No. 23A1169

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

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

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INTRODUCTION

In its response brief, the State of Texas fails to meaningfully address the constitutional issue at the heart of this case: applicants face imminent jail time simply for participating in a protest march in which some marchers at some points walked in the street, without any evidence that applicants themselves intended to obstruct a passageway, actually obstructed any passageway, or directed others to do so. While the State attempts to recast this as fact-bound dispute, the facts are not in dispute; the *legal* issue is whether, on these facts, the First Amendment permits a criminal conviction. It is uncontested that applicants walked briefly in the road. One applicant, Thompson, admitted to having walked in the street for two blocks; the other two, Henderson and Ridge, were identified as walking in the street together at a particular moment. Resp. 15. It is also uncontested that a car was briefly stopped—but by individuals other than applicants. *Id.* And it is uncontested that there is no evidence that applicants themselves intentionally obstructed any passageway, or directed anyone else to do so. The State agrees that police officers did "allow[] them to stay" on the roadway for some portion of the eleven-minute march. Resp. 5. The video clip shown to the jury, which the state describes as "fully document[ing]" the facts, shows only one of the three applicants (Thompson), and adds nothing material to these facts. Resp. 14. The legal question presented is whether, on those facts, without any evidence that applicants obstructed a passageway or directed anyone else to do so, applicants can be punished consistent with the First Amendment.

This application merely seeks a temporary stay of the mandate so that applicants are not compelled to serve the entirety of their sentence before this Court even has an opportunity to consider their substantial First Amendment claims. Applicants timely moved for this stay well in advance of the existing state court stay's August 7 sunset. They properly presented their First Amendment argument at every stage of this litigation.

And this case presents compelling reasons to grant certiorari and reverse. The conviction below violates the First Amendment protections established in *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) and *Cox v. State of Louisiana*, 379 U.S. 536, 541-553 (1965), two of this Court's landmark cases concerning liability for political protesters. As the Texas courts did, this Court should grant a stay of the mandate pending resolution of the petition for certiorari.

ARGUMENT

I. Applicants sought a stay from this Court in a timely fashion.

The State's argument that applicants have been "dilatory" in seeking this Court's relief is unfounded. The State recognizes that the stay granted by the Seventh Court of Appeals does not expire until August 7, 2024. Resp. 10. Applicants filed this application on June 25, over six weeks in advance of that expiration date.

The State maintains that counsel should have sought a stay from this Court immediately after the Court of Criminal Appeals denied review on March 27, Resp. 10, ignoring this Court's rule that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief

requested was first sought in the appropriate court or courts below." Sup. Ct. R. 23. Applicants accordingly first pursued a stay from the state courts and successfully obtained one from the Seventh Court of Appeals. They now seek a further stay, well in advance of the need for any relief from this Court, and only upon petitioning for certiorari and learning that the State refused to agree to postpone service of their one-week sentences until this petition was resolved. Moreover, by filing their stay application in tandem with their petition for certiorari, they have ensured that the Court is able fully to assess their request. There would have been no point in seeking a stay from this Court even earlier, before a petition for certiorari had been filed, and while applicants were fully protected by the state court's stay.[1]

II. The question presented is important and warrants this Court's review.

The State objects that applicants' petition presents only a request for "fact-bound error correction regarding the state courts' application" of First Amendment principles. Resp. 12. But the critical facts in this case are not in dispute. The parties agree that applicants briefly walked on the street at various points of the approximately eleven-minute march, that applicants organized the protest and instructed others to stay on the sidewalk, that other people during the march caused

[1] The cases the State cites about the equities tipping against parties who are dilatory in enforcing their rights are inapposite here, since those cases involve years or decades-long delays in seeking relief. *See, e.g. Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825) (involving a delay of almost 22 years in bringing a bill in equity); *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (involving a motion for preliminary injunction that was not filed until six years after a districting map was adopted and over three years after plaintiffs' complaint was filed).

a brief delay of a single vehicle, and that applicants themselves never obstructed a passageway or directed others to do so. Those are the only material facts for resolving the fundamental *legal* question this case raises: does the First Amendment permit the punishment of protest organizers for "obstruction" without any evidence that they themselves intended to obstruct a passageway, actually obstructed one, or directed anyone else to do so?

That question was sufficiently important to warrant this Court's review in *Claiborne* and *Cox,* both of which also concerned the application of First Amendment principles to the facts of a protest. Indeed, that will virtually *always* be the case where officials seek to punish protest organizers for their actions during a protest. But that does not mean such cases are not worthy of this Court's review. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984) ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance. This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment").

Clarifying and reinforcing the important First Amendment principles laid out in *Claiborne* and *Cox* here would not be mere error correction; it would help ensure that a wide range of political activity is not unduly chilled, in Texas and beyond, by the overzealous enforcement of commonplace "obstruction" statutes. The question of what the First Amendment demands when broad "obstruction" laws are applied to protest organizers who did not themselves obstruct a passageway is important and

recurring. And it is one upon which the First Amendment rights of all those who seek to assemble in public rest. Marching in peaceful protest is a fundamental First Amendment right, but exercising it inescapably involves some incidental presence on streets, and many states have obstruction statutes similar to Texas'. *See* Pet. App. 23-24. The issues presented here are likely to arise in virtually every public protest. Granting review would permit this Court to ensure that protesters nationwide are not penalized for fully protected First Amendment activity.

III. The Court is likely to reverse the decision below.

The lower court's decision in this case was egregiously wrong as a legal matter, and therefore the Court is likely to reverse if it grants review. By imposing criminal liability on protest organizers without individualized evidence that they themselves intentionally obstructed any passageway or directed others to do so, it disregarded the landmark precedents of *Claiborne* and *Cox*. And it also defied this Court's more recent pronouncements reaffirming the necessity of requiring subjective *mens rea* before imposing liability on those expressing themselves because of the chilling effect that any lesser *mens rea* standard would have on protected speech. *See Counterman v. Colorado*, 600 U.S. 66, 77-78, 81 (2023) (holding that true threats require a subjective *mens rea* component and affirming that expression that is "commonly a hair's-breadth away from political 'advocacy'" requires specific intent because of "the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer wide[ ] of the unlawful zone") (cleaned up); *cf. Fischer v. United States*, No. 23-5572, 2024 WL 3208034, at *9 (U.S. 2024) (expressing

concern with a "novel interpretation" of a federal obstruction statute that "would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison.").

Even though this decision is at odds with decades of precedent from this Court and other federal courts of appeals, the only evidence the State points to regarding applicants themselves shows that they were briefly present in the roadway—not that they intended to cause or actually caused an obstruction. *See, e.g.,* Resp. 4 (an investigator made "eye contact" with Henderson and told her to exit the roadway); *id.* at 6 (identifying Ridge as "among those who entered" the roadway); *id.* at 15 (Thompson admitted that he walked for at least two blocks in the street).

The State's Response amounts to an argument that any presence in the street is sufficient to warrant criminal prosecution for obstruction. *See* Resp. 21 (equating mere presence in the roadway with actual obstruction); *id.* at 9 (suggesting that streets are no longer traditional "public fora for debate"). To the same effect, Gainesville Police Sergeant Jones testified that "[e]very time one of the [applicants] walked out in the roadway it was an obstruction violation" and that each instance of stepping into the street could be a separate count. 6RR.138:17-25. But such incidental presence in the street, without any evidence of actual, intentional obstruction of a passageway, falls far short of what the First Amendment requires to convict a protester. *See, e.g., Packingham v. North Carolina*, 582 U.S. 98, 104 (2017) (recognizing streets as "a quintessential forum for the exercise of First

Amendment rights").[2]

Unable to cite any evidence that applicants themselves caused an obstruction, the State is left to rely on the acts of unnamed others—as did the court below. But the fact that *others* at a protest may have obstructed a passageway without direction or intent of the protest organizers cannot suffice to hold the organizers liable. *See Claiborne*, 458 U.S. at 929-30. As this Court made clear in *Claiborne*, leaders of a protest cannot be held responsible for the acts of others unless they "authorized, ratified, or directly threatened" those acts. 458 U.S. at 929. For the reasons explained in the Petition, and under this Court's binding case law, the First and Fourteenth Amendments do not permit applicants' convictions for the acts of others, including the central act the State relies on—the "woman carrying a rifle, who together with a man on a bicycle stood in front of a vehicle in the lane of traffic, preventing that vehicle from proceeding as other members of PRO Gainesville march crossed the street. 7RR.53-55; App.8a." Resp. 4. There is no evidence that applicants authorized or ratified anyone in the protest to obstruct any passageway; on the contrary, Thompson directed them to stay on the sidewalk. App.11a; RR7.159:19-25. Given the court's radical departure from this Court's precedent, applicants' petition will likely be granted and their convictions overturned.

[2] The State spends many pages defending the facial validity of its "obstruction" statute. But that is a straw man. This case concerns not a facial challenge to the law, but a challenge to the criminal convictions of three protest organizers without individualized evidence that they actually obstructed any passageway.

IV. Applicants presented their First Amendment claims below.

The State contends that applicants failed to preserve the constitutional issues presented to this Court. Resp. 18-19. This is baseless. At all stages of this litigation, applicants have argued that holding them criminally liable for obstructing traffic on the facts presented here violates their First Amendment rights—precisely the argument they raise here. At trial, applicants' defense attorney argued that "there is a defense that involves First Amendment protest activity." RR7.93:13-14. On appeal, applicants contended that the evidence was insufficient to sustain their convictions because their actions were protected by the First Amendment, citing *Cox v. State of Louisiana*, 379 U.S. 536 (1965), and *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147 (1969). CourtofAppeals-MeritsBrief.13-37. And in their petition for discretionary review to the Texas Court of Criminal Appeals, applicants urged 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 [Applicants] created an obstruction," in violation of the First Amendment principles laid down in *Claiborne*, 458 U.S. at 920. PetitionForDiscretionaryReview.17-21. This issue has been preserved throughout the litigation.

The State argues that some of applicants' constitutional arguments were framed below through the lens of constitutional avoidance, and therefore did not preserve a constitutional challenge to their convictions. *See* Resp. 18-19. But that makes no sense. It is unsurprising that applicants urged the courts below to interpret

the state law to avoid violating their constitutional rights, since state courts are required to seek to interpret state laws without offending the federal constitution, and criminal defendants rely on the federal constitution as a backstop and defense rather than as an affirmative claim. But the arguments that conviction would violate the First Amendment and that interpreting the statute to permit a conviction would violate the First Amendment are the same argument. Applicants' arguments squarely presented the First Amendment issue asserted here.

In any event, as the State concedes, the parties "are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." Resp. 19 (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198, 199 (1899)). Applicants repeatedly urged Texas courts to interpret state laws in ways that comport with the First and Fourteenth Amendments, and their constitutional arguments are properly preserved for this Court's direct review.

In *Cox* and *Shuttlesworth*, this Court reversed criminal convictions after state courts interpreted state laws in ways that violated the First and Fourteenth Amendments. *See Cox*, 379 U.S. at 553-54; *Shuttlesworth*, 394 U.S. at 158-59. *Cox* and *Shuttlesworth* both concerned whether state courts exceeded their authority under the U.S. Constitution to criminalize petitioners for exercising their constitutionally protected rights during a protest. *See Cox*, 379 U.S. at 545 ("The Louisiana courts have held that appellant's conduct constituted a breach of the peace under state law . . . but our independent examination of the record, which we are required to make, shows no conduct which the State had a right to prohibit");

Shuttlesworth, 394 U.S. at 150 ("The Supreme Court of Alabama, [] giving the language [of the statute] an extraordinarily narrow construction, . . . reinstated the conviction. . . . We granted certiorari to consider the petitioner's constitutional claims").

Applicants here ask for nothing more. And they plainly afforded the Texas courts every opportunity to protect their First Amendment rights. Instead, the courts upheld their convictions merely for engaging in First Amendment-protected activity. Their claims are properly before the Court.

V. The equities favor a stay, because applicants face irreparable harm, while the State will not be harmed by delaying applicants' one-week sentences while this Court resolves the petition.

Absent a stay, applicants will be forced to serve their entire one-week sentence before this Court has the opportunity to conduct its review. That is irreparable harm. Notably, a Texas court has already granted applicants a stay of the issuance of the mandate, which required it to find that there were "substantial" grounds for a stay and that Petitioners "would incur serious hardship from the mandate's issuance if the United States Supreme Court were to later reverse judgment." Tex. R. App. P. 18.2. For the same reason, this Court should stay the mandate until it resolves the pending petition.

The State does not refute the irreparable harm that denial of a stay would cause applicants. Instead, it offers the boilerplate assertion that enjoining a state from "effectuating statutes enacted by representatives of its people" constitutes irreparable injury to the state. Resp. 11. But granting a stay here would do nothing

to prevent the State from continuing to effectuate its obstruction statute. There is no injunction in place. The only issue is whether applicants serve their sentence before their petition is resolved, or after, in the unlikely event the convictions are upheld. And delaying the sentence for the time this Court needs to resolve a substantial First Amendment question imposes no actual hardship on the State, as surely the State has no interest in applying its laws in an unconstitutional manner. Indeed, the State did not even submit a brief opposing the stay applicants sought before Texas courts. Its sudden (and highly abstract) claim of injury now rings hollow.

CONCLUSION

This Court should stay issuance of the mandate pending resolution of applicants' petition for a writ of certiorari.

Respectfully submitted,

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