No. 22-434

IN THE
Supreme Court of the United States

Slade Alan Moore,
Petitioner,

v.

State of Texas,
Respondent.

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

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Lane A. Haygood
3800 E. 42nd Street, Suite 110
Odessa, Texas 79762
Tel: 432.803.5800
lhaygood@galyen.com

Mark W. Bennett
Counsel of Record
917 Franklin Street, Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

Counsel for Petitioner

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I. The Texas Courts' Judgments are Final and Subject to Review.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final judgments of the Texas court of last resort that refused to hear Mr. Moore's appeal, leaving the judgment of the Texas intermediate Eighth District Court of Appeals in place. Contrary to the assertions in the Opposition, there is nothing to indicate that the judgments of the Eighth Court of Appeals and the Court of Criminal Appeals are not the "final" judgments of those courts with regard to the habeas proceedings.

Texas has long recognized that pre-conviction habeas proceedings are separate from proceedings on the merits. *See 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 corpus petitions "under a cause number different from the . . . underlying prosecution." *Ex parte Fairchild-Porche*, 638 S.W.3d 770, 778 (Tex. App.—Houston [14th Dist.] 2021, no pet.). For reasons not apparent from the record, the Andrews County Clerk did not assign new cause numbers to the pre-trial writs in this case; nevertheless, Texas law excuses the failure of court clerks to do so by stating that "the habeas application is deemed to have been filed as an

action separate fro the underlying criminal prosecution." *Fairchild-Porche*, 638 S.W.3d at 778.

Therefore, the judgments in the cases before this Court are final judgments, separate and distinct from any further proceedings that may occur.

The decision in this case is also the latest holding of the Eighth Court of Appeals regarding the constitutionality of Tex. Pen. Code Ann. § 42.07(a)(7); the related cases of *Ex parte Barton* and *Ex parte Sanders* (pending before this Court on certiorari in Cause No. 22-430), upon which the decision of the Court of Criminal Appeals below relied, are already being cited as authority in other cases. For example, *State v. Soto*, No. 10-21-00180-CR, 2022 WL 1417329 (Tex. App.—Waco May 4, 2022, pet. ref'd) (cert No. 22-558) (section 42.07(a)(7)); *Ex parte Claycomb*, No. 07-20-00238-CR, 2022 WL 17112266 (Tex. App.—Amarillo Nov. 22, 2022, pet. filed) (Online Solicitation statute, Tex. Pen. Code Ann. § 33.07); *Ex parte Owens*, No. 04-21-00412-CR, 2022 WL 3638242 (Tex. App.—San Antonio Aug. 24, 2022, pet. ref'd) (Stalking statute, Tex. Penal Code Ann. § 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 raised through a pre-trial writ of habeas corpus. 352 U.S. 330, 331-32 (1957). Petitioners, who had been jailed without access to counsel for refusing to testify in the investigation of a fire, filed habeas petitions challenging 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 331-32.[1]

II. Contrary to the Opposition, this case is ideal for resolving conflicts over the constitutionality of electronic harassment laws.

This case presents pure legal questions of whether laws that target electronic harassment necessarily implicate the First Amendment and more specifically whether Tex. Pen. Code Ann. § 42.07(a)(7) is overbroad. As stated in the petition, a significant conflict among state high courts and federal courts of appeal exists on both issues.

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[1] 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.*, *Mills v. Alabama*, 384 U.S. 214, 215-18 (1966) (motion to dismiss indictment); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 53-57 (1989) (same).

The Texas's court's conclusion that no First Amendment scrutiny of Sec. 42.07(a)(7) is required follows reasoning adopted by the Second, Fourth, and Ninth Circuits and the West Virginia Supreme Court. *See* Pet. 24-26 (citing cases). 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.26-31. A ruling on whether Sec. 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. 30-31. A ruling on whether Sec. 42.07(a)(7) is facially overbroad would go a long way toward clarifying the proper analysis to apply to electronic and telephonic harassment laws.

Unable to deny the existing conflicts, Texas attempts to minimize them by pointing to other 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 (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). The Texas court held the opposite, construing Sec. 42.07(a)(7) to apply to "expressive speech" *intended* to communicate an idea if *also* sent with a prohibited intent.

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, which it claims is "necessary to determine the statute's validity." Opp.13-14. Its concerns are misplaced.

No facts are required to resolve the 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." *Thornhill v. Alabama,* 310 U.S. 88, 96 (1940). Whether Texas is using its power happens to 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). "Proof of an abuse of power in the particular case has never been deemed a requisite" for a First Amendment overbreadth challenge. *Id.* at 97.

This case provides a good vehicle for resolving the existing conflicts because the Texas court has definitively construed Sec. 42.07(a)(7) to punish certain *expressive* communications, and Sec. 42.07(a)(7) mirrors in key respects those laws on which other courts are conflicted. *See* Pet.27-33. Given the "uneasy and unsettled constitutional posture" of laws criminalizing electronic communications, it would be "intolerable" to leave these First Amendment questions unanswered. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

III. The opposition confirms that the significant First Amendment issues presented warrant review.

The State of Texas's Opposition to the petition for certiorari ("Opp."), only confirms the deep conflict that currently exists over the constitutionality of electronic harassment laws and demonstrates the need for this Court to articulate a proper First Amendment analysis.

A. The Texas Electronic Harassment Statute Facially Criminalizes Protected Speech.

Sec. 42.07(a)(7) imposes criminal sanctions on protected speech in a manner that leaves broad discretion to state officials to punish critics or stifle political debate (see Pet. at 12). The Opposition defends the Texas court's holding that Sec. 42.07(a)(7) presents no First Amendment issue because it sanctions conduct, not speech, but has no answer to the myriad ways in which that holding conflicts with long-settled precedent of this Court. The rationale by which Texas transmogrifies a 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). 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 despite the requirement that a defendant *intentionally* to

inflict emotional distress. *Snyder v. Phelps*, 562 U.S. 443 (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. 17, but a regulation of speech cannot evade First Amendment scrutiny simply by requiring "repeated communications." 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 final leg in Texas's argument is its incorrect assertion that Sec. 42.07(a)(7) incorporates a "reasonable person" standard. Opp.16. It does not. Section 42.07(a)(7) punishes communications sent "in a manner *reasonably likely* to harass, annoy, alarm," etc., and 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 Sec. 42.07).

Texas also suggests that the law regulates conduct not speech because it is content-neutral. Opp.17-18. Both its premise and conclusion are flatly incorrect. Section 42.07(a)(7) is not content-neutral. *See* Pet. 34-35**.** And content-neutrality is

only relevant when a law *does* regulate speech. *See City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022).

Texas fails as a matter of precedent and common sense to explain how a law regulating "electronic communications" regulates conduct. The Texas court's conclusion that Sec. 42.07(a)(7) does not implicate the First Amendment is "startling and dangerous" and therefore incorrect and warrants review. *See Stevens*, 559 U.S. at 470.

B. Section 42.07(a)(7) cannot survive First Amendment scrutiny.

Review is also warranted because Sec. 42.07(a)(7) cannot survive the First Amendment scrutiny that the Texas court refused to apply. *See* Pet.13-17. The Opposition wholly ignores this Court's overbreadth precedents, including *Stevens*, 559 U.S. at 473, and *Gooding v. Wilson*, 405 U.S. 518, 519-20 (1972), and does not address this Court's teachings in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), and *Snyder v. Phelps*, 562 U.S. at 460-61, about First Amendment protections for offensive speech.

Texas seeks to sidestep the overbreadth issue by suggesting that Sec. 42.07(a)(7) should survive under intermediate or strict scrutiny. Opp. 23. This argument—and the confused application of

precedent—only underscores the significant First Amendment issues presented.

Texas's intermediate-scrutiny analysis rests on the proposition that Sec. 42.07(a)(7) is content neutral. To support this mistaken premise, Texas points to *United States v. Lampley*, a case explaining 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, Sec. 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.

Moreover, determining liability by reference to a speaker's words is only one way a law can be content based. As observed in *Reed v. Town of Gilbert*, "[s]ome facial distinctions based on a message are obvious," but others "are more subtle, defining regulated speech by its function or purpose." 135 S. Ct. 2218, 2227 (2015). "Both are distinctions based on the message a speaker conveys" and "subject to strict scrutiny." *Id.* Section 42.07(a)(7) targets speech made for certain defined purposes and is thus content based.

Texas is similarly mistaken in relying on *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970), and *Cohen v. California*, 403 U.S. 15 (1971), to argue that intermediate scrutiny could be satisfied because Sec. 42.07(a)(7) strikes a constitutional balance between a speaker's right to communicate and a recipient's right to be left alone. Opp.21-22. 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 argues that "the same rule" should apply to "electronic mailboxes." Opp.23. But it does not follow that because the government can require an individual to be removed from a mailing list upon request, it can impose *criminal* sanctions for sending electronic communications to which a recipient might object. As *Sorrell v. IMS Health* explains, "private decision-making can avoid governmental partiality and thus insulate privacy measures from First Amendment challenge." 564 U.S. 552, 573-74 (2011) (citing *Rowan*). No such insulation is possible with Sec. 42.07(a)(7), which permits Texas itself to determine which messages to punish. Particularly given the staggering breadth of Sec. 42.07(a)(7), which targets social media posts and other public communications, not just 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.

The telephone harassment cases that cite to *Cohen* involve 1980s-era statutes that target repeated threatening or obscene phone calls.[2] Most target the repeated, non-communicative ringing of phones in homes and workplaces, posing distinct invasions of privacy unlike publications posted to the Internet. That Texas considers Sec. 42.07(a)(7) indistinguishable from the narrowly drawn and construed telephone

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[2] *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).

harassment statutes is precisely the issue requiring this Court's attention.

Texas's claim that the law survives strict scrutiny is equally flawed. Petitioners do not dispute that protecting children's psychological well-being and "protecting adults from harassment in places where they have an expectation of privacy" can be compelling interests. But a compelling interest alone does not satisfy strict scrutiny.

Strict scrutiny requires narrow tailoring—a demonstration that the speech restriction is "actually necessary." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Section 42.07(a)(7) cannot be considered narrowly tailored in its prohibition of *any* repeated electronic speech intended and reasonably likely to "alarm," "embarrass," or "offend," without regard to whether the speaker also has a legitimate purpose.

Finally, Texas's reference to David's Law is a red herring. That law is a comprehensive statutory scheme addressing teenage bullying that requires schools to develop cyberbullying polices, notify parents when their child is bullying or being bullied, and much more. Tex. Educ. Code Ann. § 37.0832. It made only minor changes to

Texas's harassment law.[3] That David's Law decreased bullying perfectly illustrates that avenues other than Sec. 42.07(a)(7)'s broad and vague regulation of online speech exist to further Texas's interest in protecting children

[3] David's Law clarified Sec. 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.

CONCLUSION

For these reasons, and those stated in the original petition for a writ of certiorari, this case is one that the Court should grant the writ of certiorari and decide the issues before it, clarifying the law and analysis as regards the First Amendment and statutes that purport to criminalize electronic harassment.

Respectfully submitted,

Lane A. Haygood
3800 E. 42nd St.
Suite 110
Odessa, Texas 79762
Tel: 432.803.5800
lhaygood@galyen.com

Mark W. Bennett
Counsel of Record
917 Franklin Street
Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

Counsel for Petitioner
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