No. 23A1169

In the Supreme Court of the United States

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

v.

TEXAS

RESPONSE IN OPPOSITION

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PARTIES TO THE PROCEEDING

Applicants, defendants-appellants below, are Torrey Lynne Henderson, Amara Jane Ridge, and Justin Royce Tompson.

Respondent, complainant-appellee below is the State of Texas.

RELATED PROCEEDINGS

County Court at Law (Cooke County Tex.):

State v. Henderson, No. CR20-65983 (Sept. 1, 2022).

State v. Ridge, No. CR20-65984 (Sept. 1, 2022).

State v. Thompson, No. CR20-65985 (Sept. 1, 2022).

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Henderson v. State, No. 07-22-00303-CR (Tex. App.—Amarillo May 7, 2024); No. 07-22-00303-CR (Tex. App.—Fort Worth Oct. 21, 2024).

Ridge v. State, No. 07-22-00304-CR (Tex. App.—Amarillo May 7, 2024); No. 07-22-00304-CR (Tex. App.—Fort Worth Oct. 21, 2024).

Thompson v. State, No. 07-22-00305-CR (Tex. App.—Amarillo May 7, 2024); No. 07-22-00305-CR (Tex. App.—Fort Worth Oct. 21, 2024).

Texas Court of Criminal Appeals

Henderson v. State, No. PD-0844-23 (March 27, 2024).

Ridge v. State, No. PD-0845-23 (March 27, 2024).

Thompson v. Texas, No. PD-0846-23 (March 27, 2024).

[1] These cases were assigned to the Texas Court of Appeals for the Second District in Fort Worth according to Texas's ordinary venue rules. They were, however, transferred to the Texas Court of Appeals for the Seventh District in Amarillo pursuant to a docket-equalization process authorized by the Texas Legislature and overseen by the Texas Supreme Court.

INTRODUCTION

It has been suggested that the summer of 2020 saw the largest series of protests in our Nation's history.[2] Even the rural community of Gainesville, Texas—located in Cooke County and with a population of fewer than 18,000—was not immune. On August 30, 2020, a group organized by Applicants and identifying itself as Progress Rights Organizers ("PRO") Gainesville gathered to advocate for the removal of a monument that had stood on the Courthouse Square for over a century.[3] As Applicants seem to concede, law enforcement made no effort to impede Applicants from exercising their rights to express their views that afternoon. To the contrary, notwithstanding the fact that some members of PRO Gainesville were openly carrying firearms, police made sure that they were permitted to march where it was safe to do—albeit separate from counter-protestors who favored retaining the monument.

As the Chief of Police would subsequently testify, had Applicants and their compatriots remained on the sidewalk, that would have been the end of it. Instead, as a video of the event that was later shown to a jury depicts, Applicants led the group across and blocked traffic on State Highway 51, known as California Street within the municipal boundaries of Gainesville. This is one of two main thoroughfares through the city of Gainesville used routinely by first responders and is thus a main artery for emergency vehicles traveling in excess of the posted speed limit, any obstruction of this roadway can quickly turn tragic. Although Applicants deny that vehicles were obstructed, at least one admits that he walked in State Highway 51 for a "couple of blocks." Appx.12a.

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[2] *See, e.g.*, Larry Buchanan, *Black Lives Matter May be the Largest Movement in U.S. Movement*, N.Y. TIMES (July 4, 2020), https://tinyurl.com/386e7ydd.

[3] The monument was subsequently removed from a city park, not the Courthouse Square, the following summer. Mark Rogers, *Confederate monument removed from Gainesville's Leonard Park*, kxii.com (June 16, 2021).

To avoid escalating an already tense situation, officers merely instructed Applicants to return to the sidewalk. Because Applicants, who led the group, repeatedly ignored those instructions, they were subsequently arrested, charged, and convicted by a jury of their peers of the misdemeanor of obstructing a public highway. Tex. Penal Code §42.03. That conviction has now been upheld through all levels of the Texas court system—all while Applicants remained on bond. Applicants have now waited 60 of the 90 days allowed by a state court to file the current petition and accompany that petition by a demand that the Court further delay the State's execution of its lawful sentence. That request should be denied.

"[I]t is a wise rule that a litigant whose claim of urgency is belied by its own conduct should not expect discretionary emergency relief from a court." *West Virginia v. B.P.J. ex rel. Jackson*, 143 S.Ct. 889, 889 (2023) (Alito, J., dissenting from denial of application to vacate injunction). By itself, Applicants' months-long delay in asking this Court for relief is more than "somewhat inconsistent with the urgency they now assert." *Brown v. Gilmore*, 122 S.Ct. 1, 3 (2001) (Rehnquist, C.J., in chambers); *see also United States v. Texas*, 144 S.Ct. 797, 799 (2024). After all, had Applicants filed their petition promptly, the Court could likely have resolved it before the summer recess and thus obviated any need for equitable relief—particularly if they had sought expedition of their request. The relief Applicants seek "is an equitable remedy," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982), and Applicants' "delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers).

It would be particularly inequitable to award the relief Applicants seek because this Court is not likely to grant review in what is a fact-bound dispute over the sufficiency of the evidence regarding whether Applicants personally violated a valid state statute—or merely stood by while others in a group they organized and led through multiple such protests did so.

STATEMENT OF THE CASE

I. Factual background

Like many small American towns, the traditional (and geographic) center of Gainesville, Texas, is the courthouse. From 1911 until July 2021, in the northeast corner of the courthouse lawn was a marble pillar topped by a statue, which served as a Confederate Soldiers and Sailors Monument. *Compare* Megan Gray-Hatfield, *Monumental Decision: County Commissioners Vote to Leave Confederate Statue Where It Stands*, GAINESVILLE DAILY REGISTER (Aug. 17, 2020), https://tinyurl.com/GainesvilleRegister, *with* Rogers, *supra* n.3. That statute—like many other such memorials—became swept into a national movement to remove Confederate symbols from places of public prominence that began after the mass shooting at Charleston's Emanual African Methodist Episcopal Church in 2015 and gained momentum following the death of George Floyd in 2020. *See* Rachel Treisman, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More than 700 Remain*, NPR (Feb. 23, 2021, 5:48 PM ET), https://tinyurl.com/NPRSPLC2020.

Appellants are leaders of a group called PRO Gainesville, *e.g.*, Appx.3a, which began advocating for removal of the Monument in July 2020 through a series of public marches and protests. Gray-Hatfield, *supra*. This Application and the accompanying petition arise out of an event on August 30, 2020, when a group of approximately 30 to 40 members of PRO Gainesville met at the courthouse in Gainesville and marched down State Highway 51 to the post office. Appx.3a, 7a. It was at least the sixth such event, and like those before it, Grey-Hatfield, *supra*, was met by counter-protestors who "gathered across the street." Appx.3a. As a result, "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.'" Appx.3a. Matters became particularly tense when PRO Gainesville members chose to leave the courthouse area by crossing Dixon Street to the area where the people holding opposing views were counterprotesting and began their march on the sidewalk bordering California Street headed east. 7RR.42; State's Exhibit 1 (1:13:30-1:14:43) (on file with Cooke County).

Although one would not know it from the Application, a video of what followed was subsequently entered into evidence without objection. *E.g.*, Appx.6a, 12a; Defense Exhibit A. As the Texas Court of Appeals for the Seventh Judicial District ("Seventh Court") later described, that video shows that "[a]fter a few people gave speeches, about thirty or forty people began marching eastward," six blocks to Denison Street. Appx.3a. Evidence entered at trial "reflected that group members began walking on the sidewalk," where "[s]ome" remained, but that "[m]ore group members entered the roadway as the march continued. By the time they reached the courthouse, most marchers were in the street." Appx.6a (discussing the testimony of Sergeant Jack Jones). At times, the protestors "walked roughly five abreast, stretching from the shoulder to the roadway's center yellow line." Appx.6a. Among the marchers was a 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 the PRO Gainesville march crossed the street. 7RR.53-55; Appx.8a.

Whether known as California Street or State Highway 51, the route Applicants chose was an active thoroughfare, not a quiet side street without traffic. A member of law enforcement testified that it is "the main avenue for our emergency vehicle traffic, EMS, fire department [and] police." Appx.3a (alteration in original) (quoting the testimony of Captain Chris Garner). A police investigator, Shane Greer, would later recount that the obstruction lasted long enough that "[h]e told marchers to get back on the sidewalk 'approximately ten times.'" Appx.7a. This investigator "specifically identified [Applicant] Thompson, who was at the rear of the group near Greer" and stated that he had "made eye contact with [Applicant] Henderson and told her to exit the roadway." Appx.7a. Investigator Greer would later describe how "[t]here were multiple vehicles stopped westbound and eastbound" on California Street. 7RR.13-17. At times, Applicants and their compatriots also blocked Dixon Street. 7RR.17.

In addition to the video and officers' testimony, Cynthia Idom, a passing motorist, described how Applicants' protest had created a hazard for public safety. 7RR.53-55. Specifically, she described how she had "come down I-35" to State Highway 51 when "all of the sudden a group cut in front of me about mid of these two parks." 7RR.53-55. She "stopped to keep from hitting someone," including a "young lady … with her long rifle." *Id.* Although Applicants focus (*e.g.*, at 8, 13, 16) on her statement that the disruption likely lasted 90 seconds or less, Idom was ultimately unsure how long she was stopped, 7RR.53-55.

The unrebutted testimony from trial is that Applicants did not have a permit or permission to march on State Highway 51 or Dixon Street on August 30, 2020. *See* 7RR.66-67. This contrasts with at least one other protest in which Applicants *did* seek—and obtain—a permit to march in a different street. 7RR.65. Specifically, they were permitted to march from B.P. Douglas Park to the courthouse with an escort of police vehicles, 7RR.65, which served to protect both the protestors and the motorists.

Nor did they have permission to occupy the street from any state or city official on the scene. True, police officers did "allow[] them to stay" on the roadway to avoid a large puddle, 6RR.165-166, which the Application repeatedly describes (*e.g.*, at 12) as a "water hazard." But police directed them to "get back on the sidewalk after the water." 6RR.165-66.[4] Those instructions were, however, "ignor[ed]" as the group chanted "Whose street? Our street." 7RR.13-17. A Gainesville police officer confirmed that officers were present but were *not* assisting protestors as they would if Applicants had obtained a permit for their activities. *See* 6RR.149.

[4] The video of the event belies any notion that marching in the street was necessary because the sidewalk was "blocked by water." State's Exhibit 1 (1:26:15-1:27:27). Captain Chris Garner of the Gainesville Police Department described that scene. 6RR.165-166.

II. Legal Proceedings

To avoid further escalating an already tense situation, officers confined their activities to warnings that protestors should exit the road. 7RR.42 (expressing concerns that if arrests were made "the situation could have become volatile and put people at risk for being injured"). Instead, on September 2, 2020, Applicants were charged by information and complaint with the misdemeanor offense of obstructing a public highway in violation of Texas Penal Code §42.03(a)(1).

At trial, witnesses for the State testified about the lengths to which police officers went to protect Applicants' rights to peacefully protests. For example, Gainesville Police Chief Kevin Phillips explained "that even though it created hazards for our personnel, we created a venue so that both sides had sight and sound visibility and could hear each side." 7RR.83. When asked, Chief Philips specifically testified that "if they had stayed on the sidewalk," in compliance with state law, "we wouldn't be here." 7RR.83. He also explained that he had conversations with Applicants before August 30, 2020, in which he "explain[ed] to them the rules for marching in the city." 7RR.66.

At trial, Investigator Greer identified Applicants Henderson and Ridge, *id.*, whom he apparently knew by first name along with Applicant Thompson, 7RR.17, as among those who entered State Highway 51. Applicant Thompson also confirmed that he, Henderson, and Ridge were the "leaders of the Gainesville movement." 7RR.162. He stated that he had "met with law enforcement … on several occasions" with the "goal … to make sure that we were following … all the rules." 7RR.167-68. Although he asserted a right to protest, he seemed to acknowledge that he knew "filling … a lane of traffic is obstructing a highway," *id.*, and admitted that he "did walk in the road," 7RR.171-72.

On August 24, 2022, the jury convicted each Applicant with obstructing the highway. CR.115. They were sentenced to seven days in jail and a $2,000 fine, CR.118, and judgment was entered. CR.123.

Although Applicants promptly appealed on August 31, 2022, CR.122, months of delays followed. For example, after improperly failing to file their brief by a court-ordered deadline, Applicants requested and received multiple extensions such that their opening brief was not even filed for seven months. *See* Appellants' Brief on the Merits, *Henderson v. State*, 2023 WL 7851698 (Tex. App.—Amarillo, Nov. 15, 2024) (No. 07-22-00303-CR, No. 07-22-0304-CR, No. 07-22-00305-CR) (Mar. 31, 2023).

On November 15, 2023, the Court of Appeals for the Seventh District affirmed Applicants' conviction, rejecting eleven separate points of error. Of relevance here, it explained that obstruction of the street is an offense only if done "without legal privilege or authority." Tex. Penal Code §42.03(a). Applying numerous cases from this Court as well as the Fifth Circuit and the Texas Court of Criminal Appeals, the Seventh Court concluded that Applicants had no such privilege because the State may "enforce its traffic obstruction laws without violating the First Amendment even when the suspect is blocking traffic as an act of political protest." Appx.13a-14a (citing, *inter alia*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 100 (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.")).

Further delay ensued both before and after Texas's highest criminal court denied Applicants' request for discretionary review on March 27, 2024. Appx.30a-32a. In an effort at further delay, Applicants waited until April 17, 2024—days before the court's mandate would issue—to move to postpone the issuance of the intermediate appellate court's mandate. *See* Tex. R. App. P. 18.1 (providing the time period for when the mandate would issue by course of law). The Court ordered a further 90-day stay before issuance of the mandate on May 7, 2024, Appx.33a-34a, the maximum amount allowed by state law. Tex. R. App. P. 18.2.

Rather than promptly see relief from this Court, Applicants waited until June 25, 2024—mere days before the Court's summer recess—before filing the instant Application.

Summary of the Argument

I. Whether considered a request for a "stay" or a petition for a writ of injunction under the All Writs Act, *Brown*, 122 S.Ct. at 3 (stating that the latter is the only way to enjoin the enforcement of a presumptively valid state law), the relief Applicants seek is an extraordinary remedy that is granted only in the exercise of the Court's equitable discretion, *e.g.*, Sup. Ct. R. 20.1. This Court has long recognized that a party seeking such interim equitable relief "must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (per curiam) (collecting cases). Applicants have not done so. Instead, in an apparent effort to further delay even their relatively minor sentence, they waited two months and filed their request just as this Court was scheduled to go into the summer recess. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (noting that the Court is not "required to exhibit a naiveté from which ordinary citizens are free"). This Court should not reward Applicants' delay by preventing Texas from enforcing its lawful sentence.

II. Even if the Court were inclined to ignore Applicants' dilatory conduct, Applicants still cannot meet the requirements for a stay, namely that there is "(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) (per curiam). The Court is unlikely to grant certiorari because (among other reasons) the petition presents a request for fact-bound error correction regarding the state courts' application of well-established legal principles. Even Applicants admit (at 12) that Texas may constitutionally restrict the time, place, and manner of even peaceful protests, including by prohibiting the obstruction of a public highway. The question is thus whether this protest obstructed the highway—an inherently fact-bound question that was determined after a jury trial. If the Court did grant review notwithstanding the fact-bound nature of the dispute, it is not likely to reverse the court of appeals' de-

cision, because the state court faithfully applied this Court's precedent to the facts presented. And the equities overwhelming favors Texas, which seeks to enforce a lawful judgment that has now been delayed for more than two years by Applicants' failure to keep to ordinary briefing schedules.

III. Nor is this case one that is inherently important because of the prevalence of obstruction statutes in Texas or other States. As Applicants admit, these statutes have existed for decades and for good reason. Though streets were considered public fora for debate in the time when most transit was on foot or by horse, there are fundamentally different safety concerns about pedestrians entering a highway in which motor vehicles may be traveling in excess of 70 mph. Applicants can point to no instance in which a State has enforced those laws to stifle debate on the pretext that a protestor had merely stepped into the road, *contra* App.18-20—including here.

ARGUMENT

I. Applicants' Dilatory Conduct Precludes Any Form of Equitable Relief.

Applicants seek equitable relief available only "subject to sound … discretion" of this Court. *See, e.g.*, *Rose v. Raffensperger*, 143 S.Ct. 58, 59 (2022) (mem.) (reiterating that a motion for a stay pending appeal is "subject to sound equitable discretion"); *cf. Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 379 (2004) (finding a request timely under the All Writs Act where a petitioner took an "active litigation posture" that "was far from ... neglect or delay"). "From the earliest ages, Courts of equity have refused their aid to those who have neglected, for an unreasonable length of time, to assert their claims," *Elmendorf v. Taylor*, 23 U.S. 152, 168 (1825),[5] on the theory that "[a] long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious

[5] *See also, e.g.*, *Benisek*, 585 U.S. at 159; *Barnette v. Wells Fargo Nev. Nat'l Bank of S.F.*, 270 U.S. 438, 444 (1926); *Chapman v. Bd. of Cnty. Comm'rs*, 107 U.S. 348, 355 (1883); *Sample v. Barnes*, 55 U.S. 70, 75 (1852).

enough to justify" such extraordinary interim relief. 11A CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE §2948.1 (3d ed. 2024); *see also Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) (noting, as an "additional factor[] militating against" a writ of injunction, that "the applicants delayed unnecessarily").

Applicants have failed to act with the diligence required for a stay of the mandate and, by extension, their sentence, pending resolution of their petition for a writ of certiorari. The normal time to seek emergency relief would have been immediately following the Court of Criminal Appeals' denial of discretionary review on March 27, 2024. *See, e.g.*, *Texas*, 144 S.Ct. at 799; *Labrador v. Poe*, 144 S.Ct. 921 (2024) (Kavanaugh, J., concurring); *cf. Spectrum WT v. Wendler*, No. 23A820, 2024 WL 1123370 (U.S. Mar. 15, 2024) (mem.). But, at minimum, one would have expected Applicants to have sought review promptly upon receipt of the state court's 90-day stay of the mandate issued on May 7, 2024. Appx.33a. Instead, they waited until June 25—just days before the Court was scheduled to go on its summer recess.

There is no reason that Applicants waited months to seek review. Applicants have been represented by the same lawyers since at least January 2023. Notice of Appearance and Designation of New Lead Counsel, *Henderson v. State*, 2023 WL 7851698 (Tex. App.—Amarillo, Nov. 15, 2024) (No. 07-22-00303CR) (Jan. 13, 2023). Had counsel promptly sought relief when the Court of Criminal Appeals denied review in March, that petition very likely could have been resolved in the ordinary course well before the stay granted by the state court expires on August 7, 2024. *See, e.g.*, *Free Speech Coal. v. Paxton*, No. 23-1122, 2024 WL 3259690 (2024) (granting a petition filed on April 12 for which a response was ordered on May 7 and filed on May 30). Instead, Applicants chose to take two months. Such deliberate foot dragging is more than "somewhat inconsistent with the urgency they now assert." *Brown*, 533 U.S. at 1304.

A stay would greatly prejudice the people of Texas. As this Court has repeatedly rec-

ognized, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Here, that interest is even more acute because a stay of the state court's mandate causes not just an abstract harm to Texas's sovereignty but deliberately undermines the "State's significant interest in enforcing its criminal judgments." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (citing *In re Blodgett*, 502 U.S. 236, 239 (1992); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). That is, Applicants have already been found guilty of violating a state criminal law beyond a reasonable doubt—based in part on their own admissions. Having chosen their course both in violating Texas traffic laws and delaying their petition here, Applicants should not now be heard to this Court to save them from an emergency of their own creation. *Brown*, 533 U.S. at 1304.

II. A Stay Is Unwarranted.

Even if the Court were to overlook Applicants' unexplained delay in seeking relief, the Court should still deny the Application. As noted above, the Court will not grant a stay pending certiorari unless there is "(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*, 558 U.S. at 190. Even if a showing is made under those factors, "in appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). "A stay is not a matter of right, even if irreparable injury might otherwise result," but is "instead an exercise of judicial discretion," "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (cleaned up). In addition to

their delay in seeking relief, Applicants fail to carry their "burden of showing that the circumstances justify an exercise of that discretion" under any of the three factors this Court traditionally considers. *Id.* at 433-34.

A. The Court is unlikely to grant certiorari.

To start, the Court is unlikely to grant review for at least three reasons.[6] *First*, Applicants effectively admit that their petition is a request for fact-bound error correction. *Second*, the split of authority touted in the Application is illusory at best. *Third*, because the question that Applicants now insist (at 18) is of "fundamental importance" was never squarely raised in the Court of Criminal Appeals, this is a poor vehicle to resolve any hypothetical disagreement among lower courts about whether the "organizers of a peaceful protest [can or] cannot be punished for" what Applicants seek to characterize (at 11) as "incidental presence in the street."

1. The petition seeks nothing more than fact-bound error correction.

To start, applicant's primary argument for review in this Court is (at 10) that the Seventh Court's unpublished decision "conflicts with this Court's bedrock precedents protecting expressive activity in public fora and prohibiting guilt by association." By asking the Court (at 11) to "reaffirm" its existing precedent, however, Applicants give away the game: This petition involves "precisely … the sort" (at 11) of fact-bound request for error correction that this Court declines to review. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 508-09 (10th ed. 2013).

This Court exists "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—not to review findings of facts or correct the misapplication of law by lower

[6] Unlike Applicants, counsel of record for the State is new to the case due to prior counsel's lack of familiarity with the procedures of this Court. The State therefore reserves the right to raise additional barriers to review should they become apparent as counsel prepares any response to the petition itself.

courts. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (declining to review concurrent findings of fact by two courts below absent "a very obvious and exceptional showing of error"); Sup. Ct. R. 10. Such review is always "discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). That is particularly true when the opinion under review arises from a *state* court and thus does not implicate this Court's role in overseeing the application of federal law by the federal judiciary. SHAPIRO, *supra*, p. 278-79 (citing, *inter alia*, *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984)). Yet fact-bound error correction is precisely what Applicants seek when they ask this Court to "reaffirm" the principles that they derive from cases like *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Cox v. Louisiana*, 379 U.S. 536 (1965).

Specifically, Applicants acknowledge that "reasonable time, place, and manner restrictions are permissible" but insist that under cases like *Cantwell* and *Cox*, "these restrictions cannot be used to deny access to [a public forum] 'broadly and absolutely.'" App.12 (quoting *Amalgamated Food*, 391 U.S. at 315). Neither the Seventh Court nor Texas said otherwise. To the contrary, Applicants never even suggest that they were required to obtain a permit to protest on the sidewalk, and the evidence reflects that they were awarded permits to use other streets at other times—just not State Highway 51 and not on August 30, 2020. *Infra* pp. 27-28.

To the extent that Applicants suggest that this Court should adopt a *different* rule because the Seventh Circuit allowed *any* "incidental" presence of protestors—no matter how short—to constitute obstruction, *e.g.*, App.11, 14, 18, that is not true. The Texas Court of Criminal Appeals has held for 40 years that no obstruction occurs when a defendant "caused a momentary hesitation of a vehicle," *Sherman v. State*, 626 S.W.2d 520, 528 (Tex. Crim. App. 1981) , or pedestrian, *cf. Haye v. State*, 634 S.W.2d 313, 314-15 (Tex. Crim. App. 1982) (holding that a suspect obstructed a sidewalk by "continu[ing] to stand in the middle"

of the path and forcing a pedestrian to step around her). And "[b]y 2018, both Fifth Circuit and Texas case law had clearly established that officers lacked probable cause to arrest a suspect who moves aside 'as opposed to [his] standing in place or making a pathway impassible.'" *Zinter v. Salvaggio*, 610 F. Supp. 3d 919, 937 (W.D. Tex. 2022) (quoting *Davidson v. City of Stafford*, 848 F.3d 384, 393 (5th Cir. 2017)).

Instead, the Seventh Court's nonprecedential decision merely recognized the principle that 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" and applied that principle to the facts before it. Appx.14a. Those facts, as fully documented in a video tape, involved an eleven-minute march in which there was evidence that Applicants and their compatriots repeatedly ignored police instructions to return to the sidewalk—all while chanting "Whose street? Our street," 7RR.13-17.

Although Applicants clearly disagree with its application, this *principle* that the right to protest does not exempt protestors from the viewpoint-neutral enforcement of generally applicable traffic laws is entirely consistent with some of the cases that Applicants cite. For example, citing *Cantwell*, *Cox* specifically recognizes that "[g]overnmental authorities" have not just the constitutional power but the "duty and responsibility to keep their streets open and available for movement." *Cox*, 379 U.S. at 554-55 (citing, *inter alia*, *Cantwell*, 310 U.S. at 306-07). *Amalgamated Food* is not inconsistent because it involved the right the picket "along the berms *beside* the public roads outside [a] shopping center"—not an instance where picketers sought to occupy the road itself. 391 U.S. at 312 (emphasis added). The Seventh Court's rule is also consistent with *McKesson v. Doe*, 592 U.S. 1 (2020) (per curiam), *see* App.15, which pointedly did *not* adopt a blanket rule that the First Amendment exempts protestors from ordinarily applicable state law. *Id.* at 3-5.

Applicants are similarly off-base to assert (at 14-16) that the Seventh Court decided an issue of *law* in a way that conflicts with the principle of *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), and its progeny that liability cannot be imposed "merely because an

individual belonged to a group" that acted unlawfully. *Id.* at 920. True, the Seventh Court cited no evidence that Applicants were the individual on the "bicycle [who] positioned himself in the intersection" "of Denison and California streets," Appx.7a, and upon whom Applicants myopically focus, *see, e.g.*, App.8, 16, 21. But the court specifically cited *Claiborne* for the "well-established" proposition—which Applicants do not appear to seriously contest—"that expressive activity is not a defense to an individual's *own* unlawful conduct." Appx.25a (citing *Claiborne*, 458 U.S. at 918) (emphasis added). And it found that the evidence supported the jury's finding that Applicants *themselves* violated section 42.03. Appx.11a-12a. For example, the Court pointed out the "Thompson admitted that he walked for 'at least two blocks in the street.'" *Id.* at 12a. And it noted that "witnesses identified Appellants Henderson and Ridge walking next to each other at the front of the group of protestors *in* California Street" with a megaphone and Thompson "near the rear," also with a megaphone. Appx.11a & n.8 (emphasis added).

As a result, the Application should be denied because the accompanying petition presents *at most* a fact-bound question of whether the Seventh Court correctly held that individualized conduct satisfies section 42.03 and the Constitution.

2. The opinion below does not conflict with the federal courts of appeals.

Applicants are also wrong to assert that the Seventh Court's decision weighing the evidence before it conflicts with decisions from the Second, Eighth, Tenth, and D.C. Circuits, "requir[ing] breathing room when enforcing state criminal laws against demonstrators who peacefully march and assemble on public streets."[7] The level of generality at which Applicants must frame the question is extremely telling: Even a cursory examination of

[7] Applicants also refer to "sidewalks" when describing the split. But they do not seem to challenge the Gainesville Police Chief's statement that "if they had stayed on the sidewalk," in compliance with state law, "we wouldn't be here." 7RR.83. As a result, this case does not present any question about the extent to which the right to protest on a sidewalk precludes enforcement of generally applicable state criminal laws.

these cases demonstrates that they dealt with factual circumstances and legal questions materially different than those presented here. Because the Texas intermediate court of appeals has *not* "decided an important federal question in a way that conflicts with the decision of … a United States court of appeals," Sup. Ct. R. 10(b), this Court's intervention is unnecessary and unwarranted.

Start with *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006) (Sotomayor, J.). There, the police were found to have clearly violated the First Amendment when they arrested protestors who had entered a public street "indiscriminately, assaulting plaintiffs, beating them with their riot batons, dragging them by their hair and kicking them." *Id.* at 53. Far from recognizing an unequivocal First Amendment privilege to enter a highway during a protest, however, the Second Circuit found it "axiomatic … that government officials may stop or disperse [a] public demonstration[]" that causes "interference with traffic upon the public streets" or "threaten[s] to escalate" into violence when a speaker has "defied police orders to cease and desist." *Id.* at 56-57 (citing, *inter alia*, *Cantwell*, 310 U.S. at 308; *Feiner v. New York*, 340 U.S. 315, 317-21 (1951)). The constitutional problem largely arose in *Jones* because the defendants subsequently "concede[d] that they had no idea, when making these arrests, which of the protestors had entered the roadway" and were alleged not to have "order[ed] the protestors to disperse or provide[d] them with any warning or justification for their actions." *Id.* at 53; *see also id.* at 59-60 (citing that concession in holding that a reasonable officer would not have "believed that he or she could disperse the otherwise peaceable demonstration because a few people within that crowd had violated the law at an earlier time"). Here, by contrast, the jury heard police officers identify these three Applicants as among those who entered State Highway 51 on August 30, 2020. 7RR.13-17.

Fogarty v. Gallegos, 523 F.3d 1147 (10th Cir. 2008), is similarly inapposite. It involved a claim that the plaintiff's arrest for disorderly conduct violated the *Fourth* Amendment because it was based on "characterizations of [a] protest in general, and not on evidence of [the plaintiff's] individual actions." *Id.* at 1158. The only time that the *First* Amendment is

even mentioned is in a parenthetical, in a footnote about the canon of constitutional avoidance, in response to the dissent. *Id.* at 1157 n.9. *Barmsay v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006), at least discusses the First Amendment above the line, *id.* at 572, 575; but it too turned on whether the Fourth Amendment was violated when protestors were "caught in a mass arrest that was devoid of probable cause," *id* at 572. Here, there is no Fourth Amendment claim at all—likely because (among other reasons) Thompson's own *admission*, which neither of the other defendants contradicted, provided such probable cause. 7RR.171-72. Apart from those admissions, Investigator Greer also identified Applicants Henderson and Ridge from a photograph of those who had obstructed the road that was published in the *Gainesville Daily Register* and entered into evidence at trial. As a result, these two cases do not resolve the same "federal question" presented here—let alone in a way that "conflicts with the decision" of the court below. Sup. Ct. R. 10(b).

Finally, Applicants' reliance on *Langford v. City of St. Louis*, 3 F.4th 1054 (8th Cir. 2021), to demonstrate a split of authority is particularly curious. In that case, the Eighth Circuit *reversed* a holding that an ordinance prohibiting obstructing traffic was "an unconstitutional restriction on speech, … void for vagueness, and … unconstitutionally applied" to an individual who refused to leave a street during a Women's March in January 2017. *Id.* at 1056. Applying *Cox*, the court expressly held "[o]rdinary traffic regulations … need *not* exempt those who wish to engage in expressive activity on public thoroughfares," *id.* at 1058 (emphasis added)—even though there was "no traffic … present" at the time of the plaintiff's arrest, App.17 (purporting to quote *Langford*, 3 F.4th at 1057). True, the court below used slightly different verbiage and cited *Singleton v. Darby*, 609 F. App'x 190, 193 (5th Cir. 2015), rather than *Cox* to hold that "[t]he First Amendment does not entitle a citizen to obstruct traffic or create hazards for others." Appx.13a. But this Court grants review to resolve substantive disagreements regarding federal law, not micromanage state-court syntax and citation selection.

The Application should thus be denied because Applicants have not shown any split of authority on the question of whether the First Amendment immunizes protestors from obeying ordinary traffic regulations that would justify review of an otherwise fact-bound application of cases like *Cox* and *Cantwell*.

3. This is a poor vehicle to resolve any such circuit split because the issue is unpreserved.

And if there *were* a split, this case would be a poor vehicle to resolve it because Applicants never presented the question that they currently seek to litigate to the state courts. Specifically, Applicants ask this Court to decide whether "the First and Fourteenth Amendments prohibit the government from convicting individuals for obstructing a passage way … without evidence that the defendants themselves" did, "directed, authorized, ratified or intended that others do" the obstructing. Pet. i. In the Texas Court of Criminal Appeals, they argued that the Seventh Court made an error of state law when it took an unduly broad view of both the definition of "obstruction," Appellants' Petition for Discretionary Review at 6-10, *Henderson v. Texas*, No. PD-0844-23, and what evidence satisfies section 42.03's *mens rea* requirement, *id.* at 12-15. The First Amendment was raised not as a bar to prosecution but in the guise of the canon of constitutional avoidance. *Id.* at 10-11 (discussing the definition of obstruction), 19-21 (*mens rea*).

Because "[s]potting a constitutional issue does not give a court the authority to rewrite a statute as it pleases," whether the canon of constitutional avoidance counsels in favor of narrowly interpreting a statute is an analytically distinct question from whether the statute as written is unconstitutional either on its face or as applied to certain facts. *Jennings v. Rodriguez*, 53 U.S. 281, 298 (2018); *see also, e.g.*, *Nielsen v. Preap*, 586 U.S. 392, 419 (2019). That distinction is material here because ultimately whether the canon of constitutional avoidance required section 42.03 to be read narrowly is a question of *state* law about which the Texas Court of Criminal Appeals had the final say. *See, e.g.*, *Bellotti v. Baird*, 428 U.S.

132, 151 (1976) (remanding with instructions to certify whether a statute should be interpreted in a way that would avoid or substantially modify a federal constitutional challenge). Whether a statute may be constitutionally applied in a specific set of circumstances is not. *See Steffel v. Thompson*, 415 U.S. 452, 474 (1974).

Although not technically a jurisdictional issue, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991), out of respect for its relationship to state courts, this Court's precedent "suggest[s] greater restraint" in deciding what issues are "pressed or passed upon" in a state-court proceeding, *United States v. Williams*, 504 U.S. 36, 44 n.5 (1992). Put another way, though parties "are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed," there must "be something in the case before the state court which, at least, would call its attention to the federal question" later urged before this Court. *Dewey v. Des Moines*, 173 U.S. 193, 198, 199 (1899); *accord Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 163-65 (2007). Because Applicants did not raise the federal question about which they now ask the Court to opine to the Court of Criminal Appeals, prudential concerns suggests that this is not an appropriate vehicle with which to address it.

B. Even if the Court did grant certiorari, Applicants have not shown they are likely to prevail because there is no error to correct.

Even if the Court were inclined to grant review on this unpreserved, fact-bound question, the Application should still be denied because the Court is unlikely to reverse the Seventh Court's conclusion that protestors lack a First Amendment privilege to violate reasonable, content neutral traffic safety laws. The State does not dispute that public streets have been listed among those fora that "have immemorially been held in trust for the use of the public[] … for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 515 (1939). But this Court has held for nearly a century that "[t]he privilege of a citizen of the

United States to use the streets and parks for communication … is not absolute, but relative." *Hague*, 307 U.S. at 515-16. It "may be regulated in the interest of all" such that the use of the street for communication is "in consonance with peace and good order" so long as "in the guise of regulation," the right of expression is not "abridged or denied." *Id.* at 516. Even if the Court were to grant review, it is likely to hold that section 42.03 lawfully regulates the use of State Highway 51 and that it was constitutionally applied here.

1. Section 42.03 is a permissible, content-neutral regulation of conduct.

A street's status as a public forum does not mean that enforcement of section 42.03 is subject to forum analysis under the First Amendment for a simple reason: It regulates conduct, not speech. This Court has long recognized that "few restrictions on action … could not be clothed by ingenious argument in the garb" of expression. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Nevertheless, distinguishing between conduct and speech is vital because only that conduct which is "inherently expressive" is protected by the First Amendment—regardless of the forum in which it occurs. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006) (*FAIR*). "[I]t is the obligation of the person … desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Although the Application makes vague aspersions about obstruction statutes as a category (*e.g.*, at 18-20), they have not established that, on its face, section 42.03 governs speech or inherently expressive conduct.

Starting with *United States v. O'Brien*, 391 U.S. 367 (1968), which held that burning a draft card in protest of the Vietnam War was *not* expressive conduct (and thus subject to regulation), *id.* at 375, this Court has repeatedly refused to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Spence v. State of Washington*, 418 U.S. 405, 409 (1974) (per curiam) (quoting *O'Brien*, 391 U.S. at 376). Instead, to determine "whether particular conduct possesses sufficient communicative elements to bring the First

Amendment into play," this Court has "asked whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (alterations omitted) (quoting *Spence*, 418 U.S. at 410-11).

The Court elaborated on this test in *FAIR*, where an association of law schools and law school faculty argued that a statute requiring law schools to grant military recruiters equal access to their campuses violated the First Amendment. 547 U.S. at 52-53. Beginning with *O'Brien*'s teaching that "conduct can[not] be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *id.* at 65-66 (quoting *O'Brien*, 391 U.S. at 376), *FAIR* reiterated that First Amendment protections extend "only to conduct that is *inherently expressive*." *Id.* at 66 (emphasis added). Barring recruiters, the Court explained, failed to meet that test because it carried communicative value only to the extent that "the law schools accompanied their conduct with speech explaining it." *Id.* Absent explanation, an outside observer "has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.*

There is nothing inherently expressive about rendering a public passageway "impassable" or rendering "passage unreasonably inconvenient or hazardous." Tex. Penal Code §42.03(b). To the contrary, "[a]ny narrowing of the road to less than its legal width is an obstruction, and any obstruction that interferes with the road in the sense of making it less convenient for travel is an offense." *Goldston v. Wieghat*, 243 S.W.2d 404, 407 (Tex. App.—Galveston 1951, no writ). This can include, for example, unauthorized parking in a thoroughfare. *Threadgill v. Texas*, 241 S.W.2d 151, 152-153 (1951). Anyone who has driven in a populated area—whether it be Gainesville, Austin, or the District of Columbia—knows that most street parking has nothing to do with communicating a message.

2. Section 42.03 can be constitutionally applied to protestors.

That a street is a public forum does not mean that protestors get an automatic pass on regulations of that street—particularly given that they were permitted to exercise their right of expression on the adjoining sidewalk. "[W]hen 'speech' and 'non-speech' elements are united in a course of conduct," this Court has instructed state courts to "balance[] the individual's right to speak with the government's power to regulate," courts "apply the intermediate scrutiny test articulated … in *United States v. O'Brien*." *Kleinman v. City of San Marcos*, 597 F.3d 323, 328 (5th Cir. 2010) (citing *O'Brien*, 391 U.S. 367). The same standard applies if the Court were to consider section 42.03 as a "limitation[] on the right of access" because it is or at least "resemble[s] 'time, place, and manner' restrictions on protected speech" which are "not ... subjected to such strict scrutiny." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 n.17 (1982) (citation omitted). Section 42.03 easily passes that standard both on its face and as applied here.

Because the challenged provision is subject to (at most) intermediate scrutiny, it "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). In other words, the restrictions must be content neutral. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981). So long as it is, it "need not be the most reasonable or the only reasonable limitation" to achieve the State's goals. *Lee*, 505 U.S. at 683 (citation omitted).

Here, Applicants do not even allege that section 42.03 is content-based—because it isn't. "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "The government's purpose is the controlling consideration." *Id.* Section 42.03 is designed to protect both motorists and pedestrians, and it applies to an individual based on where they are standing, sitting, or parking—not what

they might be saying at the time. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Because section 42.03 "serves purposes unrelated to the content of [Applicants'] expression," it "is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986)); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 70-71 (2022).

The restriction was reasonable both on its face and as applied. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. Under this standard,

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. Applicants' own authority recognizes that States have the right to regulate the use of public streets, *e.g.*, *Langford*, 3 F.4th at 1058, and that doing so serves vital public-safety purposes entirely unrelated to the suppression of speech—namely "in 'ensuring the free and orderly flow of traffic on streets and sidewalks,'" *id.* (quoting *Duhe v. City of Little Rock*, 902 F.3d 858, 865 (8th Cir. 2018)); *see also Clark*, 468 U.S. at 293 (collecting cases applying *O'Brien* to uphold a regulation against "sleeping in connection with [a] demonstration").

Here, the incidental effect on Applicants' First Amendment rights was miniscule: They were permitted to march on the abutting sidewalk—just *not* in the middle of the primary access for EMS and other emergency vehicles. As Chief Phillips explained to the jury:

> Q. Okay. Did you in any way prohibit these marchers from using the sidewalks of Cooke County -- of Gainesville, Texas?
> A. No, sir.
> Q. Have you had conversations with

any of the PRO Gainesville leaders here prior to August the 30th of 2020?
A. I have.
Q. And in those conversations did you describe for them and explain to them what the rules for marching in the city were?
A. I did.
Q. And did you explain that sidewalks were okay, streets were not?
A. That is correct.
Q. So prior to August the 30th, 2020, they were aware of those restrictions?
A. That is correct.
Q. Did any of them come up to you at the event on August the 30th, 2020 and request permission to march in California Street?
A. They did not.

7RR.66-67. True, we know in retrospect that no emergencies arose while Applicants were in the street. But that does not eliminate the State's authority "to regulate … in the interest of public safety, peace, comfort or convenience," *Cantwell*, 310 U.S. at 306-07, by keeping the route *open* for emergency vehicles at all times, *see, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994); *cf.* 42 U.S.C. §5195 (establishing a national policy to "provide a system of emergency preparedness").[8] As a result, the Court is unlikely to reverse the Seventh Court even in the unlikely event that the Court were to grant review.

C. The equities favor Texas's ability to enforce the judgment.

The equities also heavily favor Texas. When the Court "assess[es] the lower courts' exercise of equitable discretion, [it] bring[s] to bear an equitable judgment." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam) (citing *Nken*, 556 U.S. at 433). "In each [such] case, courts 'must balance the competing claims of injury and must

[8] For many of the same reasons, even if application of section 42.03 to protestors were subject to strict scrutiny, it would still survive because it is "narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information.'" *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (citation omitted).

consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)). "'[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Id.* Thus, before issuing or vacating a stay, the Court must "balance the equities" and "explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). Here, that balance is almost entirely one sided—in favor of Texas.

1. Applicants have three claims to irreparable harm, none of which is persuasive. *First*, all three claim (at 22) that they "have significant employment and personal responsibilities that would be disturbed by serving the jail sentence." The same can be said, however, of the vast majority of defendants convicted of a crime while they are awaiting appeal. Nevertheless, release pending resolution of a petition for writ of certiorari remains the exception, rather than the rule—even for federal prisoners. SHAPIRO, *supra*, at 913-17.

Second, Applicants vaguely speculate that permitting Texas to enforce its judgment may "chill" unnamed "others" from engaging in unspecified protected activity. This Court has held for over 50 years, however, that such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm" even to invoke federal-court jurisdiction—let alone to award the extraordinary relief of a stay pending appeal. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *accord Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417 (2013).

Third, Applicant Thompson suggests (at 22) that he will be harmed because while in pre-trial confinement in 2020, he was kept in protective custody due to a history of suicidality *outside* of custody. He does not explain why actions taken to protect him from self-inflicted harm constitute an irreparable harm apart from the incarceration itself. Indeed, he does not even allege facts that any mental-health conditions he may have suffered in

2020 are ongoing. That is problematic because, as this Court has recognized, a person's mental health condition can change over time. *Cf., e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007).

2. By contrast, the State of Texas will face a distinct harm in suffering further delay in the execution of its lawful sentence. *Contra* App.22-23 (suggesting there is no harm in maintaining the "status quo" of Applicants remaining on bond). This Court has long recognized that the State "ha[s] an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). That interest is so strong that this Court begins with "a strong equitable presumption against the grant of" such relief "where a claim could have been brought at such a time as to allow consideration of the merits without" delaying the enforcement of that judgment. *Id.* As discussed above, that presumption applies here because Applicants deliberately chose not to seek certiorari review in time to resolve the question before the current state court stay expired. *Supra* Part I. Further delay in such circumstances would not just "frustrate[] the public interest in deterrence," *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens, J., dissenting), but reward Applicants for the dilatory conduct.[9]

Taken together, these considerations weigh heavily against staying the state court's mandate—and, by extension, Applicants' lawful sentence. That is particularly so when considered in the light of the long-established principle that the balance of the equities and the public interest "merge when the [State] is the opposing party." *Nken*, 556 U.S. at 435.

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[9] Although *Hill* was decided in the death-penalty context, all criminal laws serve both to punish past misdeeds and deter their repetition. *See, e.g.*, *Hudson v. United States*, 522 U.S. 93, 99 (1997) (describing "retribution and deterrence" as the "traditional aims of punishment" and factors that distinguish between civil and criminal sanctions). As a result, the difference in the State's interest in enforcing different criminal judgments is one of degree, not of kind.

III. This Fact-Bound Case Does Not Present a Question of Fundamental Importance Merely Because the First Amendment Is Involved.

Stripped of their strained assertions of a split of authority, Applicants' professed belief that this case is one of exceptional importance rests entirely on their insistence that failing to disturb the state court's judgment would result in a rule that "state officials can arrest and convict protestors for stepping into a street so long as anyone in the crowd causes even a momentary delay in traffic." App.19. Moreover, Applicants bemoan, the result would not be limited to Texas because "the law invoked here is common to many States." *Id.* at 18.

Such hyperbole does not justify this Court's intervention in what is otherwise a case that is demonstrably uncertworthy. The statutes Applicants cite are half a century old. *Id.* (citing, *inter alia*, Va. Code §18.2-404 (1975); Ga. Code §16-11-43 (1968)). Yet Applicants can cite no case applying these statutes to destroy the availability of public fora to debate matters of public import. And they ignore the portions of the cases they *do* cite that stand for the proposition that "[a] group of demonstrators c[an] not insist upon the right to cordon off a street"—no matter how long the duration—"and allow no one to pass who did not agree to listen to their exhortations." *Cox*, 379 U.S. at 555.

Nor was section 42.03(c) applied against Applicants in such a manner. After all, this case did not arise through a request for a declaratory judgment from a party fearing to engage in political—or other core—speech due to the statute (or any other provision of Texas's Penal Code). *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975); *Steffel*, 415 U.S. at 458-60. It arose after a full criminal trial before a jury of Applicants' peers. True, a particular motorist was unable to determine precisely how long her travel was impeded but was likely brief. App.13 (citing the testimony of Ms. Idom). But Applicants had the opportunity to explain why they should be found either factually or legally innocent based on that testimony. The jury, which had heard Applicant Thompson admit that he and the other two Applicants had led the protest in a march down State Highway 51 and *had seen a video*

tape of the protest, simply disagreed. That disagreement is no reason for this Court to become involved.

CONCLUSION

The Court should deny the Application.

Respectfully submitted.

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