

No. 18-1182

In The
Supreme Court of the United States

—◆—
SCOTT OGLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The Third Court Of Appeals For Texas**

—◆—

**BRIEF FOR NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONER**

—◆—

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QUESTION PRESENTED

Do the various state statutes across the country that criminalize electronically communicated speech that is both intended and reasonably likely to annoy, alarm, or embarrass another person prohibit a substantial amount of protected speech in relation to the statutes' legitimate sweep, thus violating the First Amendment because the elements and scope of these statutes are so highly varied?

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal-defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal-defense lawyers, and the criminal justice system as a whole.

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SUMMARY OF ARGUMENT

The Petition presents an issue of considerable constitutional importance, and one that has divided courts across the country: whether statutes criminalizing

¹ No person other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission. No person other than *amicus* or its counsel authored this brief in whole or in part. Timely notice was provided to the parties, and the parties consented to the filing of this brief.

speech that is intended and reasonably likely to annoy, alarm, or embarrass another person violate the First Amendment. *Amicus* contends that unquestionably, such statutes impermissibly abridge the First Amendment, and give rise to a palpable risk of criminal liability for citizens who choose to express themselves in ways that may be unconventional or even untoward, but not at all inherently criminal.

The myriad of various state and federal statutes across the country have driven this confused state of affairs because the elements and scope of these statutes are so highly varied.

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ARGUMENT

I. TEX. PENAL CODE ANN. § 42.07(a)(7) Violates The First Amendment

TEX. PENAL CODE ANN. § 42.07(a)(7) provides that: “A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.” The specific electronic communications at issue in Petitioner Ogle’s case are as follows: (1) Petitioner referred to one law enforcement officer as “arrogant, condescending, belligerent” and someone “who chooses to look the other way,” Pet. App. 30; and (2) Petitioner criticized another officer, calling him a “little bitch” and “little state weasel,” and telling that officer, “[y]ou

have a Constitution to uphold, son, you're pissing on it," *id.* at 37.

II. Various State Statutes Confuse The Law By Proscribing Electronic or Telecommunication (Putative) Harassment

Almost every State in the country, as well as the Federal government, has a specific offense or statute proscribing electronic or telecommunication (putative) harassment.

See ALA. CODE § 13A-11-8(b)(1) (2018); ARIZ. REV. STAT. ANN. § 13-2916 (2019); CAL. PENAL CODE § 653m (2019) (former subsection (b) found overbroad in *In re Elias*, previously published at 252 Cal. Rptr. 348 (Cal. Ct. App. 1988)); 720 ILL. COMP. STAT. ANN. 5/26.5-3 (West 2018); KAN. STAT. ANN. § 21-6206 (West 2018); LA. STAT. ANN. § 14:285 (2018); ME. REV. STAT. ANN. tit. 17-A, § 506 (2017); MD. CODE ANN., CRIM. LAW § 3-805 (West 2018); MONT. CODE ANN. § 45-8-213 (West 2019) (amended by 2019 Montana Laws Ch. 56 (H.B. 228); prima facie portion of subsection (1)(a) found overbroad in *State v. Dugan*, 303 P.3d 755 (Mont. 2013)); NEB. REV. STAT. ANN. § 28-1310 (West 2019); OHIO REV. CODE ANN. § 2917.21 (West 2018); OKLA. STAT. ANN. tit. 21, § 1172 (West 2018); 11 R.I. GEN. LAWS ANN. § 11-52-4.2 (West 2018); UTAH CODE ANN. § 76-9-201 (West 2018) (former subsections (a) and (d) found overbroad in *Provo City v. Whatcott*, 1 P.3d 1113 (Utah Ct. App. 2000)); VT. STAT. ANN. tit. 13, § 1027 (West

2018); VA. CODE ANN. § 18.2-152.7:1 (West 2018); W. VA. CODE ANN. § 61-3C-14a (West 2018); WIS. STAT. ANN. § 947.0125 (West 2017); 47 U.S.C.A. § 223 (West 2019) (portion of former subsection (a)(1), and former subsection (d), found overbroad in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); former subsection (a)(1)(C) found unconstitutional as applied in *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999)).

A. Statutes That Incorporate An Electronic-communication Manner and Means Into A Harassment Statute

Another driver of the confusion in the law are statutes across the country that incorporate electronic-communication manner and means into a harassment statute.

ALASKA STAT. ANN. § 11.61.120 (West 2018); ARK. CODE ANN. § 5-71-209 (West 2019); ARIZ. REV. STAT. ANN. § 13-2921(A) (2019); COLO. REV. STAT. ANN. § 18-9-111 (West 2017) (former subsection (1)(e) found unconstitutional as applied in *People In Interest of R.D.*, ___ P.3d ___, 2016 WL 7473807 (Colo. App. Dec. 29, 2016), cert. granted in part, *People In Interest of R.D.*, 2017 WL 3868022 (Colo. Sept. 5, 2017)); CONN. GEN. STAT. ANN. § 53a-183 (West 2019) (subsections (a)(2), and (a)(3) in prior statute version, found unconstitutional as applied in *State v. Nowacki*, 111 A.3d 911 (Conn. App. Ct. 2015), and *State v. LaFontaine*, 16 A.3d 1281 (Conn. App. Ct. 2011), respectively); DEL. CODE ANN. tit. 11, § 1311 (West 2019); HAW. REV. STAT.

ANN. § 711-1106 (West 2018); IDAHO CODE ANN. § 18-6710 (West 2018); IND. CODE ANN. § 35-45-2-2 (West 2018); IOWA CODE ANN. § 708.7 (West 2019); KY. REV. STAT. ANN. § 525.080 (West 2018); MASS. GEN. LAWS ANN. ch. 265, § 43A (West 2018); MINN. STAT. ANN. § 609.795 (West 2018); N.H. REV. STAT. ANN. § 644:4 (2018) (former subsection I(a), and now-repealed subsection I(f), found overbroad in *State v. Brobst*, 857 A.2d 1253 (N.H. 2004), and *State v. Pierce*, 887 A.2d 132 (N.H. 2005), respectively); N.Y. PENAL LAW § 240.30 (McKinney 2019) (former subdivision 1(a) found overbroad and vague in, e.g., *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014); former subdivision 1 found unconstitutional as applied in, e.g., *People v. Pierre-Louis*, 927 N.Y.S.2d 592 (Dist. Ct. Nassau Cnty. 2011)); N.D. CENT. CODE ANN. § 12.1-17-07 (West 2017); OR. REV. STAT. ANN. §§ 166.065, 166.090(1)(c) (West 2019) (section 166.065(1)(a)(B), in prior version of statute, held overbroad in *State v. Johnson*, 191 P.3d 665 (Or. 2008)); 18 PA. STAT. AND CONS. STAT. ANN. § 2709 (West 2018); S.C. CODE ANN. § 16-3-1700(B), (G) (2018); TENN. CODE ANN. § 39-17-308 (West 2018).

B. Statutes Whose Plain Language Includes Harassment By Electronic Means

Another cluster of statutes contain plain language that encompasses harassment by electronic means:

See MO. ANN. STAT. §§ 565.090, 565.091 (West 2018) (now-repealed Section 565.090.1(5) found overbroad in *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012)); NEV. REV. STAT. ANN. § 200.571 (West 2019); N.J. STAT. ANN. § 2C:33-4 (West 2019) (now-repealed subsection (d) recognized as unconstitutional in *Schlaflin v. Borowsky*, 128 F. App'x 258 (3d Cir. 2005)); N.M. STAT. ANN. § 30-3A-2 (West 2019); N.Y. PENAL LAW § 240.26 (McKinney 2019).

C. Stalking and Cyberstalking Statutes

Electronic harassment has also been included, either explicitly or implicitly from plain language, in stalking and cyberstalking statutes.

See D.C. CODE ANN. §§ 22-3132, 22-3133 (West 2019); FLA. STAT. ANN. § 784.048 (West 2018); GA. CODE ANN. §§ 16-5-90, 16-5-92 (West 2019); IDAHO CODE ANN. § 18-7906 (West 2018); LA. STAT. ANN. § 14:40.3 (2018); MICH. COMP. LAWS ANN. § 750.411h (West 2018); MINN. STAT. ANN. § 609.749 (West 2018) (former subdivision 2(7) found overbroad facially and as applied in *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998)); MISS. CODE ANN. § 97-45-15 (West 2019); MONT. CODE ANN. § 45-5-220 (West 2019); NEB. REV. STAT. ANN. §§ 28-311.02, 28-311.03 (West 2019); NEV. REV. STAT. ANN. § 200.575 (West 2017); N.J. STAT. ANN. § 2C:33-4.1 (West 2019); N.C. GEN. STAT. ANN. § 14-196.3 (West 2018); S.D. CODIFIED LAWS § 22-19A-1 (2019); WASH. REV. CODE ANN. § 9.61.260 (West 2018) (subsection (1)(b))

considered facially unconstitutional by *Rynearson v. Ferguson*, ___ F.Supp.3d ___, 2019 WL 859226 (W.D. Wash. Feb. 22, 2019)); WYO. STAT. ANN. § 6-2-506 (West 2019); 18 U.S.C.A. §§ 2261A, 2266 (West 2019) (prior version of Section 2261A(2)(A) found unconstitutional as applied in *United States v. Cassidy*, 814 F.Supp.2d 574 (D. Md. 2011), appeal dismissed (4th Cir. 2012)).



CONCLUSION

Certiorari should be granted. This is an issue of national import because the elements and scope of similar statutes across the country are so varied.

May 22, 2019

Respectfully submitted,

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