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

BRIEF OF THE TEXAS STATE CONFERENCE OF THE N.A.A.C.P. AND FAITH COMMONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The National Association for the Advancement of Colored People ("N.A.A.C.P.") is a non-profit civil rights organization founded in 1909. The N.A.A.C.P.'s mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The first N.A.A.C.P. unit in Texas was founded in 1915. The Texas State Conference of the N.A.A.C.P. ("Texas N.A.A.C.P.") oversees more than 70 local branches and youth councils in Texas. Since its inception, the Texas N.A.A.C.P. has been fighting to ensure that every Texan has meaningful access to the American democratic system and that the voices of Texas voters are heard at the polls.

Faith Commons is a Dallas-based, inclusive-faith organization founded in 2018. Its mission is to catalyze conversations and community partnerships that address opportunities to break down systemic barriers to equity and human dignity. Faith Commons partners with civil society organizations engaging with local governments to advocate for community-based solutions that improve the lives of Dallas residents and others across the country. It succeeds in cultivating diverse relationships that encourage participation in public life.

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[1] Counsel for *amici curiae* certify, pursuant to Rule 37.6, that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than *amici* and their counsel have contributed money for this brief. Counsel for *amici* provided notice to counsel of record on July 10, 2024, pursuant to S. Ct. R. 37.2.

The *Amici* submit this brief in support of Petitioners, because this Court's decision will affect the national and local discourse on the fundamental rights of speech and assembly, and whether states will continue to weaponize protesters' speech to prosecute and convict members of the public for exercising their Constitutional right to speak out.

SUMMARY OF ARGUMENT

Protesting as a form of political expression is an original and integral part of this Nation's history. So, too, are efforts to stop protesters from calling for political change using their voices, their feet, and various forms of protected symbolic expression. The clash between the rights of protesters to march peacefully through public streets and sidewalks, and the efforts of the state to punish those acts of pure political speech and symbolic expression, is ground well-trodden by this Court. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965). The Court held nearly sixty years ago—on similar facts—that law enforcement officials may not be given "unfettered discretion" to prosecute protesters and others exercising their First Amendment rights selectively under broadly-worded criminal statutes. *Cox*, 379 U.S. at 557–58; *see also Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940).

The Texas Seventh Court of Appeals failed to adhere to that basic principle when it affirmed Petitioners' convictions for obstructing a roadway during a brief and peaceful march for racial justice in Gainesville, Texas on August 30, 2020. Rather than construe the obstruction statute strictly to require

that Petitioners' own conduct, and their own words, met the elements of the offense, the Court of Appeals instead held, improperly, that the conduct and words of *others* could form the basis for *Petitioners'* criminal liability. That exceedingly broad reading of the statute violated Petitioners' First Amendment rights twice over.

First, the Court of Appeals' holding converted a well-known protest chant—"Whose streets? Our streets."—into evidence of Petitioners' criminal culpability. This act of core expressive speech—not attributed to any specific Petitioner—provides no evidence of mens rea. If allowed to stand, that result will have a profound chilling effect on any protest participant who fears their words of empowerment and expressions of solidarity with a political struggle could be twisted into evidence of their participation in criminal acts. And just recently, this Court reemphasized the need for "breathing space" for First Amendment freedoms when speech alone forms the basis of a criminal sanction. *Counterman v. Colorado*, 600 U.S. 66, 82 (2023); *see also N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). The Court of Appeals' holding, in contrast, creates a free speech vacuum.

Second, the Court of Appeals' holding gives law enforcement officials carte blanche to arrest and punish protest organizers and leaders for the conduct of others, without evidence that the organizers themselves directed or ratified that conduct. *Contra N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886 (1982). This Court has already noted its concerns with

theories of civil liability which could attach to protest leaders who cannot control the actions of individual protesters. *See Mckesson v. Doe*, 592 U.S. 1, 4 (2020); *see also Ford v. Mckesson*, --- F. Supp. 3d ----, 2024 WL 3367216 (M.D. La. July 10, 2024). Those concerns take on an even more serious character when considered within a criminal process that seeks to punish protest leaders for holding what was, by all accounts, a short and peaceful protest that caused little more than a brief inconvenience for others attempting to use the roadway. Indeed, the theory of criminal liability applied by the court below effectively neuters the long-settled requirement that, to punish a speaker for incitement to lawlessness, that lawlessness must actually have been directed by the speaker, and must have been likely to produce that result. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949).

If left in place, then, the decision of Texas's Seventh Court of Appeals opens the door for law enforcement to criminally punish protest organizers and leaders for the conduct of others, while having insufficient evidence that the protest leaders themselves engaged in illegal acts, or directed others to do so. To reach that result, the lower court converted pure political speech—"Whose streets? Our streets."—into evidence of criminal culpability. The common usage of these types of chants at political protests demonstrates precisely why that speech falls well short of establishing the kind of subjective mental state required to impose criminal liability arising out of speech or expressive conduct. *Counterman*, 600 U.S at 79–81.

ARGUMENT

I. The First Amendment does not tolerate the conversion of common protest chants such as "Whose Streets? Our Streets" into evidence of subjective criminal intent.

Chants and music are not just well-known features of political protests, they are an essential means for protesters to spread a unified message. While a protest itself might be the reason for a community of people with shared values or a common goal to come together, chants and music unite those individual voices through a single, unifying message of solidarity and collective support for a cause.[2]

Among the most popular call-and-response chants used at public protests is "Whose streets? Our streets." Those four words communicate the basic sentiment that government must be responsive to the people, not the other way around.[3] In other words, the chant is a passionate, evocative plea for collective solidarity in support of a common cause. Its refrain is pure political speech at its core, and falls squarely within the protections guaranteed by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

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[2] *See* Mariusz Kozak, *How Music and Chants Bring Protesters Together*, WASHINGTON POST (Jul. 7, 2020), https://www.washingtonpost.com/outlook/2020/07/07/protest-chants-musicology-solidarity/.

[3] AJ Willingham, *How the Iconic 'Whose Streets? Our Streets!' Chant Has Been Co-opted*, CNN (Sept. 20, 2017), https://www.cnn.com/2017/09/19/us/whose-streets-our-streets-chant-trnd/index.html.

Though its use stretches back decades, the chant again featured prominently during the wave of protests across the country which expressed outrage over unchecked police violence against Black people following George Floyd's murder on May 25, 2020. The protests that arose out of that historical moment gave "Whose streets? Our streets" added meaning: it became a rallying cry for communities of color and their allies who believed that police could not be trusted to make their streets safer; and it expressed their collective desire, amid the grief and rage felt over Floyd's senseless murder, to reclaim their streets as spaces where everyone could feel safe.

"Whose streets? Our streets" thus frequently serves as a call for racial justice, which is precisely what Petitioners gathered to ask for when they peacefully marched to advocate for the removal of a confederate monument erected outside the Cooke County Courthouse in Gainesville, Texas. Likewise, some of *amici*'s membership and constituents frequently exercise their Constitutional right to participate in protests and marches in Texas, and have shouted this chant, among many others, to demand racial equality and an end to police violence in Texas.

Importantly though, the chant's ability to take on different meanings, and to be deployed as a show of solidarity regardless of the cause being supported, makes the chant itself highly versatile. It has become so commonly used across different protests, marches, and political gatherings, that its most important feature is perhaps how well-known and accessible it is, and how easily it can be used to unite a group with a common voice. Most people who join a protest will

be familiar with it, and those who are not can learn it immediately. At bottom, it serves as a shorthand affirmation that "[w]e the people" properly hold the government accountable. U.S. Const. Preamble.

That makes the Seventh Court of Appeals' reliance on this chant as evidence of Petitioners' intent to obstruct a roadway particularly troubling and, if allowed to stand, damaging to the First Amendment freedoms of both Petitioners and other protesters. Rather than accept this chant for what it is—pure symbolic speech conveying a message of unity—the court below took it as a collective pronouncement from the protest group of their intent to engage in an illegal act (i.e. obstructing a roadway). Worse, the court below then considered that chant as evidence of the Petitioners' *individualized* intent, despite a lack of evidence in the record that any of the Petitioners actually uttered those words, let alone obstructed a roadway. *See also Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] search or seizure of a person must be supported by probable cause *particularized* with respect to that person.") (emphasis added); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

The implications that this approach has for the rights of *amici* to have their voices heard, and to collectively engage in lawful, peaceful protests are substantial, and deserve this Court's intervention. The possibility that ordinary, commonplace protest chants such as "Whose streets? Our streets" could be used in a criminal prosecution as evidence of criminal intent—let alone satisfy the requirement of individualized, subjective intent when speech forms the basis of a criminal act, *Counterman*, 600 U.S. at 72–73—will chill *amici* and other speakers from using

chants and other forms of group speech at protests, for fear that their calls for social change and racial progress could be weaponized against them in retaliation for speaking out.

If a near-universally known chant like "Whose streets? Our streets" is fair game to establish subjective criminal intent, so, too, are any number of other commonplace chants which protesters use to convey solidarity with a cause. Chants containing non-specific calls to action, in particular, would be at risk of total censorship. For example, under the Court of Appeals' approach, the chant "No justice, no peace!" could be used as evidence of intent to engage in disorderly conduct. Likewise, another commonplace call-and-response chant—"If we don't get it, shut it down!"—could be used to establish intent to disrupt roadways, meetings, or businesses. So, too, could a chant like "When Black lives are under attack, what do we do? Stand up, fight back!" be used to show intent to engage in criminal acts.

Convicting Petitioners because some protesters utilized these chants would lead to punishment of an unprecedented amount of political speech, something the First Amendment does not tolerate. And those concerns underscore precisely why this Court in *Counterman* required that the conviction for an offense involving communicative conduct—there, for punishment of a "true threats" offense—be supported by a showing of the alleged offender's individualized, subjective intent to commit the underlying offense. That particularized proof, the Court held, was required to calibrate properly the "competing interests" at issue—the speaker's (and broader public's) First Amendment rights, on the one hand,

and the state's interest in addressing the specific harm, on the other. 600 U.S. at 80. Failing to strike that proper balance, this Court explained, would lead to self-censorship due to an "honest speaker's fear that he may accidentally [or erroneously] incur liability." *Id.* at 75 (quoting *U.S. v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment)); *see also Claiborne*, 458 U.S. at 928.

Given the breadth and scope of the many expressive uses of "Whose streets? Our streets," the Court of Appeals' reliance on this common, symbolic phrase should not be sufficient to sustain Petitioners' conviction, and on that basis alone is reason for summary disposition in their favor. When viewed in their proper context—a brief, peaceful civil rights protest along a public thoroughfare adjacent to the county courthouse—the criminal prosecutions here hold sweeping implications for the rights of protesters and protest organizers who use commonplace chants to speak with one voice. To divine an individual's subjective criminal intent from that collective language, without more, violates Petitioners' First Amendment rights, and silences the voices of *amici* and other protest organizers, leaders, and speakers who have historically used protest chants to advocate for racial justice, and demand a safer world for their communities.

II. Protest organizers cannot be held criminally liable for the actions of others not in their control.

This case further warrants the Court's review to apply the long-settled principles which shield protected speech from a troubling phenomenon: the

punishment of protest organizers and leaders for the actions of others. *Claiborne*, 485 U.S. at 927; *see also Mckesson*, 592 U.S. at 4. The lower court here erred when it held Petitioners—as the leaders of Progressive Rights Organizers (PRO) Gainesville—criminally liable for the conduct of others who did not act at Petitioners' direction. No evidence showed that Petitioners authorized, directed, or ratified the unlawful activity, and there was no basis on which to affirm their convictions.

N.A.A.C.P. v. Claiborne Hardware squarely addressed this question with respect to a protest leader's potential civil liability for the violent acts of others. *See* 458 U.S. at 929. In doing so, it roundly rejected the idea that a protest leader's "emotionally charged rhetoric" could be causally linked to individual acts of violence that occurred after the speech, without evidence that the speaker himself specifically "authorized, ratified, or directly threatened acts of violence." *Id.*

In that case, the field secretary of the N.A.A.C.P., Charles Evers, and a committee of Black Claiborne County, Mississippi citizens, organized boycotts against white merchants to protest policies of segregation and racial inequality in the Claiborne County area. *Id.* at 898–900. While addressing large crowds of protesters, Evers made provocative statements that threatened those who broke the boycotts with social ostracism and discipline, exclaiming in one speech that if the protesters caught people "going to those racist stores, we're going to break your damn neck." *Id.* at 902. Although the protests were peaceful, some individuals who did not observe the boycotts experienced incidents of violence.

Id. at 905–06. White business owners sued Evers and the N.A.A.C.P. for seven years of economic losses allegedly caused by the protests, and obtained a large judgment in the lower courts. *Id.* at 889–91, 893–94.

This Court reversed, holding that Evers and the N.A.A.C.P. were protected from civil liability, because Evers's speech, though impassioned, merely advocated for unity around a common cause. *Id.* at 928. The Court emphasized that protest leaders like Evers need not soften their speech into "purely dulcet phrases" because effective advocacy often requires strong, "extemporaneous rhetoric." *Id.* It thus made clear that the First Amendment acts as a bar to the imposition of civil liability against protest leaders and organizations that do not direct or ratify the violent or unlawful acts of others. *Id.* at 929.

That principle should apply with even greater force here, where Petitioners—in their capacity as the organizers and leaders of the protest—face *criminal* liability (and the lifelong consequences that come with it) for the conduct of others. Lacking record evidence that Petitioners themselves actually obstructed a roadway, and intended to obstruct a roadway, the court below nonetheless affirmed their convictions because of evidence ostensibly showing that others briefly marched on the street, independently of Petitioners' instructions. Their convictions violate the basic dictates of *Claiborne*.

The decision of the court below also strays from this Court's other decisions addressing speaker-based criminal liability. In *Terminiello v. City of Chicago*, this Court imposed a heightened standard of review on criminal sanctions sought against a speaker whose

words were alleged to have caused violence and lawlessness. 337 U.S. 1, 4 (1949). In reaching that conclusion, the Court emphasized that speech "may indeed best serve its higher purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* Though the standard the Court applies to punishing speakers for incitement has since changed, *see Brandenburg*, 395 U.S. at 447, the Court has never retreated from the fundamental principle that punishing a speaker for the effects their words allegedly had on others goes to the core of the First Amendment, and must be approached with "extreme care." *Claiborne*, 458 U.S. at 927; *see also Counterman*, 600 U.S. at 75

The court below did not exercise "extreme care" and defied these basic First Amendment cautions when it affirmed Petitioners' convictions on the record before it. Nothing in the record suggests that Petitioners' words were "intended (not just likely) to produce" the roadway obstructions which were attributable to others. *Counterman*, 600 U.S. at 77 (citing *Brandenburg*, 395 U.S. at 447; *Claiborne*, 458 U.S. at 927–29). Nor did the collective use of the chant "Whose streets? Our streets"—whether or not those words were attributable to Petitioners—clear the high bar set by *Claiborne* for liability to attach to Petitioners themselves. Absent this Court's intervention, *amici* fear the broader implications of Petitioners' convictions for their own First Amendment freedoms, and those of their constituents. As organizations that are united in the struggle for racial and economic justice, *amici* regularly organize, support, and participate in protests and other

meetings and gatherings that include calls to action. That work requires them to speak out publicly, and often loudly and forcefully, to spread their messages of equality and unity. Petitioners' convictions require *amici* to pause in the future before planning a protest, march, or other event utilizing public streets and spaces. Leaving the Court of Appeals' judgment intact could lead to the deprivation of protest organizers' freedom based on the exercise of Constitutional speech or protest by other protesters. The Court's precedent prohibits this result.

Worse, as anyone who has organized or observed a protest understands, even the most well-planned protests cannot account for every possible outcome. That includes the possibility that individual participants or others might (knowingly or unknowingly) violate the law. Petitioners' convictions for organizing a peaceful protest open the door to a troubling possibility: that a protest leader can be arrested and successfully prosecuted for obstructing public streets if just a single protester, acting on their own, steps onto the road while law enforcement are watching. The theory of criminal culpability underpinning Petitioners' convictions does great damage to their First Amendment rights, and severely undermines the ability of *amici* and others to gather and exercise their collective voice in the public square in the future. This case is an appropriate vehicle for the Court to reject that theory and to reaffirm the rights of protesters to speak freely in public spaces.

CONCLUSION

For the reasons explained herein, the Court should grant certiorari, and the judgment of the Texas Seventh Court of Appeals should be summarily reversed.

Respectfully submitted,

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