

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 FOR RESPONDENT

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QUESTION PRESENTED

Petitioner Gabriel Olivier was convicted and received a fine, suspended sentence, and one-year probation. He didn't appeal or otherwise seek available relief under Mississippi law. Instead, he filed a federal Section 1983 action.

The theory was that Respondent the City of Brandon's police chief "invoked" an unconstitutional ordinance against him, resulting in arrest and prosecution. While still on probation, Petitioner asked the federal court to award damages and attorney's fees against both the City and the police chief personally and to declare the ordinance facially unconstitutional. Mississippi courts never had an opportunity to interpret their own law.

The Fifth Circuit affirmed the dismissal of Petitioner's action under *Heck v. Humphrey*, 512 U.S. 477 (1994), the doctrine that bars direct and indirect collateral attacks. When civil success "necessarily implies" the invalidity of a plaintiff's prior criminal judgment or punishment, *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (citation modified) holds that *Heck* applies "no matter the relief sought."

The question presented is:

May a Section 1983 plaintiff who files suit while serving probation avoid *Heck*'s favorable-termination requirement because he wasn't in state custody long enough to seek federal habeas relief or because he claims for the first time on appeal to want purely prospective injunctive relief?

PARTIES TO THE PROCEEDING

Petitioner Gabriel Olivier was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondent the City of Brandon was a defendant in the district court and an appellee in the Fifth Circuit.

Former Police Chief William Thompson was a defendant in the district court in both his official and individual capacities. In his Fifth Circuit briefing, Petitioner abandoned all claims against Thompson.

STATEMENT OF RELATED PROCEEDINGS

Along with the proceedings listed in the Petitioner's Brief (at iii), the following are related to this case:

- *Siders v. City of Brandon, Mississippi*, 130 F.4th 188 (5th Cir. Feb. 26, 2025);
- *Siders v. City of Brandon, Mississippi*, 123 F.4th 293 (5th Cir. Dec. 11, 2024); and
- *Siders v. City of Brandon, Mississippi*, Civil Action No. 3:21-CV-614-DPJ-FKB, 2023 WL 4053414 (S.D. Miss. June 16, 2023).

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INTRODUCTION

For three decades, *Heck v. Humphrey* has promoted federalism, comity, and finality by recognizing that Section 1983 “actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments.” 512 U.S. 477, 486 (1994). These goals are accomplished through a favorable-termination requirement. Unless and until a state conviction has been vacated or set aside, Section 1983 may not be used to “necessarily imply” its invalidity. *Id.* at 487.

This Court has drawn a clear “line” with the necessarily-implies test. *Skinner v. Switzer*, 562 U.S. 521, 535 n.13 (2011). And the same line applies no matter the status of custody and “no matter the relief sought.” *Heck*, 512 U.S. at 490 n.10; *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

If civil success would shorten the duration of criminal punishment or imply the substantive invalidity of the conviction itself, then *Heck* bars the Section 1983 action. If, however, civil success would have no impact on the duration of criminal punishment and would only result in a different (outcome-neutral) procedure, then *Heck* doesn’t bar the Section 1983 action. *Skinner*, 562 U.S. at 533-37; *Wilkinson*, 544 U.S. at 82.

This case falls on the former side of the line. While serving probation, Petitioner asked the district court to award damages and attorney’s fees and to declare the ordinance facially unconstitutional. This

was a direct attack on his punishment and an indirect attack on his conviction.

Petitioner wants this case to be about religious liberty. It's not. *Heck* exists to (1) preclude collateral attacks, (2) avoid parallel litigation, and (3) prevent inconsistent resolution of similar issues. 512 U.S. at 485-90. These are neutral principles cemented in our Nation's history and tradition. The rule of law requires First Amendment issues, like all others, to be raised properly.

When, as here, a convicted person elects not to avail himself of state remedies, it comes with a price. That person can't later ask a federal court to entertain civil claims that imply his conviction was invalid and entitle him to attorney's fees under Section 1988 against local officials who lawfully arrested and prosecuted him. The Fifth Circuit correctly held that Petitioner's action is *Heck* barred.

STATEMENT OF THE CASE

1. In 2018, the City opened its Amphitheater. J.A.5. The Amphitheater is an outdoor venue used primarily for ticketed events, including both secular and religious concerts. J.A.5. It serves as a significant revenue source and major employer. C.A.ROA.428.

After it opened, Petitioner traveled to the Amphitheater with a group to, in his words, evangelize. J.A.5. The group's evangelism included using a loudspeaker to call patrons "whores," "Jezebels," "grody," "nasty," "sissies," and other

derogatory names.¹ Pet.App.21a-23a. They held large signs, some of which depicted aborted fetuses. Pet.App.29a. These activities were done at the Amphitheater's main intersection, where vehicle and pedestrian traffic is heaviest, and within a few feet of a traffic officer. C.A.ROA.349-353; Pet.App.20a-23a, 28a-30a.

Understandably, these activities presented hardships. Officers had difficulty hearing radio traffic. C.A.ROA.294, 296-301; Pet.App.23a. Safety issues arose because event attendees walked in the street to avoid the group. Pet.App.27a. Officers left their posts to prevent fights between the group and event-paying attendees. Pet.App.22a-23a.

Following a review process, the City enacted an ordinance that redirects "protests" and "demonstrations" within three hours before an event and one hour after to a designated protest area just 265 feet away from Petitioner's preferred location. J.A.13, 69-71; Pet.App.26a-28a. Inside the designated protest area, it bans loudspeakers that are "clearly audible more than 100 feet" from the area and requires signs to be handheld. J.A.70. The restrictions apply "regardless of the content and/or expression" of the protest or demonstration. J.A.70.

In May 2021, Lee Brice, a country music singer, held a concert at the Amphitheater. J.A.11. When Petitioner's group arrived, then-Chief William

¹ Courts have equated the group's more aggressive conduct, including spitting on people, to "domestic terrorism." C.A.ROA.414.

Thompson provided a copy of the ordinance. J.A.12. The group proceeded toward the protest area, stopped short of it, had a discussion, returned to the main intersection in the restricted area, and engaged in protest activities. Pet.App.28a.

A police officer directing traffic again instructed the group to go to the designated area before calling Chief Thompson for backup. J.A.15-16. At no point did Petitioner attempt to evangelize. J.A.16. Instead, he engaged with the officer while another group member used a megaphone. J.A.16.

As Chief Thompson approached, he observed large poster signs, the use of at least one voice-amplification device, and attempts to hand out literature to those passing on the sidewalk. Pet.App.29a. He also observed body cameras and other recording devices. C.A.ROA.108. Chief Thompson advised the group to relocate to the designated protest area during the restricted period. Pet.App.30a. After failing to follow Chief Thompson's command, Petitioner was arrested for violating the ordinance. Pet.App.30a.

In June 2021, Petitioner appeared in Brandon Municipal Court, with counsel, and entered a nolo contendere plea. J.A.19, 94-96. He was found guilty and received a fine, a suspended sentence of ten days' imprisonment, and a year's unsupervised probation. J.A.94-96. The probation conditioned the suspension of jail time "on one-year of no violation of City ordinance 50-45[.]" J.A.95. Petitioner paid the fine and didn't appeal his criminal conviction. Pet.App.3a.

2. With more than eight months remaining on his probation, Petitioner filed a civil suit in federal court against the City and Chief Thompson individually. J.A.i, 1-23. The suit, brought under 42 U.S.C. § 1983, alleged the defendants “invoked and applied” the ordinance “to deprive [him] of his constitutional rights.” J.A.2. He also contended the City “[c]ontinues to [s]tymie [his] [s]peech with § 50-45” and demanded money damages, injunctive relief, and attorney’s fees. J.A.19, 21-22. A preliminary injunction request stated Petitioner “would like to go back [to the Amphitheater] as soon as possible.” J.A.38.

The City and Chief Thompson opposed the preliminary injunction motion and filed a dispositive motion of their own. C.A.ROA.3-4. They raised the *Heck* doctrine as well as qualified immunity. C.A.ROA.515-535. In responding to qualified immunity, Petitioner argued Chief Thompson “violat[ed his] clearly established constitutional rights” by applying the ordinance even though Petitioner “was not participating in any activity proscribed by the ordinance.” C.A.ROA.577. The district court ultimately entered an order of dismissal based on *Heck* alone. Pet.App.B.

One day before the Court entered its judgment, Petitioner moved to amend his complaint to add a new plaintiff, Spring Siders, who was part of his group at the concert but wasn’t arrested. C.A.ROA.625, 659-660. The amended complaint also sought to withdraw the request for compensatory damages, although it continued seeking nominal

damages. C.A.ROA.648-649. Without waiting for a ruling on the motion to amend, Petitioner noticed an appeal. C.A.ROA.6.

Siders, in turn, filed a substantially similar lawsuit the same day. A different district judge denied Siders' request for a preliminary injunction. *Siders v. City of Brandon*, 2023 WL 4053414 (S.D. Miss. June 16, 2023). Siders, like Petitioner, appealed to the Fifth Circuit.

3. In Petitioner's appeal, a Fifth Circuit panel affirmed. Pet.App.14a. The panel held that *Clarke v. Stalder*, 154 F.3d 186 (5th Cir. 1998) (en banc) foreclosed Petitioner's appeal and explained Petitioner had not argued "that *Clarke* [wa]s no longer good law[.]" Pet.App.9a, 13a. The decision emphasized the "intertwined" nature of Petitioner's joint request for damages and injunctive relief and left "for another day" the issue of purely prospective relief. Pet.App.9a-10a, 13a.

Petitioner sought rehearing on two issues. First, Petitioner asked: "Can the *Heck v. Humphrey* doctrine bar a civil rights plaintiff's claim when [the] plaintiff never had an opportunity to pursue habeas corpus relief?" Rehearing was denied in light of *Wilson v. Midland Cnty.*, 116 F.4th 384 (5th Cir. 2024). Pet.App.C. Second, Petitioner asked a categorical question: "Can the *Heck v. Humphrey* doctrine bar a civil rights plaintiff's claim for prospective relief?" Rehearing also was denied on this issue over three dissenting opinions. Pet.App.42a-52a.

In Siders’ appeal, a Fifth Circuit panel likewise affirmed. *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024). Siders had not been convicted, so there was no *Heck* issue. Instead, the panel, addressing whether the City’s ordinance was a constitutional time, place, or manner restriction, held that Siders couldn’t “show a likelihood of success on the merits.” *Id.* at 300. Rehearing was denied by a 15-to-2 vote. *Siders v. City of Brandon*, 130 F.4th 188 (5th Cir. 2025).

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

When a Section 1983 plaintiff has been convicted in state court, *Heck* prohibits collateral attacks. The bar applies “whenever” a civil judgment necessarily implies the criminal conviction or punishment is invalid. *McDonough v. Smith*, 588 U.S. 109, 119 (2019). It has never mattered whether someone is in custody or what type of relief is sought. *Heck*, 512 U.S. at 490 n.10; *Wilkinson*, 544 U.S. at 81-82. The sole inquiry is whether the necessarily-implies test is satisfied.

Petitioner’s Section 1983 action meets the test. He was convicted under a local ordinance, sentenced to jail (suspended), placed on one-year probation, and never achieved a favorable termination. Instead, during his probationary period, he filed a federal lawsuit against the City and its police chief. Petitioner claimed the ordinance had been unlawfully invoked against him, and he sought “intertwined” relief of money damages, an injunction declaring the

ordinance facially unconstitutional, and attorney's fees. Petitioner's lawsuit was both a direct and indirect attack on his conviction and sentence.

It's a direct attack because civil success would have impacted his probation's duration. If the district court had enjoined enforcement of the ordinance with eight months remaining, it would have shortened his criminal punishment. Petitioner didn't wait until his sentence expired to sue or request a stay after he filed suit. A plaintiff's legal theory is evaluated at the time of filing, not subsequent events.

But Petitioner's lawsuit is an indirect attack too. Even if this Court were to disregard the intertwined damages request and the lawsuit's timing, a facial declaration finding the ordinance unconstitutional would necessarily imply Petitioner was unlawfully convicted. Petitioner's claim that invalidation must be automatic and immediate reads the word "implies" out of the test. If Petitioner was right, then *Heck* wouldn't exist. Obtaining money damages in a civil case can't reverse a criminal judgment, but it can—as this Court has held—implicitly impugn it. The principle applies with equal (if not greater) force when a plaintiff attacks the facial validity of the law he was convicted under.

The United States rightly concedes the necessarily-implies test is satisfied. It acknowledges that, by claiming "the statute under which he stands convicted is unconstitutional," Petitioner suggests "a legal infirmity in his conviction." U.S.Br.19, 21. But

the United States improperly asks this Court to disregard precedent anyway.

The United States’ “core-of-habeas” position is especially ill-advised given its support of the City on the custodial-status issue. U.S.Br.20. It can’t be that habeas matters for some actions but not others. The *Heck* rule supports “longstanding” and “deeply rooted” interests beyond habeas channeling, including federalism, comity, finality, and consistency. 512 U.S. at 484-85, 490 n.10. These neutral principles shouldn’t be sacrificed “just to see a favored result win the day.” *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 51 (2021).

ARGUMENT

Someone convicted of a crime can’t bring a Section 1983 lawsuit if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.” *Heck*, 512 U.S. at 487 (citation modified). The *Heck* rule is a substantive bar, meaning a “claim has not yet arisen” and “is not cognizable” until there is a favorable termination. *Id.* at 487, 489. *Heck* “denies the existence of a cause of action” altogether. *Id.* at 489 (citation modified).

Petitioner would limit *Heck* in two ways. First, he argues it doesn’t apply because he never had access to federal habeas relief. Second, he argues that it doesn’t apply because he requests a prospective injunction. Both should be rejected. *Trump v. J. G. G.*, 604 U.S. 670, 672 (2025) (refusing to limit *Heck* and instead extending the necessarily-implies test to APA claims).

I. *Heck* doesn't depend on access to federal habeas relief.

Petitioner's "alternative, independent" argument logically comes first. Pet.Br.13. The custodial-status question is antecedent to relief. If *Heck* doesn't apply to non-custodial plaintiffs, then Petitioner was free to request any relief available under Section 1983, including the compensatory damages he now disclaims. But Petitioner's position is factually and legally wrong.

Factually, it's incorrect to say Petitioner "was never in 'custody.'" Pet.Br.40 (emphasis added). A person who receives probation for a criminal conviction is "in custody" under the suspended sentence. *Maleng v. Cook*, 490 U.S. 488, 491 (1989). In the *Heck* context specifically, courts have explained that "the term custody encompasses not only individuals subject to immediate physical imprisonment, but also those subject to restraints not shared by the public generally that significantly confine and restrain freedom." *Lucas v. Bd. of Cnty. Comm'rs of Cnty. for Larimer Cnty. Colo.*, 2023 WL 8271988, at *5 (10th Cir. Nov. 30, 2023) (Tymkovich, J.) (citation modified). Petitioner remained in custody until June 2022 when his probation expired. J.A.83; *Savell v. Manning*, 325 So. 3d 1208, 1221-22 & n.4 (Miss. Ct. App. 2021) (addressing a trial court's "power to revoke the suspended sentence if the defendant violates the conditions of the suspension" (citation modified)).

Legally, Petitioner wants to align himself with courts that say only federal habeas matters, such that short-term custody doesn't trigger *Heck*. *E.g.*, *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 601-03 (6th Cir. 2007). But that's wrong too because custodial status isn't significant at all.² It's why Petitioner makes his argument in the alternative and why the United States can't support it. Precedent, history, and practical considerations require rejection of Petitioner's rule.

A. There's no meaningful distinction between custodial and non-custodial plaintiffs.

Heck held that a Section 1983 plaintiff can't "call into question" his conviction or punishment. 512 U.S. at 483. Whether he seeks damages or claims "other harm" that would implicate the conviction's or punishment's invalidity, the plaintiff must prove a favorable termination—that is, that the conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

² Even some courts that think custodial status is relevant would bar Petitioner's case for never seeking Mississippi's post-conviction remedies. *E.g.*, *Lucas*, 2023 WL 8271988, at *4. In those jurisdictions, if a plaintiff fails to take advantage of state habeas, then federal habeas doesn't matter. *Ibid.* They think "such a result is consistent with *Heck*'s purpose, affording the state an opportunity to cure any constitutional violations in the first instance." *Ibid.* (citation modified).

This Court has already rejected a custodial distinction: “We think the principle barring collateral attacks—a longstanding and deeply rooted feature of both the common law and our own jurisprudence—is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated.” *Id.* at 490 n.10. And the en banc courts that have recently considered the question understood, by large majorities, that footnote 10 was “a significant part of the Court’s rationale” and not mere dicta. *Savory v. Cannon*, 947 F.3d 409, 421-22 (7th Cir. 2020) (9-to-1 margin); *accord Wilson*, 116 F.4th at 396 (12-to-6 margin).

The *Heck* bar was never only about a collision between Section 1983 and the federal habeas statute. *Wilson*, 116 F.4th at 399 (explaining “that 80% of the favorable-termination avenues [described in *Heck*] require no overlap with habeas or custody”); *Savory*, 947 F.3d at 431 (“[H]abeas exclusivity is just one part of the rationale for *Heck*’s holding.”). The bar always was about “finality, consistency, federalism, and comity” as well. *Wilson*, 116 F.4th at 396; *Savory*, 947 F.3d at 431.

Critics of *Heck* claim Justice Scalia’s view defies Section 1983’s text and leaves constitutional violations unvindicated. But “[t]here’s quite a bit wrong with this argument.” *Wilson*, 116 F.4th at 401. Section 1983’s broad language “is not conclusive[.]” *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973), and shouldn’t be interpreted “to expand opportunities for collateral attack[.]” *Heck*, 512 U.S. at 485.

To accept Petitioner’s textual argument, *Heck* itself would need to be overruled. Petitioner of course hasn’t made that ask. The same textual argument lodged in this case was before the *Heck* Court. *Id.* at 491 (Thomas, J., concurring) (“Both the Court and Justice Souter embark on a similar enterprise—harmonizing ‘[t]he broad language of § 1983[.]’”). Section 1983’s text says nothing about favorable termination in either the prisoner or free-world context. Yet *Heck* unanimously imposed a favorable-termination requirement for Section 1983 relief. *Id.* at 484-87.

This Court did so because Section 1983 is interpreted against a common-law backdrop. *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017). “Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment,” even though “the coverage of the statute is broader than the pre-existing common law of torts.” *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) (citation modified). Indeed, certain rules and defenses “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoted case omitted).

At common law, criminal convictions were defenses to tort claims. Judge Oldham’s *Wilson* opinion examines the history and shows why *Heck* acknowledged the rule to be “longstanding” and “deeply rooted.” 116 F.4th at 392-93. He emphasized that, dating back to 17th century England, malicious

prosecution was the only tort available to challenge a supposedly tainted criminal proceeding. *Ibid.*

Since the tort's inception, custodial status has never mattered. In fact, conviction didn't matter. What mattered was favorable termination of a judicial proceeding. If favorable termination was acquired, tort law could provide a remedy (if all other elements were met) "regardless of whether the civil plaintiff is, was, or ever could have been convicted and placed in custody." *Ibid.* (citing MARTIN L. NEWELL, TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS 359 (1892); JOEL PRENTISS BISHOP, COMMENTARIES ON THE NONCONTRACT LAW 90 (1889)). No favorable termination meant no cause of action.

Drawing on this history, the favorable-termination requirement was engrafted into Section 1983 itself rather than as an element of any underlying constitutional provision. Support was found in a wide variety of pre-*Heck* cases "express[ing] similar concerns for finality and consistency" and respect for state court judgments. *Heck*, 512 U.S. at 484-85 (collecting cases).

Post-*Heck* cases confirm the original rationale. They require favorable termination regardless of custodial status. *McDonough* and *Thompson* are this Court's most recent opinions, and both applied the favorable-termination requirement despite neither plaintiff being in custody when they filed suit, neither having been convicted, and neither having habeas access. *McDonough*, 588 U.S. 109; *Thompson*

v. Clark, 596 U.S. 36 (2005). These cases confirm that the elemental requirement is separate from habeas deference. *Wilson*, 116 F.4th at 395; *Savory*, 947 F.3d at 431.

It's the collateral-attack prohibition that matters, not whether a plaintiff happens to be free or incarcerated when he launches the attack. *See ibid.* Favorable termination “vindicates the broader principles justifying the rule at common law: protecting the finality of criminal judgments, preventing inconsistent civil and criminal proceedings,” *Wilson*, 116 F.4th at 395-96, and avoiding “‘unnecessary friction’ between the federal and state court systems by requiring the federal court entertaining the § 1983 claim to pass judgment on legal and factual issues already settled in state court.” *Vega v. Tekoh*, 597 U.S. 134, 151-52 (2022); *see also McDonough*, 588 U.S. at 120 (highlighting the importance of the “core principles of federalism, comity, consistency, and judicial economy” in the context of Section 1983 claims).

These neutral principles are especially important today, as misdemeanors account for an estimated 80% of the Nation’s criminal docket, with an estimated 10 million new misdemeanor cases filed each year. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand. L. Rev. 1055, 1057 (2015). And most aren’t ordinance violations. Misdemeanors include serious offenses such as domestic violence, assault, battery, stalking, theft, and drug offenses. Under Petitioner’s rule, the courthouse doors would be opened to millions of new

convicted plaintiffs. *Cf.* Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 Law & Soc. Ord. 557, 563 (estimating a 1,100% increase in cases filed during the ten years following *Monroe v. Pape*, 365 U.S. 167 (1961)).

Bottom line is that the favorable-termination requirement “applies whenever a judgment in favor of the plaintiff would necessarily imply that his prior conviction or sentence was invalid.” *McDonough*, 588 U.S. at 119 (citation modified). As Judge Oldham succinctly explained: “Today, it should be clear beyond cavil that the favorable-termination element applies regardless of whether the § 1983 claimant was, is, or never could be in custody.” *Wilson*, 116 F.4th at 396.

B. Petitioner isn't deprived a remedy.

Undermining Petitioner's argument further are the many ways plaintiffs can achieve favorable termination. *Heck*, 512 U.S. at 487. Pursuing federal habeas relief is only one avenue. So claiming a lack of access to federal habeas relief is a red herring. He had, and may still have, access to other avenues.

First is direct appeal. In Mississippi, an appeal from a municipal court conviction may be taken within 40 days to the circuit court or county court. Miss. Code Ann. § 99-35-1. Brandon is in Rankin County, Mississippi, which has a county court. On appeal, the county court tries the case de novo. *Ibid.* If the county court found Petitioner guilty, he could have appealed again to the circuit court, which would

have acted as an appellate court. *Id.* § 11-51-79. If he still did not like the judgment, he could have appealed to the Mississippi Supreme Court. *Ibid.* Then, of course, if all state courts ruled against him, he could have petitioned this Court for review.

Next is postconviction. Unlike federal habeas, access to Mississippi postconviction relief is not dependent on custodial status. *Id.* § 99-39-5(1). It also is not dependent on an appeal. *Id.* at (2).³ Petitioner could have sought postconviction relief within three years of his sentence. *Ibid.* “Excepted from this three-year statute of limitations are those cases in which the petitioner can demonstrate . . . [t]hat there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence[.]” *Ibid.*

Petitioner can also seek to have his misdemeanor conviction expunged under two separate statutes. *Id.* §§ 21-23-7(6), 99-19-71(1). Expungement under Mississippi law “restore[s] the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted.” *Id.* § 99-19-71(3); *id.* § 21-23-7(6) (“Upon

³ There are two caveats: the sentence must be from a “court of record,” *id.* at (1), and postconviction relief is subject to waiver if an issue is not first raised in the trial court, *id.* § 99-39-21(1). Since Mississippi municipal courts are not courts of record, Petitioner would have been required to appeal to the county court, which is a court of record, and would have been required to raise his constitutional argument there before pursuing postconviction relief under § 99-39-5(1).

so doing the said person thereafter legal stands as though he had never been convicted of the said misdemeanor(s).”). Even though expungement is an easy route to achieve favorable termination, Petitioner chose not to take it.

Finally, Mississippi’s Governor has the authority “to grant reprieves and pardons.” Miss. Const. art. 5, § 124. Petitioner fashions himself as a sympathetic plaintiff, but there is no indication he tried to get a pardon.

* * * *

Heck’s bar was never a habeas rule aimed solely at custodial plaintiffs. It instead is a collateral-attack rule barring prisoners and free-world plaintiffs alike if success would necessarily imply the invalidity of a state conviction. Petitioner’s view of *Heck* would allow criminal defendants to plead guilty to avoid jailtime one day only to file lawsuits as civil plaintiffs the next. There is no basis in history, tradition, precedent, or logic for such an outcome.

II. *Heck* doesn’t depend on the relief requested.

Petitioner also contends *Heck* doesn’t bar prospective injunctive relief. But he repackages the argument in a way the Fifth Circuit didn’t consider. This Court shouldn’t consider it in the first instance. But if it is addressed, it should be rejected. *Wilkinson* explained that, if the necessarily-implies test is met,

an “action is barred—no matter the relief sought.” 544 U.S. at 81-82 (citation modified).

A. This Court shouldn’t decide a question the lower courts weren’t presented and the circuits aren’t split on.

Petitioner has shifted theories in hope of circumventing *Heck*. In this Court, he presents the question as whether *Heck* bars “purely prospective relief.” Pet.Br.i. But Petitioner’s case has never been about relief that is purely prospective.

The complaint alleged Petitioner was arrested and prosecuted for violating the City’s ordinance. J.A.18-19. It says the City and police chief “invoked and applied § 50-45 to deprive Olivier of his constitutional rights.” J.A.2. He requested both “equitable and legal relief[,]” including compensatory damages, nominal damages, declaratory relief, attorney’s fees, a preliminary injunction, and a permanent injunction. J.A.21-22. In resisting qualified immunity, Petitioner argued the police chief arrested him in violation of his “clearly established constitutional rights[.]” C.A.ROA.577.

Only in the Fifth Circuit did Petitioner say he was “not pursuing any retrospective relief or any claim against Chief Thompson” and that “[h]is claim is solely for prospective relief and solely against Brandon.” Appellant’s Brief, *Olivier v. City of Brandon*, 2023 WL 181569, at *17 n.2 (filed 5th Cir. Jan. 4, 2023). But that disclaimer came too late. The district court decided how *Heck* applies to an “action” that joins monetary and injunctive relief together,

not the different question of how *Heck* applies to “purely” prospective relief. Nothing in the complaint distinguishes what Petitioner supposedly wants to do in the future from what he was convicted for in the past.

Neither did the Fifth Circuit decide a question of purely prospective relief. It expressly left it “for another day.” Pet.App.13a. When Petitioner “argue[d] that the only relief he seeks is to enjoin the prospective enforcement of the Ordinance, not damages[,]” the court rejected that characterization; “Not so” the court held. Pet.App.9a. “Olivier sought compensatory and nominal damages at the district court.” Pet.App.9a-10a. (emphasis added).

By attempting to reconstruct his case, Petitioner violated the party-presentation principle. Courts are “passive instruments” and thus “normally decide only questions presented by the parties.” *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (citation modified). When litigants refuse to give lower courts the opportunity to decide arguments pressed in this Court, the response has been clear: “[N]either shall we” decide them. *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 175 (2004).

This avoidance canon is appropriate given the Fifth Circuit’s reasoning. It relied on its earlier case in *Clarke*, an en banc decision that focused on the “intertwined” nature of the plaintiff’s joint request for damages and injunctive relief. Pet.App.9a. Again,

it left “for another day” the separate issue of purely prospective relief. Pet.App.13a.

Neither case on which Petitioner based his circuit split—*Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) or *Lawrence v. McCall*, 238 F. App’x 393 (10th Cir. 2007)—grapple with *Clarke*’s reasoning. Indeed, *Martin* doesn’t cite *Clarke* and the word “intertwined” doesn’t appear in the opinion. *See generally* 920 F.3d 584. Same with *Lawrence*, plus it is unpublished and rejects prospective relief on standing grounds. 238 F. App’x at 396.

For similar reasons, Petitioner’s reliance on *Wooley v. Maynard*, 430 U.S. 705 (1977) is misplaced. Not only was *Wooley* decided before *Heck* and about the different concept of “ongoing state prosecutions,” it made clear “the relief sought [wa]s wholly prospective.” 430 U.S. at 710-11 (citation modified).

There are differences between intertwined requests as opposed to requests for only future relief. Under the necessarily-implies test, courts are required to compare the civil lawsuit with the criminal conviction. *Heck*, 512 U.S. at 486. When, as here, a plaintiff fails to separate the past conduct on which he seeks money damages from future conduct on which he seeks an injunction, past events control.

Consider standing. The City’s ordinance uses terms of “loose and indefinite meaning,” specifically the terms “protests” and “demonstrations.”⁴ *Cf.*

⁴ Indeterminate statutory language of course doesn’t equal unconstitutional vagueness. As the Fifth Circuit explained in

United States v. Fields, 39 F.3d 439, 447 n.9 (3d Cir. 1994) (Alito, J.) (analyzing the indeterminate phrase “disorderly conduct”). To bring a prospective challenge, Petitioner was required to describe the conduct he intended to engage in and show the ordinance “proscribed” it. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). But all Petitioner did was detail his past behavior that included various activities such as congregating in a group, holding signs, distributing literature, and speaking through amplification devices. J.A.4. By failing to separate specific actions that he believed the City prohibits and that he intends to engage in, Petitioner complicated the required justiciability inquiry.

Also consider the statute of limitations. The *Heck* analysis determines when a Section 1983 claim accrues. *McDonough*, 588 U.S. at 116. “[I]f it is possible to seek” one type of relief “while waiving other relief, this must mean that the claim accrues immediately and the statute of limitations runs from the time of the events said to be wrongful.” *Haywood v. Hathaway*, 842 F.3d 1026, 1028 (7th Cir. 2016). But that’s not how *Heck* operates. *Ibid.* By combining past and future complaints, Petitioner complicated when, if at all, he had a “complete and present cause

Siders, any facial challenge to the ordinance on vagueness grounds “is without merit” under this Court’s precedent. 123 F.4th at 306 n.8 (“The Supreme Court has found it ‘quite remote’ that ‘anyone would not understand’ such ‘common words’ as ‘oral protest, education, or counseling’” or the like. (citation modified)).

of action.” *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citation modified).

There is a right way and a wrong way to dismiss. When a plaintiff seeks “to dismiss a single claim, or anything less than the entire action,” he should do so “by seeking partial final judgment under Rule 54(b) from the district court, or by amending the[] complaint[] under Rule 15.” *Rosell v. VMSB, LLC*, 67 F.4th 1141, 1143-44 (11th Cir. 2023). Petitioner did neither, and anything less is ineffective. *Ibid.*

This is “a court of review, not of first view[.]” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioner should be required to stick with the complaint he brought and the case the Fifth Circuit decided. *See Illinois v. Gates*, 462 U.S. 213, 222 (1983) (rejecting discussion of argument “not pressed or passed upon”).

B. Even if the new theory is considered, Petitioner’s challenge necessarily implies the invalidity of his conviction and punishment.

The Fifth Circuit correctly held that Petitioner’s Section 1983 action was *Heck* barred. Or, put differently, the Fifth Circuit was right to “deny the existence of a cause of action” because Petitioner has not achieved a favorable termination. *See Heck*, 512 U.S. at 489. Without a favorable termination, a “claim has not accrued,” and “it cannot matter what relief” has been sought. *Morgan v. Schott*, 914 F.3d 1115, 1120 (7th Cir. 2019) (quoted case omitted).

Petitioner has two overarching problems. First, *Heck* bars Section 1983 actions that directly impugn the duration of a criminal punishment. *Wilkinson*, 544 U.S. at 81 (a plaintiff may not “invalidate the duration of their confinement” with “an injunction compelling speedier release”). Second, *Heck* bars Section 1983 actions that indirectly impugn the validity of the conviction. 512 U.S. at 487 n.7 (a plaintiff may not bring a civil action that would “necessarily imply that the plaintiff’s conviction was wrongful”) (citation modified). Both bar his action here.

1. Direct Impact on Petitioner’s Sentence

Heck’s direct inquiry asks whether a civil injunction would impact a criminal sentence’s duration. *Wilkinson*, 544 U.S. at 81. It’s “simpler” than the indirect one, *Nance v. Ward*, 597 U.S. 159, 167 (2022), as this case underscores.

When Petitioner was convicted in June 2021, he was fined and received a suspended jail sentence. Petitioner acknowledges this punishment in his brief at page eight. But what’s ignored is another part of his punishment: 12 months’ probation.⁵ J.A.83. The

⁵ The United States’ brief acknowledges Petitioner was on probation when he filed suit but says the Fifth Circuit “decided this case on the premise that petitioner was ‘not serving his sentence[.]’” U.S.Br.20 n.3. That only tells half the story. The Fifth Circuit didn’t need to consider the direct method because Petitioner brought an “intertwined” claim that was foreclosed under *Clarke*. Pet.App.10a. In any event, this Court “may affirm on any ground that the law and the record permit[.]” *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984).

probation conditioned the suspension of jail time “on one-year of no violation of City ordinance 50-45.” J.A.83.

Petitioner was still on probation when he filed this civil lawsuit in October 2021. J.A.i. In fact, more than eight months remained. *Compare* J.A.83 *with* J.A.i. Petitioner had not appealed his criminal conviction yet alleged the defendants had “invoked and applied § 50-45 to deprive [him] of his constitutional rights.” J.A.2. He contended the City “[c]ontinues to [s]tymie [his] [s]peech with § 50-45” and demanded money damages, injunctive relief, and attorney’s fees. J.A.19, 21-22. Petitioner supported a preliminary injunction motion with an affidavit stating he “would like to go back [to the Amphitheater] as soon as possible.” J.A.38. Nowhere in the complaint did Petitioner state he wanted to do anything different in the future from what he had been punished for in the past. *See generally* J.A.1-23.

A comparison of the criminal order and civil complaint shows Petitioner directly attacked his sentence. When “*Heck* use[d] the word ‘sentence[,]’” it was referring “to substantive determinations as to the length of confinement.” *Wilkinson*, 544 U.S. at 83. Since the length of Petitioner’s suspended jail sentence was ongoing at the same time he asked the district court to enjoin the City “from enforcing § 50-45” against him, his action was a direct collateral attack. *Compare* J.A.83 *with* J.A.22.⁶

⁶ This feature is not present in *Martin*. There, except for one plaintiff who twice received an extra day, “the plaintiffs were

It doesn't matter that Petitioner's probation has expired in the present day. Generally, this Court looks at the operative facts at the time of filing to determine whether there is a cause of action. *Cf. United States v. Tohono O'Odham Nation*, 563 U.S. 307, 312-13 (2011) (focusing on the "operative facts and not whatever remedies an aggrieved party might later request"). And in the *Heck* context specifically, this Court has directed focus to the complaint, *Edwards v. Balisok*, 520 U.S. 641, 645 (1997), rather than a subsequent attempt "to escape" *Heck*. *District Attorney's Office for Third Jud. Dist. v. Osborne*, 577 U.S. 52, 77 (2009) (Alito, J., concurring).⁷

sentenced to time served." *Martin*, 920 F.3d at 611. No continued confinement was involved. Point being: there is more evidence Petitioner's "split" was manufactured.

⁷ Courts have struggled with how to characterize *Heck*. Some view it as jurisdictional, others like ripeness, and still others as resembling PLRA exhaustion. No matter the comparison, time-of-filing is the way to view it. *Compare O'Brien v. Town of Bellingham*, 943 F.3d 514, 529 (1st Cir. 2019) (*Heck* is jurisdictional) *with Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 570-71 (2004) ("It has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" (quoted case omitted)); *compare Gilbank v. Wood Cnty. Dep't of Hum. Servs.*, 111 F.4th 754, 790 (7th Cir. 2024) (Easterbrook, J., concurring) (*Heck* "nominally is about ripeness.") *with Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 59 & n.20 (1993) (evaluating ripeness at time of filing); *compare Washington v. L.A. Cnty. Sheriff's Dep't*, 833 F.3d 1048, 1056 (9th Cir. 2016) ("*Heck* most closely resembles the mandatory administrative exhaustion of PLRA claims.") *with Cannon v. Washington*, 418 F.3d 714, 719 (7th Cir. 2005) (A plaintiff "may not file a lawsuit before exhausting his administrative remedies, even if he exhausts those remedies while the litigation is pending.").

Far from signaling he was willing to wait out his yearlong probation, Petitioner sought an immediate preliminary injunction, maintaining the City “[c]ontinue[d] to [s]tymie [his] [s]peech with § 50-45” in October 2021. J.A.19. And he didn’t request a *Heck* stay “in accord with common practice[.]” *Wallace*, 549 U.S. at 393-94.

Winning an injunction would have allowed Petitioner to avoid his one-year probation. That’s very different from the *Wilkinson* scenario where a plaintiff merely obtains a new procedure in the future rather than a shortened sentence for past conduct. *Heck* bars Petitioner’s premature action on this basis alone.

2. Indirect Impact on Petitioner’s Conviction

Petitioner’s action is equally barred under *Heck*’s indirect inquiry. 512 U.S. at 487 n.7. While the indirect inquiry is “less obvious” than the direct inquiry, it’s just as potent. *Nance*, 597 U.S. at 167. Even the United States, which purports to support Petitioner, has no choice but to admit that his theory “would imply a legal infirmity in his prior conviction.” U.S.Br.21.

The starting point is that Petitioner’s label doesn’t control. See *Edwards*, 520 U.S. at 645. He can’t sidestep *Heck* with an assurance he’s not attacking his criminal conviction. *J. G. G.*, 604 U.S. at 672 (necessarily-implies test applies “[r]egardless of whether the detainees formally request release from confinement”). “Although [Petitioner] has now

recharacterized his claim in an effort to escape” *Heck*, “in his complaint he squarely alleged” a constitutional deficiency that “would, by definition, undermine [his] ‘guilt’ or ‘punishment’ if his allegations are true.” *Osborne*, 577 U.S. at 77-78 (Alito, J., concurring) (citation modified).

The supposed deficiency is that the City’s ordinance violates the First Amendment. But such attacks come in two forms: facial challenges and as-applied challenges. Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55, 101 (2020). Petitioner fails to distinguish between the two, and the Fifth Circuit only decided the former. The distinction dooms Petitioner’s argument.

i. Facial Challenge

The Fifth Circuit explained “that *Heck* forbids injunctive relief declaring a state law of conviction as facially unconstitutional.” Pet.App.10a (citation modified). Its holding is correct.

“Even in the First Amendment context, facial challenges are disfavored.” *Moody v. NetChoice*, 603 U.S. 707, 744 (2024) (citation modified). It’s unsurprising, then, that *Heck* bars them. On the merits, a “rigorous standard” requires challengers to demonstrate “a substantial number of the law’s applications are unconstitutional, judged in relation to the law’s plainly legitimate sweep.” *Id.* at 723 (citation modified).

Heck is consistent with the resistance to facial challenges generally. The *Heck* doctrine is concerned with federalism, comity, finality, and consistency. 512 U.S. at 484-86. Facial challenges compromise these interests by risking premature adjudication and by counteracting judicial restraint and separation of powers principles. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008).

In claiming that a prospective facial challenge wouldn't undermine his prior conviction, Petitioner misreads this Court's canonical decisions, including *Edwards*, *Wilkinson*, and *Skinner*. They teach that a convicted plaintiff can't use federal court as an alternative forum for challenging a conviction.

Start with *Edwards*, where a plaintiff requested a declaration that his constitutional rights were violated because "of deceit and bias on the part of the decisionmaker." 520 U.S. at 648. It was held that success on this theory would "necessarily imply the invalidity of the punishment imposed" on him, since courts had reinstated good-time credits when such constitutional deficiencies were established. *Ibid.*

Later in *Wilkinson*, this Court considered a different type of procedural challenge. 544 U.S. at 76. Unlike the *Edwards* plaintiff who was found guilty of specific misconduct, the *Wilkinson* plaintiffs claimed Ohio's parole procedures shouldn't have been applied to them retroactively. *Id.* at 77. It was held that civil success wouldn't meet the necessarily-implies

standard because it would “mean at most new eligibility review” or “at most a new parole hearing at which parole authorities may, in their discretion, decline to shorten [the] prison term.” *Id.* at 82 (citation modified).

More clarification came in *Skinner*, 562 U.S. 521, where this Court divided over DNA test results. The majority interpreted “necessarily implies” more narrowly than the three dissenters and explained that, “while test results might prove exculpatory, that outcome is hardly inevitable” since the “results might prove inconclusive or they might further incriminate” the plaintiff. *Id.* at 534 (citation modified).

But all Justices in *Skinner* agreed that *Heck* would bar a Section 1983 *Brady* claim. “Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a *Brady* claim, when successful postconviction, necessarily yields evidence undermining a conviction.” *Id.* at 536 (emphasis added). That’s because a successful *Brady* claim “is, by definition, always favorable to the defendant and material to his guilt or punishment.” *Ibid.*

Emerging from these decisions is a “line” that informs the necessarily-implies standard. *Id.* at 535 n.13. This line was emphasized in the *Martin* separate opinions. 920 F.3d at 619 (Owens, J., concurring in part and dissenting in part); *id.* at 597 (Smith, J., dissenting). It’s a line focused on challenges to the validity of a conviction “as a substantive matter” versus “claims alleging only

procedural violations.” *Id.* at 619 (Owens, J., concurring in part and dissenting in part). The former (like in *Edwards* and like with a *Brady* challenge) satisfy *Heck*’s necessarily-implies test while the latter (like in *Wilkinson* and *Skinner*) don’t.

This conclusion follows not just from *Heck* and its progeny but from *Montgomery v. Louisiana*, 577 U.S. 190 (2016). In *Montgomery*, it was held that “when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.” 577 U.S. at 200.

As in the *Heck* context, *Montgomery* distinguished between substantive and procedural attacks. It explained that “substantive rules set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State’s power to impose.” *Id.* at 201 (citation modified). “Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating the manner of determining the defendant’s culpability.” *Ibid.* (citation modified).

The difference dictates the result. On the one hand, “a conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.” *Id.* at 203 (citation modified). So “when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.” *Id.* at 201. On the other hand, procedural flaws “merely raise the possibility that someone

convicted with use of the invalidated procedure might have been acquitted otherwise.” *Ibid.* (citation modified). So “the resulting conviction or sentence may still be accurate” and “a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant’s conviction or sentence.” *Ibid.*

Below, the Fifth Circuit cited its precedent in *Clarke*—a decision that relied on *Edwards*—and correctly rejected Petitioner’s facial challenge. Since Petitioner lodged a substantive attack on the law, not a procedural attack that may or may not be “material” to his guilt, *Heck* applied. *See Skinner*, 562 U.S. at 536.

The Fifth Circuit’s conclusion isn’t controversial. In *Rainey v. Samuels*, 130 F. App’x 808, 810 (7th Cir. 2005), the court held the same. There, a plaintiff asked the federal court to declare a state law unconstitutional. 130 F. App’x at 809. But applying *Heck* and *Edwards*, the court explained “that § 1983 may not be used to obtain relief that implies the invalidity of a state court’s judgment that binds the federal plaintiff *in personam*.” *Id.* at 810. The relief the plaintiff wanted necessarily implied the invalidity of the state court judgment for a substantive reason: “[I]f the statute is unconstitutional then the judgment is invalid and [the plaintiff’s] parental rights might be restored.” *Ibid.*

Courts across the country have similarly held that facial declarations necessarily imply the invalidity of prior convictions. *E.g.*, *Worthy v. N.J. State Parole Bd.*, 184 F. App'x 262, 264 (3d Cir. 2006) (“Insomuch as Worthy sought relief for alleged due process deprivations that infected the parole revocation proceedings, success on his claims, and a concomitant award of damages or declaration of unconstitutionality, would imply that his continued confinement on the basis of his revoked parole was invalid.”); *Boyle v. Nelson*, 2025 WL 295142, at *5 (D. Or. Jan. 24, 2025) (“This claim is a facial attack on the validity of Plaintiff’s conviction and so is barred by the *Heck* rule.”); *Calabrese v. Foxx*, 338 F. Supp. 3d 775, 783 (N.D. Ill. 2017) (“If the court reached the *Heck* issue, Calabrese’s facial challenge would be barred by *Heck*, for if the Domestic Violence Act’s prohibition of ‘harassment’ is void on its face, then his conviction for violating the order of protection by engaging in harassment was necessarily invalid.”); *Baxter v. City of Hernando*, 997 F. Supp. 2d 463, 465 (N.D. Miss. 2014) (“[I]f this court ruled the ordinance unconstitutional [on its face], which it does not, that would have the effect of invalidating Baxter’s conviction in state court.”).

Petitioner claims *Martin* created a split on this issue, but that has been questioned. “In *Martin*, the Ninth Circuit did not pass on the facial validity of the challenged ordinances.” *Doe v. Wasden*, 558 F. Supp. 3d 892, 904 (D. Idaho 2021). It instead dealt with the specific facts of whether the City could “prosecute individuals in the future for sleeping in public when there were no shelter beds available.” *Ibid.*

Interpreted as an as-applied case, *Martin* doesn't answer the separate question: "[D]oes finding a criminal statute facially unconstitutional call into question a previous conviction under that statute?" *Ibid.* The consensus answer is: "It would seem so." *Ibid.*

Indeed, six *Martin* dissenters found the answer "clear." 920 F.3d at 597 (Smith, J., joined by Callahan, Bea, Ikuta, Bennett, and Nelson, JJ., dissenting) ("Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions." (emphasis added)). So did Judge Owens in his separate opinion. *Id.* at 619 (Owens, J., concurring in part and dissenting in part) (*Edwards* "makes clear" that "[a] declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions.").

Petitioner attempts to gut *Heck* by claiming that a state court might reject a federal court's unconstitutionality determination. That's not right as a practical or legal matter, *cf. State v. Longino*, 67 So. 902, 904 (Miss. 1915) ("Decisions of courts construing statutes or declaring them unconstitutional are as much a part of the law of the land as legislative enactments. They become a part of the body of the

law itself, and are not merely the evidences thereof, as are decisions relating to the unwritten or common law.” (quoted case omitted)), but more importantly it’s not the test. *Muhammad v. Close*, 540 U.S. 749, 751 (2004) (asking instead whether the civil suit “would implicitly question” the criminal judgment). If the outcome turned on the immediate consequences of the civil suit, *Heck* itself wouldn’t exist, since a damages award has no automatic effect on a pre-existing criminal judgment. 512 U.S. at 481-82; *id.* at 497 (Souter, J., concurring) (rejecting the assertion that “the relief sought in a § 1983 action dictates” the outcome).

The test is necessarily “implies,” not necessarily results in. Focus is on whether there is a “connection” between the civil suit and criminal judgment. *Wilkinson*, 544 U.S. at 78. When a plaintiff claims the very law he was convicted under is unconstitutional, it’s not an outcome-neutral situation like in *Wilkinson* or *Skinner*.

Without saying so, Petitioner tries to reduce *Heck* to *Rooker-Feldman*. But they aren’t the same. While both protect state court judgments, they do so in different ways.

Under the jurisdictional *Rooker-Feldman* doctrine, a plaintiff may not “directly attack” a state court judgment by bringing a new action in federal district court that is functionally an appeal. *Lance v. Dennis*, 546 U.S. 459, 465 (2006) (quotation

modified). *Heck* is not so narrow.⁸ It’s an element of Section 1983 that also prohibits indirect attacks on state court judgments—ones that “necessarily imply” or “call into question” their invalidity. *Wilkinson*, 546 U.S. at 81; *Skinner*, 562 U.S. at 537.

ii. As-Applied Challenge

Petitioner only mentions the phrase “as-applied” in his factual statement. Pet.Br.8. He claims he lodged both facial and as-applied challenges but doesn’t suggest he pressed an as-applied argument throughout the proceedings or that the Fifth Circuit considered one. Only a facial challenge combined with a damages request is at issue.

The City highlights this non-issue to confirm the problem with Petitioner’s facial challenge. There is a distinction between facial and as-applied attacks under *Heck*. *Calabrese*, 338 F. Supp. 3d at 782-83. While enjoining a law as “void on its face” necessarily implies that a conviction under that law is invalid, “it is less clear whether *Heck* would bar an as-applied challenge.” *Id.* at 783 (citation modified).

Answering that question depends on whether Petitioner’s desired future actions “are sufficiently

⁸ Put another way, a plaintiff must show that there is jurisdiction and that he has a cause of action. *Green Valley Special Util. v. City of Schertz*, 969 F.3d 460, 494 (5th Cir. 2020) (Oldham, J., concurring) (“[J]urisdiction is necessary [but] not sufficient.”). *Rooker-Feldman* informs the former while *Heck* informs the latter. *Cf. Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (whether a cause of action exists is non-jurisdictional).

different from the conduct (allegedly) underlying his conviction[.]” *Ibid.* If a law, in its entirety, is unconstitutional, future conduct doesn’t matter because the law can’t be enforced against any person. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Not so in the as-applied context. In that scenario, some applications may be lawful while others may not.

So everything depends on what a plaintiff wants to do. Courts routinely highlight the relationship between the complaint’s factual allegations and the findings underlying the conviction. “[I]f [a plaintiff] makes allegations that are inconsistent with the conviction’s having been valid, *Heck* kicks in and bars his civil suit.” *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003).

The United States’ argument that Petitioner’s requested relief relates “to a separate transaction” is demonstrably wrong. U.S.Br.18. Petitioner here made no effort to allege facts separate from his conviction. Quite differently, his complaint alleges he doesn’t engage in “protesting” or “demonstration” as the ordinance proscribes. J.A.16-17. And in response to the City’s dispositive motion, Petitioner expressly stated the police chief applied the ordinance to him even though he “was not participating in any activity proscribed by the ordinance.” C.A.ROA.577.

If Petitioner wanted to lodge a pre-enforcement challenge that didn’t conflict with his conviction, he could have alleged discrete conduct, such as saying he only wanted to have one-on-one

conversations or pray. That’s what the plaintiffs did in *Martin* when they limited their challenge to sleeping in public when shelters were unavailable. *Doe*, 558 F. Supp. 3d at 904 (discussing *Martin*). Of course, the City here might have responded that Petitioner lacked standing because the ordinance doesn’t prohibit mere conversations or prayer. *Siders*, 130 F.4th at 189 (Oldham, J., concurring) (“the ordinance does not purport to regulate prayer, conversation, t-shirts, evangelism, or tracts”). But the point is Petitioner never gave the City that opportunity.

Petitioner instead based his challenge on past conduct, actions that undeniably constitute a “protest” or “demonstration,” like gathering in a group, holding up signs, and utilizing voice-amplification devices. Pet.App.28a-29a. Trying to reframe this identical conduct as “religious expression” rather than a “protest” or “demonstration” doesn’t avoid the conflict with his conviction.

* * * *

Petitioner’s theory fails under *Heck*’s direct and indirect inquiries. Either is “independently dispositive.” *Kitchen v. Whitmer*, 106 F.4th 525, 541 (6th Cir. 2024). Unless and until Petitioner achieves a favorable termination, his action is *Heck* barred.

C. This Court should reject Petitioner’s request for a new rule.

Precedent is emphatic: The “favorable-termination requirement applies whenever a judgment in favor of the plaintiff would necessarily imply that his prior conviction or sentence was invalid.” *McDonough*, 588 U.S. at 119 (citation modified). Whenever means whenever. This Court has refused to alter the test in past cases and should do so again. *Skinner*, 562 U.S. at 534 n.12, 544 (refusing to “muddle the clear line *Heck* and [*Wilkinson*] drew” and rejecting dissent’s request “for yet another” application beyond the direct and indirect inquiries). There are no special rules for certain types of relief, certain types of alleged constitutional violations, or certain types of challenges.

1. Relief Exception

Consider how this Court has handled relief. In both *Edwards* and *Wilkinson*, this Court addressed injunctions. Yet neither suggested favorable termination isn’t required. *Edwards* said the opposite, explaining that the sole question is whether a requested injunction would meet the necessarily-implies test. 520 U.S. at 648. *Wilkinson* then confirmed that, if it does, the favorable-termination requirement applies “no matter the relief sought.” 544 U.S. at 82 (citation modified).

That makes sense because there’s no such thing as an injunctive relief “claim.” “[A]n injunction is a remedy, not a claim.” *Madej v. Maiden*, 951 F.3d

364, 369 (6th Cir. 2020). “The holding of *Heck* and *Edwards* is that a claim under § 1983 does not accrue as long as it would imply the invalidity of a conviction or disciplinary sanction[.]” *Haywood*, 842 F.3d at 1028. Again, “[i]f the claim has not accrued,” the relief “cannot matter[.]” *Ibid*.

The United States’ position can’t be reconciled with either precedent or its view on Petitioner’s alternative argument. Quoting *Preiser*, the United States admits that, by claiming “the statute under which he stands convicted is unconstitutional,” Petitioner “suggests a legal infirmity in his conviction.” U.S.Br.19, 21 (citation modified). But the United States says it doesn’t matter because “[P]etitioner’s claim poses no conflict between Section 1983 and the habeas statute.” *Id.* at 20.

This is doublespeak. The United States spends 10 pages explaining why “the application of *Heck* does not depend on whether the plaintiff previously had access to federal habeas.” *Id.* at 24-33 (citation modified). Its argument tracks the City’s explanation as well as *Wilson* and *Savory*.

Most importantly, though, this Court’s precedent doesn’t make federal habeas access relevant to one form of relief but not another. Not even close. *Heck* and *Edwards* both applied the favorable-termination rule to plaintiffs who sought “only relief unavailable in habeas[.]” *Wilkinson*, 544 U.S. at 91 (Kennedy, J., dissenting). *Skinner* too. 562 U.S. at 534 (“It suffices to point out that Switzer has found no case, nor has the dissent, in which the

Court has recognized habeas as the sole remedy, or even an available one[.]”); *see also J. G. G.*, 604 U.S. at 686 (Sotomayor, J., dissenting) (discussing *Skinner*). This Court has thus articulated the same necessarily-implies test universally.

2. First Amendment Exception

There is no First Amendment exception either. Section 1983 provides a cause of action for a range of constitutional violations. In other contexts, this Court has declined “to classify § 1983 actions based on the nature of the underlying right asserted[.]” *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711 (1999). It’s Section 1983 that is the claim.

When a Section 1983 claim addresses “harm” related to a conviction, malicious prosecution is the common-law analogue and thus favorable termination is an element. *Heck*, 512 U.S. at 486. That’s because it was historically “the only civil remedy for unlawful initiation of criminal proceedings[.]” *Wilson*, 116 F.4th at 393 (citing *Davis v. Brady*, 291 S.W. 412, 413 (Ky. 1927)). The favorable-termination requirement doesn’t vanish just because the asserted constitutional violation changes. *Heck*, 512 U.S. at 486 n.6 (Fourth Amendment challenge); *Edwards*, 520 U.S. at 645-48 (due process challenge); *McDonough*, 588 U.S. at 116-17 (fabricated-evidence challenge); *Thompson*, 596 U.S. at 40-41 (Fourth Amendment challenge).

Petitioner can’t dispute his lawsuit alleges harm from a criminal proceeding. He says an

unconstitutional ordinance was invoked against him that resulted in an arrest, prosecution, and criminal conviction. And he stakes his prospective standing on his past arrest and prosecution. What he claims to want now is not to be arrested or prosecuted in the future for the very conduct he previously agreed violated the ordinance. J.A.94-96.

Given the theory, it's unnecessary to search for a new common-law analogue. Malicious prosecution suffices and requires favorable termination in Section 1983 actions alleging First Amendment violations. *E.g.*, *Gilles v. Davis*, 427 F.3d 197, 209-12 (3d Cir. 2005) (barring plaintiff under *Heck* who argued he engaged in protected First Amendment speech rather than disorderly conduct); *accord Smith v. Ball*, 278 F. App'x 739, 741 (9th Cir. 2008).

History confirms the malicious-prosecution analogue. At common law, “the applicability or validity of the law under which an official acted would have been litigated only if the official raised that law as a defense” or if the validity of the law was raised as a defense in criminal proceedings. Hon. Andrew S. Oldham, Adam I. Steene, & John W. Tienken, *The Ex Parte Young Cause of Action: A Riddle, Wrapped in a Mystery, Inside an Enigma*, 120 Nw. L. Rev. (forthcoming 2026) (manuscript at *13-14); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 Stan L. Rev. 1269, 1340 (2020). In other words, adjudication would have been in a criminal prosecution or as a defense to a tort claim, such as malicious prosecution. Not pre-enforcement.

Petitioner wants to abandon the common law. But “judicial oversight of public officials was a matter for King’s Bench—for the law courts, not for Chancery.” Oldham, *supra*, at *13. “A bill brought for relief against a proceeding at law upon a criminal prosecution or any writ which was mandatory and not remedial would be dismissed.” *Id.* at *7 (citation modified).

Since the anti-suit injunction was a creature of the chancery courts, not the common-law courts, it isn’t applicable here. Equity courts couldn’t pass on the validity of a law before prosecution or stop an officer from enforcing the law. *See, e.g., In re Sawyer*, 124 U.S. 200, 210 (1888) (For equity to assume jurisdiction over criminal matters was to “invade the domain of the courts of common law.”). This Court should retain the tort comparison that is consistent with history and precedent. *Heck*, 512 U.S. at 483.

Ex parte Young, decided in 1908, doesn’t change the analysis. For one thing, the relevant time period is 1871, at the latest, when Section 1983 was passed. *Nieves v. Bartlett*, 587 U.S. 391, 405 (2019); *see also Trump v. CASA, Inc.*, 606 U.S. 831, 856 (2025). At that time, anti-suit injunctions couldn’t issue against the sovereign and couldn’t enjoin criminal prosecutions. Nor could they issue based on irreparable harm alone, even in civil cases. Oldham, *supra*, at *14. “Rather, equity would interfere only if the party invoked an equitable defense that the law courts would not recognize, such as fraud, mistake, or accident.” *Id.* at *14-15. There is no such equitable need here, since the law courts would have

recognized Petitioner's defense to his criminal charge.

For another thing, whatever might be said about the correctness (or incorrectness) of *Ex parte Young*,⁹ what has been lost through the years is this Court's focus on there being no adequate remedy at law based on the "drastic" nature of the penalties. 209 U.S. 123, 131, 165 (1908); *accord Osborn v. Bank of U.S.*, 22 U.S. 738, 845-46, 848 (1824) (describing the "extreme case" where the "sum [of damages was] so greatly beyond the capacity of an ordinary agent to pay").¹⁰ This is not such a case, since the ordinance only applies to a restricted area during a limited time period, the total fine was \$164.25, and a suspended 10-day sentence was imposed subject only to "no further violation of the ordinance." J.A.82-83.

But if this Court were to scrap the malicious-prosecution analogy, Petitioner's challenge looks more like the prerogative writs. Such writs were brought by private citizens in the King's name and "served to keep in check officers, official boards, and government commissions, although they were

⁹ As discussed in the next paragraph, scholars have pointed out that the *Ex parte Young* cause of action is more consistent with the prerogative writs than the anti-suit injunction. Pfander & Wentzel, *supra*, at 1281; Oldham, *supra*, at *14; *contra* CASA, 606 U.S. at 846 n.9.

¹⁰ The original understanding of these cases paralleled *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, which explain that, even in the First Amendment context, federal courts should generally yield to state courts in the construction of state laws and administration of criminal statutes, absent extraordinary circumstances.

unavailable against the King himself or his high-level ministers.” Oldham, *supra*, at *5. Although the writs sometimes operated like an injunction, they were brought in the King’s Court and were instruments of law rather than equity.¹¹ *Id.* at *5-6. Relevant here are the writs of prohibition, mandamus, and certiorari.¹²

These writs, unlike equity actions, were “the central mechanisms for the judicial control of executive action”¹³ and “took priority over adequate

¹¹ Even though they were “creatures of law” and issued from the King’s Bench, the prerogative writs would technically fall under the “other proceedings” category in Section 1983. Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 74 Ala. L. Rev. 897, 924 n.216 (2024).

¹² These three writs were “the pillars of common law’s system of administrative oversight” and “enabled public rights suitors to test the legality of action by early administrative bodies such as commissions, boards, and justices of the peace.” Pfander & Wentzel, *supra*, at 1277.

Prohibition was used to remove a case from a court that lacked jurisdiction. Writs of prohibition issued against judicial and quasi-judicial or administrative functions. *Id.* at 1300.

Mandamus was used to compel performance of nondiscretionary duties. *Id.* at 1299. “No officer was above such a writ,” *id.* at 1299, and it was the primary method for judicial review of executive action. See EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 158 (1963) (“Mandamus became explicitly as well as practically available to enforce any legal right (for which no other remedy was available).” (citation modified)).

Certiorari was used to “quash unlawful exercises of discretionary authority” and was enforced on pain of contempt. Pfander & Wentzel, *supra*, at 1299, 1313-14.

¹³ Although Justice Scalia said that “the ability to sue to enjoin unconstitutional actions by state and federal officials is

alternative remedies in equity.” Pfander & Wentzel, *supra*, at 1296, 1304 n.205 (citation modified). And the writs of prohibition and certiorari in particular focused on the jurisdiction of lower courts to rule on a matter. That fits here. “[I]f the law [under which Petitioner was convicted is] unconstitutional and void, the [municipal court] acquired no jurisdiction of the causes.” *Montgomery*, 577 U.S. at 203 (quoting *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880)).

Still, no matter whether one looks to anti-suit injunctions or prerogative writs, the *Heck* parallel remains the same: A necessary element for each was that there could be no adequate remedy at law. John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 994, 1002, 1014 (2008) (anti-suit injunction) (“To apply the familiar principle that equity will act only when the remedy at law is inadequate, the court must identify the legal remedy.”); Pfander & Wentzel, *supra*, at 1304 (prerogative writs) (“In practice the only grounds on which [the prerogative writs] would be refused was where the petitioner had an adequate alternative remedy or was guilty of unreasonable delay or misconduct.” (citation modified)).

The right to appeal and the right to damages were adequate remedies, generally barring both anti-

the creation of courts of equity, and reflects a long history of judicial review of illegal executive action tracing back to England,” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), that assertion is imprecise. The source Justice Scalia cited detailed the role of mandamus and certiorari, not equity. See Oldham, *supra*, at *14; Pfander & Wentzel, *supra*, at 1356-57.

suit injunctions and prerogative writs. Marcellus S. Whaley, *Common Law Writs*, 11 S. Car. L. Q. 189, 197 (1959); *see also Hemsley v. Myers*, 45 F. 283, 287 (C.C.D. Kan. 1891). By contrast, inadequate remedies at law included actions where certain defenses couldn't be raised in common-law courts (thus, the anti-suit injunction), where the defendant was insolvent, or where there was no right to appeal.

Here, of course, Petitioner had the right to raise both facial and as-applied challenges and to appeal his conviction. Success on a facial challenge in the criminal court would have invalidated the law just as much as success in federal court. *See Longino*, 67 So. at 904. And success in the criminal court on either facial or as-applied grounds could then be asserted in subsequent Section 1983 litigation for both damages and an injunction.

It doesn't matter that there may be practical reasons a criminal defendant would plead guilty, not appeal, and proceed straight to federal court. Pet.Br.39. In *Younger*, this Court addressed that reality: "The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection." 401 U.S. at 45-46. Federal courts can't interfere, even in the face of potential unconstitutional conviction and even if there is irreparable harm, unless that harm is "both great and immediate." *Id.* at 46. "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single

criminal prosecution, could not by themselves be considered ‘irreparable’ in the special legal sense of that term.” *Ibid.* “[T]he threat to the plaintiff’s federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.” *Ibid.*

Wooley is consistent. 430 U.S. 705. Extraordinary circumstances existed in *Wooley* because the petitioner, Maynard, was subjected to multiple prosecutions in five weeks, which resulted in abnormal hardship. Neither of the Maynards were able to use the family vehicle for fear of prosecution and harassment. *Id.* at 710-13. Maynard also raised his First Amendment challenge in each prosecution, meaning he gave the state court the first bite at the apple. *Id.* at 708. Even though Maynard didn’t appeal, the record showed that it was not a threat that could be “eliminated by his defense in a single criminal prosecution.” *Ibid.*; see also *Younger*, 401 U.S. at 46.

The situation is different here. Petitioner has been arrested on a single occasion for protesting. J.A.93-96. This occurred after several warnings and opportunities to leave without being arrested. Pet.App.28a-30a. The ordinance impacts limited activities during a limited time frame at events that are seasonal and infrequent. J.A.70-72. Unlike the Maynards whose daily activities were constrained because they couldn’t use their vehicle, Petitioner has “ample alternative channels” to express himself. *Siders*, 123 F.4th at 308-09 (rejecting as “false” the contention that protesters can’t meaningfully reach

their intended audience within the protest area and detailing the “substantial” number of people who could be reached outside of the restricted area). And unlike Maynard who raised his challenge in state court, Petitioner didn’t give Mississippi the opportunity to provide him with a remedy through the normal criminal process. J.A.94-96.

Petitioner’s proposed First Amendment exception thus fails at every turn. The malicious-prosecution analogue applies, but, even if it didn’t, any other analogue requires there to be no adequate remedy at law, absent extraordinary circumstances. Petitioner can’t clear this hurdle, so he has no Section 1983 cause of action. Historical principles of federalism, comity, and finality confirm this view and necessitate rejection of Petitioner’s proposed new exception.

3. Pre-enforcement Exception

That Petitioner wants to bring a pre-enforcement action isn’t a good reason to ditch favorable termination either. “[T]hose seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments.” *Whole Woman’s Health*, 595 U.S. at 49. That’s why “[t]his Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court.” *Ibid.* In fact, Petitioner’s strategy is at odds with historical practice. *Ibid.* (explaining that Section 1983 pre-enforcement review “was not prominent until the mid-20th century”).

The reliance on *Wooley*, *Carey v. Brown*, 447 U.S. 455 (1980), and *Kolender v. Lawson*, 461 U.S. 352 (1983) is misplaced. Each was decided before *Heck* announced its favorable-termination requirement, and only one arguably grappled with *Heck*'s underlying concerns.

Kolender and *Carey* are irrelevant. In *Kolender*, this Court emphasized that the appellants “apparently never challenged the propriety of declaratory and injunctive relief in this case” nor did they challenge standing to seek such relief. 461 U.S. at 355 n.3. Likewise in *Carey*, the issue wasn’t briefed or considered. *See* 447 U.S. at 457-71; Br. for App. *Carey*, *Carey v. Brown*, 1980 WL 340096, at *2 (filed Feb. 21, 1980) (only question presented was whether the statute violated the Equal Protection Clause). Neither case is precedential on an issue not raised or addressed. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 56-57 (1987). Cause-of-action elements, such as favorable termination, are susceptible to waiver and forfeiture. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-62 (2010).

That leaves this Court’s pre-*Heck* decision in *Wooley*. There, this Court distinguished *Huffman v. Pursue*, 420 U.S. 592 (1975), which required exhaustion of state remedies before federal court intervention even after the state court proceedings had ended. *Wooley*, 430 U.S. at 710-11. The *Huffman* plaintiff, it explained, sought “federal post-trial intervention in a fashion designed to annul the results of a state trial” while the *Wooley* plaintiffs did

not. *Id.* at 711. Thus, this Court focused on the goal in bringing the suit.

Heck changed the focus. It looks not at the (alleged) goal but on the effect success would have on the criminal charges, either due to the remedy sought or facts pled. *Edwards*, 520 U.S. at 645 (explaining that, even if a plaintiff says he is not challenging the “result” of a prior proceeding, the challenge may still fail *Heck*’s indirect inquiry). Petitioner’s suit, under both, implicates the interests *Heck* sought to protect: finality of the criminal court judgment and respect for the state tribunal. 512 U.S. at 485-86.

Petitioner wants exactly what this Court says isn’t allowed: A “disregard [of] traditional limits on the jurisdiction of federal courts just to see a favored result win the day.” *Whole Woman’s Health*, 595 U.S. at 51 (citation modified). But he’s “not entitled to a special exemption.” *Id.* at 50. “Whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right,” *ibid.* (citation modified), favorable termination applies just the same.

Plus, Petitioner fails to grapple with practical implications of an alternate outcome. *Whole Woman’s Health* highlighted the high bar associated with pre-enforcement challenges. *Id.* at 48-51. A consequence here would be an unwarranted expansion of Section 1988.

Were Petitioner to obtain “enduring judicial relief on the merits” via a Section 1983 pre-

enforcement challenge, he would be entitled to attorney’s fees. *Lackey v. Stinnie*, 604 U.S. 192, 203-04 (2025). That’s so even though the City wouldn’t be entitled to relief on the same terms for its win. *Hoyle v. City of Hernando*, 2024 WL 4039746, at *5 (5th Cir. 2024) (Oldham, J., concurring joined by Willett, J.).¹⁴

There’s no reason to exacerbate this “oddity[.]” *id.* at *4, by dispensing with the longstanding favorable-termination rule for a Petitioner who failed to give state courts the opportunity to interpret their own law. And there certainly is no reason to expand it in the doubtful context of pre-enforcement, especially when it’s plausible under existing law that Petitioner could have brought his challenge in a different way that doesn’t implicate attorney’s fees.

Ex parte Young offers an “equitable cause of action” to enjoin state officials separate from Section 1983. *Green Valley Special Util. Dist.*, 969 F.3d at 496 (Oldham, J., concurring). And courts have extended that cause of action to local officials. *E.g.*, *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018) (“Actions under *Ex parte Young* can be brought against both state and county officials, so it is unnecessary for us to resolve the parties’ dispute over whether the Sheriff acts on behalf of King County or the State of Washington when he executes writs of restitution.” (citation modified)). But Petitioner didn’t

¹⁴ This result is “atextual” to Section 1988, which by “its plain text does nothing to differentiate between prevailing plaintiffs and prevailing defendants.” *Ibid.* (emphasis in original).

use *Ex parte Young* even though he initially sued the police chief in both his official and individual capacities.¹⁵ He instead resorted to a statute that allows for attorney’s fees against a municipality with a population of around 25,000 people.¹⁶

It also doesn’t advance Petitioner’s position to say that other plaintiffs could make a challenge he couldn’t. That’s the entire point of *Heck*. It’s an individual bar resulting from the consequence of a prior conviction. Not everyone is a viable candidate for every kind of Section 1983 action.

True, if a different plaintiff were to succeed in declaring the ordinance unconstitutional, or in recovering damages for that matter, it likewise would impugn Petitioner’s prior conviction. But that only proves the point that the necessarily-implies test is satisfied where a convicted plaintiff seeks an injunction declaring the statute facially unconstitutional—a premise Petitioner fights

¹⁵ As a matter of standing, “federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.” *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). Petitioner “abandoned his claims against William Thompson in the court of appeals[,]” Pet.Br.ii, and has never made an attempt to add any other city official to the case.

¹⁶ This doesn’t appear to have been an accident. *E.g.*, *Grisham v. City of Fort Worth*, 2016 WL 8606770, at *4 (N.D. Tex. Dec. 16, 2016) (“Apparently Kellum has come to the conclusion after his years of handling this kind of litigation, which has become a matter of routine for him, that § 1988 is intended to provide a form of economic relief to improve the financial lot of attorneys, particularly him.”).

throughout his brief. *McDonough* places focus on “his prior conviction[.]” 588 U.S. at 119.

Nothing is odd about one person being able to bring a claim that a different person could not. When it was argued in *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) that a plaintiff would be left without recourse, Justice Scalia emphasized that this Court rejects the idea that Section 1983 “must always and everywhere be available.” Rather, “to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs.” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). Petitioner doesn’t belong to “the class of beneficiaries” without a favorable termination. *Ibid.*; see also *Nance*, 597 U.S. at 178 (Barrett, J., dissenting joined by Thomas, Alito, and Gorsuch, JJ.) (unavailability of a certain type of relief “does not justify recourse to § 1983”).

And like in *Spencer*, “[i]t is not certain” that Petitioner is foreclosed. 523 U.S. at 17. That he can’t bring a facial challenge doesn’t automatically mean he couldn’t bring a properly lodged as-applied challenge. Neither is it clear that he couldn’t bring a non-Section 1983 *Ex parte Young* action or an action under the Mississippi Constitution, which “offers broader free speech protection than the First Amendment” of the federal Constitution. *Rayborn v. Jackson Cnty. Sch. Distr.*, 2023 WL 7414450, at *3 (S.D. Miss. 2023); see also Jeffrey S. Sutton, *51 Imperfect Solutions* 7–8 (2018) (litigants get “two shots” at making constitutional challenges). And he

is only barred until he obtains a favorable termination, not forever, in any event.

CONCLUSION

The Fifth Circuit should be affirmed.

Respectfully submitted,

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