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

BRIEF OF AMICI CURIAE THE NATIONAL INTITUTE OF FAMILY AND LIFE ADVOCATES AND HEARTBEAT INTERNATIONAL, INC. IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

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 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 speech-restrictive government action 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

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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.

services. It represents its member centers who are often targeted and have their First Amendment rights infringed simply because they speak a pro-life message.

SUMMARY OF ARGUMENT

The Fifth Circuit decision (*Olivier v. City of Brandon*, No. 22-60566, 2023 U.S. App. LEXIS 22506 (5th Cir. 2023)) (App. 1a) 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 section 1983 claims, and leads to absurd results.

The question presented here is whether *Heck* bars a noncustodial plaintiff's section 1983 claim for prospective relief against future enforcement of an allegedly unconstitutional ordinance. *Heck* involved a custodial defendant who sought monetary damages under section 1983 arising out of alleged police misconduct leading to his wrongful prosecution and erroneous conviction. Because his conviction had never been set aside, the Court required that he first pursue habeas relief before bringing a section 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 address 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 section 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 section 1983, undercutting federal protections for civil rights in the face of state and local overreach.

ARGUMENT

I. *Heck* does not bar Olivier's prospective section 1983 claim to prevent future enforcement of the Ordinance.

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. 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 section 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 section 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 differs in several relevant ways from the core of *Heck*. These differences render *Heck* inapplicable to Olivier's case.

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 section 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 section 1983 claim. *Id*. at 489.

The reasoning for the *Heck* holding was rooted in the common law tort of malicious prosecution *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 (emphasis added). Reasoning from the common law, the Court determined that the *Heck* defendant's section 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 section 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).

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, he paid the fine and did not appeal his conviction. App. 3a. Similarly, his section 1983 claim is not a "parallel litigation" since his prior case was closed before he brought his section 1983 action. *Id. See McDonough v. Smith*, 588 U.S. 109, 118-19 (2019). (holding that the statute of limitations for petitioner's section 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, 151-52 (2022) (emphasis added) (citing *Heck*) (disallowing

petitioner's section 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 section 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.

This Court did not indicate any intention to deny access to relief through the federal courts where the type of conflict at issue in *Heck* 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). The Fifth Circuit was wrong to deny Olivier's only hope for adjudicating his constitutional claim.

B. Olivier's claim is cognizable under section 1983 without overturning his prior conviction.

Because Olivier's section 1983 claim does not arise from the same set of facts as his prior conviction, it is not legally or logically related to that conviction in the same way Heck's was. Heck's 1983 damages claim was based on disputed facts concerning alleged police misconduct during his prior case, misconduct that led to his conviction. Before he could obtain damages, he, out of logical and legal *necessity,* had to prove that his allegations of misconduct were true. Those facts, if proven, would in turn undermine his conviction.

But the proper way to challenge his conviction was a habeas petition because that avenue "spell[s] speedier release" which "lies at the core of habeas corpus." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

Here, by contrast, Olivier's prospective claim is not in any way legally derived from or dependent upon his prior conviction. In fact, he could have filed a section 1983 action without ever having been convicted of violating the Ordinance at all. *See* Sec. II.D. Conversely, none of the facts involved in his prior conviction are relevant to his current facial constitutional challenge, which turns on a question of law. Therefore, overturning his prior conviction would not set the stage for his section 1983 action, as it would have in Heck's case, nor would it provide him the prospective relief from future prosecutions that he is seeking. Pet'r's Br. 8.

Therefore, it cannot be said, as was the case in *Heck*, that Olivier's claim is not "cognizable" until his prior conviction has been overturned because his

section 1983 claim is not legally related to his conviction in the same way Heck's was. *Heck*, 512 U.S. at 487 ("A claim for damages *bearing that relationship to a conviction or sentence* that has not been so invalidated is not cognizable under § 1983.") (emphasis added). Because the overturning of Heck's conviction was a condition precedent to his damages claim, he had no 1983 "cause of action" and his "1983 claim ha[d] not yet arisen." In contrast, Olivier's 1983 claim *is* cognizable because the overturning of his prior conviction is not a condition precedent to his prospective claim.

C. Heck's concern with conflicting civil and criminal judgments is inapplicable to Olivier's purely legal claim.

Heck was concerned with a plaintiff using a 1983 civil suit, which has a lower burden of proof than a criminal action, to attack his conviction. "[T]o permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." *Heck*, 512 U.S. at 484. See also *McDonough*, 588 U.S. at 117-18 (Heck is concerned with the "possibility of conflicting civil and criminal judgments."). However, Heck's claim involved disputed questions of fact; Olivier's claim is a pure question of law. Because "the evidentiary standard of proof applies to questions of fact and not to questions of law" (*Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring), any concern that Olivier is seeking to do an end run around the higher standard of proof required by a criminal case by filing a civil suit is simply not

supportable. *See also Addington v. Texas*, 441 U.S 418, 423 (1979) ("The function of a standard of proof . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." (citation omitted) (internal quotation marks omitted).

D. Cases in the *Heck* line have allowed prospective section 1983 claims that do not seek to overturn prior convictions.

Heck does not address the issue of prospective section 1983 claims; however several other Supreme Court cases do. These support the view that *Heck* does not disallow Olivier's prospective section 1983 claim because the Heck bar applies where a "claim *seeks*—not where it simply *relates to* core habeas corpus relief, *i.e.*, where a state prisoner requests present or future release." *Wilkinson v. Dotson*, 544 U.S. at 81 (emphases added). Putting aside the fact that Olivier never was confined and so never had the option of pursuing a habeas petition, his prospective claim is not *seeking relief* from his prior conviction, even if his claim *relates to it* because it involves the same Ordinance.

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court allowed a prisoner's prospective section 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 section 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 from unconstitutional procedures, Olivier has been convicted and is seeking a future injunction. He too, should be allowed to challenge the constitutionality of the Ordinance to prevent future unlawful infringements by local officials.

This Court has allowed a prospective section 1983 claim even if success in that claim might in the future result in earlier release from prison. In *Wilkinson*, the Court allowed prisoners who had been denied parole to bring a section 1983 claim challenging state procedures used to determine parole eligibility. 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 also allowed prospective relief when the outcome of the section 1983 claim might undermine a conviction. *Skinner v. Switzer*, 562 U.S. 521 (2011), allowed the prisoner to pursue a section 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 in Sec. I.A., the concern in *Heck* is for avoiding two conflicting resolutions *of issues based on the same set of facts*. *Vega*, 597 U.S. 151. Therefore, success in Olivier's forward-looking section 1983 claim would not create the sort of conflicting judgments at issue in *Heck*.

II. The Fifth Circuit's holding contradicts section 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 section 1983 actions where the former are contrary to the statute's "history or purpose." *Tower v. Glover*, 467 U.S. 914, 920-21. (1984) (state actors did not have immunity from a section 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 section 1983 claim for prospective relief is contrary to that statute's history and purpose and thus, under *Heck*, is incorrect.

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

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. This Court has repeatedly emphasized that a "broad construction of section 1983 is compelled by the statutory language." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (citation omitted) (allowing a section 1983 action alleging that laws levying state taxes and fees violated the Commerce Clause); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 (1978) ("Congress intended [section 1983] to be broadly construed.")

B. Federal courts have a duty under section 1983 to decide the constitutional issues presented to them.

Prior to the Civil War, state courts were responsible for deciding cases arising under the federal constitution and laws. Federal courts principally decided cases that arose between citizens of different states or cases where a federal right was denied by a state court. *Zwickler v. Koota*, 389 U.S. 241, 245-46 (1967) (reciting history of post-Civil War civil rights legislation).

After the Civil War, former Confederates organized the Ku Klux Klan and engaged in acts of violence against former slaves and their allies in the South. In order to address the deprivation of federal rights which was occurring in the southern states, in 1871 Congress passed section 1983 (a.k.a the "Ku Klux Klan Act") as part of the Reconstruction Era legislation.[2] It enforced the provisions of the Fourteenth Amendment against state executive, legislative, or judicial action and recognized that even the courts were being used to harass individuals and often "were in league with those who were bent upon abrogation of federally protected rights." *Mitchum v. Foster*, 407 U.S. 225,

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[2] *Ku Klux Klan Act of 1871, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes",* Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/historic-document-library/detail/ku-klux-klan-act-of-1871-april-20-1871-an-act-to-enforce-the-provisions-of-the-fourteenth-amendment-to-the-constitution-of-the-united-states-and-for-other-purposes.

240 (1972) (allowing a section 1983 action to prevent enforcement of a public nuisance law against a bookstore); *Ex parte Virginia*, 100 U.S. 339 (1879) (denying habeas corpus petitions of the State of Virginia and inmate judge who had excluded black people from a jury). Because state authorities could not be trusted to uphold federal rights, the Fourteenth Amendment and the civil rights laws together "alter[ed] the federal system" and established "the role of the Federal Government as a *guarantor* of basic federal rights against state power." *Mitchum*, 407 U.S. at 239. Moreover, "[t]hese [federal] courts became the *primary* and powerful reliances for vindicating every right given by the Constitution." *Zwickler,* 389 U.S. at 247 (emphasis in original).

The passage of section 1983 changed the old order by altering the relationship of the federal courts to the states. "In thus expanding federal judicial power, Congress imposed the *duty* upon all levels of the federal judiciary" to hear and decide federal constitutional claims. *Zwickler,* 389 U.S. at 248 (emphasis added).

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 of providing litigants like Olivier access to federal courts. 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).[3]

C. Section 1983 allows litigants the option of choosing a federal forum for their claims.

This Court noted in *Steffel v. Thompson*, 415 U.S. 452 (1974) that section 1983 does not require exhaustion of state judicial or administrative remedies before a section 1983 claim can be brought. *Id.* at 472-73. In fact, for the same reasons that Congress has imposed an affirmative duty upon federal courts to hear section 1983 claims (*see* Sec. I.A. *supra*), it has rejected a requirement of exhaustion of state remedies. *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (citing legislative history to support that section 1983 does not require exhaustion of state administrative remedies). In support of that rule, this Court cited three recurring

[3] 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.

themes in the Congressional debates over the passage of the Act. First, as noted in Sec. II.B., it was clear that the federal courts were to be given a "paramount role" in protecting constitutional rights. *Id.* at 503.[4] Second, Congress would not have wanted to impose an exhaustion requirement because the Act was passed in the recognition that state authorities were unwilling or unable to protect the constitutional rights of all persons. *Id.* at 505.[5] Third, many legislators believed that the bill provided dual forums in the state and federal system, allowing the plaintiff *to choose* which forum in which to pursue his claim. *Id.* at 506;[6] *Zwickler,*

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[4] "The first remedy proposed by this bill is a resort to the courts of the United States. . . . [T]here is no tribunal so fitted, where equal and exact justice would be more likely to be meted out. . . as that great tribunal of the Constitution." Cong. Globe, 42nd Cong. 1st Sess. 476 (1871). Available at https://babel.hathitrust.org/cgi/pt?id=uc1.c109461409&seq=1 (statement of Rep. Dawes) ("Globe").

[5] "[T]he local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." Globe at p. 374 (statement of Rep. Lowe).

"[H]as the Government of the United States the right under the Constitution, to protect a citizen of the United States in the exercise of his vested rights . . . by . . *the assertion of immediate jurisdiction through its courts*, without the appeal or agency of the State." Globe at p. 389, (statement of Rep. Elliott) (emphasis added).

[6] "I do not say that this section gives to the Federal courts exclusive jurisdiction. . . . It leaves, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court." Cong. Globe App., 42nd

(continues)

389 U.S. at 248 ("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") (emphasis added).

Heck did not impose a state remedies exhaustion requirement on section 1983 claims, asserting instead that a section 1983 claim that challenged the validity of a conviction for which a defendant was currently incarcerated was not cognizable without first overturning the conviction. *Heck*, 512 U.S. at 483. But Olivier's claim *is* cognizable under section 1983. See Sec. I.B. Therefore the reasoning of *Patsy* is controlling.

The City of Brandon has openly displayed animosity towards Olivier's preaching, questioning the validity of his Christianity even though it is irrelevant to the resolution of the current case. "Petitioner presents himself as a 'Christian' who wishes to peacefully 'share his faith on public streets.' . . . Video evidence proves otherwise." Br. in Opp'n 7-8. Furthermore, the City seems to take offense at Olivier's preaching as if it were an indictment of the City's reputation as a Bible Belt community and attempts to refute any such criticism. *Id*. at 8. Brandon's reputation is also irrelevant to the question whether Olivier can bring a section 1983 claim. These statements by the City as well as the timing and circumstances of the Ordinance's passage suggest it was specifically targeted at his preaching. Pet. Cert 6. In situations

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Cong., 1st Sess. 216 (1871). Available at https://digital.library.unt.edu/ark:/67531/metadc30894/m1/570/ (statement of Sen. Thurman).

like this, where state or local authorities have evidenced open bias against a litigant, the federal courts should not be allowed to renege on their "duty" to decide constitutional issues.

Section 1983 was passed to protect litigants in exactly these types of situations. "[O]ne reason the legislation was passed was to afford a federal right in federal courts because, *by reason of prejudice, passion, neglect, intolerance or otherwise* . . . the claims of citizens to the rights . . . guaranteed by the Fourteenth Amendment might be denied by the state." *Monroe v. Pape*, 365 U.S. 167, 180 (1961) (emphasis added).

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

This Court permits a plaintiff to bring a pre-enforcement challenge 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. at 462 (1974) (allowing a section 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 section 1983 challenge. *Steffel*, 415 U.S. at 458-59 ("[P]etitioner has alleged threats of prosecution that cannot be characterized as 'imaginary or speculative'"). See also:

- *303 Creative LLC v. Elenis,* 600 U.S. 570 (2023) (allowing a pre-enforcement challenge under the First Amendment to enforcement of a state law prohibiting discrimination on the basis of sexual orientation when the statute had been enforced against other speakers, and so plaintiff faced a credible threat of sanctions);

- Wooley v. Maynard, 430 U.S. 705, 710 (1977) ("[W]hen a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights.");

- *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may

> deter their exercise almost as potently as the actual application of sanctions. . . . First Amendment freedoms need breathing space to survive");
>
> - *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("[W]e have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression -- of transcendent value to all society, and not merely to those exercising their rights -- might be the loser").

In *Wooley v. Maynard,* 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 section 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 section 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,[7] the Court's perspective that the section 1983 action did not "annul" his prior state trial because of its prospective nature is equally applicable to the instant case.

Rather than being a basis for denying his claim under *Heck*, Olivier's prior conviction establishes standing for his section 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 plaintiff" for a section 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).

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 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

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[7] *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 "except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. *Id.* at 45.

section 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 section 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 in state court 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 section 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 section 1983.

CONCLUSION

The Fifth Circuit's expansion of *Heck* leaves Olivier with no federal remedy to protect his First 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 section 1983 action, since it is contrary to Congress's intent that section 1983 provide a federal forum for protecting constitutional rights against state or local incursions.

For the foregoing reasons, this Court should reverse the Fifth Circuit opinion and allow Olivier's section 1983 case to move forward.

Respectfully submitted,

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September 2025