No. 22-430

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

BRIEF OF *AMICI CURIAE* TECHNOLOGY LAW AND POLICY CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW & WOODHULL FREEDOM FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Technology Law and Policy ("TLP") Clinic at New York University School of Law is dedicated to public interest legal work at the intersection of law and technology. As one of the foremost programs of its kind, the TLP Clinic has an interest in preserving civil liberties in new and novel contexts that involve technology. This case directly implicates that interest, as it threatens individuals' First Amendment rights with respect to electronic communications.

The Woodhull Freedom Foundation ("Woodhull") is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. The Foundation's name was inspired by the nineteenth century suffragette and women's rights leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. The Foundation's advocacy has included a wide range of human rights issues, including reproductive justice, anti-discrimination legislation, combatting sexual harassment and violence, and the right to define ones' own family. Woodhull is particularly concerned that the challenged statute will hamper its ability to advocate for and support victims of sexual oppression.

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[1] *Amici* provided timely notice to counsel for all parties and received their written consent. Sup. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* or their counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

SUMMARY OF THE ARGUMENT

The First Amendment protects speech that may be unpleasant, including speech we detest. This Court has long recognized that such speech can be vital for our marketplace of ideas often precisely because it is communicated with an intent and in a manner likely to "harass, annoy, alarm, abuse, torment, or embarrass"—the very emotive functions that are criminalized by Texas Penal Code § 42.07(a)(7). In dismissing these intents as not "legitimate," and concluding that communications sent with such intents do not even qualify as speech under the First Amendment, the Texas Court of Criminal Appeals failed to recognize that such communications are in fact ubiquitous, frequently useful, and—most importantly—constitutionally protected. The court's profound error on such a critical issue involving First Amendment rights merits this Court's consideration of Petitioners' case.

Section 42.07(a)(7) is substantially overbroad. As discussed below, the statute prohibits a wide range of expression that the First Amendment does and should protect, from core political speech to commonplace forms of self-help. Indeed, speech made with the statute's proscribed intents can often be especially valuable and important to protect given its integral role in advocacy. For example, an animal rights organization might "annoyingly" comment on the Facebook page of a federal or state agency to draw attention to problematic government practices. The purchaser of a faulty product might post "alarming" online reviews to prevent other would-be customers from repeating their mistakes. The victim of workplace harassment might post "embarrassing" Tweets about their employer to pressure it to change

its misconduct policies. All considered, unconstitutional applications like these far exceed the statute's conceivable legitimate sweep. In enacting § 42.07(a)(7), the Texas Legislature may have sought to address real and serious online harms, but this poorly drawn statute fails to do so without overburdening protected expression.

The statute's overbreadth presents an especially heightened risk of chilling protected expression because it targets electronic communications. Such communications often lack clear indicia of intent. When people send emails or post on social media, the intent of the speaker is often harder to discern than in the context of in-person or even telephone communications. In those contexts, prosecutors and juries can look to circumstantial evidence such as a defendant's body language or tone of voice. Additionally, electronic communications have unique features, like the use of emojis and internet slang, that make their intended meaning and effect more ambiguous than other forms of speech. Fearing that their electronic communications will be misinterpreted and used to criminally punish them, speakers may choose not to express themselves at all.

In refusing to even apply First Amendment scrutiny to § 42.07(a)(7), the court below failed to grasp the statute's risk of chilling online speech, a danger that will only grow as more states enact electronic harassment statutes. This Court should grant review to reverse the court below and ensure that § 42.07(a)(7) and other similar electronic harassment statutes do not chill protected speech.

ARGUMENT

I. Intentionally harassing, annoying, alarming, abusive, tormenting, or embarrassing speech is protected by the First Amendment and often valuable for a democratic and pluralistic society.

This Court has long recognized that the First Amendment protects "speech we detest." *United States v. Alvarez*, 567 U.S. 709, 729 (2012). The Court has emphasized that such speech is vital for our marketplace of ideas often precisely because it is communicated with an intent and in a manner likely to harass, annoy, alarm, abuse, torment, or embarrass. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). "In fact, words are often chosen as much for their emotive as their cognitive force," and the "emotive function" of speech "may often be the more important element of the overall message sought to be communicated." *Cohen v. California*, 403 U.S. 15, 26 (1971).

The Court has upheld the rights of speakers engaging in intentionally offensive speech in a variety of contexts—from a political activist provocatively burning the American flag "to protest the policies of the Reagan administration," *see Texas v. Johnson*, 491 U.S. 397, 399 (1989), to a high school student using social media to communicate "vulgar" criticisms of her "school and the school's cheerleading team," *see Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2042 (2021). No matter its context, "speech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

Most significantly, speakers engaging in core political speech often intend to harass, annoy, alarm, abuse, torment, or embarrass to advance their goals. In *Terminiello v. City of Chicago*, for example, the Court overturned the petitioner's conviction for breach of the peace after he delivered a controversial speech "criticiz[ing] various political and racial groups whose activities he denounced as inimical to the nation's welfare." 337 U.S. 1, 3 (1949). Freedom of speech, the Court explained, "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* at 4. After all, the Court continued, "[s]peech is often provocative and challenging." *Id.*

Similarly, in *NAACP v. Claiborne Hardware Co.*, the Court held that the First Amendment protected political advocacy premised on "social pressure and the 'threat' of social ostracism," which "further[ed] the aims of [an NAACP] boycott" as part of a campaign to achieve racial justice in Mississippi. 458 U.S. 886, 909–910 (1982). As the Court noted, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.* at 910.

The freedom to send intentionally harassing, annoying, alarming, abusive, tormenting, or embarrassing communications is especially crucial when individuals seek to directly criticize or question government officials. *See City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or to challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Indeed, this Court has

emphasized that "speech critical of the exercise of the State's power lies at the very center of the First Amendment," *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991), and that individuals may use such speech to defend themselves from, or highlight what they perceive to be, abuses of government power, *see, e.g.*, *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (overturning a conviction based on a police officer's testimony that the defendant "was annoying [him]" while he was protesting his "highly questionable detention").

In all of these contexts, the Court has consistently reaffirmed that communications made with disfavored intents—as harassing, annoying, alarming, abusive, tormenting, or embarrassing as they may be—are protected by the First Amendment. This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

II. Section 42.07(a)(7) is substantially overbroad because it criminalizes protected and valuable electronic communications sent with the intent and in a manner likely to harass, annoy, alarm, abuse, torment, or embarrass.

Section 42.07(a)(7) is "a criminal prohibition of alarming breadth." *United States v. Stevens*, 559 U.S. 460, 474 (2010). As both written and authoritatively construed by Texas's highest criminal court, it criminalizes a far-reaching range of protected expression, including political advocacy and efforts at

self-help by consumers and harassment victims. But "the statute's plainly legitimate sweep"—encompassing electronic communications that may rise to the level of unprotected true threats or speech integral to criminal conduct—is relatively narrow. *United States v. Williams*, 553 U.S. 285, 292 (2008). As a result, it is unconstitutionally overbroad. *See Stevens*, 559 U.S. at 473 (explaining that a statute is facially overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008))).

A. The statute criminalizes a vast array of protected expression.

Speech restrictions are "particularly treacherous" when criminal sanctions are involved. *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam). Thus, to survive an overbreadth challenge, a "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972). Section 42.07(a)(7) is neither. In the decisions below, the Texas Court of Criminal Appeals took an already-broad statute and made it broader.

As written, the Texas statute broadly proscribes "send[ing] repeated electronic communications" with the intent and "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, [or] embarrass . . . another." Tex. Penal Code Ann. § 42.07(a)(7). The statute defines "electronic communication" to encompass most if not all forms of online speech:

> "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 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 . . . .

Tex. Penal Code Ann. § 42.07(b)(1).

The Texas Court of Criminal Appeals' authoritative construction of § 42.07(a)(7) has exacerbated, rather than alleviated, the statute's breadth.[2] In *Scott v. State*, the court interpreted the relevant statutory terms in the context of an overbreadth and vagueness challenge to another subsection of the statute, § 42.07(a)(4):

> "Harass" means "to annoy persistently." "Annoy" means to "wear on the nerves by

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[2] Because this Court "lack[s] jurisdiction authoritatively to construe state legislation," *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 369 (1971), it is "bound by the construction given to" § 42.07(a)(7) by the Texas Court of Criminal Appeals, the state's highest criminal court, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *see also City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) ("We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court.").

> 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."

322 S.W.3d 662, 669 n.13 (Tex. Crim. App. 2010) (quoting *Webster's Ninth New Collegiate Dictionary* 47, 68, 88, 405, 552, & 1245 (1988)).

In the opinions below, the Texas Court of Criminal Appeals confirmed that its broad interpretation of these terms in *Scott* also applies to subsection (a)(7). Pet. App. 13a–14a, 35a. The court further emphasized that "a person mak[ing] repeated [electronic] communications" may be held liable under § 42.07(a) even if that person has an "intent to engage in the legitimate communication of ideas." Pet. App. 12a.

Under the Texas court's reading of § 42.07(a)(7), a person commits a crime if she sends repeated electronic communications with an intent and in a manner likely to "annoy persistently," "wear on the nerves by persistent petty unpleasantness," "strike with fear," "attack with words," "cause severe distress of the mind," or "cause to experience a state of self-conscious distress of the mind"—even if the sender does not intend solely to inflict emotional distress.

As a result, § 42.07(a)(7) "criminalizes a substantial amount of protected expressive activity," *Williams*, 553 U.S. at 297, presenting "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court," *Bd. of Airport*

Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). The Court need not rely on "fanciful hypotheticals" to illustrate the statute's broad sweep. *Stevens*, 559 U.S. at 485 (Alito, J., dissenting). By proscribing communications made with the intent to harass, annoy, alarm, or embarrass, the statute criminalizes and chills a large amount of "real-world" protected expression, *id.*, including political speech, consumer complaints, and advocacy by harassment victims. In all of these contexts, repeatedly sending messages to make one's audience uncomfortable, wear them down, or shock them into paying attention is often the goal in and of itself. When faced with an uninterested listener, resource constraints, or other barriers, sometimes intentional harassment, annoyance, alarm, or embarrassment is the entire point.

Perhaps most strikingly, § 42.07(a)(7) criminalizes the core protected speech of political activists and advocacy groups, which repeatedly send intentionally harassing, annoying, alarming, or embarrassing electronic communications to draw the attention of the public and the government to their cause, particularly when they believe their stance is unpopular. For example, the animal rights group People for the Ethical Treatment of Animals ("PETA") employs purposefully "controversial" advocacy tactics to draw free media attention to its message, including by posting comments on social media,[3] in part because

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[3] *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 13–14, *PETA v. Tabak*, No. 21-CV-2380 (D.D.C. Apr. 1, 2022), 2022 WL 1538454 (describing how and why PETA uses social media to promote its cause).

it has fewer resources to spend on paid advertising than opposing interest groups.[4] Animal rights supporters who post upwards of five hundred comments on the livestreams of a public university's graduation ceremony to protest the school's use of canines in medical experiments[5] intend to and likely do "wear on the nerves by persistent petty unpleasantness." *Scott*, 322 S.W.3d at 669 n.13.

The same is true when an activist concerned about the age-appropriateness of books in the local library repeatedly posts on Facebook asking why the local librarian is "fighting so hard to keep sexually erotic and pornographic materials in the kid's section."[6] Or when a worker who opposes abortion repeatedly criticizes the leader of her union on Facebook for participating in organizing that supported abortion rights.[7] Our society accepts these types of harassing or annoying speech as legitimate forms of advocacy. But the Texas statute makes them criminal.

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[4] *See Why Does PETA Use Controversial Tactics?*, PETA, https://www.peta.org/about-peta/faq/why-does-peta-use-controversial-tactics.

[5] *See PETA v. Banks*, 2022 WL 4021938, at *2, *6 (S.D. Tex. Sept. 2, 2022) (finding this activity "indisputably affected with a constitutional interest in free speech").

[6] Tyler Kingkade, *In Rare Move, School Librarian Fights Back in Court Against Conservative Activists*, NBC News (Aug. 13, 2022), https://www.nbcnews.com/news/us-news/rare-move-school-librarian-fights-back-court-conservative-activists-rcna42800.

[7] *Carter v. Transport Workers Union of America Local 556*, 353 F. Supp. 3d 556, 563–64 (N.D. Tex. 2019).

Indeed, § 42.07(a)(7) bars one of the most important forms of political speech: direct criticism of the government. Concerned citizens in Texas and elsewhere repeatedly send intentionally harassing or annoying electronic communications to get the attention of government officials.[8] In fact, § 42.07(a)(7) has already been used to prosecute and silence a Texas citizen, Scott Ogle, for sending multiple—admittedly colorful—emails to two police officers.[9] His communications called one officer an "arrogant, condescending, belligerent" individual "who chooses to look the other way," and addressed the other as "little bitch" and "little state weasel," while writing, "you have a Constitution to uphold, son, [and] you're pissing on it."[10] While perhaps distasteful, criticism of this sort receives First Amendment protection so long as it does not fall into one of the recognized free speech exceptions. *See infra* Section II.B. Yet Texas has already used § 42.07(a)(7) to silence critical citizens exercising this right.

Additionally, the Texas statute criminalizes the complaints of consumers, who repeatedly contact businesses over the internet or post on social media to

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[8] *See, e.g.*, *Robinson v. Hunt Cnty.*, 921 F.3d 440, 445 (5th Cir. 2019) (discussing critical comments posted on the Facebook page of a local government official); *Davison v. Randall*, 912 F.3d 666, 674 (4th Cir. 2019) (same); *Kallinen v. Newman*, 2022 WL 2834756, at *1 (S.D. Tex. July 20, 2022) (same).

[9] *See Ex parte Ogle*, 2018 WL 3637385, at *1 (Tex. App. Aug. 1, 2018), *cert. denied*, 140 S. Ct. 118 (2019).

[10] Petition for a Writ of Certiorari at 8 n.3, *Ogle v. Texas*, 140 S. Ct. 118 (2019) (No. 18-1182), 2019 WL 1167875, at *8 n.3.

re-book flights,[11] acquire refunds for faulty products,[12] or warn other customers away from bad businesses[13]—particularly when a business has failed to respond over other channels.[14] The practice has become so widespread that consumer organizations now offer guides on how to effectively complain to a company on social media.[15]

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[11] Zach Honig, *How to Use Twitter to Rebook a Canceled Flight*, Fodor's Travel (July 14, 2014), https://www.fodors.com/news/airlines/how-to-use-twitter-to-rebook-a-canceled-flight.

[12] Barbara Krasnoff, *How to Get Your Money Back After a Bad Purchase*, Verge (Nov. 25, 2019), https://www.theverge.com/2019/11/25/20982536/returns-refund-purchase-complaint-problem-broken-better-business-bureau-courts.

[13] *Solving Customer Problems: Returns, Refunds, and Other Resolutions*, Fed. Trade Comm'n (May 2021), https://consumer.ftc.gov/articles/solving-customer-problems-returns-refunds-and-other-resolutions ("If you can't resolve the problem and feel the company has been unfair, you may want to warn other people by writing an online review. . . . Many companies monitor social media and may reply if they see you're dissatisfied with their response to your complaint.").

[14] Kevin Doyle, *Got Bad Customer Service? How to Complain Well and Get Results*, Consumer Reps. (Dec. 2, 2019), https://www.consumerreports.org/customer-service/got-bad-customer-service-how-to-complain-well-and-get-results (describing the experiences of multiple consumers who successfully resolved complaints through social media after unsatisfactory responses over other channels).

[15] Octavio Blanco, *The Best Way to Complain to a Company on Social Media*, Consumer Reps. (Aug. 2, 2021), https://www.consumerreports.org/consumer-complaints/best-way-to-complain-to-a-company-on-social-media-a4380499295.

Despite its ubiquity and usefulness, however, this consumer advocacy may well run afoul of § 42.07(a)(7). An email threatening to "seek[] help from a consumer protection agency or the Better Business Bureau"[16] intends to "strike with fear." *Scott*, 322 S.W.3d at 669 n.13. A Facebook post calling on a company to terminate an employee for his "white supremacist rhetoric"[17] certainly intends to cause company leadership "to experience a state of self-conscious distress of the mind." *Id.* The Texas statute chills consumers from using the full range of self-help tools at their disposal.

Finally, § 42.07(a)(7) punishes the advocacy of harassment and abuse victims and their allies, who disclose personal stories on the internet or call out alleged attackers in order to warn others about exploitative authority figures,[18] express solidarity

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[16] *Sample Complaint Letter Template*, USAGov, https://www.usa.gov/complaint-letter.

[17] *Goza v. Memphis Light Gas & Water Div.*, 2019 WL 11706044, at *5–7 (W.D. Tenn. Jan. 9, 2019) (describing social media posts and messages sent by customers of plaintiff's former employer, wherein customers complained about racist comments made by plaintiff).

[18] S*ee, e.g.*, *Grenier v. Taylor*, 183 Cal. Rptr. 3d 867, 876 (Cal. Ct. App. 2015) (members of parish who posted online about alleged sexual abuse of minors by pastor "were attempting to warn people away from attending the Church").

with other victims,[19] process their own experience,[20] or compel institutional change[21]—especially when legal recourse is unavailable or unsatisfactory.[22] Such communications often intend to harass, annoy, alarm, or embarrass. Indeed, public shaming has a long history in the context of sexual and gender-based

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[19] *See, e.g.*, *Mignogna v. Funimation Prods., LLC*, 2022 WL 3486234, at *10 (Tex. App. Aug. 18, 2022) (noting that a victim publicly tweeted about her experience with harassment "so that other women who were victims . . . would know that they are not alone").

[20] *See, e.g.*, *id.* ("My intent in my outcry was always to provide an opportunity for healing and encouragement for bravery for both myself and other victims.").

[21] *See, e.g.*, *Coleman v. Grand*, 523 F. Supp. 3d 244, 252 (E.D.N.Y. 2021) (explaining that the defendant circulated an email and letter about her experience with an abusive partner and fellow musician "to create change in the industry"); Jia Tolentino, *The Whisper Network After Harvey Weinstein and "Shitty Media Men,"* New Yorker (Oct. 14, 2017), https://www.newyorker.com/news/news-desk/the-whisper-network-after-harvey-weinstein-and-shitty-media-men ("Speech about sexual assault can stem from a variety of worthy motivations: to warn other women, to find closure and catharsis, to enact or perform solidarity, to get an abusive person out of a position of power, to change institutional procedures.").

[22] *See, e.g.*, Stephanie Madden & Rebecca A. Alt, *Know Her Name: Open Dialogue on Social Media as a Form of Innovative Justice*, Soc. Media + Soc'y, Jan. 2021, at 1, 6–8 (describing a rape victim's difficult experience with the criminal legal system); Moira Donegan, *I Started the Media Men List*, Cut (Jan. 10, 2018), https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html ("[As women who] are young, new to the industry, and not yet influential in our fields[,] . . . the risks of using any of the established means of reporting were especially high and the chance for justice especially slim.").

violence.[23] Furthermore, some victims may use deliberately harassing language to take back power from abusers.[24] Others may intentionally choose to spare no details in recounting their alarming experience, in order to force abusers and the public to confront the effects of their actions or complicity.[25] Accordingly, § 42.07(a)(7)'s overbroad language allows prosecutors to weaponize the statute against the very groups it was ostensibly meant to protect, deterring

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[23] *See* Stephen Banks, *Informal Justice in England and Wales, 1760-1914*, at 92–100 (2014) (describing how nineteenth-century English villagers used "rough music" processions to morally condemn men who beat their wives); Julia Carrie Wong & Maria L. La Ganga, *'My Own Form of Justice': Rape Survivors and the Risk of Social Media 'Vigilantism,'* Guardian (Sept. 13, 2016), https://www.theguardian.com/society/2016/sep/13/social-media-rape-survivors-justice-legal-system (describing how feminist activists in the 1960s and '70s shamed suspected abusers at their places of work).

[24] *See, e.g.*, *Todd v. Lovecruft*, 2020 WL 60199, at *4, *21 (N.D. Cal. Jan. 6, 2022) (granting motion to strike defamation claim arising out of tweet that stated, "[I] love watching the men in my industry who've sexually abused me and many others squirm as I take them out one by one while they nervously await their turn [¶] hahahahahahahaha eat goat dung you epoxy brained cowards"); *cf.* Emma A. Jane, *Online Misogyny and Feminist Digilantism*, 30 Continuum: J. Media & Cultural Stud. 284, 290 (2016) (explaining that victims of electronic harassment who "talk[] about the hurt" and express vulnerability online may fall victim to further "trolling" by those seeking to "disrupt [their] emotional equilibrium").

[25] *See, e.g.*, Katherine W. Bogen et al., *A Qualitative Analysis of How Individuals Utilized the Twitter Hashtags #NotOkay and #MeToo to Comment on the Perpetration of Interpersonal Violence*, Soc. Media + Soc'y, Jan. 2022 (categorizing and analyzing the often-graphic details victims may share in online disclosures of their experiences with interpersonal violence).

victims from speaking out. As statutes like § 42.07(a)(7) spread, entire social movements may be chilled before they even start.

In sum, the Texas statute criminalizes a wide range of protected and valuable electronic communications, from core political speech to consumer complaints to self-advocacy by victims of harassment and abuse.

B. The statute's conceivable legitimate sweep is comparatively small.

In contrast to the astounding variety and volume of protected speech that the statute covers, its applications to unprotected speech are sharply circumscribed. This Court has recognized a limited number of "historically unprotected categories of speech." *Stevens*, 559 U.S. at 468–70 (describing some of those categories); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (same). Two such categories are especially relevant here: true threats, *see Virginia v. Black*, 538 U.S. 343, 360 (2003); and speech integral to a course of criminal conduct, *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Some speech that falls within the sweep of § 42.07(a)(7) is arguably not protected under these exceptions; however, such speech comprises a small portion of all expression proscribed by the statute.

Moreover, "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Here, the state possesses several alternative tools to prosecute unprotected expression that might fall within § 42.07(a)(7)'s small legitimate sweep. For example, Texas Penal Code § 22.07(a) makes it a

crime to "threaten[] to commit any offense involving violence to any person or property with intent to . . . place any person in fear of imminent serious bodily injury[,] . . . [or] place the public or a substantial group of the public in fear of serious bodily injury." Tex. Penal Code Ann. § 22.07(a)(2), (5). Additionally, § 42.072(a) makes it a crime to "on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engage[] in conduct": (1) that "the actor knows or reasonably should know the other person will regard as threatening [injury to their person, their property, or their loved ones]"; (2) that does in fact "cause[] the other person [or their loved ones] to be placed in fear of [such injury]"; and (3) that "would cause a reasonable person to [fear such injury]." Tex. Penal Code Ann. § 42.072(a). Thus, much electronic harassment that rises to the level of a true threat, or that constitutes speech integral to a course of criminal conduct, is already punishable under different provisions of Texas's criminal code, making § 42.07(a)(7)'s legitimate applications redundant.

Comparing the statute's unconstitutional applications to its constitutional ones makes clear that the Texas statute is substantially overbroad. As authoritatively construed, it criminalizes a far-reaching range of commonplace forms of protected speech in which speakers rely on the statute's proscribed intents. By contrast, only a relatively small amount of unprotected speech falls within its bounds. Furthermore, the state can prosecute much of this unprotected speech using alternative tools, tempering the potency of the statute's already-small legitimate sweep.

III. Section 42.07(a)(7)'s overbreadth is particularly chilling because electronic communications, which often lack circumstantial evidence of intent, are uniquely susceptible to misinterpretation and thus arbitrary or discriminatory enforcement.

Compared to non-electronic communications, which may offer evidence of a defendant's body language and tone of voice, electronic communications are accompanied by far more limited and ambiguous evidence. As scientific studies have indicated, determining intent over electronic communications, especially when they consist of pure text, is challenging and inexact.[26] What's more, unique attributes of electronic communications, such as the use of emojis and internet slang, add to their ambiguity—and increase the overall risk that such communications may be misinterpreted by prosecutors or juries. Without clear indicia of intent over these mediums, prosecutors have more discretion in interpreting a defendant's communications and

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[26] *See, e.g.*, Kashfia Sailunaz et al., *Emotion Detection from Text and Speech: A Survey*, Soc. Network Analysis & Mining, Apr. 7, 2018, at 1, 4 (It can be "nearly impossible" to detect tone from pure text since "some text has emotions and words which are ambiguous, some words have multiple meanings . . . . Some text represents sarcasm, or use[s] slangs."); Saif Mohammad, *Sentiment Analysis: Detecting Valence, Emotions, and Other Affectual States From Text, in Emotion Measurement* 205–06 (Herbert L. Meiselman ed., 2016) ("Often we communicate affect through tone, pitch, and emphasis. However, written text usually does not come with annotations of stress and intonation. . . . We also communicate emotions through facial expressions. . . . Once again, this information is not present in written text." (citations omitted)).

enforcing the Texas statute against them. Fearing arbitrary enforcement, individuals may then refrain from sending electronic communications in the first place. Indeed, "[e]ven the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). The Texas statute, by failing to consider the special nature of electronic communications, further "silences some speakers whose messages would be entitled to constitutional protection." *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

To prove intent, prosecutors typically rely on various kinds of evidence—but the range of available evidence differs depending on the context in which an alleged crime was committed. When it comes to crimes involving speech communicated in person or out loud, prosecutors will often have more evidence of situational context that may prove helpful or even dispositive in determining intent. *See, e.g.*, *Watts v. United States*, 394 U.S. 705, 708 (1969) (finding that the context of the defendant's speech and the "reaction of the listeners" were important factors in determining that the defendant was not making true threats). Evidence of situational context could make the difference, for example, in whether a defendant is convicted for making true threats or is considered "just a harmless drunk guy at the beach." *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring) (quotation marks omitted).

Non-electronic communications may be accompanied by helpful indicia of intent. For example, body language is often used to corroborate or clarify intent in true threats cases. *See, e.g.*, *United States v. Bazuaye*, 559 F. App'x 709, 714 (10th Cir. 2014) (relying on both "words and physical gestures" to hold

that the defendant intended to make true threats); *Walker v. State*, 327 S.W.3d 790, 797 (Tex. App. 2010) (holding that the defendant's "aggressive body language" demonstrated his intent to make true threats (quotation marks omitted)); *Gillette v. State*, 444 S.W.3d 713, 723 (Tex. App. 2014) (affirming the defendant's conviction based on "nonverbal communication, such as body language and tone"). Similarly, tone of voice is a helpful indicator of intent. *See, e.g.*, *United States v. Fulmer,* 108 F.3d 1486, 1492 (1st Cir. 1997) (finding that the defendant's voicemail, which captured his tone of voice, "[could] legitimately lead a rational jury to find that this statement was a threat"). Evidence of tone can distinguish a true threat "from idle or careless talk, exaggeration, or something said in a joking manner." *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005) (quotation marks omitted). Both body language and tone of voice can thus distinguish true threats from communications made without the requisite intent.

In the context of electronic communications, such evidence is often unavailable, making the intent with which they are sent even harder to discern. There may not be any evidence of an individual's body language or tone of voice. Even if there were witnesses who observed or were aware of the speech, they may not be able to testify to any relevant situational context. While prosecutors or juries may try to infer demeanor and tone from electronic communications, limited evidence makes this difficult—and, in criminal cases, carries serious risks of error.

These interpretive difficulties are heightened by certain unique features of electronic communications, such as emojis and internet slang. Emojis—which are pictorial symbols denoting various

facial expressions, objects, places, and activities—are prevalent in electronic communications but may not have clearly established meanings and can be difficult to understand. Many emojis have an "inherent ambiguity," conveying a "disparate range of possible emotional meanings."[27] Likewise, some internet slang words and acronyms may also be prone to misunderstanding and misinterpretation. Take "GFY," for example, which could either mean "good for you" or "go fuck yourself."[28] In an email, text, or social media exchange, it may not be clear which "GFY" is being sent—a congratulatory "good for you," or a sudden reaction, perhaps out of envy or anger, that could reasonably harass, annoy, or alarm someone. Given the lack of clear meaning around commonly used emojis and internet slang, intent becomes even harder to discern over electronic communications.

In light of both the lack of circumstantial evidence of intent and the additional ambiguities of electronic communications, § 42.07(a)(7) presents an extraordinary risk of arbitrary or discriminatory enforcement, resulting in the chilling of protected and valuable speech.

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[27] Eric Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227, 1250 (2018) (discussing the complexities, ambiguities, and potential misunderstandings surrounding emoji use). There is also a generational divide in how emojis are interpreted. *See, e.g.*, Peter Suciu, *Generation Divide: Different Age Groups Use Emojis Differently and That Isn't Likely Going to Change*, Forbes (Aug. 24, 2021), https://www.forbes.com/sites/petersuciu/2021/08/24/generation-divide-different-age-groups-use-emojis-differently-and-that-isnt-likely-going-to-change (describing "social media friction between Millennials and Gen Z in terms of emoji use").

[28] *Internet Slang*, Rice Univ., https://www.ruf.rice.edu/~kemmer/Words04/usage/slang_internet.html.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari*.

Respectfully submitted,

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