No. 22-430

In the
Supreme Court of the United States

Charles Barton and Nathan Sanders,
Petitioners
v.
The State of Texas
Respondent

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

BRIEF OF AMICUS CURIAE THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as amicus curiae.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which brief complies with all applicable provisions of the Rules of Appellate Procedure, and copies have been served on all parties.

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[1] Counsel for both Petitioners and Respondent have consented to the filing of this brief. Both counsel were timely notified of an intent to file a brief at least ten days prior to the due date. *See* USCS Supreme Ct. R. 37.2. No counsel for a party authored the brief in whole or in part. *See id*. 37.6. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Id*.

This brief is filed with the consent of the parties. USCS Supreme Ct. R. 37.2(a); USCS Supreme Ct. R. 37.3(a).

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SUMMARY OF ARGUMENT

From Twitter jail to Texas jail, weaponizing hurt feelings is untenable public policy. Electronic posts within the scope of harassment are plainly speech as this Court has historically defined speech. Refusing certiorari allows Texas, and any state that follow Texas' lead, to create subdivisions of "non-speech" by criminalizing hurt feelings. Weaponized sensitivity is bad public policy. Certiorari should be granted.

ARGUMENT:

A) Texas Courts are not the final arbiter of federal constitutional claims.

"[T]his Court is the final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law." *New York v. Ferber*, 458 U.S. 747, 767, 102 S. Ct. 3348, 3360 (1982). See also *Hopkins v. Bonvicino*, 573 F.3d 752, 769 (9th Cir. 2009). *See, e.g., Bennett v. Mueller*, 322 F.3d 573, 582 (9th Cir. 2003) ("[S]tate courts will not be the final arbiters of important issues under the federal constitution." (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940)))

The Court of Criminal Appeals decided that this statute implicated conduct, not speech. *See Ex parte Barton*, No. PD-1123-19, 2022 Tex. Crim. App. LEXIS 235, at *1 (Crim. App. Apr. 6, 2022) *citing Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). Scott was decided October 10, 2010, only nine months after this Court's decision in *Citizens United v. FEC*, 558 U.S. 310, 310, 130 S. Ct. 876, 880 (2010)(decided January 21, 2010)(holding that the act of making political donations is speech within the scope of First Amendment protection). The Texas Court of Criminal Appeals conclusion that 'conduct' is entirely without First Amendment protection is inconsistent with this Court's decision in Citizens United.

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

First Nat'l Bank v. Bellotti, 435 U.S. 765, 776, 98 S. Ct. 1407, 1415 (1978) *quoting Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940).

First Amendment standards, "must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United,* 558 U.S. 310, 327, *quoting* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469, 127 S. Ct. 2652, 2666 (2007)(opinion of Roberts, C. J.) (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269-270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). The interpretation that this is not 'speech' and is therefore not protected is incorrect. Allowing that interpretation to stand will allow prosecution for any number of different viewpoints because someone may find the viewpoint disagreeable. In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the

speakers who may address a public issue. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85, 98 S. Ct. 1407, 1420 (1978) *citing Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972)

B) The fragility of any ego should not determine the propriety of protecting speech.

Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021). It also presents a vast array of ways to interact with, befriend, and offend others.

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S. Ct. 1243, 1248 (1969). Indeed, "…the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by the original Constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas." *Lee v. Runge*, 404 U.S. 887, 892, 92 S. Ct. 197, 200 (1971)(J. Douglas, Dissenting).

I.

I. Disfavoring the content of a communication does not make the communication exempt from the First Amendment.

The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, e.g., Bigelow v. Virginia, 421 U.S. 809, 811 (1975); *Schneider v. State*, 308 U.S. 147, 160 (1939). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 1584 (2010) quoting *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (internal quotation marks omitted).

Texas' law ignores these limitations, categorically creates a new First Amendment exception, and is rife for abuse by political figures and private individuals alike.

II. Texas' electronic harassment statute makes no attempt to distinguish between types or categories of speech, equally criminalizing private insults and political debate.

The largest problem with Texas criminalizing hurt feelings is that Texas makes no exception in Penal Code 42.07(a)(7) for important versus trivial matters. This Court has long recognized the "right to receive information and ideas, regardless of their social worth," finding that right "fundamental to our free society." *Stanley*, 394 U.S. 557, 564

1) Matters of Public Concern

Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492-494, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)(internal citations omitted); *Time, Inc.* v. *Hill*, 385 U.S. 374, 387-388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967). The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216 (2011) *citing Rankin* v. *McPherson*, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).

2) Private Concern

Speech about a private concern is speech solely in the individual interest of the speaker and its specific business audience. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 762, 105 S. Ct. 2939, 2947 (1985) Cf. *Central Hudson Gas & Elec. Corp*. v. *Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980).

Regulation of business advertising is a common example. Compare *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); United States v. O'Brien, 391 U.S. 367, 377 (1968); and *Kovacs v. Cooper*, 336 U.S. 77, 85-87 (1949), with *Buckley v. Valeo*, 424 U.S. 1 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); and *Saia v. New York*, 334 U.S. 558, 562 (1948).

The Texas law makes no distinction between private and public concerns in criminalizing hurt feelings. This could be subject to abuse by politicians mad about a series of mean tweets or private individuals upset about trivial disagreements.

3) Weaponizing the Justice System

"[A] statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." *Citizens United*, 558 U.S. 310, 336, citing *WRTL*, *supra*, at 482-483, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (Alito, J., concurring). We must, in all things, be wary of the potential for abuse. The Court of Criminal Appeals determination that electronic harassment is categorically 'not speech' and has no

First Amendment protection is particularly problematic.

Example One

Consider, while it still exists, the problem of Twitter. Recall the time Trump accused Cruz's father of plotting President John F. Kennedy's assassination? Or the time he insulted Heidi Cruz's looks[2]? What about when Trump called Cruz "a totally unstable individual[3]" and "worse than Hillary." This simple combination of tweets, sent during a contested Presidential primary, is criminal under the Texas law as interpreted by the Court of Criminal Appeals.

Example Two

"Trump incited the January 6 attack, and when his mob overran and occupied the Senate and attacked the House and assaulted law enforcement, he watched it on TV like a reality show." S.Doc.117-3,vol.1. Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump: Volume I - Preliminary and Floor Trial Proceedings (2021) (Statement by Mr. Manager RASKIN). "He reveled in it, and he did nothing to help us as Commander in Chief. Instead, he served as the

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[2] https://www.businessinsider.com/donald-trump-shared-an-unflattering-picture-of-ted-cruzs-wife-2016-3 (viewed 18 Nov. 2022)

[3] https://www.theguardian.com/us-news/2016/feb/17/ted-cruz-dares-donald-trump-to-sue-him-over-negative-campaign-advert (viewed 18 Nov. 2022)

"inciter in chief," sending tweets that only further incited the rampaging mob. He made statements lauding and sympathizing with the insurrectionists." *Id*.

Could these tweets alarm or annoy a Congressman or Representative? Certainly.

Example Three

Hypothetically, a disgruntled Republican could tweet: "I'll vote for Greg Abbott when he stands for the Star-Spangled Banner." Then: "Greg Abbott and Madison Cawthorn perfectly represent the spineless GOP." Reasonable minds may differ as to the accuracy of the second statement, but all would likely agree that attacking a politician for their disability is reprehensible. Is that hypothetical tweet disgusting? Absolutely. Should it be criminal? Absolutely not.

Example Four

Elon Musk can't stay out of the news, or off Twitter, where the billionaire Tesla CEO has long used his Twitter account to provoke, joke and troll.[4] By directing the ire of his 110,000,000 followers at any particular person, Mr. Musk could find himself in violation of Texas law. Importantly, this law has no venue requirement. It can be broken from any place at any time.

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[4] https://www.npr.org/2022/10/31/1132906782/elon-musk-twitter-pelosi-conspiracy (Visited 21 Nov. 2022)

Example Five

Flipping the political narrative, the problem of prosecution for loudly stating a widely shared opinion hits both sides of the political aisle. Tweets alleging Beto O'Rourke to be a communist and deriding him for his ridiculous positions on firearms would be equally subject to criminal prosecution in any of the 254 counties in which Beto could find a sympathetic District Attorney.

Example Six

Imagine a student from the University of Texas Law School, unhappy with a grade from a professor who emails the professor multiple times about the grade. The professor, who has submitted grades and closed the semester and is now writing a book, ignores the emails. The emails go unanswered, so the student continues to send them. The issue remains unresolved, so the student sends an email an hour until the professor, fed up with the endless emails, responds that the grade has been submitted and will remain unchanged.

Example Seven

We need not stay in the realm of candidates to find problems with this law. Consider any topic of political contention and you could easily find strangers on the internet hurling insults and invective at each other. From abortion to education to gay marriage, there are no shortage of keyboard warriors content to scream into the void. Any

engagement with these online arguments could be subject to prosecution.

Common Constitutional Problem in Each Example

Remember, this Texas law provides: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]" Tex. Penal Code 42.07(a)(7).

Intent may be inferred, so it need not be proven. *See Regalado Cuellar v. United States*, 553 U.S. 550, 569, 128 S. Ct. 1994, 2006 (2008).

Additionally, venue is not an element of the offense. As it is not a "criminative fact," venue is not an "element of the offense" under Texas law. *Schmutz v. State*, 440 S.W.3d 29 (Tex. Crim. App. 2014) (An "element" is a fact that is legally required for a fact finder to convict a person of a substantive offense. See also Tex. Penal Code Ann. § 1.07 (defining "elements of offense" to include conduct, result, and culpability elements, as well as "negation of any exception")).

Where intent is inferred and venue is not required, accusing a family member of murder and attacking a spouse fall easily within the scope of 42.07(a)(7) as ones that harass or annoy or abuse or torment Senator Cruz. *See* Tex. Penal Code 42.07(a)(7). Senator Cruz, Governor Abbott, Rep.

Cawthorn, and Beto O'Rourke would each have his pick of 254 counties in which they could press charges – since there is no geographic restriction to the law.

Granted, each would only get one shot, as multiple county prosecutions would not be permitted. "Political subdivisions of States -- counties, cities, or whatever -- never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Waller v. Florida*, 397 U.S. 387, 90 S. Ct. 1184 (1970).

Even with only one shot, such a hypothetical prosecution violates the spirit and the text of the First Amendment. The "bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). These hypothetical tweets are as entitled to constitutional protection as they are unsavory.

With no geographic restriction, no venue requirement, and no end to the fragility of ego that may result in a particular person feeling harassed or annoyed, criminal prosecution under this law is untenably problematic. Hurt feelings aren't fun but they should not be criminal.

III. **"This hurts my feelings" is not a sufficient basis to strip speech of constitutional protection.**

"[S]peech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458, 131 S. Ct. 1207, 1219 (2011) "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). Texas, bucking this trend, has opted to criminalize speech that may annoy, alarm, abuse, torment, or embarrass another. Whether it be Twitter jail or Texas jail, this is bad policy.

"From 1791 to the present," … the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 1584 (2010) quoting *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (Kennedy, J., concurring in judgment). This recognizes that there

are few "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Those categories include:

- obscenity, *Roth* v. *United States*, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957),
- defamation, *Beauharnais* v. *Illinois*, 343 U.S. 250, 254-255, 72 S. Ct. 725, 96 L. Ed. 919 (1952),
- fraud, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976),
- incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-449, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (*per curiam*), and
- speech integral to criminal conduct, *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S. Ct. 684, 93 L. Ed. 834 (1949)
- Untruthful speech, commercial or otherwise, has never been protected for its own sake. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830 (1976) citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, and n. 10 (1961);

See United States v. Stevens, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 1584 (2010).

The depths of the fragility of mans' ego cannot be the basis for criminalizing speech. Thirty years ago, this Court struck down an equally overbroad law. *See R. A. V. v. St. Paul*, 505 U.S. 377, 414, 112 S. Ct. 2538, 2560 (1992) (J. White, Concurring)("Although the [antibias] ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment."). The same result is compelled here.

Conclusion

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."

United States v. Stevens, 559 U.S. 460, 470, 130 S. Ct. 1577, 1585 (2010) quoting *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 178, 2 L. Ed. 60 (1803).

Because the majority of the Texas Court of Criminal Appeals erred in categorically exempting protected speech from the First Amendment, and because that court is not the final arbiter of a federal constitutional right, this Court should grant the petition for *certiorari*.

Respectfully submitted,

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