No. 22-____

IN THE

Supreme Court of the United States

JASPER CHEN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Texas statute criminalizes sending repeated electronic communications with the intent and likely result of "harassing, annoying, alarming, abusing, tormenting, embarrassing or offending" another. Because the law would be violated by the repeated sending of communications that contain no expressive content, like a blank email, the Texas Court of Criminal Appeals concluded that it "proscribes non-speech conduct" and does not implicate the First Amendment, even though the law would in most cases be violated by the repeated sending of expressive communications. The court thus rejected Petitioner's facial overbreadth challenges to the criminal statute. The questions presented are:

1. Is a law that criminalizes expressive speech immunized from any First Amendment scrutiny if it also criminalizes non-expressive conduct?

2. Is a law that punishes the repeated sending of electronic communications with intent and likely result to "harass, annoy, alarm, abuse, torment, embarrass, or offend" another unconstitutionally overbroad?

RELATED PROCEEDINGS

State v. Chen, Nos. 14-19-00372-CR, Court of Appeals of Texas, Houston (14th District). Judgment entered December 31, 2020.

State v. Chen, Nos. PD-0096-21, PD-0097-21, Texas Court of Criminal Appeals. Judgment entered Aug. 24, 2022.

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INTRODUCTION

This case is one of several confronting with the unconstitutionality of Tex. Penal Code Ann. 42.07(a)(7), otherwise known as the electronic harassment statute.

A 5-4 majority of the Texas Court of Criminal Appeals held in two cases, *Ex parte Barton* and *Ex parte Sanders*, that an "electronic communication" made with the "intent to engage in the legitimate communication of ideas" can nevertheless be considered "non-communicative" and judicially declared "not speech." *Sanders*, 2022 WL 1021055 at *4.

Before the Court of Criminal Appeals decided *Barton* and *Sanders*, the trial court granted Mr. Chen relief from this unconstitutional statute in the trial court. App. 22a. On *de novo* review, the Fourteenth Court of Appeals at Houston upheld the judgment of the trial court. App. 7a. The State petitioned the Court of Criminal Appeals for discretionary review. After *Barton* and *Sanders* were decided, the Court of Criminal Appeals reversed the Fourteenth Court of Appeals and remanded the case to the trial court. App. 1a.

As both *Barton* and *Sanders* have been brought to this Court's attention via a petition for a writ of certiorari, No. 22-430, so too does Mr. Chen make the same presentation.

This petition incorporates by reference the arguments of the petitioners in *Barton* and *Sanders*.

In *Barton* and *Sanders* the Texas court court held that a Texas law criminalizing "electronic communications" intended and reasonably likely to "harass, annoy, alarm, abuse, torment, or embarrass" does not implicate the protections of the First Amendment in any way and thus is not susceptible to a facial challenge

for vagueness or overbreadth. *Barton*, 2022 WL 1021061 at *2-*4, *Sanders*.

The court reached this conclusion because the law *could* be violated by repeatedly sending emails, text messages, and the like with no communicative content. It thus considered the law a regulation of conduct that facially presented no First Amendment issue, even though it could typically be applied to expressive communications. *Id*. at *6.

This Court's precedents do not allow such a law targeting speech to be exempted from any facial challenge.

Other courts that have upheld similar statutes have applied a range of inconsistent theories and approaches. This issue warrants review by this Court to clear up an existing confusion in the lower courts over how to account for First Amendment issues unavoidably imbedded in laws criminalizing harassment by communication.

Threatening criminal penalties for repeated speech that is unwelcome to the recipient will inhibit robust communication on our primary means of communicating. The issue presented is one of exceptional significance, and the Court should grant *certiorari* for this reason as well.

OPINIONS AND ORDERS BELOW

The Court of Criminal Appeals opinion in *State v. Jasper Chen* is available at 2022 WL 3641038 (Tex. Crim. App. Aug. 24, 2022). The Fourteenth Court of Appeals opinion reversed by the Court of Criminal Appeals is available at 615 S.W.3d 376 (Tex. App. Dec. 31, 2020). The order granting the writ of habeas corpus is unpublished.

JURISDICTION

The Texas Court of Criminal Appeals issued its opinion on August 24, 2022. App. 1a.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

Texas Penal Code § 42.07(a)(7) states in relevant part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> . . .
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Tex. Penal Code Ann. § 42.07(a)(7) (2021).

STATEMENT OF THE CASE

Petitioner Jasper Chen was charged by information with violating Texas Penal Code § 42.07(a)(7) in Cause No. 2233753 in the County Court at Law Number 16 of Harris County, Texas. This law is violated if a person sends repeated "electronic communications" with an "intent to harass, annoy, alarm, abuse, torment, or embarrass another," and their communications have the intended effect, or simply "offend." *Id.* The law defines an "electronic communication" broadly to include any transfer of writing, images, sounds, data or "intelligence of any nature" that is "transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." *Id.* § 42.07(b)(1). Expressly included within this definition are any communications "by electronic mail, instant message, network call, or facsimile machine," or "made to a pager." *Id.*

Petitioner is alleged to have sent electronic communications to one Li Cai in a manner reasonably likely to and intended to harass, alarm, annoy, abuse, torment, embarrass, or offend Cai. App. 35a.

Petitioner sought a pretrial writ of habeas corpus in each case, which was granted. App. 24a.

The State appealed to Texas's Fourteenth Court of Appeals, which affirmed. App. 7a.

The State sought discretionary review with the Texas Court of Criminal Appeals, which granted review and reversed based on its rulings in *Barton* and *Sanders*, which held that the electronic communications harassment statute does not implicate the First Amendment and is thus not susceptible to a facial First Amendment challenge. App. 1a. Three judges dissented. App.4a.

Barton and *Sanders* are now pending before this Court under docket number 22-430. Rather than repeat their arguments, Mr. Chen here summarizes those arguments, and incorporates them by reference.

REASONS FOR GRANTING THE WRIT

I. The Texas Court's Holdings Defy This Court's First Amendment Precedents in multiple respects

A. The Texas court refused to apply any First Amendment analysis to a statute it found to penalize "expressive speech."

B. The Texas court's rationale for refusing to apply any First Amendment scrutiny specifically contravenes this Court's precedent.

1. That the law reaches some non-expressive conduct does not exempt it from any First Amendment scrutiny.

2. That the law requires a wrongful intent does not exempt it from any First Amendment scrutiny.

C. The Texas court's refusal to conduct an overbreadth analysis upholds a law that cannot survive an overbreadth analysis under this Court's precedent.

CONCLUSION

For those reasons, Petitioner respectfully requests that this Court grant *certiorari*.

Respectfully submitted,

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November 22, 2022

APPENDIX

APPENDIX A

2022 WL 3641038

Only the Westlaw citation is currently available.

Notice: This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

COURT OF CRIMINAL APPEALS OF TEXAS

Nos. PD-0096-21, PD-0097-21

THE STATE OF TEXAS

v.

JASPER ROBIN CHEN,

Appellee.

Delivered: August 24, 2022

On State's Petition for Discretionary Review from the Fourteenth Court of Appeals Harris County

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Attorneys and Law Firms:

Patricia McLean, *for State*.

Mark Bennett, Robert J. Fickman, Houston, *for Appellee*.

OPINION

Per curiam

Appellee was charged with harassment via electronic communications. See Tex. Penal Code § 42.07(a)(7). He filed a pre-trial habeas writ application and motion to quash the charging instrument, arguing the electronic harassment statute is facially unconstitutional and also unconstitutional as applied to him under the First Amendment. The trial court ruled that the statute is facially unconstitutional and granted relief. The State appealed[11], and a majority of the Court of Appeals held the statute to be unconstitutionally overbroad. *State v. Chen*, 615 S.W.3d 376 (Tex. App. – Houston [14th] 2020, pet. filed).

The State has filed a petition for discretionary review arguing that Appellee failed to meet his burden to show the statute is unconstitutionally overbroad and the majority erred in its analysis. We recently handed down opinions in *Ex parte Barton v. State*, No. PD-1123-19, 2022 WL 1021061, 2022 Tex. Crim. App. LEXIS 235 (Tex. Crim. App. Apr. 6, 2022), and *Ex parte Sanders v. State*, No. PD-0469-19, 2022 WL 1021055, 2022 Tex. Crim. App. LEXIS 236 (Tex. Crim. App. Apr. 6, 2022), in which we held the statute constitutional on its face. The reasoning in these opinions applies to this case.[2]

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[1] In a unitary notice of appeal, the State appealed both from the trial court's order dismissing the information and from its order granting habeas corpus relief.

[2] We note that Appellee's case is governed by the 2017 version of the electronic harassment statute. Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 42.07, 1973 Tex. Gen. Laws 883, 956-57 (amended 2017).

Accordingly, we grant the State's petition for discretionary review, reverse the judgment of the Court of Appeals, and remand this case to the trial court for further proceedings not inconsistent with *Ex parte Barton* and *Ex parte Sanders*.

Keller, P.J., filed a dissenting opinion in which Keel and McClure, JJ., joined.

In *Ex parte Barton* and *Ex parte Sanders*, the Court addressed the constitutionality of the 2001 and 2013 versions, respectively, of the electronic-communications statute.[1] In both cases, the Court decided that the statute at issue does not implicate the First Amendment because the conduct it prohibits is not speech.[2] Now the Court concludes that the reasoning in those opinions applies to this case, involving the 2017 version of the statute, despite the fact that the 2017 statute adds new language regarding the meaning of "electronic communications" that makes the statute more obviously directed at speech.

Under the 2001 and 2013 versions of the statute, "electronic communications" was defined as:

> [A] transfer of signs, signals, writing, images, sound, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photooptical system. The term includes:
>
> (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and
>
> (B) a communication made to a pager.[3]

---

[1] Ex parte Barton, --- S.W.3d ——, —— n.1, 2022 WL 1021061, *1 & n.1 (Tex. Crim. App. April 6, 2022) (2001 version); Ex parte Sanders, --- S.W.3d ——, —— n.1, 2022 WL 1021055, *1 & n.1 (Tex. Crim. App. April 6, 2022) (2013 version).

[2] See Barton, supra at ——, at *1, and Sanders, supra at ——, at *1.

[3] Tex. Penal Code § 42.07(b)(1) (2001 & 2013).

In 2017, the legislature added to subsection (A) the italicized language below:

> (A) a communication initiated by electronic mail, instant message, network call, *a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool*, or facsimile machine.[4]

In *Barton* and *Sanders*, I set forth my view that derogatory posts about someone on a social media account or an internet site was criminalized even under the language of the 2001 and 2013 versions of the statute.[5] In concurring opinions in those cases, Judge Yeary disagreed, believing that the statute was limited to instances in which "harassing communications are directed and targeted specifically at an individual."[6] In support of his assessment, he quoted the definition of "electronic communications" found in the versions of the statute at issue in those cases.[7] But with its additions, the 2017 statute clearly applies beyond communications that are targeted and directed specifically at an individual. Now, it seems indisputable that annoying posts *about* an individual on social media, a message board, a blog, or the online

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[4] Tex. Penal Code § 42.07(b)(1)(A) (2017).

[5] Barton, --- S.W.3d at ——, 2022 WL, at *9 (Keller, P.J., dissenting); Sanders, --- S.W.3d at ——, 2022 WL, at *15 (Keller, P.J., dissenting) (adopting reasons articulated in Barton).

[6] Barton, --- S.W.3d at ——, 2022 WL, at *8 (Yeary, J., concurring); Sanders, --- S.W.3d at ——, 2022 WL, at *14 (Yeary, J., concurring).

[7] Barton, supra at —— n.2, at *8 n.2; Sanders, supra at —— n.2, at *14 n.2.

comment section of a newspaper can be an offense. Nothing in the statutory language of the 2017 provision suggests that the social media account, message board, blog, or other internet site must belong to the person who reasonably finds the communications annoying.

For instance, under the 2017 statute, if a person makes more than one derogatory comment about another person on Facebook, Twitter, or YouTube, that conduct can be prosecuted as a crime. That is true even if the derogatory posts or videos are on the commenter's own account. Similarly, repeated derogatory posts in the online comment section of the local newspaper could give rise to criminal liability. Criticisms of a politician on a blog or message board could also pave the way for a criminal prosecution.

To be clear, *Barton* and *Sanders* did not hold that the legislature could validly punish the sort of speech proscribed by the electronic-communications statute; it held that the statute did not proscribe speech *at all*. I found that idea problematic with respect to the earlier versions of the statute at issue in *Barton* and *Sanders*. With respect to the newer version, I find that idea to be simply untenable—and certainly not something that would support a summary remand. I respectfully dissent.

APPENDIX B

615 S.W.3d 376

COURT OF APPEALS OF TEXAS,
Houston (14th Dist.)

———

No. 14-19-00372-CR,
No. 14-19-00373-CR

———

THE STATE OF TEXAS,

Appellant,

v.

JASPER ROBIN CHEN,

Appellee.

———

Opinion filed December 31, 2020
Discretionary Review Granted August 24, 2022

———

On Appeal from the County Criminal Court at Law
No. 16, Harris County, Texas, Trial Court
Cause Nos. 2233753 and 2250796

———

Attorneys and Law Firms

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Houston, *for Appellant*.

Mark W. Bennett, Robert James Fickman,
Houston, *for Appellee*.

Panel consists of Justices Zimmerer,
Spain, and Hassan

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OPINION

Charles A. Spain, Justice

The State charged appellee by information with the misdemeanor offense of, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, sending repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another on or about April 15, 2018 continuing through October 29, 2018. Tex. Penal Code Ann. § 42.07(a)(7), (c). Appellee filed an application for writ of habeas corpus and motion to quash the information, arguing that the statute under which he was charged, Penal Code section 42.07(a)(7) (the "electronic-communications-harassment statute"), is facially unconstitutional and unconstitutional as applied to him under the First Amendment. U.S. Const. amend. I; *see* Tex. Code Crim. Proc. Ann. art. 11.09. The trial court granted the application, a writ of habeas corpus was issued, and appellee and the State appeared for a hearing on the application. After the hearing, the trial court concluded the statute is facially unconstitutional and granted habeas-corpus relief and the motion to quash the information, thereby discharging the appellee. *See* Tex. Code Crim. Proc. Ann. art. 11.40. The State appealed.[1] We affirm.

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[1] In a unitary notice of appeal, the State appealed both "from the trial court's order dismissing the information in cause number 2233753," which has been assigned case number 14-19-00373-CR by this court, "and from its order granting habeas relief in cause number 2250796," which has been assigned case number 14-19-00372-CR by this court. The State may appeal an order that dismisses an indictment, information, or complaint. Tex. Code Crim. Proc. Ann. art. 44.01(a)(1). In addition, while a respondent in a habeas action under Code of Criminal Procedure article 11.09, such as the State here, has no general right of

I. Analysis

Regarding electronic communications, the harassment statute reads, in relevant part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> > (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.
>
> (b) In this section:
>
> > (1) "Electronic communication" means 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. The term includes:
> >
> > > (A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any

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appeal from an adverse ruling, "if the granting of relief by a habeas corpus court results in one of the enumerated situations within Art. 44.01(a), the State may appeal regardless of what label is used to denominate the proceeding which results in the order being entered," which is the situation here given that the effect of the trial court's habeas-corpus judgment is to dismiss the information. *Alvarez v. Eighth Court of Appeals of Tex.*, 977 S.W.2d 590, 593 (Tex. Crim. App. 1998). The issue of whether the State was required to bring both appeals is not before us, and we express no opinion on that subject.

> other Internet-based communication tool, or facsimile machine; and
>
> (B) a communication made to a pager.

Tex. Penal Code Ann. § 42.07(a)(7), (b)(1). The State argues that the trial court erred in determining that the electronic-communications-harassment statute is facially unconstitutional. Whether a statute is facially constitutional is a question of law that we review de novo. *Ex Parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Ordinarily, the party challenging the statute carries the burden to establish the statute's unconstitutionality. *Id.* at 15.

A. Applicability of the First Amendment

We begin with the State's argument that the electronic-communications-harassment statute does not implicate a substantial amount of speech protected by the First Amendment. *See Vill. of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (in First Amendment cases, courts first decide whether statute "reaches a substantial amount of protected conduct" before deciding if it is facially overbroad or void for vagueness). The First Amendment prohibits laws "abridging the freedom of speech" and generally protects the free communication and receipt of ideas, opinions, and information. U.S Const. amend I; *see Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). These protections are not absolute, however. For example, the State may lawfully proscribe communicative conduct that invades the substantial privacy interests of another in an essentially intolerable manner. *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

On its face, the statute's prohibition on a broad array of electronic communications made "with intent to harass, annoy, alarm, abuse, torment, or embarrass another" would appear to impede the free communication and receipt of ideas, opinions, and information, thereby reaching a substantial amount of protected speech. *See* Tex. Penal Code Ann. § 42.07(a)(7), (b)(1); *Red Lion Broad. Co.*, 395 U.S. at 390, 89 S.Ct. 1794. In *Scott v. State*, however, the court of criminal appeals rejected a similar First Amendment challenge to the telephone-harassment portion of the harassment statute. 322 S.W.3d 662 (Tex. Crim. App. 2010), *cert. denied*, 563 U.S. 936, 131 S.Ct. 2096, 179 L.Ed.2d 891 (2011) (analyzing Tex. Penal Code Ann. § 42.07(a)(4) (the "telephone-harassment statute")).[2] The *Scott* court determined that the telephone-harassment statute, "by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Scott*, 322 S.W.3d at 669–70. The court reasoned that, because the "sole

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[2] At the time of *Scott*, the telephone-harassment statute read:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> . . . .
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another . . . .

See Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, sec. 42.07(a)(4), 2001 Tex. Gen. Laws 2795, 2795, *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 1278, § 1, 2013 Tex. Gen. Laws 3231, 3231.

intent" of telephone calls prohibited by the harassment statute was to cause emotional distress, the calls were "essentially noncommunicative" for First Amendment purposes. *See id.* The court went on to hold that any communicative conduct to which the subsection might apply "is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.* at 670.

Many of our sister courts have held that the reasoning of *Scott* applies equally to the similarly worded electronic-communications-harassment statute.[3] These courts reason that, since the sole intent of the *381 electronic communications encompassed by the electronic-communication-harassment statute is to invade the privacy of the recipient in an essentially intolerable manner, the statute does not reach a

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[3] *See, e.g., State v. Grohn*, No. 09-20-00075-CR, 612 S.W.3d 78 (Tex. App.—Beaumont Nov. 18, 2020, pet. filed); *Ex parte McDonald*, 606 S.W.3d 856 (Tex. App.—Austin 2020, pet. filed); *Lebo v. State*, 474 S.W.3d 402 (Tex. App.—San Antonio 2015, pet ref'd); *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (mem. op., not designated for publication); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication); *Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication); *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication); *Duran v. State*, No. 13-11-00205-CR, 2012 WL 3612507 (Tex. App.—Corpus Christi Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication).

substantial amount of speech protected by the First Amendment.[4]

In *Ex parte Barton*, however, the Fort Worth Court of Appeals concluded that the central holding of *Scott* had been abrogated by the court of criminal appeals' subsequent decision in *Wilson v. State*, and accordingly declined to apply *Scott* to the electronic-communications-harassment statute.[5] *See generally Barton*, 586 S.W.3d 573 (Tex. App.—Fort Worth 2019,

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[4] Some courts, while applying *Scott*, have nevertheless called on the court of criminal appeals to reexamine the rationale in *Scott*. For example, the decision of the Amarillo Court of Appeals in *Sanders*, which the court of criminal appeals has agreed to review, includes the following footnote:

> Chief Justice Quinn joins in the majority opinion for the reasons stated therein. However, the reasons expressed by Presiding Judge Keller in her dissent in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), the chipping away at *Scott* by the majority in *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014), and the concurrence of P.J. Keller and Judge Johnson in *Wilson* sways him to invite the Court of Criminal Appeals to reconsider the majority opinion in *Scott*. He too fears, as expressed by P.J. Keller and Judge Johnson, the potentiality of criminal convictions arising from one's exercise of First Amendment rights. This is not to say he welcomes the mid-supper calls from politicians to vendors but understands that such annoyances are part and parcel of residing in a country where ideas, innovation, intellect, and their urging remain invaluable.

2019 WL 1576076, at *5 n.6.

[5] The Fort Worth court analyzed the 2001 version of the harassment statute, which is materially identical to the current version. *See* Act of May 26, 2001, *supra* note 2.

pet. granted) (op. on reh'g).[6] The *Barton* court determined "that the *Wilson* decision recognized that a person who communicates with the intent to harass, annoy, alarm, abuse, torment, or embarrass can also have an intent to engage in the legitimate communication of ideas, opinions, information, or grievances." *Id.* at 579 (discussing *Wilson*, 448 S.W.3d 418, 422 (Tex. Crim. App. 2014)). Because the Fort Worth court read *Wilson* to concede that conduct punishable by the statute could have a dual intent—one protected by the First Amendment and one not—it departed from the "sole intent" limiting construction of *Scott* and held the electronic-communications-harassment statute implicated speech protected by the First Amendment.[7] *See id.*

In addition to recognizing the dual-intent issue that *Wilson* introduced into the *Scott* analysis, the Fort Worth Court of Appeals also noted the centrality of "the inherently personal and invasive nature of telephone calls" to the analysis of the court of criminal appeals in *Scott*. *Id.* As pointed out by Presiding Judge Keller in dissent, the *Scott* court's conclusion that the telephone-harassment statute involves conduct that "invades the substantial privacy interests of another (the victim) in an essentially intolerable manner"

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[6] The court of criminal appeals granted review on November 20, 2019. *Ex parte Barton*, No. PD-1123-19 (Tex. Crim. App. Nov. 20, 2019).

[7] This court has reaffirmed the applicability of *Scott* to the telephone-harassment statute. *See Ex parte Jones*, No. 14-19-00248-CR, 2020 WL 3243968 (Tex. App.—Houston [14th Dist.] June 16, 2020, pet. filed) (mem. op., not designated for publication). In that unpublished opinion, however, the court was not called upon to consider *Wilson, Barton*, or the electronic-communications-harassment statute. *See id.*

hinges on the idea that telephone calls are made to a "captive audience":

> [T]he telephone is a comparatively personal and private method of communication in which messages can be difficult to screen . . . . [I]t is a device readily susceptible to abuse by a person who intends to be a constant trespasser upon our privacy. When the intent of the actor is to inflict one of the higher-intensity emotional states of harass, abuse, and torment in the relatively private, "captive-audience" telephone context, and the actor's conduct is reasonably likely to achieve that end, the First Amendment provides no protection.

Barton, 586 S.W.3d at 579 (quoting *Scott*, 322 S.W.3d at 676 (Keller, P.J., dissenting)). While Presiding Judge Keller agreed with the majority that the "captive-audience" telephone context rendered "high intensity" states of harass, abuse, and torment outside of First Amendment protections, it did not do the same for "low intensity" states also covered by the statute, namely annoy, alarm, embarrass, and offend. *See id.* Regardless, her analysis, like that of the *Scott* court, relied on the notion of telephone calls to a person's home reaching a captive audience entitled to special privacy protections.

In the context of the electronic-communications statute, however, the captive-audience analysis of *Scott* loses force. While *Scott* addresses the uniquely invasive nature of telephone calls, "electronic communications" encompasses a far broader array of activities. *See* Tex. Penal Code Ann. § 42.07(b)(1). Crucially, many of the activities do not fall within the "captive-audience" context, but instead require affirmative

actions by the user to access the content at issue. Specifically, "electronic communications" is defined to include, among other things, "a communication initiated through the use of" electronic mail, a computer, a camera, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine. *Id.* These modes of communication are not made to a captive audience, but rather to an audience taking affirmative steps to seek out the content, rendering the analysis materially different from that of telephone harassment. *Cf. United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182, 125 S.Ct. 1420, 161 L.Ed.2d 181 (2005) (discussing unique privacy considerations regarding telephone harassment).

Indeed, the very idea of the "captive audience" having the privacy of their homes interrupted by unwanted telephone calls has been radically upended even in the decade since *Scott* was decided. Three years ago, and seven years after the *Scott* decision, the United States Supreme Court observed that the vast proliferation of modes and methods of contact in the "Cyber Age" inject new considerations into First Amendment analysis:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, —— U.S. ——, 137 S. Ct. 1730, 1736, 198 L.Ed.2d 273 (2017) (stating courts must "exercise extreme caution before suggesting that the First Amendment provides scant protection" to online access and communication); *see also Barton*, 586 S.W.3d at 584 (discussing *Packingham*, 137 S. Ct. at 1736).

Given that the underpinnings of *Scott* have been weakened by *Wilson*, and the telephone communications addressed in *Scott* differ significantly from the electronic communications at issue here, we agree with the Fort Worth Court of Appeals that *Scott* is not controlling. Given the vast scope of the electronic communications at issue, and absent the limiting construction of *Scott*, we conclude that the electronic-communications-harassment statute goes well beyond a lawful proscription of intolerably invasive conduct and instead reaches a substantial amount of speech protected by the First Amendment. *See Vill. of Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. 1186; *Cohen*, 403 U.S. at 21, 91 S.Ct. 1780; *Barton*, 586 S.W.3d at 584.

B. Level of scrutiny

We turn next to the question of whether the statute is content-based or content-neutral, which determines whether we apply strict scrutiny in analyzing the statute. "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). We begin with the plain text of the statute. Statutes that "place[ ] a prohibition on discussion of particular

topics, while others [are] allowed, [are] constitutionally repugnant." *Hill v. Colorado*, 530 U.S. 703, 722–23, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). However, nothing about the plain language of the electronic-communications-harassment statute indicates that any particular topic or subject matter of speech would be restricted (or not) more than speech on any other topic or subject matter. *See* Tex. Penal Code Ann. § 42.07(a)(7). *Cf. Boos v. Barry*, 485 U.S. 312, 319, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (concluding that embassy-picketing statute was content based because "the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted"). Nor does the statute facially discriminate on the basis of any particular viewpoint, an even more blatant and egregious form of content discrimination. *See Reed*, 576 U.S. at 168, 135 S.Ct. 2218.

Accordingly, we next consider whether the law's justification or purpose otherwise renders it content-based. *See id.* at 165, 135 S.Ct. 2218. In other words, we consider whether the government has adopted a regulation of speech because of disagreement with or distaste for the message it conveys. *See id.* at 164, 135 S.Ct. 2218. Protecting privacy and preventing harassment can be compelling government interests. *See Ex parte Thompson*, 442 S.W.3d 325, 348 (Tex. Crim. App. 2014) ("Privacy constitutes a compelling government interest when the privacy interest is *384 substantial and the invasion occurs in an intolerable manner."); *see also Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988) ("The government has a strong and legitimate interest in preventing the harassment of individuals."). The text of the electronic-communications-harassment statute comports with these legitimate purposes, and there is nothing in the record before us

suggesting that the legislature enacted the statute for the purpose of suppressing free expression. In the absence of such evidence, we conclude that the law's justification or purpose does not render it content-based. *See Reed*, 576 U.S. at 164, 135 S.Ct. 2218.

Under this analysis, the statute is content-neutral, and accordingly we do not presume the invalidity of the statute and need not analyze it under strict scrutiny. *See id.* Rather, we begin with the presumption that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily. *See* Code Construction Act, Tex. Gov't Code Ann. § 311.021(1); *Lo*, 424 S.W.3d at 14–15.

C. Overbreadth

When a party challenges a statute as both overbroad and vague, we first consider the overbreadth challenge. *See Vill. of Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. 1186. Ordinarily, a facial challenge to the constitutionality of a statute can succeed only when it is shown that the statute is unconstitutional in all of its applications. *State v. Johnson*, 475 S.W.3d 860, 864 (Tex. Crim. App. 2015). The First Amendment overbreadth doctrine provides an exception to this rule whereby a litigant may succeed in challenging a law that regulates speech if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (quoting *New York v. Ferber*, 458 U.S. 747, 770, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Thus, the overbreadth doctrine prohibits the government from "banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S.

234, 255, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). The overbreadth doctrine is "strong medicine" to be employed with hesitation and only as a last resort. *Thompson*, 442 S.W.3d at 348 (citing *Ferber*, 458 U.S. at 769, 102 S.Ct. 3348).

Such "strong medicine" is warranted here. As Presiding Judge Keller has noted, the breadth of the electronic-communications-harassment statute is "breathtaking," and has the potential to sweep up large swaths of protected speech:

> This provision is not limited to emails, instant messages, or pager calls. It also applies, for example, to facebook posts, message-board posts, blog posts, blog comments, and newspaper article comments. If a person makes two posts or comments on the internet with the intent to annoy or alarm another, and those two communications are reasonably likely to annoy, alarm, or offend the same person, then a person can be subjected to criminal punishment under this provision.

Criticism can be annoying, embarrassing, or alarming, and it is often intentionally so. Under this statute, a person can criticize another on the internet once, but not twice. That is true even if the criticism is of the person's political views. A blog owner or authorized moderator who wishes a more genteel approach to debate may have the authority to block or eliminate posts to enforce a more refined atmosphere at the owner's website, but the First Amendment prohibits the government from using the coercion of the criminal law to enforce a more refined atmosphere on the internet.

Ex parte Reece, 517 S.W.3d 108, 111 (Tex. Crim. App. 2017) (Keller, P.J., dissenting to denial of review). Likewise, in *Barton*, the Fort Worth Court of Appeals determined that the electronic-communications statute is unconstitutionally overbroad and vague because it "has the potential to reach a vast array of communications," cautioning that courts must take care in evaluating statutes aimed at electronic communications given their relatively recent and unprecedented ubiquity. *Barton*, 586 S.W.3d at 584 (discussing *Packingham*, 137 S. Ct. at 1736).

We agree that by its plain text the scope of the statute prohibits or chills a substantial amount of protected speech, rendering it unconstitutionally overbroad.[8] *See Ashcroft*, 535 U.S. at 255, 122 S.Ct. 1389; *see also Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (when analyzing overbreadth challenge courts construe statute in accordance with plain meaning of its language unless language is ambiguous or leads to absurd result) (applying Tex. Gov't Code Ann. § 311.011(a)).

II. Conclusion

We affirm the trial court's (1) order dismissing the information and (2) habeas-corpus judgment discharging the appellee.

(Zimmerer, J., dissenting without opinion).

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[8] For example, the plain language of the statute is so broad the State could conceivably charge people with harassment for posting, sharing, or sending intentionally "annoying" political social media posts, "alarming" photographs of warzones, or "embarrassing" photographs of celebrities, even if they are not directed to the person who is annoyed, alarmed, or embarrassed.

APPENDIX C

IN COUNTY CRIMINAL COURT AT LAW
Number 16
Harris County Texas

Habeas Cause Number 2250796

Cause Number 2233753

EX PARTE JASPER CHEN

ORDER

On Applicant's facial challenge in Applicant's *Application for Writ of Habeas Corpus and Motion to Quash*, relief is granted on the legal merits. The *Information* in cause number 2233753 is dismissed and quashed.

The Court did not reach Applicant's as-applied challenge, and did not consider the factual merits of the underlying case.

APR 17 2019
Date

(JudgeSignedDt APPLIED)

/s/ [Illegible]
Judge Presiding

APPENDIX D

THE STATE OF TEXAS

VS.

JASPER ROBIN CHEN
7900 CAMBRIDGE, APT #13-2C
HOUSTON, TX 77054

NCIC CODE: 5309 00

CAUSE NO: _____

HARRIS COUNTY CRIMINAL COURT
AT LAW NO: 2233753 016

FIRST SETTING DATE: TO BE

SPN: 02973758

DOB: W M 01/22/1989

DATE PREPARED: 11/16/2018

RELATED CASES: _____

D.A. LOG NUMBER: 2490784

CJIS TRACKING NO.: _____

BY: SB DA NO: 2886010

AGENCY: HPD

O/R NO: 20181113003

ARREST DATE: TO BE

BAIL: TO BE SET AT MAGISTRATION

PRIOR CAUSE NO: _____

CHARGE SEQ NUM: 1

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant District Attorney of Harris County, Texas, in behalf of the State of Texas, and presents in and to the Harris County Criminal Court at Law No. of Harris County, Texas, that in Harris County, Texas, **JASPER ROBIN CHEN**, hereafter styled the Defendant, heretofore on or about **April 15, 2018 continuing through October 29, 2018**, did then and there unlawfully, with intent to harass, annoy, alarm, abuse, torment and embarrass another, namely, Li, Cai, send repeated electronic communications, to-wit: electronic mail and instant message in a manner reasonably likely to harass, annoy, alarm, abuse, torment and embarrass.

FILED

Chris Daniel
District Clerk

NOV 16, 2018

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ [Illegible]
ASSISTANT DISTRICT ATTORNEY
OF HARRIS COUNTY, TEXAS
BAR NO. [Illegible]

INFORMATION