No. PD-0844-23; PD-0845-23; PD-0846-23

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

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

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

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

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

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Statutes

Other Authorities

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IN ERE OF *AMICUS CURIAE*[1]

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

Because of its experience defending expressive rights, FIRE is keenly aware that public officials can and do misuse broadly written regulu (and)-(x)4 (do) -184 (m) -2 (i) 1 (s) 1 (us) 1 (e) -184 (br) 1 (oadl) 1 (y) -184(w

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

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

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Distorting a state statute to turn a peaceful political march's temporary departure off a public sidewalk or a momentary hindrance of traffic into a crime does not provide that breathing space—it suffocates

of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515–16 (1939) (opinion of Roberts, J.). That is why the U.S. Supreme Court has time and again rejected the government's attempts to punish peaceful expression on public sidewalks. *See, e.g.*, *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 158–59 (1969)

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

In essence, the expressive freedoms Appellants exercised are those "we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). Peacefully joining with others of like mind to speak out about the issues of the day, as Appellants did here, is a treasured hallmark of American civic life and

space as its rationale for rejecting Colorado's less-stringent objective

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

These longstanding precedents and doctrinal protections

II. In Texas and Elsewhere, Government Officials Are

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

And just down Interstate 35 in Laredo, Texas, officials dug up a thirty-year-old criminal statute—one never enforced before—to arrest popular citizen journalist Priscilla Villarreal*Villarreal v. City of Laredo*, No. 20-40359, 2024 WL 244359

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

Judge Ho's point echoes one Justice Holmes voiced nearly a century ago, warning against the danger of statutes "authoritatively construed" to "permit the punishment" of "the opportunity for free political discussion . . . an opportunity essential to the security of the Republic [and] a fundamental principle of our constitutional system." *Stromberg v. People of State of Cal*., 283 U.S. 359, 369–70 (1931)

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

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

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

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

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

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In *Sherman v. State*

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

Dated: February 8, 2024

Respectfully,

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I certify that on February 8, 2024, a copy of this letter brief was served on all counsel of record through the Texas e-File electronic service function.

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