No. 22-430

In the

Supreme Court of the United States

CHARLES BARTON and NATHAN SANDERS,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

REPLY BRIEF FOR PETITIONERS

Edward G. Jones
Tobias Xavier Lopez
1319 Ballinger Street
Fort Worth, Texas 76102

Lane A. Haygood
3800 E. 42nd Street
Suite 110
Odessa, Texas 79762

Rusty Gunter
1213 Avenue K
Lubbock, Texas 79401

Mark W. Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002

David A. Schulz
Counsel of Record
Kelsey Eberly
Rachel Davidson
MEDIA FREEDOM AND
INFORMATION ACCESS
CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 436-5827
david.schulz@yale.edu

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I. THE OPPOSITION CONFIRMS THAT THE SIGNIFICANT FIRST AMENDMENT ISSUES PRESENTED WARRANT REVIEW

Texas's Electronic Communications Harassment statute, Tex. Penal Code §42.07(a)(7), is so broadly written that it imposes sanctions even on those "engage[d] in the legitimate communication of ideas." Pet.12a. Texas's Opposition to the petition for certiorari ("Opp.") only underscores the deep conflict that currently exists over the constitutionality of such laws and the need for this Court to articulate the proper First Amendment analysis.

A. The Texas Law Facially Criminalizes Protected Speech

Section 42.07(a)(7) imposes criminal sanctions on fully protected speech in a manner that leaves broad discretion to state officials to punish critics or stifle political debate. *See* Pet.35-37; Brief of *Amicus Curiae* Electronic Frontier Foundation ("EFF Br."), 4-13; Brief of *Amicus Curiae* Foundation for Individual Rights and Expression, 12-21. The Opposition defends the Texas court's holding that this law presents no First Amendment issue because it sanctions conduct, not speech, but has no answer to the myriad ways that holding conflicts with precedent of this Court. *See* Pet.13-26; Brief of First Amendment Scholars as *Amici Curiae*, 22-24. The reasoning by which Texas transmogrifies its regulation of "electronic communications" into a regulation of conduct is incorrect, and if permitted to stand will undermine the constitutional protection of online speech.

Texas first defends the holding that the law regulates conduct by noting that it is limited to communications made with a certain intent. Opp.16. But a speaker's intent is generally "irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *see* EFF Br. 15-17 (citing cases). In *Snyder v. Phelps*, for instance, this Court did not conclude that the tort of intentional infliction of emotional distress regulates conduct rather than speech because it requires a defendant *intentionally* to inflict emotional distress. 562 U.S. 443, 458 (2011). Under the contrary reasoning of the Texas court, virtually any speech restriction could avoid constitutional review through careful drafting.

Texas also points to the law's requirement for a "repeated dispatch of communications," Opp.16-17, but a regulation of speech cannot evade First Amendment scrutiny by requiring more than one speech act. Nor does the requirement that a communication be online turn the punishment of that *communication* into a sanction only on the conduct of transmitting it.

The next leg in Texas's conduct-not-speech reasoning is its incorrect assertion that §42.07(a)(7) incorporates a "reasonable person" standard. Opp.16. Section 42.07(a)(7) punishes communications sent "in a manner *reasonably likely* to harass, annoy, alarm," etc., but the Texas court has held that this "reasonably likely" language does *not* incorporate a reasonable person standard. *Long v. State*, 931 S.W.2d 285, 290 (Tex. Crim. App. 1996) (construing previous version of

§42.07), and such a standard would not be relevant to the speech versus conduct analysis in any event.

Texas finally suggests that the law regulates conduct, not speech because it is content neutral. Opp.17-18. But §42.07(a)(7) is not content neutral, *see* Pet.21-22; *infra* p.4, and content neutrality is only relevant when a law *does* regulate speech. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022).

The Opposition fails as a matter of precedent and common sense to demonstrate that the Texas court was correct to conclude that §42.07(a)(7) governs conduct and does not implicate the First Amendment. Its holding is wildly incorrect and warrants review.

B. The Overbroad Texas Law Cannot Survive First Amendment Scrutiny

Section 42.07(a)(7) cannot survive the First Amendment scrutiny that the Texas court refused to apply. As the dissent below observed, §42.07(a)(7) "punishes a substantial amount of protected speech" beyond its legitimate aim. App.28a. The Opposition has no response and wholly ignores this Court's overbreadth precedents, including *United States v. Stevens*, 559 U.S. 460, 473 (2010), and *Gooding v. Wilson*, 405 U.S. 518, 519-20, 527-28 (1972).

Texas instead seeks to sidestep the overbreadth issue by suggesting that §42.07(a)(7) could survive under intermediate or strict scrutiny. Opp.20-24. Its arguments confuse the proper application of these standards and do not in any event refute the obvious overbreadth of §42.07(a)(7).

Texas's intermediate scrutiny analysis rests on the premise that §42.07(a)(7) is content neutral. It is not. *United States v. Lampley*, cited by Texas, explains that the words spoken are irrelevant when a statute punishes speech made with intent "*solely* to harass," because such a law "precludes the proscription of mere communication." 573 F.2d 783, 787 (3d Cir. 1978) (emphasis added). But as construed by the Texas court, §42.07(a)(7) does *not* require an intent solely to harass and *does* reach "expressive speech" sent with an "intent to engage in the legitimate communication of ideas." App.12a-13a, 59a.

The specific words used are plainly relevant under the broad language of §42.07(a)(7), which criminalizes communications "reasonably likely" to "annoy," "alarm," or "embarrass," among other impermissible impacts the words used. Moreover, the intent requirement in §42.07(a)(7) defines prohibited speech "by its function or purpose," a distinction also "based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Texas's premise that intermediate scrutiny applies because §42.07(a)(7) is content neutral is wrong.

Texas is equally mistaken in concluding that §42.07(a)(7) could satisfy intermediate scrutiny under *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728 (1970), and *Cohen v. California*, 403 U.S. 15 (1971), if it were content neutral. Opp.21-23. Neither case supports this claim.

Rowan concerned the constitutionality of a law allowing a person to "require that a mailer remove his

name from its mailing lists." 397 U.S. at 729. Texas claims "the same rule" should apply to "electronic mailboxes." Opp.23. But just because the government can require individuals to be removed from a mailing list upon *their* request, it does not mean the *government* can impose sanctions on the transmission of objectionable electronic communications. "[P]rivate decisionmaking can avoid governmental partiality and thus insulate privacy measures from First Amendment challenge." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 573-74 (2011) (citing *Rowan*). No such insulation is possible with §42.07(a)(7), which empowers Texas itself to determine which messages to punish. Particularly given that §42.07(a)(7) applies to social media posts and not just direct messages to a specific person, its criminal sanctions cannot be squared with this Court's jurisprudence.

Texas also miscites *Cohen*. That decision did not uphold the privacy rights of viewers offended by Cohen's crude jacket, but rather drew a distinction between "the interest in being free from unwanted expression in the confines of one's own home" and the ability to avoid offensive speech in public. 403 U.S. at 21-22. There is no dispute that the Constitution protects certain privacy rights in the home, but that does not mean criminal punishment can be imposed on individuals because their social media posts and online publications can be read at home.

Telephone harassment cases cited by Texas, Opp.22, involve 1980s-era statutes aimed at

threatening or obscene phone calls.[1] Most target the repeated, non-communicative ringing of phones in homes and workplaces, posing distinct invasions of privacy unlike a message posted to the Internet. That Texas considers §42.07(a)(7) indistinguishable from the narrowly drawn and construed telephone harassment statutes is precisely the issue requiring this Court's attention.

Texas is equally off-base in contending that the broad and vague prohibitions in §42.07(a)(7) could survive strict scrutiny, which requires narrow tailoring even when a compelling interest exists. *United States v. Alvarez*, 567 U.S. 709, 725, 729 (2012). Petitioners do not dispute that protecting children's psychological well-being can be a compelling interest, but §42.07(a)(7) cannot be considered narrowly tailored in its prohibition of *any* repeated electronic speech intended and reasonably likely to "annoy," "alarm," "embarrass," etc., without regard to whether the speaker has a legitimate purpose. *See* Pet.22-26.

Texas's reference to David's Law to emphasize the interest at stake is a red herring. That law constructed a comprehensive regulatory scheme to address teenage bullying that requires schools to develop cyberbullying polices, notify parents when

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[1] *See*, e.g., *State v. Brown*, 266 S.E.2d 64, 65 (S.C. 1980) (construing statute proscribing calls initiated with the intent and sole purpose of conveying an unsolicited obscene, imminently threatening and/or harassing message to an unwilling recipient).

their child is bullying or being bullied, and much more. Tex. Educ. Code §37.0832. It made only minor changes to Texas's harassment laws.[2] That David's Law decreased bullying perfectly illustrates that avenues other than §42.07(a)(7)'s broad and vague regulation of online speech exist to further Texas's interest in protecting children.

A more narrowly drawn harassment law might well survive First Amendment scrutiny, but 42.07(a)(7) on its face is unconstitutionally overbroad and the Texas court refused to address the issue.

II. THIS CASE PROVIDES A GOOD VEHICLE FOR RESOLVING CONFLICTS OVER THE CONSTITUTIONALITY OF ELECTRONIC COMMUNICATIONS HARASSMENT LAWS

This case presents the purely legal questions of whether laws that target electronic communications necessarily implicate the First Amendment and whether §42.07(a)(7) is overbroad. A substantial conflict among state high courts and federal courts of appeal exists on both issues. *See* Pet.26-33.

The Texas court's conclusion that no First Amendment scrutiny of §42.07(a)(7) is required follows reasoning adopted by the Second, Fourth, and Ninth Circuits and the West Virginia Supreme Court.

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[2] David's Law clarified §42.07(b)(1)'s definition of "electronic communication" as including text message and social media communications, but Petitioners were charged with violating the law through text messages and social media even before the amendment. App.132a, 136a.

See Pet.27-29. Many courts have reached the opposite conclusion, including the First, Third, Eighth, and Eleventh Circuits and the high courts of Colorado, Minnesota, and New York. *See* Pet.29-33. A ruling on whether §42.07(a)(7) implicates the First Amendment would resolve this conflict.

There is a further conflict about how the First Amendment should be applied to communications harassment laws among those courts that recognize the existence of a First Amendment issue. Pet.31-33. A ruling on whether §42.07(a)(7) is facially overbroad would go a long way toward clarifying this issue as well.

Unable to deny the existing conflicts, Texas attempts to minimize them by pointing to decisions supposedly supporting its approach but cites wholly inapposite cases. *State v. Dugan*, for example, did apply First Amendment review and, after striking an overbroad provision, upheld a law barring electronic communications intended to "terrify, intimidate, threaten, harass, annoy, or offend," but only if using "obscene, lewd, or profane language" or threatening physical harm. 303 P.3d 755, 760, 772 (Mont. 2013). And *State v. Richards* upheld a statute requiring the *sole* intent to harass, because this requirement precluded liability for calls that "may insult or offend" but carried "a legitimate purpose." 896 P.2d 357, 362 (Idaho Ct. App. 1995). Section 42.07(a)(7) has no such "sole intent" limitation and applies to the "legitimate communication of ideas" if *also* sent with a prohibited intent. App.12a-13a.

Texas finally contends that these cases are not a good vehicle to resolve the existing conflicts because there is no record of what was in Petitioners' messages, but no facts are required to resolve the legal questions presented.

"[A]n individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). In such an overbreadth challenge, there is "no occasion to go behind the face of the statute or of the complaint" because "[p]roof of an abuse of power in the particular case has never been deemed a requisite." *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940). Whether Texas might be using its power responsibly in these cases is of no import, for the First Amendment "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

This case provides a good vehicle for resolving the existing conflicts because the Texas court has definitively construed §42.07(a)(7) to punish certain *expressive* communications, and §42.07(a)(7) mirrors in key respects those laws on which other courts are conflicted. *See* Pet.27-33.

III. THE TEXAS COURT'S JUDGEMENTS ARE FINAL AND SUBJECT TO REVIEW

A. At Issue Are Final Judgments in the Habeas Proceedings and Final Rulings on the Constitutionality of §42.07(a)(7)

This Court has jurisdiction under 28 U.S.C. §1257(a) to review the final judgments of the Texas court of last resort that concluded Barton's and Sanders's habeas petitions. Contrary to Texas's assertions, there is nothing "prototypical[ly] interlocutory" about the resolution of these petitions. Opp.9. Texas has "long recognized the separateness of pre-conviction habeas proceedings" from proceedings on the merits. *Greenwell v. Court of Appeals*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005). Pre-trial habeas petitions are "separate criminal actions," and Texas law requires court clerks to file habeas petitions "under a cause number different from the . . . underlying prosecution." *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 778 (Tex. App. 2021).[3] The judgments in *Barton* and *Sanders* are final judgments, separate and distinct from any further proceedings that may occur.

These decisions are also the final word of the state's highest court on the constitutionality of

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[3] For reasons unknown, the clerks did not assign separate case numbers to Petitioners' habeas proceedings. But when court clerks fail to do so, "the habeas application is deemed to have been filed as an action separate from the underlying criminal prosecution." *Ex parte Fairchild-Porche*, 638 S.W.3d at 778.

§ 42.07(a)(7). The judgments upholding the law are now binding on every court in Texas, and Texas courts are already applying the rationale in *Ex parte Barton* and *Ex parte Sanders* to uphold other statutes in the face of facial-overbreadth challenges. *See, e.g.*, *Ex parte Claycomb*, No. 07-20-00238-CR, 2022 WL 17112266 (Tex. App. Nov. 22, 2022) (online-solicitation statute, Tex. Penal Code §33.07); *Ex parte Owens*, No. 04-21-00412-CR, 2022 WL 3638242 (Tex. App. Aug. 24, 2022, pet. ref'd) (stalking statute, Tex. Penal Code §42.072).

This Court has previously recognized its jurisdiction to take up federal constitutional questions presented in a similar posture. In *Petition of Groban*, for example, the Court granted certiorari in a constitutional challenge to an Ohio law via a pre-trial habeas writ. 352 U.S. 330, 331-32 (1957). Petitioners had been jailed without access to counsel for refusing to testify in the investigation of a fire, and filed their habeas petitions to challenge the constitutionality of the law authorizing their detention. *Id.* at 331. This Court granted certiorari because "appellants' attack [was] on the constitutionality of [the statute.]" *Id.* at 332.[4]

[4] This Court has also granted petitions for certiorari that challenged the constitutionality of state statutes before trial outside of the habeas context. *See, e.g.*, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-57 (1989) (motion to dismiss indictment); *Mills v. Alabama*, 384 U.S. 214, 215-18 (1966) (same).

B. Delay Will Not Aid the Resolution of Petitioners' Questions and Will Cause Significant Constitutional Harm

This Court explained in *Cox Broadcasting Corp. v. Cohn* that state courts often "finally determine[] a federal issue" even though there are more state-court proceedings to come. 420 U.S. 469, 477-78 (1975). The fact that all criminal proceedings have not concluded against Barton and Sanders does not mean this Court lacks jurisdiction to address a federal constitutional issue that has been finally resolved.

Cox calls for a "pragmatic" approach to finality for jurisdictional purposes and identifies four categories of cases where jurisdiction exists. *Id.* at 486, 478-85. The fourth category finds jurisdiction over petitions where: 1) "the federal issue has been finally decided in the state courts;" 2) "the party seeking review . . . might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue;" 3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action;" and 4) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83. This Petition satisfies all four prongs.[5]

1. The Texas court has finally decided a federal issue: whether §42.07(a)(7) facially violates the First Amendment. App.44a. Though some related issues

[5] Texas is incorrect to suggest that *Cox* does not apply in criminal matters. *See Fort Wayne Books*, 489 U.S. at 54-57.

may arise in future litigation, "some such likelihood is always present in ongoing litigation." *Nike, Inc. v. Kasky*, 539 U.S. 654, 673 (2003) (Breyer, J., dissenting from denial of certiorari). *Cox* itself featured a complex web of legal questions, but that did not stop this Court from granting certiorari because, as here, the state court's judgment was "plainly final on the federal issue." 420 U.S. at 485.

2. Petitioners necessarily "might prevail" against the state's charges on nonfederal grounds. Their prosecutions will end if the State fails to meet its burden of proof on any element, depriving this Court of any opportunity to review §42.07(a)(7)'s constitutionality.

3. If this Court were to declare §42.07(a)(7) unconstitutional, reversal would end Barton's case and end Sanders's prosecution for electronic harassment under that law.

Texas contends that this prong is not satisfied because Sanders is also charged under §42.07(a)(4) so the Court can only provide partial relief. Opp.10-12. But the two provisions define separate crimes, and the Court rejected this theory of finality in *Fort Wayne Books, Inc. v. Indiana*, which similarly involved a multicount indictment. 489 U.S. 46, 54-57 (1989).

4. Declining jurisdiction would erode a clear federal policy: First Amendment protection of electronic communications. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general

finality rule." *Id.* at 55. The mere "threat of sanctions may deter . . . exercise [of First Amendment rights] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Texas's Opposition trumpets the need for legislation to address online bullying, Opp.1, 3-4, but legislators and citizens need to know "the possible limits the First Amendment places" in this area. *Fort Wayne Books*, 489 U.S. at 56. The Court should exercise its jurisdiction and resolve these significant issues.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant *certiorari*.

Respectfully submitted,

Edward G. Jones
Tobias Xavier Lopez
1319 Ballinger St.
Fort Worth, Texas 76102
(817) 335-0200
tobiasxavierlopez@gmail.com

Lane A. Haygood
3800 E. 42nd St. Suite 110
Odessa, Texas 79762
(432) 803-5800
lhaygood@galyen.com

David A. Schulz
Counsel of Record
Kelsey Eberly
Rachel Davidson
MEDIA FREEDOM AND INFORMATION ACCESS CLINIC
ABRAMS INSTITUTE
YALE LAW SCHOOL[6]
127 Wall St.
New Haven, CT 06511

[6] This Petition does not purport to represent the institutional views of Yale Law School, if any.

(203) 436-5827
david.schulz@yale.edu

Rusty Gunter
1213 Avenue K
Lubbock, Texas 79401
(806) 771-3933
rusty.gunter2@gmail.com

Mark W. Bennett
917 Franklin St., 4th Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

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