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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

APPEAL FROM SUMTER COUNTY

Honorable R. Kirk Griffin, Circuit Court Judge
Appellate Case No. 2022-001444

The State.....Respondent

v.

Brittany Martin.....Appellant

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

Following the brutal murder of George Floyd by Minneapolis police officers, Brittany Martin took to the streets of Sumter, South Carolina, in protest. For five straight days, she joined millions of people worldwide to protest police violence and demand accountability for the killing of yet another Black man by American law enforcement. After five days of protesting without incident, Brittany Martin was arrested, prosecuted, and later convicted for the common law crime of Breach of Peace of a High and Aggravated Nature ("BOPHAN"). Following her conviction for BOPHAN, the trial court sparked national outrage by sentencing Ms. Martin, who was pregnant at the time, to four years of prison.

On appeal, Ms. Martin alleges five discrete errors.

To start, Ms. Martin's conviction for BOPHAN violates the First Amendment and should be vacated. The First Amendment guarantees everyone the right to protest in a manner that "stir[s] people to anger, invite[s] public dispute, or [brings] about a condition of unrest." *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963). Yet here, Martin was convicted of a criminal offense for engaging in a nonviolent protest. Such a conviction cannot stand.

Second, the trial court reversibly erred by refusing to instruct the jury about Ms. Martin's only defense to BOPHAN—that her conduct was protected by the First Amendment. Ms. Martin was charged with three different offenses arising from her conduct at Sumter's George Floyd protests. Recognizing the obvious free speech issues raised by this case, the trial court agreed to instruct the jury about First Amendment protections on two of Ms. Martin's charges, Incitement and Threatening a Public Official. Those charges did not result in convictions. But the court refused to instruct the jury about the First Amendment protections applicable to BOPHAN, and the jury convicted. Because there was a clear factual basis for a

First Amendment instruction and because the trial court's unexplained denial of the instruction prejudiced Ms. Martin, reversal is warranted.

Third, Ms. Martin's conviction for BOPHAN violates the Fourteenth Amendment's prohibition on vague laws. Due process requires that all laws—particularly criminal laws that implicate free speech—be clearly defined so as to provide fair notice and to guard against arbitrary and discriminatory enforcement. BOPHAN, by contrast, is a common law offense that has been described by the South Carolina Supreme Court as "encompass[ing] a broad range of conduct" and "defy[ing] strict definition." *State v. Simms*, 412 S.C. 590, 594, 774 S.E.2d 445, 447 (2015). Such a law cannot pass constitutional muster. Because no one, and particularly not a protester like Brittany Martin, can discern when their conduct morphs from protected to criminal, BOPHAN must be struck down as unconstitutionally vague.

Fourth, Ms. Martin's BOPHAN conviction violates her state and federal constitutional rights to a unanimous verdict. Although a jury need not agree on the means through which an offense is committed, they must agree on the facts that comprise each element of the crime. *Richardson v. United States*, 526 U.S. 813, 817-18 (1999). Here, no such unanimity was ensured. Ms. Martin was charged with a vague law that can be satisfied in at least three separate ways and was accused of committing that offense sometime over the span of four separate days of protesting—May 31 through June 3. Furthermore, the State made no attempt to identify any *particular* conduct by Martin that met the elements of BOPHAN. Despite that, the jury was only generally instructed that their "verdicts" must be unanimous. Under these circumstances, the jury's verdict on BOPHAN does not satisfy the constitutional requirement of unanimity.

Fifth and finally, Martin's sentence is excessive and grossly disproportionate. The Eighth Amendment prohibits the imposition of punishments that far outstrip

the sentences ordinarily imposed for similar crimes. Here, the trial court was presented with ample evidence that a four-year prison sentence was *far* longer than what justice can allow. In Sumter, most BOPHAN convictions result in sentences to time served. Even in *Simms*, where the defendant was convicted of BOPHAN for violently attacking a man and causing his death, the prison sentence was only three years. 412 S.C. at 593. Given these comparators, Martin's conviction for being (at worst) disruptive at a political protest is egregiously excessive. Ms. Martin was nonviolent and nondestructive. The jury concluded that she did not incite a riot and was unable to reach a verdict on whether she was threatening. On those facts, a four-year prison term violates the Eighth Amendment.

STATEMENT OF ISSUES ON APPEAL

I. Does Martin's conviction for BOPHAN—which is based on nonviolent, nonthreatening, and non-inciting conduct at a public protest—violate the First Amendment?

II. Did the trial court reversibly err by refusing to instruct the jury about Martin's First Amendment defense to BOPHAN?

III. Is the crime of BOPHAN—which "encompass[es] a broad range of conduct," and "def[ies] strict definition," *Simms*, 412 S.C. at 594—unconstitutionally vague on its face or as applied to Martin?

IV. Does Martin's conviction for BOPHAN—which was based on unidentified conduct over the span of four days—violate her Sixth Amendment right to a unanimous verdict?

V. Is Martin's four-year prison sentence for a nonviolent, nondestructive, and victimless crime violate the Eighth Amendment's prohibition on grossly disproportionate in violation of the Eighth Amendment?

STATEMENT OF THE CASE

Following the murder of George Floyd on May 25, 2020, Brittany Martin—a Black woman, mother, chef, and activist—joined others to protest police violence in

the streets of Sumter, South Carolina. From May 30 through June 3, Ms. Martin and others exercised their First Amendment right to loudly and publicly express their grief, declare their outrage, and demand justice. Although Ms. Martin's conduct at the Sumter protests featured yelling, profanity, and harsh criticism of law enforcement, she never acted violently, destroyed property, or caused any injury.

Ms. Martin was arrested by the Sumter Police Department on one count of Instigating a Riot ("Incitement"), S.C. Code § 16-5-130(2), and five counts of Threatening the Life of a Public Official, S.C. Code § 16-3-1040(A). Nearly a year later, the Third Judicial Circuit Solicitor's Office convened a grand jury and indicted Ms. Martin on an additional count of Breach of Peace of a High and Aggravated Nature ("BOPHAN"), a common law offense. 2021 Indictment; 2022 Indictment. The operative indictment charged that Martin committed five counts of Threatening the Life of a Public Official on June 3, 2021, but alleged that the Incitement and BOPHAN counts occurred "on or about May 31, 2020 through June 3, 2020." 2022 Indictment.

At trial, the State called witnesses to testify, and Ms. Martin testified in her own defense. Transcript Volume I [hereinafter Tr. I], pp 2–3. Ultimately, the jury acquitted Martin of Incitement, failed to reach a verdict on Threatening a Public Official, and convicted her of BOPHAN. Transcript Volume II [hereinafter Tr. II], p 100:17–25. Following the verdict, the trial court proceeded immediately to sentencing, Tr. II, p 104:18–23, imposed a four-year prison term, *id.* at 116:18–20, and remanded Martin into custody without bail. Later motions for sentence reconsideration and for an appeal bond were denied. Defendant's Motion for Reconsideration of Sentence [hereinafter MRS]; Order Denying MRS [hereinafter MRS Order]; Defendant's Emergency Motion for an Appeal Bond; Order Denying an Appeal Bond.

This appeal followed.

Evidence at Trial

Ms. Martin and others protested on May 30th without incident. Tr. I, p 122:11–13.

On May 31st, Ms. Martin and others were holding signs and chanting things like "no justice, no peace" and "I can't breathe" near the road in front of the Sumter Police Department. State's Exhibits 1 & 2, V1817.[1] Some protesters, including Ms. Martin, entered the roadway at times. V1817. When approached by an officer, Ms. Martin calmly responded, "We're protesting. We have every right to do what we're doing. If we get met with any excessive force, we're going to use our Second Amendment." V1817. at 6:00. She continued chanting, "no justice no peace." A few minutes later, as Ms. Martin walked past a different officer, she stated, "You human like I am. You bleed like I do. You cut my arm, I cut your arm. You black my eye, I black my—your, your eye. You kill me, I kill you. And that's real." V1817 at 8:02. The officer did not react, and Ms. Martin kept walking. Ms. Martin and other protesters wanted to march to the courthouse, Tr. I, pp 59:11–13, and repeatedly requested police assistance in doing so, *see* V1827-2 at 1:09.

When protesters remained in the roadway, one officer stated, "if they don't leave, we're gonna mask up and gas them." V1827-2 at 3:29. Other officers respond, "let's do it." V1827-2 at 3:29. The officers returned to their vehicles, prepared to gas the protesters, and awaited authorization to do so until they were told to "stand down." V1827-2 at 3:50–5:40.

After speaking with officers about a march, Ms. Martin "instructed and spoke with her individuals that were with her. They all then at that time moved out of the

[1] At trial, the videos (contained in State's Exhibits 1 and 2) were referred to by numbers. Here, citations to the videos are indicated by 'V' followed by the specific video's number.

roadway." Tr. I, pp 59:24–60:1; *see also* 85:24–25 (Sgt. Maj. Sinkler testifying that officers "got them back on the sidewalk"). When the march began, protesters complied with officer instructions to occupy one lane of traffic behind a police escort. Tr. I, p 60:4–10; V1856. At the end of the escorted march, an officer told the protesters, "y'all did good. I'm proud of y'all. I love y'all." Although there was discord among the protesters and between the protesters and officers on May 31, there was no serious risk of harm, and no violence occurred. Tr. I, pp 98:20–99:5, 100:18–23.

The next day, June 1, Ms. Martin and others wanted to march again. As some protesters began to march on foot, Ms. Martin and others sought to accompany them riding inside of and on the roof and hood of two cars. V1945 at 0:58. When one of the SUVs slowly began to follow the march, Officer Raybon approached to try to stop the car until a police escort arrived. V1945 at 0:20. Ms. Martin stepped between Officer Raybon and the vehicle to ask that Officer Rabon step back. V1945 at 0:35. Officer Rabon put a hand on Ms. Martin's shoulder, and Ms. Martin told the officers that she wanted to march. The first car slowly drove away, V1945 at 1:19, and after explaining, "I need to catch my crowd," Ms. Martin walked away from Officer Rabon, got back on the hood of the other car, and said, "I'm telling you, if you want to fuck with—I'm the wrong one to fuck with." V1945 at 1:49, 2:01, 2:10. The second car drove away without further incident. V1945 at 2:21. This entire interaction was captured in a video lasting only two minutes and forty-three seconds. V1945. Officer Rabon testified that this interaction is *not* what led to Ms. Martin's later arrest. Tr. I, p 151:14–18 (responding "That's correct" to the question, "So this behavior is not what led, the bigger part of it, this wasn't the ultimate night that led—the ultimate threat that led to her arrest, correct?").

Later in the evening on June 1, Ms. Martin and other protesters reassembled at the Sumter Police Department. V2034. Protesters laid down on the ground in memory of George Floyd, shared their personal experiences with law enforcement,

and addressed the police. V2034. When some protesters hugged officers, Ms. Martin expressed her anger at "lukewarm ass shit," V2034 at 3:00, because "at that time we hadn't come to a resolution," Tr. I, pp 408–09. Some officers did not like what Ms. Martin was saying because, according to Officer Rabon's testimony, "[t]he people that were there for the right reason felt defeated." Tr. I, p 126:16–17. Ms. Martin and others continued to express grief and anger, at times addressing officers and at times addressing other protesters, without incident. V2034.

On June 2, protests continued at the Sumter Police Department. No testimony was offered that the demonstration was anything but lawful and peaceful. At the end of the evening, protesters congregated at an El Cheapo gas station. Tr. I, p 423:7–17. There, one officer, Major Colclough took the flag off his uniform, and he laid on the ground and allowed a protester to rest a knee on his neck as a symbol of solidarity with George Floyd. Tr. I, pp 428:7–15, 432:1–5, 435:12–16. Though the State argued that Ms. Martin "victimized" and "torment[ed]" the officer, Tr. I, pp 431:19, 433:24–25, Major Colclough testified that Ms. Martin did not force him to lie on the ground, Tr. I, p 465:22–25.

After leaving the El Cheapo gas station, many protesters went to a Sunoco gas station. Tr. I, p 163:11–18. Officers then received a 9-1-1 call from the Sunoco about a disturbance and shoplifting. Tr. I, p 163:11–13. Contrary to the State's insinuation, uncontroverted testimony established that Ms. Martin followed others to the Sunoco, Tr. I, p 372:8–12, and in fact, after arriving and discovering that some individuals were shoplifting, Ms. Martin stopped them, emphasizing, "we're not here for that," Tr. I, p 373:9–12. Officer Lyons even agreed under oath that he "wouldn't say that [Ms. Martin] is responsible for them shoplifting[.]" Tr. I, p 171:17–18. Video from the Sunoco shows Ms. Martin standing face-to-face with an officer speaking her mind. V2305. At no point does Ms. Martin touch the officer. V2305.

On June 3, officers set up a designated protest area and established a 6 PM curfew. Tr. I, p 177:21–23. The protest area was next to the roadway, separated from the police department by green space and trees. V1705. During the day, Ms. Martin and others continued to protest on the steps of the Sumter Police Department. V1705. After the officers told her about the new restrictions, Ms. Martin began to leave the area. V1704 at 0:32. As she walked away, she said,

> Go call all our hitters now. You tell them get ready. Everybody strapped, everybody. Y'all better be ready. The vests ain't gonna save you. Some of us gon' be hurt, and some of y'all gon' be hurt. We ready to die for this. We're tired of it. You better be ready to die for the blue. I'm ready to die for the black. I'm dying for the black, you better be ready for the die for the blue. Chief, it's your call. I got my people, you got your people.

V1704 at 0:32. At the bottom, of the stairs, Ms. Martin continued to say, "Fuck your curfew. Y'all will not keep killing us. Y'all will not keep hurting us." V1704 at 1:17. An officer approached the top of the steps, only feet away from Ms. Martin, and reread the new location and time restrictions to her through a bullhorn. V1705 at 0:30. Ms. Martin continued to protest the restrictions before walking away from the building. V1704 at 2:05.

Throughout trial, the State's officer-witnesses testified to their disapproval of, and even resentment toward, the content of Ms. Martin's speech and expressive conduct. Officer Rabon, for example, testified that she believed Ms. Martin "wasn't there with pure intentions," Tr. I, p 154:22–23, was "say[ing] awful things," Tr. I, p 143:9–11, and that she "just d[idn]'t see that she was trying to make a difference," Tr. I, p 143:13–15. Officer Singleton bemoaned that Ms. Martin "disparage[d] those officers and tr[ied] to tarnish that career and the noble profession." Tr. I, p 196:15–17. Chief Roark criticized that Ms. Martin's protests were not like other protests he viewed more favorably. Tr. I, pp 239:22–240:16. The solicitor even attacked Ms.

Martin personally, accusing her of having narcissistic personality disorder. Tr. I, pp 409:22–410:2.

Closing Arguments

In closing arguments, the solicitor failed to specify what conduct the State believed constituted BOPHAN.[2] Instead, she vaguely argued that the jury should conclude that Martin's conduct—which spanned five days of protesting in multiple locations—satisfied the elements of BOPHAN. *See* Tr. II, pp 30–32. Rather than pointing to particular conduct, the solicitor urged the jury to simply "use its common sense" to answer: "Did [Martin] breach the peace of our community?" Tr. II, p 31:2–5 (State's closing) ("[T]hat's all we have to prove, ladies and gentlemen."). And as proof that Martin's conduct was high and aggravated, the solicitor argued that the jury should look to the subjective reactions of city officials:

> [W]hen considering a high and aggravated nature, you need to look at what the officers had to do in light of Ms. Martin. A curfew had to be put in place, ladies and gentlemen. The chief, the mayor and city counsel felt the need to put this curfew in place to protect the citizens of Sumter and to protect these officers. A whole city shut down because of Brittany Martin and her group. That, ladies and gentlemen, is breach of peace in a high and aggravated nature.

Tr. II, p 32:5–14.

In closing, defense counsel argued that Ms. Martin's speech and conduct was protected by the First Amendment. Tr. II, pp 39:3–5, 59:14–15.

In rebuttal, the prosecution disparaged Ms. Martin and her protest. Tr. II, p 62:20–23 ("If given olive branches, Dr. King took them. Brittany Martin didn't take olive branches. How insulting to Dr. King."); Tr. II, p 64:3–12 ("While watching

[2] The solicitor devoted far more time to the charges for Incitement and Threatening a Public Official. Because those charges did not result in a conviction, they are not discussed here.

these videos, ask yourself if it truly is attempting to discuss with officers. . . . Is it a statement about how things work in the community? Is it a critical dialogue? . . . Is it political commentary? Is it diverse ideas standing next to each other and thriving? When peaceful protesters are pushed away, is that everybody thriving?"); Tr. II, pp 66:21–67:1 ("You can tell that Brittany Martin has to be told yes. And if not, it's a personal injustice to her. And she speaks even more loudly, but she acts even more poorly. She likes to exercise control and she never stops to think about her—how her behavior victimizes everyone else.").

Jury Instructions & Deliberations

In support of her First Amendment defense, Ms. Martin requested that the jury be instructed about the First Amendment protections afforded to her on each charged offense. Defendant's Proposed Instructions [hereinafter DPI]; *see also* Tr. II, p 9:9–16. The trial court agreed to do so for Incitement and Threatening a Public Official but refused to instruct the jury regarding the First Amendment protections applicable to the BOPHAN count. *See generally* Tr. II, pp 73–88 (jury instructions); *compare* Tr. II, pp 82–83 (BOPHAN) *with* 83-84 (Incitement) & 85–86 (Threatening a Public Official). Before charging the jury on the offense-specific principles, the trial court instructed the jury to consider "each charge separately on the evidence and law applicable to it uninfluenced by . . . any other charges." Tr. II, p 75:20–24.

The trial court's entire instruction on the BOPHAN charge was:

> Ladies and gentlemen, the Defendant is charged in the indictment with breach of peace of a high and aggravated nature. Breach of peace is the violation of the public order or the disturbance of the public peace or any act or conduct inciting violence. This includes any violation of any law enacted to preserve peace in good order.
>
> Peace means the peace which is enjoyed by the citizens of the community, whether certain conduct constitutes a

> breach of peace depends on the time, place and nearness of other persons.
>
> Although a breach of peace includes acts which are likely to produce violence, the State is not required to prove that actual violence took place or that the peace was actually broken. If what was done was unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required.
>
> Breach of peace of a high and aggravated nature, a person of guilty—is guilty of that charge if the person was an affrayer, rioter, disturber and breaker of the peace or was dangerous and disorderly or when armed offensively to the terror of the public.

Tr. II, pp 82–83.

Unlike its BOPHAN instruction, which was read first, the court twice instructed the jury that the State's charge of Incitement "must not be construed to prevent peaceable assembling of persons for lawful purposes or protest or petition." Tr. II, pp 83:23-25, 84:8-10. Then, in its instruction describing Threatening a Public Official, the court went to great lengths to explain the protections of the First Amendment. The court instructed the jury that:

> In order to prove the element of threats to take life or inflict bodily harm against police officers, *the prosecution must prove the Defendant used more than mere fighting words or abusive phrases*. The words must be by their very utterance—the words used must by their very utterance inflict jury or tend to incite an immediate breach of peace they must be directed a specific person and they must be inherently likely to cause the officer to react with violence and finally the words must have no role in the expression of ideas.
>
> In law, fighting words are abusive words or phrases directed at the person of the addressee and inherently likely under circumstances to cause an average person to react with violence *and playing no role in the expression of ideas*.

> *The First Amendment protects a significant amount of verbal criticism in challenge directed at police officers.* The fighting words exception may require narrow application in cases involving words addressed to a police officer because a properly trained officer may be reasonable expected to exercise a higher degree of restraint than the average citizen. *The freedom of individuals who verbally oppose or challenge police action without thereby risking a risk is one of the principal characteristics of a free nation.*

Tr. II, pp 85–86 (emphasis added).

During deliberation, the jury asked the court for "a copy of the laws like a definition of what each charge is." Tr. II, p 91:10–12. After being provided with written instructions, the jury explained that it was deadlocked on the threat charges. Tr. II, p 93:9–11. The trial court then issued an *Allen* charge, and the jury continued to deliberate. Tr. II, pp 94–96. Further deliberation did not resolve the deadlock, but the jury returned verdicts on the charges of Incitement and BOPHAN. The jury found Ms. Martin not guilty of Incitement and guilty of BOPHAN. Tr. II, 100:19–25; Verdict Forms.

Sentencing

Ten minutes after receiving the jury's verdict, the court proceeded with sentencing. Tr. II, p 104:16–25. At the solicitor's request, the chief of police spoke at sentencing and explained that "[t]hose four days [of protests] may not equal what some people may have in their minds about a riot . . . but it was very difficult on our community." Tr. II, p 107:14–17. Based on that, Chief Roark encouraged the court to impose "some level of incarceration." Tr. II, p 108:10–12. Defense counsel urged the court to impose a twenty-one-day sentence, with credit for time served, based on Ms. Martin's pregnancy and the fact that she had been nonviolently engaged in protected First Amendment speech and conduct. Tr. II, pp 108–10. Ms. Martin also addressed the court directly. Tr. II, pp 110–12. She explained that she was transforming her approach to advocacy and had become active in Black Voters

Matter and the South Carolina Black Democratic Party. Tr. II, pp 111:11–20. The trial court compared Ms. Martin's conduct and sentence to the recent federal convictions and sentences for individuals who participated in the armed breach of the U.S. Capitol on January 6, 2022, that resulted in seven deaths. Tr. II, p 115:9-19; *see also* Chris Cameron, *These Are the People that Died in Connection with the Capitol Riot*, NEW YORK TIMES (updated Oct. 13, 2022) (available at: https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html) (citing bipartisan report released by U.S. Senate). In light of those considerations, the court imposed a prison sentence of four years. Tr. II, p 116:18–20.

Ms. Martin moved for reconsideration of her sentence. MRS. The motion argued that the "four-year sentence is greater than necessary to achieve the purposes of sentencing and grossly disproportionate to other sentences" and that a credit-for-time-served sentence was especially warranted because of Ms. Martin's high-risk pregnancy and in comparison to other sentences for similar offenses. Defendant's Memo in Support of MRS [hereinafter MRS Memo] at 1, 7–9. The court denied the motion and, among other things, inaccurately noted that the jury found Martin guilty of BOPHAN despite being "presented with the lesser included offense of Breach of Peace." MRS Order; *see* Tr. II, pp 73–88 (jury instructions).

STANDARD OF REVIEW

"In criminal cases, the court of appeals sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." *City of Aiken v. Koontz*, 368 S.C. 542, 546, 629 S.E.2d 686, 688 (2006); *but see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (requiring independent appellate review of any judgment that may transgress the First Amendment).

ARGUMENT

I. Martin's conviction for BOPHAN violates the First Amendment and must be vacated.

South Carolina has sordid history of arresting, prosecuting, and punishing nonviolent civil rights protestors, including in Sumter County, for so-called breaches of the peace. Repeatedly, the judiciary has been required to step in and vindicate the First Amendment. *See, e.g.*, *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Fields v. South Carolina*, 375 U.S. 44 (1963) (reversing convictions affirmed first at *State v. Fields*, 240 S.C. 366, 126 S.E.2d 6 (1962) and again at *State v. Fields*, 242 S.C. 357, 131 S.E.2d 91 (1963)); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *City of Sumter v. McAllister*, 241 S.C. 355 (1962); *City of Sumter v. Lewis*, 241 S.C. 364 (1962). So too here.

For five consecutive days in 2020, Brittany Martin took to the streets of Sumter, South Carolina, to protest the brutal murder of George Floyd by Minneapolis police officers. Trial evidence showed that her conduct was nonviolent and nondestructive, and the jury failed to find that she was threatening (hanging on threats) or riotous (acquitting on incitement). Tr. II, pp 99:4–15, 100:23–25. Despite that record, Ms. Martin was prosecuted for and convicted of BOPHAN, essentially because her speech "stirred people to anger, invited public dispute, or brought about a condition of unrest." *Edwards*, 372 U.S. at 238 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949)); *see also* Tr. II, pp 32:7–8 (arguing that Martin was guilty of BOPHAN because "[a] curfew had to be put in place . . . [and] a whole city shut down."), 62:21–23 ("Brittany Martin didn't take olive branches."). As the Supreme Court has oft-repeated, "[a] conviction resting on any of those grounds may not stand." *Edwards*, 372 U.S. at 238 (quoting *Terminiello*, 337 U.S. at 5) (reversing the convictions of 187 Black protestors for breaching the peace at the South Carolina statehouse).

A. This Court must conduct an independent review of the record to ensure that Martin was not convicted in violation of the First Amendment.

"[I]n cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose*, 466 U.S. at 499; *Edwards*, 372 U.S. at 235 ("[I]t nevertheless remains our duty in a case such as this to make an independent examination of the whole record.") (finding the First Amendment violated). Under this rule, appellate courts bear "a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501; *see also Rouch v. Enquirer & News of Battle Creek Mich.*, 487 N.W.2d 205, 214 (Mich. 1992) ("We perceive an additional need for independent review grounded on the fear that juries may give short shrift to important First Amendment rights."). Because the requirement of independent review erupts from the federal constitution, it must be applied by state courts. *See, e.g.*, *State v. TVI, Inc.*, 524 P.3d 622, 630 (Wash. 2023) ("[A]s a matter of federal constitutional law, we do *not* defer to the trial court's finding on . . . whether the speech is unprotected.") (quotation marks omitted) (emphasis in original); *State v. Taylor*, 866 S.E.2d 740, 755–56 (N.C. 2021) (applying independent review to trial court's denial of a defendant's motion to dismiss on First Amendment grounds).

The independent review doctrine applies in criminal cases whenever a litigant raises "a plausible First Amendment defense." *In re George T*, 93 P.3d 1007, 1015 (Cal. 2004) (reversing conviction on First Amendment grounds); *see also, e.g.*, *Butt v. State*, 398 P.3d 1024, 1029 (Utah 2017) ("[A]ppellate courts are to conduct an independent review of the record to judge the merits of a First Amendment defense in an obscenity action, yielding no deference to the jury's verdict or the district

court's conclusions on underlying mixed questions of law and fact.") (reversing conviction on First Amendment grounds). Here, because Ms. Martin undoubtedly raised a plausible First Amendment defense, *see, e.g.*, Tr. II, p 9:9–16, this Court must independently review the record to determine whether the State carried its burden to prove each material element of BOPHAN without criminalizing conduct protected by the First Amendment.

B. The State failed to identify, much less prove, unprotected conduct sufficient to satisfy each element of BOPHAN.

Ordinarily, independent review requires the Court to look directly at the defendant's speech or conduct and determine whether it is protected by the First Amendment. But here, that is virtually impossible because the State failed to specify what actions by Ms. Martin (whether speech or conduct) constituted the crime of BOPHAN.

The State's charging instrument does not identify what conduct, in particular, constitutes BOPHAN. 2022 Indictment. Even at trial, the State only offered vague arguments for how Martin's conduct—which spanned several days of protesting—satisfied the elements of BOPHAN. *See* Tr. II, pp 30–32. In closing arguments, the solicitor urged the jury to simply "use its common sense" to answer: "Did [Ms. Martin] breach the peace of our community?" Tr. II, p 31:2–5 ("[T]hat's all we have to prove, ladies and gentlemen."). And as proof that Ms. Martin's conduct was high and aggravated, the solicitor argued that the jury should look to the subjective reactions of city officials:

> [W]hen considering a high and aggravated nature, you need to look at what the officers had to do in light of Ms. Martin. A curfew had to be put in place, ladies and gentlemen. The chief, the mayor and city counsel felt the need to put this curfew in place to protect the citizens of Sumter and to protect these officers. A whole city shut down because of Brittany Martin and her group. That,

> ladies and gentlemen, is breach of peace in a high and aggravated nature.

Tr. II, p 32:5–14.

But the mere existence of unrest "because of Brittany Martin and her group," cannot support a conviction. Rather, the State must identify and prove specific unlawful act(s) *by Brittany Martin* that breached the peace. But it did not.

C. Ms. Martin's conviction is based on protected conduct and must be vacated.

Ms. Martin's speech and conduct at Sumter's George Floyd protests were precisely the kind of protected First Amendment activity that cannot be criminalized. *See, e.g.*, *Edwards*, 372 U.S. at 236–38. "[T]he Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation marks omitted), even when it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); "inflict[s] great pain," *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011); is "vituperative, abusive, and inexact," *Watts v. United States*, 394 U.S. 705, 708 (1969); or "stir[s] people to anger, invite[s] public dispute, or brings about a condition of unrest," *Edwards*, 372 U.S. at 238.

In short, expression cannot be punished "unless shown likely to produce a clear and present danger of a serious substantive evil that rises *far above public inconvenience, annoyance, or unrest*." *Edwards*, 372 U.S. at 237 (quoting *Terminiello*, 337 U.S. at 4–5) (emphasis added). Only a narrow sliver of expression constitutes a "serious substantive evil" such that it is beyond the protection of the First Amendment, *United States v. Alvarez*, 567 U.S. 709, 717 (2012): as relevant here, those categories are true threats ("those statements where the speaker means

to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359 (2003)), incitement ("advocacy . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)), and fighting words ("personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," *Cohen v. California*, 403 U.S. 15, 20 (1971)).

None of those narrow categories are applicable here. Like the protesters vindicated in *Edwards*, Ms. Martin's speech and conduct did not constitute true threats, incitement, or fighting words. Ms. Martin was not convicted of threatening public officials and was acquitted of inciting a riot, Tr. II, pp 99:4–21, 100:23–25, and any disobedience of official orders is not alone enough to support a conviction, *Edwards*, 372 U.S. at 241 (failing to reach a majority to uphold the convictions based on the protesters' "defiance of (the dispersal) orders"). Ms. Martin never hurt anyone or destroyed any property. Instead, her peaceful protest, on a matter of immense public concern, "may [have] indeed best serve[d the First Amendment's] high purpose when it induce[d] a condition of unrest, create[d] dissatisfaction with conditions as they are, or even stir[red] people to anger." *Id.* at 238.

Ms. Martin's case fits squarely into South Carolina's historical pattern of exacting retribution for disfavored protected speech and conduct, *see, e.g.*, *Henry*, 376 U.S. 777–78 (reversing breach of peace convictions against nonviolent protesters), particularly for "unpleasantly sharp attacks on government and public officials," *Sullivan*, 376 U.S. at 270. Such a conviction is unlawful and must be vacated.

II. Martin's conviction for BOPHAN must be reversed because the trial court failed to instruct the jury about her First Amendment defense.

Jury instructions are vital tools for ensuring that criminal defendants are not convicted for protected speech. *See Brandenburg*, 395 U.S. at 448–49; *United States v. Maisonet*, 484 F.2d 1356, 1359 (4th Cir. 1973) (upholding instructions that defined true threats); *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985) (overturning convictions where a First Amendment instruction should have been but was not given); *see also United States v. El-Mezain*, 664 F.3d 467, 538 (5th Cir. 2011) (affirming conviction where First Amendment instruction "did not permit the jury to convict [the defendant] based on protected speech."). Given that, some states require that certain charges be accompanied by instructions that distinguish between protected speech (which cannot be criminalized) and unprotected speech (which can). *See, e.g.*, *State v. Moulton*, 78 A.3d 55, 71–72 (Conn. 2013) ("[T]he court must instruct the jury on the difference between protected and unprotected speech whenever the state relies on the content of a communication as substantive evidence of a violation[.]"); *People v. Johnson*, 986 N.W.2d 672, 679–80 (Mich. App. 2022) (reversing where jury instructions "lack[ed] language necessary to avoid infringement of the First Amendment right to free speech."). The impact of failing to adequately instruct juries about the First Amendment is on full display in this case, where Ms. Martin's lone conviction arose from the only charge for which a First Amendment instruction was denied.

In South Carolina, "a defendant is entitled to a jury instruction on [a defense] . . . if he has produced evidence tending to show the [ ] elements of that defense." *Stone v. State*, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988) (finding ineffective assistance of counsel where defense counsel failed to request a self-defense instruction). Likewise, "it is error [for a court] to refuse a requested charge on an

issue raised by the indictment and the evidence presented at trial." *State v. Kimbrell*, 294 S.C. 51, 56, 362 S.E.2d 630, 632 (1987) (reversing for failure to give "mere presence" instruction in a drug case). Reversal is required when the erroneous denial of a jury charge prejudices the defendant. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583–84 (2010); *see also State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007) ("The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law."). Here, reversal is required because the court's refusal to give a First Amendment charge on BOPHAN was both erroneous and prejudicial. *Mattison*, 388 S.C. at 479.

A. The trial court's refusal to provide a First Amendment instruction on BOPHAN was legal error.

Throughout trial, Ms. Martin argued that the jury should acquit because her conduct was protected by the First Amendment. *See, e.g.*, Tr. I, pp 49:16–17 ("This case is about free speech."), 278:2–5 ("This is a First Amendment exercise, albeit, a very aggravating one, a very rude one, but simply a First Amendment exercise."), 386:19–20 ("I'm here exercising our First Amendment right."), 389:22–23 ("I'm up here fighting for my First Amendment right[.]"); Tr. II, pp 39:3–5 ("That's a person trying to exercise her First Amendment rights to free speech in this country."), 59:14-15 ("Ms. Martin exercised her right to free speech and that is all."). As to BOPHAN, Martin argued that her actions—which involved protesting about matters of deep public concern—could not constitute an unlawful breach of the peace. *Compare* Tr. II, pp 82–83 (defining BOPHAN) *with Edwards*, 372 U.S. at 238 (holding that the First Amendment protects speech that "stir[s] people to anger, invite[s] public dispute, or brings about a condition of unrest"); *see also* Tr. II, pp 61:21–62:2 ("She intended to make statements about politics and how things work in our country . . . she did not cause public disturbance. She led a protest march and

that's all."). As the court recognized, the record supported Ms. Martin's First Amendment defense. *See* Tr. II, pp 83–84, 85–86 (granting First Amendment instructions on Incitement and Threatening a Public Official); *see also* Tr. II, p 9:9-11 (the trial court "really [ ] looking at the, you know, the First Amendment components of the charges.").

At the conclusion of evidence, Ms. Martin requested that the jury be instructed that the First Amendment specifically applies to BOPHAN. DPI at 15–18; *see also* Tr. II, pp 11:24–12:3 (arguing that the jury be instructed that BOPHAN "is not to be construed to abridge people's rights to free speech."), 12:10–14 (arguing that the BOPHAN instruction should explain that it is not intended to cover protesting). Ms. Martin's proposed charges would have instructed the jury that it could not convict her of BOPHAN based on speech unless the speech fell within one of a few narrow categories of unprotected speech. DPI at 15–18. Specifically, the proposed instructions explained the following accurate and applicable rules:

- "The fact that words are vulgar or offensive is not alone sufficient to . . . remov[e] them from the protection provided by the First Amendment." DPI at 15–16.
- "Before one may be punished for spoken words, there must be evidence that the abusive utterance tended to incite an immediate breach of the peace." DPI at 17.
- "The State may not assume that provocative expressions will incite such violence. Rather, the State must carefully consider . . . whether the expression is directed to incited or producing imminent lawless action and is likely to incite or produce such action." DPI at 17.
- "Words may convey anger and frustration and yet not rise to a level such as to provoke a violent reaction from the listener." DPI at 17–18.
- "Profane language alone cannot constitute a violation of the [law]." DPI at 18.

But the jury did not receive these instructions. Despite defense counsel's arguments, and despite the court's own acknowledgment that case implicated free speech, the court refused to instruct the jury that Ms. Martin must not be convicted of BOPHAN for conduct protected by the First Amendment. Tr. II, pp 12–13, 82–83.

B. Taken as a whole, the trial court's instructions were erroneous because they misstated the law.

Not only did the trial court fail to instruct the jury about the First Amendment principles applicable to BOPHAN, the instructions—when taken together—actually prohibited the jury from considering Martin's First Amendment defense on the BOPHAN count.

The problem arose from three separate facts: (1) The jury did not receive a general instruction about the universal applicability of the First Amendment; (2) unlike on the BOPHAN charge, the Court *did* instruct the jury about First Amendment protections that apply to Incitement, Tr. II, pp 83–84, and Threatening a Public Official, Tr. II, pp 85–86; and (3) the jury was told that they must consider "each charge separately on the evidence *and law applicable to it* uninfluenced by . . . any other charges." Tr. II, p 75:20–24 (emphasis added). Alone, these instructions were not error. But together, they conveyed an erroneous rule of law: that the First Amendment instructions that governed the jury's consideration of Incitement and Threatening a Public Official did not apply to BOPHAN. As a result, the jury instructions provided no protection whatsoever against a conviction for BOPHAN for speech or conduct protected by the First Amendment.

C. The trial court's instructional errors prejudiced Ms. Martin and warrant reversal.

Ms. Martin's only defense to BOPHAN was that her conduct was protected by the First Amendment. *See supra*, Statement of the Case, p. 8. But because of the instructional errors explained above, the jury was precluded from considering

Martin's only argument for acquittal. Though no greater showing of prejudice is required, the verdicts tell a simple and compelling story about harm caused by the court's instructional errors:

Charges	**First Amendment Charge?**	**Verdict**
Incitement	Yes	Not Guilty
Threatening a Public Official	Yes	No Verdict
BOPHAN	*No*	*Guilty*

Put simply: where the jury was instructed to apply the First Amendment, they were unable to agree on evidence of guilt. The court's instructional errors were plainly prejudicial and therefore require reversal.

III. Martin's conviction must be reversed because BOPHAN is unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Yet here, Martin was convicted of a crime that, according to our own Supreme Court, has "various definitions," "encompass[es] a broad range of conduct," and "*def[ies]* strict definition." *Simms*, 412 S.C. at 594 (emphasis added). Because BOPHAN lacks clear definition, authorizes arbitrary and discriminatory enforcement, and "inhibit[s] the exercise of constitutionally protected rights," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), Martin's conviction violates due process and must be vacated.

A. BOPHAN is facially void for vagueness.

To pass constitutional muster, a law must provide "adequate notice of what conduct is prohibited and must include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke*, 930

F.3d 264, 272 (4th Cir. 2019) (citation omitted) (declaring the term "habitual drunkard" unconstitutionally vague). Though "nearly every law entails some ambiguity, . . . laws imposing 'criminal penalties' or 'threatening to inhibit the exercise of constitutionally protected rights' are subject to 'a stricter standard.'" *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 781 (4th Cir. 2023) (quoting *Hoffman Estates*, 455 U.S. at 499). This heightened standard "applies with particular force in review of laws dealing with speech." *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976). Unlike other facial challenges, parties raising vagueness challenges that involve First Amendment freedoms need not show that the challenged law is vague in all of its applications. *Carolina Youth Action Project*, 60 F.4th at 781-82.

On its face, BOPHAN fails every test for vagueness—it lacks sufficient definition, authorizes arbitrary and discriminatory enforcement, and inhibits the exercise of constitutional rights.[3]

Much ink has been spilled about the crime's indescribable nature—more so, even, than language explaining what the crime actually requires. Breach of the peace "encompass[es] a broad range of conduct." *Simms*, 412 S.C. at 594. It is not "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed," *Edwards*, 372 U.S. at 236; nor is it "susceptible of exact definition," *State v. Randolph*, 239 S.C. 79, 83, 121 S.E.2d 349, 350 (1961); *see also State v. Poinsett*, 250 S.C. 293, 297, 157 S.E.2d 570, 571 (1967). In fact, in the words of the South Carolina Supreme Court, breach of the peace

[3] It is also worth noting that two of five Supreme Court justices would have concluded that BOPHAN has never been a crime established in South Carolina. *Simms* at 600–08 (Pleicones, J., dissenting) (examining the history of the common law offense and the statutes implementing its execution).

"*def[ies]* strict definition." *Simms*, 412 S.C. at 594 (emphasis added). But the *Simms* court explained,

> Throughout the various definitions appearing in the cases there runs the proposition that a breach of the peace may be generally defined as such a violation of the public order as amounts to a disturbance of the public tranquility, by act or conduct either directly having this effect, or by inciting or tending to incite such a disturbance of the public tranquility.

Simms, 412 S.C. at 594–95 (citing *Peer*, 320 S.C. 546, 552, 466 S.E.2d 375, 379 (Ct. App. 1996)). "It is not necessary that the peace actually be broken; commission of an unlawful and unjustifiable act, tending with sufficient directness to break the peace, is sufficient." *Peer*, 320 S.C. at 552. Additionally, "[w]hether conduct constitutes a breach of the peace depends on the time, place, and nearness of others." *Id*.

The vagueness inherent in Breach of Peace is then amplified when charged as BOPHAN. Breach of the peace of a high and aggravated nature (BOPHAN) essentially takes the common law crime of breach of the peace and adds one element: aggravation. *Simms*, 412 S.C. at 596–97; *cf. State v. Burch*, 43 S.C. 3, 3, 20 S.E. 758, 758 (1895) (describing the analogous setup of assault and battery and assault and battery of a high and aggravated nature).[4] No explicit guidance exists to

[4] Though breach of peace and BOPHAN are common law offenses, South Carolina statutes determine which courts have jurisdiction and what punishment may be given. Under S.C. Code Ann. § 22-5-150, magistrates may arrest the following categories of individuals: "(a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons." The magistrate then has two options: to try the defendant or, "when the offense is of a high and aggravated nature," bind the defendant "over for trial before the court of general sessions." *Id*. If charged by a magistrate and convicted of breach of peace, a defendant may be punished by a fine up to five hundred dollars, imprisonment for up to thirty days, or both. S.C. Code Ann. § 22-3-560. Because there is no punishment established for BOPHAN, S.C. Code Ann. § 17-

determine when something is of "a high and aggravated nature." *Simms*, 412 S.C. at 596 ("[T]he aggravators are not expressly defined by statute. Rather, the law only requires that a breach of the peace be 'of a high and aggravated nature.'"). Instead, citizens and courts are left only with the following instruction: "a wide variety of factual circumstances could render a simple breach of the peace triable in circuit court because of its 'high and aggravated nature.'" *Id*.

In addition to lacking sufficient clarity and notice about the conduct it prohibits, BOPHAN also encourages arbitrary and discriminatory enforcement. Because the crime does not provide guidance about what conduct rises to the level of causing a disturbance of the public order, law enforcement is left to enforce their own subjective determinations. Likewise, the type of amorphous 'aggravation' required by BOPHAN is also wholly subjective and a "classic term of degree." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–49 (1991) (warning against the vagueness that flows from terms like 'general' and 'elaboration'). Functionally, it requires "officers [to] deploy a glorified smell test to determine whether a [person's conduct] is [aggravated] enough to be [BOPHAN]." *Carolina Youth Action Project*, 60 F.4th at 784. Such subjectivity is repugnant to due process.

Finally, as illustrated by this case, BOPHAN's vague prohibitions also inhibit free speech. Beyond the law's general lack of clarity, there is clear and irreconcilable conflict between its prohibition on acts that disturb "the public tranquility," *Simms*, 412 S.C. at 594–95 (defining Breach of Peace), and the firmly rooted First Amendment right to engage in speech that "stir[s] people to anger, invite[s] public dispute, or [brings] about a condition of unrest," *Edwards*, 372 U.S. at 238. As a

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25-30 governs, under which "the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution." *Simms*, 412 at 598 (quoting S.C. Code Ann. § 17-25-30).

result, the public is left with little guidance regarding whether certain protected conduct (*e.g.*, protesting) will nevertheless result in arrest.

By any metric, BOPHAN is unconstitutionally vague, and Ms. Martin's conviction should be vacated.

B. BOPHAN is unconstitutionally vague as applied to Ms. Martin's conduct.

The same "basic legal standard" applies to both facial and as-applied challenges. *Carolina Youth Action Project*, 60 F.4th at 782 (striking down South Carolina's disturbing schools and disorderly conduct statutes as unconstitutionally vague as applied to schoolchildren).

BOPHAN is especially vague as applied to protesters like Ms. Martin. When Ms. Martin set out to express her outrage and grief at George Floyd's murder, she could not have understood that her conduct would subject her to criminal liability under BOPHAN. Despite well settled law protecting her right to engage in speech that causes "a condition of unrest," *Edwards*, 372 U.S. at 238, Ms. Martin was left to guess how much "public dispute" she could invite before being arrested for a disturbance of the "public tranquility," *Simms*, 412 S.C. at 594-95. Such a result unduly chills free speech and violates the first and most basic principle of due process: fair notice.

Martin's case also "illustrate[s] the real risk that the provision may be arbitrarily and discriminatorily enforced." *United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013). As the Supreme Court has cautioned, when a vague law regulates speech, it is even more important to "eliminate the impermissible risk of discriminatory enforcement" because "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile*, 501 U.S. at 1051 (citations omitted). Here, the State's evidence typified these concerns. Officer Rabon, for example, testified that he believed Ms. Martin "wasn't

there with pure intentions," Tr. I, p 154:22–23, and chided her for "say[ing] awful things," Tr. I, p 143:9–11. Officer Singleton, for his part, complained that Ms. Martin "disparage[d] those officers and tr[ied] to tarnish that career and the noble profession." Tr. I, p 196:15–17.

Because BOPHAN completely lacks clarity, encourages discriminatory enforcement, and infringes on speech, it cannot be constitutionally applied to protest-based conduct like Ms. Martin's.

IV. Ms. Martin's conviction for BOPHAN violates the Sixth Amendment because the trial court failed to ensure a unanimous verdict.

The constitutional right to a unanimous verdict, *see* U.S. Const. amend. VI; S.C. Const. Art. V, § 22, mandates that "the jury must unanimously agree on the facts that comprise each element of the crime." *State v. Adams*, 430 S.C. 420, 432 (Ct. App. 2020) (citing *Richardson*, 526 U.S. at 817–18). And although the constitution does not require a jury to agree on the means through which a crime was committed—*e.g.*, whether the defendant threatened the victim with a knife or a gun—the verdict must reflect unanimity regarding the facts that satisfy each essential element of the offense. *Id.* at 432-33. This is commonly known as the element/means distinction.

Here, BOPHAN is a common law crime that lacks defined statutory elements. *See supra*, Part III. At minimum, the State was required to prove, alternatively, that: Martin committed an unlawful act that "violat[ed] the public order," *or* caused a "disturbance of the public peace;" *or* that she committed "any act or conduct inciting violence." *Simms* 412 S.C. at 594–95. As discussed throughout, the State made no effort to identify specific acts that satisfied the elements of BOPHAN. Rather, the jury was merely presented with evidence from four days of protests and asked to decide whether Martin committed BOPHAN on any of those

four days. Though the jury returned a verdict of guilty, the instructions failed to ensure that the jury unanimously agreed as to the particular act that constituted BOPHAN. Because the jury was not required to agree on a particular act sufficient to meet one of the (at least) three possible definitions of BOPHAN, Martin's right to a unanimous verdict was violated.

A. This Court's unanimity decision in *Adams* is instructive, but its holding is distinguishable and does not control here.

South Carolina courts have only once examined the precise requirements of juror unanimity. In *State v. Adams*, 430 S.C. 420, 845 S.E.2d 217 (Ct. App. 2020), the State only charged one count of first-degree criminal sexual conduct but introduced evidence of multiple incidents of abuse at trial. *Id.* at 425–26. Relying largely on the Supreme Court's plurality and Justice Scalia's concurrence in *Schad v. Arizona*, 501 U.S. 624, 629 (1991), the Court of Appeals held that "within the element of a sexual battery, the jury is not required to agree on the factual means by which the sexual battery occurred as long as the jury agrees on the fact that 'a' sexual battery occurred." *Id.* at 437.

In so holding, the *Adams* court invoked the distinction between elements (about which the jury must be unanimous) and means (about which unanimity is unnecessary). The elements/means distinction differentiates between the actus reus of the crime and *how* the crime is committed—presupposing agreement about which act is in question. *Schad* also turned on the elements/means distinction. In *Schad v. Arizona*, the prosecution presented "theories of both premeditated murder and felony murder." 501 U.S. at 629. Both theories dealt with the same *act*—the killing. Justice Scalia's concurrence impliedly recognized that as well: "As the plurality observes, it has long been the general rule that when *a single crime* can be committed in various ways, jurors need not agree upon the mode of commission." *Id.*

at 659 (emphasis added). There was no question about what conduct the jury was evaluating.

1. The holding of Adams is limited to the charge sexual battery.

Even after *Schad*, many courts have continued to require unanimity about which *act* satisfies the elements of the crime charged. *See, e.g.*, *Francis v. State*, 36 S.W.3d 121, 124 (Tex. Crim. App. 2000) (en banc); *State v. Stempf*, 627 N.W.2d 352, 356–57 (Minn. 2001). In those jurisdictions, "if the State introduces evidence of multiple criminal acts to prove a single charge, the trial court . . . must either require the state to elect the act which it alleges constitute the crime, or instruct the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty." *State v. Klokic*, 196 P.3d 844, 847 (Ariz. 2008). On the other hand, if the State provides evidence of a "single criminal transaction," those protections are not required. *Id*. By requiring the state to specify the criminal act, or by requiring the jury to unanimously agree on the criminal act, a defendant is protected from a non-unanimous verdict. *See, e.g.*, *id*.; *Shouldis v. State*, 38 So.3d 753, 762 (Ala. 2008); *State v. Voyles*, 160 P.3d 794, 800 (Kan. 2007); *People v. Devine*, 74 P.3d 440, 443 (Colo. App. 2003); *State v. Frisby*, 811 A.2d 414, 422–23 (N.J. 2002); *Stempf*, 627 N.W.2d at 354; *State v. Lyons*, 412 S.E.2d 308, 314 (N.C. 1991); *State v. Brown*, 823 S.W.2d 576, 582–83 (Tenn. Ct. App. 1991).

In deciding whether act-specific unanimity was required in *Adams*, the Court looked at the elements of the crime charged and evaluated whether a general verdict posed an inordinate risk of unfairness. *Adams*, 430 S.C. at 434-35. Noting that the crime at issue was narrowly defined by statute and "does not prohibit any sexual battery but only certain specific acts," and that "sexual offenses involving children often present unique proof challenges warranting special considerations," the Court broke from the rule applied "in many states" and held that "within the

element of a sexual battery, the jury is not required to agree on the factual means by which the sexual battery occurred so long as the jury agrees on the fact that 'a' sexual battery occurred." *Id.* at 434–37.

Importantly, the Court's holding in *Adams* is directly tethered to its evaluation of the crime charged. Therefore, because Martin was convicted of BOPHAN, not criminal sexual conduct with a minor, the holding of *Adams* does not control here.

2. Unlike the sexual offense charged in Adams, the vagueness of BOPHAN requires act-specific unanimity.

In this case, the "risk of unfairness posed by using a general verdict," *Adams*, 430 S.C. at 435, was significant. The trial court's instruction required anonymity "on these verdict forms," Tr. II, p 87:7–8, which offered only a generic "guilty" or "not guilty," Verdict Forms. Functionally, then, the only unanimity required was that the indictment, which listed the alleged BOPHAN as occurring "on or about May 31, 2020 through June 3, 2002," be proven. 2022 Indictment.

Under *Adams*, unanimity is required about the "facts that comprise each element of the crime" but not necessarily the "means" by which the crime is committed. 430 S.C. at 432–33. To determine whether a fact comprises an element or merely a means, courts "consider[] the statutory text, history, and tradition and then probes for fundamental fairness and rationality." *Id.* at 436–37 (quotation marks omitted).

Because BOPHAN is a common law crime, no statutory text exists to guide the court. Rather, breach of the peace, and therefore its composite elements, "*defy*[] strict definition," *Simms*, 412 S.C. at 594 (emphasis added), so this court is left to turn to considerations of fundamental fairness and rationality. "The broader a statute, the more likely the constitution will limit the 'State's power to define crimes in ways that would permit juries to convict while disagreeing about means.'"

Adams, 430 S.C. at 435 (quoting *Richardson*, 526 U.S. at 820). Not only is BOPHAN broad—it is likely unconstitutionally vague both as applied to Ms. Martin and on its face. *See supra*, Part III. Ultimately, because "breach of the peace embraces a variety of conduct," more specificity than merely "the designation of the offense by name" is necessary to guide the jury. *Cf. Randolph*, 239 S.C. at 84 (reversing a breach of peace conviction because the warrant contained insufficiently definite charges). No such guidance was given here, violating Ms. Martin's Sixth Amendment right to a unanimous jury verdict.

V. Martin's four-year prison sentence for nonviolent and nondestructive conduct is grossly disproportionate and violates the Eighth Amendment.

Brittany Martin—a Black single mother who was struggling with a high-risk pregnancy—was sentenced to four years in prison for a nonviolent, nondestructive, and victimless common law offense. The sentence sparked national outrage, for good reason: it violated Ms. Martin's constitutional rights.

The Eighth Amendment does not permit a sentence that is grossly disproportionate the crime. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991). Even "a single day in prison may be unconstitutional in some circumstances." *Solem v. Helm*, 463 U.S. 277, 290 (1983). "[I]n analyzing proportionality under the Eight Amendment outside the capital context, South Carolina courts shall first determine whether a comparison between the sentence and the crime committed gives rise to an inference of gross disproportionality." *State v. Harrison*, 402 S.C. 288, 299–300, 741 S.E.2d 727, 733 (2013). If such an inference is present, "intrajurisdictional and interjurisdictional analysis is appropriate. Courts may then look to whether more serious crimes carry the same penalty, or more serious penalties, and the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

Here, Ms. Martin was convicted of the crime of BOPHAN. Because South

Carolina law prescribes no specific penalty for that crime, the judge could have imposed any sentence "conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution." S.C. Code Ann. § 17-25-30. The judge sentenced Ms. Martin to spend four years in prison despite significant mitigating factors, including Ms. Martin's high-risk pregnancy. MRS at 7–8.

A. A comparison of Ms. Martin's four-year sentence to the crime of BOPHAN gives rise to an inference of gross disproportionality.

In evaluating whether a sentence violates the Eighth Amendment's protections, a court must first compare the sentence to the crime committed, asking whether the "comparison . . . gives rise to an inference of gross disproportionality." *Harrison*, 402 S.C. at 300. A court looks not only at the crime charged but also to the specific conduct that gave rise to the conviction. *United States v. Cobler*, 748 F.3d 570, 579–80 (4th Cir. 2014). At the outset, it is worth noting that the record does not reveal what specific conduct Ms. Martin was convicted for, *see supra* Part I, rendering this analysis difficult. But a comparison of Ms. Martin's conduct over her five days of protest to her ultimate sentence of four years creates an inference of gross disproportionality. At no moment did Ms. Martin act violently. She never injured anyone, and she never destroyed any property. The State plucked out moments over the course of several days of what were undisputedly peaceful and uneventful protest. Four years in prison for a nonviolent and nondestructive protest creates an inference of gross disproportionality.

B. Comparative analysis confirms the inference of gross disproportionality.

A comparative analysis considers whether more serious crimes carry the same penalty or more serious penalties, as well as other sentences imposed for the same crime. *Harrison*, 402 S.C. at 300.

Many crimes more serious than BOPHAN, including crimes of violence and sexual offenses, carry penalties less than Ms. Martin's four-year sentence. Domestic violence (including violence causing physical injury), S.C. Code Ann. § 16-25-20(C), and transporting a child with the intent to violate a child custody order, S.C. Code Ann. § 16-17-495(C), are punishable by no more than three years. Obtaining drugs through fraud, S.C. Code Ann. § 44-53-40, is punishable by no more than two years. Leaving the scene of an accident (where no injury occurs), S.C. Code Ann. § 56-5-1210(1), is punishable by no more than one year, and suborning perjury, S.C. Code Ann. § 16-9-10, is punishable by no more than six months. Soliciting prostitution, S.C. Code Ann. §§ 16-15-90, 110; maintaining a brothel, S.C. Code Ann. §§ 16-15-90, 110; making threatening phone calls, S.C. Code Ann. § 16-17-430; committing sexual battery as a school official with an eighteen-year-old student, S.C. Code Ann. § 16-3-755(C); and selling liquor to people under twenty-one (no matter how many times this occurs), S.C. Code Ann. § 61-6-4080, are punishable by up to thirty days.

Other even more serious crimes are punishable by a *maximum* of five years—just twelve months more than Ms. Martin's sentence—including allowing another person to inflict great bodily injury on a child, S.C. Code Ann. § 16-3-95; soliciting a child prostitute, S.C. Code Ann. § 16-15-425; teaching how to make a destructive device for the purpose of civil disorder, S.C. Code Ann. § 16-8-20; cutting, mutilating, defacing, or injuring a railroad, S.C. Code Ann. § 58-15-870; removing or damaging airport facility or equipment with malicious intent, S.C. Code Ann. § 55-1-30; burning personal property to commit insurance fraud, S.C. Code Ann. § 16-11-130; attempted arson, S.C. Code Ann. § 16-11-190; felony stalking, S.C. Code Ann. § 16-3-1730; felony pointing or presenting a firearm (including a loaded firearm), S.C. Code Ann. § 16-23-410; possessing a stolen handgun or gun with obliterated serial number, S.C. Code Ann. §§ 16-23-30, 50; and bribing a public official, S.C. Code Ann. § 16-9-210.

But even more revealing are other sentences for the same crime. The prevailing practice in South Carolina's Third Circuit is to sentence individuals convicted of BOPHAN to time served, a short sentence accompanied by a fine, or a suspended sentence. MRS, Exhibit 1. In fact, Ms. Martin's sentence required, by far, the longest incarceration of those convicted of BOPHAN in the Third Circuit.

State v. Simms, 412 S.C. 590, 774 S.E.2d 445 (2015), provides a particularly stark comparator. In *Simms*, the defendant was outside of a University of Alabama and University of South Carolina football game when he approached the victim and punched him five or six times. *Id.* at 593. Unconscious, the victim fell into the street, where the truck he had been sitting in ran over him and killed him. *Id*. After being convicted of BOPHAN, the defendant was first sentenced to ten years suspended to five years in prison followed by three years of probation, but his sentenced was later reduced to ten years suspended upon three years in prison and three years of probation. *Id*. Despite the defendant's willful violence and the resulting fatality, the defendant was required to serve less prison time than Ms. Martin.

Unlike the defendant in *Simms*, Ms. Martin did not act violently. No injury whatsoever resulted from her actions, much less a fatality. Nevertheless, she received a harsher sentence. Unlike others in the Third Circuit, Ms. Martin was not charged with a more serious crime that was downgraded to BOPHAN. *See* MRS Exhibit 1. Nevertheless, she received a harsher sentence. In spite of—or perhaps because of, *see supra* Part III.B (discussing the possibility of discriminatory enforcement of vague laws)—the fact Ms. Martin was exercising her constitutional right to protest, she received a harsher sentence.

As the trial court itself noted, Tr. II, p 115:14–19, a comparison of Ms. Martin's sentence to those imposed on January 6th Capitol rioters is also instructive. Several individuals convicted of violent and truly threatening conduct

during the January 6th Capitol riots received lesser sentences than Ms. Martin, including Devlyn Thompson (46 months for beating police officers with a metal baton), Lonnie Leroy Coffman (46 months for his participation in the riot as the "most heavily armed" rioter), Nicholas Languerand (44 months for assaulting officers with weapons), Scott Fairlamb (41 months for assaulting a police officer), and Cleveland Meredith (28 months for threatening to kill House Speaker Nancy Pelosi). MRS, p. 11. Even after considering those penalties, the trial court still punished Ms. Martin's nonviolent, nondestructive conduct with a greater sentence. MRS Order, p. 3. The disparity between Ms. Martin's conduct and the January 6th rioters' conduct, and Ms. Martin's ultimately greater sentence, bolsters the inference of disproportionality here.

A comparison of Ms. Martin's conduct and her ultimate sentence creates an inference of gross disproportionality, and the comparative jurisdictional analysis compelled by *Harrison* confirms that inference. Although the Eighth Amendment grants trial courts substantial leeway in sentencing, Ms. Martin's case is one of those "rare instances" contemplated by *Harrison* where a sentence was outside those lenient bounds. Ms. Martin is thus entitled to a resentencing.

CONCLUSION

Ms. Martin's conviction and four-year-long prison sentence for peaceful protest is fundamentally contradictory to the principles enshrined in the Constitution. The proceedings below punished conduct protected by the First Amendment, imposed criminal liability for an unconstitutionally vague crime, violated Ms. Martin's Sixth Amendment right to a unanimous jury verdict, and handed down a cruel and unusual sentence in violation of the Eighth Amendment. Ms. Martin petitions this Court to reinforce those constitutional protections and vacate her conviction and sentence.

/s/ *Meredith McPhail*

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