

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GABRIEL OLIVIER,)
Petitioner,)
v.) No. 24-993
CITY OF BRANDON, MISSISSIPPI, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 86

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-993, Olivier
5 versus City of Brandon.

6 Ms. Ho.

7 ORAL ARGUMENT OF ALLYSON N. HO

8 ON BEHALF OF THE PETITIONER

9 MS. HO: Mr. Chief Justice, and may it
10 please the Court:

11 Gabriel Olivier is called to share his
12 Christian faith by preaching in a city park.
13 He was arrested and charged with violating a
14 city ordinance that purports to criminalize his
15 religious speech. Olivier has a heartland
16 Section 1983 claim to seek prospective relief
17 protecting him from future prosecution under
18 the ordinance.

19 That pre-enforcement Section 1983
20 claim isn't predicated on a past unlawful
21 conviction, and this Court shouldn't extend
22 Heck to bar it. As this Court recognized
23 nearly 50 years ago in Wooley, when a genuine
24 threat of prosecution exists, a litigant is
25 entitled to resort to a federal forum to seek

1 redress for an alleged deprivation of federal
2 rights.

3 Neither the habeas statutes nor Heck
4 and its progeny bar Olivier's claims. The
5 relief he seeks, an injunction and a
6 declaration, won't annul his conviction or
7 alter his sentence. His claims for future
8 relief are, as this Court explained in Dotson,
9 distant from the core of habeas safeguarded by
10 Heck.

11 The Fifth Circuit alone deprives a
12 person of access to a federal forum to
13 vindicate federal rights solely because he was
14 previously convicted under the law he
15 challenges. But a prior conviction shouldn't
16 forever bar a claim for future protection.
17 Olivier's past prosecution makes him a perfect
18 plaintiff because past enforcement is good
19 evidence that the threat of future enforcement
20 is real.

21 The Court should confirm that the
22 federal courthouse doors remain open to persons
23 like Olivier whose rights have already been
24 infringed.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Ms. Ho, what do you
2 do with the language in Wilkinson that seemed
3 to suggest that equitable relief could also be
4 precluded?

5 MS. HO: Certainly, Your Honor. And
6 our -- our reading of -- of Dotson is that
7 there is no form of relief, not damages, not a
8 declaration, not injunctive relief, that is
9 per se allowed or forbidden under Heck. This
10 Court did say in Dotson that a claim for
11 prospective relief would generally not be
12 barred by Heck, and it's repeated that
13 admonition.

14 But our -- our -- our position is that
15 you look at the nature of the relief to see
16 if -- if it's Heck-barred. It -- it is -- this
17 Court has said that it will not ordinarily be
18 the case that purely prospective relief like
19 Mr. Olivier seeks is barred by Heck, but that's
20 not a -- that's not a per se rule, and that's
21 not our position, Your Honor.

22 JUSTICE THOMAS: So would the -- are
23 you challenging the underlying judgment or
24 conviction of the previous convictions by
25 Petitioner?

1 MS. HO: Not -- not at all, Your
2 Honor. We are solely seeking an injunction and
3 a declaration that the ordinance cannot be
4 applied to --

5 JUSTICE THOMAS: Is this a type of
6 suit that can only be brought in habeas?

7 MS. HO: I would say this is the type
8 of suit that cannot be brought in habeas. This
9 Court has described habeas relief as relief
10 that shortens a sentence, requires immediate
11 release, or does -- does something with the
12 attendant effects of the conviction, and the
13 relief that Mr. Olivier seeks will do none of
14 those things, Your Honor.

15 CHIEF JUSTICE ROBERTS: What -- what
16 would it take to have the consequences of the
17 conviction carry forward? For example, would
18 particular burdens that are imposed on someone
19 who's been convicted carry forward, and would
20 that be enough to prevent the 1983 action?

21 Like, for example, the -- the -- the
22 individual can't, you know, possess firearms.
23 If -- so long as that is carried forward, and
24 if he overturned the conviction, it would not,
25 is that enough to block the subsequent 1983

1 action?

2 MS. HO: So, Mr. Chief Justice, in --
3 in our case, Mr. Olivier is not seeking any
4 relief from any attendant aspect of -- of his
5 sentence. I believe, in the -- in the Wooley
6 versus Maynard case, driving -- driving --
7 driving privileges were at issue there, and
8 nothing about the prospective relief in that
9 case did anything to look back and operate on
10 the sentence. So -- so --

11 CHIEF JUSTICE ROBERTS: Well, what
12 relief --

13 MS. HO: -- all of that would be
14 intact.

15 CHIEF JUSTICE ROBERTS: -- what relief
16 would he get under 1983 from any of those other
17 types of -- of burdens? Nothing?

18 MS. HO: He would -- he would -- he
19 would not, no.

20 JUSTICE JACKSON: But what about the
21 probationary period condition? Isn't there a
22 little quirk in this case? My understanding is
23 that his prior sentence carried with it
24 conditional terms that would be eliminated if
25 he won this lawsuit, right?

1 MS. HO: So, as an initial matter,
2 Justice Jackson, this -- this is an argument
3 that appeared for the first time --

4 JUSTICE JACKSON: Mm.

5 MS. HO: -- in the red brief, so --
6 and it did not -- it was not made below. So,
7 in our -- our -- our -- our position, it's
8 doubly forfeited. But -- but, to answer your
9 question, by the time the district court in our
10 case issued the order, the -- the terms of the
11 probation, if you will, on which we're simply
12 not to violate the law again, had already --
13 had already passed I think it was maybe two or
14 three months --

15 JUSTICE JACKSON: Yeah.

16 MS. HO: -- before the district
17 court's order.

18 JUSTICE JACKSON: But I guess I --

19 MS. HO: So, even if not forfeited,
20 that -- that provision -- and -- and,
21 importantly, Mr. Olivier did not seek to
22 challenge any aspect of his probation.

23 JUSTICE JACKSON: Yes. Can -- can --

24 MS. HO: And he couldn't have done so
25 by the time --

1 JUSTICE JACKSON: -- can I give you --

2 MS. HO: Pardon me, Your Honor.

3 JUSTICE JACKSON: -- a hypothetical,
4 though? If -- let's just posit for a second
5 that he was still under those terms of release,
6 that he -- what was it -- his -- his one-year
7 sentence for the past violation was suspended
8 on the condition that he not violate the
9 ordinance for a year. He then brings his 1983
10 lawsuit.

11 And I guess I'm just trying to
12 understand, under those circumstances, which I
13 admit are unusual, would it really be fair to
14 say that he's seeking only prospective relief
15 with respect to the 1983 lawsuit if it would
16 have the practical effect of suspending or
17 terminating the past conditions?

18 MS. HO: So our position would be it
19 would not have that effect --

20 JUSTICE JACKSON: Mm-hmm.

21 MS. HO: -- because Mr. Olivier did
22 not seek to undo any aspect of his prior
23 conviction, including the -- the probation.

24 JUSTICE JACKSON: Mm-hmm.

25 MS. HO: So nothing about the

1 injunction or the declaration that he sought
2 would preclude enforcement of the probation.
3 He didn't challenge his probation. And because
4 he had already served it by the time the
5 district court ruled --

6 JUSTICE GORSUCH: Well, Ms. Ho, I
7 think --

8 MS. HO: -- he couldn't have
9 challenged it if he wanted --

10 JUSTICE GORSUCH: -- I -- I think
11 you're fighting the hypothetical a little -- a
12 little bit, and -- and I'd like to just pursue
13 it a little bit further.

14 So let's say he is on probation and
15 the probation is you cannot violate this law
16 again, and then he brings an injunctive action
17 under 1983 to say you cannot enforce this law
18 to me.

19 Wouldn't that necessarily imply and,
20 in fact, preclude the court -- courts and law
21 enforcement agencies from enforcing that law
22 again to him during the course of this court
23 probation?

24 MS. HO: No, Your Honor, I don't think
25 it would -- it would not prohibit law

1 enforcement from seeking to enforce the terms
2 of the -- of the probation.

3 JUSTICE GORSUCH: The probation being
4 don't violate this law again, the same law that
5 he's bringing 1983 to say cannot be enforced?

6 MS. HO: That's -- that's -- that's --
7 that's correct, Your Honor.

8 JUSTICE GORSUCH: Even that you would
9 say would be permissible and not problematical
10 under Heck?

11 MS. HO: I -- I don't -- I -- I don't
12 think it's problematic under Heck for the --

13 JUSTICE GORSUCH: Well, let's -- let's
14 say I disagree with you on that.

15 MS. HO: All right.

16 JUSTICE GORSUCH: Okay? What do we do
17 with the fact that in this case, while the
18 probation did expire before the summary
19 judgment ruling, it was in place at the time he
20 filed his lawsuit. And should we be assessing
21 Heck problems?

22 Assume I think there is one in the
23 hypothetical Justice Jackson gave you. Should
24 we be assessing Heck problems at the time of
25 summary judgment, at the time it reaches this

1 Court, or at the time of the filing of the
2 lawsuit?

3 MS. HO: I think, in -- in this case,
4 the time -- certainly, the time to assess it is
5 by the time the district court had issued --
6 issued its -- its order.

7 I think my friend's argument on the
8 other side, in asking for a time-of-filing
9 rule, mistakes Heck, which is about when you
10 have a cause of action for a jurisdictional
11 rule. And, of course, under Article III --

12 JUSTICE GORSUCH: So you wouldn't have
13 a cause of action under Heck at the time you
14 filed, but it does spring into action and there
15 is a cause of action by the time of summary
16 judgment, is that -- is that it?

17 MS. HO: And I -- in terms of when --
18 in terms of when I think you would -- you would
19 assess when Heck applies or not, I think that's
20 when -- that's when -- and I think we know that
21 in part, Your Honor, from -- from Wallace
22 versus Kato, where Justice Scalia suggested
23 that under the unusual facts of that case, the
24 prop -- one proper thing to do would be to stay
25 the action until future action were taken.

1 JUSTICE GORSUCH: Okay.

2 MS. HO: If it -- if it were a
3 time-of-filing rule, Justice Scalia could not
4 have made that suggestion in that case.

5 JUSTICE GORSUCH: And then -- and then
6 what do we do with the fact that your client
7 sought damages, compensatory damages?

8 Now I understand he has forsworn those
9 before us, but in his complaint, he did seek
10 compensatory damages, which is
11 backward-looking.

12 MS. HO: A couple of responses to
13 that, Your Honor.

14 I think, as an initial matter, just to
15 be clear on the record, he -- he abandoned the
16 damages claim in -- in the Fifth Circuit on --
17 on appeal. Even if he -- even if he had not,
18 this Court takes a claim-by-claim approach to
19 assess --

20 JUSTICE GORSUCH: Well, it's the same
21 claim. It's just a different form of relief.
22 It's still a 1983 claim, but it's just a
23 different remedy.

24 MS. HO: Yes. And let me -- thank
25 you. Let me be clearer, Justice Gorsuch.

1 This Court goes claim by claim or
2 relief by relief, and it assesses -- it
3 assesses those --

4 JUSTICE GORSUCH: All right. Last --

5 MS. HO: -- differently, right --

6 JUSTICE GORSUCH: -- last --

7 MS. HO: -- so that -- so that in --
8 in *Balisok*, for example, Justice Scalia --
9 you -- he -- he barred one of the claims that
10 was backward-looking but remanded so that the
11 purely prospective injunctive relief claim
12 could go forward.

13 JUSTICE GORSUCH: Last -- last
14 question, then I'll leave you alone, I promise.

15 In a win here, what if it had some
16 collateral consequences, issue preclusion
17 consequences, such that it would preclude, for
18 example, the state from seeking collateral
19 consequences for his conviction? I don't know
20 what they might be in this case, but let's say
21 there were some, you know, barring him from
22 owning a gun or whatever it might be.

23 And your victory here would seem to
24 preclude them from doing that, you know, on
25 issue preclusion if you were to win. What do

1 we do about that?

2 MS. HO: I think Justice Scalia
3 anticipated just that question in Heck, Justice
4 Gorsuch, when he made clear that the federal
5 1983 judgment would not -- to quote Justice
6 Scalia, would not automatically or even
7 permissibly preclude the state. That would be
8 another -- another inquiry, and there might be
9 various grounds that a state, applying federal
10 issue preclusion rules, as the state court
11 would do, that -- that a state could -- so that
12 preclusion would not inevitably apply in that
13 case.

14 JUSTICE ALITO: Let me pick up on
15 that. In order for you to win, would it not be
16 necessary for us to backtrack on a number of
17 things that the Court said in -- in Heck?

18 The Court said that the district court
19 must consider whether a judgment in favor of
20 the plaintiff would necessarily imply the
21 invalidity of his conviction or sentence. If
22 it would, the complaint must be dismissed
23 unless the plaintiff can demonstrate that the
24 conviction or -- or sentence has already been
25 invalidated.

1 Now isn't -- is your position
2 consistent with that?

3 MS. HO: Absolutely, Justice Alito.
4 In fact, we -- we -- we -- we think that --
5 that this case comes within the four corners --

6 JUSTICE ALITO: How can that be -- how
7 can it be consistent with that if -- if someone
8 is convicted under a statute and then brings a
9 1983 claim for prospective relief seeking to
10 have that statute declared unconstitutional? A
11 ruling in that plaintiff's favor in the 1983
12 action certainly implies the invalidity of the
13 prior conviction, does it not?

14 MS. HO: Your Honor, we don't -- we
15 don't think so, and let me -- let me offer two
16 reasons why -- why not. And let me begin, as
17 Your Honor did, with Heck itself.

18 After setting out the "necessarily
19 implies" test on page 487, on page 488, Justice
20 Scalia rejected a broader rule which would bar
21 Section 1983 suits when they would resolve a
22 necessary element to a likely challenge to a
23 conviction even if the Section 1983 court need
24 not determine that the conviction is invalid.

25 JUSTICE ALITO: Well, let me make --

1 MS. HO: And the element here is the
2 law's unconstitutionality. And that's all that
3 Section 1983 should resolve.

4 JUSTICE ALITO: Let me make it more
5 concrete to pick up on the -- the situation
6 that Justice Gorsuch was positing. Let's say
7 that a defendant is convicted for -- a
8 defendant who has a prior conviction for a
9 non-violent offense is convicted for possession
10 of a firearm by a convicted felon.

11 And let's suppose that that individual
12 then brings a 1983 claim seeking to have the
13 statute declared in -- unconstitutional insofar
14 as it applies to someone like him with a prior
15 conviction for a non-violent felony.

16 Would that not -- and let's suppose he
17 wins on that, and then he is -- meanwhile, he's
18 charged once again with possession of a
19 felon -- of a firearm by a convicted felon.

20 Doesn't that invalid -- doesn't that
21 invalidate that prosecution?

22 MS. HO: No, Your Honor, because I
23 think the key is what is the relief that the
24 individual is seeking. So, if you're -- if
25 you're seeking prospective relief that you

1 cannot be prosecuted under a law going forward,
2 that -- that is a set of facts in the future.

3 What Heck protects is anything looking
4 back to the set of facts in the past, and it
5 protects that conviction. It protects
6 individual convictions, not the criminal law in
7 the abstract, Your Honor.

8 JUSTICE ALITO: On your -- on your --
9 your Question 2, Footnote 10 of Heck says: The
10 principle barring collateral attacks, a
11 longstanding and deeply rooted feature of both
12 the common law and our own jurisprudence, is
13 not rendered inapplicable by the fortuity that
14 a convicted criminal is no longer incarcerated.

15 So we would have to abandon that,
16 would we not, in order to rule in your favor on
17 Question 2?

18 MS. HO: I don't believe so. If -- if
19 the Court did -- did need to reach Question 2,
20 which we don't believe it does, I think this
21 Court, in -- in another footnote in Muhammad
22 versus Close, indicated that that issue was
23 still open. So we believe that issue remains
24 open for this Court to resolve.

25 CHIEF JUSTICE ROBERTS: Counsel, this

1 may be just repeating prior questions and, if
2 so, just repeat your answer.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: But what about
5 a requirement that the individual show up for
6 probation meetings? Every two weeks, you've
7 got to show up so we make sure that, you know,
8 whatever. Would he still have to do that after
9 the law on which that is based has been
10 declared unconstitutional?

11 MS. HO: Absolutely, Your Honor,
12 because, again, the -- the only effect that the
13 federal judgment has is forward-looking. It is
14 prospective relief. It prohibits the
15 enforcement of the ordinance against him on a
16 forward-looking basis. It does not reach back
17 and affect on a backward-looking basis.

18 CHIEF JUSTICE ROBERTS: Well, isn't
19 the requirement of probation just doing that,
20 just continuing the consequences that were
21 imposed from his prior conviction?

22 MS. HO: Perhaps, Your Honor, but,
23 again, Mr. Olivier is not challenging any
24 aspect of that aspect of -- of -- of his
25 probation, which, as -- as a record matter, had

1 already passed by the time the district judge
2 ruled --

3 CHIEF JUSTICE ROBERTS: Well, yeah, I
4 understand that.

5 MS. HO: -- ruled in his favor. But,
6 again -- again, in -- in a situation like ours,
7 we -- Mr. Olivier has not and could not
8 challenge any attendant effects of his
9 conviction, just like in -- in Wooley v.
10 Maynard, the Maynards' driving privilege --
11 they had -- they had lost some driving
12 privileges, and those were not affected by the
13 forward-looking relief in that case that simply
14 said you cannot enforce this injunction -- this
15 law on a forward-looking basis to these
16 individuals.

17 JUSTICE BARRETT: Ms. Ho, what would
18 happen if someone else challenged this law on a
19 prospective basis and won and, as the Chief is
20 positing, Mr. Olivier has this obligation to
21 continue checking in on probation?

22 MS. HO: So, Justice Barrett, we -- we
23 think that hypothetical actually underscores
24 the perversity or the non --

25 JUSTICE BARRETT: What's the one Judge

1 Oldham said in his opinion?

2 MS. HO: It makes nonsense, right --

3 JUSTICE BARRETT: Yeah. I mean, I
4 think it's --

5 MS. HO: -- that -- that Judge Oldham
6 highlighted --

7 JUSTICE BARRETT: Yeah.

8 MS. HO: -- is that -- that -- that
9 ruling would, I guess, you know, under --
10 undermine the legal reasoning of Mr. Olivier's
11 sentence, as Justice Alito and I were -- were
12 talking about. It would do the same thing, no
13 different, and yet we would not -- we would
14 certainly not say --

15 JUSTICE BARRETT: Would there be some
16 separate step then that someone like
17 Mr. Olivier might take to try to relieve
18 himself of some sort of ongoing collateral
19 consequence --

20 MS. HO: Oh.

21 JUSTICE BARRETT: -- or probationary
22 period?

23 MS. HO: Yes, Justice Barrett,
24 there -- there would be a whole series of steps
25 that someone in Mr. Olivier's position would

1 have to take. And to -- to borrow from this
2 Court's language in Skinner, it is -- it is
3 hardly inevitable that he would obtain any
4 relief down the road at the end of the day.
5 But that -- that would be a multiple-step
6 additional process that Mr. Olivier or someone
7 in his position would have to undergo.

8 JUSTICE BARRETT: And that is so
9 whether he won the prospective -- his -- his
10 quest for prospective relief or whether someone
11 else did on the same -- on the same argument
12 that the law was unconstitutional?

13 MS. HO: Yes, because, of course,
14 any -- any -- any judgment as to another --
15 another plaintiff would not -- would not apply
16 to Mr. Olivier. He would still, I think, as
17 this Court underscored most recently in CASA,
18 he -- he would have to seek his own relief.

19 JUSTICE BARRETT: But, I mean, he
20 would -- I guess what I'm saying is that the
21 process -- are you saying that the process
22 would be the same for him whether he was the
23 one who was victorious in the suit or whether a
24 third party was the one who was victorious in
25 the suit?

1 MS. HO: There might be some slight
2 differences in -- in terms of -- of state
3 procedure down the line, so I -- I don't want
4 to give a categorical, but, essentially, for
5 all the ways that matter in this case, yes, it
6 would be.

7 CHIEF JUSTICE ROBERTS: Thank --

8 MS. HO: And I see my time -- thank
9 you.

10 CHIEF JUSTICE ROBERTS: Yeah. Thank
11 you.

12 Justice Thomas?

13 JUSTICE THOMAS: Ms. Ho, would a
14 victory by a third person who was never
15 convicted under this ordinance in a 1983
16 action, would it impugn the reasoning
17 underlying the conviction of Petitioner?

18 MS. HO: Yes, absolutely, Your Honor.
19 And -- and that's --

20 JUSTICE THOMAS: Would it impugn it
21 any differently than if Petitioner brought the
22 1983 action?

23 MS. HO: No, Your Honor.

24 JUSTICE THOMAS: Would it undo the
25 conviction or the confinement of Petitioner?

1 MS. HO: No.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: If I think that your
4 blanket argument that Heck doesn't apply to
5 prospective relief under any circumstances goes
6 too far, what would you propose as a backup
7 argument that would result in a decision in
8 your favor?

9 MS. HO: So I think --

10 JUSTICE ALITO: Do you have a more
11 qualified argument?

12 MS. HO: Sure. I think you could --
13 we could -- we could rely on -- on -- on Heck
14 itself and say that prospect -- prospective
15 relief, where no element of a Section 1983
16 claim, no element of the federal 1983 claim
17 requires the Petitioner to prove the invalidity
18 of the prior conviction, no element of the
19 claim would do that, I think that would be
20 another way, Your Honor, consistent with Heck,
21 to further limit prospective relief.

22 JUSTICE ALITO: I'm not sure I
23 understand that. If the -- if the -- the
24 plaintiff in the 1983 case has been convicted
25 of violating a statute and the statute is

1 declared in the 1983 --

2 MS. HO: Oh.

3 JUSTICE ALITO: -- case to be
4 unconstitutional --

5 MS. HO: I see -- I see -- I see --

6 JUSTICE ALITO: -- why doesn't that
7 undermine the --

8 MS. HO: I understand Your Honor's
9 question. I was -- I was take -- I was taking
10 it more as just a general -- a general rule
11 regardless of -- of the circumstances.

12 I -- I think perhaps one line -- and
13 my friend can perhaps say more about this
14 theory. I think the Solicitor General's office
15 has suggested one line you might draw would be
16 in terms of custody, that if -- if, as
17 Mr. Olivier -- if the -- if the defend --
18 former criminal defendant is not in custody,
19 there would be no barrier. If the defendant
20 were in custody, then that would be a -- a
21 different world. So I -- I think that would be
22 another line that this Court could draw.

23 JUSTICE ALITO: Okay. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

1 JUSTICE SOTOMAYOR: That doesn't seem
2 consistent with Edwards, where --

3 MS. HO: I think there --

4 JUSTICE SOTOMAYOR: -- the prisoner
5 was in custody and --

6 MS. HO: I think there --

7 JUSTICE SOTOMAYOR: -- where we
8 said --

9 MS. HO: I think there would
10 definitely be -- there would definitely be some
11 tension there, Justice Sotomayor.

12 JUSTICE SOTOMAYOR: A lot of tension.

13 MS. HO: I don't -- I don't -- I don't
14 deny that.

15 JUSTICE SOTOMAYOR: I want to go -- I
16 want to understand your argument or at least
17 simplify it in my own mind as I have, okay?
18 Heck itself, and you have to put it in context,
19 was a malicious prosecution claim, and you
20 said, to prove that element, you had to prove
21 that the prosecution itself had been malicious.

22 And the Court there said the cause of
23 action is the prior conviction, and so you
24 can't bring this by 1983, correct?

25 MS. HO: Yes, Your Honor.

1 JUSTICE SOTOMAYOR: Yes, it's bringing
2 into --

3 MS. HO: Because one -- one of the
4 elements, right, would require favorable
5 termination of the prior conviction, yes.

6 JUSTICE SOTOMAYOR: Exactly. And the
7 same thing with Edwards. If he won alleging
8 defects in his disciplinary proceedings, that
9 would undo his -- the good time credit that was
10 revoked. So one of the elements was to prove
11 that that revocation was necessary, correct?

12 MS. HO: Correct.

13 JUSTICE SOTOMAYOR: What you're
14 saying, I believe, is, if the claim does not
15 rely on any facts of the prior conviction or
16 anything involving the prior conviction or its
17 proceedings, then it's purely prospective, and
18 that the prisoner should be permitted -- that
19 the defendant should be permitted to bring?

20 MS. HO: Yes. Thank you, Your Honor.
21 Yes. You -- thank you.

22 JUSTICE SOTOMAYOR: It's almost as --
23 it's almost as simple as that. I think where
24 my -- where some of my colleagues may be hung
25 up, and I was actually too when I read the Heck

1 language, is the Heck language is very broad.
2 It basically says, if it calls into question
3 language, by definition, a win by you or a win
4 by a third party would call the prior
5 convictions into question.

6 And so that line is not very -- by you
7 parroting or trying to deny that line doesn't
8 help. It does call it into question. It will
9 be used by you and others to try to go back in
10 other proceedings and get those expunged or
11 otherwise set aside. You may or may not win,
12 but it will call it into question.

13 So I guess what Justice Alito started
14 with was saying to you, do we have to disavow
15 Heck? And so I want to narrow this, the
16 question, to say does a ruling according to the
17 line we just spoke about earlier, which is
18 prospective relief that doesn't on its own rely
19 on the prior conviction or undoing the prior
20 conviction, does it directly call it into
21 question?

22 MS. HO: No, it doesn't. And I think
23 you can't construe "necessarily implies" in
24 isolation. I think the surest guide for what
25 "necessarily implies the invalidity of a prior

1 conviction" means is to look at how this Court
2 has applied it in case after case.

3 And this Court has only held a claim
4 or relief Heck-barred in -- there's two
5 buckets. The first bucket are claims where the
6 federal relief would result in immediate or
7 faster release from confinement. The second
8 bucket is -- is damages resulting from past
9 confinement. Those are the only two buckets of
10 claims where this has applied Heck.

11 And I think, when you look at how this
12 Court has applied the necessary implied
13 languages, and I think it's significant that
14 Justice Scalia was -- who -- who authored Heck,
15 was -- was in the majority in all of this
16 Court's Heck cases while he was on the Court.
17 So I think that has a particular pedigree in
18 terms of how this Court has approached it. And
19 so just as -- Mr. Olivier's claims for wholly
20 prospective relief clearly don't fall into
21 either bucket of cases for relief where this
22 Court has applied Heck.

23 So, in --

24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 MS. HO: -- in our view, what we are
2 saying is perfectly -- perfectly consistent
3 with the language of Heck as this Court has
4 applied it in case after case.

5 CHIEF JUSTICE ROBERTS: Thank you.
6 Justice Kagan?

7 JUSTICE KAGAN: I hate to beat a dead
8 horse here, but, I mean, I understand that we
9 haven't applied Heck to this case yet. I mean,
10 it doesn't fall into one of these buckets. But
11 I think that the questions really just do go to
12 the Heck language and the Heck rule.

13 And I -- I -- I -- I guess I'm -- I'm
14 just having a little trouble understanding how
15 it is that we wouldn't have to say, I'm sorry,
16 we just got it wrong when we wrote this broadly
17 because the language says what it says.

18 I mean, "necessarily implied the
19 invalidity of a conviction," if you go ahead
20 with your suit and you win and you have the
21 statute declared facially unconstitutional,
22 what follows from that logically is that the
23 past conviction was infirm, the past conviction
24 was invalid, and whether or not you're looking
25 to change that conviction in any way, you have

1 just demonstrated the invalidity of your
2 conviction.

3 So, if we take Heck for all it's
4 worth, I think your -- your -- you can't win.
5 I think that you have to be saying you just
6 can't take that language to mean what it means.

7 MS. HO: Respectfully, Justice Kagan,
8 I -- I -- I don't -- I don't believe that's
9 true because, again, if you look at how the
10 Court has applied the "necessary implication"
11 test in case after case, it has -- it has
12 made -- it has made clear --

13 JUSTICE KAGAN: No, I get that we
14 haven't applied it to a case like this --

15 MS. HO: No, but I think if you --

16 JUSTICE KAGAN: -- because we haven't
17 had the opportunity to talk about how it
18 applies to a case like this. But, again, the
19 language just read to mean what it means puts
20 you out of court.

21 MS. HO: I disagree. I disagree
22 because I think you can't -- necessarily
23 implies the invalidity of the conviction.
24 Nothing in wholly forward-looking relief,
25 prospective relief. An injunction that the

1 city cannot apply this ordinance to
2 Mr. Olivier. Nothing about that requires
3 Mr. Olivier to prove anything contrary to his
4 conviction, as in Heck. Nothing about that
5 claim is backward-looking. It is based on a
6 different set of facts.

7 So I think, if you look at how the
8 "necessary implies" language was applied in
9 Heck itself and all of the places in Heck where
10 Justice Scalia took time to say: Look, we
11 are -- we are not adopting a broad rule that we
12 were asked to, where, if -- if you -- if -- if
13 there's an element, right, if there's an
14 element involved --

15 JUSTICE KAGAN: I mean, I don't know
16 about that.

17 MS. HO: -- and I would say the
18 element here --

19 JUSTICE KAGAN: I think that this was
20 meant to be a pretty broad rule. You know,
21 Justice Scalia has a very long footnote where
22 he engages with Justice Souter, who had --

23 MS. HO: Yes.

24 JUSTICE KAGAN: -- you know, said that
25 his analysis of malicious prosecution claims

1 were wrong, right, and then he ends this
2 footnote and he says "Well, let's suppose
3 Justice Souter is right. It would simply
4 demonstrate that no common law action, not even
5 malicious prosecution, would permit a criminal
6 proceeding to be impugned in a tort action even
7 after the conviction had been reversed. That
8 would strengthen our belief that 1983, which
9 borrow general tort principles, was not meant
10 to permit such collateral attack."

11 And, I -- I -- I mean, I think that's
12 a pretty sweeping statement. It's just like
13 1983, you can't use it in any way to undermine
14 or suggest the invalidity of a -- a -- a prior
15 conviction. Malicious prosecution, not
16 malicious prosecution, it just can't be used
17 that way.

18 And I appreciate that you're not
19 asking anything to happen to that prior
20 conviction, but just by the nature of your
21 suit, if you win, you will have proved that
22 that prior conviction was wrongful.

23 MS. HO: I think what I would say to
24 that, Justice Kennedy -- let me try -- let me
25 try it again this way.

1 If you take a step back and think
2 about what -- what is the point, what is the
3 purpose of the "necessary implies" test, it is
4 to protect the core of habeas. That is the
5 point of the test.

6 And in case after case, this Court did
7 that. The two buckets of relief, relief that
8 would shorten or get you out of jail
9 immediately or damages flowing from -- from
10 that confinement.

11 This Court has let all manner of other
12 claims that some could be said in a very
13 technical sense to necessarily imply the
14 invalidity of a conviction, has allowed those
15 claims to go forward.

16 And Justice Scalia in his concurrence
17 in Dotson was as concerned about sort of
18 bloating habeas law, right, by letting the Heck
19 bar apply too strenuously. He was as much
20 concerned about not bloating habeas as Justice
21 O'Connor was in Skinner about protecting the
22 core of Section 1983 so that when this Court in
23 Nelson said: Look, if you apply -- give Heck
24 too broad, you're going to keep the heartland
25 of Section 1983 claims, which is this claim,

1 right? It is a forward-looking -- it is a
2 pre-enforcement challenge to -- to a -- a city
3 ordinance. That is as -- that is as textbook
4 Section 1983 as you get.

5 JUSTICE KAGAN: Thank you.

6 MS. HO: So what -- thank you, Your
7 Honor.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: Do you want to say
12 anything about Judge Richman's comments about
13 preclusion, a different preclusion issue than
14 the one that you've discussed earlier, which is
15 the preclusion that stems from the criminal
16 proceeding that may hamper, if not defeat, an
17 attempt to use 1983 in a case like this?

18 Do you want to say anything about
19 that?

20 MS. HO: Certainly. Thank you,
21 Justice Kavanaugh. I think the first thing I
22 would say, as -- as Judge Richman recognized by
23 joining the dissenters who believed
24 Mr. Olivier's suit should go forward, that is a
25 matter for the courts to consider on -- on

1 remand.

2 With respect to Mississippi law in
3 particular, Mississippi law does not
4 preclude -- does not apply issue preclusion to
5 constitutional claims. At JA 46, State versus
6 Smith is cited there. But that's -- that's --
7 Mississippi law would not -- would not apply
8 preclusion --

9 JUSTICE KAVANAUGH: But, in any event,
10 it's something for remand?

11 MS. HO: That's correct, Your Honor.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Can I just ask you
17 to speak quickly to QP 2? I mean, I guess I'm
18 wondering how your embrace of Justice Scalia's
19 vision related to the elements and that's how
20 we think about QP 1. How is that consistent
21 with your position on QP 2 that somehow the
22 conviction matters?

23 Justice Scalia says in his footnote in
24 Heck that it shouldn't matter whether -- not --
25 sorry, the -- the incarceration, excuse me,

1 matters.

2 MS. HO: Yes, yes.

3 JUSTICE JACKSON: That the person is
4 still in -- in custody.

5 MS. HO: Yes. And I think the
6 distinction there, Justice Jackson, is between
7 somebody who -- who was in custody and no
8 longer is.

9 Our argument in QP 2 is that in our
10 situation, where Mr. Olivier was never in
11 custody, there is no justification for applying
12 Heck's sort of attempt to harmonize the broad
13 text of Section 1983 as a general matter and
14 then the specific text of habeas.

15 JUSTICE JACKSON: With 2255. But I
16 thought -- I sort of felt like that was -- the
17 thrust of that was that Heck was about the
18 reconciliation of those two statutes.

19 MS. HO: Yes. And so, if you're
20 never -- if you're not in custody --

21 JUSTICE JACKSON: Yeah.

22 MS. HO: -- which is kind of the --
23 the -- the necessary predicate for habeas, if
24 you're not in custody, you've never had access
25 to habeas.

1 JUSTICE JACKSON: No, I understand.

2 MS. HO: It's not available to you.

3 JUSTICE JACKSON: But -- but -- but --
4 but I guess the opposite view is that if Heck
5 is really about the elements and it's really
6 about the fact that this is analogous to -- to
7 tort law, then the fact that you were never in
8 custody shouldn't matter.

9 I mean, that's what Justice Scalia
10 says in Heck. So it just seems like you're
11 taking two different positions or two different
12 views of what Heck is really about.

13 MS. HO: I think what -- I think what
14 we would say is, if -- if you -- if you don't
15 agree with us as to our top-line position in --
16 in QP 1, which I think --

17 JUSTICE JACKSON: Yes.

18 MS. HO: -- tracks the first thing of
19 what you said, then another -- another reason
20 why Mr. Olivier should not be Heck-barred is
21 because he was never --

22 JUSTICE JACKSON: In custody?

23 MS. HO: -- never in custody.

24 JUSTICE JACKSON: Okay. Thank you.

25 MS. HO: And so -- thank you, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. HO: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Robertson.

6 ORAL ARGUMENT OF ASHLEY ROBERTSON
7 FOR THE UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING VACATUR

9 MS. ROBERTSON: Mr. Chief Justice, and
10 may it please the Court:

11 This Court has long recognized Section
12 1983 as a vehicle for bringing pre-enforcement
13 challenges to state laws, and in Wooley, it
14 held that a prior conviction under the law does
15 not bar that relief.

16 This case involves a straightforward
17 application of that precedent. And, Justice
18 Alito, Justice Kagan, this Court can resolve
19 the case without backtracking from any of its
20 existing limits on Section 1983 suits.

21 There are two limits relevant here.
22 First, the Court has limited retrospective
23 challenges to a state conviction, sentence,
24 prosecution, or their effects, including suits
25 seeking damages for claims analogous to

1 malicious prosecution.

2 Second, the Court has recognized
3 additional limits for individuals in custody to
4 avoid a conflict with the federal habeas
5 statute. But a prospective suit from an
6 individual out of custody is cognizable, and
7 this Court should accordingly vacate and remand
8 on the first question presented without
9 reaching the second.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: If a third party
12 brought a 1983 action challenging this
13 ordinance and won prospective relief, what
14 would be the effect on the reasoning underlying
15 the enforcement of the ordinance against
16 Petitioner?

17 MS. ROBERTSON: We think that it would
18 imply that the ordinance was invalid in the
19 same way that this prospective suit if brought
20 by Petitioner would imply that his conviction
21 under that past statute was invalid. That's
22 why we don't understand this Court's
23 "necessarily implies" test to extend to
24 prospective suits brought by individuals
25 outside of custody.

1 Where we do understand the
2 "necessarily implies" test to apply are two
3 circumstances. The first is where an
4 individual is bringing a retrospective suit or
5 a suit for damages. In that context, the
6 context of Heck, this Court has considered
7 claims that would imply the invalidity of a
8 conviction to be analogous to malicious
9 prosecution and held they're -- held that
10 they're barred.

11 In addition, when an individual is in
12 custody, this Court has held that any relief
13 that would necessarily imply the invalidity of
14 a conviction is barred. And we would
15 understand that to include prospective suits.
16 Ordinarily, of course, as this Court said in
17 Edwards, prospective suits won't imply the
18 invalidity of the individual's conviction and,
19 therefore, his confinement, but where they do,
20 and we think a prospective facial challenge
21 would necessarily imply a legal infirmity in
22 the conviction, we would understand those suits
23 to be barred too.

24 But, when an individual is out of
25 custody and bringing that type of prospective

1 suit, that's just Wooley, and the Court has
2 made clear that those claims can go forward.

3 JUSTICE ALITO: What if a non-prisoner
4 seeks to compel testimony in a collateral
5 attack on his conviction, like a proceeding for
6 a writ of error coram nobis?

7 MS. ROBERTSON: So, if a non-prisoner
8 is bringing a sort of backwards-looking attack
9 on his conviction, we think that's barred by
10 the even more basic principle that federal
11 courts don't sit in review of state court
12 judgments absent express authority. The habeas
13 statute, of course, is one such express
14 authority, but it comes with a host of
15 procedural limitations that Section 1983 does
16 not.

17 So Section 1983, of course, can't be
18 used as a vehicle to try to invalidate a past
19 conviction or its effects, whether a person is
20 in or out of custody, but Section 1983 can be a
21 vehicle for prospectively challenging a law to
22 avoid future prosecution and the future effects
23 of that law.

24 JUSTICE JACKSON: I'm finding your
25 argument very confusing, and so maybe you can

1 help me. I mean, Justice Sotomayor had a very
2 kind of simple -- simpler way of thinking about
3 it. To the extent the person is bringing a
4 1983 lawsuit that includes an element that
5 would be shared or the element that involves
6 the past conviction, you can't do it. If he's
7 not doing that, then you can.

8 So how -- how does that differ from
9 the formulation that you are proposing?

10 MS. ROBERTSON: So I think our line is
11 similar with one caveat. So we generally agree
12 with that bright line between retrospective
13 attacks and prospective attacks. The caveat is
14 that for individuals in custody, we think the
15 Court has imposed additional limits to avoid a
16 conflict with the federal habeas statute.

17 So, if someone is in custody, we
18 understand the language in this Court's
19 opinions to suggest that they couldn't bring
20 even a prospective suit that would necessarily
21 imply the invalidity of their conviction, and a
22 facial challenge to their statute of conviction
23 would be that type of suit.

24 JUSTICE SOTOMAYOR: So a prisoner
25 whose religious rights are being violated, has

1 been disciplined for a violation of his or her
2 religious rights, can't come into court and say
3 this regulation is unconstitutional because it
4 will impinge on religious rights, I want you
5 prospectively to enjoin this regulation? A
6 prisoner can't do that?

7 MS. ROBERTSON: I think the question
8 there would be has he been disciplined and
9 suffered a loss of good time credits such that
10 the --

11 JUSTICE SOTOMAYOR: Let's assume that.
12 Assume it.

13 MS. ROBERTSON: If he -- if he has,
14 then, yes, we do understand --

15 JUSTICE SOTOMAYOR: What -- what sense
16 does that make truly?

17 MS. ROBERTSON: So --

18 JUSTICE JACKSON: And what difference
19 does it make? I mean, what if he says: I
20 don't -- I'm not challenging or I don't really
21 care about what has happened to me in the past;
22 I'm saying, from this point forward, this is
23 unconstitutional and please do not allow it to
24 happen to me again?

25 MS. ROBERTSON: So, at the outset,

1 I'll say, of course, the Court doesn't need to
2 resolve this question because the Petitioner
3 here is out of custody, but the sense that we
4 think that this line makes is that the Court
5 has been very concerned about allowing an end
6 run around the fade -- federal habeas statute.
7 And, of course, anything that might imply that
8 the deprivation of good --

9 JUSTICE SOTOMAYOR: So why did we do
10 Edwards, which was written by Justice Scalia?
11 Edwards was a disciplinary hearing with a loss
12 of good time credit, and Justice Scalia
13 dismissed all of the retrospective claims,
14 money damages, declaratory judgment, but he
15 permitted the prospective challenge of whether
16 the disciplinary proceedings procedures were
17 unconstitutional. He remanded it to see if
18 they could move forward.

19 MS. ROBERTSON: That --

20 JUSTICE SOTOMAYOR: And he said
21 there's a difference between retrospective
22 relief and prospective relief.

23 MS. ROBERTSON: That's right. And I
24 want to be clear that a prospective challenge
25 ordinarily will not necessarily imply the

1 invalidity of a past deprivation of good time
2 credits.

3 JUSTICE SOTOMAYOR: But your argument
4 today would have made Edwards dismiss the whole
5 case, not part of it.

6 MS. ROBERTSON: I don't think so
7 because I think the Court was clear that a
8 prospective challenge to the
9 unconstitutionality of procedures won't
10 necessarily imply the invalidity of past
11 deprivations of good time credits.

12 There's a difference there between a
13 procedural prospect -- a challenge to
14 procedures prospectively, which we absolutely
15 agree under Edwards can go forward, and the
16 rare case where a prospective challenge would
17 necessarily imply the invalidity of the
18 conviction. But a facial challenge to the
19 constitutionality of the rule that the
20 individual in custody violated might be that
21 type of prospective suit, so --

22 JUSTICE SOTOMAYOR: That's exactly
23 what this case is about.

24 MS. ROBERTSON: Right. So, for us --
25 for us, it is -- it is critical that the

1 individual is out of custody and --

2 JUSTICE SOTOMAYOR: But I'm saying to
3 you I don't think it should make a difference
4 whether he or she is in custody. And I don't
5 see that our cases have ever -- whether it's
6 Edwards or Wilkinson or any other has focused
7 in on that as the exclusive remedy.

8 MS. ROBERTSON: I think, if -- if --

9 JUSTICE SOTOMAYOR: As the exclusive
10 situation.

11 MS. ROBERTSON: -- if you think that
12 the -- that a prospective suit could proceed in
13 or out of custody, that makes this case all the
14 easier. And, of course, the Court doesn't need
15 to address whether someone in custody --

16 JUSTICE SOTOMAYOR: All right.

17 MS. ROBERTSON: -- can bring this type
18 of suit. We're just trying to reserve the
19 question because we do think it would implicate
20 different and more difficult questions.

21 JUSTICE GORSUCH: With respect to
22 just --

23 JUSTICE ALITO: Well, it make the --
24 it might make the case all the easier, but it
25 would be quite radical to say that someone who

1 is in custody -- would it not -- someone who is
2 in custody for violating a statute can, while
3 in custody, bring a 1983 action to challenge
4 the constitutionality of the statute under
5 which the person is serving a sentence?

6 MS. ROBERTSON: That -- that's right,
7 and that's why we're trying to hold the line
8 and at least have the Court reserve the
9 question.

10 JUSTICE SOTOMAYOR: Well, they have to
11 have credible fear of -- of prosecution, and if
12 they're in custody for that crime, they're not
13 going to be committing it again.

14 MS. ROBERTSON: So, certainly, we
15 think there would be --

16 JUSTICE SOTOMAYOR: At least not
17 immediately.

18 MS. ROBERTSON: So, certainly, we
19 think there will often be Article III
20 constraints. Of course, we understand an
21 individual to be on custody once they --
22 they're on supervised release, probation,
23 parole. And so there -- there may be instances
24 where someone --

25 JUSTICE ALITO: Well, why would

1 someone who is in custody have to show a -- in
2 order to have standing, to show the likelihood
3 of being prosecuted again under that statute?
4 The person is already serving time, already is
5 having his liberty -- anyway --

6 MS. ROBERTSON: I think it would -- I
7 would like to just say -- say for a minute why
8 we think it makes sense to draw this in
9 custody/out of custody distinction for these
10 prospective challenges, because we do think it
11 is about a concern about an end run around the
12 habeas statute in two respects.

13 The first is I think this Court has
14 expressed a concern that if an individual in
15 custody obtains a judgment from a federal
16 court -- can I finish, thank you -- from a
17 federal court that necessarily implies the
18 invalidity of his conviction and thus his
19 confinement, he may be able to take that
20 judgment and use it to spring his release.
21 That would certainly be the case. If the
22 judgment came from this Court, then he would be
23 able to seek habeas release regardless of where
24 he was in the habeas process.

25 At minimum, it would create an acute

1 tension between a federal court judgment that
2 demonstrates the unlawfulness of his
3 confinement at the same time that he has a
4 state judgment, his conviction, which would say
5 he can be lawfully held.

6 I think this Court's Section 1983
7 jurisprudence is designed to avoid that
8 tension, but, importantly, none of that tension
9 exists when the individual is out of custody,
10 as this Court in Wooley recognized, because
11 he's already released. He can't take that
12 judgment and use it to do anything to affect
13 his confinement.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: If we were -- if you
19 were writing the opinion, could you just give
20 me in a couple of sentences what you think the
21 rule should be, a summary of what you think the
22 rule should be?

23 MS. ROBERTSON: We think the Court
24 should limit its decision to prospective suits
25 from individuals out of custody, identify this

1 as a straightforward application of Wooley, and
2 that should really be it. It can make clear
3 that its decision does not address any
4 retrospective suits, including suits for
5 damages. That's the second question presented,
6 where we're with the city. And it can also
7 make clear that its decision does not speak to
8 the relief available to individuals in custody,
9 where there's a greater potential for conflict
10 with the federal habeas statute.

11 JUSTICE ALITO: Okay. That's pretty
12 complicated, but thank you.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

16 JUSTICE SOTOMAYOR: No.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?

19 JUSTICE GORSUCH: Maybe one further
20 adornment to your -- your two-line, maybe
21 five-line rule. How about parole?

22 MS. ROBERTSON: If an individual is on
23 parole, we do understand that person to be in
24 custody, and, therefore, we would have a
25 different -- a different -- we would reach a

1 different result if they tried to bring that
2 prospective challenge.

3 JUSTICE GORSUCH: And that's because,
4 again, habeas would be the appropriate relief
5 in those circumstances too?

6 MS. ROBERTSON: Exactly. We think,
7 when a person's in custody, the appropriate
8 vehicle for testing the constitutionality of
9 their statute of conviction is habeas.

10 JUSTICE GORSUCH: Okay. And I just
11 want to ask you a question about, as Justice
12 Kagan points out, Heck has some very broad and
13 pretty unqualified language. And you've --
14 you've got a footnote -- oh, my goodness,
15 Footnote 4 in your brief, in -- in which you
16 point out that the Petitioner here has
17 disclaimed any interest in using this judgment
18 to expunge his record.

19 What -- what if -- what if that
20 weren't the case? What if the Petitioner
21 avowedly brought the suit as -- as a step
22 toward expunging his record? Would that offend
23 habeas? Would that pose a problem?

24 MS. ROBERTSON: I don't think so if
25 the individual is out of custody because, at

1 that point, the avail -- the -- as long as he's
2 not asking the federal court, of course, to
3 directly nullify the effects.

4 So, if he says, I want a declaratory
5 judgment because I'm suffering collateral
6 consequences from this conviction and I want
7 the court to invalidate the conviction so that
8 I don't suffer those collateral effects, then
9 we do think that that would be barred. But, if
10 he seeks purely prospective relief, we don't
11 think the court needs to inquire into what his
12 ultimate aim is with that judgment. At that
13 point, the availability of any future relief
14 will depend on the remedies that the state has
15 chosen to offer.

16 So, if the state wants to take that
17 federal judgment and consider it in an
18 expungement proceeding or a clemency
19 proceeding, that's up to the state, but that
20 doesn't present the same sort of tension with
21 federalism and comity that a judgment when
22 someone's still in custody would.

23 JUSTICE GORSUCH: So maybe adding a
24 sixth line to your -- your two-line that a
25 declaratory judgment seeking a declaration

1 might be a problem too, but a purely -- purely
2 prospective injunction is different?

3 MS. ROBERTSON: Well, a declaratory
4 judgment is always hitched to the harm the
5 person alleges. And so, if the harm they
6 allege is I want to -- I want to engage in
7 religious expression moving forward and I
8 can't, so I want --

9 JUSTICE GORSUCH: That would be okay?

10 MS. ROBERTSON: -- a declaratory
11 judgment, that's fine.

12 But, if the harm is I'm suffering
13 harms from my conviction, that's not because
14 that asks a federal court to sit in review of a
15 state court judgment, which, of course, would
16 offend deeply rooted principles.

17 JUSTICE GORSUCH: I think I've got the
18 two lines now. Thank you.

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: Yeah. So I want a
25 declaratory judgment in order to deal with

1 prospective -- you know, my prospective
2 exercise of my religious beliefs, but if I'm a
3 prisoner, you say no. Is that -- is that
4 right? Like, so your -- your -- your big
5 fulcrum is in or out of jail?

6 MS. ROBERTSON: When it comes to
7 prospective relief. On -- on -- when it comes
8 to any sort of retrospective relief related to
9 the conviction, including damages, we don't
10 think it matters whether you're in or out of
11 custody.

12 JUSTICE JACKSON: Correct. But, when
13 it comes to prospective relief, a prisoner does
14 not have the ability to request from the court
15 prospective relief concerning the violation of
16 his constitutional rights if he's in jail?

17 MS. ROBERTSON: Prospective relief,
18 and I know -- I know I'm caveating, but we
19 think it's an important caveat, most
20 prospective relief from a prisoner will be
21 fine, but if it necessarily implies the
22 invalidity of his conviction, that's where we
23 understand this Court's decisions in Edwards,
24 Wilkinson, Skinner to carve out, and that's the
25 line we're trying to hold in this case.

1 JUSTICE JACKSON: So, if a person is
2 out and going back to Justice Gorsuch, the --
3 the -- an example that you were exploring with
4 Justice Gorsuch, he's out and he wants to deal
5 with the collateral consequences of his
6 conviction and so he brings this 1983 suit, is
7 that okay or not?

8 I think you said it might be barred,
9 but I don't understand because no habeas --
10 he's not -- it's not doing a habeas end run at
11 that point, so why would that be barred?

12 MS. ROBERTSON: So we start from the
13 baseline that a federal court cannot sit in
14 review of a state court judgment. That goes
15 all the way back to Rooker-Feldman and --

16 JUSTICE JACKSON: But that's not in
17 the Heck line of --

18 MS. ROBERTSON: And that's not even in
19 that.

20 JUSTICE JACKSON: Okay.

21 MS. ROBERTSON: We don't even need to
22 depend on the Heck line of cases for that.

23 JUSTICE JACKSON: Okay.

24 MS. ROBERTSON: So, if he's bringing
25 that type of suit, please invalidate my

1 judgment through Section 1983, we think that's
2 out whether --

3 JUSTICE JACKSON: Barred for this
4 other reason?

5 MS. ROBERTSON: Barred for this other
6 reason.

7 JUSTICE JACKSON: I see. Okay.

8 MS. ROBERTSON: But, if he's
9 bringing -- if he -- if he's asking for a
10 declaratory judgment or injunctive relief
11 because he wants to engage in the activity in
12 the future, we think he can properly proceed,
13 and the court doesn't have to sort of
14 scrutinize what does he really want to do here.
15 The court can focus on the nature of the harm
16 alleged. And if he really does have that
17 credible fear of prosecution, he can bring the
18 pre-enforcement suit.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Butler.

23 ORAL ARGUMENT OF G. TODD BUTLER

24 ON BEHALF OF THE RESPONDENTS

25 MR. BUTLER: Mr. Chief Justice, and

1 may it please the Court:

2 Petitioner had the opportunity to
3 challenge the constitutionality of the city's
4 ordinance in the Mississippi trial court where
5 he was prosecuted. Petitioner had the
6 opportunity to challenge it on direct appeal
7 through Mississippi's appellate courts or even
8 file a cert petition here. Petitioner had the
9 opportunity to seek post-conviction relief
10 under Mississippi law.

11 Petitioner had the opportunity and
12 still has the opportunity to have his
13 conviction expunged under not one but two
14 different Mississippi statutes. Petitioner had
15 the opportunity and still has the opportunity
16 to ask Mississippi's governor for a pardon.

17 And Petitioner had the opportunity and
18 presumably still has the opportunity to
19 challenge the ordinance under the Mississippi
20 Constitution, which offers greater First
21 Amendment protection than the federal
22 Constitution.

23 Although Petitioner claims in this
24 case that the courthouse doors are closed, that
25 argument ignores the countless doors Petitioner

1 chose not to enter. What this case is about is
2 Petitioner's preferred door, one that offers
3 his favored venue and an opportunity for
4 attorneys' fees.

5 That is the singular door that this
6 Court's decision in Heck versus Humphrey
7 closes, and it closes it only until a favorable
8 termination is achieved. Heck's favorable
9 termination rule applies "whenever a civil
10 judgment would necessarily imply the invalidity
11 of a criminal judgment." And under Wilkinson,
12 the same rule applies no matter the relief that
13 is sought.

14 As Petitioner conceded during oral
15 argument at the Fifth Circuit and as the United
16 States concedes in its briefing here, a
17 declaration that the ordinance is
18 unconstitutional on its face would call into
19 question the prior conviction. If this Court
20 applies the same rule that it has for the past
21 three decades, those concessions end this case.

22 In addition to precedent, longstanding
23 and deeply rooted principles of federalism,
24 finality, comity, and consistency require a
25 rejection of Petitioner's proposed new rule.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Could a third party
3 bring this -- the same 1983 action and get
4 prospective relief?

5 MR. BUTLER: Yes, Your Honor. That's
6 Judge Oldham's fellow protestor example. And
7 that only proves the point that my -- my friend
8 on the other side fights the premise that the
9 "necessarily implies" test is satisfied. That
10 proves that it is.

11 But that's the whole point, is that
12 Heck is individual to the person. Section 1983
13 is not always and everywhere available to
14 everyone. You've got to be within the class of
15 persons. And in McDonough, this Court said
16 that it is the plaintiff's conviction we're --
17 we're concerned about because we want to tie
18 the proper person to the proper claim.

19 JUSTICE THOMAS: Well, with all --
20 I -- I understand all that, but if a third
21 party can bring the exact same claim, why would
22 the Petitioner be precluded from bringing a
23 legitimate 1983 claim?

24 MR. BUTLER: Because -- because of the
25 extant conviction. And Heck tells us that we

1 want to put the proper person before the court
2 with the claim. To give the most famous
3 example ever, Roe versus Wade. There was a
4 doctor in that case, and then there was Roe
5 that both were -- were bringing the same
6 challenges, but the Court said, for abstention
7 reasons, the doctor wasn't --

8 JUSTICE THOMAS: Well --

9 MR. BUTLER: -- the proper --

10 JUSTICE THOMAS: Well, I think,
11 actually, in Heck, our concern was smuggling
12 19 -- habeas claims into 1983 actions. But my
13 point is, my question goes to whether or not,
14 if a claim is a legitimate 1983 claim, how can
15 it be a habeas claim smuggled into 1983?

16 MR. BUTLER: Well, we think -- we
17 think Heck departed from the habeas channeling
18 rationale and added the independent rationale
19 of the common law. And that was the debate
20 between Justice Scalia and Justice Souter, and
21 it added this favorable termination rule as an
22 element to the 1983 cause of action. And
23 unless and until a person with an extant
24 conviction can -- can meet that bar, then he
25 doesn't have a claim accrued.

1 And, Justice Roberts, to your -- to
 2 your point about collateral consequences of
 3 this particular ordinance, I would point the
 4 Court to JA 71. Under this particular
 5 ordinance, if there are multiple convictions,
 6 there are enhanced punishments under the
 7 ordinance. For example, if there's a second
 8 conviction within a year's period of time, that
 9 individual would be essentially removed from --

10 JUSTICE SOTOMAYOR: But --

11 JUSTICE KAVANAUGH: How do you --

12 JUSTICE SOTOMAYOR: But what you're
 13 telling me is it's possible that this prisoner
 14 has to go through the expungement process and
 15 there are procedural bars from doing that.
 16 There is no remedy for him or her in order to
 17 secure their rights even 20 years from now.

18 What you're basically saying is simply
 19 because they've been previously convicted, they
 20 cannot seek prospective relief 20 years from
 21 now unless they get an expungement. But, if
 22 they're barred by some procedural -- for some
 23 procedural reason, they have no protection.

24 MR. BUTLER: A -- a few limiting
 25 principles on that, Your Honor. We certainly

1 draw the distinction between a properly lodged
2 as-applied challenge and what the plaintiff is
3 trying to do here and make a -- a facial
4 challenge, a prospective claim in name only,
5 which is really by way of a declaration where
6 he would want the -- the entire law declared
7 unconstitutional.

8 JUSTICE SOTOMAYOR: He might win. He
9 might lose because it's a facial challenge.
10 We'll find out. But the question you're saying
11 is he's going -- he -- he is going to be
12 barred.

13 MR. BUTLER: Unless and until he is
14 able to achieve a -- a favorable termination.

15 JUSTICE SOTOMAYOR: How do you deal
16 with Edwards? How do you deal with Edwards
17 remanding for the prospective relief --

18 MR. BUTLER: Well --

19 JUSTICE SOTOMAYOR: -- to change the
20 disciplinary proceedings procedures?

21 MR. BUTLER: So, certainly, the
22 language in Edwards is, ordinarily, a
23 prospective claim would be barred -- would not
24 be within the ambit of Heck. We're very
25 comfortable with the "ordinarily" language

1 because "ordinarily" does not mean always. And
2 if there is ever a situation there where a --

3 JUSTICE SOTOMAYOR: Well, the -- the
4 procedures that he was attacking were the same
5 ones that he raised in his past disciplinary
6 proceeding, so I don't know why Justice Scalia
7 wouldn't have just ruled.

8 MR. BUTLER: Well, as I understand, it
9 was the date-stamping procedures, and it was
10 unclear in the case whether or not those
11 date-stamping procedures had actually been
12 applied. And even if they had, you still --
13 Justice Scalia would say you apply the test and
14 it's either a thumbs-up or thumbs-down
15 determination. And if it's outcome-neutral and
16 it -- it wouldn't result in a -- a disavowment
17 or -- or a collateral attack, then that's okay.
18 But, in this -- in this particular
19 circumstance, there can be no greater
20 impugment on the prior conviction than a
21 declaration that the law was unconstitutional.

22 JUSTICE KAVANAUGH: How do you --

23 MR. BUTLER: It's --

24 JUSTICE KAGAN: Didn't we say the
25 opposite of what you're saying in Wooley?

1 Wooley is this case, and we came to the -- the
2 opposite result from what you're advocating.

3 MR. BUTLER: Wooley -- Wooley is a
4 pre-Heck abstention case by its own language.

5 JUSTICE KAGAN: It is pre-Heck. I
6 mean, if -- if -- if Heck did not exist, the
7 way we would do this is we would say we have
8 this case, Wooley, and Wooley just decides this
9 case. And then the question is, should we
10 really take Heck to be sub silentio overruling
11 Wood -- Wooley?

12 MR. BUTLER: I'd push back a little
13 bit on that, Your Honor, because even -- now
14 Wooley's an abstention case which by its own
15 terms says it's conducting a jurisdictional
16 analysis. Of course, Heck is different.
17 We're -- we're trying to figure out if the
18 elements of the cause of action are met.

19 And so I would give the Court the
20 Skinner opinion, where you had Rooker-Feldman
21 and you had Heck, and this Court tackled the
22 jurisdictional issue completely separate --
23 separate from Heck and said, well, he may not
24 have an abstention problem under Wooley, but
25 he's got a Heck problem. And even in its own

1 domain, Wooley has been referred to as the
2 Wooley exception for state interference with
3 daily life activities.

4 You get other abstention cases like
5 Huffman and like Pennzoil that emphasize that
6 we care about having litigants exhaust and --
7 and go through the direct appeal, and we care
8 and we think that state courts are competent to
9 make constitutional law determinations. So I
10 think they're in tension with other abstention
11 principles even --

12 JUSTICE KAGAN: So I don't want to put
13 words in your mouth, but you're basically
14 telling us that post-Heck and some of the other
15 cases that come after that, Wooley is no longer
16 good law?

17 MR. BUTLER: I'm saying the inquiry is
18 different and it -- it's not an abstention
19 case. Wooley was looking at the relief that
20 the Petitioner said that he wanted when Heck is
21 looking at the implication of what would be
22 held.

23 And that's a big problem with all the
24 questions, is that in the Heck context,
25 we've -- we have never let a petitioner label

1 around Heck. And just because a plaintiff says
2 I promise, I promise, I'm not going to use it
3 to undo my prior conviction, we look at the
4 implication of success in a 1983 lawsuit, not
5 what a plaintiff promises.

6 And -- and that's -- that's my issue
7 too with the -- with the government's position.
8 I mean, they would say that somebody who is in
9 prison could just say -- you know, they
10 wouldn't -- they wouldn't say somebody could
11 just say I want to bring a pre-enforcement
12 challenge and I promise I won't use it to try
13 to get out of jail, but the day that that
14 person gets out of jail, it would be okay, and
15 that would rewrite the indirect method that
16 was -- that was recognized in Heck.

17 JUSTICE JACKSON: But let's say -- if
18 we assume that they couldn't just for the
19 purpose of a hypothetical, then -- then you do
20 see that there's a distinction between someone
21 who is trying to attack or change his
22 conviction and someone who's trying to prevent
23 a future conviction based on the same behavior?

24 MR. BUTLER: I do, Your Honor, but
25 Heck recognizes both a direct method and an

1 indirect method. And so what the government
2 would do would have -- would have you go back
3 to the language in Preiser that says impugn
4 the -- the -- the punishment. And so that's
5 not what Heck said. Heck changed it and said
6 we're worried about the fact of conviction or
7 the duration of confinement.

8 JUSTICE JACKSON: Right, but I guess
9 my hypothetical is trying to say that, you
10 know, we have a situation in which it is not
11 possible for a person who is seeking purely
12 prospective relief to do anything about his
13 prior relief. I mean, I -- I appreciate you're
14 saying we don't want to take his word for it.

15 MR. BUTLER: Right.

16 JUSTICE JACKSON: And -- and to the
17 extent that possibility exists, we might still
18 have a Heck problem, but in my hypothetical,
19 there's nothing you can do about your past
20 conviction, and what you're trying to do is go
21 out and speak to people again in a way that
22 does not subject you to future convictions and
23 you would like a declaration that says that.

24 MR. BUTLER: Right. And I think the
25 line, again, that we would -- the limiting

1 principle we would say is that if you're trying
 2 to seek a facial declaration of
 3 unconstitutionality, then that would imply --
 4 perhaps you could make a properly lodged
 5 as-applied challenge and say I want to do X, Y,
 6 and Z and I think the law prohibits me from
 7 doing that, and that might be okay. And we see
 8 that in the law all the time, but --

9 JUSTICE JACKSON: Can I just ask you
 10 about your -- your initial litany of doors that
 11 were available to Mr. Olivier? Were they all
 12 state forums, all state remedies that you
 13 discussed?

14 MR. BUTLER: Well --

15 JUSTICE JACKSON: Is there any other
 16 federal remedy? Because I think one of the
 17 things that's a little odd for me in this
 18 situation is that Heck really was about the
 19 intersection of two statutes, both of which
 20 were trying to give someone a federal remedy.
 21 And if we agree with you, this person ends up
 22 with no federal remedy, and -- and that just
 23 seems odd --

24 MR. BUTLER: Right.

25 JUSTICE JACKSON: -- to reconcile

1 those two statutes in a way that -- that
2 prevents their ability to -- to -- to have the
3 kind of federal forum that Congress obviously
4 wanted.

5 MR. BUTLER: Well, two -- two
6 responses to that, Your Honor. So, yes, my
7 laundry list of things were state court
8 remedies. And that's okay. We -- we have the
9 language from Muhammad v. Close that says
10 that's what Heck is all about, is making
11 plaintiffs resort to state court litigation, is
12 the language, without resorting to 1983.

13 So that's one. But then, as a federal
14 forum, the congressionally recognized federal
15 forum is 1257 through a cert petition if -- if
16 they properly raised it in the -- in the
17 criminal conviction. And, as we say in the
18 brief, perhaps there's a freestanding Ex Parte
19 Young claim that somebody could bring. But
20 Heck is all about using a civil tort statute to
21 impugn the prior conviction, and that's what
22 Heck says you can't do.

23 JUSTICE ALITO: If we take it for --
24 if we proceed on the assumption that the basic
25 idea of Heck, expressed in imprecise terms, is

1 to prevent end runs around habeas, and then we
2 have a situation in which someone is charged
3 with a minor offense with a small penalty and
4 very like -- a high likelihood that no time in
5 incarceration is going to be imposed and all
6 that would be done is maybe a small fine, and
7 then years after -- and this is done under a
8 statute, under a particular statute that --
9 like the one involved here, and then sometime
10 later the person brings a 1983 claim because
11 that person wants to engage in what he claims
12 is protected First Amendment activity going
13 forward, doesn't that seem quite far afield
14 from what Heck was trying to get at?

15 MR. BUTLER: I don't think so, Your
16 Honor, because, again, I think the limiting
17 principle is the -- the as-applied challenge.
18 He certainly could bring an as-applied
19 challenge, but not only -- just because the
20 plaintiff can't bring that facial challenge,
21 his fellow protestor has already brought the --
22 the facial challenge in a separate lawsuit
23 here.

24 And facial challenges are disfavored
25 anyway. And so the fact that we would -- we

1 would not let someone impugn their prior
2 conviction with a facial challenge, that --
3 that's not -- that's not anything out of the
4 norm.

5 I mean, yeah, I would like to
6 emphasize exactly what the Petitioner is asking
7 for here. He -- he's characterizing his suit
8 as a pre-enforcement challenge. He says he
9 wants a facial declaration of
10 unconstitutionality in the face of a prior
11 conviction while he was on probation.

12 Any one of those four things
13 individually would be disfavored under the law,
14 and he's trying to do every one of them
15 collectively in a single lawsuit. And so
16 there's no historical or traditional basis to
17 allow that.

18 JUSTICE ALITO: Well, maybe he's wrong
19 on the merits of the First Amendment claim, but
20 assume for the sake of argument that he's right
21 under the -- on -- on -- on the merits. And
22 I -- I -- you know, that's -- I'm not
23 suggesting in any way that that's the case.
24 Assume that for the sake of argument.

25 And now he wants in the future to be

1 able to engage in conduct that he thinks is
2 protected by the First Amendment. And doesn't
3 it seem a stretch of the underlying reasoning,
4 the rationale of Heck to say, no, you can't
5 ever do that, you're forever barred from
6 engaging in what you think is protected First
7 Amendment activity because you were previously
8 convicted under this statute and received more
9 or less a slap on the wrist?

10 MR. BUTLER: He is not forever barred.
11 He's only barred until he achieves a favorable
12 termination, which would be relatively easy to
13 get under Mississippi law for a first-time
14 misdemeanor.

15 And the limiting principle, again, is
16 the facial declaration portion. Nothing would
17 prohibit him from bringing an as-applied
18 challenge. Nothing would prohibit him from
19 doing different conduct than he was convicted
20 to in the past. We're only talking about the
21 drastic relief of a facial declaration of
22 the --

23 JUSTICE KAGAN: But, as to that, I
24 mean, your -- your rationale makes it sound
25 almost punitive. Well, I'm sorry, he was just

1 convicted, so he loses the right to do
2 everything that a fellow protestor can do,
3 because I haven't heard any other argument than
4 that for why he loses that right. You know,
5 any of the -- the kind of underlying concerns
6 about Heck don't seem to apply here.

7 So then it just seems to come down to
8 where just there's this extra element of
9 punishment, which is you can never challenge
10 this statute again.

11 MR. BUTLER: Well, to some degree,
12 there is. There are consequences to the -- the
13 choice of not invoking your state court
14 remedies. There's -- there's certainly that.

15 But the -- the whole rationale of Heck
16 was the indirect method. And a facial
17 declaration of unconstitutionality would be far
18 more impugning than monetary damages ever
19 would. And so, if that -- if that is the
20 reasoning of Heck, that we -- we won't let
21 monetary damages impugn the prior conviction,
22 then I would suggest a declaration of
23 unconstitutionality, which would mean the law
24 was unconstitutional from its inception, I'm
25 not sure how that would not satisfy the

1 "necessarily implies" test. And to the
2 government's credit, they admit that it would.

3 CHIEF JUSTICE ROBERTS: One -- some of
4 the -- I've seen in other cases these
5 provisions when you commit a crime, like, a
6 particular one and you're convicted, you
7 undertake not to commit further violations of
8 that provision.

9 Now, if he does, is he subject to
10 reincarceration?

11 MR. BUTLER: Certainly, that's a big
12 part of the probation in this -- in this
13 particular case. So he was under a suspended
14 10-day sentence at the time that he filed this
15 1983 suit.

16 And so my friend on the other side
17 would say, well, that's not custody because
18 that's just saying he can't violate the
19 ordinance just like, you know, any other John
20 Doe on the street couldn't violate the
21 ordinance either.

22 There's a big difference in that. If
23 he violated the ordinance, he would immediately
24 not pass go and go straight to jail for 10 days
25 because he was under the suspended sentence.

1 And that -- that constitutes custody under this
2 Court's jurisprudence. And this argument about
3 waiver, from day one, our -- our argument has
4 been that this action is Heck-barred.

5 Now what this action has transformed
6 into over the course of this litigation has
7 changed dramatically, but at every stage, in --
8 in our cert response, in the question
9 presented, we talked about the suspended
10 sentence. At page 4 of the cert response, we
11 talked about probation. At 31 of the appendix,
12 the district court acknowledged the probation.
13 At page 3 of the appendix, the Fifth Circuit
14 talked about the suspended sentence.

15 Now there were directly cases on point
16 at the Fifth Circuit that foreclosed the
17 Petitioner's argument, so none of these -- the
18 probation never was an issue because the cases
19 on -- on point dictated the result in the case.
20 And as --

21 CHIEF JUSTICE ROBERTS: Even if the --
22 the condition requires a complete -- you know,
23 the sentence is -- is finished and everything
24 else, but you can't do this thing again, you
25 know, coming back and preaching again, and if

1 you do, we're going to prosecute you, but it's
2 going to be, you know, from soup -- soup to
3 nuts, it's not like we just say you did it and
4 you go back, I mean, that's still barred?

5 MR. BUTLER: No. I mean, I don't --
6 again, the bar here is the -- the -- either --
7 anything retrospective regarding damages, which
8 was the case that he brought against an
9 individual police officer, or a facial
10 declaration. If he were to make a properly
11 lodged as-applied challenge, that would be
12 okay. He certainly doesn't need to go get
13 arrested again. As Justice Sotomayor --
14 Sotomayor pointed out, a credible threat is
15 certainly enough to give him standing.

16 The facts of this particular case is
17 that the police chief essentially begged him
18 not to make him arrest him, and he told him, as
19 the district court recognized: I'm aware of
20 your ordinance, I choose not to follow it. And
21 then directed the other people to continue
22 speaking through a bull -- a bullhorn.

23 So there was all sorts of options
24 absent arrest that could have -- that he could
25 have followed in this case.

1 JUSTICE JACKSON: I think the thing
2 that makes your case a little quirky, this
3 case, is the friend, the compatriot who is
4 doing exactly the same thing.

5 MR. BUTLER: Right.

6 JUSTICE JACKSON: And no one is
7 suggesting that he couldn't get a
8 pre-enforcement challenge -- couldn't bring a
9 pre-enforcement challenge and get --

10 MR. BUTLER: Right.

11 JUSTICE JACKSON: -- a personal
12 injunction in this way. I understand he tried
13 and failed on the merits.

14 MR. BUTLER: Right.

15 JUSTICE JACKSON: But he still was not
16 barred. And it just seems so strange when, in
17 fact, he was able to establish his standing on
18 the basis of Mr. Olivier's conviction and then
19 get into court and try to seek this kind of
20 relief, but you say Mr. Olivier can't because
21 of his own conviction.

22 MR. BUTLER: I understand, Your Honor,
23 but I think that's a -- a -- a feature of my
24 case for -- for two reasons.

25 JUSTICE JACKSON: It's not a feature

1 that defeats it?

2 MR. BUTLER: Not at -- not at all,
3 Your Honor, because, again, Heck is personal.
4 It's about who is a -- who falls within the
5 class of persons in 1983 that can -- that can
6 satisfy all the elements of the claim. And
7 if -- if he has the conviction, he can't, even
8 though somebody else can. And that just proves
9 the point that the "necessarily implies" test
10 is satisfied.

11 JUSTICE JACKSON: But isn't that --
12 isn't -- isn't the element really only there if
13 the kind of claim he's bringing is like a
14 malicious prosecution claim? In other words,
15 the element isn't there if he's saying my claim
16 is not I'm trying to challenge my prior
17 conviction, it's like I was maliciously
18 prosecuted in the past. What I'm saying is
19 this is an unconstitutional statute and should
20 not be applied to me in the future.

21 One could argue the element isn't
22 there in that circumstance if that's the claim
23 he's making.

24 MR. BUTLER: Well, I think that what
25 this Court's precedents say is what we're

1 trying to figure out is what is in the domain
2 of habeas. And the domain is much wider than
3 access to habeas. We know that because of the
4 McDonough case. That person was not even
5 convicted and that's still within the domain of
6 habeas.

7 And so what the cases tell us is that
8 once there's an extant conviction, we apply the
9 "necessarily implies" test, thumbs-up or
10 thumbs-down, and that tells us what is within
11 the domain of -- of habeas. So that's all
12 we're asking in this case, is that this Court
13 apply the same test it has for the past three
14 decades, and it's either a thumbs-up or
15 thumbs-down determination, and we think we --
16 we satisfy that test.

17 And back to the point about the
18 fellow -- the -- the fellow protestor, I think
19 that only suggests why the consequences of this
20 case are -- are not some detrimental
21 consequences. Any -- anybody could bring this
22 facial challenge.

23 JUSTICE JACKSON: No, but they -- but
24 Mr. Olivier can't -- Olivier can't get
25 post-CASA any sort of benefit, right? Each

1 person has to bring their own lawsuit to secure
2 the --

3 MR. BUTLER: Well --

4 JUSTICE JACKSON: -- personal
5 injunction.

6 MR. BUTLER: Well, he couldn't get --
7 he couldn't get a injunction that put the city
8 under threat of contempt, but if he got an
9 injunction that declared the ordinance
10 unconstitutional on its face, I -- I suspect he
11 would get a big monetary damages award if the
12 city were to go enforce that unconstitutional
13 ordinance against him in the future. So, I
14 mean, I think that that would satisfy it.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. BUTLER: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas?

20 Justice Alito?

21 Justice Sotomayor?

22 Justice Gorsuch, anything further?

23 JUSTICE GORSUCH: I just want to make
24 sure I understand your -- how you'd have us
25 read Wooley. It was a Younger abstention case.

1 Obviously, Heck says something very different,
2 and the two of them are hard to reconcile.
3 What -- what's your best shot in -- in -- in
4 maybe two -- two lines?

5 (Laughter.)

6 MR. BUTLER: How many commas do I get?
7 Abstention case, by its terms, jurisdictional
8 analysis, Heck is elemental, not
9 jurisdictional. Skinner did separate analysis
10 for -- for its jurisdiction and for -- for --
11 for Heck inquiries. And even in its own
12 domain, Wooley has been called the Wooley
13 exception that applies to state interference
14 with daily life activities. And we get other
15 cases, Huffman, Pennzoil, that treat it
16 differently. And then you get the lower courts
17 that go into this line about coercive versus
18 remedial measures that limits it even more.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 Thank you, counsel.

25 Rebuttal, Ms. Ho?

1 REBUTTAL ARGUMENT OF ALLYSON N. HO

2 ON BEHALF OF THE PETITIONER

3 MS. HO: Thank you, Mr. Chief Justice.

4 Three points. I think my friend, the
5 city's attempted distinction between an
6 as-applied claim and a facial claim and his
7 suggestion that the suit could also go forward
8 under Ex Parte Young, I think that is a
9 concession because the differences there go
10 only to the form of relief. So, if Heck, by my
11 friend's concession, does not -- would not
12 apply to -- an as-applied challenge would not
13 apply to Ex Parte Young, then I think that
14 makes this case a little bit easier because
15 then it's clearly Heck-barred.

16 And just as a matter of the record,
17 Mr. Olivier did bring an as-applied claim in
18 this case. That is JA 21. And at the record
19 on appeal at page 592, the city acknowledged in
20 its response below in the district court that
21 Mr. Olivier had brought both a facial and an
22 as-applied claim. Again, we don't think that's
23 important, but we do think my friend's attempt
24 to distinguish from that is a concession. If
25 Heck wouldn't bar an Ex Parte Young action, if

1 Heck wouldn't bar an Ex Parte -- if Heck
2 wouldn't bar a First Amendment action, it does
3 not bar his claims either.

4 And I think that goes to my second
5 point, which is this is a heartland Section
6 1983 case. As this Court discussed at length
7 yesterday, Section 1983 gives litigants access
8 to a federal forum to vindicate federal rights.
9 And -- and it has no exhaustion requirement
10 with respect to all of the doors that my friend
11 referred to that, in his view, Mr. Olivier
12 would have had to go for -- go through.

13 In terms of Wooley, Justice Kagan, I
14 think, yes, yes, Wooley was before Heck, but it
15 was after Preiser. And I think there's simply
16 no way to reconcile Wooley and the reasoning in
17 Wooley with a Heck bar applying in this case.
18 And I think outside of the Fifth Circuit, what
19 I'll call the Wooley rule, right, where you are
20 seeking to enjoin future prosecutions under the
21 ordinance you have been previously convicted,
22 that -- that -- that is Wooley to a T. That is
23 the rule in every part of the country except
24 the Fifth Circuit.

25 And we think applying Heck to

1 pre-enforcement claims like Olivier's really
2 puts what this Court has referred to as the
3 hapless plaintiff to the impossible choice of
4 intentionally flouting state law or forgoing
5 what he believes to be constitutionally
6 protected activity, as the Court said in
7 Steffel.

8 And I think this Court has repeatedly
9 rejected that kind of Catch-22 in case after
10 case, in Steffel, in Wooley, in Susan B.
11 Anthony just to name a few. The plain text
12 that Congress enacted provides Olivier a cause
13 of action for equitable relief to bar future
14 enforcement of unconstitutional laws. And
15 neither Heck nor the federal -- federal habeas
16 regime eliminates that cause of action.

17 That brings me to my last point, which
18 is Olivier's prospective pre-enforcement claim
19 won't necessarily imply the invalidity of his
20 conviction or sentence. And to your point,
21 Justice Alito, to really put a fine point on
22 it, what Mr. Olivier is seeking here is exactly
23 what the Wooleys sought and obtained, and that
24 is relief from future prosecution. That is it,
25 relief from future prosecution under the law.

1 A claim for prospective relief deals
2 with what happens in the future. It doesn't
3 relieve Olivier of any consequences of his
4 conviction, and it doesn't compensate Olivier
5 for any potential harm caused by his
6 conviction. And this Court has applied Heck's
7 favorable termination requirement only to those
8 two types of claims.

9 And that pattern shows what Heck
10 reaches, what it doesn't, and what its language
11 means. It doesn't reach a pre-enforcement
12 claim for purely respect -- prospective relief
13 against future prosecution. That's the precise
14 claim that this Court allowed in Wooley. And
15 adopting the city's interpretation would
16 radically expand Heck's scope, it would stretch
17 habeas's coverage too far, undermine Section
18 1983's effectiveness, and create an unworkable
19 rule.

20 Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:28 a.m., the case
25 was submitted.)