No. 22-430

In the Supreme Court of the United States

CHARLES BARTON AND NATHAN SANDERS,
PETITIONERS

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Suicide is one of the two most common causes of death among young Americans—an epidemic exacerbated by the growing prevalence of cyberbullying and other forms of electronic harassment.[1] Like many States, Texas has tried to protect its citizens from such disgraceful and potentially dangerous conduct by making it a crime to repeatedly send electronic communications to an individual in a manner intended to "harass, annoy, alarm, abuse, torment, or embarrass" him and that is reasonably likely to do so. Tex. Penal Code § 42.07(a)(7). And like the courts of many States, Texas's highest criminal court has upheld that statute against a First Amendment challenge because it penalizes the conduct of repeatedly sending electronic signals—not the content or message of those signals. The questions presented are:

1. Whether this Court has jurisdiction to consider the denial of a pre-trial writ of habeas corpus by a state court.

2. Whether a law prohibiting the intentional sending of repeated, unwanted electronic signals with the specific intent to cause one of a list of enumerated harms to another person facially violates the Constitution.

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[1] *See, e.g.*, Sharon Reynolds, *Cyberbullying linked with suicidal thoughts and attempts in young adults*, NAT'L INSTS. OF HEALTH (July 12, 2022), https://tinyurl.com/2a4bhu6x.

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INTRODUCTION

Courts and commentators have long recognized that balancing the interests of a speaker to communicate and of a listener to be free from harassment presents unique First Amendment challenges.[2] The federal government and the States have adopted laws to prevent various types of harassment, which can often be read to encompass verbal activity. Nevertheless, courts regularly uphold those laws against First Amendment challenges as permissible restrictions on conduct so long as they do not target particular ideologies or create classes of speakers. Although Texas has had to adapt its anti-harassment statute to the nebulous ways in which harassment is now often perpetrated online, it fits within this tradition.[3]

The Court likely cannot—and certainly need not—reach challenges to Texas's law in the posture of state courts' denials of pre-trial writs of habeas corpus. Petitioners, Charles Barton and Nathan Sanders, have been accused–not convicted–of harassing ex-partners through repeated electronic messages. Although the Court has permitted certain pre-enforcement challenges to laws allegedly implicating the First Amendment, it has done so to mitigate a potential chill of vital constitutional rights through self-censorship. That concern is not implicated here: whether petitioners' messages were protected

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[2] *Cf., e.g.*, *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021); Andrea Meryl Kirshenbaum, *Hostile Environment Sexual Harassment Law and the First Amendment: Can the Two Peacefully Coexist?*, 12 TEX. J. WOMEN & L. 67, 82 & nn.90-91 (2002).

[3] For a discussion of difficulties in defining, let alone combatting, electronic harassment, see Megan Moreno, *Electronic Harassment: Concept Map and Definition*, NAT'L INST. OF JUST., (May 2016).

communications or criminal harassment, they are in the past. Under these circumstances, the Court likely must–and certainly should–wait until there is a factual record to review and one or more convictions to overturn.

Review is also unwarranted because Texas's law falls within constitutional bounds, as numerous lower courts have held in reviewing similar laws. It targets specific forms of anti-social and potentially dangerous conduct by prohibiting the repeated transmission of electronic signals—some of which can communicate First-Amendment protected ideas, some of which indisputably do not. To avoid sweeping into its ambit innocent or protected conduct, the law also imposes a specific-intent requirement. This law and others like it thus balance the interests of those legitimately trying to communicate with the privacy interests of individuals just trying to do their jobs and live their lives.

JURISDICTION

The Court lacks jurisdiction. *Infra* Part I.A.

STATEMENT

I. Legal Background

A. Like most (if not all) States,[4] Texas has a criminal harassment statute: Section 42.07 of the Texas Penal Code prohibits conduct, ranging from making obscene proposals, Tex. Penal Code § 42.07(a)(1), to threatening an individual with bodily injury, *id.* § 42.07(a)(2), to conveying a false report that someone has died, *id.* § 42.07(a)(3). The first violation of section 42.07 is a Class

[4] For just a few representative samples, see Ala. Code § 13A-11-8(b)(1); Ariz. Rev. Stat. § 13-2921(A)(1); Cal. Penal Code § 653m(b); Idaho Code § 18-6710(1); Md. Code, Crim. Law § 3-804(a)(2); N.M. Stat. § 30-20-12(A); N.C. Gen. Stat. § 14-196(a)(3); Ohio Rev. Code § 2917.21.

B misdemeanor, *id.* § 42.07(c), punishable by a fine of up to $2000, and confinement in jail for up to 180 days, *id.* § 12.22.

Subsection (a)(7) prohibits individuals with the requisite specific intent from "send[ing] repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* § 42.07(a)(7). When petitioners sent their harassing communications in 2012 and 2015, "electronic communication" was defined as "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." Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, 2001 Tex. Gen. Laws 2795, 2795 (codified at Tex. Penal Code § 42.07(b)(1)). The term included:

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

Id.

For criminal liability to attach under any part of section 42.07, including subsection (a)(7), an individual must have specifically intended to "harass, annoy, alarm, abuse, torment, or embarrass another." Tex. Penal Code § 42.07(a). Under Texas law, "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a).

B. In 2017, the Texas Legislature expanded section 42.07 in new anti-bullying legislation, known as David's Law. Named after a 16-year-old boy who committed

suicide due to electronic harassment, David's Law passed with overwhelming bipartisan support. Act of May 27, 2017, 85th Leg., R.S., ch. 522, 2017 Tex. Gen. Laws 1400, 1400-08; *see also Legislation*, DAVID'S LEGACY FOUNDATION, https://www.davidslegacy.org/programs/legislation/. David's Law expanded the definition of "electronic communication" to include such things as social media messages, Tex. Penal Code § 42.07(b)(1)(A), and increased the penalty if the victim is a minor or if the individual has previously violated a court order to stop cyberbullying a child. *Id.* § 42.07(c)(2); Tex. Civ. Prac. & Rem. Code ch. 129A.

David's Law became effective on September 1, 2017. *See* Act of May 27, 2017, *supra*, § 18, 2017 Tex. Gen. Laws at 1407. And initial indications are that it worked: electronic bullying and suicide attempts resulting therefrom dropped more than 20% in Texas schools during the first two years after the law's enactment. Legislation, *supra* (citing data collected by the CDC).

C. Texas courts have seen several challenges to section 42.07 in recent years. The first one relevant to the current case addresses not section 42.07(a)(7), but section 42.07(a)(4), which prohibits "caus[ing] the telephone of another to ring repeatedly or mak[ing] repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." That provision was challenged as overbroad and an infringement upon speech in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 936 (2011).

In *Scott*, the Texas Court of Criminal Appeals (CCA)—the State's highest court for criminal matters—looked to this Court's statement in *Cohen v. California* that "government may properly act in many situations to

prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." 403 U.S. 15, 21 (1971) (citing *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728 (1970)); *see Scott*, 322 S.W.3d at 668-69. From this premise, the CCA first examined whether section 42.07(a)(4) was aimed at protected speech. *Scott*, 322 S.W.3d at 669-70. The court concluded that it was not and based its conclusion on four factors:

- the actor must have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient,
- there must be repeated communicative conduct,[5]
- the actor must partake in the communicative conduct in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend an average person, and
- the actor is not required to use spoken words.

Id.

Given the statutory text, the court concluded that "the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words." *Id.* at 670. Due to the specific-intent requirement about which petitioners complain (*e.g.,* at 2, 15), violators "will not have an intent to engage in the legitimate communication of ideas, opinions, or information," but "only the intent to inflict emotional distress for its own sake." *Scott*, 322 S.W.3d at 670.

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[5] To be "repeated," the statute simply requires more than one call. *Wilson v. State*, 448 S.W.3d 418, 424 (Tex. Crim. App. 2014).

II. Factual Background

Because these cases remain in their infancy, the record contains little about the messages petitioners sent. Barton was charged in August 2012 with violating section 42.07(a)(7) for repeatedly sending electronic communications to his ex-partner "in a manner reasonabl[y] likely to harass, annoy, alarm, abuse, torment, embarrass, or offend . . . ." App. 132a. Sanders likewise was alleged to have "sent repeated electronic communications." App. 136a. But he was charged in May 2015 not just with sending repeated electronic communications, but also "telephone calls . . . handwritten letters, and in person communications" to his ex-partner with the "intent to harass, annoy, alarm, abuse, torment, or embarrass." App.136a.

Neither Petitioner has placed into the record the content of the alleged "repeated electronic communications" or, in Sanders' case, any of the various types of communications. And the time for the State to do so has not yet come.

III. Procedural Background

This petition comes before the Court based on the denial of two pre-trial writs of habeas corpus. App. 101a, 102a.[6] Each petitioner argues that section 42.07(a)(7) is facially overbroad under the First Amendment.[7]

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[6] Barton (App. 99a) and Sanders (App. 102a) both moved to quash their respective information, which is an alternative means to challenge an information pre-trial. *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005) (per curiam). But it is not appealable. *Id.*

[7] Petitioners both also argued that section 42.07(a)(7) was unconstitutionally vague, but they have abandoned that argument by not raising it in their petition.

BCR.45-50; SCR.34-39.[8] Both contend that the statute is subject to and cannot withstand heightened scrutiny under the First Amendment. Pet. 22; *see also* Brief of Petitioner at 43, *Ex parte Sanders*, 2022 WL 1021055 (Tex. Crim. App. Jan. 8, 2020) (No. PD-0469-19), 2020 WL 264951, at *43; Brief of Petitioner at 21, *Ex parte Barton*, 2022 WL 1021061 (Tex. Crim. App. Jan. 22, 2020) (No. PD-1128-19).

Both trial courts denied Petitioners' applications for writs of habeas corpus. App. 101a, 102a. Texas's Second Court of Appeals reversed the denial of Barton's writ application and held in a published opinion that the statute was overbroad. App.74a-75a. Texas' s Seventh Court of Appeals upheld the denial of Sanders' writ under the CCA's *Scott* decision. App. 97a. The CCA granted discretionary review to both petitioners. App. 1a, 29a.

The CCA held in two separate published opinions that section 42.07(a)(7), like the telephone-harassment law, did not "implicate the First Amendment's freedom of speech protections because it . . . . prohibits non-speech conduct." App. 2a (Barton); *see also* App. 29a (Sanders). The Court relied heavily on its decision in *Scott*. Because of this holding, the CCA applied the rational-basis test and determined that because the statute protects individuals' "substantial privacy interests" from the invasion of those interests "in an essentially intolerable manner" by others, the statute was rationally related to the legitimate end of protecting "the peace, health, happiness, and general welfare of society" and people in the State. App. 16a.

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[8] "BCR.XX" refers to the Clerk's Record in *State v. Barton*, No. 1314404, County Criminal Court No. 8, Tarrant County, Texas. "SCR.XX" refers to the Clerk's Record in *Texas v. Sanders*, No. 2015-484541, County Court at Law No. 1, Lubbock County, Texas.

ARGUMENT

I. The Court Cannot—or at Least Should Not—Delve into This Interlocutory Decision Arising from a State Court.

The Court lacks jurisdiction over the petition because this case arises from a Texas state court and there is no "[f]inal judgment[] or decree[] rendered by the highest court of a State." 28 U.S.C. § 1257(a). Petitioners bear the burden to show that this Court has jurisdiction. *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). Petitioners cannot demonstrate that "essential prerequisite" to this Court's review based on the denial of pre-trial writs of habeas corpus. *Id.* Even if they could, the preliminary posture of these cases makes them poor vehicles to resolve either whether a now-superseded version of section 42.07(a)(7) was facially unconstitutional or whether it can be constitutionally applied to petitioners.

A. This Court lacks jurisdiction to resolve the question presented.

This petition falls outside the Court's jurisdiction over appeals from state-court judgments, which is limited to final judgments. 28 U.S.C. § 1257(a). As these cases present none of the narrow circumstances this Court has identified under which an interlocutory order may be deemed final, *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-85 (1975), the Court lacks jurisdiction.

1. This Court's "certiorari jurisdiction over cases in the federal courts of appeals" has been described as "both discretionary and unlimited in scope." Stephen M. Shapiro, et al., SUPREME COURT PRACTICE ch. 2-2 (11th ed. 2019). By contrast, as it applies to *state* courts, section 1257(a) "establishes a firm final judgment rule," which "is not one of those technicalities to be easily

scorned," but "an important factor in the smooth working of our federal system." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be . . . 'final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein.'" *Id.* (quoting *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)); *see also N.D. State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

The denial of pre-trial habeas corpus is, if anything, the prototypical interlocutory order. In the context of a criminal prosecution, "[t]he general rule is that finality . . . is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *see also Arceneaux v. Louisiana*, 376 U.S. 336, 338 (1964) (per curiam). Neither Petitioner has been tried, and they may never be convicted or sentenced. Due to the "sensitivity to the legitimate interests" of a State in enforcing its criminal law, the Court has developed an entire doctrine to prevent federal courts from interfering in ongoing criminal prosecutions. *Younger v. Harris*, 401 U.S. 37, 44 (1971). Although that doctrine does not directly apply here, it is founded on "ideals and dreams of 'Our Federalism'" that do, *id.*, and that prevent the Court from stepping into an ongoing criminal prosecution before there is a "final word of a final court," *Jefferson*, 522 U.S. at 81.

2. This Court deems an interlocutory state-court order to be final for purposes of section 1257 under only limited circumstances. Shapiro, *supra*, at ch. 3.5. And Petitioners have made no attempt to explain why the CCA's "avowedly interlocutory" ruling satisfies the final judgment rule. *Jefferson*, 522 U.S. at 81. Petitioners should thus be deemed to forfeit any such argument, and this

Court should dismiss the petition on that ground alone as such a showing is required in a petition for certiorari. Sup. Ct. R. 14.1(g)(i).

In any event, none of the *Cox* exceptions apply to this case. Indeed, only the fourth category identified in *Cox* seems even potentially relevant. 420 U.S. at 476-85. Specifically, under that category, a judgment may be considered "final" if "the federal issue has been finally decided," leaving only state-law issues to be resolved. *Id.* at 482. To fit within that category, this Court's review must be "preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state-proceedings still to come." *Id.* at 482-83. If such circumstances are present, and a refusal to immediately review the state-court decision would "seriously erode federal policy," the Court may deem an order final as to the federal issue. *Id.* at 483.

It is unclear whether this category of *Cox* can apply in a criminal case as there is no "relevant cause of action," *id.*—a term typically used in civil contexts. But assuming it can, it would not apply here because—unlike in *Cox* and subsequent applications of this rule, *id.* at 485-86—a ruling here would not end the current litigation let alone preclude future litigation.[9]

Sanders. The lack of finality is particularly clear for Sanders, who was alleged to have engaged in multiple forms of harassment but challenges only the charge

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[9] *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (federal preemption of state cause of action); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (compelled arbitration); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (exclusive venue provision); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963) (exclusive jurisdiction of NLRB).

under section 42.07(a)(7). *See* Pet. i. Specifically, in Sanders's information, the alleged "manner and means" that Sanders was charged with involved conduct prohibited by both section 42.07(a)(4) *and* (a)(7). *Id.* That means Sanders is in jeopardy of one conviction—and one punishment—for one count of harassment under section 42.07, whether either or both of "manner" and "means" are proven at trial. *Compare* App. 8a, *with, e.g.*, *Lehman v. State*, 792 S.W.2d 82, 84 (Tex. Crim. App. 1990) (en banc).

Because Sanders has challenged only one of the two means by which he could be convicted, any remedy would "merely control[] the nature and character of . . . the state proceedings still to come"—not be "preclusive of any further litigation on the relevant cause of action." *See Cox*, 420 U.S. at 482-83. It is an "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Texas law presumes that statutory provisions are severable. Tex. Gov't Code § 311.032(c). This principle applies even when a statute is determined to be overbroad under the First Amendment. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Although Sanders is not entitled to any relief, *see infra* Part II, he could *at most* obtain a partial invalidation of the statute and a remand for further proceedings under the remaining unchallenged portion of the statute. *See Reno v. ACLU*, 521 U.S. 844, 882-83 (1997) (severing "or indecent" from the prohibition on "obscene or indecent"). Therefore, the state-court decision is not final,

Nike, Inc. v. Kasky, 539 U.S. 654, 658-60 (2003) (Stevens, J., concurring), and Sanders' petition must be dismissed.

Barton: Though Barton's charging documents do not expressly reflect the identical jurisdictional infirmity that hobbles Sanders, that is not dispositive. Texas law provides that "a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences." Tex. Code Crim. Proc. art. 28.10(a). Because of the extremely early stage at which this prosecution was paused, the record does not reflect whether the State can amend the information to allege a violation under section 42.07(a)(4), creating at minimum a vehicle and very likely a jurisdictional problem with the petition.

Further, even if the Court's decision would resolve the litigation, the fourth *Cox* exception would not apply because no federal policy would be harmed by allowing Texas courts to resolve these cases on remand. No one disputes this case is within the Texas courts' jurisdiction, and there is no plausible argument that allowing the Texas courts to reach a final judgment would in itself infringe any constitutional or statutory right. In short, there is no erosion of federal policy not "common to all run-of-the-mine decisions." *Florida v. Thomas*, 532 U.S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam). The finality rule accordingly applies here and bars this Court's review.

B. This case is a poor vehicle to adjudicate the facial validity of an electronic communications harassment law.

Even if this Court *could* consider the question presented, the case's posture makes it a poor vehicle to address section 42.07(a)(7)'s constitutionality. Assuming

that petitioners are correct (at 22) that section 42.07(a)(7) is subject to heightened scrutiny—and they are not, *infra* pp. 19-20—the procedural history of this case means that the State has never had the opportunity to build the type of record necessary to determine the statute's validity. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989). As this Court previously noted, it is "not the usual judicial practice" nor is it "generally desirable" to "proceed to an overbreadth issue unnecessarily" in such a posture. *Id.* It should be particularly leery of doing so based on nothing more than two charging instruments, when petitioners may yet be acquitted without ever reaching the constitutional question presented.

1. "It is important to remember that the overbreadth doctrine operates as an exception to the normal rules of standing," not a substantive expansion of the coverage of the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641, 651 n.8 (1984). An overbreadth challenge is "ordinarily more difficult to resolve" than an as-applied challenge because it requires the "consideration of many more applications than those immediately before the court." *Fox*, 492 U.S. at 485 (citing *Broadrick*, 413 U.S. at 615). That problem is only exacerbated in the context of electronic harassment because courts "cannot appreciate yet [the internet's] full dimensions and vast potential" and "must be conscious that what they say today might be obsolete tomorrow." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *see also id.* at 1744 (Alito, J., concurring) (agreeing that the Court should be "cautious in applying [its] free speech precedents to the internet").

This case exemplifies the concerns inherent in a facial challenge of this sort. It has arrived at the Court with no

record about what was in petitioners' messages, little information about the use of the electronic communications, and no opportunity for any factual development. There is no factual record regarding the extent of the problem of electronic harassment either before or after the passage of David's Law, and whether there are feasible options to more narrowly tailor section 42.07(a)(7) in a world of constant communication. *See Moreno*, *supra* (highlighting difficulties in regulating in this area).

2. Perhaps even more fundamentally, petitioners could be found not guilty of harassment altogether, and Sanders only guilty of harassment under the manner and means laid out in section 42.07(a)(4). The Texas Rules of Appellate Procedure placed on petitioners the burden to provide any evidence needed to show their entitlement to a writ of habeas corpus with their applications. *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995) (en banc). Yet the record is silent on the context or circumstances surrounding their communications—leaving a presumption of innocence and no data from which to assess whether the State will be able to convince a jury of their guilt years (if not a decade) after the fact when witnesses have likely moved, and memories have undoubtedly faded.

It is thus impossible for the CCA or this Court to determine whether petitioners' conduct was or was not protected by the First Amendment. That does not change because they raised an overbreadth challenge. *Regan*, 468 U.S. at 651. And "for reasons relating both to the proper functioning of courts and to their efficiency," the constitutionality of section 42.07(a)(7), as applied to petitioners, should be decided prior to any overbreadth challenge. *Fox*, 492 U.S. at 485.

For these reasons, the Court should refrain from making new law regarding the intersection of the First Amendment and the internet and cell phones even if the Court were to determine it had jurisdiction (which it should not).

II. Section 42.07(a)(7) Is Constitutional.

Review is also unwarranted regardless of whether section 42.07(a)(7) constitutionally applies to petitioners (which is not at issue here), as it does not facially violate the First Amendment. Litigants always face a heavy burden to establish a facial challenge—even on an overbreadth theory. Petitioners cannot meet that burden because—both pre- and post-amendment—section 42.07(a)(7) on its face has regulated the repeated transmission of electronic data—even if that data may include (at times) verbal content. Therefore, it is subject to rational-basis review. *See Romer v. Evans*, 517 U.S. at 620 (1996). And even if section 42.07(a)(7) is construed to regulate some forms of speech, it would meet the relevant test because the State may protect the privacy and safety of its citizens against electronic harassment.

A. Petitioners face a steep burden because they have challenged section 42.07(a)(7) on its face.

As the Court has recognized, the overbreadth doctrine is "less rigid" when dealing with "conduct in the shadow of the First Amendment." *Broadrick*, 413 U.S. at 614-15. The use of a facial overbreadth claim thus "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining

comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615.

Texas's statute and others like it apply to harassing conduct, not speech. *See supra* pp. 3-4; App. 8a-17a. Consequently, any overbreadth must be "real" and "substantial" when judged in relation to the statute's "plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Petitioners' speculation about what could happen under Texas's law is insufficient to meet that burden. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Thus, even if Texas's law regulates constitutionally protected speech on the margins, petitioners cannot meet their burden unless they are able to show that it does so on its face.

B. On its face, section 42.07(a)(7) regulates conduct, not speech.

In hopes of meeting this burden, petitioners ask this Court to skip the essential question: does the statute criminalize speech or conduct? That is wrong. As this Court has recently reaffirmed, "[s]pecific criminal acts are not protected speech *even if* speech is the means for their commission." *Packingham*, 137 S. Ct. at 1737 (emphasis added). And, as this Court indicated in *Cantwell v. Connecticut*, harassing conduct may permissibly be criminalized: "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." 310 U.S. 296, 309-10 (1940).

1. Section 42.07(a)(7) constitutionally criminalizes conduct, not speech, as evidenced by (1) the specific-intent requirement, (2) the requirement of repeated acts, and (3) the reasonable-person standard. Tex. Penal Code § 42.07(a)(7). Typically, a law regulates speech and its

content "if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). On its face, section 42.07(a)(7) regulates the manner in which one sends a signal to an electronic device—not the composition of the signal. The law applies to repeated transmissions regardless of whether they are emails, texts, messages, etc., whether they express affection, attempt to persuade someone to commit suicide, contain nude pictures, or are entirely empty.

To the extent any communicative conduct might be included, such limitations are justified to prevent intolerable intrusions into significant privacy interests. As long recognized by this Court, "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21. Put another way, section 42.07(a)(7) does not criminalize electronic communications based on any particular content or content in general, but instead criminalizes the repeated dispatch of communications that is conducted with a certain intent and likely to have a certain effect on a reasonable recipient.

The specific-intent requirement thus serves to limit the impact of section 42.07(a)(7) on protected activity. Under Texas law, "intent" requires proof that it is the individual's "conscious objective or desire to engage in the conduct or cause the result." Tex. Penal Code § 6.03(a). And the CCA has determined that this intent requirement means that the individual must have the goal of "inflict[ing] emotional distress for its own sake." App. 34a (quoting *Scott*, 322 S.W.3d at 670). Although

"speech" in a colloquial sense, verbal utterances made with such an intent—and that are reasonably likely to achieve that intent, as is also required by Texas law, Tex. Penal Code § 42.07(a)(7)—fall outside the protections afforded by the First Amendment. *See e.g. Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020); *Cox*, 420 U.S. at 488; *Miller v. California*, 413 U.S. 15 (1973); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

2. Because section 42.07(a)(7) falls outside the First Amendment, and neither implicates any other fundamental right nor targets a suspect class, the appropriate standard of review is whether it bears "a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-70, 477 (1997). And because petitioners have not even addressed the law under this standard, they have forfeited any such arguments, *cf. Zinermon v. Burch*, 494 U.S. 113, 126 (1990), and have further reinforced that this case is a poor vehicle to review these sorts of laws. Any argument petitioners may have raised, however, would fail.

This Court has recognized that States have a legitimate interest in protecting the psychological well-being of minors, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989), as well as protecting adults from harassment in places where they have an expectation of privacy, *see, e.g., Rowan*, 397 U.S. at 729-30. Section 42.07(a)(7) rationally relates to these legitimate state purposes by prohibiting conduct that has been shown to lead minors to suicide or serious self-harm, and by preserving the considerable privacy interests of adults from

being inundated with unwanted electronic mailings to their private inboxes.

Petitioners try to avoid this conclusion by distorting section 42.07(a)(7) in two ways. Neither has merit.

First, they suggest (at 35) that because religious organizations using the internet to spread their messages may use speech some find "insulting and even outrageous," the statute prohibits protected speech. To the extent petitioners imply (at 34-35) that the statute prohibits posting such religious content on the internet, it ignores that section 42.07(a)(7) prohibits "send[ing] repeated electronic communications in a manner reasonably likely to" have a detrimental impact on "another." Texas law routinely distinguishes between sending direct communications and posting things on the internet. *Cf. State v. Hollins*, 620 S.W.3d 400, 407 (Tex. 2020) (per curia). To the extent petitioners suggest that religious groups will directly (and repeatedly) send harassing communications via electronic means, they notably do not point to any actual case in which Texas or any State with a similar law has attempted to apply it in such a manner. In the unlikely event that were to occur, it would be better addressed in an as-applied challenge—not a facial one. *Supra* p. 14.

Second, petitioners conflate the possible effect of the communication with the *intent* behind the communication. For example, petitioners suggest (at 12) that someone who expresses an opinion about one of this Court's decisions that annoys the recipient might be liable under the statute, thus allegedly showing that section 42.07(a)(7) runs afoul of the First Amendment and deserves heightened scrutiny. But in the mine-run of cases, the intent of such messages is to express opinion—not to annoy the ideological interlocutor for the sake of annoying him. Petitioners' other hypotheticals (*e.g.*, at 12, 24-

25) are similar: all seek to communicate an idea or persuade the listener—albeit in a potentially annoying way—not to cause annoyance or emotional distress for its own sake.

These efforts to misconstrue the statute do not transform a permissible regulation of conduct into a facial violation of the First Amendment that requires heightened scrutiny. Therefore, rational-basis review applies and is easily satisfied by section 42.07(a)(7), which is reasonably related to guarding children against suicide and adults against harassing conduct.

C. Even if section 42.07(a)(7) regulates some amount of speech, it is constitutional.

1. Section 42.07(a)(7) is content neutral.

Even if the Court were to conclude that Texas's statute limits speech rather than conduct, it is still constitutional because it is content-neutral and reasonable. Petitioners assert *sans* authority that section 42.07(a)(7) criminalizes speech based on whether its content is "alarming, embarrassing, or [] any of the other proscribed" harms. Pet. 1-2. But the face of section 42.07(a)(7) makes no such distinctions. *See Reed*, 576 U.S. at 165-66.

The content of the communication may be relevant to the intent and effect, but it does not determine whether the electronic communication is prohibited. As the Second Circuit has explained regarding a similar statute, "[a] recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet." *Gormley v. Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 942 (2d Cir. 1980), *cert. denied*, 449 U.S. 1023 (1980).

But section 42.07(a)(7) does not regulate based on content. For example, "I love watching you sleep" is an expression of affection between newlyweds, but alarming (and potentially criminally harassing) if sent from an abusive ex-partner—even if both are repeatedly transmitted via text. Or take the facts of *Wilson*, where a defendant argued that he could not be guilty because the content of his telephone calls was benign. 448 S.W.3d at 425. The CCA rejected that argument because "[b]enign content does not always prove benign intent." *Id.* Instead, the content of the communication is simply evidence to support whether it was sent with unlawful intent and whether it would be reasonably likely to cause emotional distress. *See id.* at 422 & n.12.

Where, as here, an anti-harassment statute's "narrow intent requirement precludes the proscription of mere communication," the lower courts agree that "the nature of the conversation can have no bearing on the constitutionality of the section." *United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978); *accord Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988), *cert. denied*, 488 U.S. 984 (1988); *infra* Part II.A.

2. Privacy interests allow States to pass content-neutral restrictions such as section 42.07.

Because (to the alleged extent it regulates speech) section 42.07(a)(7) is content-neutral, it is subject to the same requirements as other time, place, and manner restrictions—namely, that it be narrowly tailored to serve a legitimate government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Section 42.07(a)(7) easily satisfies that test under this Court's existing precedent, which balances the speaker's right to communicate with the recipient's right to be left alone and the State's

ability to protect essential privacy interests. This principle originates in two of this Court's cases.

First, in *Rowan*, this Court rejected a First Amendment challenge to a federal law allowing individuals to bar mail from senders they found objectionable. 397 U.S. at 729-30. Balancing the right of an individual "to be let alone" with the right of others to communicate, the Court held that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail," and that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The Court concluded that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738.

Second, this Court reaffirmed the importance of those privacy concerns in *Cohen*, which observed that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." 403 U.S. at 21.

Because those privacy interests remain unchanged no matter the form of communication, many lower courts have applied *Rowan* and *Cohen* to electronic harassment statutes. For example, citing *Cohen*, courts in States from South Carolina to California, and West Virginia to New Mexico have concluded that the use of the telephone involves "substantial privacy interests" and that the State has a "legitimate interest in prohibiting obscene, threatening or harassing telephone calls." *State v. Brown*, 266 S.E.2d 64, 65 (S.C. 1980); *People v. Astalis*, 172 Cal. Rptr. 3d 568, 573-74 (Cal. App. Dep't Super. Ct. 2014); *see also State v. Thorne*, 333 S.E.2d 817, 819 (W.

Va. 1985); *State v. Gattis*, 730 P.2d 497, 501-02 & n.1 (N.M. Ct. App. 1986).

Similarly, quoting *Rowan* as well as *Cohen*, courts in Kentucky and Nebraska have upheld harassment statutes similar to section 42.07(a)(7) that prohibited telephonic and written communications made with the "intent to harass, annoy or alarm," holding that "[t]his form of communication intrudes upon a justifiable privacy interest of the recipient and therefore, this right to communicate must be considered in light of a person's right 'to be left alone.'" *Yates v. Commonwealth*, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988); *see also State v. Kipf*, 450 N.W.2d 397, 407-09 (Neb. 1990).

Petitioners never cite *Rowan*, let alone explain why these courts were wrong to conclude that the same rule that applies to physical mailboxes should not apply to electronic mailboxes. For good reason: from the sender's perspective, there is no constitutionally significant difference in the ability to communicate one's message. From the recipient's perspective, there are far greater privacy concerns about access to one's phone or watch, which serves as a portable computer to be taken anywhere and everywhere. As the State's interest in protecting that right is at least as great, the CCA was correct to extend *Rowan* to uphold Texas's content-neutral anti-harassment rules first in the telephone context (in *Scott*) and then in the email and text message context here.

3. Section 42.07(a)(7) would pass strict scrutiny.

Even if the Court concludes that the law is content-based, and thus subject to strict scrutiny, section 42.07(a)(7) would still pass muster because it is narrowly tailored to serve a compelling government interest. *Reed*, 576 U.S. at 163. In analyzing how *Rowan* should

apply to modern, intrusive means of communication, courts have recognized that the government has not just a legitimate but a "compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." *Lampley*, 573 F.2d at 787; *cf. Cohen*, 403 U.S. at 21. As discussed above, even before David's Law—which amended section 42.07(a)(7) to what it is today—the nation saw a growing epidemic of childhood suicide caused (at least in part) by electronic harassment. *See supra* 3-4. It is hard to imagine a more compelling state interest. And the law's specific-intent requirement ensures that it serves that interest without sweeping into its ambit innocent or otherwise protected speech. *Supra* 23.

III. Petitioners' Contrary Arguments Do Not Merit Review at the Present Time.

A. Any split of authority does not merit this Court's attention.

Seeking to fashion a reason this Court should grant review, petitioners insist (at 2-3, 29) that the CCA's decision is either an outlier or representative of mass confusion regarding the constitutionality of electronic harassment laws. It is neither. Most States have some form of criminal harassment statute. *See supra* n. 4. And, for decades, numerous state and federal courts have upheld harassment laws like Texas's—and typically for the same reasons explained by the CCA. *See Gattis*, 730 P.2d at 501 & n.1. The few contrary cases to which petitioners cite either (1) reach a different conclusion based on the unique features of the law at issue, or (2) ignore the conduct/speech analysis entirely. Consequently, there is no split on "the same important matter," and no need for this Court's review. Sup. Ct. R. 10(a).

1. Most courts have held that statutes criminalizing harassing communications target conduct, not speech

Contrary to petitioners' repeated suggestion (*e.g.*, at 2-3, 29), multiple state courts have rejected First Amendment challenges to harassment laws, typically for the same reasons outlined by the CCA. Examining just a few examples—some of which were already referenced above—demonstrates both why the CCA's ruling was correct and why any split of authority the petitioners manage to find is unworthy of this Court's attention.

a. Start with state high courts. In *Thorne*, the West Virginia Supreme Court of Appeals examined a ban on repeated telephone calls made "with intent to harass or abuse another." 333 S.E.2d at 819 n.4. Quoting (among other things) *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), the court in *Thorne* concluded that "[p]rohibiting harassment is not prohibiting speech, because harassment is not protected speech." 333 S.E.2d at 819. The court reasoned that it had "never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* And, like the CCA, the West Virginia court noted that the challenged law's specific-intent requirement narrows the applicability of such statutes to acts intended to cause emotional distress, and "[p]hone calls made with the intent to communicate are not prohibited." *Id.*

In *Commonwealth v. Johnson*, the Supreme Judicial Court of Massachusetts came to a similar conclusion. 21 N.E.3d 937, 946 (Mass. 2014). That court examined a statute that penalized "willfully and maliciously" engaging in a "knowing pattern of conduct or series of acts"

that "seriously alarms" a person and "would cause a reasonable person to suffer substantial emotional distress." 21 N.E.3d 937, 944-45 (Mass. 2014); *see* Mass. Gen. Laws ch. 265, § 43A(a). The unlawful conduct was defined to include the use of a telecommunication device or electronic communication device. *Id.* Citing *Giboney*, 336 U.S. at 498, *Johnson* explained that this Court has said "that speech or writing used as an integral part of conduct in violation of a valid criminal statute is not protected by the First Amendment." 21 N.E.3d at 946. Harassment laws were valid, the court explained, because they limit conduct not communication. *Id.* at 946-47. And, again, the court noted the significance of the "scienter requirement," which undermined any argument that an individual could be liable "if his actions were accidental." *Id.* at 945. The court concluded that "[a]s the statute requires both malicious intent on behalf of the perpetrator and substantial harm to the victim, 'it is difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions.'" *Id.*

Other high courts agree. The Florida Supreme Court has upheld Florida's ban on telephone calls made with the intent to "annoy, abuse, threaten or harass" against an overbreadth challenge, holding that it was "not directed at the communication of opinions or ideas, but at conduct." *State v. Elder*, 382 So.2d 687, 690 (Fla. 1980); *see also Gilbreath v. State*, 650 So.2d 10, 12 (Fla. 1995). The Supreme Court of Montana stated that the specific-intent requirement "removes the danger of criminalizing protected speech." *State v. Dugan*, 303 P.3d 755, 769 (Mont. 2013). And the Supreme Court of New Hampshire upheld a law prohibiting "repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another," in

part because of the specific-intent requirement. *State v. Gubitosi*, 958 A.2d 962, 967-68 (N.H. 2008).[10] *Gubitosi*—like the CCA below—also noted that the requirement of repeated communications serves to limit any potential infringement upon a legitimate effort to communicate. *Id.*

b. Intermediate state appellate courts have also concluded that harassment statutes aimed at telephone or electronic communications—many of which use language similar to Texas's law—do not implicate the First Amendment because they prohibit conduct, not speech. These courts' reasoning also often highlights how the specific-intent requirement answers many of Petitioners' concerns about the hypothetical breadth of Texas's law. Pet. 12. For example, an intermediate court in Idaho explained that:

> [b]y requiring that the sole intent of the call be to annoy, terrify, threaten, intimidate, harass or offend, the statute places outside of its ambit calls which, though they may insult or offend the recipient, carry a legitimate purpose such as conveying a complaint about a business practice or government policy or attempting to persuade the hearer to a particular social, religious or political point of view.

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[10] For other state courts upholding harassment laws (albeit not always specifically targeted at electronic harassment), see *Lehi City v. Rickabaugh*, 487 P.3d 453, (Utah Ct. App. 2021), *cert. denied*, 496 P.3d 714 (Utah 2021); *State v. Moyle*, 705 P.2d 740 (Or. 1985) (en banc); *State v. Crelly*, 313 N.W.2d 455 (S.D. 1981); *People v. Weeks*, 591 P.2d 91 (Col. 1979) (en banc); *Constantino v. State*, 255 S.E.2d 710 (Ga. 1979); *State v. Jaeger*, 249 N.W.2d 688 (Iowa 1977); *State v. Thompson*, 701 P.2d 694 (Kan. 1985); *State v. Meunier*, 354 So.2d 535 (La. 1978).

Richards, 896 P.2d at 362.

An appellate court in California likewise concluded that a specific-intent requirement narrows the law and excludes those who act under mistake of fact or accident. *Astalis*, 172 Cal. Rptr. 3d at 573. And, like both the CCA and *Gubitosi*, the California court noted the significance of the requirement of repetition, stating that "[p]rudence may justify a hands-off policy for single calls made with the intent to harass, but as harassing calls are repeated the state interest in intervening to protect the recipient becomes more compelling." *Id.*[11]

c. Finally, several federal circuit courts have also ruled—in decisions this Court has declined to review—that harassment statutes regulate conduct, not speech. The Second Circuit upheld Connecticut's harassment statute prohibiting telephone calls made "with intent to harass, annoy or alarm" and "in a manner likely to cause annoyance or alarm" on the ground that it "[c]learly . . .

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[11] For other examples of intermediate state courts upholding harassment statutes, see *State v. Kronenberg*, No. 101403, 2015 WL 1255845, at *2-3 (Ohio Ct. App. Mar. 19, 2015); *City of Montgomery v. Zgouvas*, 953 So. 2d 434, 443 (Ala. Crim. App. 2006); *State v. Brown*, 85 P.3d 109, 113 (Ariz. Ct. App. 2004); *State v. Alexander*, 888 P.2d 175, 182-83 (Wash. Ct. App. 1995); *State v. Richards*, 896 P.2d 357, 362 (Idaho Ct. App. 1995); *McKillop v. State*, 857 P.2d 358, 364 (Alaska Ct. App. 1993); *People v. Taravella*, 350 N.W.2d 780, 784 (Mich. Ct. App. 1984); *Donley v. City of Mountain Brook*, 429 So. 2d 603, 610 (Ala. Crim. App. 1982); *State v. Mollenkopf*, 456 N.E.2d 1269, 1270 (Ohio Ct. App. 1982); *State v. Camp*, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982); *State v. Fin. Am. Corp.*, 440 A.2d 28, 31 (N.J. Super. Ct. App. Div. 1981); *Kinney v. State*, 404 N.E.2d 49, 50-51 (Ind. Ct. App. 1980); *von Lusch v. State*, 387 A.2d 306, 310 (Md. Ct. Spec. App. 1978); *Baker v. State*, 494 P.2d 68, 69-70 (Ariz. Ct. App. 1972); *State v. Anonymous (1978-4)*, 389 A.2d 1270, 1273 (Conn. Super. Ct. 1978); *People v. Smith*, 392 N.Y.S.2d 968, 970 (N.Y. App. Div. 1977) (per curiam).

regulates conduct, not mere speech." *Gormley*, 632 F.2d at 941-42. The Fourth Circuit, likewise, upheld the West Virginia statute discussed above, reasoning that "[b]ecause the telephone is normally used for communication does not preclude its use in a harassing course of conduct." *Thorne*, 846 F.2d at 243. Others have followed suit.[12]

2. Petitioners' contrary authorities either fail to conduct the relevant analysis or are distinguishable.

In contrast to the weight of authority cited above, petitioners have identified only a small handful of state cases over the past 50 years that even suggest a constitutional problem with electronic harassment laws. Those cases, however, do not create an issue requiring the Court's attention here because they either involve statutes that are materially distinct from Texas's law or they entirely fail to address this Court's distinction between speech and conduct.

a. To the extent that Petitioners' putatively contrary authority even addresses the conduct-speech distinction at the heart of this case, they do so regarding statutes that are materially distinguishable from that at issue here.

In *People v. Moreno*, the Colorado Supreme Court failed entirely to consider whether Colorado's statute, which prohibited communications made with the

[12] *United States v. Waggy*, 936 F.3d 1014, 1017-20 (9th Cir. 2019) (collecting cases), *cert. denied*, 141 S. Ct. 138 (2020); *see also United States v. Sayer*, 748 F.3d 425, 435 (1st Cir. 2014); *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015); *United States v. Petrovic*, 701 F.3d 849, 860 (8th Cir. 2012); *Lampley*, 573 F.2d at 787.

"intended to harass," prohibited conduct rather than speech. 506 P.3d 849 (Colo. 2022) (en banc).

Similarly, the New York Court of Appeals decision in *People v. Golb* contained almost no legal analysis whatsoever, simply relying on prior cases that did not evaluate whether the law, which prohibited communications made with the "intent to harass, annoy, threaten or alarm," proscribed conduct or speech. 15 N.E.3d 805, 813-14 (N.Y. 2014). The court did not consider whether the law could be justified as a regulation of conduct or as prohibiting an invasion of privacy. *Id.*

The third state court decision upon which petitioners rely *upheld* a law that resembles Texas's anti-harassment statute, holding unconstitutional only those parts that lacked the limiting factors discussed above. Specifically, in *In re Welfare of A.J.B.*, the Minnesota Supreme Court severed language that it thought made Minnesota's mail-harassment statute overbroad and vague. 929 N.W. 2d 840, 863 (Minn. 2019). But the court left in place the rest of the statute, which largely aligns with Texas's, and which "proscribes repeatedly mailing, delivering, or causing the delivery", "by any means, including electronically, of letters, telegrams, or packages," with "the intent to abuse." *Id.*

Much of petitioners' remaining authority is even more off point. For example, in *People v. Klick*, the Illinois Supreme Court addressed a statute criminalizing a single phone call made with an intent to annoy. 362 N.E.2d 329, 330 (Ill. 1977). Even under the rule stated above, such a law would likely be deemed aimed at speech that is merely unpleasant: it had a minimal intent requirement and no requirement of repeated calls. It also fails to employ a reasonable-person standard, such that an individual cannot be found guilty unless his

communications would have caused emotional distress to the average person. Courts in both Texas and elsewhere have found the presence of such an element relevant to limit any potential infringement of anti-harassment laws on free speech. *See, e.g., Brown*, 85 P.3d at 113; *Scott*, 322 S.W.3d at 669; App. 5a, 8a.

And like *A.J.B.*, all but one of the federal cases relied on by petitioners (at 30-32) *rejected* an overbreadth challenge to the federal government's analogous law. *See United States v. Yung*, 37 F.4th 70 (3d Cir. 2022); *United States v. Fleury*, 20 F.4th 1353, 1262-63 (11th Cir. 2021); *United States v. Ackell*, 907 F.3d 67, 73 (1st Cir. 2018). The last one did not even involve an overbreadth challenge; it reversed a conviction based on an *as applied* challenge. *United States v. Sryniawski*, 48 F.4th 583, 587-89 (8th Cir. 2022). As discussed above (at Part I), such a challenge is not before the Court and is entirely premature.

In short, these cases do not reflect a nationwide split among state courts or federal circuits. Many of the cases *upheld* the relevant law. And to the extent they found a constitutional problem, the statutes differ from Texas's in significant ways, or the cases failed to undertake the analysis required by this Court's case law. There is no irresolvable split that requires the Court's intervention.

B. This case does not present an issue of exceptional importance just because the First Amendment is involved.

Stripped of their strained assertions of a circuit split, petitioners' professed belief that this case is one of exceptional importance rests entirely on their insistence that failing to disturb this decades old law will have a "wide and real" chilling effect on all electronic communications because speakers "will choose simply to abstain

from protected speech." Pet. 37. Texas is no stranger to the dangers of electronic censorship; indeed, it is in active litigation before this Court to defend a statute designed to ensure equal access for all Texans to the digital public square regardless of their viewpoint. *See generally* Respondent's Response to Petition for Certiorari, *Netchoice, LLC v. Paxton*, No. 22-555 (U.S. Dec. 20, 2022). But it is entirely speculative that the narrow provision challenged here *might* cause individuals to refrain from First Amendment protected conduct.

Indeed, even if the Court were to take up the case, its ruling would likely have little impact. After all, the version of the statute applicable to petitioners has not been in effect for over five years. *Supra* 3-4. Although petitioners will undoubtedly argue that the alleged constitutional infirmity continues after David's Law, the fact that the statute has been amended makes this a poor vehicle to determine the constitutionality of current law. *See Fox*, 492 U.S. at 484-85.

Moreover, section 42.07(a)(7) did not chill petitioners themselves. After all, this case did not arise through a request for a declaratory judgment from a party fearing to engage in political—or other core—speech due to the statute (or any other provision of Texas's Penal Code). *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974). It arose from a pre-trial writ of habeas corpus. Petitioners will have the opportunity to explain why they are either factually or legally innocent. If they fail to do so, and if the Texas courts interpret the statute in a way that undermines the First Amendment, they can seek relief then. Those contingencies have not materialized, and there is no need for the Court to step in now.

CONCLUSION

The petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted.

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