No. 22-430

In The
Supreme Court of the United States

CHARLES BARTON AND NATHAN SANDERS,

Petitioners,

v.

STATE OF TEXAS,

Respondents.

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

BRIEF OF FIRST AMENDMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are scholars whose teaching and research focus on First Amendment law and theory. Amici respectfully offer their expertise regarding the First Amendment coverage extended to electronic communications as well as to speech with disfavored intents. Each amicus is identified below:[1]

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did counsel for any party make any contribution to authoring this brief. Pursuant to Rule 37.2(a), counsel for amici represent that all parties have provided written consent to the filing of this brief, and counsel of record for the parties received timely notice of this brief's filing. The views presented in this brief are those of the First Amendment scholars who are signatories to this brief and do not represent any university's institutional views.

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SUMMARY OF ARGUMENT

Texas Penal Code § 42.07(a)(7) proscribes the sending of "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," when a person intends to "harass, annoy, alarm, abuse, torment, or embarrass another." "Electronic communication" is defined as any "transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system," which includes communications made through "use of electronic mail, instant message . . . cellular or other type of telephone, a computer . . . text message, [or through] a social media platform." Texas Penal Code § 42.07(b)(1).

The Texas Court of Criminal Appeals acknowledged that § 42.07(a)(7) regulates "traditional categories of communication" such as "a writing, an image, and a sound," yet nevertheless determined that § 42.07(a)(7) is a regulation of non-speech conduct and does not implicate the First Amendment. *Ex parte Sanders*, No. PD-0469-19, 2022 WL 1021055, at *13–14 (Tex. Crim. App. Apr. 6, 2022) (to be reported at ___ S.W.3d ___) (hereinafter citations are to Petitioners' appendix); *see also Ex parte Barton*, No. PD-1123-19, 2022 WL 1021061, at *2, 6 (Tex. Crim. App. Apr. 6, 2022) (to be reported at ___ S.W.3d ___) (hereinafter citations are to Petitioners' appendix). The Texas Court of Criminal Appeals went so far as to find that § 42.07(a)(7) raises no First Amendment question, even if one has "an intent to engage in the legitimate communication of ideas," because this "does not negate the existence of the prohibited intent to harass, annoy, alarm, abuse, torment, or embarrass another." Pet. App. 11a. Thus, one can still violate § 42.07(a)(7) by intending to engage in the legitimate communication of ideas so long as that person also intends to embarrass or annoy the recipient of their communication.

Use of the written or spoken word implicates the First Amendment. This principle extends to electronic media, and this Court has treated regulations of a broad and diverse spectrum of electronic media as regulations of speech. The First Amendment is also necessarily implicated when a court must examine the content of a communication to determine whether the communication is harassing, annoying, alarming,

embarrassing, or offensive, which § 42.07(a)(7) demands. Even communications made with a disfavored intent implicate the First Amendment—the government cannot escape the First Amendment by creatively relabeling speech as conduct.

The Texas Court of Criminal Appeals attempts to circumvent the First Amendment by improperly recategorizing speech as conduct. By refusing to acknowledge the clear implications that the statute has on speech, and by declining to engage in any form of First Amendment analysis, the Texas court's decisions may chill some Texans from speaking at all for fear that they will face criminal prosecution for their legitimate and protected communications. This Court should grant certiorari to consider the critical free speech rights threatened by the Texas Court of Criminal Appeals' rulings.

ARGUMENT

I. Section 42.07(a)(7) Targets Communications That Have Been Recognized by This Court as Implicating the First Amendment.

Section 42.07(a)(7) criminalizes an expansive range of traditional categories of communication and more novel forms of electronic communication—both of which have long been recognized to be entitled to

First Amendment coverage.[2] Speech made electronically is entitled to as much First Amendment coverage as are traditional forms of speech made offline. In finding that the statute does not call for any First Amendment analysis, the Texas Court of Criminal Appeals exposes a great deal of protected speech to criminal sanction.

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[2] Amici write to explain that § 42.07(a)(7) is regulation of speech—it regulates activities covered by the First Amendment and necessitates some First Amendment analysis. Amici do not address the level of scrutiny § 42.07(a)(7) must satisfy or whether § 42.07(a)(7) only regulates speech that is ultimately protected under the First Amendment. The distinction between First Amendment coverage and First Amendment protection is that the former requires a determination of whether a First Amendment analysis should ensue at all, and the latter results from a finding that the speech at issue has been unconstitutionally regulated. "To conclude that the First Amendment 'covers' conduct . . . is to assert that the constitutionality of the conduct's regulation must be determined by reference to First Amendment doctrine and analysis." Robert Post, *Encryption Source Code and the First Amendment*, 15 Berkeley Tech. L.J. 713, 714 (2000). "To conclude that the conduct is 'protected' by the First Amendment, on the other hand, is to assert that the regulation of the conduct is unconstitutional." *Id.*; *see also* Lee Tien, *Publishing Software As A Speech Act*, 15 Berkeley Tech. L.J. 629, 632–33 (2000) ("In most First Amendment cases, someone's right to speak is obviously at stake. . . . But in [other cases], the government claims that 'speech' isn't at issue, and the question is whether the First Amendment even 'is brought into play.' The former cases present questions of protection; the latter, of coverage.").

A. Writings, images, and sounds are traditional forms of communication implicating the First Amendment.

The First Amendment guarantees that no law shall abridge the freedom of speech. U.S. Const. amend. I. In determining the scope of what the First Amendment covers, "[t]he Supreme Court, has recognized that speech clearly encompasses words (both spoken and written), pictures, paintings, drawings, and engravings." Clay Calvert, *Fringes of Free Expression: Testing the Meaning of "Speech" Amid Shifting Cultural Mores & Changing Technologies*, 22 S. Cal. Interdisc. L.J. 545, 548 (2013). It is widely accepted that this Court's existing doctrine recognizes "any use of language, either oral or written, necessarily constitutes 'speech' for First Amendment purposes." Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 Ohio St. L.J. 839, 851 (2017); *see also* Jorge R. Roig, *Decoding First Amendment Coverage of Computer Source Code in the Age of Youtube, Facebook, and the Arab Spring*, 68 N.Y.U. Ann. Surv. Am. L. 319, 331–32 (2012) ("According to the traditional interpretation of this Supreme Court doctrine, the oral or written word is 'pure speech' and is automatically entitled to First Amendment coverage.").

This Court has repeatedly held that pure speech—which certainly includes the written or spoken word—is "entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969); *accord Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576 (1991) (Scalia,

J., concurring) ("The First Amendment explicitly protects 'the freedom of speech [and] of the press'—oral and written speech. . . . When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication . . . we insist that it meet the high, First-Amendment standard of justification.") (citations omitted). Not only is the written and spoken word more explicitly protected by the text of the First Amendment than other forms of expression, this type of speech is surrounded by "a specific set of social conventions that make the sounds and symbols that we use in speaking and writing *especially expressive*." Roig, 68 N.Y.U. Ann. Surv. Am. L. at 333 (emphasis added).

This Court has extensive precedent demonstrating that a broad scope of traditional categories of communication implicate the First Amendment. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 18–19, 26 (1971) (reversing breach of peace conviction for individual who wore jacket with profane words as a regulation of speech because the "only 'conduct' which the State sought to punish is the fact of communication"); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (finding speech that advocates violence, but not directed to producing imminent lawless action, is protected by the First Amendment). First Amendment coverage also extends to artistic media. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("We conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); *see also Winters*

v. New York, 333 U.S. 507, 510 (1948) (finding a true crime comic magazine "as much entitled to the protecwtion of free speech as the best of literature"). This Court has also held that commercial speech that communicates a message to a consumer is within the scope of speech covered by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (finding advertisements for the prices of prescription drug prices is speech); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (finding information on beer labels is speech).

Even activities that transcend what is typically conceived of as traditional or pure speech have received First Amendment coverage. For example, restrictions on financial expenditures by candidates in support of their candidacy have been held to be a violation of the freedom of speech. *See Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976) (finding that the expenditure of money often involves speech alone and therefore cannot be categorized as nonspeech conduct). In *Sorrell v. IMS Health Inc.*, this Court reaffirmed "that the creation and dissemination of information are speech within the meaning of the First Amendment." 564 U.S. 552, 570 (2011) ("Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."). And in *Bartnicki v. Vopper*, this Court held that the First Amendment extends to the disclosure of communications illegally intercepted by another. 532 U.S. 514, 535 (2001) (noting the federal wiretapping

statute's "naked prohibition against disclosures is fairly characterized as a regulation of pure speech"). If these activities are entitled to First Amendment coverage, it follows that the traditional categories of communication § 42.07(a)(7) criminalizes are also entitled to First Amendment coverage.

B. Electronic communications implicate the First Amendment.

The Texas Penal Code's definition of "electronic communications" threatens to criminalize a large swath of protected online speech. The broad criminalization is in conflict with precedent recognizing that a diverse array of electronic communications are entitled to First Amendment coverage. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) (finding that programming selection by cable networks constituted speech); *see also Burstyn*, 343 U.S. at 502 (concluding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments"). These cases acknowledge that expression via electronic media does "not require the alteration of settled principles of our First Amendment jurisprudence." *Turner*, 512 U.S. at 639; *see also Burstyn*, 343 U.S. at 502 (recognizing that the "basic principles of freedom of speech . . . do not vary" depending on the medium).

As electronic media diversifies in form and function, this Court consistently recognizes the First Amendment applies to the rapidly evolving electronic

media landscape. In *Brown v. Ent. Merchants Ass'n*, this Court established that "video games communicate ideas" and therefore deserved the same protection as the "books, plays, and movies that preceded them." 564 U.S. 786, 790 (2011). Additionally, *Reno v. American Civil Liberties Union* acknowledged the robust free speech protections applicable to speech on the Internet, recognizing that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." 521 U.S. 844, 885 (1997); *see also* Frank D. LoMonte & Paola Fiku, *Thinking Outside the Dox: The First Amendment and the Right to Disclose Information*, 91 UMKC L. Rev. 1, 35 (2022) ("[T]he Supreme Court in *Reno* repudiated any notion of a stepped-down First Amendment analysis for digital speech."). Even when assessing controversial forms of electronic media, this Court has recognized that the "history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 826 (2000) (finding that sexually explicit cable television channels enjoyed First Amendment protection).

As access to and the quality of technology has drastically increased, this Court has recognized that "one of the most important places to exchange views is cyberspace, particularly social media." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). Social media has evolved from its humble beginnings of individuals sharing mundane day-to-day activities to its

role in helping facilitate democratic revolutions in the Middle East. *See* Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 Wash. L. Rev. 409, 429 (2012). Further, social media has become more than just a "necessary part of modern interaction" and "[i]n many ways . . . has become part of human identity." Daniel Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 375 (2014). When online speech is curtailed or regulated, the government "undermines the First Amendment value in self-expression said to be necessary to the autonomous self." Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 Fla. L. Rev. 395, 414 (2011).

Since social media is a vehicle for self-expression, the writing of a Facebook post or Tweet falls within the "communicative thoughts or words" that are inherently "pure speech" protected by the First Amendment. Harawa, 35 Pace. L. Rev. at 378. As social media garners more influence in modern culture, this Court has recognized protections for social media postings, even postings using profane or vulgar language that might offend. *See Mahanoy Area Sch. Dist. v. Levy ex rel. B.L.*, 141 S. Ct. 2038, 2042–44 (2021) (recognizing that a teenager's social media posts were protected by the First Amendment). In *Mahanoy*, this Court recognized that a public school student's private social media posts were "the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection." *Id.* at 2047. In a broader stroke, the Court has recognized a First Amendment right against government denial of access to social media. *See*

Packingham, 137 S. Ct. at 1737 (emphasizing that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights").

Beyond written and spoken words posted on social media platforms, certain actions on social media platforms can also constitute "speech" under the First Amendment. *See* Ira P. Robbins, *What Is the Meaning of "Like"?: The First Amendment Implications of Social-Media Expression*, 7 Fed. Cts. L. Rev. 127, 144 (2013). An action, such as "liking" a Facebook post, for example, constitutes speech under the First Amendment in the same manner as a written post. *Id.* As political discourse continues to be prevalent on social media, an individual "liking" a political candidate's page or message "is the twenty-first century equivalent of a campaign yard sign, and under [this Court's] First Amendment jurisprudence, should be considered protected speech." *Id.* at 127.

C. By targeting electronic communications, § 42.07(a)(7) restricts speech covered by the First Amendment.

Section 42.07(a)(7) proscribes repeated communication likely to "harass, annoy, alarm, abuse, torment, embarrass, or offend another" as harassment. Section 42.07(a)(7) reaches a wide swath of plainly legitimate traditional and electronic speech. A range of hypotheticals demonstrates the seemingly endless list of communications § 42.07(a)(7) might cover by proscribing

any harassing, annoying, alarming, embarrassing, or offensive communications. Anyone who has answered emails for an elected official can attest that constituents often seek to effect change through repeated emailing, which undoubtedly seeks to harass or annoy the elected official into action through repeated electronic communication. Alarming speech also plays an important role in much political fundraising—as electronic communications between political parties and constituents often speak in breathless tones of impending crises, intending to "alarm" the voter into considering a donation. A journalist seeking comment from an individual on a sensitive matter previously thought secret could embarrass that individual. Political speech is often known to cross into crasser, more abrasive territory, which some individuals might deem to be offensive. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (recognizing offensive speech on matters of public concern "cannot be restricted simply because it is upsetting or arouses contempt").

It is particularly concerning that § 42.07(a)(7) can reach speech meant to annoy or alarm a political actor into listening and responding to the speaker's stance. Consider a Twitter user incessantly messaging his state senator's Twitter account in an attempt to sway his policy stance on abortion or repeatedly retweeting or sharing a politician's controversial social media posts with the intent to alarm followers, a Facebook user repeatedly posting on a friend's "wall" to disagree with their stance on gun rights, or a public-school parent emailing the school board repeatedly to disagree

with a district-wide decision they have made. Each of these communications could be a violation of § 42.07(a)(7) if the speaker has an intent to harass, annoy, alarm, or embarrass the recipient in order to get their attention.

Multiple state high courts have identified such sweeping restrictions as a problem in other harassment statutes that proscribe a wide swath of communication that some may find unpleasant. *See Bolles v. People*, 541 P.2d 80, 83 (Colo. 1975) (noting the political and social value of speech provoking "alarm"); *State v. Johnson*, 191 P.3d 665, 668–69 (Or. 2008) (noting the long political history and importance of insults and abusive words); *People v. Klick*, 362 N.E.2d 329, 331–32 (Ill. 1977) (arguing that annoying speech often has legitimate purposes); *State v. Brobst*, 857 A.2d 1253, 1255–56 (N.H. 2004) (finding that a "prohibition of all telephone calls placed with the intent to alarm encompasses too large an area of protected speech"). Proscribing such a large scope of speech as harassment, as § 42.07(a)(7) does, will sweep in much plainly legitimate speech and leave it unprotected.

II. Determining That Speech is Harassing, Annoying, Alarming, Embarrassing, or Offensive Will Often Require Courts to Inquire into the Content of the Speech and Implicates the First Amendment.

Determining that an electronic communication is harassing, annoying, alarming, embarrassing, or

offensive to the recipient will often involve assessing speech in a way that implicates the First Amendment. In order to determine if a communication is proscribed under § 42.07(a)(7), a court will often need to examine the content of speech to determine if it was made with the proscribed intent and decide if that content would reasonably harass, annoy, alarm, embarrass, or offend the listener, which has the inevitable effect of discriminating against the speech based on its content.

A. Analyzing charges brought under § 42.07(a)(7) will often require examining the content of the speech.

Section 42.07(a)(7) prohibits a range of electronic communications that "harass, annoy, alarm, abuse, torment, embarrass, or offend another." Texas Penal Code § 42.07(a)(7). Determining that a communication is harassing, annoying, alarming, embarrassing, or offensive is often not going to be reliant on the noncommunicative conduct of the speaker, but instead "the content and language of the conversation between the speaker and listener." Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults* (hereinafter "*Hate Speech*"), 3 Wm. & Mary Bill Rts. J. 179, 194–95 (1994). Prosecutions under § 42.07(a)(7) will thus require courts to distinguish between acceptable and unacceptable speech content. Even assuming that the mere act of sending an email or tweeting is noncommunicative, often it is not the act of sending a text or tweeting but the "language used, the message

conveyed, and the anticipated impact of the speech" (however unpleasant the anticipated impact of the speech may be) that determines whether or not that communication is harassing, annoying, alarming, embarrassing, or offensive. *Hate Speech*, 3 Wm. & Mary Bill Rts. J. at 195–96. This determination will commonly hinge on the content of the speech itself. *See* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781, 849 (2013) (recognizing "Internet communications are expression, so regulating them implicates the First Amendment").

Indeed, finding that an electronic communication embarrasses or offends necessarily requires looking at the content of the communication because to embarrass or offend requires expression. The mere act of sending an electronic communication does not embarrass, it is the private fact shared or the compromising photo contained within the communication that causes the embarrassment. It is not sending an email that offends, it is the vulgarity and hostility contained within the email that offends. Any non-expressive element associated with electronic communication will likely not be the target of the statute because the act of communicating does not have the proscribed effect. *See* Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words and Group Libel within the First Amendment*, 81 Iowa L. Rev. 883, 913 (1996) ("If the

only plausible reason that the government would want to regulate the activity is to suppress an idea, as in the case of flag-burning, then the behavior necessarily is overwhelmingly communicative, and is, for First Amendment purposes, pure speech.").

The actual application of § 42.07(a)(7) by courts and prosecutors bears this out. In *Lebo v. State*, the defendant was convicted of violating § 42.07(a)(7) for repeatedly emailing a detective about a criminal case in which the defendant was involved. 474 S.W.3d 402 (Tex. App. 2015). The defendant sent the detective approximately 40 emails over a period of four months complaining about how the detective was handling the prior case and accusing the detective of "destroying evidence and being a felon, corrupt, and incompetent." *Id.* at 404. In *Kuzbary v. State*, the defendant was charged with violating § 42.07(a)(7) for sending several emails a day to his daughter over the course of a few months, the contents of which were "generally derogatory and bitter." No. 14-17-00146-CR, 2018 WL 3118579, at *2 (Tex. App. June 26, 2018). Both of these cases demonstrate acts of contact that on their face would not seem to violate § 42.07(a)(7)—an individual involved in a criminal case reaching out to the detective on that case, and a father emailing his daughter. What made these contacts harassing, annoying, alarming, embarrassing, or offensive under § 42.07(a)(7) was the speech content of those emails. While the court in *Kuzbary* looked to both the content and amount of the emails to determine whether they were harassing, less than one email was sent a day on average. *Kuzbary*, 2018 WL

3118579, at *4. There are many situations where this frequency of emails is unlikely to be considered harassing, annoying, or embarrassing (as anyone who has ever worked in a modern office, or attended college can likely attest), so a court must necessarily focus on the content of the speech, as opposed to an acceptable frequency. In *Lebo*, the number of contacts was not dispositive—the court also focused on the fact that the contact contained speech content that may, for example, have been harassing, annoying, or alarming. 474 S.W.3d at 404. While the speech in both of these cases is unpleasant, it is clear the speech is what was proscribed and that the speech itself is what made the contact harassing, alarming, or annoying, not merely the act of contact.

B. The content-based nature of § 42.07(a)(7) reflects that it is a regulation of speech subject to First Amendment scrutiny.

This Court has found that a law is content based when "the conduct triggering coverage . . . consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). A content-based distinction must be analyzed under the relevant First Amendment test. *Id.* Content discrimination is considered a central concern under the First Amendment because "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*,

502 U.S. 105, 116 (1991). Section 42.07(a)(7) is a law where the "conduct triggering coverage" is often going to be based on the message conveyed, rather than any non-expressive element of electronic communication, because the statute's proscription on speech reasonably likely to harass, annoy, alarm, embarrass, or offend lends itself to a content-based application. *See Holder*, 561 U.S. at 28. Accordingly, in order to ensure that certain speech is not discriminated against based on the government's desire to drive its message from the marketplace, a law like § 42.07(a)(7) must be subjected to First Amendment scrutiny.

III. Even Disfavored Speech and Speech Made with Disfavored Intents Implicate the First Amendment.

The Texas Court of Criminal Appeals attempted to justify its decision to deny First Amendment coverage to communications under § 42.07(a)(7) because "persons whose conduct violates [the statute] will not have an intent to engage in the legitimate communication of ideas, opinion, or information; they will have only the intent to inflict emotional distress for its own sake." Pet. App. 8a. Further, the Texas court concluded that even a communication made with an intent to engage in the legitimate communication of ideas will face criminal liability if the communication also intends to harass, annoy, alarm, or embarrass the recipient. *Id.* at 12a. In relying on this rationale, the Texas court implies that the nature of the speech at issue is of such

low value that it does not even implicate the First Amendment.

This "low-value" speech rationale is inappropriate in light of well-established precedent. When the speech at issue does not fall within a proscribable category of speech, this Court has regularly accorded First Amendment coverage to offensive speech. *See Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *Cohen*, 403 U.S. at 20, 26 (finding prosecution for breach of peace unconstitutional and not a valid exercise of state's police power where speaker's message was merely offensive); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' ") (citation omitted); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–41 (2002) (striking down a federal statute that would prohibit possessing or distributing sexually explicit images "which may be created by using adults who look like minors or by using computer imaging").

It is contrary to this Court's well-established jurisprudence to treat speech made with the intent to harass, annoy, alarm, or embarrass and reasonably likely to harass, annoy, alarm, embarrass, or offend as distinct categories of unprotected speech. For disfavored speech to be proscribable, it must rise to the level of obscenity, incitement, or another discretely defined category of proscribable speech. *See Matal*, 137 S. Ct.

at 1765 (Kennedy, J., concurring) ("Aside from [fraud, defamation, or incitement] and a few other narrow exceptions, it is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys.").

Neither the Texas legislature nor the Texas judiciary has the authority to create new proscribable categories of speech (i.e., "speech that intends to annoy" or "speech that reasonably offends"). This Court explained in *United States v. Stevens* that this Court's precedent "cannot be taken as establishing a free-wheeling authority to declare new categories of speech outside the scope of the First Amendment." 559 U.S. 460, 472 (2010). Although this Court noted that proscribable categories of speech beyond those that have been clearly established might exist, they must be identified by this Court. *Id.* at 468–69, 472 (noting that the only current proscribable categories of speech "long familiar to the bar" include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct") (cleaned up). Regulations on these categories of speech are permissible as long as they are not "vehicles for content discrimination" within the proscribable category of speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383–84 (1992) (recognizing "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"). The effect of the Texas Court of Criminal

Appeals' decisions in *Barton* and *Sanders* is to treat harassing, annoying, alarming, embarrassing, or offensive speech and speech made with the intent to harass, annoy, alarm, or embarrass as proscribable categories of speech.

IV. The Government Cannot Dodge the First Amendment by Relabeling Speech as Conduct.

A. Speech cannot be relabeled as conduct to escape First Amendment scrutiny.

Despite the clear application of § 42.07(a)(7) to speech, the Texas Court of Criminal Appeals found that the statute is a permissible regulation of noncommunicative conduct that "may include spoken words." Pet. App. 8a. The Texas court found that the categories of electronic communication proscribed under § 42.07(a)(7) does not implicate the First Amendment at all. Pet. App. 8a. A finding that § 42.07(a)(7) regulates only non-expressive aspects of communication means that "virtually any speech restriction could avoid First Amendment review through careful drafting." *See Hate Speech*, 3 Wm. & Mary Bill Rts. J. at 195 n.63. For example, "[a] law prohibiting one person from 'approaching another person with the intent to harass that person' could be upheld as a constitutional regulation of conduct despite the fact that it was routinely applied to expressive activity." *Id.*

Creatively relabeling verbal or written communications (i.e., traditional or pure speech) as conduct

to avoid First Amendment scrutiny conflicts with established First Amendment principles. *See* Caplan, 64 Hastings L.J. at 809–10 ("Some courts have tried to avoid the unavoidable free speech questions through creative labeling. . . . Relabeling . . . speech as conduct does not make it so."); *see also Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017) ("Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.") (citation omitted). This is true even in cases before this Court where the governmental regulation ultimately survived. *See Holder*, 561 U.S. at 27–28. In *Holder*, the government argued that the material-support statute at issue, which prohibited providing resources to a foreign terrorist organization, regulated conduct, not speech. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (articulating the test for whether expressive conduct warrants First Amendment protection)). This Court rejected that contention and held that the material-support statute "regulates speech on the basis of its content," and thus must be subject to strict scrutiny and not *O'Brien*'s less demanding intermediate scrutiny. Much like the material-support statute at issue in *Holder*, § 42.07(a)(7) directly regulates speech.

B. The Texas court's attempt to label repetitive communications as conduct fails to save § 42.07(a)(7).

In holding that § 42.07(a)(7) did not implicate the First Amendment at all, the Texas court in *Sanders* found that repetitive electronic communication "is pure conduct that must be explained by separate speech" and that this "pure conduct" would not implicate the First Amendment. Pet. App. 55a. The mere fact that communication is repetitive does not justify its prohibition. *See Hate Speech*, 3 Wm. & Mary Bill Rts. J. at 203 ("[R]epeated expressive activity is not some magic talisman that nullifies the force of the First Amendment."). Indeed, repetition is often an aspect of the message, signaling intensity of emotion or commitment to the idea being expressed. *See id.* at 202. Many important acts of speech can involve repetition, such as the chanting of a slogan at a protest. Simply because a message is repeated does not mean that the message no longer has communicative value and does not mean that the communicative content is suddenly outside the bounds of the First Amendment.

C. By finding § 42.07(a)(7) targets conduct, the Texas court subjects valuable speech to prosecution.

Allowing legislatures to circumvent the First Amendment by proscribing speech made with a disfavored intent, even if the speech is also made with the intent to engage in the legitimate communication of ideas, allows governments to open the door to criminal sanctions for a wide array of speech with only a little bit of work. This approach "precludes First Amendment scrutiny [of] specific speech acts that do carry

communicative messages and, thus, might warrant free speech protection." Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 Cardozo L. Rev. 1667, 1717 (2015). The plain text of § 42.07(a)(7) demonstrates its expansive scope, which includes a wide range of communications generally viewed as legitimate. If § 42.07(a)(7) does not implicate the First Amendment at all, and regulations of speech go without meaningful judicial review, expressive communications are vulnerable to government censorship. A law prohibiting communication with government officials with the intent to "harass" or "annoy" would receive no First Amendment review. A law prohibiting the publication of information with the intent to "embarrass" a public figure would receive no First Amendment review. A law prohibiting television reporters from speaking with the intent to "alarm" their audiences would receive no First Amendment review. A law that targets speech reasonably likely to "offend" the majority of the public would receive no First Amendment review. Finding that the First Amendment is not implicated by such laws would do significant damage to free speech principles.

CONCLUSION

Section 42.07(a)(7) seeks to prohibit speech of which Texas does not approve. Despite the fact that speech of a harassing, annoying, alarming, embarrassing, or offending nature may not be desirable to some, it is still speech. Speech—even speech that does not

ultimately receive First Amendment protection—must be analyzed as such. The Texas Court of Criminal Appeals erroneously upholds this prohibition on speech by arguing that violators of the statute do not have "an intent to engage in the legitimate communication of ideas, opinions, or information. . . ." Pet. App. 8a. This rationale goes too far in defining what types of communications belong in public discourse and, in doing so, mischaracterizes protected speech as conduct.

Respectfully submitted,

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