No. 22-___

In the

Supreme Court of the United States

CHARLES BARTON and NATHAN SANDERS,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

JOINT PETITION FOR WRIT OF CERTIORARI

Edward G. Jones
Tobias Xavier Lopez
1319 Ballinger Street
Fort Worth, Texas 76102

Lane A. Haygood
3800 E. 42nd Street
Suite 110
Odessa, Texas 79762

Rusty Gunter
1213 Avenue K
Lubbock, Texas 79401

Mark W. Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002

David A. Schulz
Counsel of Record
Stephen Stich
Kelsey Eberly
Rachel Davidson
MEDIA FREEDOM AND
INFORMATION ACCESS
CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 436-5827
david.schulz@yale.edu

QUESTIONS PRESENTED

In *Snyder v. Phelps,* this Court held that speech on matters of public concern cannot be punished "simply because it is upsetting or arouses contempt," even when the speaker intends to annoy, harass or alarm. 562 U.S. 443, 458 (2011). Many other decisions of this Court hold the same.

The Texas Court of Criminal Appeals nonetheless held that a criminal prohibition in Texas Penal Code § 42.07(a)(7) against "electronic communications" repeatedly sent with the intent and likely result to "harass, annoy, alarm, abuse, torment, embarrass, or offend" the recipient punishes "conduct," does not implicate the First Amendment, and is not subject to any overbreadth analysis, even though the court construed the law as applying to "expressive speech" sent with an "intent to engage in the legitimate communication of ideas."

The questions presented are:

1. Does the criminalization of expressive electronic communications in Texas Penal Code § 42.07(a)(7) implicate the First Amendment?

2. Is Texas Penal Code § 42.07(a)(7) unconstitutionally overbroad?

PARTIES TO THE PROCEEDING

Petitioners Charles Barton and Nathan Sanders petition jointly from separate judgments issued by the Court of Criminal Appeals of Texas.

Barton was the applicant for a writ of habeas corpus in the Tarrant County, Texas, County Criminal Court No. 8, the appellant at the Second Court of Appeals of Texas, and the respondent at the Court of Criminal Appeals. Respondent State of Texas opposed Barton's habeas application in the county court, was the appellee at the Second Court of Appeals, and was the petitioner at the Court of Criminal Appeals.

Sanders was the applicant for a writ of habeas corpus in the Lubbock County, Texas, County Criminal Court No. 1, the appellant in the Seventh Court of Appeals of Texas, and the petitioner at the Court of Criminal Appeals. Respondent State of Texas opposed Sanders's habeas application in the county court, was the appellee at the Seventh Court of Appeals, and was the respondent at the Court of Criminal Appeals.

RELATED PROCEEDINGS

Court of Criminal Appeals of Texas:

> *Ex Parte Barton*, No. PD-1123-19, (Tex. Crim. App. Apr. 6, 2022) (to be reported at --- S.W.3d ---; available at 2022 WL 1021061);
>
> *Ex Parte Sanders*, No. PD-0469-19 (Apr. 6, 2022) (to be reported at --- S.W.3d ---; available at 2022 WL 1021055).

Second Court of Appeals of Texas:

Ex Parte Barton, No. 02-17-00188-CR, (Tex. App. Oct. 3, 2019) (reported at 586 S.W.3d 573);

Ex Parte Barton, No. 02-17-00188-CR, (Tex. App. Aug. 8, 2019) (withdrawn and superseded on denial of rehearing).

Seventh Court of Appeals of Texas:

Ex Parte Sanders, No. 07-18-00335-CR (Apr. 8, 2019) (unpublished; available at 2019 WL 1576076).

Tarrant County Criminal Court No. 8, Tarrant County, Texas:

State v. Barton, No. 1314404, Rec. Doc. No. 63 (May 18, 2017) (unpublished) (order denying application for writ of habeas corpus).

Lubbock County Criminal Court No. 1, Lubbock County, Texas:

State v. Sanders, No. 2015-484,541, Rec. Doc. No. 94 (Aug. 20, 2018) (unpublished) (order denying application for writ of habeas corpus and motion to quash information).

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INTRODUCTION

A 5-4 majority of the Texas Court of Criminal Appeals held that a law punishing "electronic communications" repeatedly sent with the intent to "harass, annoy, alarm, abuse, torment, or embarrass" is a regulation of conduct, "not speech," and does not implicate the First Amendment. App.44a. Even though the court construed the law to apply to the repeated sending of expressive communications with the "intent to engage in the legitimate communication of ideas," the court found no First Amendment issue presented and refused to conduct an overbreadth analysis. App.11a-12a; App.17a; App.61a.

A speaker's disfavored intent does not categorically remove speech from the First Amendment's reach: this Court has held that the First Amendment protects intentionally harassing protests at funerals, alarming cross-burning, and embarrassing satire. Yet the Texas court found no First Amendment analysis warranted for a law that criminalizes intentionally harassing, alarming or embarrassing electronic communications because a person *could* violate the law by repeatedly sending emails, text messages, and the like with no communicative content. This conclusion is confounding and concerning.

The Texas law does not primarily punish conduct; it punishes speech. It does so primarily based on the *content* of a communication, which will typically determine whether a message is alarming, embarrassing, or in any of the other proscribed

categories. And the law, as construed by the Texas court, encompasses communications made with the intent to engage in the "legitimate communication of ideas." App.11a-12a. So construed, the law necessarily triggers First Amendment scrutiny under this Court's precedent. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

The law not only implicates the First Amendment, it plainly violates this Court's overbreadth doctrine. While Petitioners brought a facial overbreadth challenge, the Texas court refused to take it up after finding no First Amendment question presented. Yet the court construed the law definitively and there is no question that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010).

Allowing such a broad law to stand would open a Pandora's box of unreviewable First Amendment harms, including self-censorship and discriminatory enforcement against unpopular groups and speech. Core First Amendment activity like political advocacy and religious preaching is now vulnerable to prosecution in Texas whenever it is done online. Whether or not the authorities often prosecute such speech, the chill is real. The First Amendment cannot tolerate such an outcome.

Troublingly, the Court of Criminal Appeals is not alone in its confusion over the proper application of First Amendment precedent to online speech. While

most state courts of last resort and federal courts of appeal apply First Amendment scrutiny to laws criminalizing online communications made with some disfavored intent, a number of courts, like the Court of Criminal Appeals, do not. And even those courts that recognize the First Amendment issue presented by online harassment laws do not agree on a proper overbreadth analysis. This confusion over basic First Amendment principles in cyberspace warrants review by this Court.

Twenty-five years ago in *Reno v. ACLU*, the Court noted the Internet's "extraordinary growth." 521 U.S. 844, 850 (1997). That growth has since been exponential. Today, most Americans use the Internet every day to talk politics and religion, coordinate their families' daily affairs, and connect with friends. It is "the most important place[] . . . for the exchange of views," including views on matters of public concern. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Like all speech, online speech is sometimes annoying, embarrassing, alarming, or otherwise unpleasant—and often intentionally so. Criminal penalties for unwelcome speech will inhibit robust dialogue on our primary means of communication. The issue presented is of exceptional significance, and the Court should grant *certiorari*.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' opinion in *Ex Parte Barton* is available at --- S.W.3d ---, No. PD-1123-19, 2022 WL 1021061 (Tex. Crim. App. Apr. 6, 2022). The opinion of the Texas Court of Appeals, Fort

Worth, in *Ex Parte Barton* is available at 586 S.W.3d 573 (Tex. App. 2019). The May 18, 2017 order of the Tarrant County Criminal Court No. 8, denying Barton's application for habeas corpus is unpublished.

The Texas Court of Criminal Appeals opinion in *Ex Parte Sanders* is available at --- S.W.3d ---, No. PD-0469-19, 2022 WL 1021055 (Tex. Crim. App. Apr. 6, 2022). The opinion of the Texas Court of Appeals, Amarillo, in *Ex Parte Sanders* is unpublished and is available at 2019 WL 1576076 (Tex. App. Apr. 8, 2019). The August 20, 2018 order of the Lubbock County Criminal Court No. 1, denying Sanders's application for habeas corpus is unpublished.

JURISDICTION

The Texas Court of Criminal Appeals issued its opinion in each Petitioner's case on April 6, 2022. App.17a; App.61a. The Court of Criminal Appeals denied Barton's timely petition for rehearing on June 2, 2022, and denied Sanders' timely petition for rehearing on June 29, 2022. App.105a; App.106a. On August 18, 2022 and September 8, 2022, Justice Alito granted applications extending each Petitioner's time to file a petition for writ of certiorari to and including October 6, 2022. *See Barton v. Texas*, No. 22A138 (Sup. Ct. Aug. 18, 2022); *Sanders v. Texas*, No. 22A207 (Sup. Ct. Sept. 8, 2022). On September 28, 2022, Justice Alito granted applications further extending each Petitioner's time to file a petition for writ of certiorari to and including November 4, 2022. *See Barton v. Texas*, No. 22A138 (Sup. Ct. Sept. 28, 2022);

Sanders v. Texas, No. 22A207 (Sup. Ct. Sept. 28, 2022).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

Texas Penal Code § 42.07(a)(7) states in relevant part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> . . .
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

STATEMENT OF THE CASE

A. Trial Courts Deny Petitioners' Facial Challenges to § 42.07(a)(7)

Petitioners Charles Barton and Nathan Sanders were each charged by information with violating Texas Penal Code § 42.07(a)(7). A person violates this law by sending repeated "electronic communications" with an "intent to harass, annoy, alarm, abuse, torment, or embarrass another" and with the reasonable likelihood of having the intended effect, or of simply "offend[ing]." *Id.* The law defines an "electronic communication" broadly to include any writing, images, sounds, data or "intelligence of any nature" that is "transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." *Id.* § 42.07(b)(1). This definition includes communications made through "electronic mail, instant message, . . . text message, a social media platform or application, an Internet website, [or] any other Internet-based communication tool." *Id.*

Petitioners' charges are not related: Barton was charged in Tarrant County for acts allegedly committed in 2012; Sanders was charged in Lubbock County for acts allegedly committed in 2015. App.132a; App.136a. Neither information identified the content of the alleged electronic communications, specifying only the date, recipient, and type of communication. Barton was alleged to have sent "text message or email communications," App.132a; Sanders was charged with "telephone calls, text

messages, social media messages, handwritten letters, and in person communication," App.136a.

Each Petitioner moved to quash the information and applied for a pre-trial writ of habeas corpus.[1] Barton's motion to quash challenged § 42.07(a)(7) as "facially unconstitutional" because it is "overly broad and chills the protected speech of the First Amendment." App.108a. His habeas application raised the same facial constitutional challenge. App.111a-112a. Sanders sought both forms of relief simultaneously and also challenged the statute as "substantially overbroad" and thus facially "invalid under the First Amendment." App.121a-122a.

Both trial courts denied Petitioners' motions to quash and habeas applications. App.99a; App.101a; App.104a.

B. Intermediate Appellate Courts Disagree on the Constitutionality of § 42.07(a)(7)

Barton and Sanders appealed the denials of habeas corpus to the Texas Courts of Appeals for the Second and Seventh Districts, respectively. The courts issued conflicting decisions.

The Second District unanimously reversed. It rejected Respondent's argument that Barton had waived his overbreadth challenge and found the challenge meritorious. The court held that

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[1] In Texas, criminal defendants may, by pre-trial applications for habeas corpus, raise facial constitutional challenges to statutes under which they are charged. *See Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

§ 42.07(a)(7) "affects protected speech" because it is possible to violate the law while "inten[ding] to engage in the legitimate communication of ideas, opinions, information, or grievances." App.74a-75a. By way of example, the court noted that a parent could violate the law by sending "repeated text messages to [a] teenage child asking the teenager to mow the lawn." App.74a n.12. Because § 42.07(a)(7) "has the potential to reach a vast array of communications," the court struck it down as "vague and overbroad," and dismissed Barton's prosecution. App.83a; App.86a.

The Seventh District held to the contrary and affirmed. The majority held that the repeated electronic communications proscribed by § 42.07(a)(7) "are not protected speech under the First Amendment because they invade the substantial privacy interests of the victim 'in an essentially intolerable manner.'" App.97a (quoting *Scott v. State*, 322 S.W.3d 662, 670 (Tex. Crim. App. 2010)). This ruling was based on the Court of Criminal Appeals' decision in *Scott* upholding the Texas telephonic harassment law, Tex. Penal Code § 42.07(a)(4), which criminalizes repeated phone calls made with the same intent and likely effect as required by § 42.07(a)(7). Because both laws "require for guilt that the repeated communications occur 'in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another,'" the Seventh District followed *Scott*. App.92a (quoting Tex. Penal Code § 42.07(a)). The court held that § 42.07(a)(7) does not violate the First Amendment and upheld the statute without conducting an overbreadth analysis.

Chief Justice Quinn concurred that upholding § 42.07(a)(7) was dictated by *Scott*, but "invite[d] the Court of Criminal Appeals to reconsider the majority opinion in *Scott*" due to his "fears" that it created the potential for criminal convictions resulting from "one's exercise of First Amendment rights." App.97a n.6.

C. A Closely Divided Court of Criminal Appeals Holds that the Law's Prohibition of "Expressive Speech" Is Not Subject to First Amendment Scrutiny

The Court of Criminal Appeals granted petitions for discretionary review in both cases. By a 5-to-4 vote, it reversed in *Barton* and affirmed in *Sanders* on the ground that the intentional conduct proscribed by § 42.07(a)(7) does not implicate the First Amendment and is thus not susceptible to a facial overbreadth challenge. App.4a; App. 17a; App.61a.

The five-judge majority based its holding on the fact that § 42.07(a)(7) uses the same language to define the proscribed conduct as used in the telephone harassment law, and *Scott* held that the conduct proscribed by the telephone harassment law "is not speech." App.44a. The majority reasoned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." App.47a (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

The majority acknowledged that § 42.07(a)(7) on its face applies to "traditional categories of communication" such as "a writing, an image, and a sound," App.59a, but found this irrelevant. According to the majority, laws like § 42.07(a)(7) do not implicate the First Amendment, even when applied to expressive activities undertaken with an "intent to engage in the legitimate communication of ideas," if a disfavored intent is also required, for example, the intent to "annoy" or "alarm" required by § 42.07(a)(7). App.12a. In the majority's view, an intent to communicate "does not convert non-expressive conduct into expressive conduct." App.12a. The majority also noted that one could violate the statute without expressing anything, "by the repeated sending of communications containing no speech at all," or sending "computer code . . . entirely indecipherable and meaningless to humans." App.59a; App.60a. It thus refused to apply any First Amendment scrutiny because "[t]he statute is equally violated by the repeated sending of communications containing expressive speech as it is by the repeated sending of communications containing no speech at all." App.59a.

The majority acknowledged the principle that a law regulating "speech in a category traditionally outside the protection of the First Amendment nevertheless still implicates the First Amendment," but found this principle inapplicable given its conclusion that the conduct regulated by § 42.07(a)(7) "is noncommunicative." App.44a. The majority thus declined to undertake any First Amendment scrutiny

because § 42.07(a)(7) addresses "non-speech conduct that does not implicate the First Amendment." App.14a.

Four judges dissented. Writing for herself and Judge Keel,[2] Presiding Judge Keller disputed the majority's conclusion that the statute does not regulate speech, noting that "[t]he term 'electronic communications' alone suggests that the regulated conduct is speech" and that the statutory definition of that term "makes it clear that the regulated conduct is indeed speech." App.21a. The dissent agreed that the First Amendment does not protect every act that has a kernel of expressive activity, but found this observation irrelevant to § 42.07(a)(7), a law specifically "concerned with *communications*" and in particular the "inherently communicative aspect of electronic communications." App.23a (emphasis in original).

The dissenters also took issue with the majority's observation that one could violate the statute without communicating anything, such as by sending "data [that] could be meaningless." App.24a. These possibilities do not negate the First Amendment entirely, the dissent objected, but instead are properly part of an assessment of whether the law "reaches a substantial amount of First Amendment conduct in relation to its legitimate sweep," rendering it overbroad. App.24a.

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[2] Judges Slaughter and McClure dissented without opinion.

The dissent next underscored the "truly enormous amount of speech" encompassed by § 42.07(a)(7). App.25a. It observed that the law's intent requirement does not limit its broad application to First Amendment protected speech because alarming, annoying, or embarrassing someone "could be the point of the communication." App.25a-26a. The dissent provided several examples of such speech subject to potential prosecution under § 42.07(a)(7):

- A citizen could intend to "alarm" others by drawing attention to a devastating judicial decision. Presiding Judge Keller noted that her own dissenting opinion could be a crime. App.20a.
- As in the Bible's parable of the persistent widow, a citizen could repeatedly petition an unjust judge to "annoy" them into granting relief. App.26a (citing Luke 18:1-5).
- A journalist could intend to "embarrass" a politician by repeatedly exposing their indiscretions, as in Andrew Breitbart's coverage of Anthony Weiner. App.26a.

Given their conclusion that § 42.07(a)(7) implicates the First Amendment, the dissent proceeded to conduct the overbreadth analysis that the majority found unwarranted. Because the statute "punishes a substantial amount of protected speech in relation to its legitimate sweep," the dissenters would declare the law unconstitutional on its face. App.28a.

Both Petitioners timely moved for rehearing. The court denied both petitions over Presiding Judge Keller's dissent. App.105a; App.106a.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT'S HOLDINGS DEFY THIS COURT'S FIRST AMENDMENT PRECEDENTS IN MULTIPLE RESPECTS

The Court of Criminal Appeals held that a law criminalizing the repeated sending of electronic communications with the intent and likely effect "to harass, annoy, alarm, abuse, torment, or embarrass" the recipient does not implicate the First Amendment. Tex. Penal Code § 42.07(a)(7). This holding, and the court's refusal to entertain a facial overbreadth challenge, directly contradict this Court's First Amendment precedents in multiple respects.

Simply put, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). The Court should grant *certiorari* because the holding and rationale of the Texas rulings defy this Court's precedents.

A. This Court Has Squarely Rejected Each of the Texas Court's Rationales for Refusing to Apply First Amendment Scrutiny to § 42.07(a)(7)

The Texas court offered three reasons for declining to subject § 42.07(a)(7) to First Amendment scrutiny. Each contradicts holdings of this Court defining the proper scope and application of the First Amendment.

1. This Court has rejected the proposition that online speech made with a disfavored intent does not implicate the First Amendment

In refusing to apply First Amendment scrutiny to § 42.07(a)(7), the Court of Criminal Appeals rejected the fundamental principles that laws criminalizing expressive communications are subject to First Amendment scrutiny, even if they only punish speech made with a disfavored intent, and that online speech is not exempt from this First Amendment scrutiny.

The Texas court recognized that § 42.07(a)(7) on its face applies to electronic communications made with the "intent to engage in the legitimate communication of ideas." App.12a. It nevertheless found the First Amendment inapplicable because the law requires a communication to be sent with a disfavored intent, specifically an intent to "harass, annoy, alarm, abuse, torment, or embarrass." The requirement of a disfavored intent, the court held, means that § 42.07(a)(7) "does not implicate the First Amendment," even if the speech sent with a disfavored intent concerns a public figure or a matter of public concern. App.14a.

The Texas court's holding squarely contradicts decades of this Court's precedents requiring First Amendment scrutiny of laws punishing speech made with a disfavored intent.

More than fifty years ago, in *Cohen v. California*, the Court held a statute prohibiting "maliciously and willfully disturb[ing] the peace or quiet of any

neighborhood or person . . . by . . . offensive conduct" unconstitutional as applied to the defendant, who wore a jacket saying "Fuck the Draft" in a courtroom. 403 U.S. 15, 16, 26 (1971). The First Amendment applied to Cohen's expression, even if the message was "maliciously and willfully" conveyed with an intent to disturb the peace.

In *Hustler Magazine, Inc. v. Falwell*, the Court considered a First Amendment challenge to a tort action brought against a publisher for its intentionally offensive parody of a famous minister's sex life. 485 U.S. 46, 50 (1988). The Court unanimously held that a public figure cannot prevail in an intentional infliction of emotional distress claim absent a showing of actual malice. *Id.* at 56. *Falwell* rejects the proposition that a communication made with an intent to inflict emotional distress is exempt from any First Amendment scrutiny. "[W]hile such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law . . . the First Amendment prohibits such a result in the area of public debate about public figures." *Id*. at 53.

In *R.A.V. v. City of St. Paul*, the Court applied First Amendment scrutiny to a law banning cross-burning, even though it applied only if the action was intended or likely to arouse "anger, alarm or resentment"—construed as fighting words—"on the basis of race, color, creed, religion or gender." 505 U.S. 377, 380 (1992). The intent requirement did not preclude First Amendment review, and the law was facially unconstitutional because it made the prohibited speech a "vehicle[] for content

discrimination unrelated to" the reason the speech was proscribed. *Id*. at 383-84, 391.

Again, in *Snyder v. Phelps*, the Court held 8-1 that the First Amendment bars intentional infliction of emotional distress liability for speech on matters of public concern, even when that speech is *intended* to annoy, harass, or alarm its recipient. 562 U.S. 443, 460-61 (2011). The Court rejected liability for protestors with signs such as "God Hates Fags" who sought to disrupt military funerals. *Id.* at 448. "Such speech," the Court held, "cannot be restricted simply because it is upsetting or arouses contempt." *Id*. at 458.

The Texas court flouted these precedents in holding that a law criminalizing the repeated sending of expressive communications is not subject to *any* First Amendment scrutiny if sent with a disfavored intent. The implications of this holding are nonsensical and disturbing. A person can wear an intentionally annoying "Fuck the Draft" jacket in a courtroom but could not repeatedly email those words to an elected representative with an intent to annoy as a means of protesting the Selective Service system. A protester is free to abuse a grieving family member of a fallen solider by picketing near a funeral but could be punished for repeatedly posting pictures of funeral protests on Facebook or Twitter, or emailing them to the Secretary of Defense. The only distinction is the medium of the communication, but that distinction is without a difference.

A generation ago, this Court decided that electronic communications are protected speech. In *Reno v. ACLU*, the Court struck down portions of a statute that criminalized the use of an "interactive computer service" to display a "patently offensive" "communication," holding that the same settled First Amendment principles apply to communications online. 521 U.S. 844, 860 (1997); *see also Ashcroft v. ACLU*, 542 U.S. 656, 661, 673 (2004) (concluding that a law prohibiting the posting online of certain materials "harmful to minors" was likely unconstitutional and affirming the lower court's entry of preliminary injunction); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (subjecting to First Amendment scrutiny a law prohibiting sex offenders from using social media).

Every time the Court has addressed a law punishing online speech, there have been reasonable grounds to disagree about the answer to the First Amendment question presented. *See Reno*, 521 U.S. at 886 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Ashcroft*, 542 U.S. at 676 (Scalia, J., dissenting); *id.* at 676 (Breyer, J., dissenting); *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment). But in every case, all have agreed there was a First Amendment question to be asked.

The Texas court defied these precedents by refusing even to *apply* any First Amendment analysis to § 42.07(a)(7). App.2a.

2. This Court has rejected the proposition that a law restricting speech does not implicate the First Amendment if it can be violated without communicating anything

The Texas court contradicted this Court's precedents in another fundamental way. It acknowledged that § 42.07(a)(7) does penalize "expressive speech," but nonetheless declined to apply First Amendment scrutiny because one *could* violate it without actually communicating anything. The court explained that one could, for example, "send[] several e-mails containing only the letter 'B' . . . or e-mails containing nothing" and thus concluded that the statute essentially prohibits conduct rather than speech. App.59a-60a. This Court has previously rejected this very rationale for avoiding First Amendment scrutiny.

City of Houston v. Hill holds that laws facially proscribing speech implicate the First Amendment even if they also reach some non-expressive conduct, like the Texas law here. In *Hill,* a city ordinance made it unlawful to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." 482 U.S. 451, 455 (1987). The Court flatly rejected Houston's argument that "the ordinance does not inhibit the exposition of ideas," and held that it "deals not with core criminal conduct, but with speech." *Id*. at 459-60. Even though some convictions resulted from the non-expressive conduct of disobeying an officer's order to leave the scene, this Court found the law facially overbroad. *See id.* at 467;

see also Hill v. City of Houston, 789 F.2d 1103, 1113 (5th Cir. 1986) (en banc) (appendix containing examples of convictions under the ordinance), *aff'd*, 482 U.S. 451 (1987).

Conversely, this Court has held repeatedly that laws facially regulating *conduct* nevertheless implicate the First Amendment when they can also apply to expression. In *McCullen v. Coakley*, for example, the Court invalidated on First Amendment grounds a statute imposing a 35-foot buffer zone outside abortion facilities. 573 U.S. 464, 469, 497 (2014). One could imagine non-expressive violations less farfetched than repeatedly sending emails with only the letter "B"—for instance, sitting on a bench within the zone and minding one's own business. Yet such hypothetical applications did not obviate the need to conduct a First Amendment analysis on a facial challenge to the law. The Court has also subjected statutes regulating conduct to as-applied scrutiny when expressive conduct is restricted. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 375 (1968) (law prohibiting the burning of draft cards that "on its face deals with conduct having no connection with speech"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010) (law proscribing "material support" for terrorists, which "most often does not take the form of speech").

Attempting to justify its departure from this precedent concerning laws restricting expressive conduct, the Texas court cited four inapposite cases holding that the First Amendment did not apply to laws regulating conduct that had no significant

expressive component. *See* App.47a-52a. In three of the cases, the challenged statute prohibited *only* non-expressive conduct. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (prostitution and its solicitation "manifests absolutely no element of protected expression"); *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 64 (2006) (refusing to allow military recruiters onto a campus "is not inherently expressive"); *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126, 127 (2011) (declining to apply the First Amendment to a recusal statute because "the act of voting symbolizes nothing"). In the fourth case, *Virginia v. Hicks,* this Court reversed a finding of substantial overbreadth but did not dispute that the challenged policy implicated the First Amendment. 539 U.S. 113, 124 (2003). None of these cases support the Texas court's refusal to undertake *any* First Amendment analysis of § 42.07(a)(7).

If laws restricting *conduct* that can be read to apply to expressive activities implicate the First Amendment, *a fortiori* a law restricting *communications* implicates the First Amendment even if it can be read to apply to non-expressive conduct. And even if the Texas law could be viewed as a facial restriction of conduct, the Texas court's acknowledgment that it also applies to "expressive speech," App.59a, necessarily compels a First Amendment analysis under the established precedent of this Court.

3. This Court has rejected the proposition that a law imposing sanctions based on the content of a communication does not implicate the First Amendment

The Texas court's holding contravenes this Court's precedent in still another fundamental respect. To find no First Amendment issue presented, the court relied on its earlier decision upholding a law criminalizing the act of repeatedly causing a person's telephone to ring or repeatedly making anonymous telephone calls with the same intent and effect as required by § 42.07(a)(7). App.53a-59a. In *Scott v. State*, the court found the regulated telephone conduct "essentially noncommunicative" because the "usual case" of a violation would be a person having no "intent to engage in the legitimate communication of ideas, opinions, or information." 322 S.W.3d 662, 670 (Tex. Crim. App. 2010). The Texas court in the instant cases reasoned that the sending of repeated emails or text messages is the analogue of repeated telephone hang-ups. App.59a-61a.

Whatever the merits of *Scott*'s analysis of the telephone law, the usual case addressed by the electronic communications law is not an "e-mail[] containing nothing," App.59a-60a, but one containing a message. And unlike repeated telephone hang ups and anonymous calls, whose harassing nature depends on factors unrelated to the communication of any message, determining whether an email, text message, or tweet is likely to harass, alarm, embarrass, etc. will typically depend upon its *content*—its effect on the recipient is "because of" the

"message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

In this respect, the Texas rulings contradict this Court's holdings that regulations dependent upon the content of a communication *necessarily* trigger First Amendment scrutiny. *See, e.g.*, *id.*; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

B. The Texas Court's Refusal to Apply First Amendment Scrutiny Upholds a Law that Cannot Survive an Overbreadth Analysis Under this Court's Precedent

The Texas law proscribes an astounding amount of core protected speech. The Court of Criminal Appeals definitively construed § 42.07(a)(7) broadly to cover the "legitimate communication of ideas," App.12a-13a, or, in this Court's words, "matters of public concern," *Snyder*, 562 U.S. at 451. While the court refused to reach Petitioners' overbreadth challenges, the dissent found no question that "the statute punishes a substantial amount of protected speech in relation to its legitimate sweep" and that the law is plainly overbroad. App.28a; *see also United States v. Stevens*, 559 U.S. 460, 473 (2010).

This Court's precedents expose the obvious overbreadth of § 42.07(a)(7)'s application to abusive, annoying, alarming, and offending communications. In *Gooding v. Wilson*, for example, the Court held overbroad a Georgia statute that proscribed using "opprobrious words or *abusive* language[] tending to cause a breach of the peace." 405 U.S. 518, 519-20 (1972) (emphasis added). Pointing to the broad

meaning of "abusive" that includes "harsh insulting language," the Court found the statute's "great[] reach" to extend well beyond proscribable speech. *Id.* at 525. But the reach of that law pales in comparison to § 42.07(a)(7), which sanctions a laundry list of disfavored communications that the Texas court has construed broadly:

> "Harass" means "to annoy persistently." "Annoy" means to "wear on the nerves by persistent petty unpleasantness." "Alarm" means "to strike with fear." "Abuse" means "to attack with words." "Torment" means "to cause severe distress of the mind." "Embarrass" means "to cause to experience a state of self-conscious distress." "Offend" means "to cause dislike, anger, or vexation."

Scott, 322 S.W.3d at 669 n.13 (quoting *Webster's Ninth New Collegiate Dictionary* 47, 68, 88, 405, 552, 819, & 1245 (1988)). Under *Gooding*, § 42.07(a)(7) is unambiguously overbroad.

Stevens similarly establishes the obvious overbreadth of the Texas law. That case held overbroad a law prohibiting depictions of animal cruelty absent a serious redeeming value. 559 U.S. at 482. Even this limitation for some speech on matters of public concern could not save the overbroad law, because "most" speech "lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 479. The Texas statute likewise proscribes a substantial

amount of speech that is protected even if it does not address a matter of public concern. For example, § 42.07(a)(7) makes it a crime for parents to repeatedly text their children to "annoy" them into coming home before late, or friends to post baby photos to "embarrass" each other.

The patent overbreadth of the Texas law is only underscored by the Texas court's acknowledgment that it applies to the "legitimate communication of ideas." App.12a-13a. Such speech "is at the heart of the First Amendment's protection," *Snyder*, 562 U.S. at 451-52, and the First Amendment forbids its punishment "simply because it is upsetting or arouses contempt," *id*. at 458.

The dissenters vividly illustrated how § 42.07(a)(7) does just that, criminalizing a staggering amount of speech on matters of public concern. "Suppose," they wrote,

> a citizen, unhappy with an opinion from this Court, sent repeated emails to a group of like-minded citizens, saying "Texas is in trouble" and "This is arguably the most devastating ruling I have ever received from a court" and "It's time to get serious and get on the phone, write letters, etc to EVERYONE YOU KNOW to make them aware of what's happening. Name names on this court! If this stands we lose Texas. It's do or die this time." Has that citizen committed a crime? Under the Court's decision today, the answer is "Yes."

App.20a.

Other examples abound. Section 42.07(a)(7) on its face makes it a crime for a political campaign to repeatedly email potential voters using language expressly intended to "alarm" them about their opponent's platform. It is also a crime for a politician to repeatedly and intentionally communicate political views online in a manner that "offend[s]." It is a crime for a voter to intentionally and repeatedly tweet to "embarrass" a politician, and it is a crime for a priest to intentionally and repeatedly "alarm" his flock that sinning could damn them, even if the goal is to save their souls.

In stark contrast to myriad examples of protected speech subject to sanction under § 42.07(a)(7), the Texas court majority could offer only outlandish hypotheticals to show how the law could possibly apply to unprotected conduct. *See* App.59a-60a (discussing how sending emails "containing only the letter 'B,'" indecipherable computer code, or "meaningless data" could violate the law). Though one might imagine less strained examples, the unconstitutional applications dwarf the arguably permissible ones, making the statute's overbreadth "substantial . . . judged in relation to [its] plainly legitimate sweep." *Stevens*, 559 U.S. at 473.

That overbreadth imposes a chill on protected electronic communications which is far from imaginary when all that stands between a speaker and criminal prosecution is the whims of a prosecutor. This Court has invalidated similar laws for just this reason. *See Hill*, 482 U.S. at 466-67 (finding overbroad an ordinance whose "plain language is

admittedly violated scores of times daily . . . yet only some individuals—those chosen by police in their unguided discretion—are arrested").

II. COURTS ARE DEEPLY SPLIT ON THE PROPER APPLICATION OF THE FIRST AMENDMENT TO LAWS CRIMINALIZING ELECTRONIC COMMUNICATIONS SENT WITH A DISFAVORED INTENT

Despite this Court's ruling in *Reno* and its progeny that the First Amendment applies fully to online speech, courts have struggled to apply First Amendment principles to disfavored speech posted online or sent through social media. Two issues framed by the Texas court's holdings have divided courts and created uncertainty about First Amendment protections afforded in different states to online speech that alarms, annoys, or offends. First, courts have reached differing conclusions about whether the First Amendment applies to online harassment statutes like § 42.07(a)(7). Second, courts subjecting these laws to First Amendment scrutiny have differed widely regarding whether and when such laws are constitutionally overbroad.

This Court has recognized that it is "intolerable to leave unanswered," and in "uneasy and unsettled constitutional posture," questions concerning First Amendment protections. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). The conflicting decisions of state courts of last resort and the federal circuits concerning harassment laws targeting online speech threaten to do just that. This Court should clarify this issue before more courts tread down the

Texas court's erroneous path, endangering free expression in the "vast democratic forums of the Internet." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

A. A Minority of Courts Hold that Laws Criminalizing Electronic or Telephonic Communications Made with a Disfavored Intent Raise No First Amendment Issue

The Texas court joined a minority of courts in concluding that laws targeting electronic or telephonic communications made with a disfavored intent are exempt from First Amendment scrutiny because they regulate non-communicative conduct. Many of these courts found the laws' intent requirements central to that rationale even when the law applied, as here, to speech of public concern.

For instance, in *Thorne v. Bailey*, the Fourth Circuit concluded that a West Virginia statute barring the "mak[ing of] repeated telephone calls, during which conversation ensues, with intent to harass" merely "prohibits conduct and not protected speech." 846 F.2d 241, 242 n.1, 243 (4th Cir. 1988). In so holding, the court accepted the West Virginia Supreme Court's analysis of the same statute, over a dissent that understood *Falwell* to hold that "[s]peech does not lose its protected character," simply because one "intends to distress." *Id.* at 247 (Butzner, J., dissenting). *See also State v. Thorne*, 333 S.E.2d 817, 819-20 (W. Va. 1985); *accord State v. Calvert*, No. 15-0195, 2016 WL 3179968, at *4 (W. Va. June 3, 2016).

Similarly, in *Gormley v. Director, Connecticut State Department of Probation*, the Second Circuit construed a law criminalizing phoning another person with "intent to harass, annoy or alarm" as targeting conduct rather than speech, reasoning that the law regulated the making of the call itself. 632 F.2d 938, 941-42 (2d Cir. 1980).

The Ninth Circuit has twice concluded that electronic communication and telephone harassment statutes do not implicate the First Amendment. In *United States v. Osinger*, the court upheld a prior version of the federal cyberstalking statute, which at the time prohibited using an interactive computer service to engage in a "course of conduct" causing substantial emotional distress with the intent to "kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress." 18 U.S.C. § 2261A(2)(A) (2006). The court held that the law targeted a course of "harassing and intimidating conduct" rather than speech. 753 F.3d 939, 944 (9th Cir. 2014). And in *United States v. Waggy*, the Ninth Circuit reached an analogous holding in concluding that a Washington telephonic harassment statute "regulates nonexpressive conduct and does not implicate First Amendment concerns," even where the incriminating telephone call "included some criticism

of the government." 936 F.3d 1014, 1019 (9th Cir. 2019).[3]

Some state courts of last resort have adopted a similar approach. For instance, in *Commonwealth v. Hendrickson*, the Pennsylvania Supreme Court concluded that Pennsylvania's telephone harassment statute, which prohibited telephone calls made "with intent to harass another" containing "any lewd, lascivious or indecent words or language," "does not punish constitutionally-protected conduct," even where the defendant's calls "contained political speech." 724 A.2d 315, 317-18 (Pa. 1999); *see also Thorne*, 333 S.E.2d at 819-20.

B. Most Courts Hold the Opposite, but Not All Have Granted Relief Under the Overbreadth Doctrine

A large majority of courts have held to the contrary that the First Amendment is implicated by laws criminalizing electronic or telephonic communications made with a disfavored intent. Many take as a given that these laws regulate speech. *See, e.g.*, *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, at *2

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[3] The Ninth Circuit recently came to the opposite conclusion when considering the federal telecommunications harassment statute. In an unpublished opinion, the court stated that 47 U.S.C. § 223(a)(1)(C), which prohibits anonymously "utiliz[ing] a telecommunications device, whether or not conversation or communication ensues," with "intent to abuse, threaten, or harass any specific person . . . criminalizes speech," and thus "must be interpreted with the commands of the First Amendment clearly in mind." *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, at *2 (9th Cir. Dec. 27, 2021) (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)).

(9th Cir. Dec. 27, 2021) (stating that because the federal telecommunications harassment statute, § 223(a)(1)(C), "criminalizes speech" it must be subject to First Amendment scrutiny). Others explicitly consider the question and come to the same conclusion.

Most recently, in *United States v. Yung*, the Third Circuit rejected the argument that the current version of the federal cyberstalking statute "focuses on conduct, not speech," finding that the law plainly regulates "a lot of speech, [including] emails, texts, and social media posts." 37 F.4th 70, 77 (3d Cir. 2022). Similarly to the Texas law, the federal statute criminalizes sending electronic communications with the intent to "harass [or] intimidate." 18 U.S.C. § 2261A(2)(A). *See also Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 849 (Minn. 2019) (holding that a stalking statute that reached, *inter alia*, electronic communications that made one feel "frightened, threatened, oppressed, persecuted, or intimidated," sanctioned "purely expressive" communications and not just conduct).

While these courts agree that electronic harassment statutes like § 42.07(a)(7) regulate speech, they diverge on the proper First Amendment analysis to apply. Most courts recognize the overbreadth problems inherent in such laws and respond by invalidating them, narrowly construing them, or severing problematic parts. But at least one state high court has flatly rejected an overbreadth challenge to an electronic harassment law on the merits.

Finding overbreadth. Three state high courts have held electronic harassment statutes unconstitutionally overbroad. The New York Court of Appeals invalidated a statute proscribing communication "with intent to harass, annoy, threaten, or alarm" "in a manner likely to cause annoyance or alarm." *People v. Golb*, 15 N.E.3d 805, 810, 813 (N.Y. 2014). The Minnesota Supreme Court struck down a stalking law proscribing electronic communications causing someone to feel "frightened, threatened, oppressed, persecuted, or intimidated." *Matter of Welfare of A.J.B.*, 929 N.W.2d at 852-53. The same court severed "disturb, or cause distress" from a different harassment law that proscribed the electronic and physical "mail[ing] . . . of letters" with "the intent to abuse, disturb, or cause distress." *Id*. at 857, 862-63.[4] And the Colorado Supreme Court severed part of a statute prohibiting electronic communications sent with the "intent to harass, annoy or alarm," leaving only those parts that proscribed "true threats and obscenity." *People v. Moreno*, 506 P.3d 849, 855-57 (Colo. 2022). The court found the statute to apply to huge swaths of "protected communications, including forecasting a storm or engaging in political discourse." *Id*. at 854.

Likewise, four federal courts of appeal have found that the federal cyberstalking statute would be

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[4] Though Texas Penal Code § 42.07(a)(7) does not contain the words "disturb" or "cause distress," the Court of Criminal Appeals has construed each of the proscribed acts as "types of emotional distress." *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

overbroad on a plain-language reading, but upheld it by narrowly construing its terms to apply only to categorically unprotected speech. This law is identical to the prior version except that one can violate it with an intent to "intimidate" and through conduct "reasonably expected to cause" emotional distress. 18 U.S.C. § 2261A(2). *See Yung*, 37 F.4th at 76 (comparing versions). Along with the First, Third, and Eleventh Circuits, the Eighth Circuit has construed the law narrowly to apply only to categories of unprotected speech. The Eighth Circuit concluded that the law was unconstitutional as applied to a defendant who repeatedly sent offensive emails to a political campaign email address that urged the candidate to "bow out of the race." *United States v. Sryniawski*, 48 F.4th 583, 585, 589 (8th Cir. 2022); *see also Yung*, 37 F.4th at 77, 78-81 (construing the law to capture only "true threats" and speech "integral to crime" to avoid a "colli[sion] with the First Amendment"); *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (construing "intimidation" as a "true threat" to "avoid [the] serious constitutional threat" that the statute would forbid "speech on a matter of public concern") (cleaned up); *United States v. Fleury*, 20 F.4th 1353, 1363 (11th Cir. 2021) (finding *Ackell*'s overbreadth analysis "particularly persuasive").

Rejecting overbreadth. Charting a different path, the Supreme Court of Montana recognized the First Amendment implications of an electronic harassment statute but upheld it against an overbreadth challenge without narrowing or severing it. The Montana law proscribed electronic communications

made "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend us[ing] obscene, lewd, or profane language . . . or threaten[ing] to inflict injury or physical harm to the person or property of the person." Mont. Code. Ann. § 45–8–13(1)(a). It also provided that "[t]he use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend." *Id.* The court severed the prima facie evidence provision as overbroad but, without discussion, upheld the proscription on electronic communications. *See State v. Dugan*, 303 P.3d 755, 772 (Mont. 2013).

Without guidance from this Court, the existing disagreements about whether the First Amendment is implicated by laws like § 42.07(a)(7) and, if so, how an overbreadth analysis should apply will only grow and further exacerbate the differing treatment of online speech by citizens of differing states. In New York, an atheist may freely tweet at a Christian in a deliberately alarming manner. But how a Christian may respond depends on where they live. If in New York, they may fight fire with fire. If in Texas, they must turn the other cheek.

III. THE BREADTH OF A STATE'S ABILITY TO PUNISH ONLINE SPEECH PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

The implications of the Texas court's refusal to conduct any overbreadth analysis are particularly troubling and far-reaching because the types of

electronic communications subject to § 42.07(a)(7) are ubiquitous today. Some 85% of Americans use the Internet daily and 31% describe themselves as "online almost constantly."[5] Social media has "transformed the way people communicate with each other and obtain news." *NetChoice v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from grant of application to vacate stay).

The Internet provides an increasingly crucial space for political discussion, and growing opportunities for the punishment of unpopular views. During the 2020 election cycle, digital spending comprised 24.3% of all political advertising, with candidates spending over $434 million in the category, often repeatedly and intentionally embarrassing their opponents.[6] Citizens likewise depend on electronic communication to express their political views; a recent study found that 33% of tweets are "political in nature."[7] And social media has played a growing role in organizing protest movements, particularly amid

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[5] Andrew Perrin & Sara Atske, *About 3 in 10 U.S. Adults Say They Are 'Almost Constantly' Online*, Pew Research Center (Mar. 26, 2021), https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online.

[6] Travis Ridout et al., *Spending Fast and Furious: Political Advertising in 2020*, 18 The Forum 465, 475 tbl.2 (2021), https://doi.org/10.1515/for-2020-2109.

[7] Sam Bestvater et al., *Politics on Twitter: One-Third of Tweets From U.S. Adults Are Political*, Pew Research Center (June 16, 2022), https://www.pewresearch.org/politics/2022/06/16/politics-on-twitter-one-third-of-tweets-from-u-s-adults-are-political.

the uncertainty of COVID-19.[8] This type of core political speech often consists of "vehement, caustic, and sometimes unpleasantly sharp attacks." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Texas statute forbids much of it.

Similarly, religious organizations across the country have increasingly turned to the Internet to spread their beliefs and grow their communities.[9] In sharing their message, religious leaders and organizations may repeatedly and intentionally "alarm" their audience. They also use these media to express their religious viewpoints on "broad issues of interest to society at large." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). Some may find such speech "insulting, and even outrageous," but it is still protected by the First Amendment. *Id*.

The Texas court's holding exposes political and religious speakers, among others, to the threat of criminal prosecution. As this Court warned in *Thornhill v. Alabama,* this type of law "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," in turn causing "a

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[8] Shira Ovide, *How Social Media Has Changed Civil Rights Protests*, N.Y. Times (Dec. 17, 2020), https://www.nytimes.com/2020/06/18/technology/social-media-protests.html.

[9] Khadeeja Safdar, *Churches Target New Members, With Help From Big Data*, Wall Street Journal (Dec. 26, 2021), https://www.wsj.com/articles/churches-new-members-personal-online-data-analytics-gloo-11640310982.

continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." 310 U.S. 88, 97-98 (1940). The Texas court would ensure this result by precluding review of a law criminalizing speech intended to alarm.

In fact, laws prohibiting online speech are routinely used for these purposes. Texas's law is not materially different from those of:

- China, where the state used a law that, *inter alia*, forbids "berat[ing] or intimidat[ing]" others on the Internet to arrest renowned civil rights lawyer Pu Zhiqiang for a series of social media posts.[10]
- Uganda, where the state has used a law criminalizing "offensive communications" to prosecute journalists, bloggers, and other online dissenters who posted criticism of authorities.[11]

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[10] Dui Hua Hum. Rts. J., *Deeming Free Speech Disorder in Internet Space* (Mar. 5, 2015), https://www.duihuahrjournal.org/2015/03/article-293-deeming-free-speech.html.

[11] Hum. Rts. Watch, *Uganda: Ensure Justice for Detained, Tortured Author*, (Feb. 11, 2022), https://www.hrw.org/news/2022/02/11/uganda-ensure-justice-detained-tortured-author; ABA, *Trial Observation Report: Uganda vs. Stella Nyanzi* (Feb. 16, 2020), https://www.americanbar.org/groups/human_rights/reports/fairnessreport_uganda_stella_nyanzi.

- Russia, where the state forbids "blatant disrespect" on the Internet of the flag or of President Vladimir Putin.[12]

These countries don't have the First Amendment to stop these prosecutions. We do.

Even if prosecutions motivated by political or religious animus might ultimately fail on an as-applied basis, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 335 (2010) (citations omitted). The chilling effect of laws like § 42.07(a)(7) is wide and real. This Court should stop it.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant *certiorari*.

Respectfully submitted,

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[12] Reuters, *Russia's Putin Signs Law Banning Fake News, Insulting the State Online* (Mar. 18, 2019), https://www.reuters.com/article/us-russia-politics-fakenews/russias-putin-signs-law-banning-fake-news-insulting-the-state-online-idUSKCN1QZ1TZ; The Moscow Times, *Most Russians Charged for 'Disrespecting' Authorities Insulted Putin – Rights Group* (Sept. 30, 2019), https://www.themoscowtimes.com/2019/09/30/most-russians-charged-for-disrespecting-authorities-insulted-putin-study-a67504.

Edward G. Jones
Tobias Xavier Lopez
1319 Ballinger St.
Fort Worth, Texas 76102
(817) 335-0200
tobiasxavierlopez@gmail.com

Lane A. Haygood
3800 E. 42nd St. Suite 110
Odessa, Texas 79762
(432) 803-5800
lhaygood@galyen.com

Rusty Gunter
1213 Avenue K
Lubbock, Texas 79401
(806) 771-3933
rusty.gunter2@gmail.com

Mark W. Bennett
917 Franklin St., 4th Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

David A. Schulz
Counsel of Record
Stephen Stich
Kelsey Eberly
Rachel Davidson
MEDIA FREEDOM AND INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL[13]
127 Wall St.
New Haven, CT 06511
(203) 436-5827
david.schulz@yale.edu

Date: November 4, 2022

[13] This Petition does not purport to represent the institutional views of Yale Law School, if any.

APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-1123-19

EX PARTE CHARLES BARTON, *Appellant*

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

WALKER, J., delivered the opinion of the Court, in which HERVEY, RICHARDSON, YEARY, and NEWELL, JJ., joined. YEARY, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion, in which KEEL, J., joined. SLAUGHTER and MCCLURE, JJ., dissented.

OPINION

In this case, the court of appeals held that § 42.07(a)(7) of the Penal Code, the electronic harassment statute, is unconstitutionally vague and overbroad under the First Amendment. The court determined that it was not bound to follow our decision in *Scott v. State*. 322 S.W.3d 662 (Tex. Crim. App. 2010), *disavowed on other grounds by Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). In *Scott*, we held that § 42.07(a)(4) of the Penal Code, the telephone harassment statute, does not implicate the freedom of speech protections of the First Amendment of the United States Constitution because it prohibits non-speech conduct.

322 S.W.3d at 669–70. Today, we clarify our holding in *Wilson* and its impact upon our holding in *Scott*. Following *Scott*'s precedent, we hold that § 42.07(a)(7), the electronic harassment statute, also fails to implicate the First Amendment's freedom of speech protections because it too prohibits non-speech conduct. We reverse the judgment of the court of appeals.

I—Background

Charles Barton, Appellant, was charged with violating Penal Code § 42.07(a)(7), the electronic harassment statute, which provided:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 42.07, 1973 Tex. Gen. Laws 883, 956–57 (amended 2001)[1] (current version at TEX. PENAL CODE Ann. § 42.07(a)(7)).[2] Appellant filed a motion to quash the

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[1] Appellant's case is governed by the 2001 version of the electronic harassment statute. Accordingly, while we will reference the statute with its current citation, this opinion refers to the 2001 version.

[2] "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and

information arguing that the statute was unconstitutional and that the information failed to provide adequate notice because it lacked specificity. The motion was denied after a hearing. Appellant then filed a pre-trial application for habeas corpus relief again raising the constitutionality of the statute. The trial court denied relief, but the court of appeals held § 42.07(a)(7) unconstitutional and reversed. *Ex parte Barton*, 586 S.W.3d 573, 585 (Tex. App.—Fort Worth 2019) (op. on reh'g). Acknowledging that other appellate courts upheld the constitutionality of § 42.07(a)(7) by applying *Scott*, the court of appeals below nevertheless declined to follow *Scott*—finding that *Scott*'s reasoning was undermined by our later opinion, *Wilson*. *Id.* at 578 n.11, 579–80. The court of appeals found that § 42.07(a)(7) implicated the First Amendment and, following the precedent of its earlier opinion in *Karenev v. State*, held that § 42.07(a)(7) was unconstitutionally vague and overbroad. *Id.* at 580–85 (citing *Karenev v. State*, 258 S.W.3d 210, 213, 218 (Tex. App.—Fort Worth 2008), *rev'd on other grounds*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)).

We granted the State's petition for discretionary review which raised two grounds:

> 1. The court of appeals decided a facial overbreadth claim that was not preserved at trial or raised on appeal.
>
> 2. Is Tex. Penal Code § 42.07(a)(7), which prohibits harassing electronic communications, facially unconstitutional?

(B) a communication made to a pager.

TEX. PENAL CODE Ann. § 42.07(b)(1).

We answer the question raised by State's second ground for review: No. Section 42.07(a)(7) does not implicate the First Amendment, and it satisfies the "rational basis" test. The overbreadth doctrine is inapplicable, and we dismiss the State's first ground for review as moot.

II—Overbreadth and Preservation of Error

The State's first ground for review argues that the court of appeals erred in considering overbreadth under the First Amendment because Appellant failed to present a proper overbreadth argument in the trial court. The State and Appellant dispute whether the bare assertion, in Appellant's motion to quash and the hearing on that motion,[3] that the electronic harassment statute is "overly broad" and "chills" protected speech is sufficiently specific to preserve the overbreadth issue for consideration on appeal.

"The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). "In the First Amendment context, . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "[O]utside the limited First

[3] During the hearing on the pre-trial application for writ of habeas corpus, the trial court took judicial notice of the arguments that were made in the earlier motion to quash the information and the hearing on that motion.

Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

Due to our resolution of the State's second ground for review—that § 42.07(a)(7) does not implicate the First Amendment[4]—overbreadth is inapplicable. *See Martin*, 467 U.S. at 268 n.18; *Salerno*, 481 U.S. at 745. Because the doctrine is inapplicable, whether Appellant's bare references to overbreadth are sufficient to preserve the issue for appeal is entirely academic and unnecessary for our analysis.

We therefore dismiss the State's first ground for review as moot.

III—Vagueness Challenges Are As-Applied Unless the First Amendment Is Implicated

The State's second ground for review complains that the court of appeals erred in holding that § 42.07(a)(7) is unconstitutionally vague and overbroad on its face.

Generally, "in addressing a vagueness challenge," courts are to "consider whether the statute is vague as applied to a defendant's conduct before considering whether the statute may be vague as applied to the conduct of others." *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other

[4] *Infra* Part VI.

hypothetical applications of the law." *Id.* (internal quotations omitted).

This general rule gives way when freedom of speech under the First Amendment is involved. "[W]hen a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *State v. Doyal*, 589 S.W.3d 136, 144 (Tex. Crim. App. 2019) (internal quotations omitted). A law implicating First Amendment freedoms may be found facially vague without "a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions." *Id.* at 145.

Determining that § 42.07(a)(7) implicates the First Amendment, the court of appeals evaluated vagueness without first considering whether Appellant showed the statute was vague as applied to his own conduct. *See Barton*, 586 S.W.3d at 580–85.

IV—*Scott v. State*: Conduct Under § 42.07(a)(4) is Non-Speech Conduct

In finding § 42.07(a)(7) unconstitutionally vague, the court of appeals distinguished our opinion in *Scott*. *See id.* at 579. Although *Scott* involved a First Amendment challenge to a different subsection of § 42.07—subsection (a)(4), the telephone harassment statute—it has been relied upon by other appellate courts to conclude that subsection (a)(7), the electronic harassment statute, does not implicate the First Amendment. *See, e.g.*, *State v. Grohn*, 612 S.W.3d 78, 83 (Tex. App.—Beaumont 2020, pet. filed); *Ex parte McDonald*, 606 S.W.3d 856, 859–61 (Tex. App.—

Austin 2020, pet. filed); *Lebo v. State*, 474 S.W.3d 402, 406–08 (Tex. App.—San Antonio 2015, pet. ref'd).[5]

In *Scott*, the appellant argued that § 42.07(a)(4), the telephone harassment statute, is unconstitutionally "vague and overbroad" in violation of the First Amendment. *Scott*, 322 S.W.3d at 665. This statute provided:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]

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[5] *See also Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *4 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (mem. op., not designated for publication); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678, at *5 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication); *Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385, at *7 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication); *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *3 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *3 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication); *Duran v. State*, No. 13-11-00205-CR, 2012 WL 3612507, at *2–3 (Tex. App.—Corpus Christi–Edinburg Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication).

We note that one other court of appeals agreed with the appellate court in this case, finding that *Scott* does not apply because *Wilson* had undermined *Scott*'s underpinnings. *State v. Chen*, 615 S.W.3d 376, 383 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

TEX. PENAL CODE Ann. § 42.07(a)(4). We concluded that the 2001 version of § 42.07(a)(4) is not communicative conduct protected by the First Amendment because the statute criminalizes harassing conduct that, although it may include spoken words, is essentially noncommunicative. *Scott*, 322 S.W.3d at 669–70. Furthermore, we determined that "persons whose conduct violates § 42.07(4)(a) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake." *Id.* at 670. We held that because § 42.07(a)(4) does not implicate the First Amendment, Scott failed to show it was unconstitutionally vague on its face. *Id.* at 669, 670–71.

As the court of appeals correctly noted: "Because section 42.07(a)(4) did not reach communicative conduct, it did not implicate the free-speech guarantee of the First Amendment." *Barton*, 586 S.W.3d at 578 (citing *Scott*, 322 S.W.3d at 669–70). The harassing conduct is non-communicative. It is not speech.

V—*Wilson* did not Change *Scott*'s Holding

Although the court of appeals recognized our holding in *Scott*, it concluded that *Scott*'s reasoning had been undermined by our opinion in *Wilson*. *Id.* at 579–80. In *Wilson*, we revisited § 42.07(a)(4), not on a constitutionality challenge, but on a challenge to the sufficiency of the evidence to support Wilson's conviction. *Wilson*, 448 S.W.3d at 420.

Wilson was charged with violating § 42.07(a)(4), and the evidence showed that she left six voicemail messages on her neighbor's phone over a period of ten months. *Id.* at 420. The court of appeals found the evidence insufficient to show that the telephone

communications were "repeated" because the six calls occurred over a ten-month period, and the messages that were not within a thirty-day period of each other were not in close enough proximity to be considered a single episode. *Wilson v. State*, 431 S.W.3d 92, 96 (Tex. App.—Houston [1st Dist.] 2013), *rev'd*, 448 S.W.3d at 426. This analysis followed from a footnote in *Scott*, which stated that:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." . . . Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition.

322 S.W.3d at 669 n.12. The court of appeals identified two messages that it thought might be in close enough proximity to be termed a single episode—one made on August 31 and one made on September 5. *Wilson*, 431 S.W.3d at 96. However, the court of appeals found that there was a legitimate reason for the September 5 call,[6] negating both the element of an intent to harass

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[6] In the court of appeals's opinion in *Wilson*, the September 5 message related to her neighbor's driveway construction project. In the message Wilson reported that she saw cement debris in the gutters that needed to be cleaned up. *Wilson*, 431 S.W.3d at 96.

In this Court's opinion on discretionary review, we described this particular message as being made on June 11, and the September 5 message instead demanded that her neighbor never talk to or approach Wilson in public again. *Wilson*, 448 S.W.3d at 420, 421.

and the element requiring the call to be made in a manner reasonably likely to harass or annoy. *Id.* According to the court of appeals, without the September 5 call, the remaining calls were too far apart to be considered a "part of a single episode." *Id.* The court of appeals found the element of "repeated" unproven and rendered a judgment of acquittal. *Id.*

On discretionary review, we determined that *Scott*'s footnote twelve was "troublesome," and we accordingly disavowed it. *Wilson*, 448 S.W.3d at 423. We held that "'repeated' means, at a minimum, 'recurrent' action or action occurring 'again.'" *Id.* at 424. "'[O]ne telephone call will not suffice' and a conviction secured by evidence of a single communication will not stand." *Id.* (quoting *Scott*, 322 S.W.3d at 669).

As a result, we found the evidence legally sufficient. *Id.* at 426. Based on

> the content of the six calls over the ten-month period, combined with evidence of Wilson's combative conduct and verbal abuse toward [her neighbor], the jury could have rationally found that Wilson, with the intent to harass, annoy, alarm, abuse, torment, or embarrass [her neighbor], made repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend her.

Id.

Regarding the court of appeals's determination that, because the September 5th call was made with a facially legitimate reason it could not be counted among the repeated telephone communications, we disagreed and concluded, "by way of an alternate holding," that the court of appeals's sufficiency analy-

sis was flawed. *Id.* at 425. One reason the analysis was flawed—relevant to Appellant's case before us today—was that "the existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of the call." *Id.*

In Appellant's case, the court of appeals understood our alternate holding to mean that we had "acknowledged that a potential offender could have more than one intent in delivering harassing conduct." *Barton*, 586 S.W.3d at 579. Because we "did acknowledge the potential that a 'facially legitimate' reason may exist in a harassing phone call[,]" the court of appeals read *Wilson* to mean "that a person who communicates with the intent to harass, annoy, alarm, abuse, torment, or embarrass can also have an intent to engage in the legitimate communication of ideas, opinions, information, or grievances." *Id.* As a result, the court of appeals concluded that § 42.07(a)(4), and therefore § 42.07(a)(7), implicated the First Amendment. *Id.* at 580.

Wilson should not be read so expansively. *Wilson* dealt with a challenge to the sufficiency of the evidence. We specifically and primarily focused on what is sufficient to show the element of "repeated." Our "alternate holding," in turn, focused on the sufficiency of the evidence to show the necessary intent, or—more accurately—the impact of evidence of some additional intent beyond the statutory requirement. Our "alternate holding" means that the existence of an intent to engage in the legitimate communication of ideas does not negate the existence of the prohibited intent to harass, annoy, alarm, abuse, torment, or embarrass another. *Wilson*, 448 S.W.3d at 425.

This point bears repeating today. Section 42.07(a)(4) makes it an offense for a person to make repeated telephone communications, where those communications are made in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend, *so long as* the person making said communications has an intent to harass, annoy, alarm, abuse, torment, or embarrass another. TEX. PENAL CODE Ann. § 42.07(a)(4). If the person harbors some extra intent in making those communications, he nevertheless still has an intent to harass, annoy, alarm, abuse, torment, or embarrass another. Unless the separate intent is specifically an intent *not to harass, annoy, alarm, abuse, torment, or embarrass another*, the existence of a separate, facially legitimate intent to communicate does not negate the prohibited intent.

That is the point of *Wilson*'s alternate holding. Our "alternate holding" in *Wilson* was *not* that § 42.07(a)(4) could regulate expressive conduct—speech implicating the First Amendment—if the repeated telephone communications were made with an additional intent to engage in the legitimate communication of ideas.

More importantly, even accepting that a person who violates § 42.07(a)(4) may harbor, alongside an intent to harass, an additional intent to engage in the legitimate communication of ideas, that fact does not convert non-expressive conduct into expressive conduct. The Supreme Court has "rejected the view that 'conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, First Amendment protection extends "only to conduct that is inherently expressive." *Id.* at 66.

Accordingly, *Wilson*'s recognition that a person violating § 42.07(a)(4) with an intent to harass, annoy, alarm, abuse, torment, or embarrass another may also have an additional intent to engage in the legitimate communication of ideas does nothing to the core holding of *Scott*. Section § 42.07(a)(4), the telephone harassment statute, is a restriction on conduct that is non-expressive and thus not speech. This remains true even if the offense is committed using words, and even if the person does not have the sole intent to harass, annoy, alarm, abuse, torment, or embarrass another.

VI—*Scott* Applies to § 42.07(a)(7)

Several other appellate courts concluded that *Scott*'s reasoning applies to § 42.07(a)(7), the electronic harassment statute, the same way it applies to § 42.07(a)(4), the telephone harassment statute. *See, e.g.*, *Grohn*, 612 S.W.3d at 83; *McDonald*, 606 S.W.3d at 859–61; *Lebo*, 474 S.W.3d at 407; *supra* note 4.

Those courts found that § 42.07(a)(4) and (a)(7) are the same for First Amendment purposes. As the Third Court of Appeals explained in *McDonald*:

> "[t]he free-speech analysis in Scott is equally applicable to subsection 42.07(a)(7)." . . . Although . . . the language in subsections 42.07(a)(4) and 42.07(a)(7) differs slightly in that subsection 42.07(a)(4) "provides an alternative manner of committing the offense by making repeated phone calls 'anonymously,'" . . . the slight "textual difference is inconsequential to the First Amendment analysis" and . . . the remaining statutory language in the two subsections "is identical."

McDonald, 606 S.W.3d at 860 (quoting *Blanchard*, 2016 WL 3144142, at *3). Indeed,

> all subsections of section 42.07(a) require the same specific intent, that "to harass, annoy, alarm, abuse, torment, or embarrass another." And while subsection (a)(4) is violated when the actor "makes" repeated telephone communications and (a)(7) is violated when the actor "sends" repeated electronic communications, both subsections require for guilt that the repeated communications occur "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

Sanders, 2019 WL 1576076, at *3.

We agree. For First Amendment purposes, *Scott*'s holding—that § 42.07(a)(4), the telephone harassment statute, does not implicate the First Amendment—applies equally to § 42.07(a)(7), the electronic harassment statute. The conduct regulated by § 42.07(a)(7) is non-speech conduct that does not implicate the First Amendment.

VII—Section 42.07(a)(7) is a Facially Constitutional Regulation of Non-Speech Conduct

Section 42.07(a)(7) does not implicate the First Amendment's freedom of speech protections. Accordingly, we use "the familiar 'rational basis' test" to determine whether the statute is facially unconstitutional. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981). "The default, 'general rule' or 'standard' is that state action is 'presumed to be valid' and will be upheld if it is but 'rationally related to a legitimate state interest.'" *Estes v. State*, 546 S.W.3d 691, 697 (Tex. Crim. App. 2018) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). "This general rule 'gives way, however,' when a state action either 'classifies by race, alienage, or national

origin,' or 'impinge[s] on personal rights protected by the Constitution.'" *Id.* (quoting *Cleburne Living Center*, 473 U.S. at 440); *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). In applying the rational basis test:

> Above all, a court should spurn any attempt to turn rational-basis review into a debate over the wisdom, eloquence, or efficacy of the law in question. As its name would suggest, rational-basis review should focus solely on the rationality of the law or state action. Should we determine that the State has invoked a legitimate governmental purpose and, in enforcing its law, has charted a course that is "rationally related" to it, "our inquiry is at an end."

Estes, 546 S.W.3d at 698 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993)).

Is a legitimate governmental interest served by § 42.07(a)(7)? As discussed above, the conduct regulated by § 42.07(a)(7) is roughly equivalent to the conduct regulated by § 42.07(a)(4), the telephone harassment statute—at issue in *Scott*. In *Scott*, we noted that the prohibited conduct—making repeated telephone communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend—"invades the substantial privacy interests of another in an essentially intolerable manner." *Scott*, 322 S.W.3d at 668–69, 670. The State has an interest in vindicating the rights of the people which it serves and an interest in protecting the public welfare. *See State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009)

("The legislature may enact laws that enhance the general welfare of the state[.]"); *Williams v. State*, 176 S.W.2d 177, 182 (Tex. Crim. App. 1943) ("the lawmaking bodies of each State pass laws to protect the peace, health, happiness, and general welfare of society, and of the people as a whole."). These interests are legitimate, and § 42.07(a)(7) serves these interests.

Is § 42.07(a)(7) rationally related to serving those interests? Sending repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend would indeed invade the substantial privacy interests of another in an essentially intolerable manner. Undoubtedly, if the idea is to protect the people from having their privacy invaded in such a way, one of the best ways to do that is to punish those who violate that privacy interest and deter those who would. The means chosen by the Legislature further the interest.

Thus, § 42.07(a)(7) is rationally related to a legitimate governmental interest. As for whether the statute is unconstitutionally vague, because § 42.07(a)(7) does not regulate speech and therefore "does not implicate the free-speech guarantee of the First Amendment," Appellant, "in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct. He has not done that. Therefore, his vagueness challenge fails." *See Scott*, 322 S.W.3d at 670–71. We hold that § 42.07(a)(7), the electronic harassment statute, is not facially unconstitutional.

We sustain the State's second ground for review.

VIII—Conclusion

Since § 42.07(a)(7) does not regulate speech, and therefore does not implicate the free-speech guarantee of the First Amendment, the statute is not susceptible to an overbreadth challenge. Thus, we need not address whether Appellant preserved his overbreadth issue for appellate review. As a regulation of non-speech conduct, § 42.07(a)(7) is not facially unconstitutional because it is rationally related to a legitimate governmental interest. The question of whether the statute is vague will have to wait for a proper as-applied challenge.

We reverse the judgment of the court of appeals and remand to that court for proceedings consistent with this opinion.

Delivered: April 6, 2022

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-1123-19

EX PARTE CHARLES BARTON, *Appellant*

On State's Petition for Discretionary Review
From the Second Court of Appeals
Tarrant County

YEARY, J., filed a concurring opinion.

I agree with the Court and join its opinion. The statute at issue here protects citizens from harassment—from being forced and compelled to endure the delivery of repeated electronic communications sent to them in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another, and with the specific intent to do just that to them.[1] The conduct

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[1] Our Texas harassment law was enacted as part of the 1974 Penal Code. Acts 1973, 63rd Leg., ch. 399, § 1, p. 883, eff. Jan. 1, 1974. Since then, it has been amended nine times. *See* TEX. PENAL CODE § 42.07 (amended in 1983, 1993, 1994, 1995, 1999, 2001, 2013, 2017, and 2021).

Appellant in this case was charged by information with committing nine separate counts of harassment. The offenses were alleged to have occurred on or about dates between August 25, 2012, and November 16, 2012. During that time frame, the applicable harassment statute provided that:

> [a] person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

covered by the law applicable in this case appears to me to be limited in kind to instances in which harassing communications are directed and targeted specifically at an individual.[2] That the law would seek to defend private citizens from such targeted harassment is no more surprising than that it would seek to protect them from stalking, offensive touching, or assault.

With these additional thoughts, I join the Court's opinion.

FILED: April 6, 2022

PUBLISH

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* * *

> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(a)(7)).

[2] Subsection (b) of our harassment law, during the relevant time frame, provided the following definition of "electronic communication":

> [A] transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
>
> (B) a communication made to a pager.

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(b)).

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-1123-19

EX PARTE CHARLES BARTON, *Appellant*

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

KELLER, P.J., filed a dissenting opinion in which KEEL, J., joined.

Suppose a citizen, unhappy with an opinion from this Court, sent repeated emails to a group of like-minded citizens, saying "Texas is in trouble" and "This is arguably the most devastating ruling I have ever received from a court" and "It's time to get serious and get on the phone, write letters, etc to EVERYONE YOU KNOW to make them aware of what's happening. Name names on this court! If this stands we lose Texas. It's do or die this time." Has that citizen committed a crime? Under the Court's decision today, the answer is "Yes." At the risk of being prosecuted myself for violating § 42.07(a)(7) of the Texas Penal Code, let me say here that the people of Texas should be alarmed by this holding.

The Court holds today that the "electronic communications" subsection of the Texas harassment statute "does not implicate the First Amendment's freedom of speech protections" because the conduct that it regulates is non-speech conduct. I cannot agree. The term

"electronic communications" alone suggests that the regulated conduct is speech, but the statutory definition of the term makes it clear that the regulated conduct is indeed speech. The statute defines "electronic communications" broadly, and the mens rea of the statute includes intent to "annoy," "alarm," or "embarrass" another. The statute encompasses a vast amount of speech that is protected by the First Amendment. And although I have been critical of *Scott v. State*[1] in the past, the statute in this case is far broader than the telephone harassment statute, and we need not overrule *Scott* to find the statute here to be unconstitutional.

Section 42.07(a)(7) provides that a person commits an offense if:

> with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he. . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[2]

"Electronic communication" is defined expansively to mean:

> a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.[3]

"Electronic communication" includes "a communication initiated by electronic mail, instant message,

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[1] 322 S.W.3d 662 (Tex. Crim. App. 2010).

[2] TEX. PENAL CODE § 42.07(a)(7) (2011).

[3] *Id.* § 42.07(b)(1).

network call, communication tool, or a facsimile machine"[4] and "a communication made to a pager."[5] A transfer of signals, writing, images, sounds, or data by an "electromagnetic system" necessarily includes use of the internet. While the telephone harassment statute was limited to communications over the telephone, the electronic-communications statute is much more expansive, encompassing anything that could be thought of as an electronic communication.

But the breadth of the electronic-communications statute does not derive solely from the variety of electronic devices that may deliver communications or the variety of formats in which communications may occur. It also derives from the scope of the intended audience. Telephone conversations are, at least most of the time, limited to one individual communicating with another. But the internet opens up very public avenues of communication. Message boards, blogs, and internet news articles can be seen by the entire world. Depending on the privacy settings, Facebook posts can be seen by a large assortment of people. Then there are Twitter, Instagram, Snapchat, Tik Tok, and many other social networking platforms.

Since most communications over the phone are one-on-one, they are in some sense private, and although there are ways to block at least some types of unwanted calls, in some sense a telephone user might be considered a "captive audience" for harassing telephone communications. Privacy and "captive audience" rationales might allow for greater leeway in regulating telephone communications.[6] But when those ration-

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[4] *Id.* § 42.07(b)(1)(A).

[5] *Id.* § 42.07(b)(2)(B).

[6] *See Cohen v. California*, 403 U.S. 15, 21-22 (1971) (referring to "substantial privacy interests . . . being invaded in an essen-

ales are absent, we should be especially leery of punishing speech. As the Supreme Court explained in *Cohen v. California*: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[7]

The Court suggests that we need not reach the issue of whether the statute can be upheld under the *Cohen* privacy rationale because the electronic-communications statute is not aimed at speech. I disagree. The Court begins with the fact that it is possible to find some kernel of expression in almost every activity a person undertakes. But the electronic-communications statute is not concerned with just any activity—it is concerned with *communications*. And the "electronic" methods of delivering communications—including the internet and social media platforms—are mediums for delivering speech. Given the inherently communicative aspect of electronic communications, at least as a general matter, the Court errs to engage in an analysis of whether otherwise non-speech conduct constitutes expression.[8] The "intent to convey a particularized message" test for determining whether

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tially intolerable manner" and "the special plight of the captive auditor").

[7] *Id.* at 21.

[8] *See Ex parte Thompson*, 442 S.W.3d 325, 334-36 (Tex. Crim. App. 2014) (no intent to convey a particularized message required for inherently expressive conduct such as parades, paintings, and photographs) (discussing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group,* 515 U.S. 557 (1995)).

conduct that is ordinarily non-speech is actually expressive has no application to something that is ordinarily speech or expression.[9]

The Court makes much of the fact that the electronic-communications statute encompasses the mere sending of data, and it concludes that the repeated sending of data could be meaningless to an individual. Someone could send emails to flood another person's inbox. The emails could contain meaningless gibberish. But it is not enough to say that it is possible to violate a statute by conduct that does not implicate the First Amendment, if under an overbreadth analysis, the statute reaches a substantial amount of First Amendment conduct in relation to its legitimate sweep.[10]

In *Thornhill v. Alabama*, for example, an anti-loitering statute made it an offense to loiter around or picket a business with intent to influence or induce others not to patronize the business.[11] Under the

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[9] *Id.*

[10] *See See Thornhill v. Alabama*, 310 U.S. 88, 91, 99-100 (1940) (loitering/picketing at a business); *State v. Johnson*, 475 S.W.3d 860, 873 (Tex. Crim. App. 2015) (flag desecration).

[11] *Thornhill*, *supra* at 91. Specifically, the Alabama statute provided that it was an offense to:

> go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or . . . [to] picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another.

Id.

language of the Alabama statute, it appears that a criminal violation could occur if a person physically blocked entry into a business. Physically blocking entry would not be speech protected under the First Amendment. But the Supreme Court nevertheless found the statute to be overbroad because its language "comprehend[ed] every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer."[12]

And in *State v. Johnson*, we acknowledged that "intentionally or knowingly damaging a United States flag is not inherently expressive" and that "a statute that proscribes such conduct will at least theoretically apply to some circumstances that do not implicate the First Amendment."[13] But we pointed out that "[m]ost conduct that falls within the provisions of the statute and that would come to the attention of the authorities would constitute protected expression."[14] We concluded that the flag desecration statute was unconstitutionally overbroad because it, "by its text and in actual fact, prohibit[ed] a substantial amount of activity that is protected by the First Amendment, judged in relation to its legitimate sweep."[15]

If we look at the electronic-communications statute's actual sweep, we can see that its language encompasses a truly enormous amount of speech. This is so even accounting for the requisite intent to harass, annoy, alarm, abuse, torment, or embarrass. As the examples at the beginning of this opinion illustrate, alarming someone could be the point of the commu-

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[12] *Id.* at 100.

[13] *Johnson*, 475 S.W.3d at 873.

[14] *Id.* at 876.

[15] *Id.* at 882.

nication. And so could annoying and embarrassing. One can look as far back as the parable of the unjust judge in the Bible to see an example of a persistent woman who finally gets relief from an unjust judge so that she will stop bothering him.[16] As for intent to embarrass, one could look to Andrew Breitbart's disclosure of Anthony Weiner's indiscretions and Breitbart's subsequent follow-ups on that story.[17] Often, the intent specified in the statute will be a legitimate purpose of the communication. The First Amendment protects a great deal of speech that is purposefully annoying, alarming, or embarrassing.[18]

What about the *Scott* case? First, *Scott* said that the harassing phone calls would be essentially noncommunicative "in the usual case."[19] *Scott* did not hold that the harassing conduct at issue was inherently nonspeech; it held that it was usually nonspeech.[20] But

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[16] Luke 18:1-5.

[17] *See* https://www.npr.org/2011/06/07/137042268/looking-at-breitbarts-role-in-weiners-scandal.

[18] *See Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct."); *Long v. State*, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) ("The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed. Many legitimate political protests, for example, contain both of these elements.").

[19] 322 S.W.3d at 669-70 (saying it twice).

[20] Scott did not create an alternative holding when it held that harassing phone calls under the statute were not protected by the

the "usual case" in *Scott* was based narrowly on the use of a telephone, which ordinarily involves a private one-on-one communication. The electronic-communications statute is much broader, involving not only myriad different methods of conveying electronic communications but also involving an expanded audience—in many cases including everyone who has access to the internet or to a particular social media app.

Moreover, the *Scott* opinion explicitly contemplated that the recipient of the call would be the target of the actor's intent to harass, annoy, alarm, abuse, torment, or embarrass.[21] But with many forms of electronic communications—e.g. an internet news article, a blog post, a message board post, or a social media post—there will usually be a great number of recipients of the communication who are not targets of the actor's harassing intent. In fact, it would often be unnecessary for the target of the actor's intent to even receive or read the electronic communication. When information about the target is disclosed in such a public manner, and when that information is what causes the

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First Amendment because the conduct invaded privacy interests in an intolerable manner. Rather, it created a supplemental holding—that in the "not usual" case the conduct was still not protected by the First Amendment because the conduct was an intolerable intrusion on privacy. *See id.* at 670 ("To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.").

[21] *Id.* at 669 ("First, the text requires that the actor have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient of the telephone call.").

target to be embarrassed or annoyed or alarmed, that information is speech.

And our later opinion in *Wilson v. State*[22] retreated from *Scott* in two respects: (1) by rejecting the notion that the term "repeated" was limited to situations that could be termed a single criminal episode,[23] and (2) by rejecting the notion that a facially legitimate purpose for a call negated having the requisite intent to harass, annoy, alarm, abuse, torment, or embarrass.[24] Even if the *Wilson* opinion's retreat in these two respects did not ultimately invalidate the conclusion in *Scott*, that retreat undermines any extension of the reasoning in *Scott* to the broader electronic-communications statute.

I strongly disagree with the Court's conclusion that the electronic-communications statute does not implicate the First Amendment. It follows that I also disagree with the Court's conclusion that the rational basis test provides the appropriate framework for evaluating the constitutionality of the statute. I would conduct an overbreadth analysis under the First Amendment and resolve whether the statute punishes a substantial amount of protected speech in relation to its legitimate sweep. Because the Court does not answer that question, I will say here only that the breadth of the statute convinces me that the answer is "yes."

I respectfully dissent.

Filed: April 6, 2022

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[22] 448 S.W.3d 418 (Tex. Crim. App. 2014).

[23] *Id.* at 422-24.

[24] *Id.* at 425-26.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-0469-19

EX PARTE NATHAN SANDERS, *Appellant*

ON APPELLANT'S PETITION FOR
DISCRETIONARY REVIEW FROM THE SEVENTH
COURT OF APPEALS LUBBOCK COUNTY

WALKER, J., delivered the opinion of the Court, in which HERVEY, RICHARDSON, YEARY, and NEWELL, JJ., joined. YEARY, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion, in which KEEL, J., joined. SLAUGHTER and MCCLURE, JJ., dissented.

OPINION

In *Scott v. State*, we held that § 42.07(a)(4) of the Penal Code, the telephone harassment statute, does not implicate the freedom of speech protections of the First Amendment of the United States Constitution because it prohibits non-speech conduct. 322 S.W.3d 662, 669–70 (Tex. Crim. App. 2010), *disavowed on other grounds by Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). In the case before us today, we clarify and reaffirm our holding in *Scott*. Following *Scott*'s precedent, we hold that § 42.07(a)(7) of the Penal Code, the electronic harassment statute, also fails to implicate the First Amendment's freedom of

speech protections because it too prohibits non-speech conduct. We affirm the judgment of the court of appeals upholding § 42.07(a)(7) against Appellant's First Amendment challenge.

I—Background

Nathan Sanders, Appellant, was charged with violating Penal Code § 42.07(a)(7), the electronic harassment statute, which provides:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 42.07, 1973 Tex. Gen. Laws 883, 956–57 (amended 2013)[1] (current version at TEX. PENAL CODE Ann. § 42.07(a)(7)).[2] Appellant filed a pre-trial application

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[1] Appellant's case is governed by the 2013 version of the electronic harassment statute. Accordingly, while we will reference the statute with its current citation, this opinion refers to the 2013 version.

[2] "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.

TEX. PENAL CODE Ann. § 42.07(b)(1).

for habeas corpus relief on the basis that the statute was unconstitutionally overbroad. The trial court denied relief, and the court of appeals affirmed. *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *1 (Tex. App.—Amarillo Apr. 8, 2019) (mem. op., not designated for publication). The court of appeals determined that, for First Amendment purposes, § 42.07(a)(7) was the same as § 42.07(a)(4) which we upheld against a similar First Amendment challenge in *Scott*. *Id.* at *2–3. The appellate court concluded that *Scott* was controlling and rejected Appellant's First Amendment challenge. *Id.* at *3–4.

We granted Appellant's petition for discretionary review which argues that § 42.07(a)(7) violates the First Amendment and that *Scott* should be overruled.[3]

II—Appellant's Pre-Trial Writ

Before we address the substance of Appellant's challenge, we begin with the State's threshold argument that Appellant's ground for review is not properly before us. The State points out that Appellant did not raise *Scott* before the trial court in his pre-trial application for writ of habeas corpus. The State also faults Appellant for failing to make a proper First Amendment overbreadth argument in his pre-trial application. As the State sees it, Appellant's ground for review is not adequately presented, and any

[3] Appellant's ground for review specifically states:

> Texas Penal Code section 42.07(a)(7) is a content-based restriction that restricts a real and substantial amount of speech as protected by the First Amendment; speech which invades privacy interests of the listener has never been held by the United States Supreme Court to be a category of unprotected speech.

opinion on the constitutionality of § 42.07(a)(7) or regarding *Scott* would be advisory.

It is well-established that a decision of the trial court may be affirmed if it is correct on any applicable theory of law—even if that theory was not presented to the trial court. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Penry v. State*, 903 S.W.2d 715, 750 n.34 (Tex. Crim. App. 1995). It is also well-established that "[i]n our discretionary review capacity we review 'decisions' of the courts of appeals." *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007) (quoting *Lee v. State*, 791 S.W.2d 141, 142 (Tex. Crim. App. 1990)); TEX. R. APP. P. 66.1. Thus, it is not dispositive that a party may not have preserved an issue in the trial court where the court of appeals properly addressed the issue, and we granted discretionary review of it. *Gallups v. State*, 151 S.W.3d 196, 199 n.3 (Tex. Crim. App. 2004).

The court of appeals affirmed the trial court, finding that § 42.07(a)(7) is constitutional based on *Scott*. Appellant challenges the court of appeals's decision and its underlying basis in *Scott*. *Scott* was properly addressed by the court of appeals. *Scott*'s holding was relevant to § 42.07(a)(7), several other courts of appeals that considered the constitutionality of § 42.07(a)(7) relied on *Scott*, and both parties argued the applicability of *Scott* in their respective appellate briefs. Accordingly, Appellant's ground for review is properly before us, regardless of whether Appellant's pre-trial application raised *Scott* or presented an adequate First Amendment overbreadth argument.

III—*Scott v. State*

The court of appeals, following the lead of several other appellate courts,[4] upheld § 42.07(a)(7) by relying upon *Scott v. State*. In *Scott*, the defendant argued that § 42.07(a)(4), the telephone harassment statute, is unconstitutionally "vague and overbroad" in violation of the First Amendment. *Scott*, 322 S.W.3d at 665. This statute provided:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]

Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 42.07, 1973 Tex. Gen. Laws 883, 956–57 (amended 2001) (current version at TEX. PENAL CODE Ann. § 42.07(a)(4)). We concluded that the 2001 version of § 42.07(a)(4) is not susceptible to being considered communicative conduct protected by the First Amendment because the statute criminalized harassing conduct that, although it may include spoken words, was essentially noncommunicative. *Scott*, 322 S.W.3d

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[4] *Lebo v. State*, 474 S.W.3d 402, 408 (Tex. App.—San Antonio 2015, pet. ref'd); *Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385, at *7 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication); *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *3 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *3–4 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication).

at 669–70.[5] Furthermore, we determined that "persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake." *Id.* at 670. We held that § 42.07(a)(4) did not implicate the First Amendment, and, accordingly, Scott failed to show it was unconstitutionally vague on its face. *Id.* at 669, 670–71.

Additionally, we noted that while the First Amendment "generally protects the free communication and receipt of ideas, opinions, and information," the "State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially intolerable manner." *Id.* at 668–69. Therefore, if the conduct was, in fact, communicative:

> To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.

Id. at 670. In other words, communicative conduct—speech—that invades the substantial privacy interests of another in an essentially intolerable manner is

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[5] In 2013, § 42.07(a) was amended to change "he" to "the person". Act of May 22, 2013, 83d Leg., R.S., ch. 1278, § 1, 2013 Tex. Gen. Laws 3231, 3231 (current version at TEX. PENAL CODE Ann. § 42.07(a)).

outside the protection of the First Amendment. This particular discussion in *Scott* is the crux of Appellant's argument before us today.

IV—*Scott* and § 42.07(a)(7)

In considering Appellant's case below, the court of appeals determined that the text of the electronic harassment statute, § 42.07(a)(7), is—for the purposes of First Amendment analysis— identical to § 42.07(a)(4):

> As others have pointed out . . . all subsections of section 42.07(a) require the same specific intent, that "to harass, annoy, alarm, abuse, torment, or embarrass another." And while subsection (a)(4) is violated when the actor "makes" repeated telephone communications and (a)(7) is violated when the actor "sends" repeated electronic communications, both subsections require for guilt that the repeated communications occur "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

Sanders, 2019 WL 1576076, at *3. Appellant also notes that although *Scott* was concerned with the telephone harassment statute instead of the electronic harassment statute, "the rationale is the same."[6]

We agree with the court of appeals's reliance on *Scott*. For First Amendment purposes, *Scott*'s holding that § 42.07(a)(4), the telephone harassment statute, does not implicate the First Amendment should apply equally to § 42.07(a)(7), the electronic harassment statute. Accordingly, if *Scott* is still good law, then § 42.07(a)(7) does not implicate the First Amendment.

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[6] Pet'r's Br. 19.

V—Should *Scott* be Overruled?

Appellant argues that *Scott* should be reconsidered because our opinion in that case "created, *ex nihilo*, a new category of unprotected speech: speech which, for purposes of inflicting emotional distress, invades substantial privacy interests."[7] Appellant would have us overrule *Scott* and, in the absence of *Scott*, hold that § 42.07(a)(7) is unconstitutional.

"We ordinarily observe the doctrine of *stare decisis* 'to promote judicial efficiency and consistency, encourage reliance on judicial decisions, and contribute to the integrity of the judicial process.'" *Garcia v. State*, 614 S.W.3d 749, 754 (Tex. Crim. App. 2019) (quoting *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000)). Accordingly, we "should not frivolously overrule established precedent." *Ex parte Thomas*, 623 S.W.3d 370, 381 (Tex. Crim. App. 2021). However, "*stare decisis* is not an inexorable command." *Id.* "While there is a strong presumption in favor of established law," we may reconsider our precedent "when, for instance, the original rule or decision was flawed from the outset, produces inconsistent, unjust, or unanticipated results or places unnecessary burdens on the system." *Id.* In other words, "we are not constrained to follow precedent that is wrongly decided or unworkable." *Id.* at 382. Adhering to such precedent does not further *stare decisis*'s goals of promoting judicial efficiency and consistency, encouraging reliance upon judicial decisions, or contributing to the integrity of the judicial process. *Id.* at 381–82. Thus, while "precedent warrants 'deep respect as embodying the considered views of those who have come before' . . . '*stare decisis* [is not] supposed to be

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[7] Pet'r's Br. 19.

the art of methodically ignoring what everyone knows to be true.'" *Id.* at 382 (quoting *Ramos v. Louisiana*, 140 S.Ct. 1390, 1404–05 (2020)).

VI—The Core Holding of *Scott*

Appellant argues that *Scott* should be overruled because: (1) in *Stevens*, the Supreme Court emphasized that courts are not free to declare categories of unprotected speech;[8] (2) in *Alvarez*, the Supreme Court listed the categories of unprotected speech, which did not include intentional harassment;[9] and (3)

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[8] Appellant points to the following admonition in *Stevens*: "Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (referring to *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding child pornography outside the protection of the First Amendment)); *see also United States v. Alvarez*, 567 U.S. 709, 722 (2012) ("Although the First Amendment stands against any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment,'. . . .") (quoting *Stevens*, 559 U.S. at 472)).

[9] In *Alvarez*, the Supreme Court listed historical categories of speech that are outside the protection of the First Amendment:

> content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "'historic and traditional categories [of expression] long familiar to the bar.'" . . . Among these categories are advocacy intended, and likely, to incite imminent lawless action . . . obscenity . . . defamation . . . speech integral to criminal conduct . . . so-called "fighting words," . . . child pornography . . . fraud . . . true threats . . . and speech presenting some grave and imminent threat the government has the power to prevent . . . although a restriction under the last category is most difficult to sustain . . . . These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still

in *Scott*, we relied upon dicta to declare a category of speech outside the protection of the First Amendment.

As discussed above, in *Scott* we noted that "[t]he State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially intolerable manner." *Scott*, 322 S.W.3d at 668–69 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).[10] And if the conduct was, in fact, communicative:

> To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.

Id. at 670.

Appellant takes these statements from *Scott* to be our holding, and he contends that we improperly created a category of speech outside the protection of the First Amendment. In response, the State begins its brief noting that "the core holding of *Scott*" was that "harassment . . . covered by Texas Penal Code 42.07 is non-communicative conduct that does not implicate the First Amendment."[11] In his Reply Brief, Appellant,

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> thrive, and even be furthered, by adherence to those categories and rules.

Alvarez, 567 U.S. at 717–18.

[10] Appellant criticizes our citation to *Cohen* as reliance on dicta.

[11] State's Br. on the Merits 1.

again quoting the above language in *Scott*, complains that "[t]he State even gets *Scott*'s holding wrong."[12]

We disagree. A plain reading of *Scott* shows that we did not hold that the conduct proscribed by § 42.07(a)(4) constituted speech categorically outside the protection of the First Amendment. We held that it was not speech at all.

In *Scott*, the State raised six grounds for review, which we granted:

> (1) Are subsections (a)(4) and (a)(7) of Texas Penal Code § 42.07 unconstitutionally vague?
>
> (2) Do subsections (a)(4) and (a)(7) of Texas Penal Code § 42.07 implicate the First Amendment to the United States Constitution?
>
> (3) Are the term "repeated" and the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," which are both contained within Texas Penal Code § 42.07(a)(4) and (a)(7), unconstitutionally vague?
>
> (4) Did the State's allegation that appellant left "voice mail messages" implicate Texas Penal Code § 42.07(a)(7) in this case, and does that phrase necessarily fall within the definition of "electronic communication" found at Texas Penal Code § 42.07(b)(1)?
>
> (5) If some part of Texas Penal Code § 42.07 is unconstitutionally vague, did the Court of Appeals err by declaring it vague and acquitting appellant instead of applying a narrow

[12] Pet'r's Reply Br. 12–13.

> construction to the statute to avoid the alleged vagueness?
>
> (6) Has the Court of Appeals improperly determined that because subsections (a)(4) and (a)(7) of Texas Penal Code § 42.07 allegedly implicate the First Amendment and might curtail protected speech those subsections are vague, when the proper question should have been whether the subsections are overbroad?

Scott, 322 S.W.3d at 667–68, n.9. However, we only addressed two of those grounds. *Id.* at 670 ("Given our disposition of the State's second and fourth grounds for review, we need not reach the State's remaining grounds for review. We dismiss them."). We first discussed the State's fourth ground for review, which argued that the court of appeals erred in addressing the constitutionality of § 42.07(a)(7), the electronic harassment statute. *Id.* at 668. The court of appeals had found that the information language,[13] alleging that the defendant had left abusive and harassing voicemail messages, fell within the statutory defini-

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[13] The defendant in *Scott* was charged by two informations. The second information alleged that:

> on or about the 12th Day of March, 2006, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to complainant, did make repeated telephone communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant, to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages.

Scott, 322 S.W.3d at 665.

tion of electronic communication. *Id.* at 667. As a result, the court of appeals considered the constitutionality of both § 42.07(a)(4) and (a)(7). *See id.* at 667.

We agreed with the State's argument and sustained the ground because the information tracked the language of § 42.07(a)(4), not (a)(7), and because the statutory text of § 42.07(a)(4) seemed to cover ordinary voice (and therefore voicemail), whereas the text of (a)(7) seemed to cover non-telephonic messages such as e-mail and instant messages. *Id.* at 668.

After sustaining that ground, we turned to the State's second ground for review, which argued "that the court of appeals erred in concluding that § 42.07(a)(4) implicated the free-speech guarantee of the First Amendment." *Id.* at 668.[14] It was important to address "[t]he question of whether the statutory subsection implicate[d] the free-speech guarantee . . . because if the statutory subsection *does* implicate the free-speech guarantee, then Scott, in making his vagueness challenge, is relieved of the usual requirement of showing that the statutory subsection was unduly vague as applied to his conduct." *Id.* We then proceeded "[t]o answer the question of whether § 42.07(a)(4) implicates the free-speech guarantee of the First Amendment[.]" *Id.* After examining the text of the statute,

> we conclude[d] that it is not susceptible of application to communicative conduct that is protected by the First Amendment. In other

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[14] We note that the State's second ground in *Scott* also challenged the court of appeals's constitutionality ruling as to § 42.07(a)(7). *Id.* at 667–68 n.9. Due to our resolution of the State's fourth ground, the court of appeals's decision regarding § 42.07(a)(7) was no longer at issue.

> words, *the statutory subsection does not implicate the free-speech guarantee of the First Amendment*. . . . [W]e believe that the *conduct* to which the statutory subsection is susceptible of application will be, in the usual case, essentially *noncommunicative*, even if the *conduct* includes spoken words.

Id. at 669–70 (emphasis added). Finally, returning to the matter of vagueness, we ended our *Scott* opinion by stating: "*Because § 42.07(a)(4) does not implicate the free-speech guarantee of the First Amendment*, Scott, in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct." *Id.* at 670–71 (emphasis added).

The core holding of our opinion in *Scott* is that the conduct regulated by § 42.07(a)(4) is noncommunicative and does not implicate the free-speech guarantee of the First Amendment. The core holding was not that § 42.07(a)(4) regulates speech unprotected by the First Amendment. A regulation involving nonprotected speech nevertheless still implicates the First Amendment and can still be subject to First Amendment scrutiny, as explained by the Supreme Court in *R.A.V. v. City of St. Paul, Minnesota*:

> We have sometimes said that these categories of expression [obscenity, defamation, and fighting words] are "not within the area of constitutionally protected speech," . . . or that the "protection of the First Amendment does not extend" to them . . . Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity "as not being speech at all[.]" . . . What they

> mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383–84 (1992). The Supreme Court elaborated:

> Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government "may regulate [them] freely," . . . That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well.

Id. at 384. The Supreme Court proceeded to hold that the ordinance at issue in the case was facially invalid under the First Amendment, although it regulated "fighting words." *Id.* at 381. Thus, simply because the ordinance at issue covered unprotected speech did not mean that the ordinance could not be subject to First Amendment scrutiny. To the contrary, the Supreme

Court applied First Amendment strict scrutiny because (its coverage of "fighting words" notwithstanding) it proscribed only those "fighting words" that insult or provoke violence "on the basis of race, color, creed, religion or gender." *Id.* at 391. It did not prohibit "fighting words" in connection with other ideas, such as expressing hostility on the basis of political affiliation, union membership, or homosexuality. *Id.* Accordingly, the ordinance imposed a special prohibition on speakers who expressed views on disfavored subjects. *Id.* This went beyond mere content discrimination to actual viewpoint discrimination. *Id.*

As illustrated by *R.A.V.*, a statute that covers speech in a category traditionally outside the protection of the First Amendment nevertheless still implicates the First Amendment. In the absence of speech, whether protected or unprotected, the First Amendment is not implicated. When we held in *Scott* that the conduct regulated by § 42.07(a)(4) does not implicate the First Amendment because the conduct governed by § 42.07(a)(4) is noncommunicative, we meant it. It is not speech.

Therefore, the discussion Appellant complains of, wherein we referred to the State's ability to restrict communications that invade another's privacy interests in an essentially intolerable manner, was—at the very least—a recognition of the legitimate governmental purpose to which the statute bears a rational relationship. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating standard of review for upholding statutes that neither burden a fundamental right nor target a suspect class). At the most, we posed an alternative theory to support our judgment that the statute did not violate the First Amendment. But even on that basis, it was not *Scott*'s holding, or even an

alternative holding.[15] Aside from the brief mention of the theory, our disposition of the State's second ground for review in *Scott* was based squarely on our conclusion that § 42.07(a)(4) regulated non-speech conduct, even if that conduct included the use of words. We did not carve a category of speech out from the protections of the First Amendment. Appellant's retort in his Reply Brief has it backwards—the State gets *Scott*'s holding right.[16]

VII—*Scott* Was Not Wrongly Decided and Is Not Unworkable

Our clarification of *Scott*'s holding—that the telephone harassment statute, § 42.07(a)(4), regulates non-speech conduct and therefore does not implicate the First Amendment—puts to bed Appellant's specific reasons for overruling the case. But, as explained

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[15] We have previously suggested that an alternative holding "could be viewed as mere *dicta*." *Brooks v. State*, 957 S.W.2d 30, 33 (Tex. Crim. App. 1997). However, we have never explicitly held as much. *See Duran v. State*, 492 S.W.3d 741, 754 n.1 (Tex. Crim. App. 2016) (Yeary, J., concurring and dissenting) ("So far as I know, this Court has yet to fashion a rule—one way or the other—with respect to the precedential value of alternative holdings."). Our sister court, the Supreme Court of Texas, has clearly stated that alternative holdings are binding. *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 502 (Tex. 2015) ("[A]lternative holdings . . . are . . . entitled to *stare decisis* treatment[.]").

Whatever may be said regarding the precedential value of alternative holdings, what is clear in this case is that the theory stated in *Scott*—that if it were communicative conduct, "that communicative conduct is not protected by the First Amendment because . . . that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner"—was not even an alternative holding.

[16] *Contra* Pet'r's Reply Br., at 12 ("The State even gets *Scott*'s holding wrong.").

above, a precedent may be overruled if it was wrongly decided or has proven to be unworkable. *Thomas*, 623 S.W.3d at 382. Appellant is not the only one to suggest that *Scott* was wrongly decided and should be reconsidered. *See Scott*, 322 S.W.3d at 671 (Keller, P.J., dissenting); *Wilson*, 448 S.W.3d at 426–27 (Keller, P.J., concurring) ("[W]e ought to, when the issue is raised again, re-evaluate our holding in [*Scott*]."); *Ex parte Reece*, 517 S.W.3d 108, 110 (Tex. Crim. App. 2017) (Keller, P.J., dissenting to refusal of petition for discretionary review) ("The second reason to grant review is to re-examine *Scott*."); *Ogle v. State*, 563 S.W.3d 912, 912 (Tex. Crim. App. 2018) (Keller, P.J., dissenting to refusal of petition for discretionary review).

We conclude that *Scott* was neither wrongly decided nor unworkable, and we decline the suggestion to overrule it. We find no fault in our holding that § 42.07(a)(4), the telephone harassment statute, regulates non-speech conduct and therefore does not implicate the First Amendment.

"The First Amendment literally forbids the abridgment only of 'speech[.]'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989). However, the First Amendment's "protection does not end at the spoken or written word." *Id.* "[T]he Constitution looks beyond written or spoken words as mediums of expression." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). For example, "[s]ymbolism is a primitive but effective way of communicating ideas." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). Accordingly, "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[.]'"

Johnson, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

However, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia, J., concurring) ("[V]irtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."). Thus, the Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, First Amendment protection extends "only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (*FAIR*). To determine "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the question to ask is "whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11)). But "a 'particularized message'" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. The answer to the question oftentimes depends on the circumstances surrounding the conduct. "[T]he

context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410.

Where the conduct does not have a significant expressive element, then "the First Amendment is not implicated by the enforcement of a [law] of general application[.]" *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986). Such laws, applicable to "nonexpressive conduct," do not "[have] anything to do with the First Amendment." *See Virginia v. Hicks*, 539 U.S. 113, 123 (2003) (holding that city policy authorizing police to bar non-residents from low income housing development and thereafter arrest individuals violating barment order for trespassing did not violate First Amendment, even if trespasser sought to engage in speech); *Arcara*, 478 U.S. at 706–07 (finding that enforcement of statute authorizing closure of premises used for prostitution did not violate First Amendment as applied to bookstore; even though bookstore sold books, such activity did not confer First Amendment protection to prostitution activity occurring on the premises). "Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara*, 478 U.S. at 708 (O'Connor, J., concurring).

Thus:

> [N]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable,

> whereas burning a flag in violation of an ordinance against dishonoring the flag is not.

R.A.V., 505 U.S. at 385.

Delineating and applying the above principles, the Supreme Court has recognized a wide array of conduct as expressive, including displaying a red flag "as a sign, symbol, or emblem of opposition to organized government[;]"[17] saluting and *not* saluting the flag;[18] conducting a silent sit-in;[19] burning a draft card in demonstration against the war and the draft;[20] wearing black armbands to object to the hostilities in Vietnam;[21] displaying the flag upside down with a "peace symbol" made of black tape affixed to the flag to express that America stood for peace after the Cambodian invasion and the Kent State massacre;[22] camping in Lafayette Park and the National Mall to call attention to the plight of the homeless;[23] burning the flag during a protest rally;[24] nude dancing;[25]

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[17] *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[18] *Barnette*, 319 U.S. at 632–34, 642.

[19] *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966).

[20] *O'Brien*, 391 U.S. at 376.

[21] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504–06 (1969).

[22] *Spence*, 418 U.S. at 409–10.

[23] *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming, without deciding, that conduct was expressive).

[24] *Johnson*, 491 U.S. at 406.

[25] *Barnes*, 501 U.S. at 565–66.

marching in a parade;[26] organizing and choosing the participants in a parade;[27] and cross-burning.[28]

In comparison, the Supreme Court found the conduct in *FAIR* was not inherently expressive and thus did not implicate the First Amendment. *FAIR*, 547 U.S. at 66. In that case, an association of law schools and law school faculties, opposed to the military's policy on homosexuals, began restricting access to military recruiters for on-campus interviews. *Id.* at 51. In response, Congress enacted the Solomon Amendment which stripped federal funding from institutions that denied access to military recruiters. *Id.* The law schools and faculties sought a preliminary injunction against the application of the Solomon Amendment, arguing that the law put them to the choice of exercising their First Amendment rights or ensuring federal funding for their universities. *Id.* at 52–53.

Among other arguments, the Supreme Court "consider[ed] whether the expressive nature of the *conduct* regulated by the statute brings that conduct within the First Amendment's protection." *Id.* at 65 (emphasis in original). The Supreme Court determined that:

> Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. . . . [L]aw schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For

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[26] *Hurley*, 515 U.S. at 569–70.

[27] *Id.* at 574–75.

[28] *Virginia v. Black*, 538 U.S. 343, 360–61 (2003).

> example, the point of requiring military interviews to be conducted on the undergraduate campus is not "overwhelmingly apparent." . . . An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.
>
> The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection. . . .

Id. at 66.

Similarly, in *Carrigan*, the Supreme Court considered a recusal provision in a Nevada governmental ethics law that requires public officials to recuse themselves from voting on, or advocating the passage or failure of, a matter the official has a personal interest in. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 119, 121 (2011). The Nevada Supreme Court determined that the law violated the First Amendment, finding that a legislator's vote is protected speech. *Id.* at 121.

Reversing, the United States Supreme Court considered several arguments—including the contention raised by the concurrence "that legislators often 'use their votes to express deeply held and highly unpopular views, often at great personal or political

peril.'" *Id.* at 126 (quoting *id.* at 133 (Alito, J., concurring)). Invoking the reasoning of *FAIR*, the Supreme Court majority responded:

> How do they express those deeply held views, one wonders? Do ballots contain a check-one-of-the-boxes attachment that will be displayed to the public, reading something like "( ) I have a deeply held view about this; ( ) this is probably desirable; ( ) this is the least of the available evils; ( ) my personal view is the other way, but my constituents want this; ( ) my personal view is the other way, but my big contributors want this; ( ) I don't have the slightest idea what this legislation does, but on my way in to vote the party Whip said vote 'aye'"? There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country's policies . . . But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication. Cf. [*FAIR*, 547 U.S. at 66] (expressive value was "not created by the conduct itself but by the speech that accompanies it").

Id. at 126–27.

Turning to the conduct proscribed by § 42.07(a)(4), is such conduct inherently expressive? *See FAIR*, 547 U.S. at 66. Is an intent to convey a particularized message present? *See Johnson*, 491 U.S. at 404. Is the likelihood great that the message would be understood

by those who viewed it? *See id.* Because Appellant's challenge to the statute came pre-trial, and there is no record evidence of conduct to examine for elements of expression, we return to the statute's literal text:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;

TEX. PENAL CODE Ann. § 42.07(a)(4); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[W]e necessarily focus our attention on the literal text of the statute in question[.]"). The § 42.07(a)(4) offense has three gravamen: causing the telephone of another to ring repeatedly (a result of conduct offense); making repeated telephone communications anonymously (a nature of conduct offense); and making repeated telephone communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another (a nature of conduct offense). *See generally Price v. State*, 457 S.W.3d 437, 441 (Tex. Crim. App. 2015) (discussing gravamen of the offense).

Causing a telephone to ring repeatedly is not inherently expressive; there is no intent to convey a particularized message, nor is there any likelihood that an observer would understand a message from the conduct. *See FAIR*, 547 U.S. at 66; *Johnson*, 491 U.S. at 404.

As for the "makes repeated telephone communications anonymously" offense, we recognized in *Scott* that "the text [of the statute] does not require that

the actor use spoken words." *Scott*, 322 S.W.3d at 669. Repeated calls where the anonymous caller says nothing at all, or where the calls contain indistinct noise, would constitute the making of "repeated telephone communications." An observer would not comprehend any communicative message from those calls. *See Johnson*, 491 U.S. at 404.

Finally, regarding the "makes repeated telephone communications in a manner reasonably likely to harass . . ." offense, the use of harassing, annoying, alarming, abusive, tormenting, embarrassing, or offending words could easily show the calls were made in a harassing, annoying, alarming, abusive, tormenting, embarrassing, or offending manner. Again, however, "the text [of the statute] does not require that the actor use spoken words." *Scott*, 322 S.W.3d at 669. Repeated telephone communications can be made in a harassing, annoying, alarming, abusive, tormenting, embarrassing, or offending manner without any words used at all. For example, if the telephone calls are consistently repeated or made during particularly inconvenient hours, such calls could very well be made in the prohibited manner, regardless of the content of those calls. And an observer, viewing such conduct, would not understand the calls to be portraying a message. *See Johnson*, 491 U.S. at 404.

The bare statutory conduct prohibited by § 42.07(a)(4) is distinct from the expressive conduct recognized by the Supreme Court. It does not involve symbols which carry special symbolic meaning like the flag. *See, e.g.*, *Stromberg*, 283 U.S. 359; *Barnette*, 319 U.S. 624; *Spence*, 418 U.S. 405; *Johnson*, 491 U.S. 397. It does not involve acts that communicate an idea in light of societal context such as conducting a sit-in during the midst of the Civil Rights Movement, burning a draft

card as part of an anti-war protest during the Vietnam War, or taping a peace sign to an upside down flag in the aftermath of the Kent State massacre. *See, e.g.*, *Brown*, 383 U.S. 131; *O'Brien*, 391 U.S. 367; *Spence*, 418 U.S. 405. It is not "closely akin to 'pure speech'" like wearing a black armband to show solidarity with the anti-war movement. *Tinker*, 393 U.S. at 505–06. It does not even occupy the outer limits of the First Amendment's protection where one would find nude dancing that communicates a message of eroticism. *Barnes*, 501 U.S. at 565–66.

Instead, statutory conduct covered by § 42.07(a)(4) fails to express any ideas at all. Like law schools requiring military recruiters to conduct their interviews on their undergraduate campus, or a legislator's vote, an observer viewing a person repeatedly make telephone calls would not perceive any expressive element by the calling alone. Is the caller trying to annoy the person who he is calling? Or is the caller sincerely trying to reach the person, wholly intending to have a conversation? The same is true when the observer views the conduct from the receiving end. An observer would not perceive any expressive message by witnessing a telephone ring repeatedly or by seeing a person receive repeated phone calls. There is no likelihood that those who view the bare statutory conduct of making repeated phone calls would understand any expressive message from this conduct. *See Johnson*, 491 U.S. at 404. The only way for observers to know that the caller means to express anything by these acts is for the caller to explain it to them; making repeated telephone calls is pure conduct that must be explained by separate speech. *See FAIR*, 547 U.S. at 66.

Nevertheless, Appellant argues that intentional harassment constitutes protected speech because the speaker who intends to harass has a communicative intent. In other words, the speaker's intent to harass is an intent to communicate, and, if a speaker intends to communicate, his speech implicates the First Amendment.

The Supreme Court has "rejected the view that 'conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *FAIR*, 547 U.S. at 65–66 (quoting *O'Brien*, 391 U.S. at 376). Instead, First Amendment protection extends "only to conduct that is inherently expressive." *Id.* The Supreme Court's rejection is common sense. If the conduct is not inherently expressive, then an observer would not know that the conduct is intended to be expressive regardless of the actor's subjective intent.

Furthermore, even assuming that a person intending to harass, etc., by engaging in conduct covered by § 42.07(a)(4) accompanies that conduct with messages stating his intent to harass ("I want to harass you;" "I am going to harass you;" or "This is me harassing you"), that does not convert the conduct itself into speech. To the contrary, it remains non-speech conduct accompanied by explanatory speech. The Supreme Court cautioned that:

> If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply

> *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

FAIR, 547 U.S. at 66.

It is not difficult to imagine scenarios similar to the tax protestor. For example, assume a person driving his car on the highway intends to harass another driver. He drives his car aggressively, tailgates the other driver, quickly passes and cuts off that driver, repeatedly "brake checks," and, in the course of doing so, makes several rude gestures and yells several epithets that unmistakably convey his feelings. The statutes in the Transportation Code governing driving do not become subject to the First Amendment simply because those driving acts were done to express anger at the other driver.

And, frankly, we need not even imagine. Would the government's power to punish the assassination of the President be subjected to modern First Amendment scrutiny simply because the assassin accompanied his act with speech ("*sic semper tyrannis*")? *See John Wilkes Booth Shoots Abraham Lincoln*, History (Nov. 13, 2009), www.history.com/this-day-in-history/john-wilkes-booth-shoots-abraham-lincoln. Would the government's power to punish the bombing and destruction of a federal building, resulting in 168 deaths and the wounding of hundreds more, be subjected to First Amendment scrutiny simply because the bomber intended to express a message against the federal government due to their "siege of the Branch Davidians in Waco"? *United States v. McVeigh*, 153 F.3d 1166, 1177–78 (10th Cir. 1998).

No one would doubt the government's power to assess taxes or prohibit reckless driving. No one

would say the First Amendment stands to protect Presidential assassinations or allow for the deadliest act of domestic terrorism in American history. A statute or regulation proscribing non-speech conduct does not suddenly become subject to First Amendment scrutiny because the actor accompanies his non-speech conduct with speech.

In sum, we find that *Scott* was not wrongly decided, and *Scott* is not unworkable. We therefore decline Appellant's suggestion that we overrule *Scott*, and we reaffirm our holding that on its face, § 42.07(a)(4), the telephone harassment statute, proscribes non-speech conduct that does not implicate the protections of the First Amendment.

VIII—§ 42.07(a)(7)

As for § 42.07(a)(7), at issue in Appellant's case, that statute and subsection (b)(1) provide:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.
>
> (b) In this section:
>
> (1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.

TEX. PENAL CODE Ann. § 42.07(a)(7), (b)(1).

The gravamen of the § 42.07(a)(7) offense is the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another (nature of conduct). *See Price*, 457 S.W.3d at 441. Based upon the definition of "electronic communication," we find that this offense is like the § 42.07(a)(4) repeated telephone communication offense, and speech is not necessary for commission of the offense. "Electronic communication" consists of a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature. TEX. PENAL CODE Ann. § 42.07(b)(1). To be sure, some of those items, such as a writing, an image, and a sound, evoke traditional categories of communication. But the statute does not require the electronic communication to be a writing, an image, or a sound. By the literal text of the statute, the electronic communication that is sent could be in the form of "data . . . of any nature." *Id.*; *see also Boykin*, 818 S.W.2d at 785.

The bare fact that data of any nature is sent electronically does not mean that anything has been expressed. The statute is equally violated by the repeated sending of communications containing expressive speech as it is by the repeated sending of communications containing no speech at all. A person intending to harass another could violate the statute by sending several e-mails containing only the letter "B" (arguably a "writing") or e-mails containing

nothing (some minimal level of "data"). Or the person could violate the statute by sending computer code ("signals" or "data") that would be a readable sequence of machine language understood by a computer but entirely indecipherable and meaningless to humans. And there is no requirement that the data be actually usable. Entirely meaningless data understandable by neither man nor machine could just as well be sent, repeatedly, in a manner reasonably likely to harass, etc., with the specific intent to harass, etc.

But has anything been inherently expressed by such an act? *See FAIR*, 547 U.S. at 66. We think not. There is no likelihood that an observer who views the bare conduct of sending repeated electronic communication would understand any expressive message from this conduct. *See Johnson*, 491 U.S. at 404. An observer may glean, at the most, that the sender wants to send something to the receiver. The only way for an observer to know that the sender means to express anything by these acts is for the sender to explain it to them; the repeated sending of some sort of electronic communication is pure conduct that must be explained by separate speech. *See FAIR*, 547 U.S. at 66. Accordingly, the electronic harassment statute does not regulate expressive conduct. Instead, it focuses upon conduct that is not inherently expressive. If there was an intent to be expressive, the actor would have to provide separate speech accompanying and explaining the conduct.

In sum, we hold that on its face, § 42.07(a)(7), the electronic harassment statute, proscribes non-speech conduct that does not implicate the protections of the First Amendment, although elements of speech may be employed to commit the offense.

VIII—Conclusion: *Scott* Applies

In conclusion, in *Scott*, we did not create a new category of speech outside of the protection of the First Amendment. Instead, we concluded that § 42.07(a)(4), the telephone harassment statute, regulates non-speech conduct and therefore does not implicate the First Amendment even though words may be used in the commission of the offense. The same can be said for § 42.07(a)(7), the electronic harassment statute. On its face, § 42.07(a)(7) does not implicate and does not violate the First Amendment of the United States Constitution. Whether § 42.07(a)(4) or (a)(7) could implicate the First Amendment on an as-applied basis, and, if so, whether such application is permissible under the appropriate standard of scrutiny are questions for another day.[29]

The judgment of the court of appeals is affirmed.

Delivered: April 6, 2022

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[29] *See O'Brien*, 391 U.S. at 376–77 (providing test for regulations that on their face do not suppress free expression that nevertheless cause an incidental limitation on speech where speech and non-speech elements have been combined into the same course of conduct).

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-0469-19

EX PARTE NATHAN SANDERS, *Appellant*

On Appellant's Petition for Discretionary Review
From the Seventh Court of Appeals
Lubbock County

YEARY, J., filed a concurring opinion.

I agree with the Court and join its opinion. The statute at issue here protects citizens from harassment—from being forced and compelled to endure the delivery of repeated electronic communications sent to them in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another, and with the specific intent to do just that to them.[1] The conduct

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[1] Our Texas harassment law was enacted as part of the 1974 Penal Code. Acts 1973, 63rd Leg., ch. 399, § 1, p. 883, eff. Jan. 1, 1974. Since then, it has been amended nine times. *See* TEX. PENAL CODE § 42.07 (amended in 1983, 1993, 1994, 1995, 1999, 2001, 2013, 2017, and 2021).

Appellant in this case was alleged to have committed the offense of harassment on or about February 9, 2015. At that time, the applicable harassment statute provided that:

> [a] person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> * * *

covered by the law applicable in this case appears to me to be limited in kind to instances in which harassing communications are directed and targeted specifically at an individual.[2] That the law would seek to defend private citizens from such targeted harassment is no more surprising than that it would seek to protect them from stalking, offensive touching, or assault.

With these additional thoughts, I join the Court's opinion.

FILED: April 6, 2022

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> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(a)(7)).

[2] Subsection (b) of our harassment law, during the relevant time frame, provided the following definition of "electronic communication":

> [A] transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
>
> (B) a communication made to a pager.

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(b)).

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. PD-0469-19

EX PARTE NATHAN SANDERS, *Appellant*

ON APPELLANT'S PETITION FOR
DISCRETIONARY REVIEW FROM THE SEVENTH
COURT OF APPEALS LUBBOCK COUNTY

KELLER, P.J., filed a dissenting opinion in which KEEL, J., joined.

For the reasons discussed in my dissent in *Barton v. State*, ___ S.W.3d ____, No. PD-1123-19 (Tex. Crim. App. March 30, 2022), I strongly disagree with the Court's conclusion that the electronic-communications statute can be upheld on the basis that it does not proscribe speech. Because a great number of applications of the statute will be to speech, the remaining question is whether the statute punishes a substantial amount of protected speech in relation to its legitimate sweep. Because the Court does not answer that question, I will say here only that the breadth of the statute convinces me that the answer is "yes."

I respectfully dissent.

Filed: April 6, 2022

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APPENDIX C

IN THE COURT OF APPEALS
SECOND APPELLATE DISTRICT OF TEXAS
AT FORT WORTH

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No. 02-17-00188-CR

———

EX PARTE CHARLES BARTON

———

On Appeal from County Criminal Court No. 8
Tarrant County, Texas
Trial Court No. 1314404

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Before Sudderth, C.J., and Kerr, J.[1]
Opinion by Chief Justice Sudderth

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OPINION ON REHEARING

Appellee the State of Texas filed a motion for rehearing of our August 8, 2019 opinion and judgment. We deny the motion but withdraw our prior opinion and substitute the following in its place. With the exception of a footnote added to address the State's argument for rehearing, our opinion otherwise remains unchanged.

Appellant Charles Barton appeals from the trial court's order denying his application for writ of habeas corpus. In three points, he argues that the version of

[1] Justice Bill Meier was a member of the original panel but has since retired. Therefore, the two remaining justices decided the case. *See* Tex. R. App. P. 41.1(b).

penal code section 42.07(a)(7) under which he was charged is unconstitutionally overbroad and vague and that the charging instrument fails to give him notice of the offense. *See* Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013) (current version at Tex. Penal Code Ann. § 42.07(a)(7)). Because we agree with Barton that the 2001 version of section 42.07(a)(7) is unconstitutionally vague and overbroad on its face, we reverse.

Background

In February 2013, Barton was charged by information with nine counts of harassment by sending electronic text messages or email communications to his ex-wife.[2] He moved to quash the information on the grounds that penal code section 42.07(a)(7) was unconstitutional and that the information lacked the requisite specificity. After the trial court denied the motion to quash, Barton filed an application for writ of habeas corpus, again challenging the constitutionality of section 42.07(a)(7).[3] The trial court denied the application, and this appeal followed.

Discussion

We review a constitutional challenge de novo as a question of law, and we presume that the statute is

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[2] The nine counts similarly charge that on different dates, Barton "did then and there intentionally, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend Mona Dawson, send repeated electronic communications, to wit: text messages or email communications to Mona Dawson."

[3] An accused may challenge the facial constitutionality of a statute defining the charged offense through a pretrial application for writ of habeas corpus. *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014) (citing *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010)).

valid and that the legislature has not acted unreasonably or arbitrarily. *Goyzueta v. State*, 266 S.W.3d 126, 130 (Tex. App.—Fort Worth 2008, no pet.). At the time that Barton was charged, the statute, entitled "Harassment," provided in relevant part,

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment or embarrass another, he:
>
> . . . .
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.
>
> . . . .
>
> (b) In this section:
>
> (1) "Electronic communication" means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine;[4] and

[4] The definition of "electronic communication" was amended in 2017. It now reads: "(A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine;

(B) a communication made to a pager.

Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013).

As the accused, Barton bears the burden to establish the statute's unconstitutionality.[5] *Goyzueta,* 266 S.W.3d at 130. In his first and second points, Barton argues that penal code section 42.07(a)(7) is unconstitutionally vague and overbroad, both facially and as applied to him.[6] First, Barton contends that the statute is vague because the terms "annoy" and "alarm" are reasonably susceptible to different meanings to different people and because the section "lacks a clear standard of conduct . . . and is dependent on each complainant's sensitivity." Second, Barton contends that section 42.07(a)(7) is overbroad because it "chills First Amendment protected speech" and "prevents a spouse from expressing his true feelings, emotions or needs to his spouse for fear that his speech may be

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and (B) a communication made to a pager." Tex. Penal Code Ann. § 42.07(b)(1)(A). We construe only the law as it existed in 2013.

[5] Barton did not argue to the trial court and does not argue before this court that section 42.07(a)(7) constitutes a content-based restriction on speech, which would shift the burden to the State and require the application of strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (2015). Barton has therefore forfeited any such argument and we will apply the "normal standard of review," presuming that the statute is valid and placing the burden upon Barton to establish its unconstitutionality. *Wagner v. State*, 539 S.W.3d 298, 316–17 (Tex. Crim. App. 2018).

[6] A claim that a statute is unconstitutional on its face is a claim that the statute, by its terms, always operates unconstitutionally. *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006). A claim that a statute is unconstitutional "as applied" is a claim that the statute operates unconstitutionally with respect to the defendant because of his particular circumstances. *Id.* at n.3.

deemed 'annoying' and therefore criminal.'"[7] The State responds that section 42.07(a)(7) is neither overbroad nor vague.

We agree with Barton that section 42.07(a)(7) is facially unconstitutional because it is vague and overbroad and therefore do not reach his third point attacking the nonspecific nature of the information. Tex. R. App. P. 47.1.[8]

I. Section 42.07(a)(7)'s impact on the guarantee of free speech

The First Amendment protects the freedom of speech and applies to the states by virtue of the Fourteenth Amendment. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638–39, 63 S. Ct. 1178, 1185–86 (1943). The protection of free speech includes the "free communication and receipt

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[7] In its motion for rehearing, the State asserts that Appellant has never argued that 42.07(a)(7) is unconstitutionally overbroad. This is an about-face from the State's previous briefing, which not only acknowledged Appellant's overbreadth arguments but in fact referred to them no fewer than seven times in its response brief, including a four-page subsection titled, "Section 42.07(a)(7) is not unconstitutionally overbroad because it does not criminalize protected speech." [Emphasis added.] We disagree with the State's new position.

[8] In his third point, Barton argues that the information was invalid and should have been quashed because it failed to clearly specify the manner and the means by which he allegedly violated penal code subsection 42.07(a)(7). Although we do not reach this point, we note that we have no jurisdiction to review interlocutory orders unless that jurisdiction has been expressly granted by law, and no law authorizes an interlocutory appeal of an order denying a motion to quash. *Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991); *Ex parte Alvear*, 524 S.W.3d 261, 263 (Tex. App.—Waco 2016, pet. ref'd).

of ideas, opinions, and information." *Scott v. State*, 322 S.W.3d 662, 668 (Tex. Crim. App. 2010) (citing *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390, 89 S. Ct. 1794, 1806 (1969); and *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 769–70 (1942)). But the guarantee of free speech is not absolute and the State "may lawfully proscribe communicative conduct that invades the substantial privacy interests of another in an essentially intolerable manner." *Id.* (citing *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971)).

Because this is a First Amendment challenge, we must first determine whether it "reaches a substantial amount of constitutionally protected conduct" before considering whether section 42.07(a)(7) is facially overbroad or vague. *Vill. of Hoffman Estates, v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 1191 (1982).

Almost a decade ago, the court of criminal appeals addressed the issue of whether the language of section 42.07 affects protected speech in the context of its prohibition of harassing telephone calls.[9] *Scott*, 322 S.W.3d at 666. In that case, Scott moved to quash an indictment that charged him with violating the telephone-harassment subsection by calling the complainant "repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail

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[9] The subsection at issue provided: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he . . . makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* at 666 n.4; *see also* Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013) (current version at Tex. Penal Code Ann. § 42.07(a)(4)).

messages." *Id.* at 665. His motion was denied and he was convicted, but the court of appeals agreed with his argument that the telephone-harassment subsection was facially unconstitutional in violation of the First Amendment because it was unduly vague. *Scott v. State*, 298 S.W.3d 264, 270–73 (Tex. App.—San Antonio 2009),[10] *rev'd*, *Scott*, 322 S.W.3d at 671.

The court of criminal appeals reversed and held that telephone communications that violated the harassment statute were "essentially noncommunicative" because "in the usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake." *Scott*, 322 S.W.3d at 669–70. In other words, the court of criminal appeals concluded that the telephone-harassment subsection was only susceptible of application to communicative conduct "when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.* Because section 42.07(a)(4) did not reach

[10] The San Antonio court additionally held that the electronic-communications subsection was unduly vague based upon its interpretation of a second charging instrument against Scott as charging him with violating section 42.07(a)(7). *Id.* at 269. The court of criminal appeals disagreed with the San Antonio court's interpretation of the second charging instrument, held that the charging instrument did not involve an electronic communication, and held that the court of appeals erred in addressing the constitutionality of subsection 42.07(a)(7). *Scott*, 322 S.W.3d at 668.

communicative conduct, it did not implicate the free-speech guarantee of the First Amendment. *Id.*[11]

Presiding Judge Keller disagreed with the majority's decision. In her dissent, she argued that section 42.07(a)(4) implicated the First Amendment "with respect to the terms 'annoy,' 'alarm,' 'embarrass,' and 'offend,'"—emotional states that she identified as "low intensity"—but did not implicate the First Amendment "with respect to the terms 'harass,' 'abuse,' and 'torment'"—emotional states that she identified as "high intensity." *Id.* at 676 (Keller, P.J., dissenting). The distinction she drew between low and high intensity emotional states was in part based on the inherently personal and invasive nature of telephone calls:

> [T]he telephone is a comparatively personal and private method of communication in which messages can be difficult to screen. . . . [I]t is a device readily susceptible to abuse by a person who intends to be a constant trespasser upon our privacy. When the intent of the actor is to inflict one of the higher-intensity emotional states of harass, abuse, and torment in the relatively private,

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[11] At least four of our sister courts have applied this reasoning to a First Amendment analysis of subsection 42.07(a)(7). *See Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678, at *5–6 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication); *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *3 (Tex. App.—Eastland Nov. 30, 2016, pet ref'd) (mem. op., not designated for publication); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *3 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication); *Lebo v. State*, 474 S.W.3d 402, 407 (Tex. App.—San Antonio 2015, pet. ref'd). We disagree with those courts for the reasons discussed herein.

> "captive-audience" telephone context, and the actor's conduct is reasonably likely to achieve that end, the First Amendment provides no protection.

Id. (citation and footnotes omitted) (emphasis added).

Keller disagreed with what she assessed as the majority's unnecessary "graft[ing ofJ 'sole intent' onto the harassment statute as a narrowing construction." *Id.* at 676 ("[IJf the court is implying that situations are rare in which a person has more than one intent, I disagree. The mischief this statute can create is enormous."). As an example, she wrote, "One can easily imagine an ex-boyfriend hounding someone over the telephone with the intent to harass, abuse, or torment, but also having a particular grievance, real or imagined, to communicate." *Id.* at 677.

Four years later, the court of criminal appeals disavowed portions of the *Scott* decision. In *Wilson v. State*, it directly abrogated dicta in a footnote in the *Scott* decision that defined "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode." 448 S.W.3d 418, 422 (Tex. Crim. App. 2014) (discussing and quoting *Scott*, 322 S.W.3d at 669 n.12 (majority opinion)). But more important to this case, the court of criminal appeals acknowledged that a potential offender could have more than one intent in delivering harassing conduct. *Id.* at 425; *see also id.* at 426 (Keller, P.J., concurring) (describing the majority decision as "abandoning" the sole-intent requirement).

The court's decision in *Wilson* addressed an evidentiary-sufficiency challenge to a conviction for telephonic harassment under subsection (a)(4); it did not address a challenge to the constitutionality of the

statute. *Id.* at 424–26 (majority opinion) (noting that constitutional vagueness and overbreadth challenges were not implicated in the appellant's legal-sufficiency challenge). But the court did acknowledge the potential that a "facially legitimate" reason may exist in a harassing phone call. *Id.* at 425 ("[T]he existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of the call."). In her concurring opinion, which was joined by Judge Cheryl Johnson, Presiding Judge Keller reiterated her warnings of the overbreadth of the statute and urged the court to re-evaluate the holding in *Scott* at its next opportunity. *Id.* at 426 (Keller, P.J., concurring).

We agree that the *Wilson* decision recognized that a person who communicates with the intent to harass, annoy, alarm, abuse, torment, or embarrass can also have an intent to engage in the legitimate communication of ideas, opinions, information, or grievances. *See Scott*, 322 S.W.3d at 669–70. As the court explained in *Wilson*, a phone call by the appellant (a neighbor of the complainant) had both a facially legitimate reason behind it—to inform the complainant of construction issues—and could also have been made with an intent to harass or annoy the complainant when viewed in the context of other harassing phone calls made by the appellant.[12] *Wilson*, 448 S.W.3d at 425.

Indeed, four years after *Wilson*, this court rejected such an argument when we held that the electronic-communications provision of the harassment statute—section 42.07(a)(7)—was unconstitutionally vague and,

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[12] Barton's counsel supplied another apt example at oral argument: a father's repeated text messages to his teenage child asking the teenager to mow the lawn.

therefore, void. *Karenev v. State*, 258 S.W.3d 210, 213 (Tex. App.—Fort Worth 2008), *rev'd on other grounds*, 281 S.W.3d 428 (Tex. Crim. App. 2009). As we pointed out, the problem with the State's argument that harassment is not First Amendment protected speech was that the challenged statute itself defined harassment, and "[u]nless the harassment statute [was] sufficiently clear to withstand constitutional scrutiny, no unlawful harassment exists that would be excluded from First Amendment protection." *Id.* We agree with our prior holding in this respect.

Having held that section 42.07(a)(7) affects protected speech, we turn to an analysis of its vagueness and overbreadth.

II. The vagueness and overbreadth of section 42.07(a)(7)

A. Applicable law of vagueness and overbreadth analyses

"[V]ague laws offend the Federal Constitution by allowing arbitrary and discriminatory enforcement, by failing to provide fair warning, and by inhibiting the exercise of First Amendment freedoms." *May v. State*, 765 S.W.2d 438, 439 (Tex. Crim. App. 1989). When examining the vagueness of a statute, we focus on the statute's ability to provide fair notice of the prohibited conduct. *State v. Doyal*, No. PD-0254-18, 2019 WL 944022, at *5 (Tex. Crim. App. Feb. 27, 2019) (requiring that a law imposing criminal liability be sufficiently clear "(1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement"). A law that implicates First Amendment freedoms requires even greater specificity "to avoid chilling protected expression." *Id.* As the court

of criminal appeals recently explained, specificity and clarity are important to prevent citizens from "steer[ing] far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 2299 (1972)). And the United States Supreme Court has also emphasized the importance of specificity and clarity so that law enforcement has "minimal guidelines" to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858–59 (1983).

Vagueness and overbreadth are intertwined. *Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996) (citing *Kramer v. Price*, 712 F.2d 174, 176 n.3, 177 (5th Cir.), *reh'g en banc granted and prior opinion vacated,* 716 F.2d 284 (5th Cir. 1983), *aff'g dist ct.*, 723 F.2d 1164 (5th Cir. 1984) (en banc opinion) (per curiam)). A statute is overbroad in violation of the First Amendment guarantee of free speech if in addition to proscribing activity that may be constitutionally forbidden, it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment.[13] *Morehead v. State*, 807 S.W.2d

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[13] A First Amendment overbreadth challenge operates differently than other facial constitutional challenges. Generally, a facial challenge to the constitutionality of a statute must fail if it does not show that the statute, by its terms, always operates unconstitutionally. *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006). And as a general principle, a defendant does not have standing to challenge a statute on the ground that it may be unconstitutionally applied to the conduct of others. *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (citing *Cty. Court of Ulster, N.Y. v. Allen*, 442 U.S. 140, 155, 99 S. Ct. 2213, 2223 (1979); and *Broadrick v. Oklahoma*, 413 U.S. 601,

577, 580 (Tex. Crim. App. 1991). The statute's oppressive affect cannot be minor—it must "prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'" *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (footnotes and citations omitted).

B. The vagueness of "harass, annoy, alarm, abuse, torment, or embarrass" in light of the statute's overbreadth

The criminalization of "annoying" behavior—without any objective measurement or standard—has been repeatedly held unconstitutionally vague:

> What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or "indecent"—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

United States v. Williams, 553 U.S. 285, 306, 128 S. Ct. 1830, 1846 (2008) (citing *Coates v. Cincinnati*,

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610, 93 S. Ct. 2908, 2914 (1973)). But the First Amendment's overbreadth doctrine allows a court to declare a law unconstitutional on its face "even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment." *Id.* at 864–65 (citing *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587 (2010); and *Sabri v. United States*, 541 U.S. 600, 609–10, 124 S. Ct. 1941, 1948–49 (2004)).

402 U.S. 611, 614, 91 S. Ct. 1686, 1688 (1971); and *Reno v. ACLU*, 521 U.S. 844, 870-71, n.35, 117 S. Ct. 2329, 2343–44, n.35 (1997)).

Both the Fifth Circuit and the court of criminal appeals have held that prior versions of section 42.07 were unconstitutionally vague because of the words used to describe the offensive behavior—"harass, annoy, alarm, abuse, torment, or embarrass." *Kramer*, 712 F.2d at 176–78; *Long*, 931 S.W.2d at 297; *May*, 765 S.W.2d at 440. This court previously held that the 2001 version of the electronic-communications subsection was unconstitutionally vague for similar reasons. *Karenev*, 258 S.W.3d at 217.

In 1983, the Fifth Circuit addressed the pre-1983 harassment statute's provision that a person committed an offense by intentionally communicating by phone or in writing in a way that "intentionally, knowingly, or recklessly annoys or alarms the recipient." *Kramer*, 712 F.2d at 176; *see* Act of June 14, 1973, 63rd Leg., R.S., ch. 399, 1973 Tex. Gen. Laws 956–57 (amended 1983) (current version at Tex. Penal Code Ann. § 42.07(a)). The Fifth Circuit held that the terms "annoy" and "alarm" were inherently vague. *Kramer*, 712 F.2d at 178 (relying in part on *Coates*, 402 U.S. at 614, 91 S. Ct. at 1688, which struck down an Ohio statute's use of the term "annoy" and explained, "Conduct that annoys some people does not annoy others"). The Fifth Circuit placed even more importance on the fact that Texas courts had "refused to construe the statute to indicate whose sensibilities must be offended." *Id.* The court held that the statute was unconstitutionally vague, and the court of criminal appeals adopted this holding in *May*. 765 S.W.2d at 439–40 ("It is axiomatic that vague laws offend the Federal Constitution by allowing arbitrary and discriminatory enforcement, by

failing to provide fair warning, and by inhibiting the exercise of First Amendment freedoms.").

In response to *Kramer*, the Texas Legislature amended section 42.07—only to have the court of criminal appeals again hold it unconstitutionally vague in 1996. *See Long*, 931 S.W.2d at 297. The court addressed the constitutionality of part of the 1993 version of the statute in *Long*, the stalking offense, providing that a person committed an offense if, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another," the person:

> (7)(A) on more than one occasion engages in conduct directed specifically toward the other person, including following that person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person;
>
> (B) on at least one of those occasions by acts or words threatens to inflict bodily injury on that person or to commit an offense against that person, a member of that person's family, or that person's property; and
>
> (C) on at least one of those occasions engages in the conduct after the person toward whom the conduct is specifically directed has reported to a law enforcement agency the conduct described by this subdivision.

Id. at 288 (citing Act of March 19, 1993, 73rd Leg., R.S., ch. 10, 1993 Tex. Gen. Laws 46–47 (amended 1995) (current version at Tex. Penal Code Ann. § 42.07(a)). The court of criminal appeals explained that this version suffered from the same flaws denounced in *Kramer* and *May* and that the addition

of the words "harass," "abuse," "torment," and "embarrass" did nothing to remedy these flaws. *Id.* at 289. The court observed that "all [of] these terms are joined with a disjunctive 'or,' and thus do nothing to limit the vagueness originally generated by 'annoy' and 'alarm.' Moreover, the additional terms are themselves susceptible to uncertainties of meaning." *Id.*

The court did not agree with the parties that the legislature included a "reasonable person" standard by requiring that the behavior be "reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person." *Id.* The court explained that this language provided that the defendant's behavior should be measured from the perspective of the complainant—not that of a reasonable person. *Id.*

The court held that former subsection (a)(7)(B)'s threat requirement and (a)(7)(C)'s report requirement did not save the statute. *Id.* at 290-94. The purpose of subsection (a)(7)(B) was "fatally undermined by the threat requirement's relationship to the conduct requirement in (a)(7)(A)." *Id.* at 291. The stalking offense required at least two instances of conduct, but the acts did not have to be related to each other and only one had to be a threat to inflict bodily injury or commit an offense against the complainant, the complainant's family, or the complainant's property. *Id.* at 293–94. And subsection (a)(7)(C) did nothing to clarify the subsection because it did not require that the defendant know that the complainant reported his alleged harassment. *Id.* at 290–91 ("If the defendant is unaware of the report, then it cannot provide the requisite notice that he has violated the law."). The court therefore held that the stalking provision was unconstitutionally vague on its face. *Id.* at 297.

The legislature amended section 42.07 again in 2001 and for the first time added a new subsection governing electronic communications. *See* Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen Laws 2795 (amended 2013). The 2001 version (under which Barton has been charged) criminalized sending "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* In 2008, a prior panel of this court held that this subsection "suffers the same flaws as the old statute: it employs, in the disjunctive, a series of vague terms that are themselves susceptible to uncertainties of meaning." *Karenev*, 258 S.W.3d at 216. As this court explained, the legislature did not attempt, in drafting the electronic-communications subsection, to avoid those problems that were highlighted in *Long* by tying the offending conduct to "a more specific mental state than a mere intent to annoy, such as intent to place in fear of bodily injury, or with a more intense mental state, such as intent to frighten," and it did not establish any nexus between a threat requirement and a conduct requirement. *Id.* at 216–17 (quoting *Long*, 931 S.W.2d at 293–94).

On review, the court of criminal appeals did not reach the question of subsection (a)(7)'s constitutionality but reversed *Karenev* on forfeiture grounds. *See Karenev*, 281 S.W.3d at 428 (holding that the defendant forfeited his argument of facial unconstitutionality by failing to raise it in the trial court). Although it has been presented with the opportunity to address a First Amendment constitutional challenge to the "electronic communications" subsection at least twice since *Karenev* was decided, the court of criminal appeals has not yet weighed in. *See Ogle v. State*, 563 S.W.3d 912, 912 (Tex. Crim. App. 2018) (mem. op.) (Keller, P.J., dissenting to refusal of pet.), *petition for cert. filed*,

(U.S. Mar. 8, 2019) (No. 18-1182); *Ex parte Reece*, 517 S.W.3d 108, 110-11 (Tex. Crim. App. 2017) (mem. op.) (Keller, P.J., dissenting to refusal of pet.).[14]

Having held that section 42.07(a)(7) reaches First Amendment speech, we agree with our analysis in *Karenev* that the subsection suffers from a fatal flaw of vagueness because the disjunctive series of the terms "harass, annoy, alarm, abuse, torment, embarrass, or offend" leaves the electronic-communications subsection open to various "uncertainties of meaning." *Karenev*, 258 S.W.3d at 215 (citing and quoting *Long*, 931 S.W.2d at 289). And consistent with *Karenev* and *Long*, we conclude that the term "reasonably likely" does not create a "reasonable person" standard sufficient to cure the failure of the subsection to specify whose sensitivities were offended. *Id.* (discussing *Long*, 931 S.W.2d at 288–90). As best explained in *Long*:

> A reasonable person standard, even if present, probably would not, by itself, be enough to save (a)(7)(A) from a constitutional challenge. Even with an objective standard, vagueness may still inhere in the expansive nature of the conduct described. Moreover, even if a reasonable person standard clarified the law sufficiently to avoid a vagueness challenge, it would run into a serious overbreadth problem. The First Amendment does not permit the outlawing of conduct merely

[14] In both cases, Presiding Judge Keller dissented to the denial of review, urging the court to review the constitutionality of subsection (a)(7) in light of its "breathtaking" breadth. *Reece*, 517 S.W.3d at 111. The United States Supreme Court is currently considering Ogle's request for certiorari review; the State filed its response to Ogle's petition on July 22, 2019. *Ogle*, No. 18-1182 (2019).

> because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed. Many legitimate political protests, for example, contain both of these elements.

Long, 931 S.W.2d at 297 n.4[15] (internal citations omitted).

Section 42.07(a)(7) has the potential to reach a vast array of communications. At the time that Barton was charged with violating subsection (a)(7), "electronic communications" was defined as "*include[ing]*: a communication initiated by electronic mail, instant message, network call, or facsimile machine." Act of June 15, 2001, 77th Leg., R.S., ch. 1222, 2001 Tex. Gen. Laws 2795 (amended 2013) (emphasis added). The term "includes" is a term of enlargement, not of limitation or exclusion, and we do not presume that "components not expressed are excluded." *In re Perry*, 483 S.W.3d 884, 909 (Tex. Crim. App. 2016). This subsection as written therefore has the potential to reach any number of electronic communications, as Presiding Judge Keller has pointed out:

> This provision is not limited to emails, instant messages, or pager calls. It also applies, for example, to facebook posts, message-board posts, blog posts, blog comments, and newspaper article comments. If a person makes two posts or comments on the internet with

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[15] The staggering breadth of the electronic-communications subsection is one factor which distinguishes that subsection from the firearm-brandishing subsection of the disorderly-conduct statute addressed in the court of criminal appeals' recent opinion in *State v. Ross*, 573 S.W.3d 817 (Tex. Crim. App. 2019), in which the court held that the statute's use of "the phrase 'a manner calculated to alarm' means a manner that is objectively likely to frighten an ordinary, reasonable person."

> the intent to annoy or alarm another, and those two communications are reasonably likely to annoy, alarm, or offend the same person, then a person can be subjected to criminal punishment under this provision.

Reece, 517 S.W.3d at 111.[16]

It is safe to say that when *Long* was decided in 1996 and even when *Karenev* was decided in 2008, we had only a faint idea of the impact that electronic communications and the Internet would have on our society as a whole. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (explaining that we are only now at the beginning of the "Cyber Age" and are still unable to fully grasp and appreciate the "full dimensions and vast potential [of the Internet] to alter how we think, express ourselves, and define who we want to be," and that "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow"). The Supreme Court recently identified the Internet, and "social media in particular," as "the most important place[]" for the exchange of views among persons. *Id.* at 1735. Use of the Internet to communicate is now ubiquitous. *See id.* (reciting estimates that as of 2017, seven in ten American adults used at least one social networking service, with Facebook as the most popular service at the time with 1.79 billion active users).

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[16] In fact, this definition of "electronic communication" has recently been expanded to explicitly include communications initiated through the use of "a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, [and] any other Internet-based communication tool." Tex. Penal Code Ann. § 42.07(b)(1)(A).

Expanding on its past assessment of the Internet's offering of "relatively unlimited, low-cost capacity for communication of all kinds," *Reno*, 521 U.S. at 868, 117 S. Ct. at 2344, the Supreme Court observed in *Packingham* how people use social media to "debate religion and politics with their friends and neighbors or share vacation photos"; "look for work, advertise for employees, or review tips on entrepreneurship"; and "petition their elected representatives and otherwise engage with them in a direct manner." *Packingham*, 137 S. Ct. at 1735. Perhaps the best examples of the political, and often divisive, use of such platforms start with our governmental leaders. Public reactions to President Donald Trump's prolific tweeting run the gamut from amusement, to annoyance, to distress—and all points in between. *See* President Donald J. Trump (@realDonaldTrump), Twitter, https://twitter.com/realDonaldTrump; *see also, e.g.*, Sara Swartzwelder, Note, *Taking Orders from Tweets: Redefining the First Amendment Boundaries of Executive Speech in the Age of Social Media*, 16 First Amend. L. Rev. 538 (2018). Some have viewed his tweets as political posturing; others have viewed them as declarations of war. *See* Swartzwelder, 16 First Amend. L. Rev. at 538–39 (discussing President Trump's "little Rocket Man" tweet regarding North Korea, a North Korean official's statement that such tweet was a declaration of war, and the White House's dismissal of such an interpretation as "absurd"); *see also* Alexander Smith and Abigail Williams, *White House Rejects N. Korean Claim that Trump 'Declared War,'* NBC News, Sept. 25, 2017, https://www.nbcnews.com/news/north-korea/north-korean-foreign-minister-says-trump-has-declared-war-n804501.

Experience has taught us that whether the President's tweets—or an ex-spouse's emails—are annoying or

offensive is a highly subjective inquiry, and the view of whether these communications are innocuous, humorous, annoying, or offensive will differ greatly from person to person. *See Kramer*, 712 F.2d at 178; *Long*, 931 S.W.2d at 297; *May*, 765 S.W.2d at 439–40; *Karenev*, 258 S.W.3d at 215. Consequently, we agree with Barton that the electronic-communications subsection is facially unconstitutional as vague and overbroad; as such, it is void and unenforceable. *See Karenev*, 258 S.W.3d at 218. We therefore sustain Barton's first and second points.

Conclusion

Having sustained Barton's first and second points and held section 42.07(a)(7) as it existed in 2013 is facially unconstitutional and, thus, void and unenforceable, we reverse the trial court's order denying Barton's application for writ of habeas corpus and remand this matter to the trial court to enter an order dismissing the prosecution of charges against Barton on alleged violations of section 42.07(a)(7) of the Texas Penal Code. *See Long*, 931 S.W.2d at 297 (remanding case to trial court to enter an order dismissing the prosecution). We do not reach Barton's third point. Tex. R. App. P. 47.1.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Publish

Delivered: October 3, 2019

APPENDIX D

IN THE COURT OF APPEALS
SEVENTH DISTRICT OF TEXAS AT AMARILLO

No. 07-18-00335-CR

EX PARTE NATHAN SANDERS

On Appeal from the County Court at Law No. 1
Lubbock County, Texas
Trial Court No. 2015-484,541,
Honorable Mark Hocker, Presiding

April 8, 2019

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant Nathan Sanders was charged by information with harassment, that "with intent to harass, annoy, alarm, abuse, torment, or embarrass [the complainant]" he sent "repeated electronic communications to [the complainant] in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson [sic] communication."[1] Appellant subsequently filed an *application for writ of habeas corpus*

[1] TEX. PENAL CODE ANN. § 42.07(a)(7) (West 2018). Documents in the clerk's record indicate the complainant was a woman who had dated appellant.

and motion to quash information, arguing section 42.07(a)(7) of the Texas Penal Code is "facially overbroad" in "violation of the First Amendment of the United States Constitution." After consideration, the county court at law denied the application for writ of habeas corpus. Appellant now appeals the trial court's ruling. We will affirm.

In his sole issue on appeal, appellant contends Penal Code section 42.07(a)(7) contravenes the First Amendment because it is overbroad on its face.

Standard of Review and Applicable Law

Appellant challenged the constitutionality of Penal Code section 42.07(a)(7) by means of a pre-trial application for a writ of habeas corpus pursuant to Code of Criminal Procedure article 11.09.[2] A pretrial writ application may challenge the facial constitutionality of the statute under which the applicant is prosecuted, but may not be used to advance an "as applied" challenge. *Ex parte Ellis,* 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (citing *Weise v. State*, 55 S.W.3d 617, 620-21 (Tex. Crim. App. 2001)). The determination whether a statute is facially unconstitutional is a question of law subject to *de novo* review. *Ex parte Ogle,* Nos. 03-18-00207-CR, 03-18-00208-CR, 2018 Tex. App. LEXIS 5955, at *3 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication) (citing *Ex parte Lo,* 424 S.W.3d 10, 14 (Tex. Crim. App. 2013)).

Generally, a facial challenge to the constitutionality of a statute can succeed only when it is shown that the statute is unconstitutional in all of its applications. *Wagner v. State,* 539 S.W.3d 298, 310 (Tex. Crim. App. 2018) (citing *State v. Johnson,* 475 S.W.3d 860, 864

[2] TEX. CODE CRIM. PROC. ANN. art. 11.09 (West 2018).

(Tex. Crim. App. 2015)). The First Amendment overbreadth doctrine provides an exception to this rule. *Id.* (citation omitted). That exception permits a litigant to succeed in challenging a law that regulates speech if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* (citations omitted). The overbreadth doctrine, therefore, proscribes the government from "'banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.'" *Id.* (citing *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002)). The overbreadth doctrine is to be "employed with hesitation and only as a last resort." *Id.* (citing *Ex parte Thompson,* 442 S.W.3d 325, 349 (Tex. Crim. App. 2014)).

Analysis

Application of *Scott v. State*

As our sister court in El Paso stated in its recent opinion addressing a facial habeas challenge to the constitutionality of section 42.07(a)(7), we do not write on a clean slate in our consideration of appellant's contention. *Ex parte Hinojos,* No. 08-17-00077-CR, 2018 Tex. App. LEXIS 10530, at *3 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (mem. op., not designated for publication). A number of Texas courts have addressed the section's constitutional validity against overbreadth challenges. *See Lebo v. State,* 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet ref'd); *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955; *Ex parte Reece*, No. 11-16-00196-CR, 2016 Tex. App. LEXIS 12649 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State,* No. 03-16-00014-CR, 2016 Tex. App. LEXIS 5793 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication). Most often, their analyses

of the issue begin with the 2010 opinion of the Court of Criminal Appeals in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010).

In *Scott,* the court considered the question whether subsection (4) of section 42.07(a)[3] implicates the free-speech guarantee of the First Amendment. In its analysis, the court characterized the subsection's specific intent provision as requiring "that the actor have the intent to inflict harm on the victim in the form of one of the listed types of emotional distress." *Id*. at 669. It further found that the subsection, "by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Id.* at 669-70. Finally, the court concluded any communicative conduct to which the subsection might apply "is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially

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[3] Texas Penal Code § 42.07 reads in pertinent part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> * * *
>
> 4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; or
>
> * * *
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

intolerable manner." *Id.* at 670.[4] All courts of appeals who have addressed the issue hold *Scott's* free-speech analysis of subsection (a)(4) applies also to subsection (a)(7). *See, e.g.*, *Lebo,* 474 S.W.3d at 407 ("We consider the free-speech analysis in *Scott* equally applicable to section 42.07(a)(7)"); *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955, at *6-7; *Ex parte Reece*, 2016 Tex. App. LEXIS 12649, at *5-6; *Blanchard,* 2016 Tex. App. LEXIS 5793, at *7.

Appellant, however, contends *Scott* does not control the disposition of his appeal. In support, he first argues *Scott's* analysis has been rendered outmoded by decisions of the United States Supreme Court. He particularly relies on *Reed v. Town of Gilbert,* 2015 U.S. LEXIS 4061, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), which, as he notes, was decided five years after *Scott.* In *Reed*, the Court clarified the means of identification of content-based restrictions on speech, those requiring strict scrutiny when challenged under the First Amendment. As appellant sees it, *Reed*'s identification of "more subtle" content-based distinctions that define "regulated speech by its function or purpose," 135 S. Ct. at 2227, is applicable directly to section 42.07(a)(7). He contends the statute's specific intent requirement of intent to harass, annoy, alarm, abuse, torment, or embarrass another constitutes a distinction based on a message's purpose, and the proof requirement that the communication was reasonably likely to harass, annoy, alarm, abuse, torment,

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[4] Earlier in its opinion the court cited *Cohen v. California*, 403 U.S. 15, 21 (1971), for the proposition, "The State may lawfully proscribe communicative conduct (i.e., the communication of ideas, opinions, and information) that invades the substantial privacy interests of another in an essentially intolerable manner." 322 S.W.3d at 668-69.

embarrass, or offend another is a distinction based on its function. Accordingly, paraphrasing *Reed*, *id*, appellant argues "It is a distinction drawn based on the message the speaker conveys and wants to convey, and therefore is subject to strict scrutiny."

The Third Court of Appeals in *Ogle* addressed, and rejected, the same contention. 2018 Tex. App. LEXIS 5955 at *13-14. It noted Ogle had not cited authority applying *Reed's* analysis to government prohibition of "repeated and intentionally harassing conduct." *Id*. at *13. Appellant's briefing in this appeal similarly lacks such authority. And, like the court in *Ogle*, we are not persuaded that *Reed* requires abandonment of *Scott's* rationale based on the Court's holding in *Cohen*. *Id.* at *14 (citing *Cohen,* 403 U.S. at 21).

As others have pointed out, *e.g., Ogle*, 2018 Tex. App. LEXIS 5955, at * 7, all subsections of section 42.07(a) require the same specific intent, that "to harass, annoy, alarm, abuse, torment, or embarrass another." And while subsection (a)(4) is violated when the actor "makes" repeated telephone communications and (a)(7) is violated when the actor "sends" repeated electronic communications, both subsections require for guilt that the repeated communications occur "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

At oral argument in the case now before us, there was discussion regarding free-speech distinctions that might reasonably be drawn between prohibition of communications intended to harass or abuse versus those intended merely to annoy or embarrass. The dissenting opinion in *Scott* proposed such distinctions among the specific intent and "reasonably likely" effect provisions of subsection (a)(4). After analysis, the dissent concluded:

> Consequently, I would hold that the harassment provision at issue implicates the First Amendment with respect to the terms "annoy," "alarm," "embarrass," and "offend," but does not implicate the First Amendment with respect to the terms "harass," "abuse," and "torment." The Court contends that the entire statute is outside the purview of the First Amendment because "in the usual case, people whose conduct violates § 42.07(a)(4) will not have an intent to engage in legitimate communication of ideas, opinion, or information; they will have only the intent to inflict emotional distress for its own sake." But nothing in the statute limits its application to those occasions when the actor's sole intent is to inflict emotional distress, and if the court is implying that situations are rare in which a person has more than one intent, I disagree. The mischief this statute can create is enormous, as some of the hypotheticals given above illustrate."

Scott, 322 S.W.3d at 676 (Keller, P.J., dissenting).

Over the dissent, the Court of Criminal Appeals at least implicitly rejected such distinctions drawn among the statute's listed intents and "reasonably likely" effects, and instead grouped them all together as "listed types of emotional distress." *Id.* at 669. Given *Scott*'s interpretation of the language appearing in subsection (a)(4), as an intermediate court we are not at liberty to apply differing free-speech analyses based on differences among the "types of emotional distress" that are listed by identical language also in subsection (a)(7).

Appellant also points to the dissents to the Court of Criminal Appeals' refusal of the petitions for review in

Ogle and *Ex parte Reece*. *See Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018); *Ex parte Reece,* 517 S.W.3d 108 (Tex. Crim. App. 2017). That fewer than a majority of members of the Court of Criminal Appeals have called for re-examination of one of that court's opinions, however, does not provide a reason for us to question its application to the appeal before us.[5]

For those reasons we decline appellant's invitation to depart from the holdings of other Texas courts of appeals applying *Scott*'s analysis in rejection of contentions section 42.07(a)(7) is constitutionally overbroad. In so doing, however, we express our disagreement with a rationale the State offers in support of the validity of the statute.

Conduct versus Protected Speech

Citing *Ex parte Ingram,* 533 S.W.3d 887 (Tex. Crim. App. 2017) the State contends section 42.07(a)(7) does not constitute a content-based restriction on speech but, like the solicitation statute addressed in that case, merely criminalizes conduct. The State argues, "It is the *conduct* of sending repeated electronic communications in a harassing manner that is the gravamen of the offense. Because conduct and not merely speech is implicated in Section 42.07(a)(7), the statute is a conduct-based regulation that is subject to a presumption of validity."

Ingram addressed contentions subsection (c) of the pre-2015 version of Penal Code section 33.021, prohibiting online solicitation of a minor, were facially unconstitutional. 533 S.W.3d at 890. After applying a

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[5] That is particularly true here in view of the reliance on *Scott*'s analysis in the Court of Criminal Appeals' 2018 opinion in *Wagner*. *See Wagner*, 539 S.W.3d at 311-12 (rejecting overbreadth challenge to Penal Code section 25.07(a)(2)(A)).

narrowing construction to language then contained in the statute, *id*. at 895-97, the court considered Ingram's argument the statute was unconstitutionally overbroad. *Id*. at 897-900. Rejecting the argument, the court began by noting that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" is a category of speech unprotected by the First Amendment. *Id*. at 897 (citing and quoting *United States v. Stevens,* 559 U.S. 460, 471 (2010)). The court likewise cited the exemption from First Amendment protection of speech that constitutes "the commission of a 'sort[] of inchoate crime[]—[an] act looking toward the commission of another crime' that the legislature can validly punish." *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 300 (2008)). It concluded that the challenged subsection's prohibition of the conduct of soliciting a minor to meet with the intent that the minor engage in illegal sexual activity "created an inchoate offense for the object offense of sexual assault of a child." *Id.* at 898. Referring to its opinion in *Ex parte Lo,* 424 S.W.3d at 16, the court described such solicitation statutes as "routinely upheld as constitutional because offers to engage in illegal transactions such as sexual assault of a minor are categorically excluded from First Amendment protection." *Id.* (citation omitted). The court quoted another state court's summary stating, "The common thread in cases involving First Amendment challenges to luring statutes is that freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute." *Id.* (quoting *State v. Backlund,* 672 N.W.2d 431, 441 (N.D. 2003)).

The State refers also to our opinion in *Delacruz v. State,* No. 07-15-00230-CR, 2017 Tex. App. LEXIS 6018 (Tex. App.—Amarillo June 29, 2017, no pet.) (mem. op., not designated for publication), which also

addressed section 33.021(c), and relied on *Ex parte Lo's* statement that "it is the *conduct* of requesting a minor to engage in illegal sexual acts that is the gravamen of the offense." 2017 Tex. App. LEXIS 6018 at *6 (citing *Ex parte Lo,* 424 S.W.3d at 17).

The State does not cite us to authority applying *Ingram*'s "inchoate offense" analysis to section 42.07(a)(7) or describing how the communications sent with the intent and in the manner that section describes are "an integral part of conduct in violation of a valid criminal statute." *Ingram,* 533 S.W.3d at 897; *see State v. Doyal*, ___ S.W.3d ___, 2019 Tex. Crim. App. LEXIS 161, at *7 (Tex. Crim. App. Feb. 27, 2019) (form of unprotected speech involved in *Ingram* is "speech that furthers some other activity that is a crime"). Nor does the State identify the criminal statute of which it contends such communications are an integral part. *See Doyal,* 2019 Tex. Crim. App. LEXIS 161, at *7 (characterizing speech addressed in *Ingram* as "solicitation to facilitate a sex crime"); *Ingram,* 533 S.W.3d at 898 (conduct prohibited by challenged statute "created an inchoate offense for the object offense of sexual assault of a child").

Moreover, the *Scott* opinion did not characterize the forbidden telephone communications as conduct rather than speech, nor have any of the opinions finding the *Scott* analysis applicable to section 42.07(a)(7) characterized its prohibition of certain electronic communications as conduct-based regulation. *See Lebo,* 474 S.W.3d at 406-07; *Ex parte Hinojos,* 2018 Tex. App. LEXIS 10530, at *14; *Ex parte Ogle,* 2018 Tex. App. LEXIS 5955, at *13-14; *Ex parte Reece*, 2016 Tex. App. LEXIS 12649, at *6-7; *Blanchard,* 2016 Tex. App. LEXIS 5793, at *7.

Conclusion

We are not persuaded the State's proffered theory based on *Ingram* is properly applied to section 42.07(a)(7). Nonetheless, for the reasons expressed we find the repeated electronic communications the section proscribes, made with the "intent to inflict emotional distress for its own sake," *Scott*, 322 S.W.3d at 670, are not protected speech under the First Amendment because they invade the substantial privacy interests of the victim "in an essentially intolerable manner." *Id*. Accordingly, we overrule appellant's contention section 42.07(a)(7) is facially overbroad and affirm the trial court's denial of appellant's application for writ of habeas corpus.

James T. Campbell
Justice

Quinn, C.J., concurring in the result.[6]

Do not publish.

---

[6] Chief Justice Quinn joins in the majority opinion for the reasons stated therein. However, the reasons expressed by Presiding Judge Keller in her dissent in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), the chipping away at *Scott* by the majority in *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014), and the concurrence of P.J. Keller and Judge Johnson in *Wilson* sways him to invite the Court of Criminal Appeals to reconsider the majority opinion in *Scott*. He too fears, as expressed by P.J. Keller and Judge Johnson, the potentiality of criminal convictions arising from one's exercise of First Amendment rights. This is not to say he welcomes the mid-supper calls from politicians to vendors but understands that such annoyances are part and parcel of residing in a country where ideas, innovation, intellect, and their urging remain invaluable.

APPENDIX E

[1] REPORTER'S RECORD

VOLUME 3 OF 4 VOLUMES

IN THE COUNTY CRIMINAL COURT NUMBER EIGHT OF TARRANT COUNTY, TEXAS

TRIAL COURT CAUSE NO. 1314404
COURT OF APPEALS NO. 02-17-00188-CR

THE STATE OF TEXAS

vs.

CHARLES BARTON

PRETRIAL MOTIONS
HEARING ON MOTION TO QUASH
(Court's Ruling)

On the 13th day of February 2017, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Charles L. Vanover, Judge Presiding, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by Machine Shorthand.

[2] APPEARANCES

(No Appearance by State)

(No Appearance by Defense)

[3] CHRONOLOGICAL INDEX

VOLUME 3 OF 4 VOLUMES

(Pretrial Motions)
(Hearing on Motion to Quash)
(Court's Ruling)

February 13, 2017	PAGE	VOL.
Proceedings	4	3
Court's Ruling	4	3
Proceedings Adjourned	4	3
Court Reporter's Certificate	5	3

[4] PROCEEDINGS

(February 13, 2017 - Monday - 3:53 p.m.)

(Open court, Defendant not present)

THE COURT: Okay. I guess back on the record in Cause No. 1314404, the State vs. Charles Barton.

The Court having heard the Motion to Quash and the evidence in the cases cited by both Counsel for the State and Counsel for the Defense will deny the motion. Counsel for the Defense makes a compelling argument; however, the ultimate question, this Court feels, will be best suited for a higher court. The case cited by the Defense in which the Court of Appeals held the portion of the statute unconstitutional was not binding since the case was overturned at the Court of Criminal Appeals, and we will defer to their knowledge as to whether they want to revisit the issue.

(Proceedings adjourned at 3:54 p.m.)

THE STATE OF TEXAS

COUNTY OF TARRANT

I, Nancy A. Hawkins, Official Court Reporter in and for the County Criminal Court Number Eight of Tarrant County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost of the preparation of this Reporter's Record is $ _____ and was paid by Hon. Edward G. Jones, Attorney for Defendant.

(Cost for the reporter's Record is posted in Volume 4.)

WITNESS MY OFFICIAL HAND this the 7th day of July 2017.

/s/Nancy A. Hawkins
NANCY A. HAWKINS, Texas CSR No. 1831
Expiration Date: 12/31/2017
Official Court Reporter
County Criminal Court No. Eight
Tarrant County, Fort Worth, Texas
401 W. Belknap, 7th Floor
Fort Worth, Texas 76196
Office phone: (817) 884-3402
Email: nhawkins@tarrantcounty.com

APPENDIX F

IN COUNTY CRIMINAL COURT NO. 8 OF
TARRANT COUNTY, TEXAS

No. 1314404

STATE OF TEXAS

v.

CHARLES BARTON

ORDER

On this the 18th day of May, 2017, came to be heard the Original Application for Writ of Habeas Corpus.

The Writ is DENIED.

SIGNED AND ENTERED this 18th day of May, 2017.

/s/ [Illegible]
JUDGE PRESIDING

APPENDIX G

IN THE COUNTY COURT AT LAW No.1,
OF LUBOCK COUNTY, TEXAS

Cause No. 2015-484, 541

STATE OF TEXAS

v.

NATHAN SANDERS

ORDER ON NATHAN SANDER'S APPLICATION
FOR WRIT OF HABEAS CORPUS and
MOTION TO QUASH INFORMATION

On June 13, 2018, NATHAN SANDERS, through his attorney, Rusty Gunter II, filed his Application for Writ of Habeas Corpus and Motion to Quash Information. The State, by and through her Assistant Criminal District Attorney for Lubbock County, Texas, Cassie Nesbitt, responded in writing filed June 25, 2018. Though the case was subsequently set for PreTrial Hearing on August 9, 2018, the parties then waived oral argument and requested that this court rule on said submissions.

At issue before the court is the Constitutionality of Texas' Harassment statute, Texas Penal Code § 42.07(a)(7), which provides as follows:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:

> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Mr. Sanders alleges that said statute is overbroad under the First Amendment to the Constitution of the United States of America. More specifically, Mr. Sanders asserts that said statute prohibits a substantial amount of protected speech, relative to its legitimate sweep, and is therefore substantially overbroad and cannot survive strict scrutiny.

The charging document in this case, the Information which Mr. Sanders seeks to Quash and be freed from via Writ, alleges as follows:

> "... in Lubbock County, Texas, NATHAN SANDERS, hereafter styled the Defendant, heretofore on or about [*sic*] 9th day of February, A.D. 2015, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass KENDAL ARTHUR, send repeated electronic communications to KENDALL ARTHUR in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages handwritten letters, and inperson [*sic*] communication."

Contrary to Mr. Sanders' assertions, the gravamen of the offense charged here under § 42.07(a)(7) is the alleged conduct of Mr. Sanders in sending "repeated electronic communications," and not the content of said communications. Because § 42.07(a)(7) prohibits specific conduct, not content, strict scrutiny analysis is inapplicable.

In reviewing § 42.07(a)(7) under a content-neutral rational basis standard, a reasonable construction of the statute renders the statute constitutional because, regardless of the content of the communications, the very manner of sending them may be harassing, annoying, alarming, abusive, tormenting, or embarrassing (e.g. by volume or timing). The legislature may certainly outlaw such conduct without trampling on the First Amendment.

For the foregoing reasons, Defendant's Writ and Motion are DENIED.

SIGNED and ENTERED August 20, 2018.

/s/ Mark J. Hocker
Mark J. Hocker, Judge Presiding

APPENDIX H

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

02-17-00188-CR

PD-1123-19

Tr. Ct. No. 1314404

6/8/2022

BARTON, EX PARTE CHARLES

On this day, the Appellant's motion for rehearing has been denied.

PRESIDING JUDGE KELLER WOULD GRANT

Deana Williamson, Clerk

DISTRICT CLERK TARRANT COUNTY
THOMAS WILDER
401 W. BELKNAP
FORT WORTH, TX 76196

* DELIVERED VIA E-MAIL *

APPENDIX I

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

07-18-00335-CR

PD-0469-19

Tr. Ct. No. 2015-484,541

6/29/2022

SANDERS, EX PARTE NATHAN

On this day, the Appellant's motion for rehearing has been denied.

PRESIDING JUDGE KELLER WOULD GRANT

Deana Williamson, Clerk

DISTRICT CLERK LUBBOCK COUNTY
SARA SMITH
P. O. BOX 10536
LUBBOCK, TX 79408-3536

* DELIVERED VIA E-MAIL *

APPENDIX J

IN THE COUNTY CRIMINAL COURT NO. 8
TARRANT COUNTY, TEXAS

Cause No. 1314404

THE STATE OF TEXAS

vs

CHARLES BARTON

MOTION TO QUASH, DISMISS, OR SET ASIDE GROUND: UNCONSTITUTIONAL, VAGUENESS, INDEFINITENESS, AMBIGUITY, AND UNCERTAINTY

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the defendant, CHARLES BARTON, in the above named and styled case. The information that was filed in the above-entitled action should be quashed since it is facially unconstitutional and as applied to the Defendant, vague, indefinite, ambiguous, and uncertain. The harassment statute 42.07(a)(7) has been held facially unconstitutional *Karenev v. State,* 258 S.W.3d 210. Additionally, the information does not state in plain and intelligible language the specific incidents or means of text or email that constitutes the harassment charged against defendant, and does not properly apprise defendant of the nature of the proof defendant is expected to defend against at the trial on the merits. The counts charge only that a potential harassment occurred via text or email on

dates when dozens of incidents of consensual email and texts were sent between both parties.

Without specific incidents of the alleged harassment, the Defendant has been denied proper notice and is being denied due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution.

Prior decisions in *Long v. State,* 931 S.W. 2nd 286 and *May v. State,* 931 S.W.2d 285 and the Fifth Circuit's decision in *Kramer v. Price,* 712 F.2d 174, invalidated statutes that contained the terms "annoy" and "alarm" as implicating First Amendment freedoms and being unduly vague.

In this case, The Defendant argues that Statute 42.07 is 1) overly broad and chills the protected speech of the First Amendment, 2) is unconstitutional on its face, see *Karenev* and 3) is unconstitutional as applied to Defendant.

WHEREFORE, the Defendant prays that the Court grant this Motion to quash the information based upon its unconstitutionality both facially and as applied to the Defendant in all counts in the charging instrument.

Respectfully submitted

/s/ Edward G. Jones
EDWARD G. JONES, ATTORNEY
State Bar No. 00794043
1319 Ballinger Street
Fort Worth, Texas 7610:
Telephone (817) 335-0200
Fax (817) 335-0204
edjonesatty@gmail.com

Tobias Lopez
240892333

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Motion to Suppress Illegally Obtained Evidence was delivered or caused to be delivered to:

Honorable Sharen Wilson District Attorney,
Tarrant County, Texas
401 W. Belknap
Fort Worth, Texas 76196

On this the ____ day of ____, 2016.

/s/ Edward G. Jones
EDWARD G. JONES

IN THE COUNTY CRIMINAL COURT NO. 8
TARRANT COUNTY, TEXAS

Cause No. 1314404

THE STATE OF TEXAS

vs

CHARLES BARTON

ORDER

On this date, came the Defendant CHARLES BARTON by and through Defendant's Attorney of record EDWARD G. JONES to be heard Defendant's Motion to Quash for vagueness, indefiniteness, ambiguity, and uncertainty.

After hearing the evidence, the Court finds as a matter of fact and concludes as a matter of law that the above and foregoing motion should be and the same is hereby:

[ ] GRANTED

[ ] DENIED, to which ruling Defendant excepts.

SIGNED this ____ day of ____, 2016

_____
JUDGE PRESIDING

APPENDIX K

IN COUNTY CRIMINAL COURT NUMBER EIGHT
OF TARRANT COUNTY, TEXAS

Cause No. 1314404

STATE OF TEXAS

vs.

CHARLES BARTON

ORIGINAL APPLICATION FOR WRIT OF
HABEAS CORPUS

To the Honorable Judge of this court:

Applicant CHARLES BARTON files this application for a writ of habeas corpus pursuant to Article 11.09 of the Texas Code of Criminal Procedure, and in support shows the court the following:

1. On November 19, 2012, applicant CHARLES BARTON was arrested in Grapevine, Texas, subsequently posted bond and has appeared in court regularly since his arrest.

2. On February 11, 2013, petitioner was charged with HARRASSMENT under Texas Penal Code §42.07(a)(7). A copy of the information is attached to and incorporated into this petition as Exhibit 1.

3. In October, 2016, CHARLES BARTON and his attorneys filed a motion to quash the information based upon the unconstitutionality of Texas Penal Code §42.07(a)(7).

4. On February 2, 2017, CHARLES BARTON, and his attorneys argued to this court a Motion to Quash the information based upon the unconstitutionality of Texas Penal Code §42.07(a)(7), which was subsequently denied by this court.

Applicant is being illegally restrained in his liberty by respondent, in that Texas Penal Code §42.07(a)(7) is unconstitutional and void in the following manner: the portions of the harassment statute making it an offense to send electronic communications that annoy or alarm are unconstitutionally vague. Additionally, because the statute does not establish a clear standard for whose sensibilities must be offended, it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity. Also, the intent to "harass, annoy, alarm, abuse, torment, or embarrass" set out in section §42.07(a)(7) does nothing to limit the vagueness originally generated by "annoy" and "alarm," and the additional terms are themselves "susceptible to uncertainties of meaning."

Therefore, respondent's restraint of petitioner for violation of §42.07(a)(7) violates applicant's constitutional rights.

Prayer for Relief

Therefore, applicant Charles Barton respectfully requests that:

a. The court issue a writ of habeas corpus to have Charles Barton brought before it for a hearing to show cause as to why Charles Barton is being held under restraint via bond and bond conditions under an unconstitutional statute.

b. The court release Charles Barton from restraint and subsequently dismiss his case because it is filed under an unconstitutional statute.

c. The court award applicant any other relief to which applicant is entitled.

Respectfully submitted,

/s/ Edward G. Jones
EDWARD G. JONES, ATTORNEY
State Bar No. 00794043
1319 Ballinger Street
Fort Worth, Texas 76102
Telephone (817) 335-0200
Fax (817) 335-0204
edjonesatty@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above foregoing Writ of Habeas Corpus was delivered or caused to be delivered to:

Honorable Sharen Wilson District Attorney,
Tarrant County, Texas
401 W. Belknap
Fort Worth, Texas 76196

On this the 12 day of April, 2017

/s/ EDWARD G. JONES
EDWARD G. JONES

IN COUNTY CRIMINAL COURT NUMBER EIGHT
OF TARRANT COUNTY, TEXAS

Cause No. 1314404

STATE OF TEXAS

vs.

CHARLES BARTON

BEFORE ME, the undersigned authority, on this day personally appeared ED G. JONES, who being by me duly sworn, upon oath deposes and says, "I am ED G. JONES, the Defendant in this cause; I have read the above WRIT OF HABEAS CORPUS and it is true and correct."

/s/ Ed. G. Jones
ED G. JONES
Affiant

SUBSCRIBED AND SWORN TO BEFORE on 10th April, 2017, to certify which witness my hand and seal of office.

/s/ Luwana Vega
Notary Public, State of Texas

[SEAL Luwana Vega
My Commission Expires:
11/08/2019]

Commission expires:

IN COUNTY CRIMINAL COURT NUMBER EIGHT
OF TARRANT COUNTY, TEXAS

Cause No. 1314404

STATE OF TEXAS

vs.

CHARLES BARTON

ORDER SETTING HEARING

COMES NOW the Defendant CHARLES BARTON by and through Defendant's Attorney of record EDWARD G. JONES and request that the court issue a writ of habeas corpus to have Charles Barton brought before it for a hearing to show cause as to why Charles Barton is being held under restraint via bond and bond conditions under an unconstitutional statute. The court release Charles Barton from restraint and subsequently dismiss his case because it is filed under an unconstitutional statute.

Hearing is set on the 18th day of May, 2017, at 2:30 ~~o'clock~~. P.M.

/s/ [Illegible]
JUDGE PRESIDING

IN COUNTY CRIMINAL COURT NUMBER EIGHT
OF TARRANT COUNTY, TEXAS

Cause No. 1314404

STATE OF TEXAS

vs.

CHARLES BARTON

ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS

On this the ___ day of _____, 2017, came CHARLES BARTON to be heard Defendant's Motion for a Writ of Habeas Corpus.

GRANTED _____,

DENIED _____, And the defendant is granted leave of this court prior to trial in order to appeal the denial of this Writ of Habeas Corpus based upon the unconstitutionality of the Texas Harassment Statute under Texas Penal Code §42.07(a)(7) before the Second Court of Appeals.

_____
JUDGE PRESIDING

APPENDIX L

IN THE COUNTY COURT AT LAW NUMBER 1
LUBBOCK COUNTY, TEXAS

Cause No. 2015-484541

STATE OF TEXAS

vs.

NATHAN SANDERS

APPLICATION FOR WRIT OF HABEAS CORPUS
AND MOTION TO QUASH INFORMATION

To THE HONORABLE JUDGE:

Defendant / Applicant applies for a writ of habeas corpus under article 11.09 of the Texas Code of Criminal Procedure and excepts to the substance of the *Information* (a copy of which is attached as Exhibit "A") under article 27.08 of the Texas Code of Criminal Procedure.

Defendant / Applicant would show that it does not appear from the face of the *Information* that he committed an offense against the law because the statute under which he is charged, section 42.07(a) of the Texas Penal Code, is unconstitutional under the United States Constitution.

Defendant / Applicant is illegally restrained of her liberty and confined in Lubbock County, Texas by the Respondent, Sheriff of Lubbock County, Texas, by virtue of his release on bail. To be entitled to habeas corpus relief, an applicant must establish that she was

either "confined" or "restrained" unlawfully at the time that the application was filed. *See Dahesh v. State,* 51 S.W.3d 300 (Tex. App.—Houston [14th] 2000, pet. ref'd). The terms "confinement" and "restraint" encompass incarceration, release on bail or bond, release on community supervision or parole, or any other restrain on personal liberty. *Ex parte Davis,* 748 S.W.2d 555, 557 (Tex. App. — Houston [1st Dist.] 1988, pet. ref 'd).

Defendant / Applicant would show that it does not appear from the face of the *Information* that the Defendant committed an offense against the law because the statute under which he is charged, Section 42.07(a) of the Texas Penal Code, is unconstitutional under the United States Constitution.

Section 42.07(a) of the Texas Penal Code is overbroad under the First Amendment.

ARGUMENT

Mr. Sanders is charged by information with:

> With intent to harass, annoy, alarm, abuse, torment, or embarrass [complainant], sending] repeated electronic communications to [complainant] in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson communication.

Please see the *Information,* attached. This is an accusation of Harassment under section 42.07(a) of the Texas Penal Code.

SECTION 42.07(A) IS A CONTENT-BASED RESTRICTION.

A restriction that defines regulated speech based on its function or purpose is content based on its face. *Reed v. Town of Gilbert, Ariz*., 135 S.Ct. 2218, 2227 (2015).

Section 42.07(a) defines regulated speech based on its purpose—the speaker's intent to harass, annoy, alarm, abuse, torment, embarrass, or offend—and on its function—a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend.

Because section 42.07(a) defines regulated speech based on its function and its purpose, it is content based on its face.

SECTION 42.07(A) FACES STRICT SCRUTINY.

A content-based restriction is subject to strict scrutiny.

Because section 42.07(a) is content based on its face it faces strict scrutiny.

SECTION 42.07(A) RESTRICTS PROTECTED SPEECH.

> From 1791 to the present . . . the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.

U.S. v. Stevens, 553 U.S. 460, 468 (2010) (internal alterations and citations omitted). These "limited areas" include:

- Advocacy intended, and likely, to incite imminent lawless action;

- Obscenity;
- Defamation;
- Speech integral to criminal conduct;
- Child pornography;
- Fraud;
- True threats; and
- Speech presenting some grave and imminent threat the government has the power to prevent, "although," says the Supreme Court, "a restriction under the last category is most difficult to sustain."

U.S. v. Alvarez, 567 U.S. 709, 717 (2012).

Absent from these recognized categories of historically unprotected speech is speech that is intended to harass, annoy, alarm, abuse, torment, embarrass, or offend.[1]

Because the speech forbidden by section 42.07(a) falls into no recognized category of historically unprotected speech, it is protected.

SECTION 42.07(A)'s OVERBREADTH IS REAL AND SUBSTANTIAL.

A statute is *substantially overbroad* when it prohibits a substantial amount of protected speech, relative to its legitimate sweep. *U.S. v. Williams,* 553 U.S. 285, 292 (2008).

---

[1] We may offend, annoy, alarm, and otherwise cause strictly emotional harm to each other with Constitutional protection. "Courts have routinely found First Amendment protection extends to speech and conduct that society at large views as vile, politically incorrect, or borne of hate." *State v. Williams,* 144 Wash. 2d 197, 209 (2001).

While section 42.07(a) might incidentally capture some unprotected speech, most speech that is intended to harass, annoy, alarm, abuse, torment, embarrass, or offend does not fall into any category of unprotected speech.

Because section 42.07(a) prohibits a substantial amount of protected speech, relative to its legitimate sweep, it is substantially overbroad.

SECTION 42.07(A) IS INVALID.

"[A] statute is facially invalid if it prohibits a substantial amount of protected speech." *Id.* Substantial overbreadth is the end of the strict scrutiny inquiry. *See U.S. v. Stevens*, 559 U.S. at 482 (statute at issue is "substantially overbroad, and therefore invalid under the First Amendment").

Because section 42.07(a) is substantially overbroad, it is invalid under the First Amendment.

CONCLUSION

Because section 42.07(a) is a substantially overbroad content-based restriction, it is void and a prosecution under it cannot lie.

PRAYER

Because section 42.07(a) of the Texas Penal Code is overbroad under the First Amendment, please set aside the *Information,* grant habeas corpus relief under Chapter 11 of the Texas Code of Criminal Procedure, dismiss the *Information,* and discharge the accused.

Respectfully Submitted,

/s/ Rusty Gunter II
Rusty Gunter II
TBN 24029591

1213 Avenue K
Lubbock, Texas 79401-4025
Rusty.gunter2@gmail.corn

Mark Bennett
TBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com

Attorneys for Defendant / Applicant

VERIFICATION

STATE OF TEXAS
COUNTY OF LUBBOCK

On this day the Petitioner, Rusty Gunter II (attorney for the Defendant / Applicant), appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read the *Application for Writ of Habeas Corpus,* and the facts in it are true, according to his belief.

/s/ Rusty Gunter II
Rusty Gunter II

Sworn to and subscribed before me by Rusty Gunter II on the 13th day of July, 2018.

/s/ B. Page
Notary Public in and for
The State of Texas

[SEAL B. PAGE
Notary Public
State of Texas
ID #12016757
Expires 6-26-2020]

CERTIFICATE OF SERVICE

A true and correct copy of this pleading was delivered to the Attorney for the State of Texas before it was filed with this Court.

/s/ Rusty Gunter
Rusty Gunter II

Exhibit A

No. 2015 - 484541

———

THE STATE OF TEXAS

vs.

NATHAN SANDERS

———

PID: 235159
DOB: 05/19/1987
Misdemeanor Charge: HARASSMENT
Bond: $1,000
Date Prepared: May 05, 2015
Ref#: 900239891
Agency/Rpt#: LPD / 15-6039
Arrest Date: / /

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Before me, the undersigned authority, personally appeared the undersigned affiant, who under oath deposed and said that he has reason to believe and does believe that,

in Lubbock County, Texas, NATHAN SANDERS, hereafter styled the Defendant, heretofore on or about the 9th day of February, A.D. 2015, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass KENDALL ARTHUR, send repeated electronic communications to KENDALL ARTHUR in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ [Illegible]
Affiant

Sworn and subscribed before me this the 5th day of May, A.D. 2015

/s/ Cassie Nesbitt
Assistant Criminal District Attorney
of Lubbock County, Texas

Cassie Nesbitt Bar No: 24091041

No. 2015 - 484541

THE STATE OF TEXAS

vs.

NATHAN SANDERS

PID: 235159
DOB: 05/19/1987
Misdemeanor Charge: HARASSMENT
Bond: $1,000
Date Prepared: May 05, 2015
Ref#: 900239891
Agency/Rpt#: LPD / 15-6039

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant Criminal District Attorney of Lubbock County, Texas, in behalf of the State of Texas, and presents in and to the County Court at Law No. of Lubbock County, Texas, that in Lubbock County, Texas, NATHAN SANDERS, hereafter styled the Defendant, heretofore on or about 9th day of February, A.D. 2015, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass KENDALL ARTHUR, send repeated electronic communications to KENDALL ARTHUR in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Cassie Nesbitt
Assistant Criminal District Attorney
of Lubbock County, Texas

Cassie Nesbitt Bar No: 24091041

IN THE COUTY COURT AT LAW # _____
OF LUBBOCK COUNTY, TEXAS

No. 2015 - 484541

THE STATE OF TEXAS

vs.

NATHAN SANDERS

ANNOUNCEMENT OF READY

NOW COMES THE STATE OF TEXAS, BY AND THROUGH THE CRIMINAL DISTRICT ATTORNEY OF LUBBOCK COUNTY, TEXAS, AND ANNOUNCES READY FOR TRIAL.

MATTHEW D. POWELL
CRIMINAL DISTRICT ATTORNEY

/s/ Cassie Nesbitt
ASST. CRIMINAL DISTRICT ATTORNEY

No. 2015 - 484541

THE STATE OF TEXAS

vs.

NATHAN SANDERS

PID: 235159
DOB: 05/19/1987
Misdemeanor Charge: HARASSMENT
Bond: $1,000
Date Prepared: May 05, 2015
Ref#: 900239891
Agency/Rpt#: LPD / 15-6039
Arrest Date: / /

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant Criminal District Attorney of Lubbock County, Texas, in behalf of the to of Texas, and presents in and to the County Court at Law No. of Lubbock County, Texas, that in Lubbock County, Texas, NATHAN SANDERS, hereafter styled the Defendant, heretofore on or about 9th day of February, A.D. 2015, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass KENDALL ARTHUR, send repeated electronic communications to KENDALL ARTHUR in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and inperson communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Cassie Nesbit
Bar No: 24091041

Assistant Criminal District Attorney
of Lubbock County, Texas

IF YOU HAVE NO LAWYER YOU MUST APPEAR IN COURT ON THE ___ DAY OF _____, 20__, AT ___ A.M.; OR YOUR LAWYER MAY APPEAR FOR YOU BEFORE SAID DATE.

ALSO

YOU MUST APPEAR ON THE ___ DAY OF _____. 20__, AT ___ A.M. FOR A PLEA NEGOTIATION HEARING;

APPENDIX M

NAME CHARLES BARTON

ADDRESS 4228 FAIROAKS DRIVE
GRAPEVINE TX 76051

RACE W SEX M AGE 57 DOB 9/16/1955

CASE NO. 1314404

DATE FILED 2/11/2013

CID NO. 0597267

OFFENSE HARASSMENT

DATE 8/25/2012

I.P. MONA DAWSON

AGENCY Grapevine PD

OFFENSE NO. 1200066336

COURT County Criminal Court No. 8

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant District Attorney of Tarrant County, Texas, in behalf of the State of Texas, and presents in and to the County Criminal Court No. 8 of Tarrant County, Texas that CHARLES BARTON, hereinafter called Defendant, in the County of Tarrant and State aforesaid, on or about the 25th day of August 2012, did

THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT TWO: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 26TH DAY OF AUGUST, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT THREE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 27TH DAY OF AUGUST, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT FOUR: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 6TH DAY OF SEPTEMBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY, LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT FIVE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT

IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 30TH DAY OF SEPTEMBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT SIX: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 6TH DAY OF OCTOBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON

COUNT SEVEN: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 2ND DAY OF NOVEMBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT EIGHT: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 8TH DAY OF

NOVEMBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

COUNT NINE: AND IT IS FURTHER PRESENTED IN AND TO SAID COURT THAT THE DEFENDANT IN THE COUNTY OF TARRANT AND STATE AFORESAID ON OR ABOUT THE 16TH DAY OF NOVEMBER, 2012, DID THEN AND THERE INTENTIONALLY, IN A MANNER REASONABLY LIKELY TO HARASS, ANNOY, ALARM, ABUSE, TORMENT, EMBARRASS, OR OFFEND MONA DAWSON, SEND REPEATED ELECTRONIC COMMUNICATIONS, TO-WIT: TEXT MESSAGE OR EMAIL COMMUNICATIONS TO MONA DAWSON,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ [Illegible]
Assistant District Attorney of
Tarrant County, Texas

APPENDIX N

No. 2015 - 484541

THE STATE OF TEXAS

vs.

NATHAN SANDERS

PID: 235159
DOB: 05/19/1987
Misdemeanor Charge: HARASSMENT
Bond: $1,000
Date Prepared: May 05, 2015
Ref#: 900239891
Agency/Rpt#: LPD / 15-6039
Arrest Date: / /

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant Criminal District Attorney of Lubbock County, Texas, in behalf of the State of Texas, and presents in and to the County Court at Law No. of Lubbock County, Texas, that in Lubbock County, Texas, NATHAN SANDERS, hereafter styled the Defendant, heretofore on or about 9th day of February, A.D. 2015, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass KENDALL ARTHUR, send repeated electronic communications to KENDALL ARTHUR in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: telephone calls, text messages, social media messages, handwritten letters, and in person communication.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Cassie Nesbitt
Assistant Criminal District Attorney
of Lubbock County, Texas

Cassie Nesbitt
Bar No: 24091041