No. 24-993

IN THE

Supreme Court of the United States

GABRIEL OLIVIER,

Petitioner,

v.

CITY OF BRANDON, MISSISSIPPI, *et al.*,

Respondents.

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

BRIEF OF THE RELIGIOUS FREEDOM INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* *

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. Among its core activities, RFI equips students, parents, policymakers, professionals, faith-based organization members, scholars, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that understanding to contemporary challenges and opportunities.

RFI envisions a world that respects religion as an indispensable societal good and which promises religious believers the freedom to live out their beliefs fully and openly. RFI submits this brief because this Petition raises fundamental questions about when those convicted under laws that violate the First Amendment's Free Exercise guarantee may challenge those laws prospectively.

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* Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner Gabriel Olivier "is a Christian called to share his faith with his fellow citizens." Pet. Br. 2. He contends that he has a First Amendment right to "preach[] outside [Respondent City of Brandon's] official speech zone," but doing so would violate a city ordinance. *Id.* at 19. He may very well be correct: after all, "the First Amendment doubly protects religious speech" like Olivier's. *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 523 (2022). Moreover, "the threat of future enforcement" of the ordinance against Olivier "is substantial"; "most obviously, there is a history of past enforcement here"—and Olivier "was the subject" of it. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 164 (2014). Under this Court's precedents, Olivier is the "perfect plaintiff" to challenge future enforcement of this law. Pet. App. 48a (opinion of Ho, J.).

Nevertheless, the court below held that because Olivier has himself been convicted in state court for preaching in violation of the suspect ordinance, he cannot challenge it under Section 1983.

Olivier has explained why that result is wrong; RFI submits this brief to explain why it is counterintuitive. Olivier's challenge to the city's ordinance places Olivier among a long line of litigants, sanctioned for practicing their faith, who seek to vindicate their constitutional rights. The distinction that the decision below has drawn between Olivier—who may no longer vindicate his right to free exercise of his religion—and other litigants who have been permitted to do so is untenable. RFI respectfully urges this

Court to rule that the supposed distinction is not the law.

ARGUMENT

I. Olivier Is Among A Long Line Of Litigants Sanctioned Under Unlawful Free-Exercise Restraints

This Court is well acquainted with laws that "impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 461 (2017) (citation modified); see, *e.g.*, *id.* at 466 ("The State . . . [has] impose[d] a penalty on the free exercise of religion . . . ."); *Espinoza* v. *Mont. Dep't of Revenue*, 591 U.S. 464, 478 (2020) ("So applied, the provision imposes special disabilities on the basis of religious status and conditions the availability of benefits upon a recipient's willingness to surrender its religiously impelled status." (citation modified)); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). It is accordingly no surprise that religious adherents and institutions have been sanctioned under laws that were later held to violate the First Amendment's free exercise guarantee.

For example, Jack Phillips, petitioner in *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, came before this Court while subject to a remedial order of the Colorado Civil Rights Commission. See 584 U.S. 617, 630 (2018). Phillips was "an expert baker"

and "devout Christian" who endeavored to "honor God through his work at Masterpiece Cakeshop." *Id.* at 626. Phillips refused to create a wedding cake for a same-sex wedding because doing so "would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs." *Ibid.*

Following his refusal, Phillips appeared before the Commission for an adjudication of whether he had violated Colorado's public accommodations law. See *id.* at 628, 630. Phillips explained that he had "sincere religious objections" to baking a wedding cake for a same-sex wedding. *Id.* at 639. But, after a hearing in which commissioners made "official expressions of hostility to religion," *ibid.*, the Commission sanctioned Phillips, ordering him to "cease and desist from discriminating," to conduct "comprehensive staff training" on Colorado's public accommodations law, and to prepare "quarterly compliance reports for a period of two years," *id.* at 630.

Ultimately, in *Masterpiece*, Phillips challenged the Commission's remedial order before this Court, arguing that it was imposed in violation of the First Amendment. See *id.* at 631. This Court agreed with Phillips, ruling that the Commission's "hostility toward [his] sincere religious beliefs" violated the Free Exercise Clause. See *id.* at 634.

Similarly, Mark Anthony Spell, a Central Louisiana pastor, "was issued six misdemeanor citations" for violating state executive orders when he "continu[ed] to lead in person worship services in [his] church's sanctuary building" during the COVID-19 pandemic. *State* v. *Spell*, 339 So. 3d 1125, 1128, 1130 (La. 2022). The executive orders "prohibit[ed] gatherings over a

designated number of people and impos[ed] a stay-at-home order," thus forbidding religious congregation. *Id.* at 1137. However, they provided "preferential treatment for comparable secular activities" like assembling in "office buildings." *Id.* at 1135, 1137.

Pastor Spell unsuccessfully appealed his convictions, and then obtained a writ of certiorari to the Supreme Court of Louisiana. See *id.* at 1130. That court vacated Pastor Spell's misdemeanor convictions, applying the "analytical framework provided by" this Court's rulings that had enjoined laws under the Free Exercise Clause despite "the government interest . . . [in] reducing the spread of COVID-19." *Id.* at 1133–34 (citing *Tandon* v. *Newsom*, 593 U.S. 61, 64–65 (2021); *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 18 (2020)). The *Spell* court held that the executive orders, "as applied in this case, violate[d] the Free Exercise Clause and [we]re subject to strict scrutiny," which they failed. *Id.* at 1137.

The pattern in *Masterpiece* and *Spell* extends as well to unconstitutional prosecutions of churches themselves. In *Founding Church of Scientology of Washington, D. C.* v. *United States*, the federal government seized "several electrical instruments and a large quantity of literature owned by claimants-appellants, The Founding Church of Scientology of Washington, D.C. and various individual adherents of that organization." 409 F.2d 1146, 1148 (D.C. Cir. 1969). The government alleged that the seized electrical instruments—"Hubbard Electrometers" used in a religious practice of the Church called "auditing"—were medical "devices" subject to government regulation. See *id.* at 1151. The government further alleged that

the religious texts seized from the Church amounted to "labeling" of those medical "devices." *Id.* The government "framed this as a typical Food, Drug and Cosmetic Act case, involving a device whose accompanying promotional literature makes claims to curative powers unsupported in fact." *Id.* at 1153. A jury agreed and "a judgment and decree of condemnation" of the Church's religious articles and literature "was entered." *Id.* at 1148.

The Church appealed, arguing that the forfeiture proceeding "interfered with the free exercise of [] religion." *Ibid.* The D.C. Circuit agreed and reversed. *Id.* at 1162. The court held that the Church had demonstrated that auditing was one of its religious practices, and that the purportedly misleading "labeling" was, in fact, religious doctrine. See *ibid.* Because the First Amendment forbid "courtroom evaluation" of the Church's "religious doctrines," the forfeiture action was forbidden. See *ibid.*

The claimants in *Masterpiece*, *Spell*, and *Founding Church* each spent months or years subject to an unconstitutional sanction before vindication on appeal. Thus, the very litigants who achieved, through precedent, protection for freedom of religion were—per the decision below—*Heck*-barred from seeking injunctive relief against the restraints that resulted in their initial sanctions. That is notwithstanding that those sanctions were invalid. See *Montgomery* v. *Louisiana*, 577 U.S. 190, 203 (2016), *as revised* (Jan. 27, 2016) ("[A]n unconstitutional law is void, and is as no law." (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880))). A rule that closes the federal courts to precisely the

litigants who have historically safeguarded constitutional liberties cannot be correct.

II. A State Conviction Does Not Prove That A Restraint On Free Exercise Should Withstand Federal Court Review

As explained, Olivier is among a long line of litigants, sanctioned for practicing their faith, who seek to vindicate their constitutional rights. And his conviction under the statute at issue here should be no impediment to a freestanding challenge to the law's constitutionality.

A. That a state has secured a conviction under a statute does not immunize the statute from a federal court's injunction under the First Amendment. See *Wooley* v. *Maynard*, 430 U.S. 705, 710–12 (1977). *Wooley* concerned a Section 1983 action by George and Maxine Maynard, "followers of the Jehovah's Witnesses faith." *Id.* at 707. They sought an injunction against further enforcement of a New Hampshire statute criminalizing obscuring the state's motto, "Live Free or Die" on state license plates. See *ibid.* To the Maynards, "that motto [wa]s repugnant to their moral and religious beliefs." *Ibid.*

When George and Maxine initiated their federal suit, George had already been convicted three times for violating the New Hampshire prohibition (despite having explained in court "his religious objections to the motto"); fined; and—upon refusing "as a matter of conscience" to pay the fines—jailed for fifteen days. See *id.* at 708. Maxine, meanwhile, had yet to be prosecuted, but "as joint owner of the family automobiles

[wa]s no less likely than her husband to be subjected to state prosecution." *Id.* at 710.

This Court held that *both* Maynards could seek federal court injunctive relief under the First Amendment. *Id.* at 712. George was not disempowered to challenge the statute by virtue of his convictions under it. And Maxine was not disempowered merely because New Hampshire had previously prevailed against George. See *ibid.* This Court accepted the Maynards' First Amendment objection and affirmed an injunction in their favor. See *id.* at 717. Thus, *Wooley* demonstrates that a state court conviction is not an impediment to federal court injunctive relief from a law that burdens religion. Accord Pet. Br. 24–25 (discussing *Wooley*).

B. *Wooley* is not *sui generis*. For example, *Meriwether* v. *Hartop* similarly held that a state's rejection of a free-exercise defense was no impediment to a Section 1983 suit for injunctive relief. See 992 F.3d 492, 512 (6th Cir. 2021).

In that case, philosophy professor Nicholas Meriwether—a "devout Christian" who "strives to live out his faith each day"—brought a Section 1983 free exercise claim against the Trustees of Shawnee State University, his public-university employer. See *id.* at 498, 512; see also *Meriwether* v. *Trs. of Shawnee State Univ.*, 2019 WL 4222598, at *1, *7 (S.D. Ohio Sept. 5, 2019) (detailing Meriwether's claims). Shawnee State implemented a new policy requiring professors to "refer to students by their 'preferred pronoun[s].'" *Hartop*, 992 F.3d at 498. Professors who "'refused to use a pronoun that reflects a student's self-asserted gender identity'" "would be disciplined." *Ibid.*

Meriwether, however, "believe[d] that 'God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires.'" *Ibid.* He further "believe[d] that he cannot 'affirm as true ideas and concepts that are not true.'" *Ibid.* Accordingly, Meriwether "asked whether an accommodation" to the new pronoun policy "might be possible given his sincerely held beliefs." *Id.* at 500.

It was not. See *ibid.* When Meriwether refused to refer to a student who identified as female by the student's preferred pronouns, Shawnee State's dean brought "a 'formal charge' against Meriwether under the faculty's collective bargaining agreement." *Id.* at 501. The dean recommended that Meriwether be disciplined. *Ibid.* Shawnee State's provost—over Meriwether's objection that he could not comply with the university's pronoun policy "due to his 'conscience and religious convictions'"—placed a written warning in his file. *Ibid.*

Meriwether sued in federal court under Section 1983, seeking (among other remedies) an injunction against Shawnee State's further enforcement of its pronoun policy against him. See *id.* at 512; *Trs. of Shawnee*, 2019 WL 4222598 at *1, *7. Ultimately, the Sixth Circuit ruled that Meriwether stated a claim for a violation of the Free Exercise Clause. See *Hartop*, 992 F.3d at 512. Following *Masterpiece*, the Sixth Circuit explained, in an opinion by Judge Thapar, that the state university's disciplinary proceedings "exhibited hostility to [Meriwether's] religious beliefs" and

"permit[ted] a plausible inference of non-neutrality." *Ibid.*

The Sixth Circuit did not view Meriwether as an unreliable—or otherwise disenfranchised—plaintiff merely because a state adjudication had rejected his free exercise defense. See *ibid.* Rather, the Sixth Circuit treated Meriwether as the Fifth Circuit should have treated Olivier: as "a perfect plaintiff" for federal injunctive relief. See Pet. App. 48a (opinion of Ho, J.).

Olivier deserves his day in federal court, just as the Maynards did, and just as Meriwether did. For the same reasons that New Hampshire could not shelter behind George Maynard's state court convictions, and that Shawnee State could not shelter behind Meriwether's loss in the university discipline system, the City of Brandon cannot shelter behind Olivier's conviction here.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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