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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

TORREY LYNNE HENDERSON, AMARA JANA RIDGE,
JUSTIN ROYCE THOMPSON
***Appellants*,**
V.

THE STATE OF TEXAS,
***Appellee*.**

From the Seventh Court of Appeals,
Case Nos. 07-22-00303-CR; 07-22-00304-CR; 07-22-00305-CR

Trial Court Cause Nos. CR20-65983; CR20-65984; CR20-65985
From the County Court at Law of Cooke County, Texas
The Honorable John M. Morris Presiding

APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is merited in this case as it raises important First Amendment and due process questions regarding the meaning and scope of Texas Penal Code §42.03(a)(1)—Texas's Obstruction of Passageway statute—as applied to the acts of individual protesters. These questions have far-reaching implications for protesters and pedestrians who could face prosecution for stepping onto public streets, even when they are moving continuously and have no knowledge of or intention to obstruct traffic.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 30, 2020, Appellants Torrey Henderson, Amara Ridge, and Justin Thompson participated in a peaceful protest in their hometown of Gainesville, Texas. RR7.9:14-18. Three days after the march, a warrant for Appellants' arrest was issued for obstructing a passageway. CR.8. The Information charged them with violating §42.03(a)(1) for "intentionally and knowingly…obstruct[ing]…California Street." CR.7.

On August 25, 2022, in a consolidated trial, a jury found Appellants guilty of intentionally and knowingly obstructing under §42.03(a)(1), a Class B misdemeanor. CR.108-115. They were sentenced to seven days in jail and a $2,000 fine. CR.118.

Appellants appealed their convictions and their cases were transferred from the Second Court of Appeals to the Seventh Court of Appeals by order of the

Supreme Court of Texas. On November 15, 2023, the Seventh Court of Appeals affirmed Appellants' convictions in a single opinion: *Henderson v. State*, 2023 WL 7851698 (Tex. App.—Amarillo, Nov. 15, 2023) (mem. op., not designated for publication) (hereinafter "COA") (App'x.A).

On December 14, 2023, this Court granted Appellants' motion to consolidate their three cases for the purpose of briefing and case management.

GROUNDS FOR REVIEW

1. In *Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981) (en banc), this Court held that "obstruction" as used in §42.03(a)(1) must be interpreted to "give ample breathing room for the exercise of First Amendment rights," and, as such, that a "momentar[y]" stoppage of traffic caused by people continuously moving during a protest does not constitute obstruction. Did the court of appeals err by failing to give ample breathing room to the First Amendment and interpreting obstruction to include momentary stoppages of traffic while marchers are continuously moving?

2. Section 42.03(a)(1) requires that a person "intentionally [or] knowingly…obstructs a…passageway." Did the court of appeals err by treating the *mens rea* requirement as conduct-oriented instead of result-oriented?

3. The U.S. Supreme Court has held the First Amendment forbids imposing liability on a protest leader merely because others involved in the protest broke the law. This Court has held that "[w]here there is no charge on the law of parties a defendant may only be convicted on the basis of his own conduct." *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996) (en banc). Did the court of appeals err when it relied on non-individualized evidence to sustain Ms. Henderson, Ms. Ridge, and Mr. Thompson's convictions?

INTRODUCTION

This case concerns whether Appellants Ms. Henderson, Ms. Ridge, and Mr. Thompson can be convicted for knowingly and intentionally obstructing a passageway under Texas Penal Code §42.03(a)(1) for peacefully participating in a short march, where the evidence showed that the only instances of cars being stopped involved brief delays while marchers crossed the road, and the only evidence specific to Appellants showed, at most, that they marched in the road.

Appellants were leaders of a community organization that planned a march for equality in the historic downtown area of Gainesville on August 30, 2020. RR7.9:14-18; 17:24-25. Approximately "thirty or forty" people participated. COA.1. The march started at the county courthouse; marchers walked across California Street to loop back; and they crossed the street once more to return to the courthouse. COA.1-2. It "ended after ten or eleven minutes." COA.1.

In upholding Appellants' convictions, the court of appeals held that an obstruction offense occurred when an unidentified person on a bicycle stopped in front of a driver, causing her to come to a twenty-to-ninety second stop. COA.3. During that time, a group of marchers crossed the street. COA.3. The court also cited an incident after that initial crossing when marchers encountered "a large puddle of water." COA.2. A police officer testified at trial that he expressly "allowed them to stay" on the street during this time. RR6.165:14-19. "Some marchers stayed on the

sidewalk, some on the shoulder, and some in the roadway." [1] COA.2. The record contains no evidence that any Appellant, much less all three, caused a car to stop during their continuous march.

In upholding Appellants' convictions, the court erred by finding that a momentary stoppage of traffic caused by continuously moving free speech activity violates §42.03(a)(1). This holding conflicts with this Court's precedent in *Sherman v. State*, 626 S.W.2d 520 (Tex. Crim. App. 1981) (en banc), which the court failed to acknowledge. *Sherman* held that any interpretation of obstruction must "give ample breathing room for the exercise of First Amendment rights," and that continuous movement while protesting, even by causing a car to "stop," does not constitute obstruction. *Id.* at 522. The opinion also conflicts with the text of the statute, which defines "obstruct…to render impassable or to render passage unreasonably inconvenient or hazardous." Tex. Penal Code §42.03(b). In finding that Appellants committed obstruction by continuously moving through a passageway, the decision contradicts the statutory definition, *Sherman*, and an unbroken line of state and federal precedent.

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[1] The court of appeals incorrectly interpreted the testimony of Officer Greer that during that time no vehicle could "get around" the group of marchers. COA.2. Officer Greer testified that vehicles **hypothetically** could not have passed around marchers, not whether any vehicles were **actually** trying to pass. RR7.16:6-22. Section 42.03(a)(1) concerns actual obstruction, rather than theoretical obstruction. See *infra* II.A.

The court also incorrectly found that each Appellant had the requisite *mens rea* of knowingly and intentionally obstructing a passageway by relying on evidence that some protesters were told by police to get off the street, even though no evidence indicates that the roadway was actually obstructed at the time of such instructions, or that Appellants caused an obstruction knowingly or intentionally. Simply being present in the street is not prohibited by §42.03(a)(1), which applies only to actual obstruction of a passageway. The court erred by treating the culpable mental state as applying to conduct; but the plain language of the statute and *Hardy v. State*, 281 S.W.3d 414 (Tex. Crim. App. 2009), show that §42.03(a)(1) is result-oriented and the culpable mental state must apply to an actual obstruction. Because appellate courts are divided on whether to interpret §42.03(a)(1) as conduct or result oriented, the Court should grant review to resolve this split and clarify the requisite *mens rea*.

The court also impermissibly ascribed the actions of unidentified marchers to Appellants and found that Appellants had a culpable mental state based on the actions and words of others. The First Amendment prohibits imposing liability on lawful protesters based on the actions of others at a protest. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). Further, this Court has held that, where, as here, the law of parties has not been charged, defendants may only be convicted based on their own actions. *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996) (en banc).

As reflected in this Court's opinions, balancing the First Amendment right to protest with the public's right of access to passageways is a delicate but crucial task. Here, the court of appeals gave short-shrift to the First Amendment, leading to an overly expansive view of the obstruction statute that conflicts with this Court's precedent, other court of appeals' decisions, and decisions from the U.S. Supreme Court and Fifth Circuit. Tex. R. App. P. 66.3(a),(b),(c),(d). This Court's review is needed to correct this expansive interpretation of obstruction that wrongfully allows any person to be convicted simply for being in a passageway and momentarily delaying traffic—an "absurd result which we must avoid." *Morrison v. State*, 71 S.W.3d 821, 828 (Tex. App. 2002—Corpus Christi-Edinburg, no pet.).

ARGUMENT

I. The court of appeals' broad interpretation of obstruction fails to give breathing room to the First Amendment.

Section 42.03(a)(1) of the obstruction statute states:

> (a) A person commits an offense if, without legal privilege or authority, he intentionally, [and] knowingly…(1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access…regardless of the means of creating the obstruction… and whether the obstruction arises from his acts alone or from his acts and the acts of others.

"Obstruct" is defined as "to render impassable or to render passage unreasonably inconvenient or hazardous." Tex. Penal Code §42.03(b).

Here the court of appeals held that obstruction occurred only because "traffic on California Street was stopped," COA.3, and held that there is "no merit" in the argument "that section 42.03 is not violated by people engaged in continuous moving or marching." *Id*. These conclusions curtail the First Amendment right to protest and directly conflict with the text of the statute and this Court's precedent, particularly *Sherman v. State*, 626 S.W.2d 520, which the opinion failed to cite.

A. The court of appeals' opinion conflicts with this Court's precedent and the Penal Code.

Brief traffic delays caused by continuously moving marchers do not constitute obstruction under the plain text of the statute or this Court's precedent. In *Sherman,* a protester engaging in "mass picketing" was convicted for "obstructing…free ingress or egress" of any premises. *Id.* at 521. This Court looked to the definition of "obstruct" in §42.03—"to render impassable or to render passage unreasonably inconvenient or hazardous." *Id.* at 526 (quoting Tex. Penal Code §42.03(b)). It held this provision must be interpreted to "give ample breathing room for the exercise of First Amendment rights" while still "protect[ing] the right of the public to have access to the [] premises." *Id.* The Court concluded that obstruction requires a "passage be severely restricted or completely blocked before a prosecution under this statute would lie." *Id*.

Applying this definition, *Sherman* held that a passageway was not obstructed when a protester directly caused at least one vehicle to "stop momentarily to avoid

striking appellant" by walking in "half step[s]" across the street and deliberately "shorten[ing] his steps even more…coming to a very slow…snail's pace" when a vehicle approached. *Id.* at 522. The protester brought this car to a halt after a police lieutenant specifically instructed him "not to obstruct cars leaving the plant." *Id.*

Subsequent decisions from this Court and others have affirmed that engaging in protest activity while continuously moving does not rise to the offense of obstruction. In *Haye v. State*, 634 S.W.2d 313 (Tex. Crim. App. [Panel Op.] 1982), the Court distinguished the continuous movement of the protester in *Sherman* with an appellant who "caus[ed] an obstruction by standing on a sidewalk rather than moving on a passageway." *Id.* at 314–15. This Court found that remaining stationary by refusing to "move in any direction at all" when a person actually attempted to get by—as opposed to continuous movement—triggered an actual obstruction. *Id*. at 315.

In analyzing *Sherman* and *Haye*, the Fifth Circuit has found it "clearly established" under Texas law that "[t]his distinction of movement by the defendant, as opposed to the defendant standing in place or making a pathway impassible [sic], requires a finding of no obstruction." *Davidson v. City of Stafford, Tex.*, 848 F.3d 384, 393 (5th Cir. 2017); *Zinter v. Salvaggio*, 610 F.Supp.3d 919, 938 (W.D. Tex. 2022) ("[B]oth Fifth Circuit and Texas case law had clearly established that…[t]he act of remaining stationary—i.e., continuing to obstruct—is the critical fact."). The

Fifth Circuit found the principle "so clearly established" that it concluded that "qualified immunity cannot shield" officers from liability for arresting a protester under §42.03 because his continuous movement meant officers lacked probable cause to arrest him. *Davidson*, 848 F.3d at 393-94. This construction of the obstruction statute is necessary to account for protesters' First Amendment rights. *Id.* at 393 (officers must "consider the balance between Davidson's First Amendment rights and the right of the public to have access to the Clinic").

Indeed, aside from the case at bar, every appellate court decision to affirm a conviction under §42.03(a)(1) has involved a person who is fully stopped and not continuously moving. *See*, *e.g.*, *McIntosh v. State*, No. 02-21-00135-CR, 2022 WL 3097286, at *3 (Tex. App.—Fort Worth Aug. 4, 2022, no pet.) (mem. op., not designated for publication); *Gaston v. State*, 276 S.W.3d 507, 509 (Tex. App.—Houston [1st] 2008, pet. ref'd); *Barron v. State*, 43 S.W.3d 719, 720 (Tex. App.—El Paso 2001, no pet.); *Brightbill v. State*, 734 S.W.2d 733, 733-74 (Tex. App.—Amarillo 1987, no pet.).

Despite this unbroken line of precedent—and without citing to *Sherman*—the court of appeals upheld Appellants' convictions for obstruction "even if they were continuously marching." COA.3. The court also held that the passageway was rendered "impassable" or "unreasonably inconvenient or hazardous" because

"traffic on California Street was stopped" while "the crowd walked across the street." COA.3.

As discussed below, there is insufficient evidence to show that Appellants played any role in causing traffic to stop; but even if there were, causing a momentary delay[2] while continuously walking does not amount to actual obstruction, particularly when compared with the deliberate conduct of the protester in *Sherman* who slowed down and caused a car to stop while walking at a "snail's pace." 626 S.W.2d at 522. The opinion below erred by equating a brief traffic delay with unlawful obstruction.

B. The court's failure to "give ample breathing room to the First Amendment" created further error in its jury charge analysis.

The court's failure to give breathing room to the First Amendment contributed to its erroneous conclusion that the jury instruction discounting the critical context of First Amendment activity caused no harm to Appellants who "timely object[ed]" to those instructions. COA.10. The jury charge instructed: "it is not a defense to the charge of obstructing a highway or passageway that the defendant is involved in a demonstration or protest." CR.110. The court assumed without deciding that including this instruction was erroneous but found it "most likely superfluous."

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[2] The video referenced by the court shows that both times it took approximately 25 to 30 seconds for the group to cross California Street. 07-22-00303-304-305-CR-RR-Part001.mp4:1:25-50, 8:50-9:20; COA.4.

COA.10. However, the instruction to disregard Appellants' protest activity caused actual harm by limiting the jury's ability to consider the relevant context regarding why Appellants were walking along the street and ignoring this Court's guidance in *Sherman* that obstruction must be interpreted to "give ample breathing room for the exercise of First Amendment rights." 626 S.W.2d at 526. This instruction is also inconsistent with Texas Penal Code §42.04, which creates a defense for "conduct that would otherwise violate…42.03" when that conduct "consists of speech or other communication, [or] of gathering with others to…express in a nonviolent manner a position on social, economic, political, or religious questions." The jury instruction that the First Amendment "is not a defense" to the obstruction charge is refuted by this explicit statutory defense, which followed in the jury charge—creating an internally contradictory and confusing set of jury instructions. Such an "incorrect instruction on the law" in a jury charge that risks "confus[ing] and misle[ading]" the jury is sufficient to meet the "some harm" standard. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (en banc) (finding egregious harm).

II. The court of appeals erred by failing to require that §42.03(a)(1)'s culpable mental state apply to the result—actual obstruction.

The plain text of the statute and guidance from this Court indicate that §42.03(a)(1) is a result-oriented offense, but the court of appeals treated it as nature-

of-the-conduct-oriented by concluding that Appellants knowingly and intentionally[3] obstructed a passageway simply because they had the knowledge or intent of walking on the street. COA.7-8. This was error because the statute itself and this Court's decision in *Hardy v. State*, 281 S.W.3d 414 (Tex. Crim. App. 2009), demonstrate that obstruction is a result-oriented offense; and, therefore, the culpable mental state must apply to the prohibited result—actual obstruction. The evidence fails to show that Appellants knowingly and intentionally rendered the roadway "impassable," or "unreasonably inconvenient or hazardous." Another court of appeals has similarly erred by concluding that §42.03(a)(1)'s culpable mental state applies to conduct and not the result; this Court should grant review to clarify the correct *mens rea*.

A. The statute's text and this Court's precedent make clear that §42.03(a)(1) is a result-oriented offense, and the culpable mental state must apply to that result.

The text of §42.03(a)(1) supports a result-oriented reading of the statute. It states that a person commits an offense if the person "intentionally, knowingly…obstructs a highway…regardless of the means of creating the obstruction." By explicitly disclaiming any requirement for specific conduct, the statute plainly punishes the result of "render[ing] [passage] impassable

[3] Although §43.02(a)(1) also includes "recklessly," Appellants were charged only with knowledge and intent. CR.7.

or…unreasonably inconvenient or hazardous." Tex. Penal Code §42.03(b). Accordingly, the culpable mental state must apply to that result. *See McQueen v. State*, 781 S.W.2d 600, 603 (en banc) (holding that "unspecified conduct that is criminalized because of its result requires culpability as to that result").

Further, "the gravamen of the offense…decide[s] which conduct elements should be included in the culpable mental-state language." *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). This Court's precedent confirms that actual obstruction is the gravamen of §42.03(a)(1). In *Haye*, the Court stated that "the gravamen of the offense as stated in Sec. 42.03…is the obstruction of a public sidewalk to which the public has access." 634 S.W.2d at 316.

More recently, in *Hardy v. State*, this Court explored the distinction between §42.03(a)(1) and §42.03(a)(2)—a part of the statute that Appellants were not charged with—which criminalizes failing to obey a reasonable order to move. 281 S.W.3d at 424. *Hardy* makes clear that §42.03(a)(1) requires an **actual** obstruction whereas §42.03(a)(2) allows for prosecution for failing to obey an order to move to prevent a **potential** obstruction. *Id.* ("Section(a)(1) is unambiguously intended to criminalize actual obstruction of a public passageway," rather than conduct that creates a "potential" obstruction). The Court further implied that the offense is result-oriented by explaining that protesters standing on a street when no cars are coming cannot be convicted under §42.03(a)(1) because "passage is not being impeded, but they have

the potential to become an obstruction if vehicles approach and they do not move." *Id.*

Thus, the culpable mental state in §42.03(a)(1) applies to the result of creating an actual obstruction, and the court of appeals erred by treating it as applying to conduct that could create a potential obstruction. Throughout its opinion, the court relied on testimony that "Appellants" and other marchers "were instructed, both prior to the march and during the march, to stay on the sidewalk." COA.4. The court points to no evidence indicating that any Appellant knowingly or intentionally lingered in the street when a car was trying to pass or that any order to move was given to any Appellant while a car was trying to pass. Lacking this evidence, the court erred by concluding that disobeying requests to move and simply marching on the street amounted to knowingly and intentionally obstructing a passageway.[4]

While *Hardy* demonstrates that §42.03(a)(1) is a result-oriented offense requiring a culpable mental state as to actual obstruction, this Court has not explicitly

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[4] Relying on orders to move to uphold Appellants' convictions for actual obstruction also amplifies egregious harm caused by including unindicted elements of §42.03(a)(2) in the very first numbered paragraph of the jury charge. COA.6-8. The inclusion of this language, and the State's reliance on evidence irrelevant to the Information, constituted egregious harm. *See, e.g., Trejo v. State,* 313 S.W.3d 870, 874 (Tex. App. —Houston [14th Dist.] 2010, pet. ref'd) (defendant was egregiously harmed by charge authorizing jury to convict him for an unindicted offense).

classified the offense as such or resolved a split in the appellate courts about the proper *mens rea* under §42.03(a)(1). In *Bailey v. State*, the Fourth Court of Appeals departed from *Hardy's* reasoning without citing to that decision and concluded that "obstructing a highway is a conduct-oriented crime" so "the State was required to show Bailey intentionally, knowingly, or recklessly engaged in the act or acts that caused his truck to obstruct the highway." *Bailey v. State*, 304 S.W.3d 544, 546 (Tex. App.— San Antonio, 2009, pet. ref'd).

Bailey conflicts with the Thirteenth Court of Appeals' treatment of §42.03(a)(1) in *Morrison v. State*, where the court treated §42.03(a)(1) as result-oriented by finding that a car parked in a lane of traffic did not amount to obstruction because passageway was not rendered "impassable" or "unreasonably inconvenient," especially since no car actually tried to pass. 71 S.W.3d 821, 828 (Tex. App.—Corpus Christi 2002, no pet.). The court found that holding otherwise and convicting people based only on the conduct of being in the street would "subject virtually every mail carrier and delivery person to prosecution on a daily basis," which is "an absurd result which we must avoid." *Id.*

This Court should grant review to clarify the proper *mens rea* needed under §42.03(a)(1) and to address conflicting interpretations by lower courts and this Court's analysis in *Hardy*. Tex. R. App. P. 66.3(a),(b),(c),(d).

B. The court's mischaracterization of §42.03(a)(1) as conduct-oriented resulted in erroneous analysis of a preserved jury charge error.

The court further erred by concluding that there was no harm in including "both conduct-oriented and result-oriented language" in the jury charge *mens rea* section, COA.7-8, even though the appropriate *mens rea* for §42.03(a)(1) is result-oriented. *See Price,* 457 S.W.3d at 441 (it is error for a trial court to "fail[] to limit the language in regard to the applicable culpable mental states to the appropriate conduct element"). Because §42.03(a)(1) is result-oriented, it was error to include nature-of-the-conduct instructions in the jury charge.

III. The court of appeals erred when it relied on non-individualized evidence to sustain Ms. Henderson, Ms. Ridge, and Mr. Thompson's convictions.

In holding that the evidence was legally sufficient to sustain each Appellant's conviction for obstructing a passageway under §42.03(a)(1), the court of appeals relied overwhelmingly on evidence about other protesters and unnamed actors during the march while failing to evaluate the scant evidence specific to each Appellant. This violates both First Amendment and due process requirements by improperly conflating organized free speech activity with individual criminal action. This Court should grant review because upholding Appellants' convictions based on the conduct and intent of others conflicts with holdings from this Court and the U.S. Supreme Court.

A. The court of appeals relied on the acts of unnamed others to conclude that Appellants created an obstruction.

Where charges against an individual stem from expressive activity shielded by the First Amendment—including the march here—it is especially important for courts to ensure that individuals are not convicted based on the unlawful acts of others. The U.S. Supreme Court has explained that, in the context of free speech activity, liability "may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Claiborne*, 458 U.S. at 920. Further, "the First Amendment does not allow the government to hold a protest leader liable anytime a protester does something unlawful. Rather, liability must be tailored such that there is a sufficiently close relationship between the leader's actions and the protester's unlawful conduct." *Doe v. Mckesson*, 71 F.4th 278, 290 (5th Cir. 2023).[5]

Similarly, the Supreme Court has established that "guilt is personal" as required by the Due Process Clause of the Fifth Amendment. *Scales v. U.S.*, 367 U.S. 203, 224-25 (1961). This Court's precedent also makes clear that where defendants are not charged under the law of parties, they can be convicted based only on their own conduct:

> Because our penal code generally criminalizes conduct of individuals, the State is required to properly instruct the jury if it proceeds upon a

[5] Although *Claiborne* concerns civil liability, its holding applies to criminal liability. *See, e.g.*, *Santopietro v. Howell*, 73 F.4th 1016, 1025–26 (9th Cir. 2023).

> parties theory. Where there is no charge on the law of parties a defendant may only be convicted on the basis of his own conduct.

Goff, 931 S.W.2d at 544. Appellants were not charged under the law of parties, CR.108-14, so their convictions had to be based on their own conduct.

The court of appeals upheld Appellants' convictions based on the acts of others without the individualized analysis required to protect Appellants' due process and First Amendment rights. Throughout its opinion, the court cites primarily to a "group" and "marchers," including references to "some marchers" and "most marchers," without specifying whether any Appellant engaged in any specific activity that blocked traffic. COA.2-3. The court did not separately examine the sufficiency of the evidence for each Appellant and its discussion of any evidence specific to Appellants was scant.

In finding that the Appellants created an obstruction, the court hinged its analysis largely on an instance where "a young man on a bicycle" and a "young lady" caused a car to stop in the road for a brief period, during which time some marchers passed by. COA.3. But neither the unidentified "young lady" nor the "young man" is an Appellant. The court also cited evidence that some marchers caused traffic to briefly stop, *see e.g.* COA.3. ("[T]raffic on California Street was stopped due to the presence of the crowd in the roadway."), but failed to connect each Appellant's actions to causing the stoppage of any traffic—and the record reveals no such connection.

Instead, in holding that Appellants created an obstruction, the court cited evidence that Appellants were leaders of the group that organized the march and were identified as "active participants" in the march. COA.3. But organizing and participating in a march is not unlawful, even if others may commit an offense during part of it. Instead, relying on the acts of others to sustain Appellants' convictions is precisely what the First Amendment and due process prohibit.

B. The court of appeals relied on the acts of unnamed others to conclude that Appellants had the requisite *mens rea*.

The same First Amendment and due process concerns should also have guided the court's *mens rea* analysis. The Supreme Court has held that, when attempting to distinguish between non-protected criminal activity that is intertwined with protected First Amendment activity, it is critical to ensure that intent is judged based on the defendant's own *mens rea*: "intent must be judged 'according to the strictest law,'" otherwise an individual could be punished for "his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Claiborne*, 458 U.S. at 919 (citing *Noto v. United States*, 367 U.S. 290, 299). The Seventh Circuit has similarly warned that "[s]pecially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some

participants to all others." *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972).

Here, the court failed to ensure that the evidence of the culpable mental state was specific to each Appellant. The only evidence of any Appellant's instructions for the march involved Thompson who "made a speech to the protesters in which he reviewed 'a few rules, including staying hydrated and staying on sidewalks.'" COA.4. Nevertheless, the court relied on evidence that there was a chant of "Whose Streets? Our streets," COA.4, but there is no evidence that Appellants engaged in this chant,[6] or that this traditional protest chant could be used to infer *mens rea* for causing an obstruction. The court's analysis noted that jurors could draw their own conclusions about Appellants' intent from a video of the march, COA.4—but the video focuses largely on the unidentified mass of protesters, not the individual Appellants, which raises the same due process and First Amendment concerns. Moreover, the court did not identify any part of the video that sheds light on any Appellant's state of mind.

The evidence specific to Appellants cited by the Court in its *mens rea* analysis shows only that Appellants were involved in a protest, and that at least one Appellant was asked to get back on the sidewalk. The court's only mention of Appellant Ridge

[6] Although the court states that "Henderson and other group members" engaged in this chant, the evidence shows only that marchers in proximity to Henderson engaged in it. COA.2; RR6.123:14-21.

is she "carried a megaphone at the front of the group," COA.4. This falls far short of showing that any Appellant intentionally or knowingly created an obstruction. The court erroneously treated evidence about any single Appellants as if it applied to all three.

The court strayed far from the "strictest law" guidelines established by the Supreme Court and failed to engage in any individualized inquiry into the sufficiency of evidence of *mens rea* when it relied on evidence about the acts of unnamed marchers and that Appellants merely marched with the group.[7] This Court should grant review to clarify that individuals participating in a protest cannot be convicted under §42.03(a)(1) based on the acts of others.

PRAYER

Appellants pray that the Court grant this petition, order briefing on the merits, reverse their convictions, and order a judgment of acquittal.

[7] The court's error in relying on non-individualized evidence infected other areas of its opinion. Specifically, Appellants argued on appeal that "the jury charge erroneously allowed for non-unanimity based on the actions of others and not Appellants themselves" and therefore caused egregious harm. Appellants' Reply Br. at 25; COA.8-9.