No. _____

IN THE

Supreme Court of the United States

TORREY LYNNE HENDERSON, AMARA JANA RIDGE and JUSTIN ROYCE THOMPSON,

Petitioners,

—v.—

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SEVENTH COURT OF APPEALS FOR THE STATE OF TEXAS

APPLICATION FOR A STAY OF THE MANDATE PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Applicants are Torrey Henderson, Amara Ridge, and Justin Thompson. The State of Texas is the respondent.

RELATED PROCEEDINGS

Texas Court of Criminal Appeals

Torrey Lynne Henderson v. The State of Texas, PD-0844-23 (petition for discretionary review refused March 27, 2024)

Amara Jana Ridge v. The State of Texas, PD-0845-23 (petition for discretionary review refused March 27, 2024)

Justin Royce Thompson v. The State of Texas, PD-0846-23 (petition for discretionary review refused March 27, 2024)

Seventh Court of Appeals of Texas

Torrey Lynne Henderson v. The State of Texas, 07-22-00303-CR (judgment upholding conviction entered on November 15, 2023; stay of issuance of mandate granted May 7, 2024)

Amara Jana Ridge v. The State of Texas, 07-22-00304-CR (judgment upholding conviction entered November 15, 2023; stay of issuance of mandate granted May 7, 2024)

Justin Royce Thompson v. The State of Texas, 07-22-00305-CR (judgment upholding conviction entered November 15, 2023; stay of issuance of mandate granted May 7, 2024)

County Court of Law of Cooke County, Texas

The State of Texas v. Torrey Lynne Henderson, CR20-65983 (judgment and sentence entered September 1, 2022)

The State of Texas v. Amara Jana Ridge, CR20-65984 (judgment and sentence entered on September 1, 2022)

The State of Texas v. Justin Royce Thompson, CR20-65985 (judgment and sentence entered on September 1, 2022)

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

INTRODUCTION

Pursuant to Rule 23 of this Court, applicants respectfully apply for a stay of the issuance of the mandates pending disposition of applicants' concurrently filed petition for a writ of certiorari, to permit applicants to remain at liberty while this Court resolves their petition. The petition raises fundamental First Amendment questions regarding their criminal convictions for participating in a brief, nonviolent, protest march, on charges of "obstructing" a passageway, without individualized evidence that any of them actually obstructed any passageway. In effect, applicants were convicted for the acts of others that they did not direct, authorize, or ratify, in contravention of controlling decisions of this Court.

Applicants have been sentenced to seven days in jail, but for nearly four years have been permitted to remain free pending their trial and appeals. The prosecution, however, has refused to agree to delay their sentence while this Court reviews their petition.[1] Absent a stay from this Court, they will be compelled to serve the entirety of their sentence before this Court has had an opportunity to address their petition. Applicants will thus suffer irreparable harm in the absence of the limited stay sought here, while the State will suffer no harm by permitting the status quo to continue until the petition is resolved.

The Texas Seventh Court of Appeals granted applicants a stay of the issuance of the mandates for the maximum amount of time Texas law permits: 90 days, to allow for the filing of the petition for certiorari. Tex. R. App. P. 18.2 ("In a criminal case, the stay will last for no more

[1] Applicants' counsel emailed the State's counsel on June 20, 2024, asking whether the State would agree to delaying applicants' incarceration until this Court resolves their petition for certiorari. The State refused.

than 90 days, to permit the timely filing of a petition for certiorari."). The Texas Seventh Court of Appeals website provides that applicants' mandates are calendared to issue on July 23, 2024.[2] Only this Court can grant a further stay.

The case for a stay is strong. Indeed, the court below granted an initial 90-day stay pursuant to Tex. R. App. P. 18.2, which required it to find that there are "substantial" grounds for a stay, and that applicants "would incur serious hardship from the mandate's issuance if the United States Supreme Court were to later reverse the judgment." Tex. R. App. P. 18.2. Texas law restricts any Texas court from extending the stay, but this Court has that authority. Accordingly, applicants request the Court to grant a stay of the mandates pending resolution of applicants' concurrently filed petition for certiorari.

Applicants Amara Ridge, Torrey Henderson, and Justin Thompson face imminent incarceration for lawfully exercising their First Amendment rights to engage in peaceful protest. Ridge and Henderson are mothers caring for two small children; Thompson has suffered from suicidal ideation that, in his pre-trial detention, led to his being held in solitary confinement wearing nothing but a smock. Applicants have been free on bond without incident for the nearly four years since they were arrested for the misdemeanor in question. They should not be made to serve their sentence before this Court resolves their petition.

The convictions in this case arise from an uneventful, peaceful, and short march on a calm Sunday afternoon, on a quiet street in Gainesville, Texas. Applicants organized and participated in a brief protest march calling for the removal of a confederate monument from the courthouse

[2] The Texas Seventh Court of Appeals' case pages for all applicants, which document the set date for the mandates' issuance as July 23, 2024, can be accessed at the following links: https://perma.cc/R6S3-SZFW (documenting set date for Ms. Henderson), https://perma.cc/NL9N-LRV8 (documenting set date for Ms. Ridge), https://perma.cc/D2S8-96YV (documenting set date for Mr. Thompson).

lawn. Applicants were convicted for obstructing a passageway under Texas Penal Code § 42.03(a)(1). No evidence showed that applicants themselves intentionally or knowingly blocked any traffic or rendered any street impassable or unreasonably inconvenient or hazardous. The court below nonetheless upheld applicants' convictions based on the actions of unidentified others in the march—an unnamed bicyclist and "the crowd" generally. In the context of a peaceful protest, the First Amendment forbids punishment without proof that applicants themselves intentionally obstructed a passageway or directed others to do so—yet the court below affirmed the convictions without any such evidence.

Applicants' convictions contravene this Court's precedent, which has rejected attempts to criminalize protest actions under "obstruction" statutes without proof of intent to obstruct traffic on public streets. *See e.g.*, *Cox v. State of Louisiana*, 379 U.S. 536, 541-553 (1965) (reversing a conviction under an obstruction statute that lacked specific intent to obstruct because such a conviction would give law enforcement unfettered discretion to punish individuals for engaging in protected activity). And the Court has also held that protest organizers cannot be held liable for the illegal actions of others without proof that they directed, authorized, or ratified, those actions. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (invalidating civil tort liability imposed on protest leader for actions of others absent proof that the leader directed, authorized, or ratified the tortious activity). The court of appeals' decision runs roughshod over these principles, making this Court's intervention necessary to protect the guarantees of the First Amendment.

Because the convictions trench directly on core First Amendment freedoms, there is a reasonable probability that the Court will grant certiorari, and if so, it will likely reverse the convictions. Applicants will suffer irreparable injury if they are required to serve their

sentences before this Court resolves their petition, and the State faces no harm from a continuation of the status quo for that period of time. Accordingly, the Court should grant a stay of the mandate until this Court resolves the petition for certiorari.

A. Factual Background

Texas's Obstruction Statute

The State convicted applicants under Texas's Obstruction of Passageway statute, Section 42.03(a)(1), which provides in pertinent part:

> A person commits an offense if, without legal privilege or authority, he intentionally, [or] knowingly…: (1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access…regardless of the means of creating the obstruction…and whether the obstruction arises from his acts alone or from his acts and the acts of others.[3]

"Obstruct" is defined as "to render impassable or to render passage unreasonably inconvenient or hazardous." Tex. Penal Code § 42.03(b). Violation of the statute is a Class B misdemeanor with a sentence of up to 180 days in jail, a maximum fine of $2,000, or both. Tex. Penal Code §§ 42.03(c), 12.22.

Applicants' Convictions Under the Obstruction of Passageway Statute

On August 30, 2020, applicants Torrey Henderson, Amara Ridge, and Justin Thompson participated in a brief, peaceful march from the courthouse and back in their rural community of

[3] Although § 42.03(a)(1) also includes "recklessly," Appellants were not charged with reckless conduct. They were charged only with intentionally *and* knowingly obstructing a passageway. CR.7.

Gainesville, Texas along with thirty or forty others. App.3a. The march "ended after ten or eleven minutes." *Id.*

Applicants organized the march as leaders of a community organization called PRO Gainesville to call for the removal of a confederate monument at the Cooke County Courthouse. RR7.17:24-25. Applicants' hometown is infamous for its dark history of racism and violence, stemming from the "Great Hanging" of suspected Unionists during the Civil War.

Law enforcement officials in Gainesville had advance notice of the protest. Three days before the march, PRO Gainesville issued a press statement announcing their intention to hold a protest peacefully calling for the removal of the monument. RR9.DefendantsExhibit5.[4] It stated, in part, "We look forward to continue working together [with the Cooke County Sheriff's Office and Gainesville Police Department] to create a safe environment in our community." *Id.* The Gainesville Police Department's Patrol Captain testified that the Department was "ready for them to march" that day. RR6.163:16. In preparation for the day's activities, the Gainesville Police Department set up a barricade blocking traffic in front of the courthouse lawn. RR6.131:17-20. Law enforcement officers were on duty to "keep the peace and provide safety for all parties involved." App.3a. Just before the march, applicant Thompson gave a speech in which he reviewed "a few rules, including staying hydrated and staying on sidewalks." *Id.* at 11a.

The marchers began at the Cooke County courthouse, proceeded down California Street on the sidewalk, crossed the street to loop back, and finally crossed the street again to return to the courthouse. PetitionForDiscretionaryReview.3. During the march, applicants walked in a "very orderly" fashion without stopping. RR7.144:7-10; RR7.120:20-23; RR6.184:1-3. A police officer

[4] RR refers to the trial court Reporter's Record. A single Reporter's Record was kept for all applicants. It contains nine volumes.

testified at trial that he allowed the marchers to walk on the roadway for a portion of the march to avoid water along the curb of the sidewalk on their way back to the courthouse. RR6.165:14-19 ("[T]here was water there so we allowed them to stay [on the street]"). During that time, "some marchers stayed on the sidewalk, some on the shoulder, and some in the roadway." App.6a. The march "ended after ten or eleven minutes." *Id.* at 3a.

The police captain who accompanied the protesters confirmed that applicants never stopped in the middle of the road. RR6.184:1-3. The police captain testified that there was no emergency traffic blocked by the march. RR6.184:4-9.

The record contains no evidence that any of the three applicants obstructed any passageway during their continuous march or did anything more than walk across and along the street briefly near the end of the short march. Instead, the Gainesville Police Department's theory, based on a Sergeant's testimony, was that "[e]verytime one of [the marchers] walked out in the roadway it was an obstruction violation" that "theoretically could have been separate counts." RR6.138:17-25.

Though the court of appeals noted that police officers ordered some marchers out of the street, App.7a, applicants were not charged with "disobey[ing] a reasonable request or order to move," Tex. Penal Code § 42.03(a)(2), and no evidence indicates that a passageway was actually obstructed at the time of such instructions, or that applicants caused any obstruction knowingly or intentionally. When the Gainesville Police Captain was asked "[w]ho stopped the traffic," the testimony went as followed:

Q: Did Amara Ridge?

A: No, she did not.

Q: Did Torrey Henderson?

A: No, she did not.

Q: Did Justin Thompson?

A: No, he did not.

…

Q: Did you see them tell the people who did stop traffic to stop traffic?

A: I did not see that.

RR6.188:3-19.

No arrests were made at the march, which was brief and entirely peaceful. Three days later, however, warrants were issued for the arrest of the three applicants for obstructing a passageway. CR.8.[5] They were charged with violating § 42.03(a)(1) of Texas's obstruction statute by "intentionally and knowingly…obstruct[ing]…California Street." CR.7. No others were arrested or charged.

B. Procedural History

On August 25, 2022, in a consolidated trial before the County Court at Law of Cooke County, Texas, a jury found applicants guilty of the sole charge brought against them: intentionally and knowingly obstructing a passageway under § 42.03(a)(1), a Class B misdemeanor. The consolidated trial resulted in identical convictions and sentences for all three applicants. They were sentenced to seven days in jail and a $2,000 fine. CR.118. During trial, their defense attorney asserted "there is a defense that involves First Amendment protest activity." RR7.13-14.

Applicants appealed their convictions, and the Texas Seventh Court of Appeals consolidated applicants' cases for briefing and oral argument.

[5] CR refers to the Clerk's Record. There are three separate Clerk's Records: one for each applicant. However, these Clerk's Records are largely identical and the page numbers correspond to the same type of document in each set of records.

On November 15, 2023, the court affirmed applicants' convictions in a single opinion. *Henderson v. State*, No. 07-22-00303-CR, No. 07-22-00304-CR, No. 07-22-00305-CR, 2023 WL 7851698 (Tex. App.—Amarillo, Nov. 15, 2023) (Mem. Op., not designated for publication). The court of appeals reasoned that "traffic on California Street was stopped," and the court also based its holding on the actions of people other than applicants. App.9a. Despite the expressed concern that upholding applicants' convictions would violate the First Amendment, the court upheld the convictions for a peaceful, routine march, without any individualized evidence that applicants themselves either obstructed traffic or encouraged others to do so. *Id.* at 9a, 15a.

The principal "obstruction" cited by the court in upholding applicants' convictions involved an instance where "a young man on a bicycle" caused a car to stop in the road for 20 to 90 seconds while accompanied by a "young lady," during which time some marchers passed by. App.8a. But there is no evidence that those unnamed individuals are related to applicants or PRO Gainesville, or were part of the march. The court also cited an incident when marchers encountered "a large puddle of water." *Id.* at 6a. A police officer testified that he expressly "allowed them to stay" on the street during this time. RR6.165:14-19. "Some marchers stayed on the sidewalk, some on the shoulder, and some in the roadway." App.6a. The record contains no evidence that any of the applicants caused a car to stop or otherwise obstructed a passageway during their continuous march. Using the passive voice and attribution only to a "crowd," the court stated that "traffic on California Street was stopped due to the presence of the crowd in the roadway." *Id.* at 9a. But the court failed to connect applicants to any stoppage of traffic—and the record reveals no such connection.

In their petition for discretionary review to the Texas Court of Criminal Appeals, applicants argued that "[t]he court of appeals' broad interpretation of obstruction fails to give breathing room

to the First Amendment." PetitionForDiscretionaryReview.6. Applicants also argued that "[t]he court of appeals relied on the acts of unnamed others to conclude that Petitioners created an obstruction," citing *Claiborne*, 458 U.S. at 920. PetitionForDiscretionaryReview.17-21. On March 27, 2024, the Court of Criminal Appeals denied applicants consolidated petition for discretionary review without an accompanying opinion. App.30a-32a.

On May 7, 2024, the Texas Seventh Court of Appeals granted applicants a stay of the issuance of the mandates for the maximum amount of time Texas law permits: 90 days. Tex. R. App. P. 18.2; App.33a-34a. Applicants' mandates are calendared to issue on July 23, 2024.

LEGAL STANDARD

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also* 28 U.S.C. § 2101(f) ("In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable amount of time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."); *White v. Florida*, 103 U.S. 1301, 1302 (1982) (applying standards for granting a stay of mandate pending disposition of a petition for certiorari to request for a stay in a criminal case). Additionally, "[i]n close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190 (citation omitted).

REASONS FOR GRANTING THE STAY

This Court should stay the mandates and preserve the status quo by allowing applicants to remain free on bond pending its resolution of their petition for certiorari. Applicants satisfy all three of the criteria for a stay pending disposition of a certiorari petition.

First, there is a reasonable probability that this Court will grant certiorari. The Texas Seventh Court of Appeals' decision upholding applicants' convictions for obstructing a passageway without evidence that they themselves did so, or that they directed anyone else to do so, based on evidence concerning the actions of unnamed others, conflicts with this Court's bedrock precedents protecting expressive activity in public fora and prohibiting guilt by association. *See, e.g.*, *Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza Inc.*, 391 U.S. 308, 315 (1968); *Claiborne*, 458 U.S. at 920. The question presented by the petition for certiorari is exceptionally important as it involves a fundamental cornerstone of the First Amendment: the right to engage in protest on public sidewalks and streets. The law invoked here is common to many states and a failure to protect applicants' First Amendment rights will chill protest rights across the country.

Second, if the petition for certiorari is granted, there is a fair prospect that a majority of this Court will vote to reverse the judgment below. This Court has reversed similar state law convictions for traditional protest activity where, as here, there is no evidence that the defendants themselves either directly engaged in illegal activity or directed others to do so. *See, e.g.*, *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 158-59 (1969) (reversing a civil rights protester's conviction for participating in a public demonstration on a public sidewalk without a permit). Imposition of criminal liability in these circumstances violates the First Amendment right to protest and the Fourteenth Amendment right to due process.

Third, the balance of harms and equities leans heavily in applicants' favor. Applicants face imminent irreparable harm of serving the entire term of their incarceration in the absence of a stay. The harm of a fully completed sentence cannot be undone. And the State suffers no harm from the stay of the mandate in these misdemeanor cases. Applicants have already been free on bond for nearly four years, and the Texas court of appeals granted the maximum stay it was authorized to issue. App.33a-34a. To issue such a stay, the Texas court was required to find that applicants "would incur serious hardship from the mandate's issuance if the United States Supreme Court were to later reverse the judgment." Tex. R. App. P. 18.2. For the same reason, applicants respectfully ask this Court to stay the mandates until it resolves the petition for certiorari.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT THE WRIT OF CERTIORARI

Applicants' concurrently filed petition is precisely of the sort this Court grants for review. The state court below "decided an important question of federal law in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. The Court of Appeals' Opinion Conflicts with this Court's Precedent Protecting the Right to Protest in Traditional Public Forums

There is a reasonable probability that this Court will grant certiorari to reaffirm that organizers of a peaceful protest cannot be punished for incidental presence in the street or the actions of unidentified others absent proof that the organizers themselves obstructed a passageway or directed, authorized or ratified others to do so.

Applicants were convicted for violating an "obstruction" statute without any evidence that they obstructed any traffic or passageway. The only particularized evidence that any traffic was "obstructed" or even remotely inconvenienced involved a 20-90 second delay caused by an

unidentified bicyclist who was not even tied to applicants' march. Although the court cited as another example of obstruction a time when marchers stepped into the street after encountering a water hazard in their path, and vaguely claimed that the "crowd" generally caused an obstruction, it cited no evidence that applicants' specific actions obstructed any passageway nor did it specify the duration of any obstruction or the impact on any member of the public. Applicants' convictions under these facts contravene this Court's precedent and stifle an important federal right that this Court has long defended against the overbroad application of state criminal laws.

This Court has long recognized that "streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Amalgamated Food Emps. Union Loc. 590*, 391 U.S. at 315. Public sidewalks and streets are "a quintessential forum for the exercise of First Amendment rights," *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017), and are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).

While reasonable time, place, and manner restrictions are permissible, these restrictions cannot be used to deny access to them "broadly and absolutely." *Amalgamated Food Emps. Union Local 590*, 391 U.S. at 315. Instead, the permissible use of such authority requires two things, particularized for each Petitioner, absent here: specific intent and actual obstruction.

Bedrock precedent makes this clear. In *Cantwell*, the Court held that the defendant could not be convicted for approaching others on the street absent a showing that he actually interfered with the rights or interests of others. *Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940).

Similarly, in *Cox v. State of Louisiana*, this Court reversed a conviction under a Louisiana obstruction of traffic statute where the Louisiana Supreme Court had "construed the statute so as

to apply to public assemblies which do not have as their specific purpose the obstruction of traffic." 379 U.S. at 553. The march in *Cox* involved approximately 2,000 students who, like the applicants here, took a route that looped by a courthouse. *Id.* at 540. Even though the sidewalk near the courthouse "was obstructed, and thus, as so construed, . . . [the march] violated the statute," *id.* at 553, this Court reversed the conviction because the "obstruction" statute—which did not require specific intent to obstruct—gave law enforcement officers "unfettered discretion" to punish individuals for peaceful demonstrations on public streets. *Id.* at 558.

So, too, here. Punishing applicants for a peaceful, brief march during which they neither obstructed nor specifically intended that anyone obstruct a roadway, but during which unidentified others delayed one vehicle for 20 to 90 seconds, directly infringes applicants' First Amendment rights to demonstrate in public. The court below acknowledged that applicants' "march ended after ten or eleven minutes," and applicants were continuously marching that entire time. App.3. Although applicants primarily marched on the sidewalk, they did, at most, step into the street to cross it, to avoid a water hazard near the sidewalk, and to cross back to the courthouse at the very end of their march. No precautions by applicants could have saved them from arrest under the Gainesville Police Department's avowed position that "[e]verytime one of [the marchers] walked out in the roadway it was an obstruction violation" that "theoretically could have been separate counts." RR6.138:17-25.

The principal instance of "obstruction" identified lasted only 20 to 90 seconds—and was caused not by applicants, but by unidentified others who were not arrested or prosecuted. When the Gainesville Police Captain was asked "[w]ho stopped the traffic," and was specifically asked about applicant Ridge, Henderson, and Thompson, he testified for each of them that they did not stop traffic or instruct others to stop traffic. RR6.188:3-19. Even if, as in *Cox*, the passageway was

technically blocked for a brief period of time, the record shows no "specific purpose" by applicants to obstruct a roadway either by intentionally or actually interfering with traffic themselves. 379 U.S. at 553. There is a reasonable probability that this Court will grant certiorari to make clear that persons who engage in a peaceful march along public sidewalks cannot be prosecuted for such incidental effects.

B. The Decision Below Conflicts with this Court's Free Speech Precedents by Holding Applicants Liable for the Acts of Others During the Course of a Protected Protest

The decision below also violates the First and Fourteenth Amendments because it imposes criminal liability on applicants as protest organizers based on the actions of others without any evidence that they directed, authorized, ratified, or intended those actions. For this reason, too, there is a reasonable probability that this Court will grant certiorari.

Over four decades ago, this Court established in *N.A.A.C.P. v. Claiborne Hardware Co.* that, in the context of free speech activities, even civil liability cannot be imposed on the leader of a group "merely because an individual belonged to a group" that acted unlawfully. 458 U.S. at 920. The Court held that the leader of a protest could not be held responsible for acts of violence that occurred during the protest where he neither "authorized, ratified, or directly threatened" those acts. *Id*. at 929. That principle controls here, as applicants were not themselves found to have obstructed any traffic, but were held responsible for the acts of others, without any evidence that they directed, authorized, or ratified any obstruction.

The *Claiborne* Court stressed that in order to distinguish non-protected activity from protected First Amendment activity, "intent must be judged 'according to the strict law'"; otherwise an individual could be punished for "his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily

share." *Id*. at 919 (citing *Noto v. United States*, 367 U.S. 290, 299 (1961)). Yet no such intent was established here. To the contrary, the only instructions any applicant provided warned protesters to remain on the sidewalks.

Recently, in *Counterman v. Colorado*, 600 U.S. 66 (2023), this Court affirmed the importance of *mens rea* standards in shielding protected speech from criminal prosecution. There, the Court held that even where an individual himself makes direct threats towards another, the individual cannot be held liable absent proof that he intended to communicate a genuine threat or recklessly disregarded the threatening character of his speech. In so doing, the Court noted that "condition[ing] liability on the State's showing of a culpable mental state" is an "important tool to prevent" chilled speech—and one that is particularly important when it comes to "political advocacy" and "strong protests against the government and prevailing social order." *Id.* at 75, 81 (cleaned up); *cf. McKesson v. Doe*, 144 S. Ct. 913, 914 (2024) (Sotomayor, J., statement regarding denial of writ of certiori) (noting that in *Counterman* "the Court made clear that the First Amendment bars the use of 'an objective standard' like negligence for punishing speech, and it read *Claiborne* and other incitement cases as 'demand[ing] a showing of intent.'") (citing *Counterman*, 600 U.S. at 78, 79 n. 5, 81).

Ensuring that individuals are not convicted based on the unlawful acts of others in their proximity is especially important in criminal proceedings because "guilt is personal" as a basic matter of due process. *Scales v. United States*, 367 U.S. 203, 224-25 (1961); *see also United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972) ("Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others.").

The decision below conflicts with these precedents by affirming applicants' convictions for leading a march in the absence of any evidence that they themselves either intentionally obstructed a roadway or directed, authorized, or ratified others to do so.

As noted above, the principal obstruction the court cited was caused by "a young man on a bicycle" who caused a single car to pause for between 20 to 90 seconds while an unidentified "young lady" walked next to him. App.8a. Neither of these individuals was arrested. And neither was identified as being related to applicants or PRO Gainesville or even a participant in the march. *Id.* In fact, the police chief testified that "nobody was ever specifically identified as being PRO Gainesville or not, except obviously we knew who the leadership was." RR7.78:13-17; CR.109.

The court below also stated that "traffic on California Street was stopped due to the presence of the crowd on the roadway," but failed to specifically connect any of the applicants' actions to an actual obstruction. App.9a. [6] Throughout its opinion, the court repeatedly cited generically to actions of the "group" and "marchers," including references to "some marchers" and "most marchers," without specifying whether applicants themselves engaged in any specific activity that purportedly obstructed traffic. App.3a-29a. If the First Amendment right to protest means anything, individuals cannot be prosecuted for the acts of unidentified others or an amorphous "crowd," absent evidence establishing individual responsibility and *mens rea*.

The evidence cited by the court specific to applicants concerns their First Amendment protected activity. The court cited evidence that applicants were leaders of a group that organized the march and were identified as "active participants" in the march. App.9a. The court also found salient the fact that applicants carried megaphones during their protest. App.11a. But just as in

[6] *See also* App.6a ("[S]ome marchers stayed on the sidewalk" where the Gainesville Police Department Chief had previously given the group express permission to march); *id.* ("The video reflected that group members began walking on the sidewalk and on the shoulder of the highway.").

Claiborne where this Court rejected holding the plaintiff liable on the basis of his protected First-Amendment activity of giving speeches, so too applicants' criminal liability cannot turn on their merely organizing and participating in the march.

C. The Decision Below Conflicts with Decisions of Federal Courts of Appeals

There is a reasonable probability that this Court will grant the writ of certiorari because the decision below also creates a split with federal courts that require breathing room when enforcing state criminal laws against demonstrators who peacefully march and assemble on public streets and sidewalks.

The Second Circuit, for example, has held that the First Amendment protects demonstrators who march on public streets or sidewalks and "merely inconvenience pedestrian or vehicular traffic." *Jones v. Parmley*, 465 F.3d 46, 59 (2d Cir. 2006) (Sotomayor, J.). In *Jones*, the Second Circuit explained that "New York courts have interpreted [the state's obstruction] statute to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic." *Id.* (citing *People v. Pearl*, 321 N.Y.S.2d 986, 987 (1st Dep't 1971)).

Similarly, the Eighth Circuit in *Langford* recognized that a protester charged with an ordinance involving the obstruction of traffic and failure to obey dispersal orders may not have been arrested lawfully if "no traffic was present" at the time that she stepped off a sidewalk. *Langford v. City of St. Louis*, 3 F.4th 1054 (8th Cir. 2021).

In addition, federal circuit courts have applied *Claiborne* to require evidence of individual protesters' own actions rather than holding individuals liable for actions of others in a protest. *Fogarty v. Gallegos*, 523 F.3d 1147, 1158 (10th Cir. 2008) ("The defendants' arguments that the police had probable cause to arrest Fogarty rest only on characterizations of the protest in general, and not on evidence of Fogarty's individual actions. The Fourth Amendment plainly requires

probable cause to arrest Fogarty as an individual, not as a member of a large basket containing a few bad eggs. In other words, that Fogarty was a participant in an antiwar protest where some individuals may have broken the law is not enough to justify his arrest."); *Barham v. Ramsey*, 434 F.3d 565, 574 (D.C. Cir. 2006) (holding that "[v]ague allegations that 'demonstrators' committed offenses will not compensate" for a failure to show "any objective basis" for arresting individual demonstrators in a park).

D. This Case Presents an Issue of Fundamental Importance

This case involves a fundamental element of the First Amendment: the right to engage in peaceful protest on public streets and sidewalks. If the mere fact that members of a "crowd" briefly walk in the street is sufficient to hold protest organizers and participants criminally liable, the right to protest peacefully in public fora will be a nullity. The question whether state officials can, as here, throw individuals in jail for engaging in a short, peaceful march without any evidence that they themselves actually obstructed any roadway is of fundamental importance because the rights affected are central to our democracy. Every march will involve some incidental walking in the street, so if that is sufficient to permit conviction of a march's leaders, every marcher will be at risk.

Moreover, the law invoked here is common to many states. Texas's obstruction statute is identical to the obstruction statute in Tennessee (TENN. CODE ANN. § 39-17-307(a)(1)) (West 2020), nearly identical to a statute in Colorado (COL. REV. STAT. ANN. § 18-9-107) (West 2022), very similar to statutes in New Jersey (NJ STAT. ANN. § 2C:33-7) (West 1979), Delaware (DEL. CODE. ANN. TIT. 11, § 1323) (West 1995), and Pennsylvania (18 PA. CONS. STAT. § 5507) (West 1973), and similar to statutes in Georgia (GA. CODE ANN. § 16-11-43) (West 1968), Louisiana (LA. STAT. ANN. § 14:100.1) (2014), and Virginia (VA. CODE. ANN. § 18.2-404) (West 1975).

Under the decision below, state officials can arrest and convict protesters for stepping into a street so long as anyone in the crowd causes even a momentary delay in traffic. Such a brief delay is no more significant than daily incursions that occur on all public streets due to stop signs, red lights, delivery drivers, construction work, or rush hour traffic.

The question of whether applicants can be held responsible for actions of the "crowd" is also important. Indeed, this Court recently affirmed the "undeniably important" constitutional issue of whether a person's "role in leading a protest onto a highway, even if negligent and punishable as a misdemeanor" can "make him personally liable for the violent act of an individual whose only association with him was attendance at the protest." *McKesson v. Doe*, 592 U.S. 1, 4 (2020).

This case presents a similar and equally "undeniably important" question. Indeed, this case is an even more straightforward vehicle for this Court's review and involves a question with broader applicability than *McKesson*. In that case, after remand from this Court and certification to the Louisiana Supreme Court, the state court determined that a protest leader could be held civilly liable under a Louisiana-specific tort theory for the actions of others, and the Fifth Circuit affirmed. *McKesson*, 144 S. Ct. 913-14 (Sotomayor, J., statement regarding denial of writ of certiorari). Although this Court denied certiorari of the Fifth Circuit opinion, the writ came on a motion to dismiss, while the case was still proceeding in the district court below. *Id.* at 914. By contrast, this case has not only reached its procedural end, but involves simpler facts where no violence is at issue and the court cited no specific evidence that applicants did anything unlawful themselves, but held them generally liable for the actions of unnamed others absent individualized *mens rea*.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL REVERSE THE JUDGEMENTS IF THE PETITION FOR CERTIORARI IS GRANTED

Because the decision below conflicts with this Court's bedrock precedent, there is a fair prospect that this Court will reverse applicants' convictions for largely the reasons detailed in the previous section. *See In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers) ("Where review is sought by the more discretionary avenue of writ of certiorari, . . . the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case."). Indeed, the decision below is so plainly contrary to *Claiborne* and *Cox* that applicants' petition suggest that the case is appropriate for summary disposition.

This Court has previously reversed state law convictions that, as here, impermissibly intrude upon protesters' right to expressive activity in public spaces. In *Shuttlesworth v. City of Birmingham, Alabama*, this Court reversed a civil rights protester's conviction for participating in a public demonstration on a public sidewalk without a permit. 394 U.S. 147, 158-59 (1969). In *Cantwell*, this Court reversed the conviction of Jehovah's Witnesses for "breach of the peace"—another category of similarly sometimes-permissible, but often-overbroad laws—for being on public streets and sharing their beliefs with their neighbors. *Cantwell*, 310 U.S. at 311. The lower court affirmed the conviction because the Jehovah's Witnesses "stopped two men in the street," *id.* at 302-03, but this Court held that the state's "power to regulate [the public streets] must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom [of the First Amendment]." *Id.* at 304. And in *Cox v. State of Louisiana*, this Court reversed a conviction under a Louisiana obstruction of traffic statute where the Louisiana Supreme Court had "construed the statute so as to apply to public assemblies which do not have as their specific purpose the obstruction of traffic." 379 U.S. at 553.

As noted above, punishing applicants for their peaceful, short march would intrude directly on their exercise of their First Amendment rights on public streets and sidewalks requires reversal.

Furthermore, there is a fair prospect of reversal because the decision below imposes criminal liability on applicants based on the actions of others without any evidence that they directed, authorized, ratified, or intended those actions. Imposition of criminal liability in the absence of individualized *mens rea* violates the First Amendment right to protest and the Fourteenth Amendment right to due process. The principal obstruction the court identified was caused by "a young man on a bicycle" and a "young lady," who caused a single car to pause for between 20 to 90 seconds. But no one besides applicants was arrested.

The court also failed to heed the "strictest law" standard for determining that applicants had criminal intent. No evidence demonstrated that the applicants intentionally stopped any vehicle or member of the public from moving. Instead, the court below relied on the incidental consequences of a peaceful march, and the actions of unspecified marchers and the "crowd." The court also impermissibly relied on protected speech, noting that some marchers briefly chanted, "Whose streets? Our streets," App.11a, without any evidence that applicants themselves engaged in this chant.[7] The only evidence of any instructions from any applicants about the march concerned applicant Justin Thompson, who "made a speech to the protesters in which he reviewed 'a few rules, including staying hydrated and *staying on the sidewalks*.'" *Id.* (emphasis added).

Imposing criminal liability on protest "organizers" or "leaders" based on the acts of a "crowd" or of unidentified marchers without evidence that the defendants directed, authorized, or ratified any of the illegal conduct squarely violates the fundamental right to protest and due process

[7] The court states that "Henderson and other group members" engaged in this chant, but the evidence shows only that marchers in proximity to Henderson did so. App.7a; RR6.123:14-21.

rights. If that holds for the sort of violence at issue in *Claiborne*, it surely holds with respect to the incidental and passing presence in the street identified in this case during a peaceful eleven-minute march.

III. THE BALANCE OF IRREPARABLE HARMS AND EQUITIES FAVORS APPLICANTS

The balance of harms and equities tilts heavily in applicants' favor. The harm to applicants is imminent and irreparable: they will be jailed within the month and forced to complete their entire term of incarceration before this Court has an opportunity to even consider their petition for certiorari raising fundamental First Amendment questions. Applicants are all currently out on bond pending appeal for this misdemeanor offense and have significant employment and personal responsibilities that would be disturbed by serving the jail sentence. Applicants Ridge and Henderson are mothers, each responsible for the care of two young children. Applicant Thompson has a history of mental health conditions with suicidality, which makes any time in jail even more onerous. When Applicant Thompson was previously jailed pre-trial for this offense, he was forced to remain in solitary confinement wearing nothing but a smock due to his history involving suicidality. He worries he would be forced to endure the same treatment during his term of incarceration in jail before the U.S. Supreme Court has a chance to consider whether to review his case. The absence of a stay would not only irreparably harm applicants, but it will also have a severe chilling effect on others who will fear being criminally prosecuted and convicted for exercising their First Amendment rights by stepping into public streets or sidewalks.

Meanwhile, staying the issuance of the mandates for a limited time will simply preserve the status quo and will have no impact on Texas. As the Texas court below found, a stay of the mandates is warranted here. App.33a-34a. Applicants' petitions present substantial questions and

applicants will suffer irreparable harm in the stay's absence. *See Graves v. Barnes*, 405 U.S. 1201, 1203-1204 (1972) (Powell, J., in chambers) (noting that this Court in the context of direct appeals "weighed heavily" whether or not "a lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim."). In granting applicants' stay request, Texas rules required that the appellate court find that the grounds for a stay were "substantial" and that applicants or others "would incur serious hardship from the mandate's issuance if the United States Supreme Court were to later reverse the judgment." Tex. R. App. P. 18.2. At the appellate court level, the State did not file a response brief with any reasons to oppose a staying the issuance of the mandates.

In addition, applicants have already been out on bond without issue for nearly four years while their misdemeanor cases have proceeded through the courts. A stay of the issuance of the mandates would simply allow applicants to remain out of jail until proceedings are complete in this Court.

Finally, granting a stay request here has no risk of opening the floodgates of litigation. While this case has important implications for people's First Amendment rights across the country, this stay request implicates just three people's ability to maintain their liberty while this Court considers their petition for certiorari.

CONCLUSION

This court should stay issuance of the mandate to be entered by the Texas Seventh Court of Appeals pending resolution of applicants' petition for a writ of a certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS SEVENTH DISTRICT OF TEXAS AT AMARILLO

No. 07-22-00303-CR
No. 07-22-00304-CR
No. 07-22-00305-CR

TORREY LYNNE HENDERSON, AMARA JANA RIDGE, AND JUSTIN ROYCE THOMPSON, APPELLANTS

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law

Cooke County, Texas[1]

Trial Court Nos. CR20-65983, CR20-65984, CR20-65985, Honorable John H. Morris, Presiding

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November 15, 2023

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and YARBROUGH, JJ.

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[1] These appeals were transferred to this Court from the Second Court of Appeals by docket equalization order of the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001.

Torrey Lynne Henderson, Amara Jana Ridge, and Justin Royce Thompson, Appellants, appeal from their convictions for the misdemeanor offense of obstructing a highway or passageway.[2] We affirm.

[2] *See* TEX. PENAL CODE ANN. § 42.03(a)(1).

BACKGROUND

On August 30, 2020, Appellants participated in a protest in Gainesville calling for the removal of a Confederate monument on the lawn of the Cooke County Courthouse. A group called Progressive Rights Organizers (PRO) Gainesville, of which Appellants were leaders, organized the event. PRO Gainesville had released a press statement three days earlier regarding the protest. On the day of the event, a group of protestors gathered on the courthouse lawn. Counter-protestors gathered across the street. Several law enforcement officers were on duty at the event to, as one officer testified, "keep the peace and provide safety for all parties involved."

After a few people gave speeches, about thirty or forty people began marching eastward along California Street, a state highway.[3] Initially, the marchers were on the sidewalk. At times, individuals moved off the sidewalk into the street. A Gainesville police officer who was monitoring activities that day testified that he told marchers to get back on the sidewalk. After walking about six blocks to Denison Street, the group walked across California Street, crossing where there was no stop sign or stoplight. They then walked west, returning to the courthouse. The march ended after ten or eleven minutes. No arrests were made that day.

On September 3, 2020, Appellants were arrested and charged with the offense of obstructing a highway or passageway. All three pleaded not guilty and the case proceeded to a jury trial. The jury found each

[3] Captain Chris Garner testified that California Street is "the main avenue for our emergency vehicle traffic, EMS, fire department, [and] police."

appellant guilty and assessed identical punishments: confinement in the county jail for seven days and a fine of $2,000. This appeal followed.

ANALYSIS

ISSUES 1–4: SUFFICIENCY OF THE EVIDENCE

In their first four issues, Appellants argue that the evidence is insufficient to support their conviction because (1) they were continuously marching along a passageway; (2) there is no evidence that they caused any obstruction by rendering a passageway impassable or unreasonably inconvenient or hazardous; (3) there is no evidence they had the requisite *mens rea* of "intentionally and knowingly" obstructing a passageway; and (4) they were given the legal privilege and authority to walk along the sidewalk and street by police.

In assessing the sufficiency of the evidence, we review all the evidence in the light most favorable to the verdict to determine whether, based on the evidence and reasonable inferences therefrom, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017). "[O]nly that evidence which is sufficient in character, weight, and amount to justify a factfinder in concluding that every element of the offense has been proven beyond a reasonable doubt is adequate to support a conviction." *Brooks v. State*, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010) (Cochran, J., concurring). When reviewing all the evidence under the *Jackson* standard of review, the ultimate question is whether the jury's finding of guilt was a rational finding. *See id.* at 906–07 & n.26. In

our review, we defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony. *See id.* at 899. Thus, even if we would have resolved the conflicting evidence in a different way, we must defer to the jury's findings that are supported by sufficient evidence. *Id.* at 901–02 (discussing *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008)).

> The relevant portion of section 42.03 of the Texas Penal Code provides:
>
> (a) A person commits an offense if, without legal privilege or authority, he intentionally, knowingly, or recklessly:
>
> (1) obstructs a highway, street, sidewalk, railway, waterway, elevator, aisle, hallway, entrance, or exit to which the public or a substantial group of the public has access, 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;
>
> . . .
>
> (b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous

TEX. PENAL CODE ANN. § 42.03.[4]

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[4] The complaint and information for each Appellant was identical and largely tracked the statute, alleging that each "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 a substantial

The evidence presented at trial included the following. Gainesville Police Department Sergeant Jack Jones testified that he was the leader of the department's special response team on August 30, 2020, and observed the events outside the courthouse and on California Street. During Jones's testimony, the trial court admitted into evidence a video recording taken that day. The video reflected that group members began walking on the sidewalk and on the shoulder of the highway. When the group crossed California Street, both westbound and eastbound traffic came to a stop. As the group walked back to the courthouse, they encountered a large puddle of water next to the sidewalk. Some marchers stayed on the sidewalk, some on the shoulder, and some in the roadway. More group members entered the roadway as the march continued. By the time they reached the courthouse, most marchers were in the street. They walked roughly five abreast, stretching from the shoulder to the roadway's center yellow line.[5]

Captain Garner testified that the place where the group crossed California Street is not a controlled intersection and has no crosswalk. He observed westbound and eastbound vehicles "having to come to a stop" there as the group crossed the street.[6]

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group of the public had access, by walking in the roadway with a group [Appellant] had organized, causing it to be impassable or hazardous for motorist[s] or pedestrians."

[5] Evidence presented at trial showed that the two lanes of the roadway were divided by double yellow lines, indicating a no-passing zone.

[6] Texas law provides that a pedestrian shall yield the right-of-way to a vehicle on the highway if crossing a roadway at a place other than in a marked crosswalk or in an unmarked crosswalk

Gainesville Police Department Investigator Shane Greer, who was directed to monitor the march, testified that he observed some participants get into the street while they walked east. He told marchers to get back on the sidewalk "approximately ten times." At the intersection of Denison Street and California Street, someone on a bicycle positioned himself in the intersection and "shut down eastbound and westbound traffic." Greer observed "multiple vehicles stopped westbound and eastbound." When the marchers crossed California Street and began their westbound return walk, Greer instructed marchers on the roadway to get back onto the sidewalk, and they complied. However, once the group reached the post office, "the majority of the group entered the roadway into the lane of traffic." Greer again told them to exit the roadway, but they disregarded his commands. More people then entered the roadway. Greer testified that he told Appellants that they needed to get out of the roadway. He specifically identified Appellant Thompson, who was at the rear of the group near Greer. He further testified that he made eye contact with Appellant Henderson and told her to exit the roadway. She looked at him and shook her head. Then Henderson and other group members began chanting, "Whose streets? Our streets." The crowd remained on the street. Greer testified that no vehicles could get around the group and that California Street was obstructed. It remained obstructed until the group returned to the courthouse.

Additionally, the State presented witness Cynthia Idom, who was driving east on California Street at the time of the march. Idom testified that she noticed the

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at an intersection. *See* TEX. TRANSP. CODE ANN. § 552.005(a).

group of people on the south side of California. A young man on a bicycle suddenly cut in front of her, causing her to stop abruptly. She said she "had to stop pretty quick or [she] would have hit him." Idom testified that the man "put his hand out for me to stop. And then a young lady walked beside him with her long rifle . . . . I sat there and waited and they kind of just watched me and I watched them." While Idom was stopped, the marchers crossed California Street. She testified that she waited for all of them to get across the roadway before she could continue driving. She was unsure of how long she was stopped but stated that "it felt longer than I'm sure it was." She agreed it was "between maybe twenty seconds to a minute and a half."

Finally, Gainesville Chief of Police Michael Phillips testified that his agency brought in staffing and made accommodations for the August 30 protest at the courthouse. An area outside the courthouse was established for protestors and another area was set up across the street for the "counter-protest presence." He testified that the marchers did not have a permit to march on California Street that day and that nobody had applied for permission to use California Street for a march that day. Phillips had previously explained to PRO Gainesville leaders that using the sidewalks for marching was allowed, but marching in the streets was not. Phillips testified that no vehicular patrol was assigned for a march and that no officers were assigned to conduct traffic control or escort a march. He said the police department "had not prepared for that type of mobile event."

In their first argument, Appellants assert that section 42.03 is not violated by people engaged in continuous moving or marching. We find no merit in

Appellants' argument. The statute contains no requirement that an obstruction must be stationary, and we will not read such a requirement into the statute. The evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that Appellants, even if they were continuously marching, obstructed the highway. We overrule Appellants' first issue.

Appellants next argue that there is no evidence that they rendered any passageway unreasonably inconvenient or hazardous. "Obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous. TEX. PENAL CODE ANN. § 42.03(b). As set forth above, Greer testified that traffic on California Street was stopped due to the presence of the crowd in the roadway. Officer Greer not only testified that Appellants were leaders of PRO Gainesville, which organized the event, but he also positively identified all three as active participants in the march that obstructed the roadway. Idom testified that she had to stop her vehicle on the roadway because the crowd walked across the street in front of her.

We conclude that this evidence is sufficient to support the jury's finding that the highway was rendered impassable or that passage was unreasonably inconvenient or hazardous. *See, e.g.*, *Haye v. State*, 634 S.W.2d 313, 315 (Tex. Crim. App. 1982) (holding that individual standing in middle of sidewalk, forcing pedestrian to walk around in mud, sufficient to support finding that obstruction of sidewalk rendered passage unreasonably inconvenient); *Robles v. State*, 803 S.W.2d 473, 476–77 (Tex. App.—El Paso 1991, no pet.) (evidence was sufficient to support finding that passage to medical

facility was impassable and defendant caused inconvenience even though witness could have stepped over or around protestor to enter building); *Lauderback v. State*, 789 S.W.2d 343, 346–47 (Tex. App.—Fort Worth 1990, writ ref'd) (where appellant blocked one lane of traffic, passage rendered unreasonably inconvenient or hazardous). We overrule Appellants' second issue.

In their third issue, Appellants urge that the evidence does not support a finding that they knowingly and intentionally obstructed the street. "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a). "A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). The language of the jury charge tracked these definitions.

Proof of intent generally relies on circumstantial evidence. *Haye*, 634 S.W.2d at 315. A jury may infer intent from a defendant's acts, words, and conduct. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). We must scrutinize circumstantial evidence of intent as we do other elements of an offense. *Laster v. State*, 275 S.W.3d 512, 519–20 (Tex. Crim. App. 2009). If the record supports conflicting inferences, we "'must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and [we] must defer to that resolution.'" *Matson v. State*, 819 S.W.2d

839, 846 (Tex. Crim. App. 1991) (quoting *Farris v. State*, 819 S.W.2d 490, 495 (Tex. Crim. App. 1990)).[7]

There was testimony that Appellants were instructed, both prior to the march and during the march, to stay on the sidewalks. Appellant Thompson testified that, before the march, he made a speech to the protesters in which he reviewed "a few rules, including staying hydrated and staying on sidewalks . . . ." Officer Greer testified that he told the marchers to get out of the street and back on the sidewalk "approximately ten times." The evidence also showed that, despite being informed of the need to stay on the sidewalk, Appellants entered the roadway and maintained their presence in the roadway. Witnesses identified Appellants Henderson and Ridge walking next to each other at the front of the group of protesters in California Street. Appellant Henderson was specifically instructed to get off the roadway by Officer Greer. She shook her head and the protesters then began chanting, "Whose streets? Our streets."[8] Garner testified that when he told Appellant

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[7] In support of their argument that they lacked the requisite *mens rea*, Appellants rely, in part, on their own testimony from the punishment phase of the trial. In a bifurcated trial before a jury on a plea of not guilty, "'our consideration of the evidence is necessarily limited to that evidence before the jury at the time it rendered its verdict of guilt.'" *Barfield v. State*, 63 S.W.3d 446, 450 (Tex. Crim. App. 2001) (en banc) (quoting *Munoz v. State*, 853 S.W.2d 558, 560 (Tex. Crim. App. 1993) (en banc)). Therefore, we do not consider evidence from the punishment phase of the trial when determining the sufficiency of the evidence to support Appellants' convictions.

[8] The evidence showed that Appellants Henderson and Ridge carried a megaphone at the front of the group and that Appellant Thompson, who was near the rear of the group, also had a megaphone.

Thompson the marchers were not getting out of the roadway, Thompson said he had "no clue" and "just shrugged [him] off." Thompson admitted that he walked for "at least two blocks in the street." Finally, a video of the entire march was played for the jury. It was the jury's task to review the video and other evidence and draw its own conclusions about Appellants' knowledge and intent. Considering all the evidence in the light most favorable to the jury's verdict and deferring to the jury's implicit inference about the weight of the evidence, a reasonable juror could find that Appellants knowingly and intentionally obstructed the street. We conclude that the evidence sufficiently establishes that Appellants possessed the requisite intent to commit the offense in question. Appellants' third issue is overruled.

Appellants next argue that "[e]ven if simply stepping onto California Street were considered an obstruction, the evidence is insufficient to prove [they] lacked the legal privilege or authority to walk on California Street." Appellants did not offer evidence that any authorized official gave them permission to walk in the street, but argued that officers "tacitly permitted" the march by "accompanying" them. Police officers testified that they did not grant Appellants permission to walk in the street. When the group began marching away from the courthouse, some officers were sent with the group to keep people safe, but not to assist the protestors or to direct or stop traffic. Again, Officer Greer testified to telling marchers to stay on the sidewalk multiple times. We conclude the evidence was sufficient to prove that Appellants lacked legal privilege or authority to walk on California Street. We overrule Appellants' fourth issue.

ISSUE 5: FIRST AMENDMENT PRIVILEGE

The fifth issue raised by Appellants alleges that they had the legal privilege and authority to walk along the sidewalk and street under the First Amendment. They claim that their peaceful march in a street, "a quintessential public forum," was consistent with the exercise of First Amendment freedoms.

Free speech guarantees are not absolute. The State may reasonably regulate the time, place, and manner of the exercise of First Amendment rights as necessary to the protection of other compelling state interests. *Grayned v. City of Rockford*, 408 U.S. 104, 115–16, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Lauderback*, 789 S.W.2d at 347 (citing *Palmer v. Unauthorized Practice Comm. of the State Bar of Texas*, 438 S.W.2d 374, 377 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) for the proposition that free speech guarantees in both the United States Constitution and the Texas Constitution must yield to the extent necessary to protect public interest). The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that one desires. *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). For example, "[t]he First Amendment does not entitle a citizen to obstruct traffic or create hazards for others." *Singleton v. Darby*, 609 F. App'x 190, 193 (5th Cir. 2015) (per curiam). "A State may therefore enforce its traffic obstruction laws without violating the First Amendment, even when the suspect is blocking traffic as an act of political protest." *Id.; see, e.g., Shuttlesworth v. Birmingham*, 382 U.S. 87, 100, 86 S.

Ct. 211, 15 L. Ed. 2d 176 (1965) (Fortas, J., concurring) (observing that "[c]ivil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law."). The State clearly has the power under the First Amendment to regulate use of streets and roadways for the access and safety of the public. *See Haye*, 634 S.W.2d at 315 (holding that section 42.03 protects public's right to reasonably convenient use of passageways without encroachment upon First Amendment rights).

Moreover, the record establishes that the City of Gainesville had adopted procedures by which people could obtain a permit to have a march, demonstration, or parade on its streets, including the state highway also known as California Street. It is uncontested that Appellants neither sought nor obtained a permit from the city for their march on August 30, 2020. Appellants argue that, if their convictions were predicated on their lack of an official permit, their convictions should be overturned due to Gainesville officials' unconstitutional application of the permit policy. An "as-applied" challenge to a statute asserts that a statute, although generally constitutional, operates unconstitutionally as to the claimants because of their circumstances. *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.3 (Tex. Crim. App. 2006). To complain about the constitutionality of an ordinance as applied, defendants must raise the issue at trial. *Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (en banc); *see* TEX. R. APP. P. 33.1(a). Appellants do not direct us to any point in the record reflecting that they raised this issue, nor has our review revealed such an objection. Therefore, this

issue was not properly preserved for this Court's appellate review.

Because Appellants have not established that the First Amendment secured an absolute privilege allowing them to march in California Street, we overrule their fifth issue.

ISSUES 6–9: JURY CHARGE ERRORS

Appellants' sixth through ninth issues claim various errors in the jury charge. An analysis of a claim of error in the jury charge involves two steps: we first determine whether the charge is erroneous and, if so, we then decide whether an appellant was harmed by the erroneous charge. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013). If error occurred in a jury charge, whether it was preserved determines the degree of harm required for reversal. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (en banc) (op. on reh'g).

In issue six, Appellants assert the trial court erred by including the following instruction in the abstract portion of the charge:

> A person commits an offense if . . . the defendant intentionally, knowingly, obstructs a highway, street or sidewalk . . . [or] 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 prevent obstruction of a highway or any of the other areas set out above.

The instruction tracks the language of sections 42.03(a)(1) and 42.03(a)(2)(A) of the Penal Code. Appellants contend that the inclusion of this language authorized the jury to convict them for an unindicted offense, i.e., section 42.03(a)(2)(A)'s prohibition on "disobeying a reasonable request or order to move."

Since Appellants did not object to the complained-of portion of the charge, we review the record for egregious harm. Assuming, without deciding, that the trial court erred by including language from section 42.03(a)(2)(A) in the abstract portion of the jury charge, we analyze whether the error caused egregious harm justifying reversal.

In determining egregious harm, we must consider "the actual degree of harm . . . in light of 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." *Almanza*, 686 S.W.2d at 171. "Egregious harm is a high and difficult standard to meet, and such a determination must be borne out by the trial record." *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015) (internal quotations omitted).

Considering the entirety of the charge, this first factor weighs against a finding of egregious harm. The error appears only in the abstract portion of the charge, not in the application portion. The application paragraph of the charge instructed the jury:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the August 30, 2020, in Cooke County, Texas, [Appellant], 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.

"It is the application paragraph of the charge, not the abstract portion, that authorizes a conviction." *Crenshaw v. State*, 378 S.W.3d 460, 466 (Tex. Crim. App. 2012). Here, the application paragraph of the charge correctly instructed the jury that it could not convict Appellants unless they found beyond a reasonable doubt that they had obstructed California Street. "Texas courts have repeatedly held that where the application paragraph of the charge correctly instructs the jury on the law applicable to the case, this mitigates against a finding that any error in the abstract portion of the charge was egregious." *Roberts v. State*, No. 02-17-00108-CR, 2018 Tex. App. LEXIS 2609, at *8 (Tex. App.—Fort Worth Apr. 12, 2018, no pet.) (per curiam) (mem. op., not designated for publication) (quoting *Kuhn v. State*, 393 S.W.3d 519, 529 (Tex. App.—Austin 2013, pet. ref'd). The application paragraph did not authorize the jury to convict based on Appellants' disobeying a reasonable request or order to move, but adhered to the offense alleged in the complaint.

With respect to the state of the evidence, we recognize that the jury saw and heard evidence showing that marchers were told to leave the street and stay on the sidewalk, and that such orders were not obeyed. However, as set forth above, Appellants'

mental state was contested, and the State's evidence that they received and refused orders to exit the street had a bearing on that issue. Additionally, Appellants argued that the presence of the police officers indicated that the marchers were in the roadway with permission; again, evidence the police officers were verbally instructing marchers to get out of the roadway had a bearing on that issue. We conclude that this factor does not weigh in favor of finding that Appellants suffered egregious harm.

When weighing the third factor, argument of counsel, we must determine whether any statements made by the State, Appellants' trial counsel, or the trial court exacerbated or ameliorated the complained-of charge error. *Arrington v. State*, 451 S.W.3d 834, 844 (Tex. Crim. App. 2015). Appellants direct us to two places in the record at which the State referred to Appellants' failure to obey a request or order to move. In one instance, the questioning addressed Appellants' mental state, and in the other, it addressed their claim that the officers implicitly permitted them to march in the street. Because these references were not connected to the failure to obey an order to move as a separate offense, we conclude the third factor does not weigh in favor of finding that Appellants suffered egregious harm.

Finally, we consider the record as a whole. Appellants argue that nothing informs the jury to disregard the extraneous definition related to section 42.03(a)(2) and that the jury was allowed to convict them for unindicted offenses. However, as discussed above, the application paragraph of the charge did not authorize the jury to convict Appellants for an unindicted offense. Considering all four *Almanza* factors, we conclude that Appellants did not suffer

egregious harm from the complained-of instruction. We overrule issue six.

In issue seven, Appellants contend that the charge was erroneous because it included a conduct-oriented culpable mental state, while obstruction of a passageway is a result-of-conduct offense.[9] Appellants claim that the nature-of-conduct language included in the definition allowed the jury to convict them based solely on their intentional conduct of "being in the street" rather than the result of that conduct: "obstruction." Although the abstract portion of the charge defined the culpable mental states in both conduct-oriented and result-oriented language, the application paragraph instructed the jury that, in order to find Appellants guilty, they were required to find that Appellants did "intentionally and knowingly obstruct, by rendering impassable or by rendering passage unreasonably inconvenient or hazardous, a street . . . ."

The language of the charge is consistent with the definitions and offense as set forth in the Penal Code. *See* TEX. PENAL CODE ANN. §§ 6.03, 42.03. Further, where the Court of Criminal Appeals has not categorized an offense, a trial court does not err by including the statutory definitions of both "intentionally" and "knowingly." *See Murray v. State*, 804 S.W.2d 279, 281 (Tex. App.—Fort Worth 1991, pet. ref'd) ("[W]hen an offense is not clearly categorized as either a 'result' or a 'nature of the conduct' type offense, with respect to the intent and

[9] Appellants do not direct us to any court decision establishing that obstructing a highway is a result-of-conduct offense. The Fourth Court of Appeals has concluded that obstructing a highway is a conduct-

knowledge required, . . . the trial court may submit statutory definitions of 'intentional' and 'knowingly' because both definitions allow the jury to consider the nature of the offender's conduct or the results of his conduct."). Because a binding court has not definitively determined whether the offense is conduct-based or results-based, we conclude that the trial court did not err by including the definitions of "intentionally" and "knowingly" at issue. We overrule Appellants' seventh issue.

In their eighth issue, Appellants argue that the jury charge is erroneous because it failed to require that the jury's verdict be unanimous with regards to a specific criminal act. Because Appellants did not raise this objection during the charge conference, we review for egregious harm. *Nava*, 415 S.W.3d at 298.

Under the Texas Constitution and Code of Criminal Procedure, a Texas jury must reach a unanimous verdict about the specific crime that the defendant committed. *O'Brien v. State*, 544 S.W.3d 376, 382 (Tex. Crim. App. 2018). The jury must agree that the defendant committed one specific crime, but this does not mean that the jury must unanimously find that the defendant committed that crime in one specific way or even with one specific act. *Id.* The requirement of jury unanimity is not violated by a jury charge that presents the jury with the option of choosing among various alternative manner and means of committing the same statutorily defined offense. *Jourdan v. State*, 428 S.W.3d 86, 94 (Tex. Crim. App. 2014); *see also Francis v. State*, 36 S.W.3d 121, 125 (Tex. Crim. App. 2000) ("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.").

In this case, the evidence at trial indicated that California Street was obstructed at more than one point during the short march. In its closing argument, the State asserted, "California Street became impassable or blocked on three different occasions." Appellants contend that non-unanimity may have resulted in this case because the State charged one offense while it presented evidence that Appellants committed the charged offense on multiple but separate occasions. *See Ngo v. State*, 175 S.W.3d 738, 748 (Tex. Crim. App. 2005) (requiring jury unanimity on the specific crime for which defendant is convicted).

We are not convinced the charge was erroneous. But even if we assume that the trial court erred by not instructing the jury that it was required to unanimously agree on which specific portion of the march satisfied the charge, we nonetheless overrule Appellants' eighth issue because we cannot conclude that any such error caused Appellants egregious harm. *See Wooten*, 400 S.W.3d at 607 (error analysis not required when harm analysis is dispositive). The egregious harm standard is difficult to meet and requires a showing that Appellants were deprived of a fair and impartial trial. *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011). As set forth above, we consider the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, arguments of counsel, and any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171.

When considering the entire jury charge, we observe that it contained instructions that jurors were to "unanimously agree[] upon a verdict" and "reach[] a unanimous verdict." The jury charge did not inform jurors that they must reach unanimity as to which

portion of California Street was obstructed. However, we note that the charges against Appellants arose from a single transaction, the August 30 march. The application paragraph of the charge tracked the complaint and information, to which Appellants did not object. To convict Appellants, the jury was required to find that they obstructed California Street "by walking in the roadway with a group" Appellants had organized, causing it to be impassable or hazardous. The jury was required to agree on the same act, which caused the same injury, i.e., "walking in the roadway . . . causing it to be impassable or hazardous," for a conviction.[10] The first factor weighs against a finding of egregious harm.

Under the second factor, "we look to the state of the evidence to determine whether the evidence made it more or less likely that the jury charge caused appellant actual harm." *Arrington*, 451 S.W.3d at 841. As summarized above, the jury heard testimony about and viewed photographs and a video recording of the August 30 protest. Appellants' defensive theory of the case was not that Appellants did not march in the roadway as alleged, but that their conduct was authorized or privileged or that any obstruction was not unreasonable. Given the state of the evidence, it is highly unlikely that any juror believed that some of the alleged incidents took place but that others did not. On these facts, the likelihood of non-unanimity is "exceedingly remote." *See Jourdan*, 428 S.W.3d at 98.

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[10] This is unlike *Ngo*, on which Appellants rely, in which the State sought one conviction with evidence that the defendant committed three different acts that the applicable statute defined as separate criminal offenses. *See Ngo*, 175 S.W.3d at 742.

This factor weighs against a finding of egregious harm.[11]

Under the third factor, we consider whether any arguments of counsel may have exacerbated or ameliorated the error in the charge. *Arrington*, 451 S.W.3d at 844. In voir dire, the State informed jurors that "the verdict has to be unanimous." In closing, the State focused the jurors' attention on the three specific instances of obstruction but did not indicate whether the jury had to be unanimous about which specific incident Appellants committed when reaching their verdict. Unlike *Ngo*, upon which Appellants rely, the prosecution did not affirmatively represent to the jury that it need not be unanimous. *See Ngo*, 175 S.W.3d at 750–51 (in case in which there were three different ways charged offense could have been committed, State improperly argued it could prove one to the satisfaction of part of the jury, another one to the satisfaction of others, and the third one to the satisfaction of another part of the jury). Because the arguments of counsel neither exacerbated nor ameliorated the error, this factor weighs neither for nor against a finding of egregious harm.

We find no additional circumstances that require consideration under the fourth factor. We conclude that, on the particular facts of this case, the failure of the trial court to expressly require juror unanimity, if it was error, neither affected the very basis of the case

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[11] In response to Appellants' assertion that the evidence was "generalized for an entire group of people and not tethered to Appellants' specific conduct," we note that the jury charge explicitly provided for a conviction only upon a finding of specific conduct by each individual Appellant, namely that said Appellant obstructed California Street "by walking in the roadway," rendering the street impassable.

nor actually operated to deprive Appellants of their valuable right to a unanimous jury. Appellants did not suffer egregious harm. Accordingly, we overrule issue eight.

In issue nine, Appellants assert that the jury charge contained a misstatement of law on their First Amendment defense, specifically the instruction reading, "It is not a defense to the charge of obstructing a highway or passageway that the defendant is involved in a demonstration or protest." Appellants objected to the sentence and asked for it to be struck from the charge. The trial court denied their request. On appeal, Appellants urge that the instruction likely confused the jury and caused Appellants harm 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."

Article 36.14 of the Texas Code of Criminal Procedure requires that a trial court provide a jury charge "distinctly setting forth the law applicable to the case . . . ." TEX. CRIM. PROC. CODE ANN. art. 36.14. A jury charge must include instructions informing 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) (Clinton, J., dissenting) (per curiam) (en banc). "Reversible error in the giving of an abstract instruction generally occurs only when the instruction is an incorrect or misleading statement of law that the jury must understand in order to implement the commands of the application paragraph . . . ." *Alcoser v. State*, 663 S.W.3d 160, 165 (Tex. Crim. App. 2022) (internal quotations omitted).

Here, the instruction was most likely superfluous. However, even assuming the trial court erred in including the complained-of instruction, we must determine whether the error was harmful. When a defendant timely objects, reversal is required if the error caused "some harm" to the defendant. *Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016). "Some harm" requires a finding of "actual harm, as opposed to theoretical harm, as a result of the error." *Id.* After reviewing the entire record, we cannot conclude that Appellants suffered harm from its inclusion.

First, the trial court's instruction that being involved in a demonstration or protest is not a defense to the charged offense is not an incorrect statement of the law. As the Second Court of Appeals held in *Lauderback*, section 42.03 is "limited to the obstruction of highways and there [are] no facial restrictions on free speech." *Lauderback*, 789 S.W.2d at 348 (noting that appellant could have picketed elsewhere, but chose to do it in an area that caused obstruction in highway, so State had interest in removing her); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918, 926, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (it is well-established that expressive activity is not a defense to an individual's own unlawful conduct). Additionally, Appellants were not deprived of their First Amendment defense. The instruction immediately following the one challenged by Appellants sets forth the defense provided under section 42.04 of the Penal Code, which provides, as a defense to prosecution, that a defendant be given a warning or order to move, disperse, or otherwise remedy the violation prior to a speech-based arrest. *See* TEX. PENAL CODE ANN. § 42.04. Finally,

including a merely superfluous abstract instruction never produces reversible error, as it has no effect on the jury's ability to fairly and accurately implement the commands of the application paragraph. *See Plata v. State*, 926 S.W.2d 300, 302–03 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234, 235 (Tex. Crim. App. 1997); *Manrrique v. State*, No. 02-19-00458-CR, 2021 Tex. App. LEXIS 7682, at *28 (Tex. App.—Fort Worth Sept. 16, 2021, no pet.) (mem. op., not designated for publication) ("When the application portion of the jury charge correctly tracks the indictment, the error of giving surplus law in the abstract portion of the charge is not reversible.").

We conclude that inclusion of the challenged instruction, even if erroneous, did not cause harm to Appellants. Thus, there is no reversible error. We overrule Appellants' ninth issue.

ISSUE 10: FAILURE TO EXCUSE JURORS FOR CAUSE

In issue ten, Appellants contend that four prospective jurors should have been excused for cause because they expressed bias against Appellants. To preserve error regarding a trial court's denial of a challenge for cause, the record must show that an appellant made a clear and specific challenge for cause, that he used a peremptory challenge on that juror, that all his peremptory challenges were exhausted, that his request for additional strikes was denied, and that an objectionable juror sat on the jury. *Buntion v. State*, 482 S.W.3d 58, 83 (Tex. Crim. App. 2016). Here, Appellants' challenges for cause to venire members 9, 10, 15, and 23 were denied by the trial court. Appellants' trial counsel used two of her three

peremptory challenges on number 10 and number 23; venire members 9 and 15 sat on the jury. However, Appellants' trial counsel did not use her remaining peremptory challenge on number 9 or number 15, nor did she request additional strikes. Therefore, Appellants have waived any error with respect to this complaint. *See Riddle v. State*, No. 02-02-00157-CR, 2003 Tex. App. LEXIS 2933, at *3–4 (Tex. App.—Fort Worth Apr. 3, 2003, pet. dism'd) (mem. op.) (per curiam). We overrule issue ten.

ISSUE 11: INEFFECTIVE ASSISTANCE OF COUNSEL

In their related final issue, Appellants argue that they received ineffective assistance of counsel because their trial counsel failed to seek additional peremptory strikes to ensure that venire members 9 and 15 were not empaneled.[12]

To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) that the deficient

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[12] Venire member number 9 was asked by the State if she could listen to the court's instructions and follow them in considering the evidence in the case to determine a verdict. She answered, "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 trial court then asked, "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?" She answered, "No."

Number 15 stated that she was raised to "believe officers" and agreed that she "would give an officer more credibility just by virtue of [his] being an officer." However, she also revealed that her father, brother, and sister had a negative experience with law enforcement.

performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 691–92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id.* at 697. For an appellate court to find that counsel was ineffective, "counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2002). "'It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence.'" *Id.* at 142–43 (quoting *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007)). Direct appeal is usually an inadequate vehicle to raise this claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Trial counsel should ordinarily have an opportunity to explain her actions before an appellate court denounces her actions as ineffective. *Id.*

The record does not reflect why counsel chose not to request additional peremptory strikes. Appellants did not file a motion for new trial, and trial counsel thus has not had an opportunity to explain or defend her trial strategy. Moreover, trial counsel has not had an opportunity to explain the effect, if any, of her alleged deficient conduct with regards to the exercise of peremptory strikes. Conducting voir dire and exercising peremptory strikes are inherently matters of trial strategy. *See State v. Morales*, 253 S.W.3d 686, 697–98 (Tex. Crim. App. 2008) (en banc). As the Court of Criminal Appeals noted in *Morales*, trial counsel could have a tactical reason for keeping a juror who

appears to be unfavorable. *Id.* at 698. Trial counsel may, for example, have chosen to use her peremptory strikes on venire members she found were less favorable to her client. Here, nothing in the record indicates trial counsel's reasons for how she exercised her peremptory strikes. In the absence of such information, we cannot say that trial counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See, e.g., Delrio v. State*, 840 S.W.2d 443, 446 (Tex. Crim. App. 1992) (per curiam) (en banc)("Although we would certainly expect the occasion to be rare, we cannot say . . . that under no circumstances could defense counsel justifiably fail to exercise a challenge for cause or peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner.").

Appellants have not established that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88. Having determined that Appellants failed to establish the first prong of the *Strickland* test, we need not consider whether they were prejudiced by the allegedly deficient performance. We overrule Appellants' eleventh issue.

CONCLUSION

Having overruled each of Appellants' issues on appeal, we affirm the judgments of the trial court.

Judy C. Parker
Justice

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APPENDIX B

OFFICIAL NOTICE FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

3/27/2024

COA Case No. 07-22-00303-CR

HENDERSON, TORREY LYNNE

Tr. Ct. No. CR20-65983
PD-0844-23

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

APPENDIX C

OFFICIAL NOTICE FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

3/27/2024

COA Case No. 07-22-00304-CR

RIDGE, AMARA JANA

Tr. Ct. No. CR20-65984
PD-0845-23

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

APPENDIX D

OFFICIAL NOTICE FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

3/27/2024

COA Case No. 07-22-00305-CR

THOMPSON, JUSTIN ROYCE

Tr. Ct. No. CR20-65985
PD-0846-23

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

APPENDIX E

IN THE COURT OF APPEALS SEVENTH DISTRICT OF TEXAS AT AMARILLO

No. 07-22-00303-CR
No. 07-22-00304-CR
No. 07-22-00305-CR

TORREY LYNNE HENDERSON, AMARA JANA RIDGE, AND JUSTIN ROYCE THOMPSON, APPELLANTS

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law

Cooke County, Texas

Trial Court Nos. CR20-65983, CR20-65984, CR20-65985, Honorable John H. Morris, Presiding

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May 7, 2024

ORDER STAYING ISSUANCE OF MANDATES

Before QUINN, C.J., and PARKER and YARBROUGH, JJ.

Appellants, Torrey Lynne Henderson, Amara Jana Ridge, and Justin Royce Thompson, appealed from their convictions for the misdemeanor offense of

obstructing a highway or passageway. We affirmed the district court's judgments in November of 2023. *See Henderson v. State*, Nos. 07-22-00303-CR, 07-22-00304-CR, 07-22-00305-CR, 2023 Tex. App. LEXIS 8617, at *33 (Tex. App.—Amarillo Nov. 15, 2023, pet. ref'd) (mem. op., not designated for publication). Thereafter, Appellants filed petitions for discretionary review with the Texas Court of Criminal Appeals, which were refused on March 27, 2024.

Each Appellant has now filed with this Court a motion requesting that we stay issuance of our mandate pursuant to Texas Rule of Appellate Procedure 18.2, which authorizes an appellate court to grant a stay of its mandate if a party "move[s] to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari." TEX. R. APP. P. 18.2. In their motions, Appellants assert that they would incur serious hardship from the mandate's issuance if the United States Supreme Court should later reverse the judgments. The State has not filed a response to Appellants' motions, but the motions indicate that Appellants' request for a stay is opposed by the State.

We grant Appellants' motions and will stay issuance of our mandates for 90 days in order to allow Appellants to seek relief from the United States Supreme Court. *See id.* After 90 days have passed, this Court's mandates will issue without further notice. *See id.*

It is so ordered.

Judy C. Parker
Justice

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