No. 24-993

In the
Supreme Court of the United States

Gabriel Olivier

Petitioner,

v.

City of Brandon, Mississippi, and William A. Thompson, *individually and in his official capacity as Chief of Police for Brandon Police Department,*

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICI CURIAE LIFE LEGAL DEFENSE FOUNDATION, THE NATIONAL INTITUTE OF FAMILY AND LIFE ADVOCATES, HEARTBEAT INTERNATIONAL, INC., AND HUMAN COALITION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amicus Life Legal Defense Foundation ("Life Legal") is a California non-profit corporation that provides legal assistance to pro-life advocates. Life Legal is concerned about federal, state and local governments' abuse of their powers to silence the speech of those with whom they disagree. The overturning of *Roe v. Wade* returned the issue of abortion "to the people and their elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). To counter government efforts to "keep the peace" by suppressing speech deemed offensive by some, speakers need the broad array of legal remedies available to them under federal law. For this reason, Life Legal disagrees with the narrow view of *Heck v. Humphrey*, 512 U.S. 477 (1994), embraced by the Fifth Circuit here.

Amicus Heartbeat International, Inc. ("Heartbeat") is an IRC § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to serve women and children through an effective network of life-affirming pregnancy help centers. Heartbeat serves approximately 3,592 pregnancy help centers, maternity homes, and non-profit adoption agencies (collectively, "pregnancy help organizations") in over 97 countries, including approximately 2,278 in the United States—making

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[1] Pursuant to Rule 37, no counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* or its counsel funded it. Counsel for all parties were notified more than ten days prior to the filing of this brief.

Heartbeat the world's largest such affiliate network. Heartbeat and its affiliates have been targets of ordinances aimed at suppressing their speech. Heartbeat is concerned about the impact of insulating such ordinances from federal review and the chilling effect that would have on its speech and that of its affiliates.

Amicus the National Institute of Family and Life Advocates (NIFLA) is a national legal network for prolife pregnancy centers. Its purpose is to provide legal training, consultation, and education to its 1,800 member centers. More than 1,500 of its members operate as medical facilities providing free medical services, such as ultrasound confirmation of pregnancy to mothers contemplating abortion, and STI testing and treatment. The mission of NIFLA and its members is to provide alternatives to abortion for women by offering life-affirming services. We represent our member centers who are often targeted and have their First Amendment rights infringed simply because they speak a pro-life message.

Amicus Human Coalition, a Texas nonprofit 501(c)(3) corporation, is a comprehensive care network that reaches women facing unexpected pregnancies, rescues innocent children from abortion, and restores families to stability. Partnering with state grant programs and private funding, Human Coalition operates specialized women's care clinics and virtual clinics in major cities across the country and employs licensed professional doctors, nurses and social workers. Human Coalition has a strong interest in protecting women and their children from abortion while maintaining their conscience rights to serve families

in accordance with their beliefs that human life begins at conception and is worthy of protecting from abortion. Human Coalition supports broad access to federal courts in order to protect the constitutional right to freedom of speech for itself and its members.

SUMMARY OF ARGUMENT

The Fifth Circuit decision (*Olivier v. City of Brandon*, No. 22-60566, 2023 U.S. App. LEXIS 22506 (5th Cir. 2023)) barring Gabriel Olivier from pursuing his 42 U.S.C. § 1983 claim on the basis of this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) ("*Heck*"), is an unsupported extension of the *Heck* doctrine, flies in the face of the policy behind § 1983 claims, and leads to absurd results.

The question presented here is whether *Heck* bars a noncustodial plaintiff's § 1983 claim for prospective relief against future enforcement of an allegedly unconstitutional ordinance. *Heck* involved a custodial defendant who sought *monetary* damages under § 1983 arising out of the circumstances of a prior arrest and prosecution. Because his conviction had never been set aside, the Court required that he first pursue habeas relief before bringing a § 1983 action if success in the latter would "render a conviction or sentence invalid." *Heck* 512 U.S. at 486-87. This holding prevented the use of a civil action to challenge the validity of an outstanding criminal judgment. *Id.* at 486. *Heck* did not bar subsequent claims that are prospective in nature, like Olivier's claim for a preliminary injunction to prevent the Respondents from enforcing Section 50-45 of the Brandon Code of Ordinances ("Ordinance").

The Fifth Circuit's decision effectively nullifies the possibility of any individual who has been convicted of a crime under an unconstitutional ordinance from ever bringing a subsequent § 1983 claim challenging that ordinance to protect the exercise of his rights in the future. This result simply cannot be correct. By adhering to a very noncontextual and rigid interpretation of *Heck,* the Fifth Circuit has exalted form over substance and worked a grave injustice on Olivier. In addition, the decision tacitly assumes that state court criminal defendants uniformly possess the knowledge, ability, and resources to defend their rights in criminal proceedings. Relying on this assumption, the decision has significantly shortened the reach of § 1983, undercutting federal protections for civil rights in the face of state and local overreach.

ARGUMENT

I. *Heck* does not bar prospective § 1983 claims to prevent future enforcement of an allegedly unconstitutional law.

Olivier was convicted of violating Brandon's Ordinance which requires that "protests" and "demonstrations" near the Brandon Amphitheater be held in a designated area if they occur three hours before an event, or one hour after. It also has regulations regarding the use of loudspeakers and signs. *Olivier v. City of Brandon*, No. 22-60566, 2023 U.S. App. LEXIS 22506, at *2-3 (5th Cir. 2023); Appendix ("App.") 3a. Olivier violated the Ordinance, pled *nolo contendere* at his municipal court trial, received a suspended ten-day sentence,

and paid a fine. He never was in custody and did not appeal his conviction. *Id*.

Subsequently, he brought a § 1983 action seeking damages and an injunction preventing future enforcement of the Ordinance. The District Court held that all of his claims were barred by *Heck*. Olivier appealed the decision only with respect to his request for injunctive relief. *Id*. at 3a-4a.

Citing *Heck*, the Fifth Circuit held that Olivier's § 1983 claim for injunctive relief was barred because "success on that claim would necessarily imply the invalidity of a *prior* conviction" that was still valid and that the bar was necessary in order "to ensure 'finality and consistency' of *prior* criminal proceedings and to prevent 'duplicative litigation and the potential for conflicting judgments.'" App. 7a (emphases added) (quoting *Aucoin v. Cupil*, 958 F.3d 379, 382 (5th Cir. 2020)).

However, the rationale and facts underlying *Heck* are clearly distinguishable from Olivier's situation, which is two steps removed from the core of *Heck*. He is seeking relief from *future* prosecutions not his prior conviction, and he is noncustodial and therefore without access to habeas relief.

A. *Heck v. Humphrey* is concerned with avoidance of multiple contradictory judgments arising from the same set of circumstances.

In *Heck*, the plaintiff was a prisoner serving a sentence for voluntary manslaughter. He had lost his direct appeal in state court and was denied federal habeas corpus relief. *Heck*, 512 U.S. at 479. While the appeal in state court was pending, he sued

the county prosecutors and a state investigator under § 1983 for damages for, among other things, destroying exculpatory evidence and using an unlawful voice identification procedure at trial. *Id*. at 478-79. The *Heck* Court held that his conviction must first be invalidated by a writ of habeas corpus before he could bring his § 1983 claim. *Id*. at 489.

The reasoning for the *Heck* holding was rooted in the common law. The Court noted that § 1983 claims are a type of tort liability and that the tort of malicious prosecution was the closest analogy to the one at issue in *Heck*. *Id*. at 483-84.

> We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of *outstanding* criminal judgments applies to § 1983 *damages* actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

Id. at 486 (emphases added). Reasoning from the common law, the Court determined that the *Heck* defendant's § 1983 claim constituted a "parallel litigation over the issues of probable cause and guilt" concerning an "outstanding criminal judgment[]" (i.e. one for which a prisoner was currently incarcerated) that constituted a "collateral attack on the conviction through the vehicle of a civil suit." *Id*. at 484 (citations omitted). The *Heck* court denied his § 1983 claim "until the conviction or sentence has been invalidated" (*Id*. at 490) in order to avoid "two

conflicting resolutions arising out of the *same or identical transactions*." *Id*. at 484 (emphasis added) (citation omitted).

Thus, the *Heck* court did not leave the plaintiff without a means of vindicating his rights. The habeas corpus procedure was the proper means of doing so when a successful § 1983 lawsuit would "imply the invalidity of any outstanding criminal judgment." *Id*. at 487, 489.

Olivier's prospective claim is distinguishable from the material facts of *Heck*, and therefore it does not fall within its bar. The claim does not implicate the *Heck* Court's concern with "finality and consistency" in outstanding judgments. Indeed, his claim does not involve any outstanding criminal judgments. His criminal case is closed, and he paid the fine. App. 3a. Similarly, his § 1983 claim is not a "parallel litigation" since his prior case was closed before he brought his § 1983 action. *Id*. at 3a. *See McDonough v. Smith*, 588 U.S. 109, 118-19 (2019). (holding that the statute of limitations for petitioner's § 1983 claim began to run when he was acquitted at the end of his second trial because bringing the claim before his acquittal would have resulted in a parallel litigation in violation of *Heck*).

Olivier's suit is neither "collateral" to his prior criminal case, nor is it an "attack" on it, as he is seeking prospective relief in the form of an injunction which prevents *future enforcement* of an allegedly unconstitutional ordinance. "Injunctions do not work backwards to invalidate official actions taken in the past. Rather, they operate to prevent future official enforcement actions." *Olivier v. City of Brandon*, 121 F.4th 511, 514 (5th Cir. 2024)

(Oldham, J., dissenting from denial of reh'g en banc); App. 50a.

Moreover, his prospective claim does not implicate *Heck*'s concern with two conflicting resolutions of issues "*based on the same set of facts*." *Vega v. Tekoh*, 597 U.S. 134, 151 (2022) (emphasis added) (citing *Heck*) (disallowing petitioner's § 1983 claim based on an alleged violation of *Miranda v. Arizona* because, among other things, it would disserve judicial economy to require "the federal court entertaining the § 1983 claim to pass judgment on legal and factual issues already settled in state court." This Court noted: "As *Heck* explains, malicious prosecution's favorable-termination requirement is 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." *McDonough*, 588 U.S. at 117-18 (emphases added) (citing *Heck*). Because the § 1983 claim seeks an injunction against Respondent's use of the Ordinance against the *future actions* of Olivier, necessarily those future actions would not involve the "same set of facts" underlying his previous criminal conviction, so the concerns underlying *Heck* are not present here.

B. Cases in the *Heck* line have allowed prospective § 1983 claims.

Heck does not address the issue of prospective § 1983 claims; however several other Supreme Court cases do. These support the view that *Heck* does not disallow prospective § 1983 claims which are not

seeking to overturn a conviction and therefore cannot be addressed by habeas corpus.

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court allowed a prisoner's prospective § 1983 claim enjoining prison officials from employing unconstitutional procedures in disciplinary proceedings because such future relief "ordinarily" would not "necessarily imply" the invalidity of previous loss of good-time credits. 520 U.S. at 648. The *Edwards* plaintiff had lost good-time credits under those procedures, but he had to pursue the claim to restore them using a habeas proceeding. *Id*. *See also Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (allowing a § 1983 damages claim to determine the validity of the procedures used for imposing the loss of good-time credits, but disallowing the claim to restore lost credits). Like the prisoners in these cases who had lost good time credits in the past and were seeking prospective relief, Olivier has been convicted and is seeking a future injunction. He too, should be allowed to sue for an injunction to prevent future constitutional infringements by local officials.

In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Court allowed prisoners to bring a § 1983 claim challenging state procedures used to deny parole eligibility and suitability. Notably, the prisoners did not seek injunctions ordering immediate or speedier release into the community, even though, had they been successful in their claims, that might have been the eventual outcome of new parole hearings. *Id*. at 81-82. Similarly, Olivier is not seeking to overturn his prior conviction, only to establish the unconstitutionality of the Ordinance in order to prevent *future* infringements on his rights.

The Court has allowed prospective relief even when the outcome of the § 1983 claim might undermine a conviction. *Skinner v. Switzer*, 562 U.S. 521 (2011), allowed the prisoner to pursue a § 1983 claim for DNA testing even though, had he been successful, it might have provided a basis for challenging his conviction. Because the results of the testing may not have been in his favor, success on his claim did not "'necessarily imply' the invalidity of his conviction" and so he was not required to pursue habeas relief. *Id*. at 533-34. Here, the issuance of a preliminary injunction is not the same as a trial on the merits and would not be binding on state courts, so it also would not necessarily imply the invalidity of his prior conviction, as the Fifth Circuit noted. App. 11a – 12a.

More importantly, even if success did *imply* the invalidity of his prior conviction, as discussed above the concern in *Heck* is for avoiding two conflicting resolutions *of issues based on the same set of facts*. *Heck*, 512 U.S. at 484-85; *Vega*, 597 U.S. 151. Therefore, success in Olivier's forward-looking § 1983 claim would not create the sort of conflict at issue in *Heck*.

The Fifth Circuit's decision is in conflict with decisions from the Ninth and Tenth Circuits holding that a § 1983 request for injunctive relief to prevent the future enforcement of an unconstitutional law is not barred by *Heck*. Pet. for Writ of Cert. ("Pet. Cert.") 11-17. Furthermore, the Fifth Circuit has sent conflicting signals. Contradicting its holding in *Olivier*, in a subsequent case the court stated in dicta that "[A] suit seeking prospective injunctive relief does not implicate *Heck*'s favorable-termination requirement. . . . 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. " *Wilson v. Midland Cnty.*, 116 F.4th 384, 398, n.5. (5th Cir. 2024) (holding that an appellant who had finished her sentence could not sue for monetary damages for a conviction tainted by Due Process violations under § 1983 until she received a favorable termination of that conviction). *Wilson* is the subject of another petition pending in the Court. *See Wilson v. Midland Cnty.*, No. 24-672

II. The Fifth Circuit's holding contradicts § 1983's history and purpose.

As discussed in Sec. I, *supra*, the *Heck* ruling is derived from the common law tort of malicious prosecution. *Heck*, 512 U.S. at 484. Yet, this Court has avoided importing common law rules into § 1983 actions where the former are contrary to the statute's "history or purpose." *Tower v. Glover*, 467 U.S. 914, 920 (1984) (state actors did not have immunity from a § 1983 action for their intentional acts in conspiring to deprive respondent of his federal rights). As this Court explained, "We have consistently refused to allow common-law analogies to displace statutory analysis . . . if the statute's history or purpose counsel against applying such rules in § 1983 actions." *Heck*, 512 U.S. at 492 (Souter, J., concurring) (citations omitted). Requiring a favorable termination of Olivier's prior conviction before he can pursue his § 1983 claim for prospective relief is contrary to that statute's history and purpose and thus, under *Heck*, is not necessary.

A. The Fifth Circuit's holding erroneously denies Olivier the broad relief available under § 1983.

The Civil Rights Laws were passed in 1871, pursuant to the Fourteenth Amendment, as part of the Reconstruction Era legislation. They established "the role of the Federal Government as a guarantor of basic federal rights against state power." *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (allowing a § 1983 action to prevent enforcement of a public nuisance law against a bookstore). Section 1983 employs broad language as a means of enforcing constitutional protections when they are threatened by state and local authorities. It permits "*any* citizen" or "other person within the jurisdiction of the United States" to sue "*[e]very* person who, under color of" state law deprives that citizen or person of "*any* rights, privileges, or immunities secured by the Constitution" and applies to suits brought at law or, as in the instant case, in equity. By its own terms, the reach of § 1983 is intended to be far and wide. "A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of '*any* rights, privileges or immunities secured by the Constitution and laws.'" *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (emphasis in original) (citation omitted) (allowing a § 1983 action alleging laws levying state taxes and fees violated the Commerce Clause). "Congress intended [§ 1983] to be broadly construed." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 (1978) (holding that municipal corporations were persons who could be sued under § 1983).

Furthermore, Congress intended that federal courts should be readily available to plaintiffs

seeking to vindicate their federal constitutional rights.

> "[T]hese [federal] courts . . . became the *primary* and powerful reliances for vindicating every right given by the Constitution. . . . Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility. . . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States."

Zwickler v. Koota, 389 U.S. 241, 246-48 (1967) (emphasis in original) (citations omitted) (abstention from adjudicating the constitutionality of a state statute was not required when the statute was not subject to an interpretation that would avoid or modify the federal question). The *Heck* decision, based as it is in the common law, is concerned with "pragmatic considerations" regarding the entertaining of civil suits that are within the domain of habeas corpus. *McDonough*, 588 U.S. at 119. This Court did not indicate any intention to deny access to relief through the federal courts where such conflicts would not arise. The defendant in *Heck* was not left without a forum to vindicate his constitutional rights; he was able to file a habeas petition. Olivier, however,was never in

custody (Pet. Cert. 27) and, absent habeas, § 1983 is "the only statutory mechanism . . . by which individuals may sue state officials in federal court for violating federal rights." *Heck*, 512 U.S. at 500 (Souter, J., concurring).

Applying *Heck*'s bar to prospective claims to prevent future applications of an allegedly unconstitutional law puts noncustodial individuals like Olivier in a constitutional no man's land, undermining § 1983's purpose. As the Ninth Circuit noted:

> 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.

Martin v. City of Boise, 920 F.3d 584, 614 (9th Cir. 2019).[2]

The Fifth Circuit's expansion of *Heck* leaves Olivier with no federal remedy to protect his First

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[2] This Court rejected *Martin*'s Eighth Amendment holding in *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024), but did not challenge the holding that the homeless people could bring a § 1983 challenge for prospective relief.

Amendment rights. The Court should not allow this extension of the common law requirement of favorable termination in malicious prosecution actions to prevent a prospective § 1983 action, since it is contrary to Congress's intent that § 1983 provide broad safeguards for constitutional rights against state or local incursions.

B. The Fifth Ciruit's decision contradicts § 1983's history of allowing pre-enforcement challenges to unconstitutional laws to avoid penalties for violating those laws.

This Court allows for pre-enforcement challenges to an allegedly unconstitutional law. *Ex parte Young*, 209 U.S. 123 (1908) (allowing a party to challenge a state railroad law in lieu of violating it and being subjected to "immense fines" and possible imprisonment). By barring Plaintiff's claim because of alleged concerns that it would undermine his prior conviction, the Fifth Circuit has left him without any means of protecting his First Amendment right against future infringement, other than exposing himself to another criminal prosecution. The lower court's decision "place[s] the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing . . . constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (allowing a § 1983 challenge to a criminal trespass statute where "threats of prosecution" established an "actual controversy" and no state prosecution was pending).

Indeed, a credible threat of prosecution forms the basis for an "actual controversy" under Article III, thereby setting the stage for a § 1983 challenge. *Steffel*, 415 U.S. at 458-59. Rather than being a basis for denying his claim under *Heck*, Olivier's prior conviction establishes standing for his § 1983 claim. *See also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) ("We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'") (citations omitted).

His prior conviction makes him the "perfect plainitiff" for a § 1983 pre-enforcement challenge in order to avoid future prosecution, and his claim should not have been denied. App. 48a (Ho, J., dissenting from denial of reh'g en banc).

C. The Fifth Circuit decision contradicts this Court's allowance of § 1983 pre-enforcement challenges even when a party has previously been convicted in a state court.

In *Wooley v. Maynard,* 430 U.S. 705 (1977), a pre-*Heck* decision that bears many similarities to the instant case, the plaintiff had been convicted of violating a state statute requiring, ironically, that noncommercial vehicles bear license plates with the state motto "Live Free or Die." Three times he appeared in court and tried to explain that his religious beliefs as a Jehoveh's Witness would not allow him to display the state motto on his license plate. Three times he lost. He had to pay fines and was sentenced to fifteen days in jail. After completing his sentence, he successfully brought a §

1983 challenge for declaratory and injunctive relief against future enforcement of the statute against him. *Id*. at 707-09.

The reasoning of *Wooley* is directly applicable to the current case. The Court allowed the plaintiff's § 1983 challenge because it was not "designed to annul the results of a state trial," was "wholly prospective, to preclude further prosecution under a statute", and did not "seek to have his record expunged, or to annul any collateral effects those convictions may have." *Id*. at 711. Although the case was decided before *Heck* and considered *Younger* abstention only,[3] the Court's perspective that the § 1983 action did not "annul" his prior state trial because of its prospective nature is equally applicable to the instant case. *See also 303 Creative LLC v. Elenis,* 600 U.S. 570 (2023) (allowing a pre-enforcement challenge to a state law prohibiting discrimination on the basis of sexual orientation when the statute had been enforced against others and so plaintiff faced a credible threat of sanctions).

The Fifth Circuit has extended *Heck* beyond its rightful boundaries. Understood correctly, *Heck* is a pragmatic opinion that directs plaintiff-prisoners to the proper procedure – habeas corpus – to avoid conflicting judgments based on the same set of facts. Olivier's request for prospective relief does

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[3] *Younger v. Harris*, 401 U.S. 37 (1971) held that principles of judicial economy and proper state-federal relations preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. The Fifth Circuit's interpretation of *Heck* contradicts *Wooley*, while this Court has never indicated any inclination to overturn *it. See 303 Creative,* 600 U.S. at 5586 (2023) (citing *Wooley* favorably in support of position that governments may not compel speech).

not implicate the "core of *Heck*." App. 47a (Ho, J., dissenting from denial of reh'g en banc). The Fifth Circuit opinion denies Olivier his right to pursue a § 1983 pre-enforcement challenge that has historically been provided to plaintiffs who have been wrongfully convicted in the past.

III. The Fifth Circuit's decision leads to irrational and unjust results.

The Fifth Circuit decision has unmoored *Heck* from its context and purpose, and in so doing, raises uncertainty as to how far the *Heck* bar reaches. Would it bar another individual, such as a co-demonstrator with Olivier who had not been arrested, from bringing his own § 1983 action? Logically, the second demonstrator's successful claim would "necessarily imply the invalidity" of Olivier's conviction as surely as a claim by Olivier himself. App. 7a; *see* also App. 51a (Oldham, J., dissenting from denial of reh'g en banc). Does the Fifth Circuit's view of the *Heck* bar only apply to actions brought by the same individual, and if so, why?

The Fifth Circuit majority cannot be unaware of the difficulties its reading of *Heck* creates. The seven dissenting judges of the *en banc* court spelled out the absurd consequences of barring Olivier from prospective relief when he indisputably faces a threat of future prosecution for engaging in expressive activity at the same location. App. 46a-48a (Ho, J., dissenting from denial of reh'g en banc); App. 51a-52a (Oldham, J., dissenting from denial of reh'g en banc).

One suspects that, despite Congress's intent that litigants enjoy the choice of a federal or state forum (*Zwickler*, *supra*), the majority's concern may be less about conflicting judgments than about federal courts being the court of first resort for resolving constitutional questions about state laws. Olivier could have raised a constitutional challenge to the ordinance when he was first charged under it. Why didn't he?

While some litigants may deliberately forego raising a constitutional defense in a state court criminal proceeding for tactical reasons, myriad practical factors could lead a state court criminal defendant to lack the knowledge, means, or realisitic opportunity to do so.

For example, an arrested individual might not even be aware that his rights were violated until he later reads or hears something or consults an attorney experienced in First Amendment jurisprudence. Only then might he realize that he in fact has a legitimate constitutional grievance.

An indigent individual, even if provided with a public defender, might be unable to afford to take time off work to follow through on contesting a charge. He would be susceptible to the urging of his public defender to plead nolo contendere because "you aren't admitting anything," no matter how strongly the individual feels that his conduct should not be unlawful. It is unlikely that an overburdened public defender would inform his or her clients that, by pleading nolo contendere in the Fifth Circuit, they are forever waiving their right to bring a prospective challenge to the law under which they were arrested — assuming the public defender was even aware of that unexpected rule.

The criminal defendant who does not have a court-appointed attorney but believes that the ordinance he was arrested under is unconstitutional is not any better off. He must either represent himself or pay an attorney to raise his constitutional defense. If he loses at the trial court level, he would pay more to appeal and possibly appeal again.

At the end of this expensive process, assuming it was successful, the defendant would not have declaratory relief that the law was unconstitutional. He would not have injunctive relief protecting him from future arrests. He would merely have a dismissal of the criminal action against him, which would then permit him finally to seek forward-looking relief through a § 1983 action.

Congress specifically provided not just theoretical access to federal courts to assert constitutional claims against state and local governments, but also a financial mechanism to make such access attainable: "The purpose of [42 U.S.C.] § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. . . . Accordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, (1983) (simplified).

Under the Fifth Circuit's holding, an individual who has been charged under an unconstitutional law must know his rights, must be immediately prepared to assert them, and must pay his own attorney (unless one is appointed) to follow through with his constitutional defense to obtain dismissal of the charge, simply to preserve his right

to seek forward-looking relief. Such a result is patently not what Congress intended when enacting § 1983.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and resolve the conflict among the circuits on this important issue of the proper reach of *Heck*.

Respectfully submitted,

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April 14, 2025