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In The Court of Criminal Appeals

TORREY LYNNE HENDERSON, AMARA JANE RIDGE, & JUSTIN ROYCE THOMPSON,

***Appellants*,**

v.

THE STATE OF TEXAS,

Appellee.

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

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF APPELLANTS AND REVIEW

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide—including in Texas[2]—through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights.

Because of its experience defending expressive rights, FIRE is keenly aware that public officials can and do misuse broadly written regulations and statutes to stifle protected speech on matters of public concern. The misapplication of criminal statutes is particularly pernicious because it constricts the breathing space needed for First Amendment rights to flourish and threatens Americans' ability to participate in public debate without fear of arrest and prosecution.

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[1] Pursuant to Rule 11(c), amicus affirms that no fee was paid in the preparation of this brief.

[2] *See, e.g.*, Will Creeley, *Victory for Free Speech on Campus: Federal Court Strikes Down Gun Rights Protest Restrictions at Tarrant County College*, Foundation for Individual Rights and Expression (Mar. 16, 2010), https://www.thefire.org/news/victory-free-speech-campus-federal-court-strikes-down-gun-rights-protest-restrictions-0 [[https://perma.cc/ZEK7-YYLW]] (detailing defense of student protest in support of gun rights).

FIRE submits this brief to urge this Court to grant review so that it can reverse Appellants' convictions and ensure ample breathing space for the First Amendment right to engage in peaceful political protest in public spaces.

SUMMARY OF ARGUMENT

Throwing someone in jail for a peaceful political march down a sidewalk strikes at the heart of the First Amendment. Since even before the founding, Americans have used peaceful marches and demonstrations to petition public officials, convey support for causes, and rally their fellow citizens for change on issues of public importance. Whether protesting over taxes, voting rights, civil rights, abortion, or wars, the First Amendment protects the right to assemble and share one's views in public spaces. After all, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964).

So vital is the right to peaceful political protest that the Supreme Court has upheld it for messages many would find repulsive. Nearly 50 years ago, the Supreme Court recognized even Nazis had a constitutional right to parade down the streets of a small town many

Holocaust survivors called home. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). And more recently, the Court affirmed that the First Amendment protected individuals who publicly protested on the sidewalk near a funeral for a fallen Marine with signs reading "Thank God for Dead Soldiers" and "You're Going to Hell." *Snyder v. Phelps*, 562 U.S. 443, 449 (2011).

Those cases reflect a tenet necessary to preserving robust public debate: First Amendment rights need breathing space. Not only must that breathing space broadly protect *what* someone says, it must also protect *how* they say it. Because the First Amendment provides us broad latitude to express ourselves in both content and form, decades of precedent has made clear the need for exacting precision when demarcating the line between protected speech and unprotected conduct. Indeed, even content-neutral time, place, and manner restrictions must be narrowly tailored and leave open ample channels for a speaker to share their message. And the breathing space the First Amendment requires is particularly vital in the context of criminal statutes, which cannot criminalize or chill protected expression.

Distorting a state statute to turn a peaceful political march's temporary departure off a public sidewalk or a momentary hindrance of traffic into a crime does not provide that breathing space—it suffocates it. That's what the record shows happened here. And this is no isolated incident. Across the nation, public officials too often abuse criminal statutes to target dissent, posing an ongoing danger to free expression.

Courts must stand vigilant against that threat to our First Amendment freedoms. FIRE urges this Court to grant review and reject the State's sweeping view of Tex. Pen. Code § 42.03(a)(1), uphold Appellants' fundamental First Amendment rights, and secure breathing space for all to exercise those rights by reversing Appellants' convictions.

ARGUMENT

I. Given the Breathing Space it Needs, the First Amendment Protects Peaceful Protest Like Appellants'.

Appellants' peaceful political march was a quintessential exercise of the First Amendment rights to free speech, peaceful assembly, and petition. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out

of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515–16 (1939) (opinion of Roberts, J.). That is why the U.S. Supreme Court has time and again rejected the government's attempts to punish peaceful expression on public sidewalks. *See, e.g.*, *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 158–59 (1969) (reversing criminal conviction of civil rights protestor who used public sidewalk without permit); *Edwards v. South Carolina*, 372 U.S. 229, 230, 236 (1963) (reversing "breach of the peace conviction" of civil rights protestors who used public sidewalks, where record showed "[t]here was no violence of threat of violence . . . .").

To the same end, the U.S. Supreme Court has made clear that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," including in public spaces like streets. *Snyder*, 562 U.S. at 452. No matter if Americans are gathering in a public park to protest a war, marching down the sidewalk to advocate for religious freedom, or rallying outside City Hall against a bond measure, the First Amendment protects it. If the First Amendment protects the right of

Nazis to march down the streets of Skokie and the right of someone to hold a "Thank God for Dead Soldiers" sign on the sidewalk outside a solemn military funeral—and it does—then surely it also protects the right of Appellants to march on the sidewalks of Gainesville and call for removal of Confederate monuments.

In essence, the expressive freedoms Appellants exercised are those "we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). Peacefully joining with others of like mind to speak out about the issues of the day, as Appellants did here, is a treasured hallmark of American civic life and "a basic tenet of our constitutional democracy." *Cox v. Louisiana*, 379 U.S. 536, 552 (1965). And because the First Amendment is "the guardian of our democracy," *Brown v. Hartlage*, 456 U.S. 45, 60 (1982), courts have long held that the freedoms it protects require special judicial attention. So when the government proposes to regulate or restrict free expression, it may do so "only with narrow specificity"—because our "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In fact, the U.S. Supreme Court just cited the need for First Amendment breathing

space as its rationale for rejecting Colorado's less-stringent objective standard for criminalizing "true threats": "By reducing an honest speaker's fear that he may accidentally or erroneously incur liability, a *mens rea* requirement provides 'breathing room' for more valuable speech." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023) (cleaned up).

In the same way, the State faces a rigorous standard to justify criminalizing public protest. *See, e.g.*, *Shuttlesworth*, 394 U.S. at 151 (explaining that a law targeting demonstrations failed to meet First Amendment requirements because it lacked "narrow, objective, and definite" standards). FIRE urges this Court to grant review, and to find that the State has not met that burden.

Above all, a person violates Section 42.03(a)(1) only when they obstruct a street or sidewalk "without legal privilege or authority." And there is no stronger legal privilege or authority than what the Constitution squarely protects: Appellants' First Amendment right to peacefully march on the sidewalk for political change. Moreover, as Appellants point out, the Gainesville Police Department facilitated their march along the street and sidewalk. (Appellants' Br. at 3–4).

Nor did that privilege vanish just because some marchers briefly moved off the sidewalk into the street. Indeed, even when peaceful protesters moved off a sidewalk to "get around the water" from sprinklers—much like Appellants did here—the U.S. Supreme Court overturned a disorderly conduct conviction because the march fell "well within the sphere of conduct protected by the First Amendment." *Gregory v. City of Chicago*, 394 U.S. 111, 112, 127 (1969). In short, a brief detour from a public passageway does not justify convicting peaceful political demonstrators.

These longstanding precedents and doctrinal protections demonstrate the essential importance we assign to free speech. But because the State misapplied a criminal statute to peaceful protest, Appellants now face exactly the kind of criminal sanctions that First Amendment "breathing space" should preclude. Unfortunately, their case epitomizes a troubling national trend.

II. In Texas and Elsewhere, Government Officials Are Choking Free Expression by Misapplying Criminal Laws Against Dissent.

The State not only stretched Section 42.03(a)(1) beyond its reasonable scope, *see Sherman v. State*, 626 S.W.2d 520, 526 (Tex. Crim. App. 1981), but also twisted it to ensnare protected speech. Both distortions threaten the breathing room expressive freedom requires to flourish. What's more, the State's wrongful arrest and prosecution of Appellants is just one of many recent examples of public officials misapplying criminal statutes to target dissent.

Texas is no stranger to this disturbing pattern. In Castle Hills, Texas, the mayor conspired with local police to arrest 72-year-old city council member Sylvia Gonzalez under a rarely used Texas law barring the concealment or impairment of government records. *Gonzalez v. Trevino*, 42 F.4th 487, 489–90 (5th Cir. 2022), *cert. granted*, No. 22-1025, Oct. 13, 2023. After the outspoken Sylvia momentarily misplaced a petition to oust the city manager, local officials punished her under the Texas law, even though "most indictments under the statute involved fake government IDs." *Id.* at 490. If Castle Hills's authorities

wished to silence the city manager's critic, they succeeded: Sylvia stated she would never again run for political office or engage in any other "public expression of her political speech." *Id.*

And just down Interstate 35 in Laredo, Texas, officials dug up a thirty-year-old criminal statute—one never enforced before—to arrest popular citizen journalist Priscilla Villarreal*Villarreal v. City of Laredo*, No. 20-40359, 2024 WL 244359, at *17, *20 (5th Cir. Jan. 23, 2024) (en banc) (Higginson, J., dissenting.[3] *Months* after Priscilla asked a police officer for newsworthy information—something the press does every day—local officials orchestrated her arrest under the obscure Texas law. *Id.* at *23 (Willett, J., dissenting).

Similarly troubling incidents abound in other states. For example, in Connecticut, law enforcement enforced an anti-discrimination advertising law to punish non-commercial speech they declared offensive. *Cerame v. Lamont*, 346 Conn. 422, 424, 431 (Conn. 2023). In Washington state, authorities charged Jaina Bledsoe with "malicious mischief" after she wrote chalk messages condemning the city commissioner's comments on a public sidewalk, even though county

[3] FIRE currently represents Villarreal and is preparing to file a petition for *certiorari* with the U.S. Supreme Court this spring.

prosecutors admitted that no other malicious mischief charges had ever been filed for chalk markings on public property. *Bledsoe v. Ferry Cnty.*, 499 F. Supp. 3d 856, 866–69 (E.D. Wash. 2020). And in Louisiana, police arrested Jerry Rogers for criminal defamation because he criticized a murder investigation—*after* the district attorney told them the arrest would violate the Constitution. *Rogers v. Smith*, 603 F. Supp. 3d 295, 298–99 (E.D. La. 2022), *aff'd*, No. 22-30352, 2023 WL 5144472 (5th Cir. Aug. 9, 2023).

In none of these instances did a speaker threaten somebody. Nor did they call for imminent violence. They simply exercised their right to express dissent—just as the marchers did here. Yet for exercising that right, these dissenters faced penal sanction under misapplied statutes.

So too did Appellants.

The police did not arrest Appellants or other marchers at the scene; in fact, they worked hand-in-hand with the marchers to carry out a peaceful political protest. (Appellants' Br. at 3–4.) If Appellants were doing more than peacefully marching—and at most, momentarily departing from a public passageway they were on with the police's blessing—one would imagine the many police around would have acted

on the spot to preserve public safety. *See IBEW Loc. Union 479 v. Becon Constr. Co.*, 104 S.W.3d 239, 245 (Tex. App.–Beaumont 2003) (Burgess, J., concurring) (concluding that "evidence in the record reflects that no obstruction, as defined above, of ingress or egress ever occurred" in part because "officers at the scene of the picketing did not arrest anyone for violating" anti-picketing law).

But not until *three days* after the march did a magistrate issue an arrest warrant claiming Appellants "obstruct[ed] a highway or passageway." (Appellants' Br. at 1.) That delay hints at selective enforcement of the statute based on the content—or viewpoint—of Appellants' messaging. Indeed, the State's brief before the Seventh Court of Appeals, with its focus on audio evidence reflecting the marchers' chant "Whose streets? Our streets," reveals the State's decision to arrest and convict Appellants was based, at least in part, on their pure speech. (State's Br. at 21.)

Selective enforcement against dissent is a dangerous outcome for free expression and public participation. And as the examples from Texas and other states above show, it is all too common. Of course, FIRE is not urging this Court to step outside the issues on appeal and

rule on whether the State selectively enforced Section 42.03(a)(1). Rather, the point is that "courts must," as Judge Ho explained in Sylvia Gonzalez's case, "make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse." *Gonzalez*, 60 F.4th at 908 (Ho, J., dissenting), *cert. granted*, No. 22-1025, Oct. 13, 2023; *see also R.A.V. v. City of Saint Paul,* 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

Judge Ho's point echoes one Justice Holmes voiced nearly a century ago, warning against the danger of statutes "authoritatively construed" to "permit the punishment" of "the opportunity for free political discussion . . . an opportunity essential to the security of the Republic [and] a fundamental principle of our constitutional system." *Stromberg v. People of State of Cal.*, 283 U.S. 359, 369–70 (1931). As the above examples and this case show, that danger still lurks. FIRE urges this Court to check this danger by granting review and upholding Appellants' fundamental First Amendment right to engage in peaceful political protest against the State's misuse of Section 42.03(a)(1), and safeguard the breathing space vital to public debate.

III. This Court Should Construe the Statute to Safeguard the Breathing Space Necessary for Robust Public Participation.

The Court should narrowly construe Section 42.03(a)(1) to permit First Amendment rights the breathing space they require.

To ensure that breathing space, the U.S. Supreme Court has long demarcated with exacting precision the boundaries of the "well-defined and narrowly limited classes of speech" that lie beyond the First Amendment's protection. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). For example, only speech "directed to inciting or producing imminent lawless action" and in fact "likely to incite or produce such action" may lawfully be prohibited as incitement. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In so holding, the Court struck down an Ohio statute that "purport[ed] to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action"—a prohibition that fell "within the condemnation of the First and Fourteenth Amendments." *Id.* at 449. The First Amendment's few other categorical exceptions are similarly narrow, ensuring freedom of expression the broad breathing

space it requires. *See, e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (speech integral to criminal conduct); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (defamation of public officials); *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography).

To protect expressive rights from the government simply deciding "that some speech is not worth it," the U.S. Supreme Court has repeatedly rejected attempts to introduce new categorical exceptions. *United States v. Stevens*, 559 U.S. 460, 470 (2010) (depictions of animal cruelty); *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792–93 (2011) (violent video games); *United States v. Alvarez*, 567 U.S. 709, 722–23 (2012) (false statements). And even content-neutral regulations on the time, place, or manner of protected speech in public fora must be "narrowly tailored" in service of a "significant governmental interest," and, for good measure, must leave speakers "ample alternative channels" to voice their message. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). To secure First Amendment rights the "'breathing space' essential to their fruitful exercise," such precision

is necessary. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (internal citation omitted).

This Court should grant review to apply that precision to Section 42.03(a)(1). There can be no question that Appellants were engaged in peaceful expressive activity, properly protected by the First Amendment. When Texas courts, including this one, have confronted similar cases, they have correctly and "consistently recognized the First and Fourth Amendment rights of protestors to express their views without being subjected to false arrests." *Herrera v. Acevedo*, No. 21-20520, 2022 U.S. App. LEXIS 33981, at *7–9 (5th Cir. Dec. 9, 2022) (citing *Faust v. State*, 491 S.W.3d 733, 745 (Tex. Crim. App. 2016); *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 205 (Tex. 1981)).

Nor can there be any doubt that Section 42.03(a)(1) permits a narrowing, speech-protective construction, allowing for "the right of the public to the reasonably convenient use of sidewalks and other passageways without an encroachment upon the First Amendment rights of the individual." *Haye v. State*, 634 S.W.2d 313, 315 (Tex. Crim. App. 1982). Again, this Court has already done the work.

In *Sherman v. State*, this Court relied on Section 42.03 while reviewing a conviction under an anti-picketing ordinance. Fulfilling its mission "to construe this statute so as to render it constitutionally valid if at all possible," the Court declared the operative meaning of "obstruction" to "requir[e] that passage be *severely restricted* or *completely blocked* before a prosecution under this statute would lie." 626 S.W.2d at 525–26 (emphases added). By so doing, the opinion reasoned, "we give ample breathing room for the exercise of First Amendment rights." *Id.*

Under this binding construction, Appellants' arrest violates the First Amendment. The fact that they were not arrested at the time of the alleged misconduct highlights that they did nothing more than exercise their First Amendment rights. Instead, the officers present understood, in the moment, the necessity of honoring the breathing space that freedom of expression requires to survive.

In sum, FIRE urges the Court to grant review and reject the State's expansive view of Section 42.03(a)(1) and the evidence, and instead carefully construe the statute consistent with its text and with precedent. Doing so will stave off future selective enforcement of the

statute and provide the breathing room needed to ensure Appellants and all Texans can exercise their First Amendment rights without fear of criminal prosecution.

Dated: February 8, 2024

Respectfully,

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