

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 *AMICUS CURIAE*
TEXAS ASSOCIATION OF COUNTIES
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae is Texas Association of Counties (TAC), a Texas nonprofit corporation formed to improve and promote the value of county government statewide. Most of the 254 Texas counties are members of TAC. Each county office is represented on the TAC Board of Directors. This cooperative effort unites state leaders, including law-enforcement and governmental entities, helping them understand the value of county government to serve Texans more effectively on the municipal scale.

Amicus has a strong interest in this case because the rule Petitioner asks this Court to adopt would expose amicus and its members to unwarranted lawsuits which deplete the public fisc by expanding the opportunities for collateral attacks on criminal convictions. Additionally, State District Courts, County Courts at Law and Justice Courts have an interest in determining the constitutionality of State Law which should, as a matter of comity, allow State Courts to pass on the constitutionality of State laws before such cases are submitted to the Federal Courts. Amicus respectfully urges the Court to affirm the decision below.

¹ Pursuant to this Court's Rule 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the amicus curiae or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Heck v. Humphrey*, this Honorable Court held that a claim that attacks the constitutionality of a conviction or imprisonment is not cognizable under 42 U.S.C. § 1983 and does not accrue until that “conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck v. Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994).

Heck bars Petitioner’s § 1983 claims unless and until Petitioner’s conviction is reversed because success on Petitioner’s claim would necessarily imply that his conviction is invalid.

This Court has a long and rich tradition of respect for State courts to pass on the constitutionality of state laws. This doctrine of comity “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379 (1982) (quoting *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761 (1950)).

Petitioner asks this Court to virtually eliminate the *Heck* bar on all state misdemeanor cases and would open the door to collateral attack of virtually any municipal ordinance especially those implicating first amendment rights such as sign ordinances and park regulations. Criminal defendants would be able to pay a fine and/or serve their time without having to bring their constitutional defenses to the State court's attention. They could simply file suit in federal court to collaterally attack their convictions. This result would be contrary to this Court's longstanding consistent direction that a litigant must first show a favorable termination of their criminal prosecution in order to file a separate suit under § 1983. Petitioner's requested rule would deprive State courts of the ability to pass on the constitutionality of State statutes and local ordinances. Simply put, a State court should be permitted to be the first to rule on a criminal defendant's constitutional challenge to a state law or local ordinance.

Heck does not turn on the type of relief requested or a plaintiff's incarceration status. Rather it should turn only on whether the requested relief necessarily implies the invalidity of the plaintiff's conviction or sentence.

Finally, the Court should not create a new and different rule for applying *Heck* to First Amendment challenges.

The Court should affirm the decision below.

ARGUMENT

I. COMITY REQUIRES THAT STATE COURTS BE ALLOWED TO RULE ON THE CONSTITUTIONALITY OF STATE STATUTES AND LOCAL ORDINANCES, AND *HECK* PROTECTS THIS COMITY.

This Court has a longstanding tradition of allowing state courts to pass on the constitutionality of state laws and local ordinances that arise from a criminal prosecution. See *Ex parte Royall*, 117 U.S. 241, 250, 6 S. Ct. 734, 740, 29 L. Ed. 868 (1886) (“The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the state court to pass.”).

This Court reinforced this tradition in *Fenner v. Boykin*:

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. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court.

Fenner v. Boykin, 271 U.S. 240, 244, 46 S. Ct. 492, 493, 70 L. Ed. 927 (1926); *see accord*, *Younger v. Harris*, 401 U.S. 37, 45, 91 S. Ct. 746, 751, 27 L. Ed. 2d 669 (1971).

Later this Court also considered this “intolerable condition” in *Rose v. Lundy*:

Under our federal system, the federal and state “courts [are] equally bound to guard and protect rights secured by the Constitution.” *Ex parte Royall*, 117 U.S., at 251, 6 S. Ct., at 740. Because “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,” federal courts apply the doctrine of comity, which “teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590, 94 L. Ed. 761 (1950). *See Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S. Ct. 18, 19, 70 L. Ed. 2d 1 (1981) (per curiam) (noting that the exhaustion requirement “serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights”).

Rose v. Lundy, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203, 71 L. Ed. 2d 379 (1982). Though *Rose* deals with mixed state and federal habeas corpus petitions, the Court’s reasoning is equally applicable to the present case.

State courts must have the first opportunity to pass on the constitutionality of state laws and local ordinances. See *Moore v. Sims*, 442 U.S. 415, 429, 99 S. Ct. 2371, 2380, 60 L. Ed. 2d 994 (1979) (“State courts are the principal expositors of state law.”).

Heck’s favorable termination requirement serves to preserve this comity doctrine and avoid judicial confusion. See *McDonough v. Smith*, 588 U.S. 109, 117–18, 139 S. Ct. 2149, 2156–57, 204 L. Ed. 2d 506 (2019) (noting that *Heck*’s favorable termination requirement “is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments.”).

Heck preserves comity by requiring a person convicted of a crime to have his conviction set aside before his 42 U.S.C. § 1983 claim even accrues.

Petitioner would have this Court relieve state criminal defendants of the responsibility to challenge the constitutionality of a statute or city ordinance during their criminal proceedings. This would provide a criminal defendant with an end run around the *Heck* “favorable termination” requirement and allow a convicted person the ability to bring suit directly

challenging the constitutionality of an ordinance in federal court, thus bypassing the state courts altogether.

Because Petitioner's claim has not yet accrued, the Fifth Circuit Panel below was careful to correct the District Court's dismissal with prejudice and to instruct the District Court to modify its ruling to dismiss "with prejudice to their being asserted again until the *Heck* conditions are met." *Olivier v. City of Brandon, Mississippi*, No. 22-60566, 2023 WL 5500223, at *6 (5th Cir. Aug. 25, 2023), cert. granted, 145 S. Ct. 2871 (2025) (quoting *Deleon v. City of Corpus Christi*, 488 F.3d 649, 657 (5th Cir. 2007)).

Therefore, Petitioner is not without recourse. But he must have his conviction set aside before seeking to have the Ordinance declared unconstitutional or seeking injunctive relief against future enforcement of the Ordinance. Petitioner will have "a complete and present cause of action for the loss of his liberty only once the criminal proceedings against him terminated in his favor." *McDonough v. Smith*, 588 U.S. 109, 121, 139 S. Ct. 2149, 2159, 204 L. Ed. 2d 506 (2019).

This Court should affirm the decision of the Court below.

II. PETITIONER'S REQUESTED RELIEF IS IRRELEVANT FOR THE PURPOSES OF *HECK*.

Petitioner argues that forward-looking injunctive relief should not be barred by *Heck*. However, the only

question that matters is whether the relief sought, in whatever form, would necessarily imply that his conviction is invalid.

Heck involved a § 1983 case seeking damages, but this Court has noted that the *Heck* bar is also applicable to equitable relief. *See Muhammad v. Close*, 540 U.S. 749, 751, 124 S. Ct. 1303, 1304, 158 L. Ed. 2d 32 (2004) (Noting that in “*Edwards v. Balisok*, 520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed.2d 906 (1997), we applied *Heck* in the circumstances of a § 1983 action claiming damages and equitable relief.”); *see also, Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S. Ct. 1242, 1248, 161 L. Ed. 2d 253 (2005).

The Fifth Circuit noted that “a suit seeking prospective injunctive relief does not implicate *Heck*'s favorable-termination requirement.” *Wilson v. Midland Cnty., Texas*, 116 F.4th 384, 398 (5th Cir. 2024). In some cases, this might be correct. For example, *Edwards v. Balisok*, involves prospective relief that does not implicate *Heck*:

He requests an injunction requiring prison officials to date-stamp witness statements at the time they are received. *Id.*, at I–10. Ordinarily, a prayer for such prospective relief will not “necessarily imply” the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983.

Edwards v. Balisok, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589, 137 L. Ed. 2d 906 (1997).

However, in contrast to *Edwards*, Petitioner seeks injunctive relief to prevent the future enforcement of the City's Ordinance *because* it is unconstitutional. If Petitioner is successful, the finding that the Ordinance is unconstitutional necessarily implies that his conviction is invalid.

Regardless of the type of relief sought, Respondent's claim is under § 1983. And § 1983 jurisprudence firmly incorporates the *Heck* favorable termination requirement if the requested relief would necessarily imply that Respondent's conviction is invalid.

III. CUSTODIAL STATUS IS IRRELEVANT FOR THE PURPOSES OF *HECK*.

Petitioner argues that *Heck* should not apply because he was never in custody and was unable to access federal habeas corpus relief. However, the critical inquiry is whether the relief sought would necessarily imply that his conviction is invalid.

The *Heck* favorable termination analysis has been applied by this Court when a litigant was acquitted but the *Heck* analysis was crucial to determine when the plaintiff's cause of action accrued. *See McDonough v. Smith*, 588 U.S. 109, 119, 139 S. Ct. 2149, 2157, 204 L. Ed. 2d 506 (2019); *see also, Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 370, 137 S. Ct. 911, 920, 197 L. Ed. 2d 312 (2017) (applying *Heck* to determine when the plaintiff's § 1983 claims accrued when the plaintiff had

spent 48 days in pretrial detention and did not file suit until after his confinement.).

This Court applied *Heck* principles to determine that limitations ran on a claim where the plaintiff was not yet prosecuted. *See Wallace v. Kato*, 549 U.S. 384, 394, 127 S. Ct. 1091, 1098, 166 L. Ed. 2d 973 (2007).

A noncustodial plaintiff is required to follow the *Heck* favorable disposition test as shown in *Thompson v. Clark*:

While Thompson was in custody, one of the police officers prepared and filed a criminal complaint charging Thompson with obstructing governmental administration and resisting arrest. Thompson remained in custody for two days. A judge then released him on his own recognizance.

Before trial, the prosecution moved to dismiss the charges, and the trial judge in turn dismissed the case. The prosecutor did not explain why she sought to dismiss the charges, nor did the trial judge explain why he dismissed the case.

Thompson v. Clark, 596 U.S. 36, 40, 142 S. Ct. 1332, 1336, 212 L. Ed. 2d 382 (2022). This Court found that Thompson had made the requisite showing that there was a favorable termination of his criminal charges:

In sum, we hold that a Fourth Amendment claim under § 1983 for malicious prosecution does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction.

Thompson v. Clark, 596 U.S. 36, 49, 142 S. Ct. 1332, 1341, 212 L. Ed. 2d 382 (2022).

Lower courts have found this Court’s instruction to be clear. *See Wilson v. Midland Cnty., Texas*, 116 F.4th 384, 396 (5th Cir. 2024) (“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.”). The favorable-termination element of the *Heck* rule provides a definitive point for when a claimant’s cause of action accrues promoting judicial economy and certainty without resorting to various and confusing exceptions.

IV. THE COURT SHOULD NOT CARVE OUT A SEPARATE ANALYSIS FOR FIRST AMENDMENT CLAIMS UNDER *HECK*.

Amicus recognizes the vital constitutional right of religious expression in the public square, as undoubtedly do the citizens of the City of Brandon, Mississippi. As noted in Respondent’s Original Brief to the Supreme Court, “Far from discriminating against those who share the Gospel, Brandon celebrates religious exercise in countless ways. *See*

e.g., Mayor's Prayer Breakfast, <https://brandonmainstreet.com/event/mayors-prayerbreakfast/>." (Respondent's Brief in Opposition, p. 7-8). Obviously, many of those folks believe in the importance of prayer and witnessing for the health of the body politic and one's own body. See, e.g., P. Mueller, J. Plevak & T. Rummans, *Religious Involvement, Spirituality, and Medicine: Implications for Clinical Practice*, MAYO CLINIC PROC., December 2001, Vol 76. And certainly, if the voters of Brandon believe such rights are being tread upon by the local government, they can elect a new one. Goodness knows, the docket sheet of this case confirms there are many institutional minute men that would be willing to help them.

To be sure, the Founders were keen on free exercise of religion, given some of the historical record they were aware of and responding to when they drafted and debated the First Amendment. See, e.g., *Saint Margaret Clitherow*, BRITANNICA.COM, <http://www.britanica.com/Saint-Margaret-Clitherow>. Still though, the First Amendment doesn't trump the right to a republican form of government as promised by the Constitution of the United States. See U.S. Constitution, art. IV, § 4. And, as critical as the First Amendment is, it is an amendment, and it is not absolute. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP*

Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800, 105 S. Ct. 3439, 3447, 87 L. Ed. 2d 567 (1985).

Such understanding is important for our country and particularly for local governments whose taxpayers bear the cost of legislative mistakes—particularly now as the Amendment seems to be weaponized in new ways. *See, e.g.*, S. Malanga, *Municipal Litigation Lottery*, CITY-JOURNAL, <https://www.city-journal-litigation-is-busting-city-budgets> (Visited Sept. 9, 2025). Finally, time, place, and manner restrictions like those ultimately at issue here have been held as constitutional, to allow for reasonable protection against the types of conduct at issue here. ROA 295-301, 398-424.

Plaintiff's cause of action is under 42 U.S.C. § 1983 *regardless* of the Constitutional right asserted. The only analogous tort claim to § 1983 in the common law is the tort of malicious prosecution. *See McDonough v. Smith*, 588 U.S. 109, 117 fn.5, 139 S. Ct. 2149, 2156, 204 L. Ed. 2d 506 (2019) (“But two constitutional claims may differ yet still both resemble malicious prosecution more than any other common-law tort; comparing constitutional and common-law torts is not a one-to-one matching exercise.”) (citing *Heck*, 512 U.S. at 479, 484, 114 S. Ct. 2364).

To be sure, First Amendment claims are treated differently in some regards. For example, this Court has repeatedly held that a person need not expose himself to actual arrest in order to have standing to challenge a statute or ordinance on First Amendment grounds. *See Babbitt v. United Farm Workers Nat.*

Union, 442 U.S. 289, 302, 99 S. Ct. 2301, 2310–11, 60 L. Ed. 2d 895 (1979) (“[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not “first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.”) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1216, 39 L. Ed. 2d 505 (1974)).

While this is an important *standing* issue, “there is no freestanding constitutional right to pre-enforcement review in federal court.” *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 52, 142 S. Ct. 522, 539, 211 L. Ed. 2d 316 (2021) (THOMAS, J., concurring in part and dissenting in part) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220, 114 S. Ct. 771, 127 L. Ed. 2d 29 (1994) (SCALIA, J., concurring in part and concurring in judgment)).

Conversely, *Heck* does not deal with standing, *Heck* is an *accrual* rule. See *Wallace v. Kato*, 549 U.S. 384, 393, 127 S. Ct. 1091, 1098, 166 L. Ed. 2d 973 (2007) (*Heck* “delays what would otherwise be the accrual date of a tort action until the setting aside of an extant conviction which success in that tort action would impugn.”); see also *McDonough v. Smith*, 588 U.S. 109, 121, 139 S. Ct. 2149, 2159, 204 L. Ed. 2d 506 (2019) (“The accrual rule we adopt today, by contrast, respects the autonomy of state courts and avoids these costs to litigants and federal courts.”).

An individual who reasonably fears that he may be prosecuted under an allegedly unconstitutional statute is in a significantly different legal position

from an individual who has actually been convicted under the same statute.

The former is starting fresh with only an articulable fear of a potential prosecution. An individual fearing prosecution may avail himself of prospective relief through judicial remedies to prevent the alleged unlawful action.

Conversely, and importantly, the latter has an existing state law conviction that is subject to being impugned. This conviction should, as a matter of comity, be respected by the federal courts and left undisturbed except on direct appeal. Moreover, a convicted person had his day in court and either did not or would not challenge the constitutionality of the statute or ordinance under which he was convicted in that forum. Such a challenge should be made to the state courts as a defense to criminal prosecution.

Constitutional rights are customarily and properly brought as a defense to a criminal prosecution and not as a pre-enforcement suit:

The truth is, too, that unlike the petitioners before us, those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal-question jurisdiction did not even exist for much of this

Nation's history. See *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 376, 132 S. Ct. 740, 181 L. Ed. 2d 881 (2012). And pre-enforcement review under the statutory regime the petitioners invoke, 42 U.S.C. § 1983, was not prominent until the mid-20th century. See *Monroe v. Pape*, 365 U.S. 167, 180, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 994 (7th ed. 2015). To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed.2d 172 (2011) (First Amendment used as a defense to a state tort suit).

Whole Woman's Health v. Jackson, 595 U.S. 30, 49–50, 142 S. Ct. 522, 537–38, 211 L. Ed. 2d 316 (2021).

The present case should be no different. Petitioner must show that his “conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus” before his § 1983 claim accrues. *Heck v. Humphrey*, 512 U.S. 477, 486–87, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994).

This Court should find that Petitioner's § 1983 claim has not yet accrued and should affirm the Fifth Circuit.

CONCLUSION

For all the aforementioned reasons, the Court should affirm the decision of the Fifth Circuit.

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