No. 24A_____

IN THE

# Supreme Court of the United States

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GABRIEL OLIVIER,

*Applicant*,

v.

CITY OF BRANDON, MISSISSIPPI, and WILLIAM A. THOMPSON, *individually and in his official capacity as Chief of Police for Brandon Police Department*,

*Respondents*.

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**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to this Court's Rule 13.5, applicant Gabriel Olivier requests a 30-day extension of time, to and including March 14, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The court of appeals entered its judgment on August 25, 2023, App., *infra*, 1a, 13a, and denied Olivier's timely petition for rehearing on November 14, 2024, *id.* at 14a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 12, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important, recurring question that has divided circuits regarding the reach of this Court's decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court held that a prisoner cannot bring a claim under 42 U.S.C. § 1983 that, if successful, would "necessarily imply the invalidity of his conviction or sentence" unless "the conviction or sentence [is] invalidated." *Id.* at 487, 490. Instead, a prisoner may bring such claims only in a habeas proceeding. Since *Heck*, the circuits have split over whether § 1983 plaintiffs may pursue prospective injunctive relief against future enforcement of allegedly unconstitutional laws. The Ninth and Tenth Circuits have held that *Heck* doesn't bar such suits. *Martin* v. *City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019), *abrogated on other grounds by City of Grants Pass* v. *Johnson*, 603 U.S. 520 (2024); *Lawrence* v. *McCall*, 238 F. App'x 393, 395–96 (10th Cir. 2007). But in the decision below, the Fifth Circuit relied on circuit precedent holding that *Heck* bars that relief. See App., *infra*, 9a; *Clarke* v. *Stalder*, 154 F.3d 186, 190 (5th Cir. 1998) (en banc).

a. Olivier is an evangelical Christian who often preaches in public. App., *infra*, 2a. In 2021, he attempted to share his faith on public sidewalks near an amphitheater owned by respondent City of Brandon in Mississippi. See *id.* at 3a. The City charged Olivier with violating an ordinance that restricted "protests" and "demonstrations" to a designated area. *Ibid.* Olivier pleaded no contest and received a suspended sentence of ten days' imprisonment and a fine. *Ibid.* After paying the fine, Olivier sued respondents—the City and its police chief—under § 1983, claiming that the ordinance violated his First Amendment and other constitutional rights. *Ibid.* As part of those claims, he sought an injunction against future enforcement of the ordinance against him for his evangelism. *Id.* at 8a.

b. The district court granted the City's motion for summary judgment or judgment on the pleadings. *Olivier* v. *City of Brandon*, 2022 WL 15047414, at *10 (S.D. Miss. Sept. 23, 2022). It held that *Heck* barred Olivier's request because it "functionally challenge[d] the legality of his conviction." *Ibid.*

c. The Fifth Circuit affirmed. The panel held that *Heck*'s prohibition applied to Olivier's "challenge to the constitutionality of the very law that led to [his] conviction." App., *infra*, 12a. In reaching that conclusion, the panel relied on Fifth Circuit precedent that "squarely applie[d] to Olivier's case." *Id.* at 9a (citing *Clarke*, 154 F.3d 186). But the panel acknowledged that "[t]here is admittedly friction between" Fifth Circuit precedent and this Court's precedents. *Id.* at 10a.

d. The Fifth Circuit denied en banc rehearing by a one-vote margin, over three dissents supported by eight circuit judges. The dissenting judges explained that *Heck* "plainly does nothing" to bar Olivier's request for injunctive relief because

injunctions "operate to prevent future official enforcement actions" and a ruling in Olivier's favor would "not invalidate [his] previous conviction." App., *infra*, 22a–23a (Oldham, J., dissenting from denial of rehearing en banc). The panel's decision (and the Fifth Circuit precedent it relied upon) "misreads *Heck*" and "defies common sense" because a suit challenging future enforcement of a law does not result in speedier release or implicate the previous conviction under that same law. *Id.* at 19a (Ho, J., dissenting from denial of rehearing en banc). Further still, the decision below "sends an odd message to citizens who care about defending their constitutional rights"—it forecloses claims brought by citizens who are "perfect plaintiff[s]" because they have already been convicted and face the prospect of future enforcement again. *Ibid.* On one point, however, the dissenting judges agreed with the panel—Fifth Circuit precedent conflicts with "[a]t least two of our sister circuits." *Id.* at 19a n.2; see also *id.* at 12a (panel opinion acknowledging conflict with Ninth Circuit).

2. The Fifth Circuit's decision warrants this Court's review. It openly splits with the decisions of other courts of appeals and conflicts with this Court's precedent.

a. The Fifth Circuit diverged from the Ninth and Tenth Circuits on an important issue that affects the ability of previously convicted citizens to protect themselves against future enforcement of unconstitutional laws. In the Fifth Circuit, a § 1983 plaintiff cannot seek to enjoin a law under which he was previously convicted or sentenced. App., *infra*, 10a–12a; *Clarke*, 154 F.3d at 189–91. But in the Ninth and Tenth Circuits, the exact same request for injunctive relief is permissible. As the Ninth Circuit reasoned, *Heck* doesn't "insulate future prosecutions from challenge."

*Martin*, 920 F.3d at 615. The Tenth Circuit similarly affirmed that a request for prospective relief declaring a statute "unconstitutional" "would not be barred [by *Heck*], since a grant of prospective relief would not imply the invalidity of the prior sentences." *Lawrence*, 238 F. App'x at 395–96. Other courts of appeals, meanwhile, have directed district courts to "parse" challenges to "the constitutionality of the [statute] under which [the plaintiff] was convicted" to determine whether "claims for injunctive relief might survive [under *Heck*] even if the corresponding claims for damages do not"—underscoring the need for clarity on this "important" but unsettled issue. *Abusaid* v. *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005).

b. The Fifth Circuit's approach is also inconsistent with this Court's precedent. Typically, *Heck* bars a civil suit that collaterally attacks a prior conviction by seeking retroactive relief. By contrast, "claims for *future* [injunctive] relief" are "distant from [*Heck*'s] core." *Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005). So "[o]rdinarily, a prayer for *** prospective relief will *not* 'necessarily imply' the invalidity of" a prior conviction or sentence, and "may properly be brought under § 1983." *Edwards* v. *Balisok*, 520 U.S. 641, 648 (1997) (emphasis added). For good reason, then, "[n]othing in the Constitution, federal law, or Supreme Court precedent dictates th[e] curious result" reached by the panel. App., *infra*, 18a (Ho, J., dissenting from denial of rehearing en banc).

3. The Fifth Circuit's decision below also implicates a circuit split on another issue: whether *Heck* applies to noncustodial plaintiffs. Olivier was never in custody and wasn't in custody at the time of his suit, so he couldn't initiate habeas proceedings

as required by *Heck*. The district court held that *Heck* nonetheless applied. *Olivier*, 2022 WL 15047414, at *10. The courts of appeals are deeply divided on that issue, too. At least five circuits hold that noncustodial plaintiffs can bring § 1983 suits—either categorically or where plaintiffs couldn't have sought habeas relief as a practical matter. See *Huang* v. *Johnson*, 251 F.3d 65, 75 (2d Cir. 2001); *Wilson* v. *Johnson*, 535 F.3d 262, 267–68 (4th Cir. 2008); *Powers* v. *Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007); *Cohen* v. *Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010); *Harden* v. *Pataki*, 320 F.3d 1289, 1299 (11th Cir. 2003). But four other circuits, including the Fifth Circuit, hold that *Heck* applies even to plaintiffs that aren't in custody. See *Wilson* v. *Midland Cnty.*, 116 F.4th 384, 396 (5th Cir. 2024) (en banc), *petition for certiorari pending*, No. 24-672 (U.S.); *Savory* v. *Cannon*, 947 F.3d 409, 421 (7th Cir. 2020) (en banc); *Newmy* v. *Johnson*, 758 F.3d 1008, 1011–12 (8th Cir. 2014); *Gilles* v. *Davis*, 427 F.3d 197, 210 (3d Cir. 2005).

4. Additional time is necessary for counsel to prepare a petition that would be helpful to the Court. The undersigned counsel of record didn't represent Olivier in the proceedings below, and an extension would afford counsel time to become fully familiar with the case. Moreover, counsel for Olivier have had, and will continue to have, significant professional responsibilities in other time-sensitive matters before and after the current February 12 deadline.

Accordingly, Olivier respectfully requests that his time to file a petition for a writ of certiorari be extended by 30 days, to and including March 14, 2025.

Respectfully submitted.

*/s/ Allyson N. Ho*

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