for judgment on the pleadings as well as summary judgment, arguing that Olivier's claims were barred by *Heck*. The district

court agreed with defendants, denied Olivier's request for injunctive relief, and dismissed his claims with prejudice.

Olivier now appeals on a single, narrow issue: whether the district court erred in barring his request for injunctive relief under *Heck*.[1]

II.

Before addressing the merits, we begin with some housekeeping.

A.

First is the standard of review. The district court never stated which motion it was granting. It did, however, refer to matters beyond the pleadings. We thus construe the court's decision as a grant of summary judgment. *See Reynolds v. New Orleans City*, 272 F. App'x 331, 335 (5th Cir. 2008) (construing the district court's decision as a grant of summary judgment in a similar situation); *cf.* FED. R. CIV. P. 12(d) ("If, on a motion [for judgment on the pleadings], matters outside the pleadings are . . . not excluded . . . the motion must be treated as one for summary judgment").

Our review is *de novo*. *See Newbold v. Operator, L.L.C.*, 65 F.4th 175, 178 (5th Cir. 2023) (citation omitted). Summary judgment is appropriate if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We will draw "all reasonable inferences" in the non-movant's favor, *Newbold*, 65 F.4th at 178 (citation omitted), and may affirm "on

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[1] Olivier has also abandoned his claims against Chief Thompson.

any ground raised below and supported by the record." *Ballard v. Devon Energy Prod. Co., L.P.*, 678 F.3d 360, 365 (5th Cir. 2012) (citation omitted).

B.

Next are defendants' half-hearted assertions that Olivier forfeited his chance to oppose the application of *Heck* to his request for injunctive relief. He did not.

First, defendants claim that Olivier waived his challenge because he raised it in a sur-reply before the district court. We disagree. Olivier raised this objection in his initial opposition, albeit in a footnote. Whatever defects there may have been in this presentation were harmless because defendants were able to respond. *See Redhawk Holdings Corp. v. Schrieber*, 836 F. App'x 232, 235 (5th Cir. 2020) (holding that district courts may "consider arguments . . . raised for the first time in a reply brief" if it provides the opposing party "an adequate opportunity to respond."). The district court also succinctly recited the parties' arguments and ruled on this issue in its decision. *See Olivier*, 2022 U.S. Dist. LEXIS 196233, at *21. "An argument is not forfeited on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it." *CEATS, Inc. v. TicketNetwork, Inc.*, 71 F.4th 314, 325 (5th Cir. 2023) (cleaned up). That is what happened here.[2]

Defendants also say that Olivier forfeited his objection to *Heck* because he failed to properly brief it on appeal. Their theory goes like this: *Heck* focuses on claims not relief. But in his briefs, Olivier focuses

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[2] Olivier's case thus differs from others where the parties waived their claims by failing to give the trial court "a fair opportunity to consider the[m]." *Harper v. Lumpkin*, 64 F.4th 684, 691 (5th Cir. 2023) (citation omitted).

mostly on whether *Heck* bars injunctive *relief*, rather than his underlying *claims*. So he waived the issue on appeal—or so defendants allege.

This distinction, however, is wordplay and finds no support in our *Heck* jurisprudence. Indeed, this court has used "claim" and "relief" interchangeably in its opinions. *See McCollum v. Lewis*, 852 F. App'x 117, 121 (5th Cir. 2021) ("*Heck* bars most of McCollum's *claims*.") (emphasis added); *White v. Fox*, 294 F. App'x 955, 960 (5th Cir. 2008) ("*Heck* . . . bar[s] these avenues of *relief*") (emphasis added). Olivier did not forfeit his challenge.

C.

One last item of housekeeping remains. Defendants contend that Olivier's claims are not ripe for disposition. Olivier's request for injunctive relief is a pre-enforcement challenge. Such challenges are not ripe if the issues are "abstract or hypothetical." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008) (citation omitted). "[K]ey considerations" include the "fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* (citation omitted). A case is generally ripe if the questions are "purely legal ones," and not if "further factual development is required." *Id.*; *see Feds for Med. Freedom v. Biden*, 63 F.4th 366, 386 (5th Cir. 2023). To demonstrate ripeness, a plaintiff must also show "some hardship." *Roark & Hardee LP*, 522 F.3d at 545 (citation omitted).

Olivier easily makes both showings. His challenge is a purely legal one: whether *Heck* bars a claim for injunctive relief that disputes the constitutionality of a local ordinance. *See Feds for Med. Freedom*, 63 F.4th at 386. Further factual development is not needed to

address this claim. Olivier also states that he can no longer preach at the Amphitheater because of the Ordinance. "[W]here a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, hardship has been demonstrated." *Roark & Hardee LP*, 522 F.3d at 545 (quoting *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 743-44 (1997)). That is precisely what Olivier alleges; his claims are thus ripe for disposition. We move on to the merits.

III.

Heck commands that "a convicted criminal may not bring a claim under . . . § 1983, if success on that claim would necessarily imply the invalidity of a prior conviction." *Aucoin v. Cupil*, 958 F.3d 379, 382 (5th Cir. 2020) (citation omitted). This prohibition continues until the conviction is "reversed," "expunged," or "declared invalid." *Heck*, 512 U.S. at 487. The *Heck* bar seeks to ensure "finality and consistency" of prior criminal proceedings and to prevent "duplicative litigation and the potential for conflicting judgments." *Aucoin*, 958 F.3d at 380, 382.

Though a classic example of a *Heck*-barred claim is one for money damages, courts have expanded *Heck* to also bar declaratory and injunctive relief. *See Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005); *Clarke*, 154 F.3d at 190-91.[3] Thus:

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[3] *See also VanBuren v. Walker*, 841 F. App'x 715, 716 (5th Cir. 2021) ("*Heck* prevents [a plaintiff] from raising *any* constitutional claim or seeking *any* injunctive relief that would result in invalidating, or implying the invalidity of, a conviction or sentence that has not otherwise been reversed, expunged, or called into question." (citations omitted)); *Lavergne v. Clause*, 591 F.

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or **equitable relief**), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would **necessarily** demonstrate the invalidity of confinement or its duration.

Wilkinson, 544 U.S. at 81-82 (emphasis added in bold); *see Nelson v. Campbell*, 541 U.S. 637, 647 (2004).

Olivier's plea of *nolo contendere* is a conviction that implicates *Heck*. *See Claunch v. Williams*, 508 F. App'x 358, 359 n.2 (5th Cir. 2013) ("[A] plea of *nolo contendere*. . . . is enough . . . to trigger *Heck*."); *Kastner v. Texas*, 332 F. App'x 980, 981 (5th Cir. 2009) (same); *see also* MISS. CODE ANN. § 21-23-7(8) ("Upon the entry of a plea of nolo contendere[,] the court *shall convict* the defendant") (emphasis added). To prevail, he must therefore show that his request to enjoin the ordinance would not "necessarily" invalidate his conviction. *Wilkinson*, 544 U.S. at 82.

Olivier insists that he meets this burden. According to him, the injunction he seeks is entirely prospective; it concerns "the constitutionality of the ordinance and its application to his religious speech in the future." Defendants disagree, comparing Olivier's case to *Clarke*, an en banc decision of this court. We agree with defendants.

In *Clarke*, a prison inmate challenged the constitutionality of a prison rule that banned certain

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App'x 272, 273 (5th Cir. 2015) ("*Heck* applies to [ ] claims for declaratory and injunctive relief as well as damages under § 1983." (citation omitted)).

threats against prison employees. *Clarke*, 154 F.3d at 187-88. He sought damages and "prospective injunctive relief from . . . the rule on grounds of facial unconstitutionality" under the First Amendment. *Id.* at 188. The en banc court held that *Heck* barred both forms of relief. In so doing, the *Clarke* court distinguished between prospective relief that would "merely enhance eligibility for earlier release" and those that would "create entitlement to such relief." *Id.* at 190 (citation omitted). The inmate's request for injunctive relief implicated the latter, the court reasoned, because a favorable ruling "would be binding on state courts," which "could only conclude that [the inmate] had been convicted of violating an unconstitutional rule." *Id.* (citing cases). Thus, because the inmate's conviction had yet to be "reversed, expunged or otherwise declared invalid," his facial challenge to the constitutionality of the prison rule was "not [ ] cognizable in a § 1983 action." *Id.* at 191.

Clarke squarely applies to Olivier's case. As in *Clarke*, Olivier also seeks to enjoin a state law under which he was convicted. *See id.* at 190. He likewise requests "prospective injunctive relief . . . on grounds of facial unconstitutionality." *Id.* at 188. Under *Clarke*, such relief "necessarily implies" the invalidity of the conviction and is barred under *Heck*. *Id.* at 189. It also goes without saying that, as an en banc decision, *Clarke* is binding. *See Veasey v. Abbott*, 13 F.4th 362, 365 (5th Cir. 2021); *Coastal Prod. Servs. v. Hudson*, 555 F.3d 426, 431 n.10 (5th Cir. 2009).

Olivier's attempts to distinguish *Clarke* do not persuade us. For starters, he argues that the only relief he seeks is to enjoin the prospective enforcement of the Ordinance, not damages. Not so: Olivier sought compensatory and nominal damages at the district

court. And either way, *Clarke* would still bar his challenge. Damages notwithstanding, *Clarke* makes clear that *Heck* forbids injunctive relief declaring a state law of conviction as "facially unconstitutional." *Clarke*, 154 F.3d at 190. Simply put, a "[c]onviction based on an unconstitutional rule is the sort of 'obvious defect' that, when established, results in nullification of the conviction." *Id.* (citations omitted).

True, unlike the inmate in *Clarke*, Olivier is not serving his sentence. But in this circuit, *Heck* applies even if a § 1983 plaintiff is "no longer in custody" and "thus [cannot] file a habeas petition." *See Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000).

Most of the cases Olivier cites do not rebut *Clarke*. He quotes *Aucoin*, for example, and says that there is "no *Heck* bar if the alleged violation occurs 'after' the cessation of the plaintiff's misconduct that gave rise to his prior conviction." Yet *Aucoin* was an excessive force case that had nothing to do with injunctive relief; nor did the plaintiff challenge the constitutionality of the underlying statute of conviction. *See Aucoin*, 958 F.3d at 382-83. Olivier also relies on *Edwards v. Balisok*, 520 U.S. 641, 648 (1997), where the Supreme Court said, in passing, that "[o]rdinarily, a prayer for [certain] prospective relief" will not undermine *Heck*. In context, however, the Court was referring to the specific relief sought in that case: an injunction "requiring prison officials to date-stamp witness statements." *Id.* at 648. And as *Clarke* recognized, the injunction in *Edwards* had only an "indirect impact" on the inmate's conviction. *Clarke*, 154 F.3d at 189.

Olivier finds stronger support in *Wilkinson*, 544 U.S. 74 and *Skinner v. Switzer*, 562 U.S. 521 (2011). In *Wilkinson*, several inmates challenged the constitutionality of their parole-hearing procedures and

sought declaratory and injunctive relief compelling officials to apply different rules. *Wilkinson*, 544 U.S. at 76-77. *Heck* did not preclude such relief because the inmates' success would merely mean "new [parole] eligibility review" or "a new parole hearing," neither of which "necessarily spell[ed] immediate or speedier release," or implied the invalidity of their sentences. *Id.* at 81. Likewise in *Skinner*, the Supreme Court permitted an inmate to seek an injunction compelling DNA testing because "[s]uccess . . . gains for the prisoner *only access* to [ ] DNA evidence, which may prove exculpatory, inculpatory, or inconclusive." *Skinner*, 562 U.S. at 525 (emphasis added). That was so even if the "ultimate aim" of the injunction may be to "use the test results as a platform for attacking his conviction." *Id.* at 534. These cases suggest that the Supreme Court sees *Heck* as a bar to injunctive relief in only the narrowest of circumstances. *Cf. Nelson*, 541 U.S. at 647 ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.' ").

There is admittedly friction between *Clarke* and these decisions. On one hand, *Skinner* suggests that an injunction would not "necessarily" imply the invalidity of a conviction unless that outcome is "inevitable." *Skinner*, 562 U.S. at 534. Yet enjoining a law as unconstitutional may not "inevitably" lead to the invalidity of the underlying conviction; preliminary injunctions "merely [ ] preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And the district court may very well reach a different result after trial; "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* (citations omitted). Such findings also would not bind Mississippi state courts, which have the ultimate say over

Olivier's conviction. *See, e.g.*, *Stewart v. Guar. Bank & Trust Co.*, 596 So.2d 870, 873 (Miss. 1992) (explaining that an "interlocutory injunction" is not an "adjudication on the merits" and does not have *res judicata* effect). This court never addressed that issue in *Clarke*, relying instead on the preclusive effect that federal *judgments* and *findings on the merits* have on state courts.[4] *See Clarke*, 154 F.3d at 190.

But on the other hand, the injunctive relief in *Wilkinson* (parole review) and *Skinner* (DNA testing) resemble the one in *Edwards* (date-stamping): they concern matters that are entirely separate from the underlying conviction. *See Wilkinson*, 544 U.S. at 82 (explaining that the plaintiffs could proceed with their request for injunctive relief because they only "render invalid [ ] state *procedures*" for parole (emphasis added)). Indeed, a preliminary injunction will only issue if the proponent shows a likelihood of success that the statute is unconstitutional. *See Rest. Law Ctr. v. United States DOL*, 66 F.4th 593, 597 (5th Cir. 2023). Which is why courts describe this relief as a rare and "extraordinary and drastic remedy." *Anibowei v. Morgan*, 70 F.4th 898, 902 (5th Cir. 2023) (citation omitted). That is different from a challenge to the constitutionality of the very law that led to plaintiff's conviction, as in *Clarke*. Again, *Clarke* distinguished *Edwards* on this very basis: it found the relief sought in *Edwards* had "only an indirect impact on the validity of [the] prisoner's conviction." *Clarke*, 154 F.3d at 189 (citations omitted); *see also Martin v. City of Boise*,

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[4] The dissent in *Clarke* raised some of these concerns. *See Clarke*, 154 F.3d at 191 (Garza, J., dissenting) (explaining that the injunction in *Clarke* would, at best, "possibly imply" the invalidity of the conviction).

920 F.3d 584, 619 (9th Cir. 2019) (Owens, J., dissenting) (explaining that the injunctive relief in *Edwards* concerned "procedural violations" and that constitutional challenges, no matter how prospective, are "substantive").

Still, we need not bridge the gap between *Clarke* and these decisions today. Olivier does not claim that *Clarke* is no longer good law; he only seeks to distinguish it. We have already rejected those efforts above.

Finally, Olivier urges us to carve out an independent exception to *Heck* for prospective challenges like his. That is what the Ninth Circuit did in *Martin* when it permitted several homeless individuals to enjoin two ordinances that banned camping and lodging on public property. 920 F.3d at 603-04. In so doing, the *Martin* court reasoned that *Heck* ensured the "finality and validity of previous convictions"—not to "insulate future prosecutions from challenge." *Id.* at 611. But again, that brings us right back to *Clarke*, which Olivier does not seek to overturn. *See* 154 F.3d at 189; *see also Martin*, 920 F.3d at 619 (Owens, J., dissenting) (viewing the challenge in *Martin* as a "substantive" attack that "impl[ied] the invalidity" of the convictions). And because we have rejected Olivier's invitation to distinguish *Clarke*, we likewise leave this question for another day.

All this leads to one conclusion: affirmance. But we will make one modification to the judgment. The district court denied Olivier's claims "with prejudice." That mandate, however, would bar Olivier from pursuing his claims even if his conviction were later "reversed," "expunged," or "declared invalid." *Heck*, 512 U.S. at 487. To avoid this outcome, we have explained that the "preferred" language under *Heck* is to dismiss the claims "with prejudice *to their being asserted*

again until the Heck conditions are met." *Deleon v. City of Corpus Christi*, 488 F.3d 649, 657 (5th Cir. 2007) (citation omitted) (emphasis added). So we will modify the judgment accordingly. *See id.* (modifying the judgment under similar circumstances); *see Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996) (same).

IV.

Under *Clarke*, Olivier's request to enjoin the enforcement of the Ordinance as unconstitutional would "necessarily" imply the invalidity of his conviction. *Clarke*, 154 F.3d at 188. Thus, the *Heck* bar applies. We therefore AFFIRM the judgment as MODIFIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
NORTHERN DIVISION

GABRIEL OLIVIER

PLAINTIFF

VS.

CITY OF BRANDON, MISSISSIPPI AND WILLIAM A. THOMPSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE FOR BRANDON POLICE DEPARTMENT

DEFENDANTS

CIVIL ACTION NO. 3:21-cv-00636-HTW-LGI

Sept. 23, 2022

ORDER

This is a civil rights action brought by Plaintiff Gabriel Olivier ("Plaintiff" or "Olivier") against Defendants the City of Brandon, Mississippi ("the City"); and William A. Thompson, Jr., individually and in his official capacity as Chief of Police for the Brandon, Mississippi Police Department ("Chief Thompson") (hereinafter collectively referred to as "Defendants"). The gravamen of Plaintiff's lawsuit is whether a certain City Ordinance regarding public protests/demon-

strations unconstitutionally prevents religious demonstrators from sharing their religious beliefs with other members of society.

Plaintiff's Verified Complaint [Docket no. 1] states that Plaintiff's constitutional rights have been violated under the First[1] and Fourteenth[2] Amendments to the United States Constitution, as guaranteed by

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[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I

[2] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV

Title 42 U.S.C. § 1983[3] and 1988[4]. Plaintiff further has requested declaratory relief under the authority of Title 28 U.S.C. §§ 2201[5] and 2202[6]. Accordingly, this

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[3] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West)

[4] Title 42 U.S.C. § 1988 provides in pertinent part:

Proceedings in vindication of civil rights. (a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to

court possesses subject matter jurisdiction over this matter by way of Title 28 U.S.C. § 1331[7], hailed as federal question jurisdiction.

Before this court are two motions: (1) a *Motion for Preliminary Injunction* **[Docket no. 3]**, filed by the Plaintiff; and (2) a *Motion for Judgment on the Pleadings, or, alternatively, for Summary Judgment* **[Docket no. 25]**, filed by the Defendants.

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and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

[5] (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C.A. § 2201 (West)

[6] Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C.A. § 2202 (West)

[7] The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331 (West)

This court has reviewed thoroughly the submissions of the parties and the relevant jurisprudence. Upon concluding its analysis, this court finds, as follows.

I. PERTINENT FACTS

Olivier is an Evangelical Christian[8] who believes that sharing his religious views is an important part of exercising his faith. Olivier alleges that "he imparts a religious, evangelistic message that everyone sins and deserves eternal damnation, but Jesus Christ grants salvation to those who repent and believe in him." [Docket no. 1, ¶ 13]. In furtherance of his aim to spread this message, Olivier contends that he "identifies sins he believes are relevant for the community at large, like drunkenness and abortion, that require repentance." [Docket no. 1, ¶ 14].

Olivier, along with a group of supporters, engages routinely in sidewalk protests on public accessways outside of well-attended events. As part of their protests, Olivier and his supporters display signage with controversial messaging and pass out religious literature "expounding on the gospel message". Olivier also wears expressive clothing depicting his views, and at-

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[8] The Merriam-Webster Dictionary defines "evangelize" as the act of "preach[ing] the gospel." *Evangelize*, MERRIAM-WEBSTERDICTIONARY.COM, https://www.merriam-webster.com/dictionary/evangelize (last visited September 22, 2022). It further defines "preach" as the act of "set[ting] forth in a sermon," "advocat[ing] earnestly," or "deliver[ing] (something, such as a sermon) publicly." *Preach*, MERIAM-WEBSTERDICTIONARY.COM, https://www.merriam-webster.com/dictionary/preach (last visited September 22, 2022).

tempts to engage individuals in conversation or debate on various religious topics, including abortion, often utilizing a voice amplification device to do so.

The City of Brandon, Mississippi owns and maintains Quarry Park, a public park within the City's corporate limits. Quarry Park encompasses nature/running/biking trails, a dog park, baseball facilities, multiple open green spaces, several parking lots, and an outdoor entertainment venue called the Brandon Amphitheater ("the Amphitheater"). The Amphitheater opened in 2018, and, since then, has held various live ticketed concert events. According to the Defendants, the Amphitheater's capacity, depending on the seating/standing room configuration for a specific event, can exceed 8,500 people.

According to Olivier, he is particularly interested in "imparting his views on public sidewalks bordering Boyce Thompson Drive . . . where that portion of the street runs through Quarry Park near the intersection with the main entry to the Brandon Amphitheater." [Docket no. 1, ¶ 25]. Olivier states that in 2018 and 2019, he visited this intersection "on event days to share his religious message about 5 or 6 times." [Docket no. 1, ¶¶ 28-31].

A. Previous Incidents

Defendants allege that, on days of events, Plaintiff and other individual engaging in public protests and demonstrations at the Amphitheater have caused disruptions in traffic flow and created safety hazards. Defendants have submitted Video footage and Affidavits in support of their allegations. In particular, Defendants point to incidents that occurred on May 12, 2018, the date of a "Hank William's, Jr. Concert". The

following are excerpts from the Affidavit of a concert attendee, Heather Perry [Docket no. 15-9].

> 2. On May 12, 2018, I attended the Hank Williams, Jr., Concert at the Brandon Amphitheater.
>
> 5. As I was crossing Boyce Thompson Drive . . . Mr. Olivier through his microphone said to and about me that "there's a whore walking down the street with her shirt up." Mr. Olivier and the other protestors were located on the sidewalk standing in and near the access to the sidewalk by me and other pedestrians. As I crossed the street onto the sidewalk, I was just a few feet [from] Olivier when he began to say to and about me through his microphone, "nasty, nasty, nasty, grody[9], grody, grody." As I was walking away, I heard Mr. Olivier say about me through the microphone, "nowhere in the Bible does it say that a woman is to be dressed half naked in the street at night."
>
> 7. Mr. Olivier singled me out to embarrass and humiliate me. A police officer who was directing traffic came to where we were. Mr. Olivier made me upset to the point that I wanted to hit him. The police officer advised me that if I did, even for the terrible things he was saying to and about me, that I would be arrested. I was upset and candidly had the police officer not been there, it is likely that . . .

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[9] Merrian-Webster Dictionary defines "grody" as "disgusting [or] revolting". *Grody*, MERRIAM-WEBSTERDICTIONARY.COM, https://www.merriam-webster.com/dictionary/grody (last visited September 22, 2022).

> my interaction with Mr. Olivier would've become physical.

Defendants have also submitted Video Footage of this May 12, 2018, incident. [Docket no. 15-10]. Although this court is unable to discern the words spoken, the video shows a young lady growing visibly disturbed and aggravated as Olivier speaks to her. The video also shows a police officer leaving his post directing traffic to intervene in the situation between the young lady and Olivier. [Docket no. 15-10 Subfile 5-Boyce-Thompson-Front-ent, REC_0021 at 2:12-5:28].

Another clip of the Video Footage recorded later on the same day, May 12, 2018, shows Olivier at the subject intersection speaking to a couple, a male and a female, who appear to be walking towards the Amphitheater entrance. The video shows the male growing visibly aggravated and coming back towards Olivier after the couple had passed by Olivier. Pursuant to the footage, police officers rushed to the intersection to intercede and de-escalate the altercation between the pedestrian and Olivier. The Officers appear to be conversing with the male, and eventually convinced him to walk away from Olivier.

In support of their contention that Olivier previously has caused disruptions, Defendants have also submitted an Affidavit from Fred Shanks, a reserve police officer, who is currently employed by the City in the Parks and Recreations Department [Docket no. 15-11]. Officer Shanks stated that, as a part of his duties as a reserve police officer, he conducted traffic control duties at the Amphitheater during events. He stated that he has had previous interactions with Olivier and his group, to wit:

> 5. I witnessed the [Plaintiff and his group] yelling, using bullhorns in an aggressive tone to families with children present as well as single women and teenage girls.
>
> 7. The words they yelled mainly at females included "fornicators", "Jezebels", "whores", and "sissies (at men). These provoked many hostile engagements with event attendees.
>
> 8. Many times I had to remove myself from directing traffic and assisting pedestrians crossing Boyce Thompson Drive, to intervene to prevent event attendees from initiating physical contact with them in response to their comments.
>
> 9. My repeated interventions in this respect prevented me from keeping event attendees safe and out of traffic.

Olivier, contrary to the above-mentioned evidence, asserts that his speech is respectful. [Docket no. 3-1, ¶ 15]. Oliver contends that "whore" and "drunkard" are biblical terms, and that he "speaks to the crowd, and does not direct his comments toward any specific person," [Docket no. 23-1, ¶ 12]. Olivier maintains that he does not use vulgar language. [Docket no. 23-1, ¶ 15]. Finally, says Olivier, he is not aggressive or hostile toward anyone. [Docket no. 23-1, ¶¶ 16-17].

B. The Subject Ordinance

On December 19, 2019, the City of Brandon amended its Code of Ordinances to include Brandon Code of Ordinance Section 50-45: "*Designating a Protest Area and Related Provisions Regarding Public Protests/Demonstrations During Events at the Brandon Amphitheater*" (hereinafter referred to as the

"Subject Ordinance"). The Subject Ordinance reads, as follows:

> 1. Three (3) hours prior to the opening of the Brandon Amphitheater to event attendees for a live ticket concert event ("Event") and one (1) hour after the conclusion of the Event, individuals and/or groups engaging in public protests and/or demonstrations, regardless of the content and/or expression thereof, are prohibited within the Restricted Area shown in Exhibit "A" attached hereto, except in the designated Protest Area as shown on Exhibit "A" attached hereto.
>
> 2. The Protest Area is available to individuals and/or groups during the time specified in Section 1 above, without the necessity of prenotice or permit, subject to the following terms and conditions:
>
> > (a) All individuals and/or groups shall be and remain wholly within the Protest Area while actively engaged in public protests and/or demonstrations. Vehicles are prohibited in the Protest Area;
> >
> > (b) The use of lasers, blinking or blinding lights, electric drums, or other amplified percussion or musical instruments, or equipment except as provided herein-below, is prohibited;
> >
> > (c) The use of a megaphone and/or loudspeaker which is clearly audible more than 100 feet from where the Protest Area is located is prohibited;

(d) Libel, slander, obscenities, and/or speech that incites imminent violence or law breaking is prohibited;

(e) The use of ladders, step stools, tables, chairs, buckets and/or any other object or thing that is customarily used to heighten an individual from the ground is prohibited;

(f) Temporary signs are permitted; however, wooden, or metal signs or sign stakes made from hard material that may be used as a weapon are prohibited. All signs must be hand-held and shall not be affixed to anything in the Protest Area or otherwise affixed to the Protest Area. The top of any sign may not be elevated more than 4 feet beyond the height of its holder.

(g) Anything brought onto the Protest Area shall be removed within 75 minutes of the conclusion of an Event.

(h) Each group shall have a representative who shall be present at all times while the group is, in whole or in part, within the Protest Area. The representative shall, when reasonably requested by the Chief of Police and/or his designee, provide photo identification. Individuals who are engaged in a demonstration and/or protest shall maintain on their possession while in the Protest Area photo identification and provide the same to the Chief of Police and/or his designee as and when reasonably requested. Requests for identification by the Chief of

> Police and/or his designee shall only be made in the event of a credible complaint and/or an observed violation of the provisions herein or other applicable federal or state law or municipal ordinance.
>
> 3. In the event of a violation of the provisions herein, in addition to the general fines and penalties provided in Section 1-12 of the Code of Ordinances of the City of Brandon, the offending individual will be removed from the Protest Area and is not be permitted to return to the Protest Area during the Event on the day of the violation and if the same individual violates the provisions herein again during an Event in the same calendar year, the individual shall be removed from the Protest Area and is not be permitted to return to the Protest Area during any Event for the remainder of that calendar year.

[Docket no. 3-2].

Olivier contends that the City passed the Subject Ordinance "in apparent response to" the City's interactions with Oliver and his group.

Defendants, however, state that the City adopted the Subject Ordinance after engaging in a continuous review process to improve the efficiency and safe flow of vehicular traffic, as well as to further the safety of pedestrians and event attendees at the Amphitheater. As part of this review process, say Defendants, the City hired third-party engineering firm, Neel-Schaffer, to study, report on, and make recommendations regarding the vehicular and pedestrian traffic and

parking. Defendants have submitted the engineering firm's findings as [Docket nos. 15-3 through 15-7][10].

Further, say Defendants, the City considered reports from police officers and City officials. An Affidavit from Brandon Police Department's Chief Investigator, Beau Edgington [Docket no. 15-8] states:

> 13. [As a part] of the problems that became apparent was the location of protestors at the intersection of Boyce Thompson Drive and Rock Way, which is the main intersection leading to the entrance of the Amphitheater. At this intersection, the stationed police office is responsible for directing traffic involving the predominate flow of the crowd entering and exiting the Amphitheater. From the opening of the Amphitheater, it became apparent that the location of protestors at this intersection caused disruption in the flow of the crowd and traffic control. We observed that pedestrians would leave the sidewalk and the crossing on Boyce Thompson Drive to avoid [the protestors], and thereby caused interruption with the flow of vehicular traffic, and in so doing put themselves in harms' way. We observed that when there were events with no protestors so located . . . the pedestrian and [vehicular] traffic flowed smoothly without interruption. As such, it was determined that, for purposes of safety and free and easy flow of the crowd and traffic, . . . there was a need

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[10] Defendants' submissions include the following: April 23, 2018 Neel-Schaffer Report, Ex. 3; May 21, 2018 Neel-Schaffer Report, Ex. 4; June 10, 2018 Neel-Schaffer Report, Ex. 5; July 6, 2018 Neel-Schaffer Report, Ex. 6; July 27, 2018 Neel-Schaffer Report, Ex. 7.

> to implement certain restrictions where protestors could [gather] and at the same time [identify] a reasonable alternative location for protestors. The ordinance as adopted incorporates our recommendations in this respect.

C. The Subject Incident

On May 1, 2021, the Amphitheater hosted a concert featuring artists Lee Brice and Parmalee. Olivier attended this event and, on this day, was arrested for violating the Subject Ordinance. Video Footage from Olivier's vantage point [Docket nos. 23-2, 23-3 and 23-4] shows the following.

Chief Thompson approached Olivier and his group and referenced the existence of "the new Ordinance." Olivier stated that he was aware of and had read the Subject Ordinance. Chief Thompson provided a copy of the Subject Ordinance to Olivier and identified the available Protest Area. Chief Thompson stated that the primary purpose of a designated area is to keep demonstrators "out of traffic".

At approximately 6:20 p.m., Olivier and his group proceeded toward the designated Protest Area. The video shows members of Olivier's group conversing with Olivier; however, no sound is available for this part of the footage [Docket no. 23-3]. The video shows that Olivier stopped short of the designated area, and then returned to the sidewalk at the intersection of Boyce Thompson Drive and Rock Way.

This court observes that Olivier and his group next engaged in protest activities and initiated interactions with pedestrians using a voice amplification device. Brandon Police Officer Bradley Turner's Affidavit [Docket no. 15-12] states that Olivier distracted

him from directing pedestrian and vehicular traffic during this time period.

> 9. While . . . attempting to maintain vehicular and pedestrian traffic at the Intersection, I reminded Plaintiff and the other protestors that they had already been provided with a copy of the Subject Ordinance and I told them that the designated Protest Area was back down the sidewalk from where they came and that it was clearly marked. They did not indicate to me that they were either unable to locate the designated Protest Area or that they required assistance in locating the same.

Olivier told the Officer that he had a copy of the Subject Ordinance and that "[he] is choosing not to obey it." [Docket no. 23-4]. Olivier then told his fellow group members to "Go ahead and set up [there] and just do what [they] do."

Officer Turner then radioed for assistance, and Chief Thompson responded. Chief Thompson came to the scene, accompanied by another Officer.

Chief Thompson states that as he approached Olivier and his group, he observed that they had large poster signs, were using at least one voice amplification device to single out and make comments to and about event attendees and were attempting to hand out literature to those pedestrians on the sidewalk. Olivier's Video Footage shows that the group held large signs stating, "Repent or Perish", as well as a large graphic image of a purportedly aborted, blood-covered, fetus.

Chief Thompson asserts that he observed that Olivier and his group were obstructing the sidewalk

and that in order to avoid Olivier and his group, pedestrians were forced to leave the sidewalk and "walk around the group in the public street". [Docket no. 15-1, p, 3]. Chief Thompson advised Olivier and his group that they needed to relocate to the designated Protest Area. Olivier stated to Chief Thompson that forcing the group to relocate would violate their "right to exercise [their] religious rights", and that the Ordinance is "an attempt to restrict [his] ability to speak freely." Chief Thompson then arrested Olivier and another member of his group, Bryan David Peden, for violating the Subject Ordinance.

Chief Thompson's Affidavit in support of the charge [Docket no. 15-17, p. 29] states that ". . . [O]n the 1st day of May, 2021, . . . Gabriel Olivier[,] did willfully and unlawfully violate City Ordinance 50-45 within the corporate limits of the City of Brandon, Mississippi by engaging in public protest/demonstration during the restricted time period within the restricted area near the Brandon Amphitheater in violation of the peace, dignity and laws of the [State of Mississippi] and/or the ordinances of said city within the corporate limits of [Brandon, Mississippi]."

On June 23, 2021, Olivier entered a plea of *nolo contendere*[11] in Brandon Municipal Court to the

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[11] A plea of *nolo contendere* is, for purposes of punishment, the same as a plea of guilty; the difference is that a plea of nolo contender is viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. *United States v. AEM, Inc.,* 718 F. Supp. 2d 1334 (M.D. Fla. 2010) (citing Federal Rule of Criminal Procedure 11(a)(3), 18 U.S.C.A.).

charge of violating the Subject Ordinance. Olivier retained Attorney Jim Kelly to represent him in the Municipal Court proceedings.

The Municipal Court rendered a sentence of 10 days imprisonment (suspended)[12], and a fine of $304.00. [Docket no. 15-17, p. 28]. On August 2, 2021, Olivier paid the $304.00 fine. Oliver did not appeal his Municipal Court conviction.

II. PROCEDURAL POSTURE

On October 6, 2021, Olivier filed his Verified Complaint in this court [Docket no. 1]. Contemporaneously with his Verified Complaint, Olivier filed a Motion for Preliminary Injunction, requesting that this court enjoin the City from enforcing City Ordinance § 50-45 against him [Docket no. 3].

Defendants argue that Plaintiff's request for a preliminary injunction should be denied. [Docket nos. 15 and 16]. This is so, say Defendants, because Plaintiff cannot demonstrate a likelihood of success on the merits of his claims to warrant prospective injunctive relief. Further, say Defendants, this court should dismiss Plaintiff's lawsuit "as a whole". On December 26, 2021, Defendants filed a Motion for Judgment on the Pleadings or, alternatively, for Summary Judgment [Docket no. 25], asserting that Plaintiff has made no viable claim against the Defendants.

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[12] The City of Brandon's Municipal Court Order [Docket no. 15-17, p. 27-28] states that Oliver's "jail time shall remain suspended conditioned on one-year of no violation of City Ordinance 50-45."

III. LEGAL STANDARDS

A. Injunction Standard

A preliminary injunction is appropriate when the movant demonstrates "(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 457 (5th Cir. 2017); accord *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012).

"[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Planned Parenthood Ass'n of Hidalgo County Texas, Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012); see also, *Winter v. Natural Resources Defense Council, Inc*., 129 S.Ct. 365 (2008) (rejecting the "possibility" standard and noting that the "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction," emphasis in original, citations omitted); *Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 94 S.Ct. 1113 (1974); *O'Shea v. Littleton*, 94 S.Ct. 669, (1974). A preliminary injunction may not be issued simply to prevent the possibility of "some remote future injury." *Winter*, 129 S.Ct. at pp. 375-376.

B. Rule 12(c) and Summary Judgment Standard

As stated *supra*, Defendants ask this court to dismiss Plaintiff's lawsuit "as a whole". The Defendants have challenged Plaintiff's case under two Federal Rules of Civil Procedure: Rule 12(c)[13] and Rule 56[14].

Rule 12(c) of the Federal Rules of Civil Procedure provides that "[a]fter the pleadings are closed–but early enough not to delay trial–a party may move for judgment on the pleadings." In ruling on a Rule 12(c) motion for judgment on the pleadings, the court adopts the same standard involved in deciding a Rule 12(b)(6)[15] motion to dismiss, accepting "all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Guidry v. Am. Pub. Life Ins.*

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[13] Rule 12(c) of the Federal Rules of Civil Procedure states: "Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

[14] Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part:

> Summary Judgment.
>
> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

[15] Rule 12(b)(6) of the Federal Rules of Civil procedure states: "How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: failure to state a claim upon which relief can be granted."

Co., 512 F.3d 177, 180 (5th Cir. 2007) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). To survive a Rule 12(c) motion for judgment on the pleadings, the plaintiff must plead sufficient facts to state a facially plausible claim to relief. *See, c.f., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (discussing the Rule 12(b)(6) motion to dismiss standard). Assuming all of plaintiff's factual allegations are true, the Court must find that Plaintiff's right to relief is more than speculative in order to deny a motion for judgment on the pleadings. *See Id.* at 588.

Under Rule 12(c), like Rule 12(b)(6), the central question is whether the Complaint includes claims that are plausible. *Twombly*, 550 U.S. at 555. Accordingly, this court must compare the legal claims identified in Plaintiff's Complaint with the factual allegations offered in support, inclusive of any exhibits attached to the Complaint and Answer. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015) ("In considering a motion for judgment on the pleadings under Rule 12(c), the court is generally limited to the contents of the pleadings, including attachments thereto. The 'pleadings' include the complaint[and] answer to the complaint[.]"); *Housing Authority Risk Retention Group, Inc. v. Chicago Housing Authority*, 378 F.3d 596, 600 (7th Cir. 2004) ("In a motion for judgment on the pleadings, the court considers the pleadings alone, which consist of the complaint, the answer, and any written instruments attached as exhibits."). For Plaintiff's claims to be plausible, the court must be able to draw a reasonable inference that the defendants are liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Merely reciting the elements of a cause of action, or making conclusory factual or legal

assertions, is insufficient for Plaintiff to defeat a motion to dismiss. *Jordan v. Flexton*, 729 F. App'x 282, 284 (5th Cir. 2018).

Under Rule 56 of the Federal Rules of Civil Procedure, however, this court must consider whether the whole record before it provides a viable basis for relief (as opposed to looking to the pleadings alone). *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). The central inquiry is whether no genuine issues of material fact exist, such that the party moving for summary judgment is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

To avoid summary judgment, a plaintiff must produce evidence of "specific facts showing the existence of a genuine issue for trial." *Foulston Siefkin LLP v. Wells Fargo Bank of Texas, N.A*., 465 F.3d 211, 214 (5th Cir. 2006). A factual issue is "material only if its resolution could affect the outcome of the action," *Burrell v. Dr. Pepper/Seven Up Bottling Grp*., 482 F.3d 408, 411 (5th Cir. 2007), and "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment," *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002) (quotation omitted).

IV. ANALYSIS

A. Heck Bar

Defendants first contend that Olivier's lawsuit *sub judice* challenges the Defendants' May 1, 2021, actions and, as such, is barred under the United States Supreme Court's ruling in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

Under the *Heck* doctrine, Section 1983 may not be used to undermine a prior criminal conviction. *Id*. This doctrine, which "bars litigation of claims that

would call into question the validity of a conviction, unless the conviction is set aside, emanates from [a] policy of finality that prevents [a] collateral attack of a criminal conviction once that matter has been litigated." *Connors v. Graves*, 538 F.3d 373 (5th Cir. 2008).

Defendants assert that because "success on [Olivier's] claim for money damages (and the accompanying claim for declaratory relief) would 'necessarily imply the invalidity of the punishment imposed' " for violating the ordinance, Olivier's claim must fail. *Wilkinson v. Dotson*, 544 U.S. 74, 81 (2005) (quoting *Edwards v. Balisok*, 520 U.S. 641, 648 (1997). Defendants also cite the following cases in support of their argument: *Abusaid v. Hillsborough Cty. Bd. Of Cty. Comm'rs*, 637 F. Supp. 2d 1002 (M.D. Fla. 2007) (applying *Heck* bar to claims seeking damages for past enforcement of allegedly unconstitutional ordinance); *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (en banc) (explaining that "the type of prospective injunctive relief that Clarke[, a prisoner,] requests in this case—a facial declaration of the unconstitutionality of the [relevant Department of Corrections' Rule]—is so intertwined with his request for damages . . . that a favorable ruling on the former would 'necessarily imply' the invalidity of Clarke's [prior conviction]"); and *Eubank v. Ghee*, 202 F.3d 268 (6th Cir. 1999) ("The holding in *Heck* applies regardless of whether the plaintiff seeks injunctive or monetary relief.").

Olivier, however, contends that his lawsuit does not challenge the Municipal Court's sentence. Further, says Olivier, he does not seek to overturn his conviction, either directly or indirectly. Oliver, rather, claims that his challenge focuses "entirely on the con-

stitutionality of the [Subject] Ordinance and its application to his [protected] religious speech." Olivier alleges that no finding by this court would negate an element of the Municipal Court offense, nor establish a fact inconsistent with Olivier's previous criminal conviction.

Olivier finally contends that *Heck* cannot act as a bar to his § 1983 claims when [he] has had no access to habeas corpus relief, citing *Black v. Hathaway*, 616 F. App'x 650, 651–52 (5th Cir. 2015) ("In *Heck*, the Supreme Court addressed the intersection between § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254.") (5th Cir. 2007). Olivier claims that because he is not in custody and unable to bring a federal habeas corpus proceeding, he is free to bring a § 1983 claim to secure relief. *Parker v. Fort Worth Police Dep't*, 980 F.2d 1023, 1025 (5th Cir. 1993). *Heck,* therefore, says Olivier, has no bearing on his non-prisoner constitutional claims.

This court disagrees with Olivier. First, this court notes that the Fifth Circuit has explicitly rejected Olivier's argument that *Heck* does not apply because he is not in custody. *See Walker v. Munsell*, 281 F. App'x 388, 390 (5th Cir. 2008) ("This circuit . . . has determined that *Heck's* bar applies to both custodial and noncustodial § 1983 plaintiffs.").

Next, Olivier argues that he is not challenging his Municipal Court conviction. Olivier's action for damages and declaratory relief *sub judice*, however, functionally challenges the legality of his conviction. In other words, Olivier's success in this civil suit would prove that his Municipal Court conviction violated his constitutional rights.

As stated *supra, Heck* bars claims under § 1983 if "success on the claim would necessarily imply that a prior conviction or sentence is invalid." *Aucoin v. Cupil*, 958 F.3d 379, 382 (5th Cir. 2020). Explained another way*, Heck* states actions for damages "that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement" are not cognizable under § 1983 unless the conviction or sentence that forms the basis of his claim has been invalidated. *Heck v. Humphrey*, 512 U.S. at 486–87. This "favorable-termination" requirement applies both to actions to recover damages for "allegedly unconstitutional convictions or imprisonment" as well as actions to recover damages "for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." *Heck v. Humphrey*, 512 U.S. at 486–87. As an example of the latter category, the United States Supreme Court provided the hypothetical of an individual convicted of resisting arrest, who then sought to bring a § 1983 action against his arresting officers for the violation of his Fourth Amendment rights. *Id.* at 486, n.6. In order to prevail on his § 1983 claim, said the Court, the individual would have to negate an element of the offense for which he was convicted—namely, that his arrest was lawful. *Id.*

Generally, jurisdictions in which an individual's *nolo contendere* is treated as a conviction, *Heck* bars that individual's subsequent § 1983 claims because a successful outcome in the latter would necessarily imply that the individual's prior plea or conviction was invalid. *Curry v. Yachera,* 835 F.3d 373, 378–79 (3d Cir. 2016) (plaintiff, who pleaded *nolo contendere* to theft by deception and conspiracy relating to a theft at a Wal-Mart store and later brought a § 1983 civil rights action against Walmart, its employees, and police officers, was barred by *Heck* where Pennsylvania

law treated the *nolo contendere* plea the same as a conviction and success on the claims would imply that petitioner's conviction was invalid); *Szajer v. City of Los Angele*s, 632 F.3d 607 (9th Cir. 2011) (finding that *Heck* barred civil rights claims challenging a search that discovered an assault weapon that formed the basis of a no contest plea).

Olivier does not dispute that he pled *nolo contendere* to violating the ordinance by "protesting" or "demonstrating," during restricted times and in restricted areas. Mississippi Rule of Criminal Procedure 15.3 (b), "states: that "[a] person charged with a criminal offense in county or circuit court, who is represented by counsel, may appear before the court at any time the judge may fix, be arraigned, enter a plea of guilty to the offense charge or, with leave of the court in misdemeanor cases, *nolo contendere*, and be sentenced at that time or some future time set by the court." Olivier retained Attorney Jim Kelly to represent him in the Municipal Court proceeding and entered his *nolo contendere* plea on June 23, 2021.

The Mississippi Supreme Court in *Bailey v. State*, 728 So. 2d 1070, 1072 (Miss. 1997) held that Mississippi statutes on municipal court powers provide that [upon the entry of a plea of *nolo contendere*] municipal judges "shall convict" a defendant "of the offense charged and shall proceed to sentence the defendant according to law." The conviction may be appealed "as in other cases." Miss. Code Ann. § 21–23–7(8). Thus, said the *Bailey* Court, "defendants who plead nolo contender in municipal court would be convicted by statute". *Id*.

In *Welch v. State*, 958 So. 2d 1288, 1289 (Miss. Ct. App. 2007) the Mississippi Court of Appeals stated

that a "a defendant waives any objections to [his previously entered *nolo contendere*] when he (1) knowingly and intelligently requested permission to plead *nolo* [*contender*], and (2) understood that the court considered it the equivalent of a guilty plea and could sentence him to the penitentiary. Once accepted, the trial court and this Court will treat it as a guilty plea. The Court explained that a *nolo contendre* plea waives the "right to contest the truth of the charge," and the defendant submits to the punishment imposed. *Id*. (internal citations and quotations omitted).

Here, Olivier submitted a *nolo contendere* plea in the Brandon Municipal Court. By doing so, he acknowledged the power of the Municipal Court to accept his plea of *nolo contendere*, which the Municipal Court Order denominated as "guilty", and to sentence him under a constitutional ordinance. Olivier did not appeal his conviction. A finding by this court that Olivier's speech did not constitute restricted speech, or that the Subject Ordinance is facially unconstitutional would, therefore, undermine his Municipal Court conviction; a conviction which has not been terminated in his favor.

Accordingly, this court finds that Olivier's § 1983 claims challenging the constitutionality of the Subject Ordinance are barred under the *Heck* doctrine. This court's holding is consistent with *Heck's* concern of "duplicative litigation and the potential for conflicting judgments." *Id.* at 382.

This court, having found that Olivier's § 1983 claims are barred under *Heck*, need not address the Subject Ordinance and the alleged speech restrictions contained therein. Further, this court finds that Olivier is not entitled to a preliminary injunction, enjoining the City from enforcing the Subject Ordinance.

As stated *supra*, a preliminary injunction is appropriate when the movant demonstrates "(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *Planned Parenthood*, 862 F.3d 445 at 457.

Olivier is not entitled to such prospective injunctive relief because, in light of this court's finding that it cannot entertain Olivier's §1983 claims, Olivier cannot demonstrate any likelihood of success on the merits of his lawsuit.

V. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Defendants' *Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment* **[Docket no. 25]** hereby is **GRANTED.**

IT IS FURTHER ORDERED that, for the reasons stated *supra*, Plaintiff Gabriel Olivier's Motion for Preliminary Injunction **[Docket no. 3]** hereby is **DENIED**.

IT IS FINALLY ORDERED that Plaintiff's claims against Defendants City of Brandon and Chief William A. Thompson, individually and in his capacity as Chief of Police for the Brandon Police Department, hereby are **DISMISSED** with prejudice.

SO ORDERED, this the 23rd day of September 2022.

/s/ HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
for the Fifth Circuit

No. 22-60566

GABRIEL OLIVIER,

Plaintiff—Appellant,

versus

CITY OF BRANDON, MISSISSIPPI;
WILLIAM A. THOMPSON, *individually and in his official capacity as Chief of Police for Brandon Police Department*,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:21-CV-636

Nov. 14, 2024

ON PETITION FOR REHEARING EN BANC

Before WIENER, GRAVES, and DOUGLAS,
Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en bane poll, eight judges voted in favor of rehearing, Chief Judge Elrod, and Judges Jones, Smith, Richman, Willett, Ho, Duncan, and Oldham, and nine judges voted against rehearing, Judges Stewart, Southwick, Haynes, Graves, Higginson, Engelhardt, Wilson, Douglas, and Ramirez.

PRISCILLA RICHMAN, *Circuit Judge,* dissenting from the denial of rehearing en banc:

I write separately to note that we are not called upon to address issue preclusion in this appeal. Criminal defendants, such as Olivier, may challenge the constitutionality of the statute or ordinance under which they have been charged *in the proceedings in which they are prosecuted.* The availability of such a claim or defense may have a preclusive effect in subsequent § 1983[1] litigation, regardless of whether the defendant actually asserted that claim or defense.

For example, if a defendant raised a constitutional claim and received an adverse ruling, that determination might have preclusive effect in subsequent litigation. Even if a defendant did not challenge the constitutionality of the statute or ordinance on which his conviction was based, the fact that he could have raised the issue may have preclusive effect. As the Supreme Court noted in *Heck v. Humphrey*,[2] "[t]he res judicata effect of state-court decisions in § 1983 actions is a matter of state law" and res judicata or other preclusion doctrines may provide an independent basis to bar § 1983 actions like Olivier's.[3]

In the case before us, the City of Brandon asserted as an affirmative defense in the district court that "[t]o the extent applicable, Plaintiff's claims are barred by the doctrines of collateral, equitable, and/or judicial estoppel and/or res judicata."[4] However, the district court dismissed Olivier's claims solely on the

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[1] 42 U.S.C. § 1983.

[2] 512 U.S. 477 (1994).

[3] *Id.* at 480 n.2.

[4] ROA.86.

basis of the *Heck* bar.[5] Accordingly, neither the City's nor Olivier's briefing in this court considered whether there are preclusive effects of Olivier's conviction, independent of the *Heck* bar, in this § 1983 action.[6]

I agree with JUDGE OLDHAM's dissental regarding the *Heck* bar. It is worth emphasizing, though, that this appeal concerns only prospective injunctive relief. It is clear the *Heck* bar forecloses Olivier's claims for damages. But even his suit for prospective injunctive relief may be foreclosed on grounds not presently before our court.

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[5] ROA.680-85.

[6] *See* City of Brandon Br. at 13-17 (arguing that Olivier forfeited his prospective relief arguments by not arguing on appeal "that the dismissal of his underlying claims was erroneous" and by not "properly rais[ing] the arguments in the district court"); Olivier Br. at 24-25 (discussing abstention and other "preclusion" doctrines).

JAMES C. HO, *Circuit Judge,* joined by ELROD, *Chief Judge,* and SMITH, WILLETT, DUNCAN, and OLDHAM, *Circuit Judges,* dissenting from denial of rehearing en banc:

Gabriel Olivier is an evangelical Christian who feels called to share the good news with his fellow citizens and neighbors. But a local ordinance forbids him from doing so outside the city's public amphitheater. In fact, he's already been arrested and fined for doing so in the past. So he brought this suit under the First and Fourteenth Amendments to enjoin the city from enforcing the ordinance against him in the future.

Olivier would seem the ideal person to challenge future enforcement of the ordinance. His prior conviction (along with his personal convictions) confirms that he's at risk of future injury under the ordinance. *See, e.g., Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164 (2014) ("[P]ast enforcement . . . is good evidence that the threat of enforcement is not 'chimerical.' ").[1]

Yet the panel held the opposite. It held that Olivier's prior conviction is the very reason why we must close our courthouse doors to him.

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[1] Nor does *res judicata* apply here. Olivier pled no contest. And even if he had contested the constitutionality of his charge, Mississippi law has "removed claims based in constitutional principle from the bounds of common law *res judicata." Smith v. State*, 149 So.3d 1027, 1032 (Miss. 2014). *See also Bragg v. Carter*, 367 So.2d 165, 167 (Miss. 1978) ("Although the doctrine of res judicata is based upon the public policy of putting an end to litigation, we nevertheless think the doctrine is not inflexible and incapable of yielding to a superior policy . . . . The doctrine of res judicata must yield to the constitution.") (citation omitted).

Nothing in the Constitution, federal law, or Supreme Court precedent dictates this curious result. It's due entirely to our own misreading of *Heck v. Humphrey,* 512 U.S. 477 (1994), decades ago in *Clarke v. Stalder,* 154 F.3d 186, 189 (5th Cir. 1998) (en bane)—as the panel opinion confirmed.

The panel dutifully noted that "*Clarke* is binding." *Olivier v. City of Brandon,* 2023 WL 5500223, *4 (5th Cir.). "As in *Clarke,* Olivier also seeks to enjoin a state law under which he was convicted." *Id.* "Under *Clarke,* such relief . . . is barred under *Heck." Id.*

The good news here is that the problem is one of our own making, so it's one that we can (and should) fix ourselves. As a plurality of our en banc court recently observed, "a suit seeking prospective injunctive relief does not implicate *Heck's* favorable-termination requirement." *Wilson v. Midland County,* 116 F.4th 384, 398 n.5 (5th Cir. 2024). "Such a suit challenges only the future enforcement of a law and does not result in 'immediate or speedier release into the community' or 'necessarily imply the invalidity' of a prior conviction or sentence." *Id.* (citing *Heck*, 512 U.S. at 481, and *Wilkinson v. Dotson,* 544 U.S. 74, 82 (2005) (noting that the "prisoners' claims for *future* [injunctive] relief . . . are yet more distant from" the core *of Heck)). "Insofar* as our *pre-Wilkinson* cases"—namely, *Clarke*—"said otherwise, the Supreme Court has since clarified the law." *Id.*[2]

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[2] At least two of our sister circuits also construe *Heck* not to apply in cases such as this. *See also Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) *("Heck* . . . serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. "); *Lawrence v. McCall*, 238 F. App'x

Clarke not only misreads *Heck*. It also defies common sense. The fact that Olivier was previously convicted under the ordinance should make him not just a permissible but a perfect plaintiff. But instead, *Clarke* uniquely prohibits citizens like Olivier from bringing suit. That gets things entirely backwards. And it sends an odd message to citizens who care about defending their constitutional rights. On the one hand, we tell citizens that you can't sue if you're not injured. But on the other hand, we tell them that you can't sue if you *are* injured. Once again, when it comes to suits against the government, the message is: "Heads I win, tails you lose." *Tucker v. Gaddis,* 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring).

Citizens like Olivier deserve their day in court. *Clarke* turns the law upside down. We should have granted rehearing en banc to overturn it.

I respectfully dissent from the denial of rehearing en banc.

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393. 396 (10th Cir. 2007) *("Heck* does not bar . . . prospective relief"). In *City of Grants Pass v. Johnson*, __ U.S. __ (2024), the Supreme Court abrogated *Martin's* interpretation of the Eighth Amendment. *Grants Pass* does not undermine *Martin*'s analysis of *Heck*.

ANDREW S. OLDHAM, *Circuit Judge,* joined by ELROD, *Chief Judge,* and JONES, SMITH, RICHMAN, WILLETT, HO, and DUNCAN, *Circuit Judges,* dissenting from the denial of rehearing en bane:

As we recently said while sitting en bane: "[A] suit seeking prospective injunctive relief does *not* implicate *Heck's* favorable-termination requirement (or, for that matter, *Preiser's* habeas-channeling rationale)." *Wilson v. Midland Cnty.,* 116 F.4th 384, 398 n.5 (5th Cir. 2024) (en bane) (emphasis added) (citing *Heck v. Humphrey,* 512 U.S. 477 (1994), and *Preiser v. Rodriguez,* 411 U.S. 475 (1973)). The panel in this case nevertheless applied the *Heck* bar to a street preacher's claim for injunctive relief. That result is indefensible.

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Gabriel Olivier is a street preacher in Mississippi. *Olivier v. City of Brandon,* No. 3:21-cv-006360-HTW-LGI, 2022 WL 15047414, at *2 (S.D. Miss. Sept. 23, 2022). He "engages routinely in sidewalk protests on public accessways outside of well-attended events," and he "attempts to engage individuals in conversation or debate on various religious topics." *Ibid.* In 2021, he sought to engage in public protest outside of the Brandon Amphitheater, an outdoor entertainment venue owned by the City of Brandon, Mississippi. *See id.* at *2, *6. The City of Brandon arrested Olivier for violating a local ordinance (the "Ordinance") regulating public demonstrations outside of the Amphitheater. *See id.* at *4-7. He pleaded no contest, and the local court "rendered a sentence of 10 days imprisonment (suspended), and a fine of $304.00." *Id.* at *7. Olivier paid his fine and did not appeal his conviction. *Ibid.*

On October 6, 2021, Olivier filed a § 1983 lawsuit against the City of Brandon and its chief of police. He

argued that the Ordinance violated his rights under the First and Fifth Amendments and sought nominal and compensatory damages arising from his previous arrest for violating the Ordinance. Crucially, Olivier also asked for prospective injunctive relief regarding future enforcement of the Ordinance. *Ibid.* Unfortunately for Olivier, the district court and the panel held that his § 1983 claim for prospective injunctive relief was barred under *Heck,* since he had not achieved a "favorable termination" of his previous conviction.

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As our en banc court recently explained, *Heck* bars the *retrospective* use of 42 U.S.C. § 1983 to collaterally attack criminal convictions. *See Wilson,* 116 F.4th at 391. Contrariwise, *Heck* permits *prospective-relief* claims that (1) do not implicate the habeas remedy of release from custody, and that (2) do not resemble "tort suits that would undermine criminal proceedings and judgments." *Id.* at 390, 392. *See also Wilkinson v. Dotson,* 544 U.S. 74, 82 (2005) (holding *Heck* does not bar prospective-relief suit); *Skinner v. Switzer,* 562 U.S. 521, 534 (2011) (same).

Heck plainly does nothing to bar Olivier's prospective-relief claim. In relevant part, Olivier seeks a court order "enjoin[ing] named defendants from taking specified unlawful actions"—namely, enforcing a law that abridges his constitutional rights *in the future.* Injunctions do not work backwards to invalidate official actions taken in the past. Rather, they operate to prevent future official enforcement actions upon threat of contempt. *See Whole Woman's Health v. Jackson,* 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.") (citing *California v. Texas,* 141 S. Ct. 2104, 2115-16 (2021)).

"All that a court can do is announce its opinion that the statute violates the Constitution, decline to enforce the statute in cases before the court, and instruct executive officers not to initiate enforcement proceedings." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy,* 104 VA. L. REV. 933, 941 (2018). None of that does anything to undermine, collaterally attack, or otherwise impose tort liability on Olivier's previous conviction.

A simple hypothetical reveals why. Suppose that—after Olivier is convicted of violating the Ordinance—one of his fellow protestors brings a § 1983 suit. Let's call this fellow protestor Sam. Sam was with Olivier on May 1, 2021, but Sam was *not* arrested and convicted. Sam brings a § 1983 claim seeking prospective injunctive relief. If the district court were to grant relief and enjoin future enforcement of the Ordinance against Sam, that decision would undermine the legal reasoning of Olivier's previous conviction. But does that mean that Olivier's conviction somehow prohibits Sam from protecting his own constitutional rights? Of course not, because that would mean that *no one* could *ever* challenge a law after any other person had been convicted for violating it. *But see, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (allowing a pre-enforcement challenge to a Colorado law which had been previously enforced against other parties). If Olivier's suit is a collateral attack barred by *Heck,* how is it not a collateral attack when Olivier's friend brings it?

The answer is that neither suit is barred by *Heck.* The grant of a forward-looking injunction—whether to Olivier or to Sam—does not invalidate Olivier's previous conviction. Viewed in this light, it is clear that

Heck does not bar § 1983 claims for prospective injunctive relief. Indeed, at least one of our sister circuits has expressly rejected this interpretation of *Heck*. *See Martin v. City of Boise,* 920 F.3d 584, 614 (9th Cir. 2019) ("The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future. Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff Edwards,* and *Wilkinson* compel the opposite conclusion.").

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The panel's decision is unpublished, so it carries no precedential effect under our rule of orderliness. It also conflicts with *Wilson*. So if there is a saving grace, it is that future panels can do the right thing—notwithstanding today's error. That is hollow solace to Gabriel Olivier, of course. He deserves better. I respectfully dissent.

APPENDIX D

Constitutional and Statutory Provisions Involved

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants

of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in

light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency

or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.