No. 24-993

IN THE

Supreme Court of the United States

GABRIEL OLIVIER,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief of the Liberty Justice Center as Amicus Curiae Supporting Petitioner

April 15, 2025

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Question Presented

The question presented is whether *Heck v. Humphrey* bars a plaintiff who has previously been prosecuted from bringing suit under 42 U.S.C. § 1983 seeking prospective relief for future prosecutions of the same type.

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Interest of the Amicus Curiae[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation aimed at revitalizing constitutional restraints on government power and protecting individual rights. The Liberty Justice Center is interested in this case because a regime that narrows standing to bring lawsuits under 42 U.S.C. § 1983 impairs citizens' ability to protect their constitutional rights through the judicial system.

Summary of Argument

Applying *Heck v. Humphrey,* 512 U.S. 477 (1944), to bar § 1983 suits seeking prospective relief for future prosecutions creates a Catch-22 that allows the government to engage in standing games to prevent citizens from enforcing their constitutional rights.

As Judge Ho pointed out in his dissent below, a person who has already been prosecuted under a provision of law is an *ideal* plaintiff for a § 1983 claim seeking prospective relief against it. It stands to reason that, if the law was enforced against them once, for habitual behavior that they intend to repeat or continue, that past prosecution is at least strong evidence that the person is at risk of future prosecution. Citizens like Gabriel Olivier who have had their constitutional rights violated and are likely to have that experience repeated deserve their day in court. The Fifth Circuit's interpretation denies them that opportunity.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

The Fifth Circuit's apparent dismissal of this common-sense point is even more concerning when considered in conjunction with the government's ever-present gamesmanship with respect to Article III standing requirements. When a citizen attempts to protect their rights under § 1983 before any prosecution has occurred, the government will grasp at any available straw to undermine the plaintiff's standing, arguing that the threat is too speculative because the plaintiff won't actually engage in the proscribed conduct, or insisting that the government never entended to enforce the statute. But if a citizen waits to bring a challenge until they have already been prosecuted, the Fifth Circuit says it is too late to bring a § 1983 suit. As Judge Ho put it, "when it comes to suits against the government, the message is: 'Heads I win, tails you lose.'" App. 48a. This standing game is only fun for the government.

This Court should grant the petition for certiorari to make clear that *Heck* does not bar § 1983 suits seeking only prospective relief for future prosecutions—and prevent other courts from adopting the Fifth Circuit's erroneous approach that hinders enforcement of constitutional rights.

Argument

I. The government commonly argues that plaintiffs bringing pre-enforcement challenges lack standing because their injury is too speculative.

Article III standing requires an injury-in-fact; "the injury must be actual or imminent, not speculative—meaning that the injury must have already occurred or be likely to occur soon." *FDA v. All. for Hippocratic*

Med., 602 U.S. 367, 381 (2024) (citing *Clapper v. Amnesty Int'l USA*, 568 U. S. 398, 409 (2013)).

Although a plaintiff can meet this standard without actually being prosecuted, "when a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury." *Id*. Pre-enforcement review is permitted when the threatened enforcement is "sufficiently imminent." *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). "Specifically, [this Court has] held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id*. (quoting *Babbitt v. Farm Workers,* 442 U. S. 289, 298 (1979)).

Though federal precedent on standing to bring pre-enforcement challenges is somewhat liberal, plaintiffs nonetheless face a number of difficulties in bringing such a claim. Predictably, the government uses all such obstacles to its advantage in trying to defeat the plaintiff's standing in a § 1983 suit.

Second, although this Court's precedent says plaintiffs need only allege "an intention to engage in a course of conduct arguably affected with a constitutional interest," that may be easier said than done. *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt*, 442 U.S. at 298). Courts have held that a plaintiff must present "concrete plans to engage in conduct." *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 551 (10th Cir. 2016). "'Some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day

will be"—are insufficient. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (citations omitted).

In practice the government often questions a plaintiff's stated intent to engage in conduct or the concreteness of their plans—and courts then find the plaintiff's allegations insufficient. In one recent example, the Sixth Circuit agreed with the government that the plaintiff trade association "did not sufficiently allege that its members intended to engage in expression arguably protected by the First Amendment"—specifically that they "failed to establish that any . . . members had a concrete plan to hold a captive-audience meeting" that could result in charges being brought against them. *Associated Builders & Contractors of Mich. v. Cowen*, No. 23-1803, 2025 U.S. App. LEXIS 3586, at *9 (6th Cir. Feb. 13, 2025); *see also Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 964 (6th Cir. 2009) (plaintiffs lacked standing because they articulated their intended speech or conduct with insufficient specificity). Indeed, plaintiffs who want to challenge an unconstitutional provision of law find themselves in a tricky spot; they don't want to violate the law and risk prosecution, but they need to present enough details of how they would plan to violate the law to convince a court that they are serious about it.

Third, there is uncertainty about what exactly qualifies as a sufficiently imminent, credible threat of enforcement. Though a plaintiff is not "required to await and undergo a criminal prosecution" before seeking relief, when a plaintiff brings a challenge at the pre-enforcement stage, the court must determine whether the plaintiff has true "fears of state prosecution" that are not "imaginary or speculative". *See Doe v. Bolton*, 410 U.S. 179, 188 (1973); *see also Younger*

v. Harris, 401 U.S. 37, 42 (1971). "One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury." *Susan B. Anthony List*, 573 U.S. at 158. This Court has noted that "[t]he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt*, 442 U.S. at 297-98 (internal citations omitted). Precedent illustrates that this requires a fact-intensive, relatively subjective inquiry, resulting in outcomes that are difficult to predict.

Sometimes incurring costs to avoid prosecution is not a sufficient injury, and sometimes it is. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."); *but see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734 (1998) (There is harm in being "force[d] . . . to modify [one's] behavior in order to avoid future adverse consequences."); *see also Virginia v. Am. Booksellers Assn., Inc.,* 484 U. S. 383, 393 (1988) (noting costly compliance measures that would be necessary to avoid prosecution).

Likewise, courts have been mixed in their receptiveness to the government's invocation of prosecutorial discretion to undercut a plaintiff's standing. Courts vary in their willingness to anticipate whether a prosecution will occur in the future and whether the lack of current prosecution has any bearing on the likelihood of a future prosecution. *See Clapper*, 568 U.S. at 414 (noting the Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors"); *see also O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) ("[I]t

seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture."); *but see Am. Booksellers Ass'n*, 484 U.S. at 393 (concluding that "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them" where "the State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *see also Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 929 n.27 (5th Cir. 2023) (discussing that while in some cases the standing doctrine may substitute prosecutorial discretion for judicial resolution, in other cases plaintiffs can allege sufficiently concrete facts to overcome the standing barrier even though the "governmental authority has so far chosen not to prosecute" them).

Given these difficulties, and their exacerbation by the government's gamesmanship, pre-enforcement challenges alone are insufficient to ensure vindication of constitutional rights under § 1983.

II. Someone who has previously been prosecuted under a law is an ideal plaintiff to challenge it.

A plaintiff who has already been prosecuted and intends to continue or repeat their past conduct, like Gabriel Olivier, seems like an obvious solution to the government's concerns about overly speculative pre-enforcement challenges.

As Judge Ho noted in his dissent below, someone who has already been prosecuted is an ideal plaintiff for a § 1983 claim seeking prospective relief because they're clearly at risk of future prosecutions if they repeat the same behavior. *See Susan B. Anthony*

List, 573 U.S. at 164 ("[P]ast enforcement . . . is good evidence that the threat of enforcement is not 'chimerical.'").

As described in *Babbitt v. Farm Workers,* a plaintiff has standing where he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." 442 U. S. at 298. Even though plaintiffs are not required to actually violate a statute, and be prosecuted for the violation, to achieve standing to challenge it, a past prosecution is strong evidence that they are at risk of future prosecution. Someone who has already been prosecuted has demonstrated not just an "intention to engage in" that conduct but has actually put their money where their mouth is and engaged in the behavior to the point of prosecution. Likewise, when the government has enforced a statute against an individual, and has not since disavowed it, there is every reason to believe that the government would enforce the law again if the individual repeats the same behavior.

Indeed, the point seems obvious to this Court, having recognized it on multiple occasions. In *Kolender v. Lawson*, a case where appellants had not even challenged the plaintiff's standing, this Court noted that the plaintiff's history of being stopped approximately 15 times in a period of two years evinced a "credible threat" that he might be detained again under the statute. 461 U.S. 352, 355 n.3 (1983). In *O'Shea v. Littleton*, the court noted that, "[o]f course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." 414 U.S. at 496. And the Court has recognized "a history of past enforcement" creates a substantial threat of

future enforcement. *See Susan B. Anthony List*, 573 U.S. at 164. Even if some cases calling for pre-enforcement review are difficult or arguable, *this* scenario should present an easy case for review.

The clarity achieved through hindsight should dispense with any lingering doubts about "concrete plans" to engage in the same conduct and overcome the government's cries of prosecutorial discretion. Even if the government promised to refrain from enforcing a statute again, common sense dictates that it would be ill-advised for someone who had already been preosucted for violiating a statute to rely on such a promise.

Yet the Fifth Circuit's decision in this case overlooks these common sense conclusions, —holding that their courthouse doors must be closed to ideal plaintiffs like Olivier. As Judge Ho noted in his dissent, the Fifth Circuit's conclusion is based on a misreading of *Heck v. Humphrey*, 512 U.S. 477 (1994). The commonly accepted understanding of *Heck*'s holding is a plaintiff convicted of a crime for violating a law cannot bring a § 1983 claim for damages arguing that the law was unconstitutional, because the plaintiff should have raised that argument in the criminal case. The Fifth Circuit's misinterpretation extends *Heck* to even bar prospective relief against future prosecutions under a law the plaintiff has been convicted of violating. The result if this misunderstanding is a further temporal limitation and narrowing of the set of circumsances for plaintiffs to have standing to bring § 1983 challenges for prospective relief.

Conclusion

Narrowing the window of standing for § 1983 suits will prevent courts from fulfilling their "solemn responsibility" to "guard, enforce, and protect every right granted or secured by the Constitution of the United States[.]" *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

The Fifth Circuit's interpretation makes standing a fleeting state of affairs which invites and requires strategic gamesmanship; plaintiffs must wait long enough to demonstrate a sufficiently imminent credible threat of enforcement to safeguard their standing position against the government's tactics, but be sure to file suit before they are actually prosecuted. This is unlikely to result in efficient outcomes; it does little to further the protection of constitutional rights and only serves to encourage and bolster the government's standing games.

Enforcing constitutional rights shouldn't be difficult; "[t]he basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." *Watson v. Memphis*, 373 U.S. 526, 533 (1963). Fulfillment requires giving citizens like Gabriel Olivier their day in court.

This Court should grant the petition for certiorari and hold that *Heck* does not bar § 1983 suits seeking prospective relief against future prosecutions under a law the plaintiff has previously been convicted of violating.

Respectfully submitted,

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