No. 18-1182

In The
Supreme Court of the United States

SCOTT OGLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, Texas 78705

MARK WILLIAM BENNETT
Counsel of Record
BENNETT & BENNETT
917 Franklin Street,
Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

This facial-overbreadth challenge presents an irreconcilable conflict on an important constitutional question: whether the First Amendment permits harassment statutes to stretch beyond unprotected speech (such as obscenity and "true threats") to criminalize not only harassing conduct or speech integral to harassing conduct, but also *speech itself* when intended to "harass, annoy, alarm, abuse, torment, or embarrass" another person and reasonably likely to do so. *See* TEX. PENAL CODE ANN. § 42.07(a)(7). Far from being "illusory," Resp. 17, the split among state high courts is real, and it is growing. *See In re Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019).

Respondent's kitchen-sink opposition cites decisions addressing statutes much narrower than section 42.07(a)(7). And to the extent respondent's additions cover common ground with the ruling below, they reflect disagreement on the merits and, if anything, deepen the split. This facial challenge to the entirety of section 42.07(a)(7) squarely presents an important First Amendment issue, and no jurisdictional or factual obstacles preclude review. The Court should grant the petition to ensure that the First Amendment's protection of electronically communicated speech does not vary depending on where speech is communicated or received.

ARGUMENT

I. THE CONFLICT IS REAL AND GROWING.

A. The Decision Below Conflicts With A Recent Decision By The Minnesota Supreme Court.

Not only are Texas courts in conflict with the high courts of Colorado, New York, and Illinois (Pet. 13-19), but the split continues to grow. In a June 2019 opinion, the Minnesota Supreme Court considered and rejected conduct-centric arguments like those urged by respondent and accepted below. *A.J.B.*, 929 N.W.2d at 852, 859. Although Minnesota's statute was expressly framed in terms of conduct and arguably covered less protected speech than section 42.07(a)(7),[1] the court

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[1] Minnesota's statute made it a crime to "stalk" someone by "repeatedly mail[ing] or deliver[ing] or caus[ing] the delivery by any means, including electronically, of letters, telegrams, messages, packages, . . . or any communication made through any available technologies or other objects[.]" 929 N.W.2d at 849. "Stalking" means engaging "in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." *Id.*

This mens rea requirement differs slightly from section 42.07(a), allowing a conviction when the actor "has reason to know" of the specified harm (whereas Texas requires intent), but also requiring actual harm (which Texas does not require). Regardless, the court held that Minnesota's statute would be unconstitutionally overbroad even if it required actual knowledge that the specified harm would ensue. *Id.* at 857.

nonetheless held it unconstitutionally overbroad. *See id.* at 857.

The Minnesota court's analysis exposes the conceptual flaw in characterizing section 42.07(a)(7) as affecting only conduct or speech integral to proscribable conduct. Although the stalking-by-mail statute addressed "conduct," that conduct was "tethered closely" to expression. *Id*. at 851. The court explicitly rejected, as "circular," the argument that the statute permissibly prohibited only speech "integral to criminal conduct." *Id.* at 852. "It is not enough that the speech itself *be labeled* illegal conduct . . . . [I]t must help cause or threaten *other* illegal conduct . . . which may make restricting the speech a justifiable means of preventing that other conduct." *Id.* (quoting Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1011 (2016)).

Like other courts invalidating similar statutes as unconstitutionally overbroad, the Minnesota court identified examples of protected speech within the statute's sweep, such as sending letters to a city councilperson saying, "I hate your position on gun control and I will organize a campaign to unseat you!" *Id.* at 852. If the letters made "the city councilperson feel that his or her power, social standing, or self-esteem [was] in danger" and caused "the councilperson to worry or feel depressed and intimidated so as to deter the councilperson from pursuing the gun-control measure," as the constituent surely intended, those letters would "fall within the plain language of" the

statute. *Id.* Yet, "[n]o one would dispute that the constituent's letters reside at the core of protected First Amendment speech." *Id.* Those letters, if emailed, also would fall within the plain language of section 42.07(a)(7).

The Minnesota court also considered and ultimately upheld a separate mail-harassment statute after limiting the requisite intent to abuse, but not before rejecting—again—the state's "circular" argument that the mail-harassment statute covered only speech integral to criminal conduct. *Id.* at 858, 863. As the decision demonstrates, state high courts do not agree that "statutes criminalizing harassing communications target conduct, not speech." Resp. 18. The growing conflict warrants this Court's attention.

B. Respondent's Disagreements With Other Conflicting Decisions Concern The Merits, Not The Clear Split On The Issue Presented.

Both Colorado and New York had criminal harassment statutes that were functionally identical to section 42.07(a)(7): They required the same intent and prohibited the same communications. Pet. 13-16. Both high courts held those statutes unconstitutionally overbroad. Pet. 13-16. Respondent does not deny any of this. *See* Resp. 27-28. Instead, it attempts to dismiss the split because those courts "fail to perform the analysis" found in other courts' decisions that respondent prefers. Resp. 27. But any

such "failure," Resp. 28, is a merits disagreement that does not diminish those holdings that criminal harassment statutes covering the same types of communications as section 42.07(a)(7) encompass too much protected speech. Respondent does not dispute that the same communication criminalized in Texas would be protected in Colorado and New York—and that undisputed reality confirms the conflict.

Respondent's attempt to distinguish other cases is similarly unavailing. It opaquely argues (at 28) that the Illinois statute invalidated in *People v. Klick*, 362 N.E.2d 329 (Ill. 1977), could be construed as "aimed at speech" due to a "minimal intent requirement, no requirement of repeated calls, and no reasonable-person standard." Respondent's "minimal intent requirement" is unclear: The Illinois statute required an "intent to annoy," 362 N.E.2d at 330, and section 42.07(a)(7) also requires, in the disjunctive, "intent to . . . annoy." TEX. PENAL CODE ANN. § 42.07(a)(7). Respondent also does not explain how including a reasonable-person standard targets conduct rather than speech.[2]

Nor does respondent's observation that Illinois's statute lacks Texas's repeated-communication requirement signify a material difference. In Texas, anything more than one communication suffices, *see Wilson v. State*, 448 S.W.3d 418, 424 (Tex. Crim. App. 2014), and

[2] Respondent says only that Arizona and Texas courts found a reasonable-person standard "significant," without explaining the constitutionally relevant difference. Resp. 24.

respondent never explains how that requirement ensures proscription of only an insubstantial amount of protected speech. *See A.J.B.*, 929 N.W.2d at 860 (holding the repeated-mailing element irrelevant because the state "fails to explain why a requirement that the mailing or delivery occur more than once" prevents criminalization of "a significant amount of protected speech").

Respondent makes the same hollow arguments about statutes held unconstitutional by intermediate courts in Washington and Wisconsin. Resp. 28 (discussing *City of Everett v. Moore*, 683 P.2d 617 (Wash. Ct. App. 1984) and *State v. Dronso*, 279 N.W.2d 710 (Wis. Ct. App. 1979)).[3] It also argues that the Utah statute held unconstitutional in *Provo City v. Whatcott*, 1 P.3d 1113 (Utah Ct. App. 2000), differed from section 42.07(a)(7) because it included a recklessness standard for mens rea. But the Utah court did not base its decision on that standard; indeed, it gave several examples of protected speech the statute would proscribe even with a "specific intent to annoy or offend." *Id.* at 1116. None of the alleged differences affects those overbreadth holdings or otherwise diminishes the conflict on the question presented.

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[3] Respondent says the analogous statute in *Moore* "was also unconstitutionally vague," Resp. 28, but that holding addressed a different subsection. 683 P.2d at 619-20.

C. Respondent's Kitchen-Sink Effort To Diminish The Split Underscores Disagreements About First Amendment Protections That, If Anything, Broaden The Conflict.

Sweepingly asserting that "most courts" have upheld harassment statutes as targeting conduct, not speech, Resp. 18, respondent lumps in laws that expressly frame harassment in terms of conduct and are materially distinct from section 42.07(a)(7) and the other overbroad statutes at issue in the split. Far from rendering the conflict "illusory," Resp. 17, those decisions are inapposite, and, to the extent they cover common ground, deepen the conflict. At a minimum, they highlight enduring confusion among states over the dividing line between speech and conduct in the harassment context, confirming the issue's importance and need for guidance from this Court.

For example, respondent cites *Commonwealth v. Johnson*, which addresses a statute that expressly and "specifically criminalizes 'a knowing pattern of *conduct* or series of *acts*.'" 21 N.E.3d 937, 945 (Mass. 2014) (emphasis in original). While the statute also encompasses speech, *id.* at 944, the court stressed, as respondent notes (at 19), that when speech is "an integral part of conduct in violation of a valid criminal statute," First Amendment protections do not apply. *Johnson*, 21 N.E.3d at 945-46. Respondent suggests that all harassment laws fall under this umbrella, but section 42.07(a)(7) is a very different statute.

Respondent also cites high-court decisions from Florida and West Virginia, but those statutes are narrower than section 42.07(a)(7), both as to their targets (telephone calls only), and requisite intent (neither statute, for example, addresses intent to embarrass). *Compare State v. Thorne*, 333 S.E.2d 817, 819 n.4 (W. Va. 1985), *and State v. Elder*, 382 So.2d 687, 689 n.1 (Fla. 1980), *with* Pet. App. 39-40.[4] The Florida court cited its obligation to construe the statute to render it constitutional, thus requiring "a course of conduct that serves little, if any, informative or legitimate communicative function." *Elder*, 382 So.2d at 690-91. The West Virginia court said the telephone-harassment statute did not prohibit "[p]hone calls made with intent to communicate" and therefore was not overbroad. *Thorne*, 333 S.E.2d at 819-20.

Those cases are inapposite or at most indicative of enduring confusion over the speech/conduct dividing

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[4] Similarly, intermediate-appellate decisions respondent cites (at 20-21, 23) mostly address materially narrower statutes. *See City of Montgomery v. Zgouvas*, 953 So.2d 434 (Ala. Crim. App. 2006); *People v. Astalis*, 172 Cal. Rptr. 3d 568 (Cal. App. Dep't Super. Ct. 2014); *State v. Richards*, 896 P.2d 357 (Idaho Ct. App. 1995); *State v. Gattis*, 730 P.2d 497 (N.M. Ct. App. 1986). Decisions upholding statutes closer in scope to section 42.07(a)(7) merely underscore states' inconsistent treatment of the same speech. *See State v. Brown*, 85 P.3d 109 (Ariz. Ct. App. 2004); *State v. Kronenberg*, No. 101403, 2015 WL 1255845 (Ohio Ct. App. Mar. 19, 2015); Pet. 19-20 n.10. Other cases did not involve facial challenges, *von Lusch v. State*, 387 A.2d 306 (Md. Ct. Spec. App. 1978), or addressed a statute materially narrowed by a state high court. *See* Pet. 26 (discussing amendments to the Connecticut statute in *Gormley v. Dir., Conn. State Dep't of Probation*, 632 F.2d 938, 941 (2d Cir. 1980)).

line. Disagreement among states has dangerous consequences because speech may be criminalized not only where communicated, but also where received. The threat of states' inconsistent protection of the same speech is not "pure speculation," Resp. 30, but law. *See*, *e.g.*, TEX. PENAL CODE ANN. § 1.04(a); MONT. CODE ANN. § 46-2-101.

II. THIS CASE IS A GOOD VEHICLE TO ADDRESS AN IMPORTANT ISSUE.

This case squarely presents an issue of compelling constitutional importance regarding the scope of First Amendment protection when states overambitiously criminalize electronic communications. Respondent's argument that the Court cannot consider a facial challenge to section 42.07(a)(7) rests on two flawed premises: an erroneous contention that petitioner abandoned the facial challenge; and a mistaken assertion that the Court requires an as-applied prerequisite. Because there is a final state-court determination on the facial-overbreadth issue, jurisdiction lies under 28 U.S.C. § 1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-86 (1975).[5] And in exercising jurisdiction, nothing cabins the Court's review to a hypothetical, limiting construction neither the Texas legislature nor Texas courts have imposed.

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[5] Respondent's sole objection to jurisdiction under *Cox* is the false premise that petitioner challenges only "three words" in section 42.07(a)(7). Resp. 13.

Respondent's assertion that petitioner suddenly abandoned his facial challenge makes no sense. As respondent acknowledges, this case has always involved a facial challenge to all of section 42.07(a)(7). Resp. 12 n.3 ("[I]n state court, Petitioner sought to have section 42.07(a)(7) declared unconstitutional as a whole."). And as the petition confirms, nothing has changed. The question presented quotes the entire statute, and the petition expressly argues that *all of the words* in the proscription render it facially overbroad: "The statute at issue in this case prohibits any repeated electronic communication intended to 'harass, annoy, alarm, abuse, torment, embarrass, or offend another.' TEX. PENAL CODE ANN. § 42.07(a)(7). The scope of speech included in such a definition is extremely broad." Pet. 29. Moreover, the petition identified the covered speech that is not challenged—and that list includes only "'true threats,' obscenity, defamation, and fighting words." Pet. 30.

The petition highlights the statute's inclusion of speech intended and reasonably likely to annoy, embarrass, or alarm because those are the *most* sweeping types of speech targeted by section 42.07(a)(7). Those words also are identical to, or in some cases significantly broader than, words in the functionally identical statutes struck by the high courts of New York, Colorado, Illinois—and now Minnesota—on the one hand, and those upheld by Montana and Texas courts on the other hand. Emphasizing those three words cannot reasonably be

construed as abandoning petitioner's consistent facial challenge.

Respondent may prefer an edited statute, but that is not what the Texas legislature enacted; and no Texas court has limited section 42.07(a)(7) in the manner respondent discusses, despite numerous opportunities to do so. *See* Pet. App. 20-22 (Keller, P.J., criticizing the Texas Court of Criminal Appeals's repeated refusal to consider the constitutionality of section 42.07(a)(7)); Resp. 7 (discussing Texas intermediate-appellate opinions upholding section 42.07(a)(7)); *see also Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010) (upholding same language in telephone-harassment subsection, § 42.07(a)(4)). While other states' courts have used interpretive tools to confine overbroad harassment statutes to unprotected speech,[6] section 42.07(a)(7) remains in effect in its entirety. And its sweep, as Presiding Judge Keller observed, is "breathtaking." Pet. App. 21.

Opposing petitioner's facial challenge, respondent notes decisions that upheld portions of a *federal* statute,[7] contemplated a state's possible limiting construction of a four-day-old, previously unlitigated state statute,[8] and conducted an as-applied analysis prior to a facial challenge.[9] But the Court has often

[6] *See*, *e.g.*, Pet. 18 n.9, 26 n.16 (discussing Illinois's and Connecticut's limiting constructions).

[7] *Reno v. ACLU*, 521 U.S. 844 (1977).

[8] *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

[9] *Bd. of Trs. of S.U.N.Y. v. Fox*, 492 U.S. 469 (1989).

considered First Amendment facial challenges without any as-applied prerequisite,[10] and the longstanding entrenchment of Texas law on section 42.07(a)(7) makes it appropriate to consider a facial challenge to the whole provision. *Cf. City of Houston v. Hill*, 482 U.S. 451, 469-70 (1987) (hearing facial challenge to municipal statute despite the city's arguing the possibility of a limiting construction). Petitioner's facial-overbreadth challenge squarely presents an important question of First Amendment doctrine that is properly before the Court and merits immediate review.

III. SECTION 42.07(a)(7) VIOLATES THE FIRST AMENDMENT.

Respondent's comfort with prolonged uncertainty over section 42.07(a)(7), and statutes like it, cannot be squared with the Court's admonition that it is "intolerable" to leave questions about First Amendment protections in an "uneasy and unsettled constitutional posture." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). Respondent ignores the chilling effect of allowing section 42.07(a)(7) to remain in effect, suggesting that a facial challenge is unnecessary because unconstitutional prosecutions can be fixed by as-applied challenges and reversals on appeal. *See* Resp. 29-30 & n.6. But as the Court has long made clear, "[t]he assumption

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[10] *See*, *e.g.*, *United States v. Stevens*, 559 U.S. 460, 473 (2010); *United States v. Williams*, 553 U.S. 285, 292 (2008).

that defense of criminal prosecution will generally assure ample vindication of constitutional rights is unfounded" when overbroad statutes impact speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

Respondent's suggestion (at 17) that this Court "should refrain from making new law regarding the intersection of the First Amendment and the internet" without more guidance also finds no support in the Court's precedent. This hands-off approach would dangerously grant unchecked authority for states to proscribe speech in the medium for most modern communication. *See*, *e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). And nothing in section 42.07(a)(7) requires guidance from expert witnesses to determine the constitutional issue: whether the statute's language reaches a substantial amount of protected speech relative to its plainly legitimate sweep. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Beyond asserting that section 42.07(a)(7) regulates conduct, not speech, respondent devotes little effort to arguing that the statute is constitutional. It says that speech "limitations are justified to prevent intolerable intrusions into significant privacy interests," Resp. 31, but the Colorado and Illinois high courts properly rejected a First Amendment privacy exception in this context. Pet. 14-15, 18.

In positing the law's content-neutrality because words' meanings could differ based on context, Resp. 32, respondent ignores the impossibility of

determining whether speech falls under the statute without examining the speech's content. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); Pet. 32-34. And although respondent summarily states (at 33) that "section 42.07(a)(7)'s specific-intent requirement, requirement for repeated communications, and reasonable-person standard make it narrowly tailored," it fails to explain how those requirements limit prohibited speech to that "actually necessary to the solution" of the problem, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011), much less do so more effectively than narrower statutes in other states. Pet. 33-34 & n.19 (collecting alternatives).

CONCLUSION

The petition should be granted.

Respectfully submitted,

MARK WILLIAM BENNETT
Counsel of Record
BENNETT & BENNETT
917 Franklin Street,
Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
UNIVERSITY OF TEXAS
SCHOOL OF LAW
SUPREME COURT CLINIC
727 East Dean Keeton Street
Austin, Texas 78705

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