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 A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

BRIEF OF AMICUS CURIAE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC IN SUPPORT OF PETITIONERS

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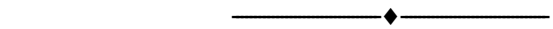
INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the University of Virginia School of Law First Amendment Clinic (the "UVA First Amendment Clinic"). As an entity that frequently represents journalists, news organizations, and other members of the press, the UVA First Amendment Clinic has a strong interest in this case, which concerns a law punishing "electronic communications" repeatedly sent with the "intent to harass, annoy, alarm, abuse, torment, or embarrass" and in a manner likely to do so. As construed by the Texas Court of Criminal Appeals, this law is a content-based restriction on speech. Yet, the Texas court declined to apply this Court's doctrine of substantial overbreadth.

The UVA First Amendment Clinic writes to underscore the chilling effect this decision will have on the publishing and newsgathering of journalists and other members of the news media. Application of the overbreadth doctrine is needed to bring clarity to journalists in the state and prevent retaliation against members of the press that the current construction of the law may enable.



[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amicus curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; counsel of record for all parties were given timely notice of the intent to file this brief; and counsel of record for all parties have provided written consent to the filing of the brief.

SUMMARY OF ARGUMENT

Petitioners are entitled to a judicial determination as to whether they are being prosecuted under a constitutional statute. *Terminiello v. Chicago*, 337 U.S. 1, 5–6 (1949) (evaluating "[t]he statute as construed in the charge to the jury" and finding it constitutionally impermissible); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940) (given state court's construction "there is no occasion to go beyond the face of the statute"). Because the law in question restricts speech based on its content, Petitioners are entitled to have this determination conducted under the Court's doctrine of substantial overbreadth.[2]

Beyond that, however, the Court's overbreadth doctrine has an additional functional benefit. First Amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). Because these freedoms are of such "transcendent value," even "[i]mponderables

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[2] *See City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1479–80 (2022) (Alito, J., concurring) (describing overbreadth doctrine as a "somewhat less demanding" version of facial challenge that "applies when a law affects freedom of speech"); *United States v. Stevens*, 559 U.S. 460, 473 (2010) (conceptualizing overbreadth analysis as a " 'second type of facial challenge' " applicable in the First Amendment context) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *see also* Henry Paul Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 24 (1981) (conceptualizing overbreadth doctrine as facial challenge that incorporates the Court's methodologies for assessing content-based regulation of speech).

and contingencies" raised through state action—including deterred or "chilled" speech—may be intolerable to free speech. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Citizens uncertain whether some form of expression is legal may choose simply to abstain from protected speech rather than test a speech-restrictive law on a case-by-case basis. *Id.* Thus, overbreadth doctrine ensures that laws that affect freedom of speech do not "lend themselves too readily to denial" of that right. *Id.*

Criminal laws governing harassment and abuse are undoubtedly important—to journalists and members of the news media as much as to every other segment of the population.[3] But, if imprecisely drafted, statutes designed to address legitimately harassing or abusive online or electronic speech can sweep far too broadly, and could be read to criminalize aspects of both newsgathering and news reporting.[4] Accordingly, whether Texas Penal Code § 42.07(a)(7) is overbroad or

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[3] *See*, *e.g.*, Margaret Sullivan, *Online Harassment of Female Journalists is Real, and it's Increasingly Hard to Endure*, Washington Post (Mar. 14, 2021), https://perma.cc/24R2-9B3H; Michelle Ferrier, *Attacks and Harassment: The Impact on Female Journalists and their Reporting*, International Women's Media Foundation and Troll-Busters.com (2018) https://perma.cc/4N6U-NDA3.

[4] *See generally* Erin Coyle & Eric Robinson, *Chilling Journalism: Can Newsgathering be Harassment or Stalking?*, 22 Comm L. Pol'y 65 (2017); *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 Harvard L. Rev. 844, 844 (1970) ("Precision in the drafting of statutory provisions to avoid applications which conflict with the first amendment is no doubt a goal to which all conscientious legislators would subscribe. It is, however, a goal that often is not achieved.").

not, the Texas Court of Criminal Appeals' failure to analyze the law as implicating the First Amendment at all leaves journalists and media organizations without guidance as to whether their electronic communications put them at risk of prosecution. At the very least, the court should have conducted an overbreadth analysis.

ARGUMENT

I. Application of the substantial overbreadth doctrine is required, in part, because, as construed, § 42.07(a)(7) can be applied to prosecute newsgathering and publishing.

In interpreting § 42.07(a)(7) of the Texas harassment statute, the Texas court construed the term "sends . . . electronic communication" to mean "sen[ding] . . . data of any nature." Pet. App. 59a. As this construction encompasses "traditional categories of communication," such as "writing," "image," and "sound," it follows that "the statute is equally violated by the repeated sending of electronic speech as it is by the repeated sending of communications containing no speech at all." *Id.*

But, after settling on this construction, the Texas court failed to apply the correct form of constitutional scrutiny. Specifically, the court's construction is irreconcilable with its conclusion that § 42.07(a)(7) "does not implicate the protections of the First Amendment." Pet. App. 14a, 60a. Because the statute imposes a

content-based restriction on protected speech—for instance, electronic communications that are "annoy[ing]," "alarm[ing]," or "offen[sive]" and thus fall far short of a "true threat"[5]—it clearly implicates the First Amendment and should have been subject to overbreadth analysis. *United States v. Stevens*, 559 U.S. 460, 472 (2010).

The Texas court incorrectly elided the legal analysis required for a provision given the above construction with that required for a provision construed to "regulate[] non-speech conduct, even if that conduct included the use of words." Pet. App. 45a.[6] This analytical error—ignoring the difference between (i) non-speech conduct that involves the use of words and (ii) the repeated sending of data of any nature, whether electronic speech or no speech at all—is demonstrated below through a discussion of the technology underlying modern journalistic tradecraft and publishing.

Instead, given its construction of § 42.07(a)(7), the Texas court was required to proceed with an analysis of whether "a substantial number of its applications are unconstitutional, judged in relation to the statute's

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[5] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

[6] *See also* Pet. App. 8a (explaining that the Texas court had earlier construed the phone harassment provision such that "persons whose conduct violates [the phone provision] will not have an intent to engage in the legitimate communication of ideas, opinions or information").

plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460 (2010). Here, the potential chill to journalists and news publishers, among other speakers, necessitates, at the least, an overbreadth analysis.

A. The Texas court's construction of "electronic communication" encompasses online publishing, broadcasting, and some newsgathering practices.

Every day—every second—news organizations engage in the "transfer of signs, signals, writing, images, sounds, data, or intelligence . . . transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." Texas Penal Code § 42.07(b)(1).[7] When a journalist writes a story on his or her laptop, that device translates the letters on the keyboard into corresponding code comprised of bits—stores of information represented through positive or negative voltage.[8] That information travels electronically via an oscillating signal called a carrier wave from point A (which employs a modulator to convey the bits to be transferred) to Point B (which employs a demodulator to receive it).[9] This digital (*i.e.*, bit-based) transfer relies on the same principles as that of

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[7] *Cf.* Elisha Shearer, *More than Eight-in-Ten Americans Get Their News from Digital Devices*, Pew Research (Jan. 12, 2021), https://perma.cc/QVV6-EVVX.

[8] Douglas E. Comer, The Internet Book: Everything You Need to Know About Computer Networking and How the Internet Works 48 (2019).

[9] *Id.* at 47.

broadcast television and radio stations, though the encoded information in those media is audio or video, not binary code.[10]

Almost as frequently, journalists engage in the same type of "electronic communication" as they gather news, including "communication initiated by electronic mail [or] instant message, [or] network call." Texas Penal Code § 42.07(b)(1). "Web based communication technologies including email, GPS, encrypted cyber forums, video conferencing platforms such as Skype, Zoom, and Microsoft Teams have become extremely useful, if not vital, for journalistic investigations."[11]

This is the reality of modern news publishing and newsgathering—activities recognized as quintessential protected speech. "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966). The speech-based tools of journalism that allow news to be responsibly published—questioning a subject of reporting, seeking comment from the target of critical coverage, reaching out to potential sources to add context, interviewing a subject-matter expert—are protected as well; this is important because "without some protection for seeking out the news, freedom of

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[10] *Id.* at 46–47.

[11] Amanda Gearing, Disrupting Investigative Journalism: Moment of Death or Dramatic Rebirth? 76 (2021).

the press could be eviscerated." *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

Yet, despite its own construction, which recognized that the Texas statute could be violated by this type of communicative speech, the Texas court's analysis focused solely on "electronic communication" that did not contain expressive content. The court identified examples that, taken alone, were not expressive; and could be both likely to and intended to evoke the emotional states identified in § 42.07(a)(7). For instance, the court posited that "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," Pet. App. 59a–60a, to demonstrate its point that not all violations of the statute implicate protected speech.

Even if true, that point is not decisive. While "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow," *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965), the Texas court's decision instead proves a corollary: There are few restrictions on the freedom of speech through media (as opposed to the unmediated spoken word) which cannot be costumed as regulation of non-expressive conduct. Indeed, because sending "data of any nature" encompasses nearly the entire writing, publishing, and distributive functions of present-day mass media, a factfinder cannot possibly judge whether a defendant violates § 42.07(a)(7), as construed, without looking at the content of the "data" in question.

This differs analytically from a statute construed to include only "non-speech conduct, even if that conduct included the use of words." Pet. App. 45a. Indeed, Texas factfinders could readily distinguish between a reporter who pays his taxes and one who does not by looking at the reporter's paystubs and tax filings, without reading what that reporter has written about the Texas Comptroller. *See Rumsfeld v. Forum for Accad. & Institutional Rights*, 547 U.S. 47, 66 (2006) ("*FAIR*").[12] The same is true for a print newspaper delivered in a criminal manner—intentionally or recklessly thrown through a window, for example. A factfinder need not see the contents of the paper to discern the intent of the delivery person and the damage suffered by the homeowner. *See* Texas Penal Code § 28.04.[13] Perhaps a factfinder may even be able to judge whether a defendant has violated the telephone harassment statute, as construed in *Scott v. State*, 322 S.W.3d 662, 668–70 (Tex. Crim. App. 2010), by looking solely at the manner in which the defendant makes

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[12] As the Court noted in *FAIR*, "[i]f an individual intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would [not] have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment." *Id.*

[13] *But see Houston Chron. Pub. Co. v. City of Houston*, 620 S.W.2d 833, 833, 838–39 (Tex. Civ. App. 1981) (enjoining content-neutral ordinance "banning sales of newspapers to occupants of motor vehicles while such vehicles were on public streets or public property" as, *inter alia*, unreasonable time, place, and manner restriction).

the calls and the defendant's intent in doing so. *See* Pet. App. 8a, 45a.

The factfinder cannot distinguish, however, between an electronic communication sent in a manner likely to and intended to annoy, alarm, or embarrass, and one that is not, without looking at the content of that communication. As such, the Texas court was not permitted to forgo an overbreadth analysis. The First Amendment manifestly applies; the question is whether it dooms the statute.

B. An overbreadth analysis of § 42.07(a)(7) is needed because the statute chills speech by introducing avenues for state retaliation against publishers and newsgatherers, among others.

The need for an overbreadth analysis is established—not overcome—by the Texas law's proscription of repeated "electronic communications [sent] in a manner reasonably likely to annoy, alarm, . . . embarrass or offend," and its inclusion of "annoy, alarm, . . . or embarrass" in the intent provision. The application of these provisions to journalistic speech would require factfinders to ask what emotional impact this speech (likely) has upon the subjects of reporting or newsgathering, and what impact was intended by the journalists, without constraining that inquiry to whether those journalists have engaged in unprotected

speech.[14] This content-based restriction will inevitably deter newsgathering and publishing.

Publishers who "embarrass" the subjects of their work have faced state retaliation under similar electronic harassment statutes. For instance, in 2011, "an anonymous cartoonist who went by the name MrFuddlesticks created a set of Internet video cartoons parodying the Renton, Washington police department." Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Law, and "Cyberstalking,"* 107 Nw. Univ. L. Rev. 731, 734 (2013). The city prosecutor obtained a search warrant aimed at figuring out the cartoonist's identity on the grounds that the cartoon might violate Washington's law which then criminalized electronic communications made "with intent to harass, intimidate, torment or embarrass" and "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language." *Id.*; Wash. Rev. Code Ann. § 9.61.260 (West 2010).

Further, reporting and opinion journalism of a critical nature may generally be reasonably likely to embarrass or annoy the subject of such reporting, or to alarm or offend the subject or other readers. In Georgia, for example, a reporter writing a critical article about a candidate for public office was charged with

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[14] This is comprised of the "historic and traditional categories long familiar to the bar" including obscenity, defamation of private individuals, fraud, incitement, and speech integral to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

violation of a state law that criminalized repeatedly contacting a person "for the purpose of harassing, molesting, threatening, or intimidating such person." Coyle & Robinson, *supra*, at 83–84 & nn. 123–129, *accord Owens v. Chidi*, No. 14-cv-9730-6, at *3 (Ga. Super. Oct. 17, 2014). The reporter had reached out to the candidate for comment, calling and sending a text message that read, "[i]f you would like to discuss the contents of my Peach Pundit piece before publication, I'm at [email address]." *Id.*

Likewise, newsgathering can involve methods of outreach that may be intended to alarm members of a community into supplying information about a person who is reasonably likely to be annoyed, alarmed, embarrassed, or offended by the request for information. Frequently, for example, newsgathering involves the need to identify certain individuals involved in events of public note. Journalists use a mix of methods to identify such individuals, including express calls for members of the public to name individuals depicted in photos or video of events. *See*, *e.g.*, USA TODAY Staff, *Help USA TODAY Tell the Story of Who Stormed the US Capitol*, USA TODAY (Jan. 7, 2021), https://perma.cc/4SPD-5HQ8.

A subset of this newsgathering, "[t]he publication of truthful personal information about police officers, is linked to the issue of police accountability." *See Brayshaw v. City of Tallahassee*, 709 F. Supp. 2d 1244, 1249 (N.D. Fla. 2010). But a New Jersey case demonstrates how the Texas law may deter that type of newsgathering by opening avenues for retaliation. In *Alfaro v.*

Rempusheski, a civil plaintiff alleged that the defendant police officer had violated his First Amendment rights through the pretense of effectuating an arrest under New Jersey's cyber-harassment statute. No. CV 21-02271, 2021 WL 5995758 (D.N.J. Dec. 10, 2021).[15] The arrest followed the plaintiff attending a rally, posting a picture of the police officer, and including the caption "if anyone knows who this bitch is throw his info under this tweet." *Id.* While the plaintiff in that instance sought information more coarsely than would a beat reporter, the public accountability objective, intent, electronic medium of expression, and emotional impact on the person whose identity is sought would be the same.

II. The substantial overbreadth doctrine provides clarity to journalists and other speakers while balancing competing interests.

For laws that burden protected speech but that have some "legitimate sweep," *Stevens*, 559 U.S. at 472, the substantial overbreadth doctrine is a prudent tool that provides clarity to journalists and other speakers, balances competing interests, and accounts for the cost of overturning legislation. In addition to the state high

[15] Under that law, a "person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person" "knowingly sends . . . any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person." N.J.S.A. § 2C:33-4.1(a)(2).

court and federal appellate cases discussed by Petitioner, Pet. 31–32, amicus curiae offer several additional cases that illustrate the application of this doctrine by lower courts where a failure to do otherwise might have chilled journalistic speech.

In *State v. Mireles*, a Washington court reviewed a cyberstalking statute that criminalized making an electronic communication "with intent to harass, intimidate, torment, or embarrass any other person." 482 P.3d 942, 948 (2021). The Court found that the "statute's criminalization of speech made with the intent to 'embarrass' swe[pt] a substantial amount of protected speech within reach of the statute." *Id*. at 950. The Court applied a limiting construction, striking the term "embarrass" from the statute. *Id.* at 951.

In *Fitts v. Kolb*, two plaintiffs sought a declaratory judgment that South Carolina's criminal libel law was unconstitutional after they were arrested for statements made in their published work. 779 F. Supp. 1502 (D.S.C. 1991). "Fitts, the president of The Voice, a weekly newspaper in Kingstree, South Carolina," criticized two state legislators as "black traitors" who participated in "corrupt dealings." *Id.* at 1505. Wilder, a writer for The Banner, a newspaper in Orangeburg, South Carolina, published an article in which he "reported that [a] Mr. Still had been charged with a criminal act," though, because Wilder's article was based on an incorrect police report, "in fact, he had not." *Id.* at 1506. The South Carolina court found the libel law to be facially overbroad because it "lack[ed] the high degree of protection afforded free expression by the

'actual malice' standard." *Id*. at 1515. Though the statute referenced malicious intent, this was not deemed to be synonymous with the requisite actual malice. *Id*.

And in a case involving an overbreadth challenge to an Idaho statute that restricted speech related to various types of audio and visual reporting on the agriculture industry, the substantial overbreadth doctrine was utilized to determine whether the restrictions would impermissibly chill journalists' speech. *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1195 (9th Cir. 2018).

In this way, the Court's overbreadth doctrine provides a balanced method for judicial examination of speech-restrictive statutes. While the doctrine accounts for the "substantial social costs" of preventing the application of a law that may apply in some circumstances to unprotected speech or truly unexpressive conduct, *see Virginia v. Hicks*, 539 U.S. 113, 119 (2003), it also recognizes that even a statute with a "plainly legitimate sweep" may be impermissible if a substantial number its applications are unconstitutional, *see Stevens*, 559 U.S. at 472. In such cases, the overbreadth test ensures that laws that affect freedom of speech do not "lend themselves too readily to denial" of that right. *Dombrowski*, 380 U.S. at 486.

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CONCLUSION

For the foregoing reasons, amicus curiae respectfully urge that this court to grant Petitioners' writ of certiorari.

Respectfully submitted,

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[16] This brief does not purport to represent the institutional views of the University of Virginia School of Law, if any.