No. 24-993

IN THE

Supreme Court of the United States

GABRIEL OLIVIER,

Petitioner,

v.

CITY OF BRANDON, MISSISSIPPI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. If left uncorrected, the decision below will prevent individuals like Olivier from challenging laws that limit the ability to speak in the public square 3

A. *Heck* does not apply to prospective, injunctive relief 4

1. *Heck* and its progeny confirm that the favorable-termination requirement applies only to plaintiffs attempting to collaterally attack their convictions 4

2. A plaintiff previously convicted of violating an unconstitutional ordinance is the "perfect plaintiff" to challenge that ordinance 7

B. *Heck* does not bar §1983 suits when habeas relief is not available to a plaintiff 9

II. Access to the public square is an important part of our history and tradition, yet states and localities often use the modern public forum doctrine to subvert that access 12

A. From the Greek Agora to the American Revolution, public squares have served as the center for civil discourse 13

B. The public square played a unique role in early American history 14

C. This Court's modern public forum doctrine has confused courts and undermined access to the public square 16

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs, 405 F.3d 1298 (11th Cir. 2005) 7

Aucoin v. Cupil, 958 F.3d 379 (5th Cir. 2020) 4

Boos v. Barry, 485 U.S. 312 (1988) 2

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 1

Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) 20

Clarke v. Stalder, 154 F.3d 186 (5th Cir. 1998) 7

Cohen v. Longshore, 621 F.3d 1311 (10th Cir. 2010) 9

Cornelius v. NAACP Legal Def. and Ed. Fund, Inc., 473 U.S. 788 (1985) 19

District of Columbia v. Heller, 554 U.S. 570 (2008) 10

Edwards v. Balisok, 520 U.S. 641 (1997) 5, 6

Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998) 9

Freedom from Religion Found., Inc. v. Abbott,
955 F.3d 417 (5th Cir. 2020) 20

Gilles v. Davis,
427 F.3d 197 (3d Cir. 2005) 9

Gomez v. Toledo,
446 U.S. 635 (1980) 11

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001) 20

Hague v. Comm. for Indus. Org.,
307 U.S. 496 (1939) 13

Harden v. Pataki,
320 F.3d 1289 (11th Cir. 2003) 9

Heck v. Humphrey,
512 U.S. 477 (1994) 2-12

Huang v. Johnson,
251 F.3d 65 (2d Cir. 2001) 9

Iancu v. Brunetti,
588 U.S. 388 (2019) 20

Int'l Soc'y for Krishna Consciousness v. Lee,
505 U.S. 672 (1992) 18

Ison v. Madison Loc. Sch. Dist. Bd. of Educ.,
3 F.4th 887 (6th Cir. 2021) 21

Lamb's Chapel v.
Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 18, 19

Lawrence v. McCall,
238 F. App'x 393 (10th Cir. 2007) 7

Martin v. City of Boise,
920 F.3d 584 (9th Cir. 2019) 7

Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n,
138 S. Ct. 1719 (2018) 1

McDonough v. Garcia,
116 F.4th 1319 (11th Cir. 2024) 21

Minnesota Voters Alliance v. Mansky,
585 U.S. 1 (2018) 20

Monell v. Dep't of Soc. Servs.,
436 U.S. 658 (1978) 11

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 2

Newmy v. Johnson,
758 F.3d 1008 (8th Cir. 2014) 9

Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n,
460 U.S. 37 (1983) 17-19

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 20

Powers v. Hamilton Cnty. Pub. Def. Comm'n,
501 F.3d 592 (6th Cir. 2007) 9

Preiser v. Rodriguez,
411 U.S. 475 (1973) 5

Price v. Garland,
45 F.4th 1059 (D.C. Cir. 2022) 21

Savory v. Cannon,
947 F.3d 409 (7th Cir. 2020) 9, 10

Skinner v. Switzer,
562 U.S. 521 (2011) 6

Spencer v. Kemna,
523 U.S. 1 (1998) 10-12

Steffel v. Thompson,
415 U.S. 452 (1974) 7, 8

Susan B. Anthony List v. Driehaus,
134 S. Ct. 2334 (2014) 1

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 7

Thomas v. Collins,
323 U.S. 516 (1945) 14, 15

Tucker v. Gaddis,
40 F.4th 289 (5th Cir. 2022) 8

United States v. Price,
383 U.S. 787 (1966) 11

Univ. of Tex. v. Camenisch,
451 U.S. 390 (1981) 6, 7

Walker v. Tex. Div. Sons of Confederate Veterans, Inc.,
576 U.S. 200 (2015) 20

White Coat Waste Project v. Greater Richmond Transit Co.,
35 F.4th 179 (4th Cir. 2022) 20, 21

Wilkinson v. Dotson,
544 U.S. 74 (2005) 5

Wilson v. Garcia,
471 U.S. 261 (1985) 11

Wilson v. Johnson,
535 F.3d 262 (4th Cir. 2008) 9

Wilson v. Midland Cnty.,
116 F.4th 384 (5th Cir. 2024) 10, 11

Wolff v. McDonnell,
418 U.S. 539 (1974) 5

Constitutional Provisions

U.S. Const. amend. I 1-3, 17

U.S. Const. amend. XIV 2

Statutes and Rules

28 U.S.C. §2254 5

42 U.S.C. §1983 ..... 2-5, 9-11

Other Authorities

1 Annals of Cong. 759-60 (1789) 15

Teresa A. Bejan, *Two Concepts of Freedom (of Speech)*, 163 Proc. Am. Phil. Soc'y 95 (2019) 14

Irving Brant, The Bill of Rights: Its Origin and Meaning (1965) 15

John McK. Camp II, The Athenian Agora: A Short Guide to the Excavations (2003) 13

Erwin Chemerinsky, *Federal Jurisdiction* (8th ed. 2020) 11

John P. Collins, *Has All* Heck *Broken Loose? Examining* Heck*'s Favorable-Termination Requirement in the Second Circuit After* Poventud v. City of New York, 42 Fordham Urb. L.J. 451 (2015) 12

James Madison, Letter to Jacob Engelbrecht (July 4, 1827) 16

Lewis Mumford, The Culture of Cities (1938) 14

Plato, The Apology of Socrates (Benjamin Jowett trans.) 13

Brief for SLF as *Amicus Curiae* in *Keister v. Bell*, No. 22-388 21

David Watkin, The Roman Forum (2009) 14

Gordon S. Wood, The Creation of the American Public, 1776-1787 (1969) 16

Timothy Zick, Speech Out of Doors: Preserving First Amendment Liberties in Public Places (2008) 15, 16

Timothy Zick, *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581 (2006) 16

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit legal organization dedicated to defending liberty and rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, to protect our First Amendment rights. This aspect of its advocacy is reflected in the regular representation of parties challenging government overreach and other actions in violation of the constitutional framework. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

This case concerns SLF because it has an abiding interest in the preservation of the public square as the traditional "marketplace of ideas." Access to the public square is an important part of our nation's history and tradition, yet states and localities too often use the modern public forum doctrine to subvert that access. Through its 1A Project, SLF educates the public about the First Amendment, and it defends the rights of individuals to engage in open inquiry in the public square.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Debate on public issues "should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Parks, streets, and other public spaces give the freedom of speech and assembly the necessary "breathing space" to flourish. *See Boos v. Barry*, 485 U.S. 312, 322 (1988) (citation omitted). That's what Gabriel Olivier thought when he tried to share his faith on the sidewalk outside the City of Brandon's public amphitheater. But officers arrested Olivier for doing so because of a City ordinance restricting "protests" and "demonstrations" near the amphitheater. Olivier pled no contest in municipal court and paid a $304 fine. A few months later, Olivier challenged the ordinance under the First and Fourteenth Amendments, seeking to enjoin its future enforcement against him. The Fifth Circuit, applying its precedent construing this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), held that Olivier's prior conviction barred his §1983 suit because even the prospective relief he seeks would undermine his prior conviction. That decision was wrong, and it merits this Court's correction.

The Fifth Circuit misapplied *Heck* in several ways; *amicus* highlights two. First, *Heck* bars only retrospective attacks on convictions. It does not apply to forward-looking claims for prospective injunctive relief. Because Olivier seeks to challenge the *future* enforcement of an unconstitutional ordinance, *Heck* preemption cannot apply to him. Second, *Heck* does not bar §1983 suits when habeas relief is not available

to a plaintiff. Olivier was never confined, and therefore never had access to habeas relief. Thus, allowing the decision below to stand will make it impossible for Olivier—and others like him—to vindicate his First Amendment rights. For that reason alone, the Court should grant the petition.

Amicus also writes separately to highlight the historical significance of speech and assembly in the public square. Although this Court is asked only to resolve the *Heck* preclusion issue, the context in which this case arises matters. Access to the public square is an important part of our nation's history and tradition. Yet states and localities often use the modern public forum doctrine to subvert that access. The Court's public forum doctrine, originally intended to provide guidance for lower courts assessing government actions that impact free speech, has spurred confusion in the lower courts and undermined access to the public square.

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. If left uncorrected, the decision below will prevent individuals like Olivier from challenging laws that limit the ability to speak in the public square.

The Fifth Circuit wrongly barred Olivier's claim by misapplying *Heck v. Humphrey* and its progeny. First, *Heck* bars only the retrospective use of §1983 to attack a criminal conviction; it does not bar forward-looking claims for injunctive relief like the one here. Second,

Heck applies only when an individual has access to the writ of habeas corpus. If habeas is not available—as it was not to Olivier—a §1983 suit is appropriate.

A. *Heck* does not apply to prospective, injunctive relief.

Heck does not apply to forward-looking claims for relief. *Heck* prevents the "retrospective use" of §1983 to "collaterally attack" a prior criminal conviction. App. 50a (Oldham, J., dissenting from denial of reh'g en banc). But *Heck* does not apply when a plaintiff seeks future injunctive relief. And Olivier—who has previously been convicted under the ordinance—is the "perfect plaintiff" to challenge "future enforcement" of that ordinance. App. 46a, 48a (Ho, J., dissenting from denial of reh'g en banc).

1. *Heck* and its progeny confirm that the favorable-termination requirement applies only to plaintiffs attempting to collaterally attack their convictions.

Heck bars §1983 claims if "success on the claim would necessarily imply that a prior conviction or sentence is invalid." App. 38a (quoting *Aucoin v. Cupil*, 958 F.3d 379, 382 (5th Cir. 2020)). In other words, *Heck* provides that a plaintiff cannot bring a §1983 suit "that seeks retroactive relief from the burdens of a prior conviction" unless he can show that his conviction was reversed, expunged, declared invalid, or called into question by a writ of habeas corpus. Pet. 18; *Heck*, 512 U.S. at 486-87. That is, unless he has achieved a "favorable termination" of his previous conviction. *Heck*, 512 U.S. at 492 (Souter, J., concurring).

But this favorable-termination requirement does not apply to individuals seeking prospective injunctive relief concerning *future* enforcement of a law. This Court has repeatedly confirmed that *Heck* does not preclude a litigant from seeking "an otherwise proper injunction enjoining the *prospective* enforcement of invalid … regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (emphasis added); *see Edwards v. Balisok*, 520 U.S. 641, 648 (1997) ("Ordinarily, a prayer for ... *prospective* [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under §1983." (emphasis added)).

Put *Heck* in its context. That case "lies at the intersection" of §1983 and 28 U.S.C. §2254—"the federal habeas corpus statute." *Heck*, 512 U.S. at 480. Both statutes "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials, but they differ in their scope and operation." *Id.* When a plaintiff seeks to "collateral[ly] attack" his conviction, he must seek habeas relief or receive favorable termination of his conviction. *Id.* at 484-87. But that's the extent of *Heck*'s reach. The *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*." *Wilkinson v. Dotson*, 544 U.S. 74,81 (2005) (emphasis added).

The whole point of *Heck*, then, is to separate §1983 claims from "the core of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). And Olivier's claim "for *future* relief" is "yet more distant from that core." *Wilkinson*, 544 U.S. at 82 (emphasis in original). That

is why in *Edwards*, this Court held that though a plaintiff could not seek a declaratory judgment that allegedly unconstitutional procedures used in the past deprived him of his rights, he *could* pursue an injunction against those same procedures in the future. 520 U.S. at 648.

That is the case here. Olivier seeks prospective injunctive relief against *future* enforcement of the City's ordinance against him. That claim does nothing to "demonstrate[] the invalidity of th[at] conviction." *Heck*, 512 U.S. at 481-82. After all, "[i]njunctions 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." App. 50a (Oldham, J., dissenting). When a plaintiff asks for prospective relief, all a court can do is say a statute violates the Constitution, decline to enforce it, and instruct executive officers not to initiate enforcement proceedings. *See id.* at 51a (Oldham, J., dissenting). "None of that does anything to undermine, collaterally attack, or otherwise impose tort liability on Olivier's previous conviction." *Id.*

Nor does an injunction "necessarily imply the invalidity of a conviction" unless that outcome is "inevitable." *Skinner v. Switzer*, 562 U.S. 521, 534 (2011). The Fifth Circuit acknowledged the "friction" between this Court's decision in *Skinner* and its holding below—conceding that "enjoining a law as unconstitutional may not 'inevitably' lead to the invalidity of the underlying conviction" since "preliminary injunctions 'merely preserve the relative positions of the parties until a trial on the merits can be held.'" App. 11a (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395

(1981) (brackets omitted)). Yet the panel ignored its own warning, concluding that circuit precedent tied its hands. App. 13a-14a (citing *Clarke v. Stalder*, 154 F.3d 186, 189 (5th Cir. 1998) (en banc)).

Not only does the Fifth Circuit's opinion conflict with this Court's precedents, but it also stands opposite at "least two of [its] sister circuits," which "construe *Heck* not to apply in cases such as this." App. 47a n.2 (Ho, J., dissenting); *see Martin v. City of Boise*, 920 F.3d 584, 603 (9th Cir. 2019) (concluding *Heck* does not apply to prospective injunctions); *Lawrence v. McCall*, 238 F. App'x 393, 395-96 (10th Cir. 2007) (same); *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1315-16 n.9 (11th Cir. 2005) ("[S]ome of [plaintiff's] claims for injunctive relief might survive even if the corresponding claims for [retrospective] damages do not.").

2. A plaintiff previously convicted of violating an unconstitutional ordinance is the "perfect plaintiff" to challenge that ordinance.

Not only does *Heck* not bar Olivier's claim for prospective relief, but Olivier is the "perfect plaintiff" to challenge the City's ordinance. App 48a. (Ho, J., dissenting). As Judge Ho explained below in dissent, Olivier's prior conviction and dedication to publicly sharing his faith "confirm[] that he's at risk of future injury under the ordinance." *Id.* at 46a. That's because "past enforcement" is "good evidence that the threat of enforcement is not 'chimerical.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014); *Steffel v.*

Thompson, 415 U.S. 452, 459 (1974) (concluding a protestor who had been told to stop distributing handbills was under "threat" of prosecution for distributing handbills).

But the Fifth Circuit got things "entirely backwards." App. 48a (Ho, J., dissenting). Indeed, its opinion "sends an odd message" to those "who care about defending their constitutional rights." *Id.* "On the one hand" it "tell[s] citizens that [they] can't sue if [they're] not injured. But on the other hand, [it] tell[s] them that [they] can't sue if [they] *are* injured. Once again, when it comes to suits against the government, the message is: 'Heads I win, tails you lose.'" *Id.* (quoting *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring)).

Judge Oldham effectively illustrated the inconsistency of the result endorsed below. App. 51a. Olivier was arrested on May 1, 2021, for violating the ordinance. *Id.* As a result of his arrest and no contest plea, he cannot challenge the ordinance on constitutional grounds. *Id.* But a "fellow protestor" who joined him that day but was not arrested and convicted may challenge the ordinance without issue. *Id.* And if the "fellow protestor" is successful, "that decision would undermine the legal reasoning for Olivier's previous conviction" just as much as it would have had Olivier been the one to bring suit. *Id.* "If Olivier's suit is a collateral attack barred by *Heck*," Judge Oldham asked, "how is it not a collateral attack when Olivier's friend brings it?" *Id.* "The answer" is that "neither suit is barred by *Heck*." *Id.*

At bottom, the Fifth Circuit has improperly deprived Olivier of his access to the federal courts, and "[h]e deserves better." App. 52a. (Oldham, J., dissenting).

B. *Heck* does not bar §1983 suits when habeas relief is not available to a plaintiff.

Heck does not apply in this case for another reason: where a litigant has never been confined—and thus has never had access to a habeas remedy—a §1983 suit is appropriate. Thus, because Olivier pled no contest and never was confined, his only available remedy in federal court lies with a §1983 claim.

Most circuits agree. The Second, Fourth, Sixth, Tenth, and Eleventh Circuits have all decided that because *Heck* was meant to separate §1983 claims from habeas claims, the absence of a habeas remedy allows a §1983 suit. *See Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Wilson v. Johnson*, 535 F.3d 262, 267-68 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 601, 603 (6th Cir. 2007); *Cohen v. Longshore*, 621 F.3d 1311, 1316-17 (10th Cir. 2010); *Harden v. Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003).

A minority of circuits disagree. *See Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998); *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005); *Savory v. Cannon*, 947 F.3d 409, 421 (7th Cir. 2020) (en banc); *Newmy v. Johnson*, 758 F.3d 1008, 1010-11 (8th Cir. 2014). Those circuits often rely on a footnote in *Heck*, where the majority opined that "the principle barring collat-

eral attacks … is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck*, 512 U.S. at 490 n.10.

But that footnote is "the very quintessence of dicta"—an "unargued, unbriefed, [and] unconsidered pronouncement" that "was not at issue and was not argued." *See Wilson v. Midland Cnty*, 116 F.4th 384, 407 (Willett, J., dissenting) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 625 n.25 (2008)). As Judge Easterbrook explained, "a clearer example of dicta is hard to imagine," since that footnote "did not matter to the disposition of Heck's claim," and "the majority thought [it] would not matter to anyone, ever." *Savory*, 947 F.3d at 432 (Easterbrook, J., dissenting).

At least five members of this Court later agreed. In *Spencer v. Kemna*, decided four years after *Heck*, five justices—four concurring and one dissenting—expressed the view that §1983 claims are barred only when the alternative remedy of habeas relief is available. *See* 523 U.S. 1, 21 (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, JJ.) ("The better view, then, is that a former prisoner, no longer 'in custody,' may bring a §1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy."); *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under §1983.").

Section 1983 was "meant to *open* courthouse doors, not bolt them shut." *Midland County*, 116 F.4th at 409 (Willett, J., dissenting) (emphasis in original). That statute provides relief to "every person" subjected to a "deprivation of [their] rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983; *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 (1978) (holding that Congress "intended to give a broad remedy for violations of federally protected civil rights"). Thus, because the Fifth Circuit's decision leaves Olivier without *any* access to federal court, it compromises the "high purposes" of §1983, which should "sweep as broad as its language." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (quoting *United States v. Price,* 383 U.S. 787, 801 (1966)); *Gomez v. Toledo*, 446 U.S. 635, 639 (1980) ("As remedial litigation," §1983 "is to be construed generously to further its primary purpose.").

While §1983 is broad, *Heck* is narrow. Indeed, many commentators have suggested that *Heck* may be "applicable only to prisoner litigation." *See, e.g.*, Erwin Chemerinsky, *Federal Jurisdiction* 656-67 (8th ed. 2020). That makes sense. Consider how the majority framed the issue in *Heck*: "This case presents the question whether a *state prisoner* may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. §1983." 512 U.S. at 478 (emphasis added). As explained, *Heck* was intended to avoid an impermissible collision between habeas and §1983 relief, when *prisoners* seek to challenge their convictions.

But that collision is inapplicable to noncustodial plaintiffs, whom habeas does not reach. *Spencer*, 523

U.S. at 20-21 (Souter, J., concurring); *see* John P. Collins, *Has All* Heck *Broken Loose? Examining* Heck*'s Favorable-Termination Requirement in the Second Circuit After* Poventud v. City of New York, 42 Fordham Urb. L.J. 451, 459 (2015) ("Permitting suits by plaintiffs who were never or are no longer incarcerated does nothing to thwart 'the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.'") (quoting *Heck*, 512 U.S. at 486).

All considered, the Fifth Circuit's opinion produces a "patent anomaly." *Spencer*, 523 U.S. at 20-21 (Souter, J., concurring). Olivier—an individual "free of custody"—has been deprived of the prospective relief he seeks, yet "exactly the same claim could be redressed if brought by a former prisoner who had succeeded in cutting his custody short through habeas." *Id.* That makes no sense, and this Court should take this opportunity to say so.

II. Access to the public square is an important part of our history and tradition, yet states and localities often use the modern public forum doctrine to subvert that access.

Although this Court is asked only to resolve the *Heck* preclusion issue, the context in which this case arises matters. This case originated when the City of Brandon relegated Olivier to a remote "protest area" that was "too isolated" for anyone to even "hear his message." Pet. 7. Access to the public square is an important part of our nation's history and tradition. Yet states and localities often use the modern public fo-

rum doctrine to subvert that access. The Court's public forum doctrine, originally intended to provide guidance for lower courts assessing government actions that impact free speech, has spurred confusion in the lower courts and undermined access to the public square.

A. From the Greek Agora to the American Revolution, public squares have served as the center for civil discourse.

Citizens have used public squares for assembly and discourse since "ancient times." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). People from many nations and cultures have used sidewalks, parks, and other public places to "assembl[e]," to "communicat[e] thoughts between citizens," and "to discuss[] public questions." *Id.* Indeed, "[s]uch use of the streets and public places" has often been "part of the privileges, immunities, rights, and liberties of citizens." *Id.*

Since the start of Western civilization, public squares have been the heart of civic engagement. In ancient Greece, the Agora served as the focal point of public life. *See* John McK. Camp II, The Athenian Agora: A Short Guide to the Excavations 4 (2003). The Agora was a large open square, where people would trade goods and engage in social interaction. *Id.* Long colonnades provided covered walkways for citizens to discuss politics, business, and other topics. *Id.* Socrates, among other philosophers, commonly orated in these areas. *See* Plato, The Apology of Socrates 17c (Benjamin Jowett trans.)

The Agora is intertwined with the first known formulation of free speech. The Greek term *isegoria*, commonly translated to "freedom of speech" or "equal speech in public," dates to the fifth century BCE. Teresa A. Bejan, *Two Concepts of Freedom (of Speech)*, 163 Proc. Am. Phil. Soc'y 95, 98 (2019). And *isegoria* derives from the verb *agoreuein*, which itself is rooted in the word *agora*. *Id.* Even the ancient Greeks understood the important connection between free speech and the public square.

The use of public squares for assembly was not a Hellenistic anomaly; instead, the tradition continued throughout world history. The Roman Forum was the political and cultural center of ancient Rome. *See* David Watkin, The Roman Forum 1, 11 (2009). It featured a public square that hosted numerous activities, including the great speeches of Cicero and Sulla. *Id.* at 21. Even medieval Europeans gathered in city squares to participate in community meetings, religious ceremonies, and performances. *See* Lewis Mumford, The Culture of Cities 54-55 (1938). These open, public spaces were essential to the society.

B. The public square played a unique role in early American history.

The American experiment began in the public square. Since the beginning, it has been our nation's tradition to allow "the widest room for discussion," and provide for "the narrowest range for its restriction," particularly when free speech "is exercised in conjunction with peaceable assembly." *Thomas v.*

Collins, 323 U.S. 516, 530 (1945). Indeed, the freedoms of speech and assembly are "cognate rights." *Id.*; *see* 1 Annals of Cong. 759-60 (1789).

The Framers knew well the dangers of silencing unpopular views through government limits on assembly. *See* Irving Brant, The Bill of Rights: Its Origin and Meaning 62-68 (1965). For example, the English government arrested William Penn in 1670 for delivering a sermon to Quakers gathered on a public street. *Id.* Although a jury acquitted Penn of unlawful assembly, his trial remained in the Western conscience for decades to come. *Id.*

Penn's trial shaped the framing of the First Amendment. *Id.* at 62, 69. During the House Debates, Representative Theodore Sedgwick of Massachusetts denounced the inclusion of both speech and assembly as repetitive. 1 Annals of Cong. 759-60. But Representative John Page of Virginia rebuffed this concern by invoking Penn's trial and stating: "If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." *Id.* at 760. After Page's statement, the House defeated Sedgwick's motion to strike the assembly provision by a large majority. *Id.* at 761. The Framers thus included the dual freedoms of speech and assembly to protect people like Penn—those who wish to peacefully gather and preach in the public square.

Access to the public square played a key role in colonial life as well. *See* Timothy Zick, Speech Out of Doors: Preserving First Amendment Liberties in Public Places 26 (2008). Early Americans took to streets

and parks as demonstrators, uprisers, street preachers, pamphleteers, and soapbox orators. *Id.* And public speeches and events were "a common form of political protest and political action" during the Revolutionary period. Gordon S. Wood, The Creation of the American Public, 1776-1787 320 (1969). The colonial people gathered in the public square to express outrage over the Stamp Act of 1765 and other Crown directives. Zick, *supra*, 27. By giving the common man a place to express his dissent, the public square "helped propel Americans into Revolution." *Id.* at 28. The founders thus understood from experience that the ability to speak freely in public spaces was not merely a right, but a safeguard against tyranny. *See* James Madison, Letter to Jacob Engelbrecht (July 4, 1827).

C. This Court's modern public forum doctrine has confused courts and undermined access to the public square.

From ancient times to the modern age, the public square has served as a central hub for humanity's political and cultural development. Yet states and localities have employed the modern public forum doctrine to subvert traditional access to the public square. *See* Timothy Zick, *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581, 581-82 (2006) (compiling recent examples). These restrictions often masquerade as permissible regulations, but in practice function as tools of exclusion—particularly when they relegate speakers to remote, invisible, or inaccessible locations. *See id.* at 583.

The Court has recognized that *some* limitations may be necessary to preserve the public square for all.

In crafting the public forum analysis framework, the Court sought to provide lower courts with guidelines to inform their analysis of free speech claims based "on the character of the property at issue." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n.*, 460 U.S. 37, 44 (1983). The Court explained that the circumstances surrounding the forum would impact whether government action impacting speech passed constitutional muster. *Id.*

This framework was well-intentioned. But over time, new cases arose that did not easily fit the initial categories the Court had set forth. While the Court has attempted to fit new cases into existing categories or streamline the existing framework, the lower courts still struggle to determine the precise contours of the forum doctrine. This has produced confusion and uncertainty for governments seeking to regulate the public square and for citizens challenging those regulations.

The Court first categorized public forums into traditional, designated, and nonpublic in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45-46 (1983). In that case, a teachers union claimed that a school violated the First Amendment when it denied the union access to its mailing system but granted access to a different union. *Id.* at 39-41. The Court explained that public property generally falls within one of three categories: (1) "places which by long tradition or by government fiat have been devoted to assembly and debate" (the traditional public forum); (2) "property which the State has opened for use by the public as a place for expressive activity"

(the designated public forum); and (3) "[p]ublic property which is not by tradition or designation a forum for public communication" but which the government has reserved "for its intended purposes" (the nonpublic forum). *Id.* at 45-46.

The Court held that content-based restrictions in traditional public forums—quintessential places like "streets and parks"—must "serve a compelling state interest" and be "narrowly drawn." *Id.* at 45. Designated public forums like those "opened for use by the public as a place for expressive activity" trigger the same standard. *Id.* But when the government sets aside property for specific uses in a nonpublic forum, it may impose content-based restrictions so long as they are viewpoint-neutral. *Id.* at 46.

The Court further divided the categories a few years later. It described designated public forums as having one of two natures: limited or unlimited. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). Under this understanding, a limited public forum is a type of designated public forum. But a distinction exists between forums opened for unlimited use and those with a limited scope.

A decade later, the Court revisited the forum doctrine in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). There, it considered whether a school could open its property for speech on social, recreational, and civic matters while refusing religious groups access to the property. *Id.* at 386-87. The district and appellate courts both called the school facilities a "limited public forum." *Id.* at 389-90. They determined that a municipality may deny speakers

access to a limited public forum so long as the regulation is reasonable and viewpoint-neutral—the standard the Court applied to the nonpublic forum in *Perry*. *Id.* Because the school closed its facilities to all religious groups and did not distinguish between religions, the lower courts held that the restriction was viewpoint neutral. *Id.*

Unanimously reversing the lower courts, this Court held that restricting access to religious groups constituted viewpoint discrimination because it allowed groups to present non-religious views about family values but did not allow religious groups to share their own views on the same topic. *Id.* at 393-94. The Court concluded that it was unnecessary to conduct a forum analysis because the regulation would not survive any scrutiny. *Id.* at 392. But it clarified that "[w]ith respect to public property that is not a *designated* public forum open for indiscriminate public use for communicative purposes, we have said that '[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity[.]'" *Id.* at 392-93 (quoting *Cornelius v. NAACP Legal Def. and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (emphasis added).

With this description, the Court seemed to affirm that a designated public forum is like a traditional public forum. It also appeared to return to its original language for the third kind of forum by calling it a nonpublic forum. But it left the limited public forum language untouched. And it did not intervene on remand when the lower courts merged the limited and nonpublic forum categories.

At the turn of the century, the prospect of the limited public forum as a separate category emerged. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009) (describing limited forums as those limited to certain groups or subjects); *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (describing the same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (parties agreed forum was a limited public forum). By 2015, the Court appeared to have accepted four types of forums: traditional, designated, limited, and nonpublic. *See Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215-216 (2015).

But this Court soon called the four-category framework into question. In *Minnesota Voters Alliance v. Mansky*, the Court signaled a return to traditional, designated, and nonpublic categories, merging limited public forums into the nonpublic forum category. 585 U.S. 1, 11 (2018). *See also Iancu v. Brunetti*, 588 U.S. 388, 422 (2019) (Roberts, C.J., dissenting) ("In several cases, the Court has treated such initiatives as a limited public (or nonpublic) forum.")

Yet the lower courts remain confused. They vary between two, three, or four categories and associated tests for each one. For example, the Fifth Circuit has recently identified "two broad categories of forums." *Freedom from Religion Found., Inc. v. Abbott*, 955 F.3d 417, 426 (5th Cir. 2020). Meanwhile, the Fourth Circuit has observed that "there is considerable confusion over whether there are three or four types of free-speech forums." *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 196 n.13 (4th Cir. 2022). This confusion largely stems from "conflicting

guidance on whether 'limited public forum' is (1) a synonym for or subtype of 'designated public forum'; (2) a synonym for 'nonpublic forum'; or (3) a completely separate fourth category." *Id.*

This confusion persists in courts across the country. *See McDonough v. Garcia*, 116 F.4th 1319, 1322 (11th Cir. 2024) ("The Supreme Court has recognized four types: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum."); *Price v. Garland*, 45 F.4th 1059, 1067-68 (D.C. Cir. 2022) (categorizing traditional, designated, and nonpublic forums, and calling the limited public forum a "hybrid case" in which "the Government has create[d] a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects" and concluding that restrictions in a limited public forum must be viewpoint-neutral and reasonable) (internal quotation marks and citation omitted); *Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 897 (6th Cir. 2021) (holding that the government may not impose content-based restrictions in a "limited public forum," thereby equating a limited public forum with a traditional or designated public forum).

The effects of this confusion are also felt around the country—from street evangelists to college students on campus. *See, e.g.,* Brief for SLF as *Amicus Curiae* in *Keister v. Bell*, No. 22-388. The right to speak and assemble in the public square is a foundational American liberty. But the lack of clarity surrounding the public forum doctrine may yield different results for similarly situated citizens based on which part of the country they reside. If courts do not

even know how many forums there are, they cannot be expected to apply the same standards each time. And the more standards and forums that are introduced, the less speech will be protected in the end. This will come at a great cost to all Americans.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

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