

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHERIF SAYED MAHMOUD — PETITIONER

VS.

THE STATE OF TEXAS — RESPONDENT(S)

**ON PETITION FOR A WRIT OF CERTIORARI
FROM THE COURT OF CRIMINAL APPEALS OF TEXAS;
CAUSE NO. PD-0412-19**

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QUESTION(S) PRESENTED

1. Whether Section 33.021 of the Texas Penal Code is a content-based restriction. The courts of appeals continue applying the incorrect standard of review to statutes that restrict speech based on its content.
2. Challenging the Constitutionality of Section 33.021(c) and (d) of the Texas Penal Code.

LIST OF PARTIES

The trial judge was Hon. Mary Ann Turner of the 359th District Court of Montgomery County, Texas. The parties to the order appealed from are Sherif Sayed Mahmoud and the State of Texas. Mr. Lopez was represented before the trial court by Hons. Chris Allen and Bill Patillo, 430 North Main Street, Conroe, Texas 77301-2812. He was represented in the intermediate appellate court by Hon. Richard Canlas, 300 West Davis, Conroe, Texas 77301. He was represented in the Court of Criminal Appeals by Mark Bennett, 917 Franklin Street, Fourth Floor, Houston, Texas 77002; and Lane A. Haygood, 522 North Grant Avenue, Odessa, Texas 79761. He is proceeding *in forma pauperis* in this court.

The State of Texas was represented in the trial court by Hons. Brett W. Ligon, Laura Bond, and Mary Nan Huffman, and is represented on appeal by Hons. Bigon, Adam McLane, and Jason Larman, all of the Montgomery County District Attorney's Office, 207 W. Phillips Street, Second Floor, Conroe, Texas 77301.

RELATED CASES

- Mahmoud vs. State of Texas, CCA No. PD-0412-19, Court of Criminal Appeals of Texas. Judgment entered July 24, 2019.
- Mahmoud vs. State of Texas, COA No. 09-17-00483-CR, Ninth Court of Appeals. Judgment entered April 3, 2019.
- Mahmoud vs. State of Texas, CCA No. PD-0442-16, Court of Criminal Appeals of Texas. Judgment entered October 18, 2017.
- Mahmoud vs. State of Texas, COA No. 09-15-00424-CR, Ninth Court of Appeals. Judgment entered March 30, 2016.
- State of Texas vs. Mahmoud, 14-01-00392-CR, 359th District Court of Montgomery County. Judgment entered November 29, 2017
- Leax vs. State of Texas, CCA No. PD-05147-16, Court of Criminal Appeals of Texas. Judgment entered October 18, 2017.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, the Court of Criminal Appeals of Texas, appears at Appendix A to the petition and is reported at:

<http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=a044ad71-c360-4f9f-b27e-90721b4081ee&coa=coscca&DT=PDR%20DISP&MediaID=0fe507ac-173d-45a6-8c8f-fce9d764d3c>

JURISDICTION

The date on which the highest state court, the Court of Criminal Appeals of Texas, decided my case was July 24, 2019. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE

This is a First Amendment challenge to a content-based restriction on speech, Section 33.021 of the Texas Penal Code.¹ The Ninth Court of Appeals treated this content-based restriction on speech as a restriction on conduct, and as a result applied the wrong presumption—that the statute is valid — and the wrong standard — intermediate, rather than strict scrutiny. The Court of Criminal Appeals denied the petition of discretionary review assuming that it has been addressed in Leax vs State, although in this case, unlike Leax, the record has been sufficiently developed proving that the anti-defense provisions in questions were in-fact invoked against me in court.

PROCEDURAL HISTORY

The State charged me, Mr. Mahmoud, by indictment under section 33.021(c) of the Texas Penal Code.² That statute provided in relevant part:

ONLINE SOLICITATION OF A MINOR

(a) In this section:

- (1) "Minor" means:
 - (A) an individual who represents himself or herself to be younger than 17 years of age; or
 - (B) an individual whom the actor believes to be younger than 17 years of age.
- (2) "Sexual contact," "sexual intercourse," and "deviate sexual intercourse" have the meanings assigned by Section 21.01.

¹ Tex. Penal Code § 33.021 (Pre-September 2015)

² State of Texas vs. Mahmoud, 14-01-00392-CR

(c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.

(d) It is not a defense to prosecution under Subsection (c) that:

- (1) the meeting did not occur;
- (2) the actor did not intend for the meeting to occur; or
- (3) the actor was engaged in a fantasy at the time of commission of the offense.

On September 1, 2015, Acts 2015, 84th Leg., R.S., Ch. 61 (S.B. 344), Sec. 1, eff. September 1, 2015 and Acts 2015, 84th Leg., R.S., Ch. 61 (S.B. 344), Sec. 2, eff. September 1, 2015 went into effect. The acts replaced Section 33.021 of the Texas Penal Code in which the anti-defense provisions in Section 33.021(d) specifically Section 33.021(d) 2 and Section 33.021(d) 3 were entirely deleted due to their restriction of protected speech.⁴

On September 10, 2015, Mr. Mahmoud filed a motion to quash the indictment, alleging that the indictment filed against him was unlawful because section 33.021(c) and (d) was overbroad, in violation of the First Amendment to the United States Constitution.⁵

On September 25, 2015, the trial court denied Mr. Mahmoud's motion to quash.⁶

On October 16, 2015, Mr. Mahmoud filed Notice of Appeal, Mr. Mahmoud's brief was filed on November 23, 2015. The State filed its brief on February 08, 2016.⁷

³ Tex. Penal Code § 33.021 (Pre-September 2015)

⁴ Tex. Penal Code § 33.021 (Post-September 2015)

^{5,6} State of Texas vs. Mahmoud, 14-01-00392-CR

⁷ Mahmoud vs. State of Texas, COA No. 09-15-00424-CR

On March 30, 2016 the Ninth Court of Appeals issued a memorandum opinion in Cause No. 09-15-00424CR.⁹ No motion for rehearing or en banc reconsideration was filed.⁸

On April 26, 2016, Mr. Mahmoud filed Petition for Discretionary Review.⁹

On October 18, 2017, the Court of Criminal Appeals issued an opinion in Causes CCA No. PD-0442-16¹⁰ and CCA No. PD-0517-16¹¹. The Court of Criminal Appeals stated in its decision:

“Second, although Leax’s challenge to the anti-defensive provisions are cognizable (unlike in Ingram), the claim nonetheless must fail because the record is insufficiently developed on appeal for Leax to show that any of the anti-defensive provisions in Section 33.021(d) would have been invoked against him.”¹²

....

Mr. Mahmoud’s PDR was refused for the reason that it was a pre-trial challenge and so record cannot reflect whether the anti-defense provisions will be invoked or not.¹³

On October 23, 2017, Mr. Mahmoud went to trial. The anti-defense provisions in Section 33.021(d) were invoked against him in trial. The next day, the jury convicted him.¹³

On November 29, 2017, Mr. Mahmoud was sentenced to two years in prison. He filed notice of appeal on the same day.¹⁴

On April 3, 2019, the Ninth Court of Appeals issued a memorandum opinion in Cause No. 09-17-00483-CR.⁹ No motion for rehearing or en banc reconsideration was filed.¹⁵

⁸ Mahmoud vs. State of Texas, COA No. 09-15-00424-CR

^{9,10,13} Mahmoud vs. State of Texas, CCA No. PD-0442-16

^{11,12} Leax vs. State of Texas, CCA No. PD-05147-16

^{13,14} State of Texas vs. Mahmoud, 14-01-00392-CR

¹⁵ Mahmoud vs. State of Texas, COA No. 09-17-00483-CR

On June 4, 2019, Mr. Mahmoud filed Petition for Discretionary Review.¹⁶

On July 24, 2019, the Court of Criminal Appeals issued an opinion in Cause CCA No. PD-0412-19. The Court of Criminal Appeals denied the Petition for Discretionary Review.¹⁷

REASONS FOR GRANTING THE PETITION

In *Leax v. State*¹⁸ the Court of Criminal Appeals granted review “to determine whether the statute under which Leax was convicted (and its corresponding provisions) restricted speech on the basis of its content.” And thus to determine the ultimate issue of whether the pre-September 2015 version of section 33.021(c) and (d) of the Texas Penal Code is unconstitutional.

In Leax, however, the Court of Criminal Appeals did not reach that issue because “the record [was] insufficiently developed to determine on appeal whether any of the anti-defensive provisions would have been invoked against Leax.”

Mr. Mahmoud was convicted¹⁹ under the same statute—the pre-September 2015 version of section 33.021(c) and (d) of the Texas Penal Code²⁰—as Mr. Leax. In this case, however, the record shows that the “anti-defensive” provision of section 33.021(d) was invoked against Mr. Mahmoud.²¹

^{16,17} Mahmoud vs. State of Texas, CCA No. PD-0412-19

¹⁸ Leax vs. State of Texas, CCA No. PD-05147-16

^{19,21} State of Texas vs. Mahmoud, 14-01-00392-CR

²⁰ Tex. Penal Code § 33.021 (Pre-September 2015)

At trial, starting with jury selection, the State of Texas began to invoke against Mr. Mahmoud the “anti-defensive provisions” of Section 33.021(d) as the law was written prior to the September 2015 amendment:

Some things that are not a defense. The offense of online solicitation of a minor happens the moment the person solicits the minor over the Internet for sex. The moment a message is sent—it says, Hey, I want to meet you at your house and I want to engage in X, Y, Z, the offense is committed. Okay. I don’t have to prove that a meeting occurred. I don’t have to prove that anybody showed up to meet anybody. The offense happens the moment somebody on a keyboard says, I’m going to meet you at the park, and we’re going to engage in X, Y, Z.

Who here says, Laura, I need a little bit more. Like, they’ve got to show up? I got to really know they’re going to follow through with it?

Anybody I see noes, but I don’t see any yeses.

Questions? Okay.

It’s not an offense that the actor didn’t intend for the meeting to occur. Hey, I’m going to meet you at the park and we’re going to have sex, but I didn’t really mean that. Okay. That’s not a defense. The moment the solicitation happens and you’re soliciting a minor for sex is when the offense is committed.

Okay. And it’s not a defense if the actor was engaged in some type of fantasy. It wasn’t real. That’s just something I’m in to. I wasn’t really going to do. I just like talking about it. Okay. That’s not a defense.

....

In addition, the trial court invoked the “anti-defensive provisions” with its written charge and reading of charge to the jury:

It is not a defense to prosecution for online solicitation of a minor that the meeting did not occur, that the actor did not intend for the meeting to occur, or that the actor was engaged in a fantasy at the time of commission of the offense.

....

^{22,23} Mahmoud vs. State of Texas, CCA No. PD-0412-19

Because this case²⁴ presents the issue of the constitutionality of section 33.021(c) and (d), the same issue presented by Leax²⁵, but in this case with a fully developed record, the Court of Criminal Appeals should have granted review for the same reasons it granted review in Leax.

ARGUMENT

The Supreme Court's modern (since 2010) approach to content-based restrictions is illustrated in Appendix H.

Section 33.021 restricts speech.

The first inquiry under that modern approach is whether the statute restricts "speech," which includes expressive or communicative conduct.²⁶

Offers to engage in illegal transactions are excluded from First Amendment protection, but not because they are "conduct" or "not speech." They are unprotected speech because of their "constitutionally proscribable content."²⁷

²⁴ Mahmoud vs. State of Texas, CCA No. PD-0412-19

²⁵ Leax vs. State of Texas, CCA No. PD-05147-16

²⁶ Ex Parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014); State v. Johnson, 475 S.W.3d. 860 (Tex. Crim. App. 2015); see also Scott v. State, 322 S.W.3d 662, 670 (Tex. Crim. App. 2010) (discussing whether harassment statute was susceptible of application to "communicative conduct").

²⁷ Ex parte Lo, 424 S.W.3d (Tex. Crim. App. 2013)

The language quoted within the Lo *dictum* (“offers to engage...”) originated in *United States v. Williams*, which went on to say, “Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech ... that is intended to induce or commence illegal activities.”²⁸ So offers to engage in illegal transactions are, in the rest of the United States, still speech.

Even in Texas—indeed, even in Lo—the Court of Criminal Appeals recognized that the solicitation of minors, like obscenity and child pornography, is speech:

The State may not justify restrictions on constitutionally protected speech on the basis that such restrictions are necessary to effectively suppress constitutionally unprotected speech, such as obscenity, child pornography, or the solicitation of minors.

²⁹
....

Actual solicitation is unprotected speech. But the fact that some of the speech that Section 33.021(c)³⁰ forbids is unprotected is not the end of the inquiry: courts must ask whether, because of the definitions in Section 33.021(a) and the exclusions of inferential-rebuttal defenses in Section 33.021(d) the statute also forbids a substantial amount of protected speech—speech other than actual solicitation.

²⁸ *U.S. v. Williams*, 553 U.S. 285, 298 (2008) (emphasis added)

²⁹ *Ex parte Lo*, 424 S.W.3d (Tex. Crim. App. 2013)

³⁰ Tex. Penal Code § 33.021 (Pre-September 2015)

Section 33.021 does not restrict only commercial speech.

Where a statute restricts only commercial speech, it is subject to only intermediate scrutiny. Such is not the case here.³¹

Section 33.021 is a content-based restriction.

Where, as here, a statute³² restricts noncommercial speech, the next inquiry is whether the statute restricts the speech (including expressive or communicative conduct) based on its content.

Section 33.021³³ restricts communications—things happening “over the Internet, by electronic mail or text message or other electronic message service or system.”

To determine whether a person has violated Section 33.021³⁴, a fact-finder must look at the content of a communication from that person to a “minor.” Because it is necessary to look at the content of the communication to decide if the speaker violated the law, Section 33.021’s restriction is content-based.³⁵

The statute’s restriction is also content-based because liability depends on the topic discussed (meeting for sex),³⁶ the function or purpose of the speech (to arrange a meeting for sex),³⁷ the ideas or views expressed (that the defendant would like to meet for sex),³⁸ the subject matter (sex),³⁹ and the “thought underlying” the communication (thoughts, whether real or fantasy, of meeting children for sex).⁴⁰

^{31,32,33,34} Tex. Penal Code § 33.021 (Pre-September 2015)

^{35,38} Ex Parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014)

³⁶ Reed v. Town of Gilbert, Ariz., 476 U.S., 135 (2015), S.Ct. 2218

³⁷ Reed v. Town of Gilbert, Ariz., 476 U.S., 135 (2015), S.Ct. 2227

³⁹ Hill v. Colorado, 530 U.S. 703, 723 (2000)

⁴⁰ See Ex Parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014) (holding a portion of section 21.15 of the Texas Penal Code content-based because it discriminated on the basis of the underlying sexual thought)

Because Section 33.021 is a content-based restriction on speech, it is presumptively invalid.

Content-based restrictions on speech are presumptively invalid:

[W]hen the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. Content-based regulations ... are presumptively invalid, and the government bears the burden to rebut that presumption.

⁴¹
....

Section 33.021 fails strict scrutiny

A content-based restriction that is not the least restrictive means of restricting unprotected speech fails strict scrutiny. See Thompson, 442 S.W.3d at 344.⁴²

In the oral argument of Leax vs. State⁴³, the State represented by Hon. Jason Larman agrees that the pre-2015 version of Section 33.021(c)⁴⁴ is not the least restrictive evidenced by the fact that the post-2015⁴⁵ of the same law has completely removed parts (d) 2 and (d) 3 yet is sufficient to protect the citizens against these types of crimes. The state argues that these anti-defense provisions have never and will not be used against any defendant in the court of law. It adds in its argument that since the statute has been changed it no longer restricts protected speech.⁴⁶

⁴¹ Ex parte Lo, 424 S.W.3d (Tex. Crim. App. 2013)

⁴² Ex Parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014)

⁴³ Leax vs. State of Texas, CCA No. PD-05147-16

^{44,46} Tex. Penal Code § 33.021 (Pre-September 2015)

⁴⁵ Tex. Penal Code § 33.021 (Post-September 2015)

The State erred in its statement that these anti-defense provisions are never invoked in trial courts. The very same provisions were invoked in trial against Mr. Mahmoud on October 23, 2017,⁴⁶ a year and a half after the oral argument in Leax case⁴⁷. The anti-defense provisions were invoked⁴⁸ by the same District Attorney office that on February 15, 2017 stated that they are aware that Section 33.021 (d) 2 and Section 33.021 (d) 3 criminalized protected speech, but claimed to have no intention to invoke in trial against any defendant.⁴⁹

In addition, the state's argument that changing the law ends the effect of the overbroad Pre-2015 Statute⁵⁰ is also incorrect. The statute of limitations does not limit when a person is to be charged for sex crimes. The old statute⁵¹ can still be applied on any citizen to criminalize any old communication with a minor that occurred before September 1, 2015.

The State can at any time charge an adult for any communication he had with a minor claiming that the adult meant to solicit a minor but the adult cannot use the fact that the communication makes no such prove of intention to his defense as restricted by the anti-defense provisions. By invoking the anti-defense provisions⁵⁰ the statute represents a threat to the society of being criminalized for any protected speech they have had before September 1, 2015.

^{46,48} State of Texas vs. Mahmoud, 14-01-00392-CR

^{47,49} Leax vs. State of Texas, CCA No. PD-05147-16

⁵⁰ Tex. Penal Code § 33.021 (Pre-September 2015)

CONCLUSION

The Court of Criminal Appeals lost its way when it rejected to review section 33.021⁵¹ once the undeniable proof that the state does invoke the pre-2015 anti-defense provisions⁵² there by contradicting the same courts previous ruling in Leax vs. State.⁵³

Because Section 33.021⁵⁴ is a content-based restriction on speech, it is presumptively invalid and the State has the burden of rebutting that presumption by showing that the statute satisfies strict scrutiny. This Court should find section 33.021 of the pre-2015 Texas Penal Code⁵⁵ overbroad and void the statute.

Respectfully submitted,

Sherif Sayed Mahmoud

Sherif Sayed
(Signature)

10/11/18
(Date)

⁵¹ Mahmoud vs. State of Texas, CCA No. PD-0412-19

⁵² State of Texas vs. Mahmoud, 14-01-00392-CR

⁵³ Leax vs. State of Texas, CCA No. PD-05147-16

^{54,55} Tex. Penal Code § 33.021 (Pre-September 2015)