No. 23-1351

IN THE

Supreme Court of the United States

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

Petitioners,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS AND REVERSAL

JT MORRIS
Counsel of Record
JOSHUA A. HOUSE
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE, Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org

Counsel for Amicus Curiae

331238

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Do the First and Fourteenth Amendments prohibit the government from convicting individuals for obstructing a passageway based solely on their participation in a peaceful march on public sidewalks and streets, without evidence that the defendants themselves knowingly or intentionally obstructed any passageway or directed, authorized, ratified, or intended that others do so?

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and *amicus curiae* participation in cases that implicate expressive rights. *See*, *e.g.*, Brief of FIRE as Amicus Curiae in Support of Petitioner and Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023) (No. 22-138); Brief of FIRE *et al.* as Amicus Curiae in Support of Petitioner and Reversal, *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175 (2024) (No. 22-842).

Because of its experience defending freedom of expression for speakers of all ideological stripes, FIRE is keenly aware that law enforcement and other public officials misuse criminal laws trying to stifle protest and other protected public advocacy. This case presents an opportunity for the Court to reaffirm the breathing space it time and again has upheld for the venerable American freedom to peacefully protest.

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1. Under Rule 37.6, FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. FIRE provided timely notice of this brief under Rule 37.2.

SUMMARY OF ARGUMENT

Petitioners' peaceful political march was a quintessential exercise of the First Amendment rights to free speech, peaceful assembly, and petition. Yet for exercising those rights, the State of Texas jailed and prosecuted them. Jailing political protestors for a peaceful march down a sidewalk strikes at the First Amendment's heart and spurns our national commitment to free expression.

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

So vital is the right to peaceful political protest that this Court has upheld it for messages many would find repulsive. Nearly 50 years ago, the Court recognized even Nazis had a constitutional right to parade down the streets of a small town many Holocaust survivors called home. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). And more recently, the Court held the First Amendment protected individuals who publicly protested on the sidewalk near a funeral for a fallen Marine, with signs reading "Thank God for Dead Soldiers" and "You're Going to Hell." *Snyder v. Phelps*, 562 U.S. 443, 449, 454 (2011).

Those decisions reflect a principle crucial for robust public debate to survive: First Amendment rights need breathing space. Not only must that breathing space broadly protect *what* someone says, it must also protect *how* they say it. Because the First Amendment ensures broad latitude to express ourselves in both content and form, this Court time and again has emphasized the need for exacting precision when demarcating the line between protected speech and unprotected speech or conduct. Indeed, even content-neutral time, place, and manner restrictions must be narrowly tailored and leave open ample channels for a speaker to share their message. And First Amendment breathing space is particularly vital in the context of criminal statutes, which must not punish or chill protected expression.

By upholding the conviction of peaceful protestors, the decision below squarely conflicts with this Court's benchmark decisions preserving that breathing space. As Petitioners rightly explain, the decision below conflicts with *NAACP v. Claiborne Hardware* and *Cox v. Louisiana*.[2] Even more so, it clashes with *Counterman v. Colorado* and *Brandenburg v. Ohio*.

This Court stressed in *Counterman* that to give First Amendment rights "breathing room," the government must meet a stringent intent standard to criminalize even "the most prominent categories of historically unprotected speech." 600 U.S. 66, 75 (2023). But here, the appeals court reasoned that the chant, "Whose streets? Our streets," showed a specific intent to obstruct traffic.

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2. Pet. 4, 26 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Cox v. Louisiana*, 379 U.S. 536 (1965)).

Pet. 11. That conclusion defies *Counterman* and chokes First Amendment breathing room. Even worse, it makes political advocacy a crime.

That is why *Brandenburg* drives the nail in the coffin for the decision below. There, this Court left no doubt: The government cannot punish Americans for mere political advocacy. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969). And here, the state failed to show Petitioners did anything to cross the *Brandenburg* line from protected advocacy to intending to incite others to imminently block traffic. In fact, the police captain testified below that not one of the Petitioners instructed others to block traffic. Pet. 8–9.

Public protest is just as essential a part of American political life as it was 250 years ago. To that end, this Court's First Amendment decisions, securing constitutional breathing space for public protest, must mean what they say. *Amicus* FIRE urges the Court to grant certiorari and summarily reverse.

ARGUMENT

I. Only with ample breathing space can the Constitution's deep-rooted commitment to protecting peaceful protest survive.

Few liberties are so engrained in our history and tradition as public political protests. America's "streets and parks" have "immemorially been held in trust for the use of the public and, time out of mind, hav[ing] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague*

v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Colonists trudged through muddy roads to rally against the Stamp Act, sparking the Revolution. And two centuries later, peaceful masses marched through the streets of Selma, leading the way toward defeating Jim Crow's stranglehold over equality. Find a crossroads in American history, and you'll likely find that public protest played a part in choosing our path.

When people exercise that expressive freedom, as Petitioners did here, they are putting into motion those liberties "we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). Peacefully joining with others of like mind to speak out about the issues of the day is a treasured hallmark of American civic life and "a basic tenet of our constitutional democracy." *Cox*, 379 U.S. at 552. Thus, the First Amendment, meeting its role as "the guardian of our democracy," *Brown v. Hartlage*, 456 U.S. 45, 60 (1982), staunchly protects freedom of speech, peaceful assembly, and the right to petition—all of which shield peaceful public protesters from prosecution.

But like all First Amendment freedoms, the freedom to peacefully protest in public spaces "need[s] breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). That is why, for example, states face a rigorous standard to justify restricting public protest. *See*, *e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (explaining that a law targeting demonstrations failed to meet First Amendment requirements because it lacked "narrow, objective, and definite standards"). And of course, when the government intrudes on First Amendment breathing space by criminalizing expression,

it faces a severe burden to justify its acts. In fact, this Court recently cited the need for First Amendment breathing space as its rationale for rejecting Colorado's less-stringent objective standard for criminalizing "true threats": "By reducing an honest speaker's fear that he may accidentally or erroneously incur liability, a mens rea requirement provides 'breathing room' for more valuable speech." *Counterman*, 600 U.S. at 75 (quoting *United States v. Alvarez*, 567 U. S. 709, 733 (2012) (Breyer, J., concurring in judgment)).

In upholding that breathing space, this Court has time and again rejected the government's attempts to punish peaceful expression on public sidewalks, like the Petitioners' peaceful march here. *See*, *e.g.*, *Shuttlesworth*, 394 U.S. at 158–59 (reversing criminal conviction of civil rights protestor who used public sidewalk without permit); *Edwards v. South Carolina*, 372 U.S. 229, 230, 236 (1963) (reversing "breach of the peace" conviction of civil rights protestors who used public sidewalks, where the record showed "[t]here was no violence or threat of violence"). Likewise, this Court has made clear that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," including in public spaces like streets. *Snyder*, 562 U.S. at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

So whether Americans are gathering in a public park to protest a war, marching down the sidewalk for religious freedom, or rallying outside City Hall against a bond measure, the First Amendment protects them—and courts must safeguard the breathing space that ensures that broad protection. If the First Amendment protects the right of Nazis to march down the streets of Skokie and

the right to display a "Thank God for Dead Soldiers" sign on the sidewalk outside a solemn military funeral—and it does—then surely it also protects the right of Petitioners to march on the sidewalks of Gainesville, Texas and call for removal of Confederate monuments.

Without First Amendment breathing space, the effects of government overreach into public protest would be dire. Just take common criminal sanctions. There's jail time and probation. Or perhaps paying a speech-chilling fine. *See Timbs v. Indiana*, 586 U.S. 146, 153–54 (2019) (noting fines can "chill the speech of political enemies, as the Stuarts' critics learned several centuries ago"). In all cases, there's the social stigma of a criminal record to bear for the public protester seeking a job or maintaining a professional license. *E.g.*, *United States v. Dionisio*, 410 U.S. 1, 10 (1973) (noting that an arrest "results in a record involving social stigma"). Letting today's sweeping penal codes choke out the breathing space necessary for public protest will no doubt chill it—upending the deep-rooted American tradition of robust political discussion and protest in our public spaces.

Yet allow Texas to invade that breathing room is precisely what the appeals court did here. It upheld criminal convictions for "obstruct[ing] a passageway" against three political protestors who peacefully marched down a sidewalk, despite no evidence that any of them blocked traffic or intended to incite any crime. *See* Pet. 7–9. In fact, the record showed that only a nameless cyclist blocked traffic for no more than 90 seconds. *Id.* at 8, 10. And although a testifying police captain admitted that no Petitioner stopped traffic, the appeals court still reasoned all three had intent under the authorizing statute

to obstruct traffic because some of their fellow protesters chanted "Whose streets? Our streets." But that chant alone is protected speech, incapable of satisfying Texas's heavy burden on intent. *E.g.*, *Hess v. Indiana*, 414 U.S. 105, 107, 109 (1973) (First Amendment protected protester from criminal punishment for saying "We'll take the fucking street later (or again)" during an anti-war protest).

In short, the decision below abides the government criminalizing core political expression without evidence that Petitioners did anything other than what the First Amendment protects. That is no way to maintain the breathing space needed for First Amendment rights to survive. Instead, it's a path to suffocating it.

II. The Court should summarily reverse under *Counterman* and *Brandenburg*.

Summary reversal is warranted. The appellate court's decision squarely conflicts with this Court's precedent, including *Claiborne Hardware* and *Cox*, as Petitioners rightly explain. Pet. 26. So too does it clash with *Counterman* and *Brandenburg v. Ohio*. Not only do those two decisions foreclose Petitioners' convictions, but both also reflect the Constitution's commitment to ensuring breathing space for expressive freedoms.

In *Counterman*, this Court held that the First Amendment requires "strategic protection" in the form of intent requirements for even "the most prominent categories of historically *unprotected* speech." 600 U.S. at 75 (emphasis added). As the Court explained, the stringent *mens rea* standard ensures "breathing room" against criminal and tort liability alike. *Id.* at

75–76 (discussing the actual malice standard for civil and criminal defamation). If unprotected speech like true threats enjoys the breathing room a stringent *mens rea* standard provides, then core political speech like peaceful protests demands an even higher standard—a principle this Court reaffirmed in *Counterman*. *Id.* at 81–82 (discussing *Claiborne Hardware, Hess*, and *Brandenburg*). To that end, some unknown participants chanting "Whose streets? Our streets," is nowhere near meeting this Court's "strong intent requirement" needed to uphold Petitioners' convictions. *See id.* at 81.

Even had *Petitioners* chanted "Whose streets? Our streets," it would not be enough for Texas to overcome the First Amendment. And *Brandenburg* leaves no doubt as to why. There, this Court held the First Amendment forbids throwing citizens in jail for mere advocacy. 395 U.S. at 447–48. Even if speech tends to breach the peace or lead to unrest, the Court reasoned, the First Amendment protects it unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. That showing requires specific intent. *Counterman*, 600 U.S. at 81 (citing *Brandenburg*).

If the First Amendment protects calling for a march on Congress while advocating forceful "revengeance," like Clarence Brandenburg did, then it protects chanting "Whose streets? Our streets," during a peaceful march down a public sidewalk. Spirited political advocacy alone cannot prove specific intent, as *Brandenburg* and *Hess* make clear. Otherwise, it would open the door to officials prosecuting, "either directly or through a chilling effect . . . dissenting political speech at the First Amendment's

core." *Counterman*, 600 U.S. at 81. That is a dire threat to free expression. To snuff out that threat, the Court should grant certiorari and uphold its longstanding precedent protecting peaceful political advocacy from overreaching—and speech-chilling—criminal prosecution.

CONCLUSION

By any measure, Texas turned peaceful public protest into a crime. This case is not a close call: This Court's precedents and the longstanding breathing room afforded First Amendment rights soundly foreclose any criminal conviction. Thus, *amicus* FIRE urges the Court to grant the petition for certiorari and summarily reverse the judgment below.

Respectfully submitted,

JT Morris
Counsel of Record
Joshua A. House
Foundation for Individual Rights and Expression
700 Pennsylvania Ave. SE, Suite 340
Washington, DC 20003
(215) 717-3473
jt.morris@thefire.org

Counsel for Amicus Curiae

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