No. 24-993

In The
Supreme Court of the United States

GABRIEL OLIVIER,

Petitioner,

v.

CITY OF BRANDON, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings. FIRE represents speakers, without regard to their political views, in lawsuits across the United States. *See*, *e.g.*, Br. Amici Curiae FIRE & First Amend. Laws. Ass'n Supp. Resp'ts, *Lackey v. Stinnie*, 145 S. Ct. 659 (2025) (No. 23-621); Br. Amici Curiae FIRE et al. Supp. Resp'ts, *Murthy v. Missouri*, 603 U.S. 43 (2024) (No. 23-411).

In pursuing this mission, FIRE routinely represents plaintiffs whom the government has already punished or threatened. *See, e.g.*, *Luttrell v. City of Germantown*, No. 2:25-cv-02153 (W.D. Tenn. filed Feb. 12, 2025) (representing homeowner cited for using skeletons in Christmas decorations); *Gray v. Wright*, No. 5:23-cv-00007 (S.D. Ga. filed Jan. 31, 2023) (representing Army veteran who received a criminal citation for holding "God Bless the Homeless Vets" sign outside city hall). FIRE therefore has a strong interest in ensuring that Americans are not barred from federal court simply because they have previously suffered sanction under an unconstitutional law. The Fifth Circuit's ruling below

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[1] Under Rule 37.6, *amicus* FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

would undermine the ability of FIRE's clients—and all Americans—to vindicate their constitutional rights if this Court does not reverse.

INTRODUCTION

The Fifth Circuit's decision below breaks with this Court's precedent and other federal circuits, straining *Heck v. Humphrey*, 512 U.S. 477 (1994), beyond its intended scope. According to the panel, *Heck* bars anyone convicted under a law from *ever* bringing a federal suit to enjoin that law's future enforcement. But that ruling "gets things entirely backwards." *Olivier v. City of Brandon*, 121 F.4th 511, 513 (5th Cir. 2024) (Ho, J., dissenting from denial of rehearing *en banc*). As this Court and other circuit courts of appeals have recognized, those who have already suffered prosecution are often the *best* people to seek an injunction against that law's future enforcement, because it's clear the law regulates their conduct. This Court should therefore reverse.

Plaintiff Gabriel Olivier wanted to share religious views with others near Brandon Amphitheater in Brandon, Mississippi. So, he brought a civil-rights action under 42 U.S.C. § 1983 and the First Amendment to challenge a municipal ordinance prohibiting speech or leafleting near the Amphitheater other than in a "protest area" far removed from people coming to events at the venue.

Olivier was uniquely well positioned to pursue his § 1983 claims. Several months earlier, Brandon police had cited him under the ordinance. However, because he did not contest the citation and just paid the fine, and hence never pursued *habeas* relief, the Fifth

Circuit held he could not sue to stop the ordinance's *future* enforcement. *Olivier v. City of Brandon, Mississippi*, No. 22-60566, 2023 WL 5500223, at *4 (5th Cir. Aug. 25, 2023); App. 14a.

The Fifth Circuit's decision rests on a misreading of *Heck*, one unique among the Courts of Appeals and which two other circuits have expressly rejected. The Fifth Circuit's view is that Olivier's First Amendment challenge to the ordinance could "necessarily imply the invalidity" of his prior conviction. *Id.* But under blackletter law, a constitutional challenge to a law's future enforcement does not invalidate all previous actions under that law.

This Court should thus reject that misreading of *Heck*'s narrow scope. Such rejection and clarification is vital to prevent the improper foreclosure or chill of civil-rights actions under § 1983, including those seeking to vindicate First Amendment rights.

SUMMARY OF ARGUMENT

As *amicus* here, and as a staunch defender and advocate of First Amendment rights, FIRE seeks to emphasize three points:

First, *Heck*'s motivating concerns are far removed from the facts of this pre-enforcement civil-rights action. The Fifth Circuit's undue expansion of *Heck* thus endangers all constitutional pre-enforcement challenges.

Second, § 1983 actions challenging laws that restrict First Amendment rights are a vital means of preventing future violations of such rights. There is much in First Amendment caselaw about what constitutes a sufficient "credible threat of prosecution" to confer standing for a pre-enforcement challenge. But it has long been clear that individuals prosecuted and convicted under a speech-restrictive law have standing to challenge it and its future application.

Third, nothing in *Heck*—or any of this Court's other cases—suggests its concern for collateral attacks on past convictions supported precluding pre-enforcement First Amendment challenges. *Heck* prevents using § 1983 as a backdoor collateral attack on a criminal conviction. But it does not reach forward-looking relief to restrain enforcement of an unconstitutional law or officials' future conduct. The Fifth Circuit's ruling would create perverse incentives for governments to prosecute first and ask questions later: Governments could silence critics by securing quick convictions, then invoke *Heck* to ward off future federal-court challenges to those laws.

Heck does not bar Olivier's § 1983 challenge to enjoin future enforcement of Brandon's amphitheater ordinance. This Court should accordingly reverse and hold individuals who have suffered past enforcement of an unconstitutional law remain fully entitled to seek prospective relief in federal court to enjoin its future enforcement.

ARGUMENT

I. The Fifth Circuit's Novel Expansion of *Heck* Will Thwart Routine Constitutional Litigation.

This Court's decision in *Heck* was not meant to bar everyday constitutional lawsuits. In *Heck*, this Court held a state prisoner could not use § 1983 to challenge the constitutionality of his conviction by way of a suit for damages. 512 U.S. at 486–90. *Heck* addressed the overlap of § 1983 and *habeas corpus* relief, following *Preiser v. Rodriguez*, 411 U.S. 475 (1973). In *Preiser*, the Court held "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." *Heck*, 512 U.S. at 481 (citing *Preiser*, 411 U.S. at 488–90). *Preiser* suggested in *dicta* that a prisoner perhaps could bring a § 1983 claim for damages arising from his conviction. *Id.* at 481–82 (citing *Preiser*, 411 U.S. at 494). But *Heck* rejected this suggestion amid concern over expanding collateral attacks on state convictions. *Id.* at 484–86.

Analogizing to the tort of malicious prosecution, the *Heck* Court held a § 1983 action does not lie to challenge "the validity of [an] outstanding criminal judgment[]." *Id.* at 486–87. A damages claim

challenging a prior conviction is permissible only if the conviction has been reversed, expunged, declared invalid, or called into question by a federal court in a *habeas* suit. *Id.*

In this case, the panel below held Olivier's claim "necessarily implie[d]" his prior conviction was invalid simply because he sought to enjoin future enforcement of the ordinance under which he was previously convicted. *Olivier*, 2023 WL 5500223, at *6 (quotation marks omitted). The panel relied on a prior Fifth Circuit *en banc* decision, *Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998), as "mak[ing] clear that *Heck* forbids injunctive relief declaring a state law of conviction as 'facially unconstitutional.'" *Olivier*, 2023 WL 5500223, at *4 (quoting *Clarke*, 154 F.3d at 190); App. 10a.[2] It thus held Olivier could not challenge the Brandon ordinance or seek protection from future prosecution because he "seeks to enjoin a state law under which he was convicted." *Olivier*, 2023 WL 5500223, at *4; App. 9a. The panel acknowledged the "friction" between the Fifth Circuit's cases and contrary statements in this Court's decisions, but felt bound by Circuit precedent. *Id.* at *5; App. 11a.

The Fifth Circuit denied *en banc* review by a 9-to-8 vote. It did so over strong dissents arguing that

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[2] *Clarke* concerned a prisoner who challenged the prison's enforcement of a rule against him and sought return of good time credits and damages as relief, while also claiming the rule was facially unconstitutional. In short, the plaintiff-prisoner's claims in *Clarke* primarily challenged his underlying conviction. 154 F.3d at 189. The court disallowed the plaintiff's facial challenge to the rule because it was "so intertwined with his request for damages and reinstatement of his lost good-time credits." *Id.*

dismissal of Olivier's § 1983 claims was "indefensible" and "gets things entirely backwards." 121 F.4th at 513 (Ho, J., dissenting from denial of rehearing *en banc*); *id.* (Oldham, J., dissenting from denial of rehearing *en banc*).

No other circuit has followed the Fifth Circuit's lead. And two circuits, the Ninth and Tenth, expressly reject the Fifth Circuit's view. To compound matters further, the Fifth Circuit held in this case that Olivier's only remedy was a *habeas* petition when he was previously charged, notwithstanding that he never experienced any confinement and thus could have never sought *habeas* relief. These failings are central to Olivier's opening brief, but *amicus* notes them to underscore how the Fifth Circuit's approach creates a perfect storm to preclude challenges to state and local laws infringing First Amendment rights.

II. This Court's Precedent Affirms That Those Previously Prosecuted Under a Law Are Often the Best Positioned to Sue.

Individuals whom the government has charged, prosecuted, or convicted under a law are not barred from challenging it in the future. To the contrary, under precedents of this Court and other federal courts, they might well be the *best* people to do so, as they plainly have standing to challenge application of a law already applied to them.

Past enforcement is evidence that a plaintiff has standing. This Court has long held "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). A

plaintiff challenging an unconstitutional law or state action can bring suit upon showing simply an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute," provided there is a "credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). One way to prove a credible threat of prosecution is to show "there is a history of past enforcement." *Id.* at 164. "Past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical,'" but instead is a real and patent threat. *Id.* (citation omitted); *cf. Steffel*, 415 U.S. at 456, 458–60 (plaintiff had standing to challenge application of Georgia criminal trespass law where he had twice faced threats of arrest for handbilling and his companion was prosecuted).

Lower court decisions likewise reflect that past enforcement favors rather than prohibits prospective civil-rights claims. *See, e.g.*, *Kenny v. Wilson*, 885 F.3d 280, 288–89 (4th Cir. 2018) (students challenging vague school disturbance and disorderly conduct laws faced "credible threat of future enforcement" primarily because they had previously been arrested and criminally charged under the statutes); *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1025 (6th Cir. 2024) (plaintiff's showing of past instance of enforcement of criminal law prohibiting posting photos of marked ballots "support[] a credible threat of enforcement" for action challenging the law on First Amendment grounds); *Hershey v. Jasinski*, 86 F.4th 1224, 1230 (8th Cir. 2023) (plaintiff had standing to challenge state university's policy requiring students to give advance notice before distributing "non-

University" publications, where an officer previously ordered him to stop and the student had received a trespass warning barring return).

The ability to enjoin unconstitutional speech restrictions is vital in First Amendment cases, where the injury is not only prosecution or a conviction, but also the chilling effect of potential punishment that results in self-censorship. *See N.R.A. v. Vullo*, 602 U.S. 175, 189 (2024). FIRE therefore regularly represents individuals previously charged or punished under laws that restrict speech, who seek to enjoin enforcement in the future.

In *Luttrell v. City of Germantown*, No. 2:25-cv-02153 (W.D. Tenn. filed Feb. 12, 2025), FIRE represented a homeowner cited by the city (and who faced fines and other punishment) for using skeletons in a Christmas display in her yard. The suit challenged the city's holiday decorations ordinance and its determination that the homeowner's display was not appropriate for the Christmas season.[3]

FIRE also represents Rebekah Massie, an Arizona mother whom law enforcement removed from a city council meeting and arrested for violating a rule against making "complaints" about city officials during the public comment period. First Am. Compl. ¶¶ 4–5, *Massie v. City of Surprise*, No. 2:24-cv-02276

[3] A month after Luttrell filed suit, the city dropped the pending citations. *Victory! Charges Dropped Against Tenn. Woman Cited for Using Skeletons in Christmas Decorations*, FIRE (Mar. 10, 2025), https://www.thefire.org/news/victory-charges-dropped-against-tenn-woman-cited-using-skeletons-christmas-decorations.

(D. Ariz. filed Jan. 17, 2025), ECF No. 23. FIRE brought suit to enjoin the policy in light of the obvious First Amendment problems.[4]

And in *Gray v. Wright*, FIRE represented an Army veteran who received a criminal citation for "holding a sign reading 'God Bless the Homeless Vets'" outside city hall. Compl. ¶ 1, No. 5:23-cv-00007 (S.D. Ga. filed Jan. 31, 2023), ECF No. 1. The city's police chief asserted that individuals must obtain permits before demonstrating on public property, including on the sidewalk in front of city hall.[5]

These cases illustrate why past enforcement is a hallmark of a justiciable controversy, not an impassible procedural roadblock. It's clear these plaintiffs were regulated by the laws they challenged: They had already been arrested or ticketed for their alleged crimes. One could easily imagine them simply paying their fines, as Olivier did, before later deciding to vindicate their constitutional rights in federal court. Barring such plaintiffs would leave constitutional violations unchecked and send an absurd message: If you have not been harmed, you lack standing to sue; but if you *have* been harmed, you also cannot sue. As Judge Ho wrote below, this amounts to "[h]eads I win, tails you lose." *Olivier*, 121 F.4th at 513 (Ho, J.,

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[4] The City of Surprise withdrew its policy, without comment, after Massie filed suit and moved for a preliminary injunction. *Supra* note 3, ¶¶ 11, 132.

[5] The city revoked the ordinance after FIRE filed suit. *Victory: After FIRE Lawsuit, Georgia City Rescinds Law Requiring Mayor's Permission to Protest*, FIRE (July 6, 2023), https://www.thefire.org/news/victory-after-fire-lawsuit-georgia-city-rescinds-law-requiring-mayors-permission-protest.

dissenting from denial of rehearing *en banc*). That cannot stand.

And the erroneous ruling below further endangers constitutional claims when combined with abstention doctrines. If Olivier had brought a pre-enforcement facial challenge before any arrest, a court might have considered enforcement speculative and concluded he lacked standing. If he waited until after being charged, but before any conviction, a federal court would likely abstain to avoid interfering with the ongoing state proceeding. *See Younger v. Harris*, 401 U.S. 37 (1971). And if he waited until after conviction, as here, the Fifth Circuit holds *Heck* bars the § 1983 claim unless he first secures *habeas* or other relief overturning the conviction. *Olivier*, 2023 WL 5500223, at *4, *6. Of course, for plaintiffs like Olivier, *habeas* is not a realistic option: Olivier's sentence was only a fine and a suspended term, so he was never "in custody" as required by 28 U.S.C. § 2254.

The right time to sue, the Fifth Circuit seems to be saying, is *never*. Its decisions—culminating with the panel opinion in this case—set a trapline of procedural barriers leaving plaintiffs like Olivier little or no opportunity to seek to enjoin unconstitutional laws. That flips this Court's precedent, which views past enforcement as supporting, not negating, a plaintiff's request to enjoin future unconstitutional behavior. This Court should therefore reverse and hold that those previously convicted under a law are not categorically barred from challenging it.

III. *Heck* Did Not Insulate State or Local Officials from § 1983 Actions Seeking to Enjoin Unconstitutional Laws.

Nothing in *Heck* or its progeny suggests this Court intended a sea-change in pre-enforcement challenges to unconstitutional laws. *Heck* addressed the specific concern of whether § 1983 allows a collateral attack on an extant criminal conviction in a damages claim. *See Heck*, 512 U.S. at 478. The Court held such a suit is impermissible in the interests of ensuring finality and limiting collateral federal attacks on state criminal judgments. *Id.* at 484–85. But it did not preclude pre-enforcement challenges to future application of unconstitutional laws, including laws that impermissibly restrict speech.

This Court's decisions since *Heck* distinguish § 1983 actions challenging an outstanding conviction or current confinement from § 1983 actions seeking only prospective relief by challenging rules or regulations going forward. In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court held a prisoner's due process challenge to procedures used in a disciplinary proceeding against him was precluded under *Heck*. But his request for prospective injunctive relief (to require prison officials to date-stamp witness statements when received) was *not* foreclosed. As the Court said, "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id.* at 648.

Similarly, in *Wilkinson v. Dotson,* 544 U.S. 74 (2005), this Court held prisoners' § 1983 challenges to the constitutionality of state parole procedures in

future hearings were permissible and did not contravene *Heck*, as they did not seek to undo their convictions or to have a court order "immediate or speedier release into the community." *Id.* at 76, 82. Rather, they merely sought new, constitutional parole hearings. The Court held their claims were cognizable under § 1983 because success for the plaintiffs "would not necessarily spell immediate or speedier release"; it would "at most … speed consideration of a new parole application." *Id.* at 81–82 (emphases omitted).[6]

In this case, Olivier has made clear he does not "seek to overturn his conviction, either directly or indirectly," but only challenges "the constitutionality of the [Brandon amphitheater ordinance] and its application to his future [speech]." Pet'r's App. 36a–37a. Declaratory or injunctive relief concerning the constitutionality of future application of the ordinance, to Olivier or others, would not in any way invalidate Olivier's existing conviction or challenge the punishment he received (and accepted). As Judge Oldham correctly observed: "Injunctions do not work backwards to invalidate official actions taken in the past. Rather, they operate to prevent future official enforcement actions upon threat of contempt." *Olivier*,

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[6] Notably, the prior Fifth Circuit cases cited in the panel's decision below all concerned instances in which parties sought to challenge existing, outstanding convictions. *Clarke*, 154 F.3d at 189 (plaintiff's facial challenge to prison rule was "intertwined with his request for damages and reinstatement of his lost good-time credits"); *VanBuren v. Walker*, 841 F. App'x 715, 716 (5th Cir. 2021) (per curiam) (holding *Heck* barred prisoner's claims against prosecutor involved in his conviction); *Lavergne v. Clause*, 591 F. App'x 272, 273 (5th Cir. 2015) (per curiam) (barring claims against judge who presided in case resulting in plaintiff's conviction); *cf.* Pet'r's App. 7a & n.3.

121 F.4th at 514 (Oldham, J., dissenting from denial of rehearing *en banc*). Such forward-looking relief "does nothing to … collaterally attack[] or otherwise impose tort liability on [the] previous conviction." *Id.*

Any other interpretation of *Heck* would have absurd effects on the important interests § 1983 protects. As Judge Oldham noted: Suppose Olivier had a friend who engaged in the very same speech but was not arrested or convicted. *Id.* This friend would have standing to seek the same injunction that Olivier wants. But while the friend's lawsuit could go forward (assuming he could show a likelihood of enforcement, which Oliver could all but automatically establish), the Fifth Circuit's misreading of *Heck* bars Olivier simply because he had that statute enforced against him already. That's so even if the effect on Olivier's past conviction—which is none at all—would be the same no matter who brought the suit. *Id.*

Those convicted under unconstitutional laws are not fated to be permanent constitutional martyrs, forbidden from ever preventing further harm to themselves—and others who may face enforcement of the unconstitutional law. Yet, as the Ninth Circuit reasoned in *Martin v. City of Boise*, that's just the rule the Fifth Circuit's reading would create: "The logical extension of [that] 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 … in the future." 920 F.3d 584, 614 (9th Cir. 2019), *abrogated on other grounds by City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

The decision below also creates a perverse incentive: The moment the government succeeds in convicting someone for violating a law (even on a minor charge with a small fine), that person loses the ability to seek federal injunctive relief against that law. Meanwhile, the government can continue enforcing it against that person and others with impunity, unless and until someone else who was never convicted but still has standing steps up to challenge it. The panel's misreading of *Heck* thus incentivizes governments to prosecute first and think later.

In sum, *Heck* does not bar Olivier's suit. He is not seeking to erase his prior conviction in this § 1983 action. He asks only for an injunction against Brandon, Mississippi enforcing an unconstitutional ordinance against him or others in the future. That is the fundamental protection § 1983 affords, and it should not be denied here.

CONCLUSION

The Fifth Circuit's reading stretches *Heck* beyond its breaking point. This Court did not intend *Heck* to bar everyday First Amendment or other constitutional litigation from federal courts. Olivier isn't attacking his old conviction; he's trying to prevent the next one. For that reason and those above, this Court should reverse the Fifth Circuit's decision and hold *Heck v. Humphrey* does not bar § 1983 suits seeking to enjoin the future enforcement of unconstitutional laws.

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Respectfully Submitted,

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