No. 24-993

IN THE
Supreme Court of the United States

GABRIEL OLIVIER,
Petitioner,
v.
CITY OF BRANDON, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists or files *amicus* briefs in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights.

The Foundation has an interest in this case not only because it believes that both Olivier's freedom of speech and freedom of religious exercise have been violated, but also because Olivier's access to the courts in order to vindicate these injustices has been unconstitutionally impinged as well.

SUMMARY OF THE ARGUMENT

Imagine, if you will, a federal executive order providing that all speeches and demonstrations concerning President Trump's tariff policies must

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of amicus curiae's intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

take place within the confines of a designated location 50 miles south of Point Barrow, Alaska, a wilderness area inhabited by caribou, polar bears, and few other living creatures.

Amicus cites this extreme and absurd scenario to illustrate that "free speech zones" can infringe First Amendment freedom of expression rights – especially if the intent and/or effect of the restriction is to prevent the speaker from communicating with his intended audience.

The right of free speech is more than just the right to give a speech in an open, empty field. Communication is not really communication unless others can hear, read, or view the message. The freedom of expression guaranteed by the First Amendment clearly contemplates both speakers and listeners.

But that is essentially what the City of Brandon ("the City") has done to Gabriel Olivier. They have deprived him of his free speech and free exercise rights by restricting him to an area where virtually no one can hear him. And they have further ensured that no one can hear him by prohibiting him from using any amplification that enables him to be "clearly heard" more than 100 feet from the free speech zone.[2] Clearly, this restriction had nothing

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[2] The principal author of this brief and his wife conducted an experiment on April 14, 2025 in their front lawn in rural Pike Road, Alabama. After pacing himself more than 100 feet from his wife, they found that they could talk and be "clearly audible" to one another at a distance of more than 100 feet without yelling and without amplification.

to do with the flow of pedestrian or vehicular traffic. It was clearly designed to prevent speech from being heard.

Motivated by his religious convictions, in May 2021 Olivier preached a Christian message from the Bible outside the Brandon Amphitheater, as he had done on previous occasions. There is no evidence that he preached his message in an offensive way or that he caused any emotional harm, breach of the peace, or disruption of the flow of pedestrian or vehicle traffic. But a police officer stopped him and ordered him to go to a designated protest area because of a City ordinance adopted in 2019. Olivier at first complied, but he found that the free speech zone was in an isolated location where people could not hear him. He therefore returned to his previous location and was charged with violating the ordinance.

By relegating Olivier to this free speech zone, the City has separated him from his intended audience (those who are going to and from the City Amphitheater) and banished him to a remote and isolated location where he would not be able to reach his intended audience and would be able to speak to few if any listeners. The isolation—and constitutional injury—is even greater because the ordinance prohibits him from using any sound amplifier that is "clearly audible more than 100 feet from the free speech zone. In so doing, the City has effectively established a "free speech zone" and in so doing has violated Oliver's rights under the Free Speech and Free Exercise Clauses of the First Amendment as well as under Mississippi's Religious Freedom Restoration Act (RFRA).

Worse still, Olivier's access to the courts to vindicate this constitutional injury via a claim for prospective injunctive relief has been totally stonewalled by the courts below under the preclusion doctrine of *Heck v Humphrey*, 512 U.S. 477 (1994), simply because Olivier pled *nolo contendere* and paid the fine in response to being charged with violating this unlawful ordinance. The courts below wrongfully applied this procedural barrier which highlights a circuit split, fails to comport with the original understanding of §1983, and fails as a matter of plain reason.

ARGUMENT

I. The Free Speech Clause of the First Amendment protects Olivier's expressive activity, and the Courts disfavor free speech zones.

Freedom of speech is not only a God-given right; it is essential to the discovery of truth through the free exchange of speech in the marketplace of ideas, and it is a vital check on government power. The Framers recognized no exceptions to the right of "pure speech," which accurately describes Olivier's speech. Yet "free speech zones" such as the one in the case at hand infringe speech and should be held unconstitutional.

So-called free speech zones began to arise in the late 1900s and early 2000s as a means of shielding persons from messages they did not want to hear. Frequently these free speech zones have been established on university campuses, which has been an anomaly because, as this Court observed in *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), "The

vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." But that vigilant protection of constitutional freedoms is equally vital in or near a public amphitheater, which is a place for the expression and exchange of ideas Olivier was preaching on public property outside the amphitheater, so we therefore assume the place where he was standing was a traditional public forum and therefore entitled to the full protection of the First Amendment.

The most recent free speech zone case to reach the Supreme Court, *Uzuegbunam v. Preczewski,* 141 S. Ct. 792 (2021), did not directly address the constitutionality of free speech zones because the College had eliminated its free speech zones before the case reached the Court—a pattern common to many cases in which colleges or other public entities establish free speech zones (or other constitutionally injurious policies) and then abolish them when challenged and subsequently claim they can't be sued because the case has been mooted. The majority in *Uzuegbunam* found that the plaintiff was still entitled to damages even though the free speech zones had been abolished, because "*every* legal injury necessarily causes damage," *Id* at 798 (emphasis original), and "the common law inferred damages whenever a legal right was violated." *Id.* at 799.

In *McCullen v. Coakley,* 573 U.S. 464 (2014), this Court unanimously struck down a Massachusetts law prohibiting individuals from standing on a public sidewalk within 35 feet of an abortion facility. The free speech zone established by the City of

Brandon is even more egregious than the 35-foot zone established by the City of Boston, because Boston's zone leaves people free to stand anywhere outside the 35-foot zone while Brandon's zone requires them to be within a restricted area, and because Boston's restriction involved an area where emotions are likely to run high because of the abortion issue while no such emotions are likely to be present in the Brandon situation.

Several lower courts have ruled free speech zones unconstitutional:

- *Khademi v. South Orange County Community College District,* 194 F. Supp. 2d 1011 (C.D. Cal. 2002), held that the college's free speech zone policy could not survive strict scrutiny.
- *Pro-Life Cougars v. University of Houston,*259 F. Supp. 2d 575 (S.D. Tex. 2003), held that the university's free speech zone policy was not narrowly tailored to serve a compelling interest.
- At the 2000 Democratic National Convention in Los Angeles, police set up a "demonstration zone" which was the only place protesters were allowed to demonstrate. In *Service Employee Int. Un., Local 660 v. City of Los Angeles,* 114 F. Supp. 2d 996 (C.D. Cal. 2000). the federal court granted a preliminary injunction against the demonstration zone, holding that the policy was not narrowly tailored and did not provide adequate alternative means of communication, because at all times it kept demonstrators too far away from their intended audience, convention

attendees. The fact scenario of this case almost directly parallels that of Olivier.

- In at least one instance, *United for Peace and Justice v. City of New York,* 243 F.Supp.2d 19 (S.D.N.Y., 2003), a court held that post 9/11 security concerns justified a ban on marches past the United Nations building in an area that posed a high security risk. However, there has been no suggestion of a similar security risk in Brandon, Mississippi.

As this Court has recognized in *Perry Educ. Ass'n v. Perry Local Educators' Assn*, 460 U.S. 37, 48-49 (1983) and other cases, in traditional public fora, speech restrictions must be neither content-based nor viewpoint-based, but rather must be supported by a compelling interest. have no less restrictive means available, and must provide an alternative means of expression. Analyzing these points in turn:

(1) The Foundation makes no argument either way as to whether the restriction is content or viewpoint based. We note that the ordinance on its face applies "regardless of the content and/or expression" of the speech, but others may argue that the ordinance was motivated by content or viewpoint considerations.

(2) Even though in some circumstances it may be necessary to restrict speech, Brandon has not shown that such restrictions were necessary in this instance. Presumably, the City would claim that preserving the flow of pedestrian or vehicular traffic in the area during busy events constituted a compelling interest. But the City has made no showing that the traffic

at the time of Olivier's arrest was so heavy as to justify this type of restriction

(3) The burden is on the City to show that less restrictive means were available to achieve its interest. The Foundation suggests several alternative means the City could have employed:

(a) The City could have required speakers to use a different area only if there was actual disruption. There is no evidence that Olivier caused any actual disruption of the flow of traffic.

(b) The City could have placed restrictions only on demonstrations involving a certain number of people. A demonstration involving hundreds, even dozens of people could cause an impediment. A single speaker like Olivier is unlikely to cause an impediment.

(c) The City could have required speakers to move to areas where they could still encounter a substantial number of listeners. Instead, the City established a free speech zone so remote from the crowds that the speaker could reach few if any listeners.

(d) Most fatal of all to the City's ordinance is its provision that, even in the free speech zone, the speaker may not use any amplification device that enables him or her to be heard from a distance of more than 100 feet from the free speech zone.

> Clearly, this restriction has nothing to do with preserving the flow of traffic. Its only possible purpose must be the suppression of unwanted speech.

In sum, the City of Brandon's ordinance fails every element of the strict scrutiny standard applicable to speech restrictions in a traditional public forum. It does not serve a compelling interest, it is not narrowly tailored, and it offers no meaningful alternative channels of communication. By relegating Olivier to a remote area devoid of listeners and barring amplification beyond 100 feet, the City has not merely regulated speech—it has suppressed it. Such a policy strikes at the heart of the First Amendment, and this Court should reaffirm that neither convenience nor bureaucratic design can justify silencing a citizen's peaceful expression of his religious convictions in a public space.

II. Both the Free Exercise Clause of the First Amendment and the Mississippi Religious Freedom Restoration Act (RFRA) protect Olivier's preaching.

There appears to be no question that Olivier preached at the City Amphitheater, on this occasion and on previous occasions, because he believed God had called him to preach the Word of God. His speech is therefore also protected by the Free Exercise Clause as well as the Free Speech Clause. That speech can merit the protection of both clauses was clearly established in *Widmar v. Vincent,* 454 U.S. 263 (1981).

James Madison, George Mason, and others understood religion as "the duty we owe the Creator, and the manner of discharging it." *Reynolds. V. United States,* 98 U.S. 145 (1879), *Davis v. Beason, 133* U.S. 333 (1890), *United States v. Macintosh,* 283 U.S. 605 (1931). It therefore involves, as this Court stated in *Macintosh,* "duties superior to those arising from any human relation."

The State of Mississippi has recognized these rights in the Mississippi RFRA (MSRFRA), enacted in 2014 and encoded as MS Code Sec. 11-61-1. The MSRFRA recognizes religious freedom as an "unalienable right" and provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it has a compelling interest that cannot be achieved by less restrictive means. The City has not demonstrated that its interest is compelling, much less that its interest cannot be achieved by less restrictive means. It further provides in Section (6) that

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government, as defined by subsection (4) of this section. Standing to assert a claim or defense under this section shall be the same as the general rules of standing under Article III of the United States Constitution.

Olivier may therefore bring his claim under RFRA even if his claims under the Free Speech and

Free Exercise Clauses are barred by the Court's application of *Heck*.

In short, the City's amphitheater policy has made the so-called free speech zone a "free speech cage" in which speakers are allowed to speak only to the wind in an area empty of listeners, and even then under the restriction that no one more than 100 feet away can hear him.

In fact, the First Amendment has made the entire nation a free speech zone. Attempts to relegate speech to restrictive zones have no place in a free society.

III. The Fifth Circuit's confusion surrounding *Heck* stems from a departure from the common law.

To add insult to injury and lock the courthouse doors behind it, the decision below improperly extends *Heck* to bar Olivier's claim for prospective injunctive relief—relief that would not disturb his prior conviction but merely prevent future constitutional violations. This misapplication not only distorts the narrow purpose of *Heck*, but also deepens a tectonic circuit split, departs from the original intent of §1983, and ultimately denies Olivier meaningful access to federal court at the very moment his rights most need protection. All these points are clarified by returning to *Heck*'s original roots in the common law.

In *DeLeon v. City of Corpus Christi*, the Fifth Circuit—upon quoting *Heck*'s own declaration that it "the hoary principle that civil tort actions are not

appropriate vehicles for challenging the validity of outstanding criminal judgments."—declared that, "[i]n short, the common law animated *Heck*, and so it lights our way today." 488 F.3d 649, 654 (2007) (quoting *Heck*, 512 U.S. at 486). In the Olivier's case, however, the light of the common law has been snuffed out.

As the dissenters from denial of *en banc* recognized below, *Heck* was never meant to impose a sweeping bar on constitutional claims unrelated to a plaintiff's incarceration or the validity of a past criminal judgment. Rather, the rule was grounded in the common-law tort of malicious prosecution, which imposes a favorable-termination requirement as a prerequisite for a damages claim premised on the wrongfulness of a prosecution. *See Heck*, 512 U.S. at 486. This origin matters.

The full quote from *Heck* referenced above continues to say that the principle "*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 (emphasis added). In the common law tradition, the favorable-termination rule applied only to claims seeking retrospective damages for harms caused by allegedly wrongful criminal proceedings—not to forward-looking claims that sought to enjoin future enforcement of unconstitutional laws. It is this principle—not a blanket prospective immunity for the state—that undergirds the doctrine.

In *DeLeon*, the Fifth Circuit seemed to grasp this nuance. There, the Court recognized that Heck

"applies only to claims that, if successful, would necessarily imply the invalidity of a conviction or sentence." Id. at 652. This formulation preserves space for claims that challenge the ongoing application of unconstitutional laws without necessarily undermining past convictions. Yet as Olivier's case demonstrates, the Fifth Circuit has failed to consistently apply its own guidance.

Instead, the court has extended *Heck* far beyond its original purpose, using it to bar not only damages claims that would imply the invalidity of a prior conviction, but also claims for purely prospective injunctive relief. In *Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998) (en banc), the Fifth Circuit first took this doctrinal misstep, reasoning that *Heck* could apply even when the plaintiff sought only to enjoin future enforcement of a law under which he had been convicted. That reasoning was dubious then and is indefensible now, especially after the Supreme Court's decisions in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), and *Skinner v. Switzer*, 562 U.S. 521 (2011), both of which limited *Heck* to cases implicating the validity of a conviction or the duration of confinement.

In *Dotson*, the Court held that *Heck* did not bar a § 1983 action seeking prospective injunctive relief related to parole eligibility, because the claim did not necessarily imply the invalidity of the plaintiffs' convictions or sentences. 544 U.S. at 82. Similarly, in *Skinner*, the Court allowed a § 1983 plaintiff to challenge the denial of DNA testing because the requested relief would not by itself invalidate his conviction. 562 U.S. at 534. These cases clarify that *Heck* is limited to retrospective attacks on

convictions—not to any claim that might, even indirectly, cast doubt on a criminal judgment.

That distinction matters. In Olivier's case, the only relief sought is a forward-looking injunction to prevent the City of Brandon from continuing to enforce an allegedly unconstitutional ordinance. That relief, if granted, would not undo or expunge his prior conviction; it would merely prevent the same unlawful conduct from recurring. This is not a collateral attack on a criminal judgment—it is a claim to prevent future constitutional violations. And under *Dotson*, *Skinner*, and the very logic of *Heck* itself, it is not barred.

The Fifth Circuit's en banc dissenters correctly highlighted this error, observing that *Heck* "does nothing to bar Olivier's prospective-relief claim." *See Olivier v. City of Brandon*, F.4th 511, 514 (5th Cir. 2024) (Oldham, J., dissenting). Yet the panel clung to *Clarke*, applying its misreading of *Heck* despite the weight of contrary authority and the Fifth Circuit's own internal criticism. As Judge Ho observed, the result is a doctrinal mess: a rule that "not only misreads *Heck*," but also "defies common sense" by barring suits from the very plaintiffs best positioned to assert constitutional claims—those who have actually suffered under the challenged law. *Id.* at 513 (Ho, J., dissenting).

The fact that this confusion has persisted for decades underscores the need for intervention. As Judge Richman noted, the district court dismissed Olivier's case solely on *Heck* grounds, without exploring alternative preclusion doctrines that might apply. Yet *Heck* itself expressly left open the

role of state preclusion law. See *Heck*, 512 U.S. at 480 n.2. By reflexively invoking *Heck* to bar all post-conviction claims—regardless of their nature—the Fifth Circuit has not only expanded the doctrine beyond recognition, but has also bypassed the nuanced, fact-sensitive inquiry that preclusion law demands.

Worse still, this confusion is not limited to the Fifth Circuit. While other circuits have recognized the limits of *Heck*, their rulings reflect varying understandings of when and how *Heck* applies to prospective claims. *See, e.g.*, *Martin v. City of Boise*, 920 F.3d 584, 614 (9th Cir. 2019) (rejecting the idea that a prior conviction bars prospective injunctive relief under *Heck*); *Lawrence v. McCall*, 238 F. App'x 393, 396 (10th Cir. 2007) (same). The result is a mature and consequential circuit split—a split the Court must now resolve.

Left uncorrected, the Fifth Circuit's approach erects an arbitrary barrier to constitutional relief. It tells citizens like Olivier: if you have not yet suffered an injury, your claim is unripe. But if you have suffered one—if you've actually been convicted—you're forever barred from federal court unless you first obtain a favorable termination, even for future-focused claims. That is not what *Heck* requires. It is not what the common law contemplated. And it is not what Congress intended when it enacted § 1983 to provide a federal remedy against unconstitutional state action.

This Court should step in to clarify that *Heck* does not bar prospective injunctive relief, especially where that relief does not necessarily imply the

invalidity of a prior conviction. In doing so, it can restore *Heck* to its common-law roots, resolve the confusion that plagues the Fifth Circuit and others, and reaffirm the core purpose of § 1983: ensuring a meaningful federal forum for vindicating constitutional rights.

CONCLUSION

The Foundation urges this Court to grant this petition for writ of certiorari. Olivier's injuries to his freedom of speech and free exercise of religion deserve to have their day in court, and the decades long circuit split that is standing in the way is in dire need of reconciliation by this Court.

Respectfully submitted,

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