CASE NOS. 07-22-00303-CR;07-22-00304-CR; 07-22-00305-CR

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO

TORREY LYNNE HENDERSON,
AMARA RIDGE,
JUSTIN ROYCE THOMPSON

V.

THE STATE OF TEXAS.

On appeal from County Court at Law of Cooke County, Texas
In case nos. CR20-65983; CR20-65984; CR20-65985
The Honorable John M. Morris Presiding

APPELLANTS' BRIEF ON MERITS

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument will assist the Court with the legal issues presented here since the facts as applied present a case of first impression under Section 42.03 of the Texas Penal Code.

STATEMENT OF THE CASE

On August 25, 2022, a jury found Appellants Torrey Henderson, Amara Ridge, and Justin Thompson guilty of obstructing a highway or other passageway under Section 42.03 of the Texas Penal Code, a Class B misdemeanor, while Appellants were engaging in peaceful protest and continuously walking along a roadway. RR7.223:3-224:7. The consolidated trial resulted in identical convictions and sentences for all three Appellants. On September 1, 2022, the trial court sentenced each Appellant to seven days in the Cooke County Jail and a $2,000 fine, the highest possible fine amount for a Class B misdemeanor. RR8.3-4. Appellants timely appealed this conviction and are out on bond. On October 21, 2023, Appellants' cases were transferred to this Court from the Second Court of Appeals by order of the Supreme Court of Texas.

ISSUES PRESENTED

1. Was it insufficient to sustain a conviction against Appellants under Texas Penal Code Section 42.03(a)(1) where Appellants were engaging in peaceful protest and continuously marching along a passageway?

2. Was it insufficient to sustain a conviction against Appellants under Section 42.03(a)(1) where there is no evidence in the record that Appellants caused any obstruction by rendering a passageway impassable or unreasonably inconvenient or hazardous?
3. Was it insufficient to sustain a conviction against Appellants under Section 42.03(a)(1) where there is no evidence in the record that Appellants had the requisite mens rea of "intentionally and knowingly" obstructing a passageway?
4. Was it insufficient to sustain a conviction against Appellants under Section 42.03(a)(1) when the record is clear that Appellants were given the legal privilege and authority to walk along the sidewalk and street by police?
5. Was it insufficient and unconstitutional to sustain a conviction against Appellants under Section 42.03(a)(1) when they had the legal privilege and authority to walk along the sidewalk and street under the First Amendment?
6. Was it reversible error for the jury charge to define the offense of obstruction using language from Section 42.03(a)(2) that was not charged in the Information?
7. Was it reversible error for the jury charge to include a conduct-oriented culpable mental state and fail to limit the mens rea to the result of obstruction?

8. Was it reversible error for the jury charge to allow the jury to convict each Appellant for "walking in the roadway with a group the defendant had organized" without requiring that the jury's verdict be unanimous with regards to a specific criminal act?
9. Was it reversible error for the jury charge to contain a misstatement of law on the First Amendment defense to Section 42.03 that was confusing to the jury and deprived Appellants of a statutory and constitutional defense?
10. Did it violate Appellants' right to a fair and impartial trial to allow two venirepeople to become jurors who stated unequivocally that they believed Appellants to be guilty before trial began?
11. Was it ineffective assistance of counsel for Appellants' trial counsel not to seek additional peremptory strikes to ensure that two veniremembers who demonstrated flagrant bias against Appellants were not empaneled on the jury?

STATEMENT OF FACTS

On Sunday August 30, 2020, Appellants Torrey Henderson, Amara Ridge, and Justin Thompson peacefully walked along a historic street in their hometown of Gainesville, Texas. RR7.9:14-18. They walked in an orderly fashion without stopping on or blocking any street or passageway. RR7.144:7-10; RR7.120:20-23; RR6.184.4-9. Appellants spent most of the march on the sidewalk, but walked along the street at points, such as when a "water hazard" on the sidewalk blocked their path. *Id.;* RR6.124:3-7; RR7.10:10-13; RR7.10:23-11:2.

Approximately thirty or forty people participated in the march, which lasted no more than eleven minutes in its entirety. RR6.180:2-3; RR6:115:9-12. The Gainesville Police Department (GPD) was "ready for them to march" that day, RR6.163:13-16, and officers even walked along with them, appearing to escort them at points. RR6.137:4-7; RR6.164:21-24; RR7.138:17-19; RR9.DefendantsExhibit3. Law enforcement formed a "perimeter" around marchers, who were "very orderly. . . marching up the street, very disciplined." RR7.120:20-23.

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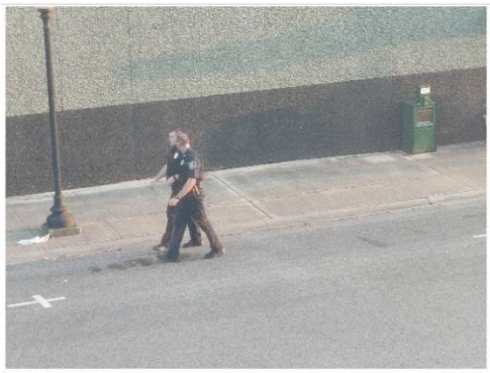
 [2]

Even though the orderly and peaceful group continued moving without stopping and remained on the sidewalk for much of the brief march, GPD nonetheless interpreted Section 42.03 of the Penal Code ("obstruction offense") as criminalizing even a single step into the street from the sidewalk. RR6.138:17-25; RR6.165:23-25. Days after the march, the three Appellants were singled out and charged with "obstructing a highway or passageway" under Section 42.03 of the Texas Penal Code. There is scant evidence in the record about Appellants' individual actions on the day of the protest and no evidence that any Appellant ever blocked any traffic. RR7.121:18-24; RR6.188:3-13; RR6.188:3-13.

PRO Gainesville

Appellants were leaders of a group called PRO Gainesville that advocates for justice and equality in Gainesville, Texas. RR7.229:1-2; RR7.1-14. All three Appellants were raised in Gainesville, and Appellant Henderson and Appellant

[1] RR9.DefendantsExhibit3
[2] *Id*.

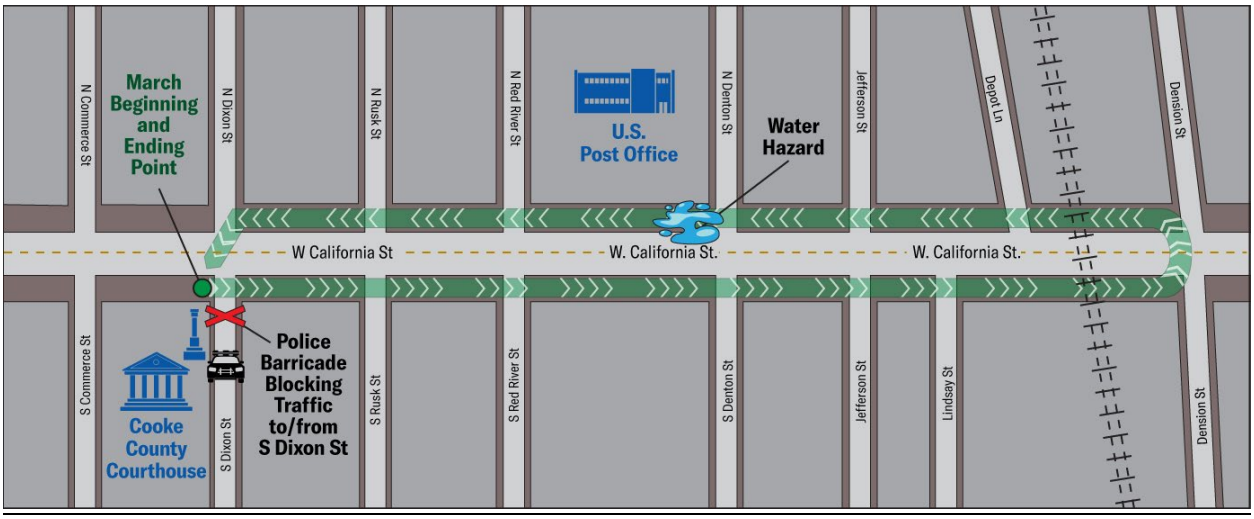
Ridge are mothers raising children in the area. RR7.229:3-230:2. As leaders of PRO Gainesville, Appellants organized protests and demonstrations during the summer and fall of 2020 to advocate for fairness and equality in their community. RR7.255.14-16. One of PRO Gainesville's specific goals was to call for the removal of a confederate monument at the Cooke County Courthouse, which bore the inscription "Confederate States of America." RR7.245:2-23; RR7.110.3-10; RR7.254:20-24; RR7.228:1-12. Appellants recognized that not everyone in their community agreed with their views and that some people in Gainesville, including in the local government, did not support PRO Gainesville's advocacy for equality. RR7.246:2-3; RR7:236:20-237:16; RR7.254:17-24. Because of this, as leaders of PRO Gainesville, Appellants consistently prioritized public safety and working with law enforcement to ensure that they could exercise their First Amendment rights in an orderly and lawful way. RR7.228:13-17.

Three days before the scheduled August 30, 2020 protest, PRO Gainesville released a press statement announcing their intention to hold a protest peacefully calling for the removal a confederate monument on the Cooke County Courthouse lawn: "We look forward to continue working together [with the Cooke County Sheriff's Office and GPD] to create a safe environment in our community." RR9.DefendantsExhibit5.

Appellants initiated communications with GPD about the march in advance, so that law enforcement was adequately prepared for the demonstration. RR6.163:3-18; RR6.169:5-14. When asked whether he was aware of plans for anyone to march on August 30, 2020, GPD Patrol Captain Chris Garner testified "We were ready for it . . . we were ready for them to march." RR6.163:13-16. He also testified that GPD was "[r]eady for anything" that day. RR6.163:17-18. Captain Garner added that GPD had "multiple meetings" with PRO Gainesville, including Appellants, prior to August 30. RR6.169:21-170:3.

The Protest

On August 30, 2020, PRO Gainesville held their planned march calling for the removal of the confederate monument from the Cooke County courthouse lawn. RR7.245:2-23; RR7.110.3-10; RR7.254:20-24; RR7.228:1-12. Prior to the march, several people made speeches on the courthouse square. RR7.118:10-14; RR7.43:20-23; RR7.159:19-161:8. Appellant Thompson gave a speech going over plans for the march such as "staying hydrated and staying on sidewalks" and expressing his sense that "the police were trying to do anything they could to file charges against us for anything." RR7.159:19-160:2; RR7.165:16-22. Appellant Thompson testified that in his leadership of the march, he intended for the people marching to stay on the sidewalks. RR7.161:6-13.



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Following the speeches at the courthouse square, a group of about thirty or forty people started walking eastbound on the sidewalk on the south side of California Street. RR6.180:2-3; RR7.10:4-7. Several law enforcement officers walked with them "for safety and anything that may pop up." RR6.137:4-10;

[3] This visual aid, created by counsel on appeal, shows the general trajectory of the march for the Court's convenience. It is based largely on the Gainesville map represented in State's Exhibit 2. *See* RR9.StatesExhibit2. The visual aid does not represent Appellants' route, since there are minimal facts about each Appellant in the record. Instead, it represents the scene as a whole as discerned from general facts about the march in the record establishing that the march started "at the courthouse and then went eastbound on the south side of California Street all the way down to Denison." RR7.12:3-5. The marchers then traveled back towards the courthouse and crossed California Street diagonally from the north side of California Street to the northeast corner of the courthouse. RR7.13:15-18. Railroad tracks were between Depot Lane and Denison. RR6:118:9-21; RR7.209:9-12. Water was near the post office at the intersection of Denton Street. RR6.165:14-19. Police cars were stalled "on the inside of road barricades on the north and south side of the 100 block of South Dixon to shut down that street." RR6.131:17-20. Due to the barricades, the intersection of Dixon and California Street went from a four-way intersection to a "T" intersection. RR6.148:17-149:7.

RR6.164:21-24. The marchers then crossed over onto the north side of California Street and came back westbound past Depot Lane, where Officer Greer testified that a few unnamed marchers "came into the roadway," RR7.13:16-19, but obeyed his command to get back on the sidewalk. RR7.14:1-3. Captain Garner testified that he and others allowed the marchers to walk on the roadway for at least part of the walk back due to water on the sidewalks. RR6.165:14-19 ("Coming back westbound was an area by the post office at the intersection of Denton Street where there was water and we were instructing them to get back off out of the roadway, however there was water there so we allowed them to stay…").

Arrest

The march ended just ten or eleven minutes after it began, returning to the lawn and steps in front of the courthouse. RR6.115:9-13. No arrests were made the day of the march.

Three days later, Appellants learned that a local magistrate had issued a warrant for their arrest and that GPD had accused them of "obstructing a highway or passageway." CR.8. Appellants surrendered into custody and were each released on a $2,500 cash bond. CR.9.

Trial

On August 23, 2022, Appellants were brought to trial in the same Cooke County Courthouse where they started and ended their protest nearly two years

before. RR6.1. Voir dire was taken, a jury was sworn, and Appellants pled not guilty. RR6.104-05. The prosecution called five witnesses: Sergeant Jack Jones, Captain Chris Garner, Investigator Shane Greer, Cynthia Idom, and Chief Kevin Phillips. RR6.3; 7RR.3. After the presentation of the State's case, Appellants moved for a directed verdict based on insufficient evidence to extend to the jury the question of whether obstruction occurred or not. RR7.85:2-5. Appellants' trial counsel pointed out that "no testimony or evidence has been put before the jury that would suggest that traffic was in any way obstructed" and that the only two individuals identified as having stopped in the street were not "identified or related" to Appellants. RR7.85:4-13. The trial court denied this motion, RR7.85:14, and Appellants called Simone Carter, Ron Underwood, Justin Thompson, and Investigator Shane Greer as witnesses. RR7.3. The jury returned a verdict finding Appellants guilty of "obstructing a highway or passageway," RR7.223:18-20, and sentenced each Appellant to confinement in the Cooke County Jail for seven days and a fine of $2,000. RR7.266:4-6.

SUMMARY OF ARGUMENT

Engaging in peaceful protest by marching along a passageway has a long and vital history in our society. Our nation's streets are "a quintessential forum for the exercise of First Amendment rights," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), and no court has ever interpreted Section 42.03(a)(1) of the

Texas Penal Code to criminalize peaceful protesters simply for walking along a passageway while continuously moving. The verdict below is sharply at odds with an unbroken line of precedent where courts "give ample breathing room for the exercise of First Amendment rights" by narrowly construing Section 42.03(a)(1) to "require[e] that passage be severely restricted or completely blocked before a prosecution under this statute would lie." *Sherman v. State,* 626 S.W.2d 520, 526 (Tex. Crim. App. 1981).

The evidence in this case is insufficient to sustain a conviction against Appellants for obstructing a passageway under Section 42.03(a)(1), which is the only statute Appellants were charged with violating. Throughout their peaceful protest, Appellants were continuously moving along a passageway without causing any obstruction. There is no evidence in the record that Appellants rendered the passageway impassable or unreasonably inconvenient or hazardous. There is also no evidence that Appellants had the requisite mental state of "intentionally and knowingly" obstructing a passageway. Moreover, Appellants had clear legal privilege and authority to walk along a passageway because of the First Amendment and because the Gainesville Police Department gave them express and implicit permission to walk along the street and sidewalk. Based on these facts, no reasonable juror could find that Appellants obstructed a passageway in violation of Section 42.03(a)(1), and Appellants' convictions must be reversed.

The jury charge also contained four critical errors that harmed Appellants' rights and necessitate reversal: (1) The trial court improperly instructed the jury on an offense that was not charged in the Information; (2) The court improperly included instructions on the wrong mental state for Appellants' culpability; (3) The jury charge erroneously allowed for a non-unanimous verdict on the specific violation for each Appellant; and (4) The trial court allowed a misleading and confusing misstatement of law regarding the First Amendment to remain in the charge. These errors, both individually and in cumulative effect, further require reversal of the convictions below.

There were also errors during voir dire that deprived Appellants of their right to a fair and impartial trial. The trial court erroneously overruled Appellants' objections to four veniremembers for cause, despite two veniremembers' explicit admission that they had already predetermined Appellants' guilt. It was an abuse of discretion for the trial court to overrule Appellants' objections and allow two jurors to be empaneled after admitting that Appellants "would be guilty" before trial began. And it was ineffective assistance of counsel for Appellants' trial counsel not to seek additional peremptory strikes to cure such overt and flagrant bias against Appellants. For these reasons and the arguments below, Appellants' convictions were unlawful, unconstitutional, and unjust. Appellants respectfully ask that these convictions be reversed and that this Court render a judgment of acquittal.

ARGUMENT

I. The evidence is insufficient to sustain a conviction under Section 42.03(a)(1) of the Texas Penal Code for obstructing a passageway because Appellants were moving constantly.

Texas courts review the legal sufficiency of the evidence by considering the evidence in the light most favorable to the jury's verdict to determine whether any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Sufficiency of the evidence must be measured against the "hypothetically correct jury charge defined by the statutory elements as modified by the charging instrument." *Edward v. State*, 635 S.W.3d 649, 656 (Tex. Crim. App. 2021).

Here, Appellants were only charged with violating Texas Penal Code Section 42.03(a)(1), the first part of the "obstructing highway or other passageway" statute [hereinafter "obstruction statute"], which states:

> A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly: (1) obstructs a highway, street…to which the public or a substantial group of the public has access, or any other place used for the passage of persons, vehicles, or conveyances, 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.

Tex. Penal Code § 42.03(a)(1). Section 42.03(b) defines "obstruct" as "to render impassable or to render passage unreasonably inconvenient or hazardous." *Id.*

The Information, or charging instrument, for all three Appellants did not charge them with "recklessly" violating 42.03(a)(1). Instead, it charged them with "intentionally and knowingly" violating it:

> "…defendant, did then and there without legal privilege or authority, intentionally and knowingly obstruct, by rendering impassable or by rendering passage unreasonably inconvenient or hazardous, a street, namely California Street, to which the public or substantial group of the public had access, by walking in the roadway with a group she[/he] had organized, causing it to be impassable or hazardous to motorist or pedestrians."

CR.7. Accordingly, the application paragraph of the jury charge for all three Appellants also only charged them of violating Section 42.03(a)(1), modifying the statute to exclude the mens rea of "recklessly":

> Now, if you find from the evidence beyond a reasonable doubt that on or about the August 30, 2020, in Cooke County, Texas, the defendant, [], did then and there intentionally and knowingly obstruct, by rendering impassable or by rendering passage unreasonably inconvenient or hazardous, a street, namely California Street, to which the public or a substantial group of the public had access, by walking in the roadway with a group the defendant had organized, causing it to be impassable or hazardous for motorists or pedestrians, then you will find the defendant guilty of the offense of obstructing a highway or passageway as charged in the information.

CR.109. Even in the light most favorable to the jury's verdict, the evidence is legally insufficient to show that Appellants obstructed any passageway under the meaning of the statute, let alone that they possessed the requisite mens rea of "intentionally and knowingly" obstructing any passageway, or that they lacked the legal privilege or authority to carry out the actus reus even if they had, *arguendo*, obstructed.

A. The evidence is insufficient to show Appellants "obstructed" any passageway.

The trial record is clear that Appellants were continuously walking along a street and sidewalk while engaging in peaceful protest activity. RR7.144:7-10; RR7.120:20-23; RR6.185:2-4. Binding case law from the Court of Criminal Appeals and authority from other Texas courts and the Fifth Circuit demonstrate that the evidence at trial— even when viewed in the light most favorable to the verdict—is legally insufficient to affirm a conviction for obstructing a highway or other passageway. Every court to have considered analogous facts has carefully limited the scope of liability under Section 42.03 to avoid infringing on the rights of free expression and assembly shielded by the U.S. and Texas Constitutions. The verdict below impermissibly broadens the statute beyond its text and directly violates Appellants' constitutional rights.

1) No Texas court has ever interpreted the obstruction statute to apply to peaceful protesters, like Appellants, who are moving continuously along a passageway.

Texas has had some version of the obstruction statute since 1860, *Threadgill v. State*, 241 S.W.2d 151, 152 (Tex. Crim. App. 1951), but it has never been extended to prohibit people from walking or continuously moving along a street. In *Sherman v. State*, the Court of Criminal Appeals used the "obstructing highway" statute to analyze the Penal Code's prohibition on "mass picketing." 626 S.W.2d 520, 526 (Tex. Crim. App. 1981). Because the mass picketing statute prohibited "obstructing

the streets and public roads surrounding" a place of business, the court relied on Section 42.03 to "give the term 'obstruction' the same definition in both statutes." *Id.* In *Sherman*, a union member was protesting outside a factory on a roadway. He "walked slowly in front of at least one car causing it to stop momentarily to avoid striking appellant." *Id.* at 522. While carrying a picket sign, the protester walked so slowly in front of the car that he was going at a "snail's pace." *Id.* Because of this momentary obstruction, Mr. Sherman was convicted under the "mass picketing" statute, but the Court of Criminal Appeals reversed.

The court held that causing a momentary obstruction or inconvenience was insufficient to sustain a conviction of "obstructing" the passageway surrounding the factory. *Id.* at 526 ("Under our view . . . what is prohibited is the rendering impassable or the rendering unreasonably inconvenient or hazardous the free ingress or egress to the struck premises."). The court explained that "[b]y requiring that passage be severely restricted or completely blocked before a prosecution under this statute would lie we give ample breathing room for the exercise of First Amendment rights." *Id*. Because the evidence at trial showed only "a momentary hesitation of a vehicle entering the struck premises," there was "simply [] not enough to support a conviction under this statute as we construe it." *Id.* at 528.

Following the Court of Criminal Appeals' approach in *Sherman*, no court has ever extended Section 42.03 to a situation where someone is continuously moving

or walking along a passageway. In *Morrison v. State*, the Thirteenth Court of Appeals reversed the conviction of someone who parked their car in a lane of traffic so that cars had to enter the opposite lane of oncoming traffic to go around them. 71 S.W.3d 821, 826 (Tex. App.—Corpus Christi Edinburg 2002, no pet.). The court cited a treatise interpreting Section 42.03 to find that "no violation of the statute is proven by evidence that shows the defendant only caused a slower passage or momentarily impeded progress." 6 Michael B. Charlton, *Texas Practice: Texas Criminal Law* § 24.4 (1994). The court also noted that it would give police too much discretion to criminalize every momentary obstruction in a public street. "To hold the vehicle obstructed a roadway under these circumstances, would subject virtually every mail carrier and delivery person to prosecution on a daily basis. This would be an absurd result which we must avoid." *Morrison*, 71 S.W.3d at 826.

The U.S. Court of Appeals for the Fifth Circuit has also consistently applied these principles to hold that there is no probable cause to arrest someone under Section 42.03 for walking or continuously moving along a street. In *Davidson v. City of Stafford, Texas*, the Fifth Circuit found it to be "clearly established" under Texas law that a protester could not be arrested for walking in a parking lot and delaying—but not completely blocking—someone's access to an abortion clinic. 848 F.3d 384, 393 (5th Cir. 2017), *as revised* (Mar. 31, 2017). Because the protester was continuously moving, the Fifth Circuit found 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." *Id.* The Fifth Circuit held that police officers who arrested the protester were not shielded by qualified immunity because it was clearly established that there was no probable cause under Section 42.03 to arrest someone for "walking, approaching, harassing, and delaying Clinic patients, but not stopping or preventing their entry into the Clinic." *Id.* (citing *Sherman*, 626 S.W.2d at 528). In allowing the protester's civil rights claims to proceed, the Fifth Circuit emphasized that he was "exercising core First Amendment rights" and "not (even arguably) in violation of § 42.03 when he stood outside of the Clinic." *Id.* at 394.

Similarly, in *Herrera v. Acevedo*, the Fifth Circuit again found it to be "clearly established" that "there is *no* probable cause to arrest under [Section 42.03] without a showing that the individual actually 'render[ed] [passage] impassable or . . . render[ed] passage unreasonably inconvenient or hazardous.'" No. 21-20520, 2022 WL 17547449, at *1 (5th Cir. Dec. 9, 2022) (quoting *Davidson*, 848 F.3d at 393). In *Herrera*, the plaintiff was charged with obstructing a passageway while engaged in protest in downtown Houston. The police alleged that the plaintiff had "stood on, or obstructed, the sidewalk to participate in the protests." *Id.* at *3. Quoting *Sherman*, the Fifth Circuit found that "[b]y requiring [under § 42.03] that passage be severely restricted or completely blocked . . . we give ample breathing room for the exercise

of First Amendment rights." *Id.* (quoting 626 S.W.2d at 526). The court then allowed the plaintiff's claim to proceed because it was "unclear from this record if HPD officers had probable cause to arrest Herrera during the protest" and he was "attempting to participate in a constitutionally protected peaceful protest." *Id.; accord Zinter v. Salvaggio*, 610 F. Supp. 3d 919, 937 (W.D. Tex. 2022) (finding no probable cause to arrest a protester who stood in front of a city hall but stepped aside for passersby because "[t]he act of remaining stationary—*i.e.*, continuing to obstruct—is the critical fact" for violating Section 42.03).

Federal courts' narrow and consistent interpretation of Section 42.03 aligns with decisions of the Court of Criminal Appeals, as well as with all other appellate court decisions in Texas that have interpreted the obstruction statute in the context of public protests. Every appellate decision affirming a conviction under Section 42.03(a)(1) has involved someone who is actually stopped in the street and rendering a road impassable or unreasonably dangerous or hazardous. *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.) (finding that a rational trier of fact could have found that parking and completely stopping an 18-wheeler on "an unlit road during a foggy and misty night" rendered a road impassable or created an unreasonably inconvenient or hazardous condition); *Gaston v. State*, 276 S.W.3d 507, 509 (Tex. App.—Houston [1st] 2008) (upholding conviction of protesters who parked two cars in downtown

Houston and chained themselves with handcuffs during rush hour while refusing to move); *Barron v. State*, 43 S.W.3d 719, 720 (Tex. App.—El Paso 2001) (finding that blocking a passageway with rope could constitute actual obstruction). In each of those cases, defendants were completely stopped and rendered a passageway "impassable" or "unreasonably inconvenient or hazardous," as required by the statute. The trial court's decision here is the single outlier holding, contrary to this body of law, that peaceful and continuous moving or marching may violate Section 42.03(a)(1). This wrongful decision should be reversed.

2) The evidence is insufficient to show beyond a reasonable doubt that Appellants rendered a passageway impassable or unreasonably inconvenient or hazardous.

To "obstruct" under Section 42.03(a)(1), a person must "render impassable or render passage unreasonably inconvenient or hazardous." Tex. Penal Code § 42.03(a)(1). Here, the evidence is insufficient to show beyond a reasonable doubt that Appellants rendered a passageway impassable or unreasonably inconvenient or hazardous.

<u>There is no evidence in the record that Appellants rendered any passageway impassable.</u>

Undisputed evidence at trial demonstrates that Appellants walked continuously along California Street for a maximum of eleven minutes and did not render any passageway impassable. RR6:115:9-12. Captain Garner testified that the marchers at no point stopped in the middle of the road. RR6.184.4-9. Mr.

Underwood, who was present at the protest, testified that the protesters "were moving constantly." RR7.144:10; RR7.120:20-23; RR6.185:2-4. Appellant Thompson, who was at the back of the protest, RR7.161:17-18, further testified that he "didn't see any cars" behind him and "didn't see any cars trying to get around" him, further demonstrating that Appellants did not render the passageway impassable. RR7.171:20-24. Appellant Henderson corroborated Appellant Thompson's testimony, noting "I didn't see any cars behind us . . . I didn't see any vehicles trying to get around." RR7.171:20-24. Appellant Henderson emphasized multiple times in her testimony that she did not "block[] the road, but she simply "walk[ed] in it. RR7.172:2-6.

For most of the march, protesters walked constantly along the sidewalk, but some protesters stepped off the sidewalk to walk continuously on the shoulder or street when necessary, such as, for example, when a water hazard was blocking the sidewalk. RR6.165:14-19.

Just as it would have been "an absurd result" in *Morrison* to find that a parked vehicle had obstructed a roadway even if it may have "momentarily imped[ed]" traffic, since that would "subject every mail carrier and delivery person to prosecution on a daily basis," 71 S.W.3d at 826, finding that Appellants here rendered a passageway impassable by, at worst, briefly stepping foot into the shoulder or street would subject every pedestrian to routine prosecution. Such a

sweeping interpretation of the obstruction statute would be absurd, but it is precisely the interpretation adopted by the State in this case. At trial, GPD Sergeant Jones testified that "[e]very time one of them walked out in the roadway it was an obstruction violation" and that each instance of stepping into the street could be a separate count. 6RR.138:17-25. GPD Patrol Captain Garner testified that every time a person is part of a group crossing the street it is "a violation of the Texas Penal Code obstruction of a highway." RR6:178:11-179:2. He also testified that if marchers had "stayed on the sidewalk [] they wouldn't have been obstructing at all[.]" RR6:165.23-25. Such an interpretation of the obstruction statute would criminalize anyone for stepping off a sidewalk into the shoulder or roadway even once and no matter how briefly. This interpretation is severely overbroad and harshly penalizes innocent and ordinary conduct. It also runs contrary to the text of the statute and every prior interpretation of it—by every court. This interpretation should be rejected by this Court.

There is no evidence in the record that Appellants rendered any passageway unreasonably inconvenient or hazardous.

The record is clear that Appellants were continuously moving throughout their peaceful protest and there is no evidence that any of the three Appellants caused any obstruction in a passageway that either rendered it "impassable" or "unreasonably inconvenient or hazardous." The only evidence in the record of anyone potentially

rendering a passageway even mildly inconvenient involved up to three individuals who are not parties here and were not identified as being associated with Appellants.[4]

The State's witness, Ms. Cynthia Idom, testified that she was driving along California Street during the march when unnamed individuals briefly "walked across the street." RR7 55: 6.[5] Ms. Idom slowed down and stopped her car for only "twenty seconds to a minute and a half" for those protesters to go "all the way across the road." RR7.55:10; 56:25-57:1. Stopping for that amount of time is not unusual on California Street. Officer Greer testified that cars stop periodically in the historic

[4] The result of unnamed others' conduct is not enough to convict Appellants because they did not have the necessary mens rea. *See Supra* Section I.B.; *cf. Cucuta v. State*, No. 08-15-00028-CR, 2018 WL 1026450, at *15 (Tex. App.—El Paso, Feb. 23, 2018) (unpublished) ("The Texas law of parties is not so broadly worded as to infringe upon any such innocent activity protected by the First Amendment … a person is criminally responsible for an offense committed by the conduct of another only if the person acted 'with intent to promote or assist the commission of the offense … encourages … the other person to commit the offense[]'"). In addition, Chief Phillips testified that "nobody was ever specifically identified as being PRO Gainesville or not, except obviously we knew who the leadership was," so the testimony is insufficient to show that these unnamed people were "with a group the defendant had organized," as the jury charge application paragraph lays out. RR7.78:13-17; CR.109.

[5] The only evidence of anyone pausing on California Street involved up to three individuals who are not Appellants here. At Denison Street on the west side, an unnamed person on a bicycle "put their bike sideways in the middle of the roadway." RR7.12:21-13:2. On the east side of Denison Street, there were two unnamed subjects, including "one being armed with a long gun" who briefly stopped in the road. *Id*. Appellants were not alleged to be anywhere near these unnamed subjects. *See, e.g.,* RR7.161:17-18 (indicating Appellant Thompson was at the very back of the march).

downtown where the march took place due to red lights, waiting for left turns, and railroad tracks. RR7.33:20-34:8. Ms. Idom never testified that she saw Appellants cross the street nor did she identify them in relation to the issue she complained of.

And even if Appellants had walked across the street, a driver briefly pausing to allow pedestrians to cross the street in a historic downtown with a speed limit no higher than thirty-five miles per hour, RR7.35:17-21, does not rise to an "unreasonabl[e] inconvenien[ce]" under the statute and clearly established caselaw. Ms. Idom's brief stop mirrors the momentary inconvenience that the Court of Criminal Appeals found insufficient to support a finding of "obstruction" in *Sherman*, 626 S.W.2d at 526. There, the court found no obstruction, even though the driver of a car had to stop and wait for a protester in the middle of the street who "walked slowly . . . at a snail's pace." *Id.* at 522. Even if annoying, this "momentary hesitation" required by the driver was "simply . . . not enough to support a conviction under this statute as we construe it." *Id.* at 528.

Further, there is no evidence in the record that Appellants rendered any passageway hazardous. Captain Garner testified that there was no emergency traffic blocked by the march. RR6.184.4-9. In fact, the march route saw very little traffic at all that day and the protest itself happened in broad daylight. The only evidence about anything even remotely hazardous was the water on the sidewalk that day

which the protesters had to avoid by stepping *into* the street. *See* RR6.123:1-5; RR6.124:3-7; RR6.165:14-19.

There is almost no evidence in the record about Appellants' individual actions on the day of the march. While a photo, RR9.StatesExhibit3, shows Appellant Ridge and Appellant Henderson in the street, it shows them clearly mid-stride, in broad daylight, with no cars behind them. The photo proves nothing about the length of time these Appellants were on the street, particularly where other testimony demonstrates protestors only briefly entered the street. Furthermore, the photo and surrounding testimony indicates that Appellant Ridge's or Appellant Henderson's position on the road did not completely obstruct the passageway, or even render it unreasonably inconvenient or hazardous.

Similarly, the only other evidence in the record about Appellants in the street is Appellant Thompson's testimony which fails to prove a violation of Section 42.03(a)(1). He testified that he remained on the sidewalk until he noticed that officers appeared to be walking in the road to escort the group in an orderly fashion back to the courthouse. RR7.170:6-20. At that point, Appellant Thompson walked in the street to follow the officers' lead and guidance. *Id.* He further testified that he did not see any cars nearby when he stepped into the street briefly and walked to the courthouse lawn to end the march. RR7.171:21-24.

This evidence is insufficient to show that any of the three Appellants rendered any passageway impassable or unreasonably inconvenient or hazardous. Appellants convictions under Section 42.03(a)(1) must be overturned.

B. Not only is the evidence insufficient to prove Appellants obstructed a passageway, the evidence is also insufficient to show Appellants had the required mens rea of "intentionally and knowingly" obstructing any passageway.

Appellants were charged with the mens rea of "intentionally and knowingly" "rendering impassable or [] rendering passage unreasonably inconvenient or hazardous." CR.7; CR.109. Since a culpable mental state is specified, the State has the burden of proving Appellants had the mental states of "knowingly and intentionally." *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) ("As with all elements of a criminal offense, the State must prove the mens rea element beyond a reasonable doubt."); *Edward v. State*, 635 S.W.3d 649, 656 (Tex. Crim. App. 2021) (sufficiency of the evidence is measured against the hypothetically correct jury charge defined by the statutory elements as modified by the charging instrument."). The evidence here is legally insufficient to show that the State met its burden of proving beyond a reasonable doubt that Appellants "intentionally and knowingly…render[ed] impassable or render[ed] passage unreasonably inconvenient or hazardous," as the statute requires. CR.109 (emphasis added); Tex. Penal Code § 42.03(a)(1); (b). The State failed to meet its burden at trial because

there is insufficient evidence to indicate that any of the Appellants possessed the requisite mens rea.

In *McQueen v. State*, the Court of Criminal Appeals held that "unspecified conduct that is criminalized because of its result requires culpability as to that result." 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). Therefore, it is not enough for the State to prove that Appellants were merely on a passageway, obstructed or not. It is also not enough for the State to prove that they intended to be on or knew they were on a passageway, even if the passageway, unbeknownst to them, happened to be impassable or unreasonably inconvenient or hazardous. Instead, the State's burden is to prove beyond a reasonable doubt that Appellants intended to render the passageway impassable or unreasonably inconvenient or hazardous and knew that it was either unreasonably inconvenient or hazardous, or entirely impassable. *See State v. Ross*, 573 S.W.3d 817, 826 (Tex. Crim. App. 2019) (analyzing a statue regarding display of a firearm with a mens rea of "intentionally or knowingly" and finding that "simply persuading a jury that the actor's display was objectively alarming would not, by itself, be enough for a conviction…the State would ultimately have to prove to the jury's satisfaction that the actor knew that his display was objectively likely to cause alarm.")

Here, the State needed, but failed, to prove that Appellants knew and intended to make the passageway impassable or knew and intended to make the

passageway unreasonably inconvenient or hazardous. *See infra* Section II.B. The testimonial evidence all demonstrates the opposite—that Appellants intended to stay on the sidewalks and never intended to block any traffic. RR7.161:6-13 Even before the march began, Appellants' explicit intention was to prioritize public safety and to work closely with law enforcement to ensure their First Amendment activities would be orderly and lawful. RR7.228:13-17; RR9.DefendantsExhibit5.[6] Furthermore, Appellant Thompson "told people to stay on the sidewalks" and stated he "intended to march people on the sidewalks," not the road. *Id.*[7]

All three Appellants made it clear that they never intentionally or knowingly engaged in obstruction in violation of the law. Appellant Henderson affirmed that, to the best of her knowledge, she "followed law enforcement" during the march and stated, "I don't feel what I was doing was a crime." RR7.241:15-24. Appellant Ridge also emphasized that her intentions were never to engage in illegal activity.

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[6] The only reason Appellants did not apply for a permit for the march was because their permits had been "denied at that point" for previous protests. RR7.169:2-3; *see infra* Section I.C.3.

[7] While the State appeared to use Ms. Henderson's participation in the chant "whose streets? Our streets" as evidence that she meant to block the street, the trial court noted explicitly that the chant was not "held out by the state as evidence of intent to obstruct traffic." RR7.121:918. The evidence in the record does not even show that Ms. Henderson herself participated in the chanting. RR7.15:1-11. The record indicates only that the chanting started shortly after Investigator Greer made eye contact with Appellant Henderson. *Id*. Furthermore, Ms. Henderson testified unequivocally that she did not tell Investigator Greer "no" to getting out of the street, RR7.242:2-5, and she was not even in the street when he made eye contact with her. RR7.171:9-13.

RR.7.251:23-25.[8] Appellant Thompson testified he "asked officers afterwards even if we did everything okay" during the march, indicating that he intended the march to go smoothly and legally and did not knowingly obstruct. RR7.257:11-12.

Appellants aimed to take every precautionary measure to stay within the confines of the law in part because they could not risk spending time in jail. Appellant Thompson testified that any period of confinement "would be very detrimental to my mental health" and "my job" indicating that he had no incentive to engage in obstruction in violation of the law. Appellant Henderson testified that she is a "single mom with boys," and "can't imagine" spending time in jail away from them. RR7.239:10-13; RR7.247:22-25 (Appellant Ridge's testimony). No testimony in the record revealed any motive for Appellants to intentionally or knowingly obstruct under the meaning of the statute.

In addition, law enforcement's own actions undermined any knowledge the State claims Appellants supposedly had about obstruction, and gave Appellants the impression that law enforcement was escorting or facilitating their march. RR6.137:4-7; RR6.164:21-24; RR7.138:17-19; RR9.DefendantsExhibit3. With law

[8] In the one instance in which Appellant Ridge testified that people may have been inconvenienced on the day of the march, she clearly explained why she did not think or know that any inconvenience was unreasonable. She explained, "you get stopped by trains, everybody hates that, you know. And everybody in Gainesville knows that because it goes right through the middle of town. So I do feel for that, for those people that were stopped for the few seconds that they were." RR7.248:16-23.

enforcement walking alongside protesters, Appellants had no reason to know that they made the roadway impassable or unreasonably inconvenient or hazardous.

C. Even if simply stepping onto California Street were considered an obstruction, the evidence is insufficient to prove Appellants lacked the legal privilege or authority to walk on California Street.

Obstruction of a passageway under Section 42.03(a)(1) is only a violation if a person acts "without legal privilege or authority." The term "legal privilege or authority" is not defined in Section 42.03 or anywhere in the Texas Penal Code. If a term is not defined in a statute or other relevant parts of the code, courts apply a "plain meaning rule" and "read 'words and phrases . . . in context and . . . according to the rules of grammar and common usage.'" *Blackenship v. State*, 650 S.W.3d 902, 211 (Tex. App.—Fort Worth 2022) (cleaned up). Statutory construction is a question of law that courts of appeals review de novo. *Id.* "Standard dictionaries" may be consulted to determine the "fair, objective meaning" of undefined statutory terms. *Id.* Here, Merriam-Webster defines "legal" as "relating to law," "privilege" as "a right [] granted as a peculiar benefit []," and "authority" is defined as "freedom granted by one in authority. *Legal, Privilege, Authority*, MERRIAM-WEBSTER DICTIONARY ONLINE (2023).

1) The First Amendment gave Appellants the legal privilege and authority to march on California Street during a peaceful march.

By walking along California Street, Appellants exercised their rights in a quintessential traditional public forum. *Faust* v. State, 491 S.W.3d 733, 745 (Tex. Crim. App. 2015). The Supreme Court has repeatedly recognized that it is "a basic rule . . . that a street . . . is a quintessential forum for the exercise of First Amendment rights." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Indeed, "public streets a[re] the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).[9] The overwhelming evidence in the record was that Appellants marched in a peaceful manner consistent with the exercise of First Amendment freedoms. *Hague v. Comm. for Indus. Org*., 307 U.S. 496, 515 (1939) ("Such use of the streets and public spaces has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); *see, e.g.* RR7.120:20-23;6RR.13-14.

Since the First Amendment does not draw a distinction in public fora between streets and sidewalk, it was legally erroneous for GPD to enforce a bright-line rule between the street and sidewalk as to where protesters could engage in protected expressive activity. GPD made clear at trial that walking along a sidewalk does not violate Section 42.03(1)(1). Captain Garner testified that "permission is not needed"

[9] *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (recognizing that "streets" are "quintessential public forums"); *United States v. Grace*, 461 U.S. 171, 177 (1983) ("[S]treets . . . are considered, without more, to be 'public forums.'").

for a march, since "[a]nyone can walk on the sidewalk, and then the freedom of speech, you can protest." RR6.182:19-24. Chief Phillips testified that marching on the sidewalk during the march was not a violation of the law, and "had they stayed on the sidewalk there would have been no violation." RR7:63.1-10. While GPD apparently recognized protesters' First Amendment rights on the sidewalk, the Department arbitrarily foreclosed these same rights the moment someone stepped into the street.

GPD's stark dichotomy between the street and the sidewalk does not exist in the text of Section 42.03(a)(1), the cases interpreting it, or binding caselaw on the right to protest.[10] Protesters do not lose their First Amendment protections as soon as they step from the sidewalk into the street and are not subject to strict liability simply because they step onto a different type of passageway. Allowing police officers to arrest any pedestrian who steps into the street gives the state arbitrary and unbridled discretion and impermissibly chills the long-established First Amendment right to march and protest in public streets.

2) *Law enforcement officers appeared to give Appellants legal privilege and/or authority to march along their route.*

[10] Although Section 42.03(b) may allow officers to distinguish between the street or the sidewalk in determining whether a demonstration is "hazardous"," it was legally erroneous for GPD to treat any person's momentary presence on the street as a categorical violation of the statute.

Just as law enforcement officers can confer the legal privilege to drive on the opposite side of the road due to construction or any other reason, so too law enforcement officers here provided Appellants with the legal privilege or authority to march along California Street, including on sidewalks, the shoulder of the road, and the road itself by accompanying the protesters on their march and facilitating it. Officers' testimony at trial fails to demonstrate otherwise.

The record establishes that several law enforcement officers accompanied Appellants on their march "for safety and anything that might pop up." RR6.137:4-7. Mr. Underwood testified, "What I saw was a group of protesters with . . . three law enforcement in a perimeter and they just looked very orderly to me marching up the street, very disciplined." RR7.120:20-23. The officers' active guidance and facilitation tacitly gave Appellants the legal privilege and/or authority to walk along their route.

Moreover, officers' testimony indicated in no uncertain terms that Appellants had the legal authority to stay on the sidewalk and that they were allowed to walk off the sidewalk for at least a segment of the march. Captain Garner testified that "[a]nyone can walk on the sidewalk" and protest without permission. RR6.182:19-24. He further testified that, for at least part of the protesters' march back to the courthouse, he and other officers "allowed them to stay" on the roadway due to

"water on the sidewalk." RR6.165:14-19.[11] These affirmative statements undermine any assertion that Appellants lacked legal privilege or authority to march on the sidewalk, and even briefly on the street. At the very least, GPD's instructions were non-specific regarding exactly when Appellants were allowed to be in certain parts of the passageway and when they were not, making the evidence insufficient to find that Appellants lacked legal privilege/authority at the times they were individually alleged to be in the roadway.[12] On balance, the evidence is insufficient to find that

[11] Appellants were not charged with "disobeying] a reasonable request or order to move" under Section 42.03(a)(2), but even if they were, the evidence in the record is insufficient to prove Appellants were ordered to move and refused.

First, there is absolutely no evidence in the record that Appellant Ridge was ever ordered to move. Second, the only evidence about Appellant Henderson came from Officer Greer, who testified that he made eye contact with Appellant Henderson and told her to exit the roadway while she was continuously walking and that she then looked at him and shook her head. RR7.15:1-11. Appellant Henderson testified that she did not refuse to move. RR7. 242:2-6. Captain Garner's testimony indicates he and others "allowed [marchers] to stay" on the roadway due to water obstructing the sidewalk near the location where Officer Greer told Appellant Henderson to exit the roadway. RR6.165:14-19. Any order instructing Appellant Henderson to move out of the street was invalidated by a contradictory instruction that she was allowed to remain in the street. *Id.* Third, there is no evidence in the record that Appellant Thompson himself violated any order to move from the street, even though others were ordered to move in his presence. RR6.177:6-12; RR7:15:1-5.

[12] See e.g., *Cox v. State of La*., 379 U.S. 536, 541-553 (reversing a conviction under Louisiana's obstruction statute where the appellant had been convicted for "leading the meeting on the sidewalk across the street from the courthouse" after the police chief had previously told the appellant that "he must confine" his protest to that side of the street because this amounted to unconstitutional unfettered discretion of law enforcement).

law enforcement did not give Appellants legal privilege or authority to march along their route. Appellants' convictions should be overturned.

3) *If Appellants' convictions were predicated on their lack of an official permit, their convictions must be overturned due to Gainesville officials' unconstitutional application of their permit policy, which prevented Appellants from gaining express documentation of legal privilege or authority to exercise their free speech rights without risking arrest.*

Because the First Amendment and GPD's words and actions gave Appellants the legal privilege and authority to walk in the street, they did not need a permit to engage in their peaceful march. However, even if this Court were to find that protesters ordinarily need a permit to obtain legal privilege or authority to march in the street where Appellants did, Appellants tried to obtain permits from GPD in the past but were unconstitutionally denied these permits.

In Gainesville, the police chief typically has ultimate discretion to sign off on or deny permit applications and appears to have been the sole decisionmaker when it came to Appellants' permit requests. RR7.66:7-8. Because PRO Gainesville's public grievances included criticisms of the police, RR7.43:20-23, the requirement for Appellants to request a permit from the GPD created an unconstitutional conflict of interest that placed them at the mercy of a police chief who did not approve of them or their speech. *Cox v. State of La*, 379 U.S. 536, 557 (1965) (holding that a municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the

police to say some ideas may, while others may not, be disseminate[d]."); *see also Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969) ("It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

Chief Phillips testified about the acrimony between him and Appellants. RR7.72:206. GPD officers were aware of PRO Gainesville's multiple complaints and grievances against the police department. *See* RR7.43:20-23; 71:1-72:11. The Chief even told PRO Gainesville organizers that "it might be best" not to march. RR7.72:12-18. He further threatened to file noise violation charges against Mr. Thompson should his group proceed with demonstrations, even if those demonstrations were on the sidewalk. RR7.181:7-9; RR7.186:13-25.

Appellant Thompson attempted to work with Gainesville officials on multiple occasions, seeking permission to engage in expressive activity and protection from the GPD to ensure his group could proceed with organizing public demonstrations and marches, RR7.70:9-16, but the GPD denied PRO Gainesville permits to march or hold demonstrations. RR7.168:25-169:3; RR7.70:9-16. Meanwhile, as PRO

Gainesville's permit applications were denied, Chief Phillips approved and permitted counter-protestors to hold a "Show of Force" rally targeting PRO Gainesville protestors. RR7:72:23-73:3.

GPD's denials of PRO Gainesville's permit applications regulated speech in a way that chilled Appellants' protected expressive activity and denied them equal protection of the laws. This unconstitutional regulation of protected speech means that no prosecution can be upheld on the basis that PRO Gainesville members, including Appellants, lacked a permit to engage in peaceful protest.

After PRO Gainesville's previous permit applications were denied, PRO Gainesville members decided to proceed with their August 30, 2020 march without a permit because they understood that going through the permit application process would be a futile effort given the GPD's prior denials of their applications. RR7.169:2-3. PRO Gainesville's decision to proceed with their peaceful march without a permit was well within their constitutional rights. *See Shuttlesworth*, 394 U.S. at 151 ("And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."). Thus, if the basis for their conviction involved their lack of a permit from GPD, their convictions should be reversed.

II. The jury charge contained reversible errors.

The court's instructions to the jury included four errors requiring reversal of the convictions below. First, the trial court improperly instructed the jury on an offense under Section 42.03(a)(2), "disobeying a reasonable request or order to move" which was never a part of the Information. Second, the court improperly included instructions on the wrong mental state for Appellants' culpability. Third, the jury charge erroneously allowed for a non-unanimous verdict on the specific violation for each Appellant. And fourth, the trial court allowed a misleading and confusing misstatement of law regarding the First Amendment to remain in the charge. Individually and cumulatively, these errors caused Appellants sufficient harm to warrant reversal of the convictions below.

A. The jury instructions improperly included instructions on Section 42.03(a)(2), which was not charged in the Information.

The Information against each Appellant is limited to the charge of actual obstruction under Section 42.03(a)(1) and the court's jury instructions could not go beyond this clear limitation. But the trial court erred by providing the jury with instructions regarding "disobey[ing] a reasonable request or order to move" under Section 42.03(a)(2), which is wholly absent from the Information.

As a general rule, instructions in the jury charge must "conform to allegations in the indictment." *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012). A jury charge "may not enlarge the offense alleged and authorize the jury to convict the defendant on a basis or theory permitted by the jury charge but not alleged in the

indictment" or information. *Reed v. State*, 608 S.W.3d 856, 859 (Tex. App. —Waco 2020, pet. granted); *see also Gollihar v. State*, 46 S.W.3d 243, 254 (Tex. Crim. App. 2001) (explaining that "the indictment [is] the basis for the allegations which must be proved and . . . the hypothetically correct jury charge for the case must be authorized by the indictment").

In this case, each Information only charged Appellants with actual obstruction under Section 42.03(a)(1). CR. at 6. The Information therefore did not put Appellants on notice that they could be prosecuted for "disobey[ing] a reasonable request or order to move" under Section 42.03(a)(2). However, the court mistakenly listed the requirements of Section 42.03(a)(2) in the definition of the offense in the very first numbered paragraph of the jury charge:

> A person commits an offense if . . . the defendant . . . disobeys a reasonable request or order to move issued by a person the actor knows or is informed is a peace officer, a fireman, or a person with authority to control the use of the premises to prevent obstruction of a highway or any of the other areas set out above.

CR. at 108. It was error to include the elements of an unindicted offense in the opening paragraph to the jury, particularly when this paragraph defined the offense in a way that was critical to the jury's understanding of the application section of the charge.

Although any mention of Section 42.03(a)(2) is absent from the application section of the charge under paragraph four, this does not cure the error. "The

meaning of a jury charge must be taken from the whole charge." *Wingo v. State*, 143 S.W.3d 178, 190 (Tex. App. —San Antonio 2004), *aff'd*, 189 S.W.3d 270 (Tex. Crim. App. 2006). It therefore constitutes reversible error for an instruction to contain "an incorrect or misleading statement of a law that 'the jury must understand in order to implement the commands of the application paragraph.'" *Alcoser v. State*, No. PD-0166-20, 2022 WL 947580, at *2 (Tex. Crim. App. Mar. 30, 2022) (quoting *Plata v. State,* 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997)). Likewise, jury instructions must give the jury a "complete understanding of concepts or terms in the application part of the charge," *id.*, and clearly explain to jurors "under what circumstances they should convict, or under what circumstances they should acquit." *Ex parte Chandler*, 719 S.W.2d 602, 606 (Tex. Crim. App. 1986). The jury instructions in this case failed to do either.

The jury instructions were erroneous and misleading because they contained two different—and contradictory—definitions of the offense. While the application paragraph tracked the language of the Information and was limited only to Section 42.03(a)(1), the first paragraph contained additional and extraneous elements of Section 42.03(a)(2), thereby authorizing the jury to convict Appellants for an offense not alleged in the Information. This wrongful inclusion of an unindicted offense was misleading and confusing to the jury and prevented them from obtaining a "complete

understanding of concepts or terms in the application." *See Alcoser*, 2022 WL 947580 at *2; *see also Murphy v. State*, 44 S.W.3d 656, 664 (Tex. App. —Austin 2001, no pet.) (explaining that when instructions "offered to the jury two different definitions of an essential element of the offense" the charge was "an erroneous charge" and "confusing, misleading, and a misstatement of the law").

Although this error was not objected to during the charging conference, the trial court's decision to include elements of an unindicted offense in the same definition of the offense as the application paragraph constitutes egregious harm under Texas Court of Criminal Appeals precedent. The court established four factors in *Almanza v. State* to determine when egregious harm arises. 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). "Egregious harm only arises if the error is so severe that it deprived the accused of a fair and impartial trial." *Wingo*, 143 S.W.3d at 191 (citing *Almanza,* 686 S.W.2d at 160). The actual degree of harm must be determined from the "entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Id.* The totality of these factors here demonstrates a finding of egregious harm.

First, when analyzing the entire jury charge, it would have been impossible for the jury to ignore the extraneous and unindicted elements of paragraph one. Although the application section (paragraph four) correctly tracked the Information

enumerating only the elements of Section 42.03(a)(1), the first paragraph of the jury instructions defined not only the applicable subsection but included the definition of a separate offense that is beyond the scope of this case. No reasonable juror would ignore this sweeping definition in the first paragraph of the charge, particularly when there was no jury instruction to only apply paragraph four or focus only on the elements listed in the application. Any reasonable juror would read the application paragraph in light of the erroneous definition contained in paragraph one and believe they were authorized to convict Appellants of the unindicted offense in Section 42.03(a)(2).

Moreover, even if the state *had* properly included Section 42.03(a)(2) in the Information, the jury charge would still be inaccurate and misleading because it only contained one aspect of Section 42.03(a)(2) without critical qualifications and limitations on that provision. The jury charge only quoted from the first part of the offense and failed to include the narrowing statutory language requiring a reasonable order to move to be tied to "prevent[ing] obstruction of a highway or any of those areas mentioned in Subdivision (1)" or "maintain[ing] public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard." Tex. Penal Code § 42.03(a)(2). Including *some* elements of this subsection but not *all* of them is even more prejudicial to Appellants because the language that the jury received contained none of the statutory limitations to the offense, which narrowly define the

offense of failure to obey a reasonable order to disperse only in specific circumstances. It would be impossible for a reasonable juror to know these full statutory limitations, which further compounds the error in the flawed and misleading definition in paragraph one.

Second, the evidence proffered by the State exacerbates this error and weighs in favor of finding egregious harm. Even though evidence related to Section 42.03(a)(2) is wholly irrelevant because that offense is not at issue, the State introduced evidence trying to establish that Appellants or others in the march were instructed by GPD to leave the street and stay on the sidewalk and failed to obey those orders. *See, e.g.,* RR6.176:13-19; RR7.15:2-9. By focusing the jury on whether Appellants obeyed GPD's orders to move or disperse, rather than determining whether Appellants actually obstructed a passageway as required by the Information and Section 42.03(a)(1), the State lent credence to the overly broad and erroneous jury charge.

Third, the attorney for the State repeatedly relied on this evidence to wrongfully suggest to the jury that they could convict Appellants for "disobey[ing] a reasonable request or order to move," further confusing the jury as to which provisions of Section 42.03 were properly before them. The prosecutor argued that Officer Greer would testify that he "told this crowd at least ten times to get off the street. And what were the various reactions? Well, . . . [Appellant] actually made

eye contact with Officer Greer and shook her head no when she was told to get off the street." RR6.108:12-18; *see also* RR7.170:21-25 ("So let me interrupt you. The officers testified they were not escorting you. They said they were trying to keep you on the sidewalk. Officer – Investigator Greer said he told you, your group, at least ten times to get on the sidewalk"). By repeatedly drawing the jury's attention to the orders to leave the street, the State increased the harm of the jury instruction error.

Fourth, the record shows no instruction or other information directing the jury to disregard anything related to Section 42.03(a)(2). Throughout the trial, the jury was never told that the Information was limited to actual obstruction or to focus solely on the elements of Section 42.03(a)(1) and not the extraneous definition of Section 42.03(a)(2) added to the first paragraph of the charge.

As in other cases where jury instructions mistakenly allow a jury to convict appellants for offenses that were never included in an indictment, the inclusion of this language in the jury charge, and the State's reliance on evidence irrelevant to the Information, constituted egregious harm and denied Appellants a fair and impartial trial. *See, e.g., Trejo v. State,* 313 S.W.3d 870, 874 (Tex. App. —Houston [14th Dist.] 2010, pet. ref'd) (holding that defendant was egregiously harmed by trial court's submission of charge authorizing jury to convict him for an unindicted offense); *Daniels v. State,* 754 S.W.2d 214, 222–23 (Tex. Crim. App.1988) (holding that charge error that allowed jury to convict appellant for

an unindicted offense caused egregious harm); *Fella v. State*, 573 S.W.2d 548, 548 (Tex. Crim. App. 1978) (holding that the trial court erred by authorizing the jury to find appellant guilty based on a theory not alleged in the indictment); *Steward v. State,* 830 S.W.2d 771, 774 (Tex. App. —Houston [14th Dist.] 1992, no pet.) (same). Even if this Court finds that the threshold for egregious harm caused by this error is not met but that this wrongful jury instruction caused Appellants some harm, Appellants contend that trial counsel's failure to object to a clearly erroneous jury instruction relating to an unindicted offense constitutes ineffective assistance of counsel. *See Ex parte Simpler,* No. AP-76,087, 2009 WL 256526, at *1 (Tex. Crim. App. Feb. 4, 2009) (finding that failure to object to the inclusion of elements in a jury charge "not alleged in the indictment" was ineffective assistance of counsel necessitating a new trial).

B. The trial court erred by failing to tailor the appropriate mens rea to the conduct at issue

The court's instructions regarding "intentionally" or "knowingly" compounded this previous error and misled the jury regarding the mental state required to prove the offense of obstruction under Texas law. Section 6.03 of the Texas Penal Code establishes two possible conduct elements: the nature of the conduct and results of the conduct, as well as the effect of the circumstances surrounding the conduct.

In a jury charge, "the language in regard to the culpable mental state must be

tailored to the conduct elements of the offense." *Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015). When "specific acts are criminalized because of their very nature, a culpable mental state must apply to committing the act itself." *McQueen v. State,* 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). "On the other hand, unspecified conduct that is criminalized because of its result requires culpability as to that result." *Id.* 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." *Price*, 457 S.W.3d at 441; *see also Cook v. State,* 884 S.W.2d 485, 491 (Tex. Crim. App. 1994) (finding that "the trial judge erred in not limiting the culpable mental states to the result of appellant's conduct.").

In this case, the trial court erred because the jury charge included instructions on the conduct itself in the definitions of "knowingly" and "intentionally," even though the offense of actual obstruction under Section 42.03(a)(1) is purely a results-oriented offense. Specifically, the jury charge included the extraneous culpability language of a conduct-oriented offense, including that "[a] person acts intentionally . . . with respect to the nature of their conduct when it is their conscious objective or desire to engage in the conduct" and "[a] person acts knowingly . . . with respect to the nature of their conduct." CR.109. Appellants timely objected to the inclusion of these instructions during the charging conference, but the trial court overruled that objection. RR7.93:1-

6.

This was error because obstruction of a passageway under Section 42.03(a)(1) is a result-oriented offense not a conduct-oriented offense. The offense at issue requires no particular conduct; in fact, the statute itself disclaims any requirement for specific conduct. *See* Tex. Penal Code § 42.03(a)(1) (stating that a violation may occur "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"). The "gravamen" of this statute is the result of the offense: causing an obstruction. As explained by the Court of Criminal Appeals, "[w]e use the gravamen of the offense to decide which conduct elements should be included in the culpable mental-state language. The gravamen of the offense is: the 'gist; essence; [or the] substance' of the offense." *Price,* 457 S.W.3d at 441 (quoting (Ballentine's Law Dictionary 534 (3rd ed. 1969)). Here, there is no particular conduct proscribed by the statute. It is the *result* of the offense that renders a passageway "impassable or . . . unreasonably inconvenient or hazardous." Tex. Penal Code § 42.03(b); *but see Bailey v. State,* 304 S.W.3d 544, 546 (Tex. App. —San Antonio 2009, pet. ref'd) (contradicting the text of the statute to find that obstruction is a conduct-oriented offense). Because the gravamen of obstruction focuses solely on the result, it was error for the trial court to include instructions on a culpable mental state not limited to this result. *Cook*, 884 S.W.2d at 491 ("It is error for a trial judge to not limit the definitions of the culpable

mental states as they relate to the conduct elements involved in the particular offense."); *see also Alvarado v. State*, 704 S.W.2d 36, 39 (Tex. Crim. App. 1985) ("What matters is that the conduct (whatever it may be) is done with the required culpability to effect the *result* the Legislature has specified."); *Coleman v. State*, 279 S.W.3d 681, 685 (Tex. App.—Amarillo 2006), *aff'd*, 246 S.W.3d 76 (Tex. Crim. App. 2008) ("A jury charge should contain only the portion of the statutory definition that corresponds to the correct culpable mental state as proscribed by the offense.").

Because Appellants promptly objected to the erroneous inclusion of instruction on a conduct-oriented mental state, RR7.92:16-93:7, reversal is required if the error is "calculated to injure the rights of defendant." This requires only "some harm" to the accused from the error. *Almanza*, 686 S.W.2d at 171. In other words, an error, properly preserved, will call for reversal as long as the error is not harmless. *Id*.

In *Sneed v. State,* the Fifth Court of Appeals discussed the harm that flows from an incorrect mens rea definition included in the charge. The court found that including instructions regarding the nature of conduct in a jury charged focused solely on a results-oriented offense was harmful because it "allow[ed] the jury to do that which the law does not – find the accused guilty based only on his conduct, rather than on intending or knowing the prohibited result." 803 S.W.2d 833, 836

(Tex. App.—Dallas 1991, pet. ref'd) (finding this error caused egregious harm).

Appellants here suffered the same type of harm as in *Sneed* because incorrect and misleading statements of law in the definitions section of the charge prevented the jury from correctly applying the mens rea requirements in the application paragraph. As the jury was instructed to find Appellants guilty for "intentionally and knowingly" causing an obstruction, the trial court improperly permitted the jury to convict Appellants for the nature of their conduct and not solely the results of their actions.

The State compounded this harm by relying on this improper construction of Appellants' culpable mental state in its closing argument, claiming: "Ms. Henderson [was] shouting . . . 'Whose streets? Our streets. Whose streets? Our streets.' That shows – that indicates an intent to be in the streets, for whatever reason, that was not legal." RR7.212:6-9. This argument, combined with this conduct-oriented instruction in the jury charge, improperly advised the jury that they could convict Appellants solely for intentional conduct—being in the street—rather than the result of that conduct—obstruction. This is an erroneous construction of the statute that caused Appellants actual harm.

This error is also exacerbated by the previous jury charge error. By improperly instructing the jury on "disobey[ing] a reasonable request or order to move" under section 42.03(a)(2)—while allowing them to wrongfully focus on the

nature of Appellants' conduct rather than the result—the trial court essentially authorized the jury to convict Appellants for disobeying a request or order to move, with the intent and knowledge of engaging in that conduct. The jury charge was not limited to the mens rea actually required here: intent and knowledge of actual obstruction under Section 42.03(a)(1). The jury instructions therefore caused Appellants harm and require reversal of the convictions.

C. The jury charge deprived Appellants of their right to a unanimous verdict.

Texas law requires that a jury reach a unanimous verdict about the specific crime that is committed by each defendant. *See Landrian v. State*, 268 S.W.3d 532, 535 (Tex. Crim. App. 2008). Here, however, the application paragraph of the charge instructed the jury to convict each Appellant for "walking in the roadway with a group the defendant had organized" without instructing the jury that its decision had to be unanimous with regards to a specific criminal act. CR.109. By giving the jury this open-ended instruction and failing to adequately instruct them on unanimity, the trial court erred and egregiously harmed Appellants' right to a fair and impartial trial.

It is well-established that juries must "agree upon a single and discrete incident that would constitute the commission of the offense alleged." *Stuhler v. State*, 218 S.W.3d 706, 717 (Tex. Crim. App. 2007). Non-unanimity may arise "when the jury charge fails to properly instruct the jury, based on the indicted offense(s) and specific evidence in the case, that its verdict must be unanimous."

Cosio v. State, 353 S.W.3d 766, 771 (Tex. Crim. App. 2011). Including the word "unanimously" in a "boilerplate section of the jury charge" does not alleviate this error nor obviate the court's obligation to ensure that the jury reaches unanimous agreement over "which single, specific criminal act the defendant committed." *Ngo v. State*, 175 S.W.3d 738, 745-48 (Tex. Crim. App. 2005) (en banc).

"[N]on-unanimity may occur when the State presents evidence demonstrating the repetition of the same criminal conduct, but the actual results of the conduct differed" or "when the State charges one offense and presents evidence that the defendant committed the charged offense on multiple but separate occasions." *Cosio*, 353 S.W.3d at 771-72. Here, the State relied on evidence that every time one of the Appellants or another protester stepped into the street, it constituted a separate criminal offense.

> Prosecution: And the obstructions you made in that – that are reflected in this video, the video itself, from observing the video, reviewing it, how many times were these protestors obstructing California Street?
>
> Sergeant Jones: Every time one of them walked out in the roadway it was an obstruction violation.
>
> Prosecution: Okay. And theoretically those could have been separate counts?
>
> Sergeant Jones: That is correct.

See RR6.138:17-25. This testimony rendered it impossible for the jury to point to a single and specific criminal act because they were instructed to focus on an entire group of people and not the specific actions of Appellants.

The trial court did not correct this testimony with instructions to the jury that they must reach a unanimous verdict with regards to a "single, specific criminal act the defendant committed." *Ngo*, 175 S.W.3d at 748. Instead, the jury was instructed simply to convict Appellants for "walking in the roadway with a group the defendant had organized" CR.109, which made it impossible for the jury to reach a decision about which specific criminal acts each Appellant committed. *See Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) (en banc) ("The unanimity requirement is undercut when a jury risks convicting the defendant on different acts, instead of agreeing on the same act for a conviction.").

This non-unanimity allowed by the jury charge constitutes egregious error, even though Appellants did not raise this issue during the charging conference. *Ngo*, 175 S.W.3d at 752. This error violated the court's obligation to ensure that Appellants were convicted by a unanimous verdict and deprived Appellants of their right to a fair and impartial trial under the factors of *Almanza*, 686 S.W.2d at 171. First, the court was obligated to instruct the jury specifically on the need for unanimity regarding the factual basis for the criminal offense because the charge as a whole and application section allowed Appellants to be convicted by a non-

unanimous verdict without a specific factual finding on each Appellant's actions and the result of those actions.

Second, the state of the evidence weighs in favor of finding egregious harm. As stated above, *see supra* footnote 4, the evidence used against Appellants is generalized for an entire group of people and not tethered to Appellants' specific conduct. This exacerbated the risk of non-unanimity by the jury of finding a single, specific unlawful act.

Third, and making the above errors more profound, the State's attorney explicitly relied on generalized and non-specific allegations against Appellants to exacerbate this risk of non-unanimity. During opening argument, the State referred generally to a "crowd" of people and "all marchers [who] entered the roadway." RR6.107:19-108:4. During closing argument, the State averred that Appellants were "involved" in the protest, RR7.208:7, and that "California Street became impassable or blocked on three separate occasions," RR7.209:7-8, but the prosecutor did not connect this alleged generalized obstruction to Appellants' actions. Rather than identifying a single, specific criminal act for each Appellant, the jury charge and prosecutor's comments could have led the jury to convict Appellants for the generalized actions of an entire group of people, which violates unanimity.

Fourth, there is nothing in the record that alleviates the court's obligation to ensure that the jury's verdict is unanimous with regards to each Appellant and the

conduct of the offense. Throughout the trial, the jury was never told that it had to reach a unanimous decision as to which criminal act(s) each Appellant committed. Instead, the jury was allowed to focus on more generalized actions of an entire group of people and there is no way to know if the verdict was unanimous with regards to Appellants specifically. This is reversible error that caused Appellants egregious harm. *See Ngo,* 175 S.W.3d at 752 ("We . . . agree that appellant's constitutional and statutory right to a unanimous jury verdict was violated and this violation caused egregious harm to his right to a fair and impartial trial.").

D. The trial court erred by giving the jury a charge that was legally erroneous and confusing to the jury regarding the First Amendment defense to Section 42.03.

As articulated above, Texas courts have always construed Section 42.03(a)(1) in the context of free speech activity to give ample breathing room to the exercise of the rights of free expression and assembly. *See supra* Section I.D. But the trial court here erroneously included a jury instruction, over Appellants' objections, that was legally erroneous, confusing to the jury, and could have been interpreted to nullify the constitutional and statutory limitations on overbreadth of the obstruction statute.

Paragraph five of the jury charge states: "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. Appellants objected to this section, asking for it to be "struck in its entirety." RR7.93:8-11. Defense counsel explained that this

instruction was "prejudicial and confusing" because "there is a defense that involves First Amendment protest activity" already specifically articulated in the charge, and that adding this extraneous misstatement of the law "is prejudicial and creates an unfair perception in the mind of the jury." RR7.93:12-17. The trial court denied Appellants' request to strike the paragraph. RR7.94:3-4.

The State's attorney claimed that the inclusion of this language was required by *Lauderback v. State*, where the Second Court of Appeals upheld a conviction of obstruction of someone who stopped in a wheelchair in a lane of traffic for an extended period of time while picketing outside a bank. 789 S.W.2d 343, 346 (Tex. App. —Fort Worth 1990, pet. ref'd). The appeals court in that case sustained the conviction because "appellant created an obstruction by making the passage unreasonably inconvenient and hazardous." *Id.* at 347. Although the court rejected the appellant's argument that the First Amendment barred conviction in those circumstances, the appeals court *did not* articulate the rule urged by the State's attorney and included in the jury charge here that First Amendment activity is not a defense to the charge at issue. Instead, the court in *Lauderback* balanced the appellant's First Amendment rights with the ability of the state to regulate obstructions in a roadway and found that under the specific circumstances in that case, "preventing obstructions in the roadway furthers an important or substantial governmental interest." *Id.*

Indeed, the rule urged by the State and included in the jury charge runs counter to the statutory interpretation of the Court of Criminal Appeals in *Sherman*, where the court explained that "[b]y requiring that passage be severely restricted or completely blocked before a prosecution under this statute would lie we give ample breathing room for the exercise of First Amendment rights." 626 S.W.2d at 526. The trial court's inclusion here of the phrase "It is not a defense to the charge of obstructing a highway or passageway that the defendant is involved in a demonstration or protest"—without the appropriate context or nuance required by the Court of Criminal Appeals—likely confused the jury and improperly broadened the scope of liability under Section 42.03 beyond its statutory and constitutional limits.

Furthermore, this misstatement of law in the jury charge is also inconsistent with the plain text of the statute because Section 42.04 creates a defense for "conduct that would otherwise violate . . . 42.03" when that "conduct consists of speech or other expression . . . or of gathering with others to . . . express in a nonviolent manner a position on social, economic, political, or religious questions." The express terms of the statute also require that "the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally harmed the interests." Tex. Penal Code § 42.04. But by instructing the jury that being

"involved in a demonstration or protest" is not a defense, the court deprived Appellants of a defense permitted by the very statute with which they were charged.

Such an "incorrect instruction on the law" in a jury charge that risks "confus[ing] and misle[ading]" the jury is an error that can—and did—cause egregious harm. *See Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (citing *Ruiz v. State*, 753 S.W.2d 681, 686 (Tex. Crim. App. 1988)). Because Appellants timely objected to this flawed instruction, they must only establish "some harm" that injures the rights of Appellants. *Almanza,* 686 S.W.2d at 171. This case far exceeds the "some harm" standard because all three Appellants were deprived of a statutory defense and of their constitutional right to expressive activity as a result of this legally erroneous instruction. *Sherman*, 626 S.W.2d at 526.

The jury charge errors, both individually and in their cumulative effect, require reversal of the convictions below.

III. Errors in voir dire deprived Appellants of a fair and impartial trial.

In addition to the reversible errors outlined above, Appellants' right to a fair trial was thwarted by the trial court's refusal to dismiss veniremembers for cause during voir dire, despite their open admission that they could not be fair and impartial and that two of them had already predetermined Appellants' guilt. These two veniremembers agreed that even before they heard any testimony, they knew that Appellants "would be guilty" and had a "preconceived notion," "bias," or

"prejudice" and already "formed an opinion" on the case. RR6.46:11-47:10. Despite this flagrant admission of bias during voir dire, the trial court overruled Appellants' objections for cause. RR6.93:2-19. As a result, Appellants were deprived of a right to a fair and impartial trial because two jurors were empaneled against them after openly admitting to finding them guilty before the trial began.

A. Appellants' rights were irreparably harmed in voir dire.

Over a third of the venire expressed clear and unequivocal bias against Appellants, including two individuals who were eventually seated on the jury due to Appellants' exhaustion of their peremptory strikes. In the middle of voir dire, one venireperson stated, "If this is about that crazy protest they was having out here then I would say guilty." RR6.46:11-13. The prosecutor confirmed that this veniremember had already determined the defendants' guilt before a single shred of evidence was heard. RR6.46:14-22. When the prosecutor asked if anyone else felt the same way, seventeen people—more than a third of the panel—raised their hands in agreement. RR6.46:16-47:5. The trial court correctly struck some—but not all—of these panelists for cause. Two people were still seated on the jury who openly expressed flagrant bias against Appellants and prejudged their guilt. And despite Appellants' vigorous objections—including one of the Appellants himself speaking up to voice concerns—the jury was irreparably tainted and biased against them.

"A veniremember is challengeable for cause if (among other reasons) he has a bias in favor of or against the defendant or a bias or prejudice against any of the

laws applicable to the case upon which the state or defense is to rely." *Tracy v. State*, 597 S.W.3d 502, 512 (Tex. Crim. App. 2020). The question is whether this "bias or prejudice would substantially impair the prospective juror's ability to carry out his oath and follow instructions in accordance with the law." *Id.* The proponent of the challenge carries "the burden of establishing that the challenge is proper, [and] . . . has shown that the veniremember understood the requirements of the law and could not overcome his prejudice well enough to follow the law." *Id.*

1) The trial court erroneously overruled objections to four veniremembers who expressed clear bias against Appellants.

Although the trial court properly struck some veniremembers for cause, the court erroneously overruled Appellants' objections to four panel members who expressed naked bias against Appellants, including the two venirepeople who predetermined Appellants' guilt before any evidence was heard. Venireperson 9 and venireperson 15 both admitted during voir dire that they believed Appellants to be guilty even before hearing any evidence; and venirepeople 10, 15, and 23 admitted to being biased in favor of police and giving greater weight to their credibility.

Venireperson 9 expressed agreement with the statement that the appellants "would be guilty" due to a "preconceived notion," "bias," or "prejudice." RR6.46:17-47:5. The Court, the prosecutor, and this venireperson then had the following exchange:

> Zielinski: Okay. [Venireperson 9], do you feel that you could listen to both those instructions and follow them in considering the evidence in this case to determine a verdict?
>
> Venireperson 9: No. If they were protesting peaceably then we wouldn't be here. I would follow the letter of the law and what the law asked me to do.
>
> . . . .
>
> The Court: You've got to understand this, that you have not heard any facts of this case. You may have a set of facts in your mind that you think happened, but you're not going to make a decision based on what you think happened. Once you hear all the evidence and hear the real facts from the witnesses who were there or have knowledge of the situation, could you then make a fair decision as to whether the Defendants are guilty or not guilty?
>
> Venireperson 9: No.
>
> Zielinski: No? That's your answer?
>
> Venireperson 9: No.
>
> The Court: Okay. Thank you.

RR6.50:3-25. Appellants objected to this veniremember for cause, but the Court simply responded: "I don't have those notes on mine for her so I am going to overrule the objection." RR6.93:13-14.

Venireperson 15 also agreed with the statements that "If this is about that crazy protest they were having out here then I would say guilty" and "They would be guilty." RR6.46:11-47:5. She also agreed that she had a "preconceived notion," "bias," or "prejudice" and already "formed an opinion" on the case. *Id.* Venireperson

15 never mitigated or backed away from this position. Instead, she added that her father, brother, and sister worked in law enforcement and that she would weigh the testimony of police officers more favorably than other witnesses. She stated that she was "raised to, like, believe officers." RR6.74:21-22. And when asked for clarification, she venireperson 15 responded "yes" to the question of whether she would "give an officer more credibility just by virtue of being an officer." RR6.74:23-25. Appellants challenged this venireperson for cause but the trial court overruled this objection. RR6.93:15-19.

Venireperson 10 also expressed a clear bias in favor of police. When asked whether he would lend more credibility to a witness's testimony if that person was a police officer, venireperson 10 responded: "Yeah, I believe they took an oath and I would hope they would tell the truth. But I mean, I think an oath means something." RR6.73:23-74:14. The conversation continued:

> Defense Counsel: And because of that oath and because of the training and experience that a police officer has, you would give them a little bit of an advantage testifying? You would be inclined to believe them a little bit more?
>
> Venireperson 10: I think so, yes.
>
> Defense Counsel: Okay. I got to—so can I put you down as a yes, you would?
>
> Venireperson 10: Yes.

Id. Appellants' trial counsel challenged Venireperson 10 for cause "because [he] offered that [he] would give more credibility to law enforcement by virtue of just being police officers." RR6.93:15-18. The Court summarily overruled this challenge. RR6.93:19.

Similarly, venireperson 23 expressed that police officers are "trained professionals so you have to give them more credibility. As mentioned before they have taken an oath. They understand the law better generally against somebody that took U.S. history and learned the constitution . . . in the fourth grade." RR6.75:6-13. Venireperson 23 responded "Yes" to the question of whether he "would give an officer more credibility by . . . virtue of being an officer here in court . . . ." RR6.75:21-24. Appellants tendered the same challenge for cause, which was also denied. RR6.93:15-19. Indeed, the trial court overruled all of Appellants' challenges for cause. RR6.93:2-19.

These veniremembers expressed a clear and absolute bias against Appellants, yet the trial court erroneously overruled their objections for cause. Although trial courts have "discretion in ruling on challenges for cause," the Due Process Clause requires that all persons are presumed innocent, and no person may be convicted unless each element of the offense is proved by the prosecution beyond a reasonable doubt. *Ladd v. State*, 3 S.W.3d 547, 560 (Tex. Crim. App. 1999) (citing *In re Winship,* 397 U.S. 358 (1970)). "Therefore, a venireman who cannot presume the

defendant innocent is challengeable for cause under [Texas Code of Criminal Procedure] Article 35.16(c)(2) for having a bias or prejudice against the law." *Id.* Moreover, a "veniremember is challengeable for cause if he or she cannot impartially judge the credibility of witnesses." *Cubit v. State*, No. 05-12-01549-CR, 2014 WL 2801352, at *1 (Tex. App.—Dallas June 17, 2014, no pet.) (not designated for publication) (citing *Ladd*, 3 S.W.3d at 560). "This means only that jurors must be open minded and persuadable, with no extreme or absolute positions regarding the credibility of any witness." *Id.*

Here, veniremembers 9 and 15 expressed unequivocally that they thought Appellants "would be guilty" and had a "preconceived notion," "bias," or "prejudice" and already "formed an opinion" on the case. RR6.46:11-47:5. There was no rehabilitation on this issue from the court or attorneys. These veniremembers' admission of bias was therefore not "ambiguous, vacillating, unclear, or contradictory." *See Tracy*, 597 S.W.3d at 512. Likewise, veniremembers 10, 15, and 23 stated in absolute terms that they would give more credibility to police officers due to their biases in favor of law enforcement. RR6.73:23-74:14; RR6.74:21-25; RR6.75:6-24. Once again, none of these veniremembers clarified or walked back this claim or stated that they could be fair and impartial members of the jury. These veniremembers' naked bias was in no way equivocal or unclear. All four veniremembers should have been struck for cause.

2) *While the trial court erred by not striking biased veniremembers for cause, it was also ineffective assistance of counsel for trial counsel not to request additional peremptory strikes to exclude flagrantly biased veniremembers from the jury.*

Appellants promptly objected to the inclusion of all four veniremembers for cause, but the trial court overruled those objections. Trial counsel then used peremptory challenges on veniremembers 6, 10, and 23, exhausting Appellants' peremptory strikes on two of the veniremembers complained of here, 10 and 23. *See* RR6.94:2-95:11. The veniremembers who exhibited the clearest bias and prejudgment against Appellants—Venirepeople 9 and 15—were empaneled on the jury despite Appellants' objections. RR6.94:9-95:8.

Appellants were aghast that two venirepeople who openly expressed such bias against them were allowed to sit on the jury. When venireperson 9's name was called during the discussion of challenges for cause, Appellant Thompson spoke up and urged the court to strike this person for cause, stating "she had already made an opinion in her head." RR6.93:10-12. The court nevertheless overruled that objection and veniremembers 9 and 15 were seated on the jury, despite their unmistakable bias against Appellants and their sworn statements that they had predetermined Appellants' guilt. This caused Appellants egregious harm and violated their due process right to a fair and impartial trial.

When a trial court errs in overruling a challenge for cause, "the defendant is harmed if he uses a peremptory strike to remove the veniremember and thereafter

suffers a detriment from the loss of the strike." *Tracy*, 597 S.W.3d at 512. To preserve this error, an appellant must demonstrate that: "(1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venireperson; (3) all his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury." *Sells v. State*, 121 S.W.3d 748, 758 (Tex. Crim. App. 2003).

Here, all of these elements were met except for one. Trial counsel asserted clear and specific challenges for cause against the four venirepeople mentioned above and used peremptory challenges on two of them. All of Appellants' peremptory challenges were exhausted and two objectionable jurors with unequivocal bias and predeterminations of guilt were empaneled on the jury. But trial counsel did not request additional strikes despite the veniremembers' flagrant bias against Appellants. This oversight and failure to preserve this error constituted ineffective assistance counsel because it deprived Appellants of their due process right to a fair and impartial trial.

To prevail on an ineffective assistance of counsel claim, Appellants must show by a "preponderance of the evidence that [their] counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different." *Salinas v. State,* 163 S.W.3d 734, 740 (Tex. Crim. App. 2005)

(citing *Strickland v. Washington,* 466 U.S. 668, 687–88 (1984)). When reviewing these claims, courts carry a "strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Id.* Therefore, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland,* 466 U.S. at 689 (quoting *Michel v. State of La*., 350 U.S. 91, 101 (1955)). Although ineffective assistance of counsel claims are rarely raised on direct appeal, they can be established when "firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.'" *Salinas*, 163 S.W.3d at 740 (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)).

Failing to ask for additional peremptory strikes to cure a court's failure to strike a juror for cause can constitute ineffective assistance of counsel, particularly where this decision "somehow (1) tainted the jury, (2) affected its ability to render a verdict based solely on the facts and law, or (3) prejudiced his defense against the charges." *Suarez v. State*, No. 07-01-0378-CR, 2003 WL 77088, at *1 (Tex. App.—Amarillo Jan. 7, 2003, no pet.) (not designated for publication). Here, these elements are met because venirepeople 9 and 15 clearly expressed their predetermination of Appellants' guilt, which irreparably tainted the jury, impeded its ability to render a verdict based solely on the facts and law, and prejudiced Appellants' defense. Moreover, the record makes clear that trial counsel's decision to seek additional

peremptory strikes was not a tactical or strategic decision. When raising an objection to venireperson 9, trial counsel said, "I don't have her notes written down." RR6.93:8-9. And while trial counsel challenged venireperson 15 for cause, she did so only on the grounds that she "would give more credibility to law enforcement by virtue of just being police officers," and not raising venireperson 15's unambiguous statements predetermining Appellants' guilt. *See* RR6.93:15-18. Taken together, trial counsel's attempt to strike these veniremembers but failure to inform the court of their clear and unequivocal bias or seek additional strikes was not a tactical or strategic decision but rather an oversight that deprived Appellants of their right to a fair and impartial jury. Under the standards for ineffective assistance of counsel, this error fell "below the standard of prevailing professional norms" and "but for counsel's deficiency, the result of the trial would have been different." *Salinas,* 163 S.W.3d at 740 (citing *Strickland,* 466 U.S. at 687–88). The errors of trial counsel and the court in voir dire deprived Appellants of their right to a fair and impartial trial, which is sufficient to reverse Appellants' convictions.

CONCLUSION

This Court should reverse the judgments of the trial court and order a judgment of acquittal for all three Appellants. In the alternative, this Court should remand this case back to the trial court for a new trial.

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