No. 22A-___

In the
Supreme Court of the United States

CHARLES BARTON,
Petitioner,
v.
STATE OF TEXAS,
Respondent.

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

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit.

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, applicant Charles Barton requests an extension of fifty-nine (59) days, to and including November 4, 2022, within which to file a petition for writ of certiorari in this case. His petition will challenge the decision of the Court of Criminal Appeals of Texas in *Ex Parte Barton*, No. PD-1123-19, 2022 WL 1021061 (Tex. Crim. App. 2022). In support of this application, Petitioner states:

1. The Court of Criminal Appeals of Texas issued its opinion on April 6, 2022, and denied a timely petition for rehearing on June 8, 2022. The court's opinion and order denying rehearing are attached to this application as Appendix A and Appendix B. Without an extension, the petition for writ of certiorari would be due on September 6, 2022. This application is filed more than ten days before that date.

2. This Court's jurisdiction would be based on 28 U.S.C. § 1257(a).

3. This case is an excellent candidate for certiorari. In the court below, Petitioner challenged, on First Amendment overbreadth grounds, a provision of the of Texas Penal Code that criminalizes the sending of "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," with the "intent to harass, annoy, alarm,

abuse, torment, or embarrass another." Tex. Penal Code Ann. § 42.07(a)(7). Over four judges' dissent, the court refused to conduct an overbreadth analysis. It concluded instead that "[t]he conduct regulated by § 42.07(a)(7) is non-speech conduct that does not implicate the First Amendment." App. A at 12. It reached this conclusion despite the statute's definition of "electronic communication" 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," including "a communication initiated by electronic mail, instant message, network call, or facsimile machine." Tex. Penal Code Ann. § 42.07(b)(1).

4. The questions presented will essentially be: (1) Does Texas Penal Code § 42.07(a)(7) implicate the First Amendment? (2) Is Texas Penal Code § 42.07(a)(7) facially overbroad in violation of the First Amendment?

5. For each question presented, the Texas court's decision either creates or entrenches a split of authority. First, the holding that Texas Penal Code § 42.07(a)(7) does not implicate the First Amendment collides with decisions of several federal circuit courts that have construed the current version of the federal cyberstalking statute, 18 U.S.C. § 2261A(2)(B). While all have upheld the narrower federal statute against overbreadth challenges, each has held that the statute implicates the First Amendment. *See United States v. Yung*, 37 F.4th 70, 77 (3d Cir. 2022) (holding that the statute "reaches a lot of speech"); *United States v. Fleury*, 20 F.4th 1353, 1363-64 (11th Cir. 2021) (recognizing that "it's feasible to think of

limited instances in which § 2261A(2)(B) could apply to constitutionally-protected speech"); *United States v. Ackell*, 907 F.3d 67, 77 (1st Cir. 2018) (acknowledging that the statute "could have an unconstitutional application"). Although more research needs to be done, undersigned counsel is aware of no contrary authority outside the Texas judiciary as exemplified by its holding in this case.

6. Second, the Texas court's decision entrenches a split among state high courts regarding the overbreadth of statutes criminalizing the same acts as § 42.07(a)(7). *Compare, e.g.*, *People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014) (invalidating New York law proscribing "communicat[ion] with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm," with "intent to harass, annoy, threaten or alarm another person") *and Bolles v. People*, 541 P.2d 80, 81 n.1, 83 (Colo. 1975) (invalidating Colorado law proscribing "[c]ommunicat[ion] with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of communication, in a manner likely to harass or cause alarm," with "intent to harass, annoy, or alarm another person") *with State v. Dugan*, 303 P.3d 755, 760, 772 (Mont. 2013) (upholding in part and invalidating in part Montana law proscribing, "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicat[ing] with a person by electronic communication and us[ing] obscene, lewd, or profane language, suggest[ing] a lewd or lascivious act, or threaten[ing] to inflict injury or physical harm to the person or property of the

person"). Without this Court's review, the split will likely deepen given the ongoing proliferation of laws regulating electronic communication.

7. This case is an ideal vehicle for the Court to consider the questions presented. Because Petitioner's challenge is facial, the Court need only resolve pure questions of law. Further, judges at both appellate levels in Texas reached opposing conclusions on the questions presented, and their analyses will prove useful for the Court's own consideration of those questions: the Court of Criminal Appeals divided 5-4 and granted discretionary review after a split emerged in the Texas Court of Appeals. *Compare Ex parte Barton*, 586 S.W.3d 573 (Tex. App. 2019) (holding § 42.07(a)(7) unconstitutionally overbroad), *rev'd and remanded*, No. PD-1123-19, 2022 WL 1021061 (Tex. Crim. App. Apr. 6, 2022) *with Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076 (Tex. App. Apr. 8, 2019) (upholding § 42.07(a)(7) against overbreadth challenge), *aff'd*, No. PD-0469-19, 2022 WL 1021055 (Tex. Crim. App. Apr. 6, 2022). The decision below is therefore particularly ripe for this Court's review.

8. Petitioner has a legitimate need for a 59-day extension. On July 27, 2022, the Yale Law School Media Freedom & Information Access Clinic (the "Clinic") agreed to enter the case and will serve as lead counsel. The extension is needed for Clinic members to fully familiarize themselves with the decisions below and to conduct additional research. This includes one attorney who will be joining the Clinic on August 16, and law student interns whose semester begins on August 22. Between now and September 6, Clinic attorneys must meet several litigation

deadlines in addition to carrying out their academic and administrative responsibilities. More time is needed for the Clinic to present the issues in a manner most useful to the Court.

9. Counsel for Respondent has indicated that Respondent does not oppose this application.

10. For these reasons, Petitioner respectfully requests that the due date for his petition for a writ of certiorari be extended to November 4, 2022.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1123-19

EX PARTE CHARLES BARTON, Appellant

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

WALKER, J., delivered the opinion of the Court, in which HERVEY, RICHARDSON, YEARY, and NEWELL, JJ., joined. YEARY, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion, in which KEEL, J., joined. SLAUGHTER and MCCLURE, JJ., dissented.

O P I N I O N

In this case, the court of appeals held that § 42.07(a)(7) of the Penal Code, the electronic harassment statute, is unconstitutionally vague and overbroad under the First Amendment. The court determined that it was not bound to follow our decision in *Scott v. State*. 322 S.W.3d 662 (Tex. Crim. App. 2010), *disavowed on other grounds by Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014). In *Scott*, we held that § 42.07(a)(4) of the Penal Code, the telephone harassment statute, does not implicate the freedom of speech protections of the First Amendment of the United States Constitution because it prohibits non-speech conduct. 322 S.W.3d at 669–70. Today, we clarify our

holding in *Wilson* and its impact upon our holding in *Scott*. Following *Scott*'s precedent, we hold that § 42.07(a)(7), the electronic harassment statute, also fails to implicate the First Amendment's freedom of speech protections because it too prohibits non-speech conduct. We reverse the judgment of the court of appeals.

I — Background

Charles Barton, Appellant, was charged with violating Penal Code § 42.07(a)(7), the electronic harassment statute, which provided:

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

Act of May 24, 1973, 63d Leg., R.S., ch. 399, § 1, sec. 42.07, 1973 Tex. Gen. Laws 883, 956–57 (amended 2001)[1] (current version at TEX. PENAL CODE Ann. § 42.07(a)(7)).[2] Appellant filed a motion to quash the information arguing that the statute was unconstitutional and that the information failed to provide adequate notice because it lacked specificity. The motion was denied

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[1] Appellant's case is governed by the 2001 version of the electronic harassment statute. Accordingly, while we will reference the statute with its current citation, this opinion refers to the 2001 version.

[2] "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 by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.

TEX. PENAL CODE Ann. § 42.07(b)(1).

after a hearing. Appellant then filed a pre-trial application for habeas corpus relief again raising the constitutionality of the statute. The trial court denied relief, but the court of appeals held § 42.07(a)(7) unconstitutional and reversed. *Ex parte Barton*, 586 S.W.3d 573, 585 (Tex. App.—Fort Worth 2019) (op. on reh'g). Acknowledging that other appellate courts upheld the constitutionality of § 42.07(a)(7) by applying *Scott*, the court of appeals below nevertheless declined to follow *Scott*—finding that *Scott*'s reasoning was undermined by our later opinion, *Wilson*. *Id.* at 578 n.11, 579–80. The court of appeals found that § 42.07(a)(7) implicated the First Amendment and, following the precedent of its earlier opinion in *Karenev v. State*, held that § 42.07(a)(7) was unconstitutionally vague and overbroad. *Id.* at 580–85 (citing *Karenev v. State*, 258 S.W.3d 210, 213, 218 (Tex. App.—Fort Worth 2008), *rev'd on other grounds*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)).

We granted the State's petition for discretionary review which raised two grounds:

> 1. The court of appeals decided a facial overbreadth claim that was not preserved at trial or raised on appeal.
>
> 2. Is Tex. Penal Code § 42.07(a)(7), which prohibits harassing electronic communications, facially unconstitutional?

We answer the question raised by State's second ground for review: No. Section 42.07(a)(7) does not implicate the First Amendment, and it satisfies the "rational basis" test. The overbreadth doctrine is inapplicable, and we dismiss the State's first ground for review as moot.

II — Overbreadth and Preservation of Error

The State's first ground for review argues that the court of appeals erred in considering overbreadth under the First Amendment because Appellant failed to present a proper overbreadth argument in the trial court. The State and Appellant dispute whether the bare assertion, in

Appellant's motion to quash and the hearing on that motion,[3] that the electronic harassment statute is "overly broad" and "chills" protected speech is sufficiently specific to preserve the overbreadth issue for consideration on appeal.

"The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). "In the First Amendment context, . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.").

Due to our resolution of the State's second ground for review—that § 42.07(a)(7) does not implicate the First Amendment[4]—overbreadth is inapplicable. *See Martin*, 467 U.S. at 268 n.18; *Salerno*, 481 U.S. at 745. Because the doctrine is inapplicable, whether Appellant's bare references to overbreadth are sufficient to preserve the issue for appeal is entirely academic and unnecessary for our analysis.

We therefore dismiss the State's first ground for review as moot.

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[3] During the hearing on the pre-trial application for writ of habeas corpus, the trial court took judicial notice of the arguments that were made in the earlier motion to quash the information and the hearing on that motion.

[4] *Infra* Part VI.

III — Vagueness Challenges Are As-Applied Unless the First Amendment Is Implicated

The State's second ground for review complains that the court of appeals erred in holding that § 42.07(a)(7) is unconstitutionally vague and overbroad on its face.

Generally, "in addressing a vagueness challenge," courts are to "consider whether the statute is vague as applied to a defendant's conduct before considering whether the statute may be vague as applied to the conduct of others." *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018). "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.* (internal quotations omitted).

This general rule gives way when freedom of speech under the First Amendment is involved. "[W]hen a vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct." *State v. Doyal*, 589 S.W.3d 136, 144 (Tex. Crim. App. 2019) (internal quotations omitted). A law implicating First Amendment freedoms may be found facially vague without "a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions." *Id.* at 145.

Determining that § 42.07(a)(7) implicates the First Amendment, the court of appeals evaluated vagueness without first considering whether Appellant showed the statute was vague as applied to his own conduct. *See Barton*, 586 S.W.3d at 580–85.

IV — *Scott v. State*: Conduct Under § 42.07(a)(4) is Non-Speech Conduct

In finding § 42.07(a)(7) unconstitutionally vague, the court of appeals distinguished our opinion in *Scott*. *See id.* at 579. Although *Scott* involved a First Amendment challenge to a different

subsection of § 42.07—subsection (a)(4), the telephone harassment statute—it has been relied upon by other appellate courts to conclude that subsection (a)(7), the electronic harassment statute, does not implicate the First Amendment. *See, e.g.*, *State v. Grohn*, 612 S.W.3d 78, 83 (Tex. App.—Beaumont 2020, pet. filed); *Ex parte McDonald*, 606 S.W.3d 856, 859–61 (Tex. App.—Austin 2020, pet. filed); *Lebo v. State*, 474 S.W.3d 402, 406–08 (Tex. App.—San Antonio 2015, pet. ref'd).[5]

In *Scott*, the appellant argued that § 42.07(a)(4), the telephone harassment statute, is unconstitutionally "vague and overbroad" in violation of the First Amendment. *Scott*, 322 S.W.3d at 665. This statute provided:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:
>
> (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[.]

TEX. PENAL CODE Ann. § 42.07(a)(4). We concluded that the 2001 version of § 42.07(a)(4) is not communicative conduct protected by the First Amendment because the statute criminalizes harassing

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[5] *See also Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *4 (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, at *5 (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, at *7 (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, at *3 (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, at *3 (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, at *2–3 (Tex. App.—Corpus Christi–Edinburg Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication).

We note that one other court of appeals agreed with the appellate court in this case, finding that *Scott* does not apply because *Wilson* had undermined *Scott*'s underpinnings. *State v. Chen*, 615 S.W.3d 376, 383 (Tex. App.—Houston [14th Dist.] 2020, pet. filed).

conduct that, although it may include spoken words, is essentially noncommunicative. *Scott*, 322 S.W.3d at 669–70. Furthermore, we determined that "persons whose conduct violates § 42.07(4)(a) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake." *Id.* at 670. We held that because § 42.07(a)(4) does not implicate the First Amendment, Scott failed to show it was unconstitutionally vague on its face. *Id.* at 669, 670–71.

As the court of appeals correctly noted: "Because section 42.07(a)(4) did not reach communicative conduct, it did not implicate the free-speech guarantee of the First Amendment." *Barton*, 586 S.W.3d at 578 (citing *Scott*, 322 S.W.3d at 669–70). The harassing conduct is non-communicative. It is not speech.

V — *Wilson* did not Change *Scott*'s Holding

Although the court of appeals recognized our holding in *Scott*, it concluded that *Scott*'s reasoning had been undermined by our opinion in *Wilson*. *Id.* at 579–80. In *Wilson*, we revisited § 42.07(a)(4), not on a constitutionality challenge, but on a challenge to the sufficiency of the evidence to support Wilson's conviction. *Wilson*, 448 S.W.3d at 420.

Wilson was charged with violating § 42.07(a)(4), and the evidence showed that she left six voicemail messages on her neighbor's phone over a period of ten months. *Id.* at 420. The court of appeals found the evidence insufficient to show that the telephone communications were "repeated" because the six calls occurred over a ten-month period, and the messages that were not within a thirty-day period of each other were not in close enough proximity to be considered a single episode. *Wilson v. State*, 431 S.W.3d 92, 96 (Tex. App.—Houston [1st Dist.] 2013), *rev'd*, 448 S.W.3d at 426. This analysis followed from a footnote in *Scott*, which stated that:

> The term "repeated" is commonly understood to mean "reiterated," "recurring," or "frequent." . . . Here, we believe that the Legislature intended the phrase "repeated telephone communications" to mean "more than one telephone call in close enough proximity to properly be termed a single episode," because it is the frequent repetition of harassing telephone calls that makes them intolerable and justifies their criminal prohibition.

322 S.W.3d at 669 n.12. The court of appeals identified two messages that it thought might be in close enough proximity to be termed a single episode—one made on August 31 and one made on September 5. *Wilson*, 431 S.W.3d at 96. However, the court of appeals found that there was a legitimate reason for the September 5 call,[6] negating both the element of an intent to harass and the element requiring the call to be made in a manner reasonably likely to harass or annoy. *Id.* According to the court of appeals, without the September 5 call, the remaining calls were too far apart to be considered a "part of a single episode." *Id.* The court of appeals found the element of "repeated" unproven and rendered a judgment of acquittal. *Id.*

On discretionary review, we determined that *Scott*'s footnote twelve was "troublesome," and we accordingly disavowed it. *Wilson*, 448 S.W.3d at 423. We held that "'repeated' means, at a minimum, 'recurrent' action or action occurring 'again.'" *Id.* at 424. "'[O]ne telephone call will not suffice' and a conviction secured by evidence of a single communication will not stand." *Id.* (quoting *Scott*, 322 S.W.3d at 669).

As a result, we found the evidence legally sufficient. *Id.* at 426. Based on

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[6] In the court of appeals's opinion in *Wilson*, the September 5 message related to her neighbor's driveway construction project. In the message Wilson reported that she saw cement debris in the gutters that needed to be cleaned up. *Wilson*, 431 S.W.3d at 96.

In this Court's opinion on discretionary review, we described this particular message as being made on June 11, and the September 5 message instead demanded that her neighbor never talk to or approach Wilson in public again. *Wilson*, 448 S.W.3d at 420, 421.

> the content of the six calls over the ten-month period, combined with evidence of Wilson's combative conduct and verbal abuse toward [her neighbor], the jury could have rationally found that Wilson, with the intent to harass, annoy, alarm, abuse, torment, or embarrass [her neighbor], made repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend her.

Id.

Regarding the court of appeals's determination that, because the September 5th call was made with a facially legitimate reason it could not be counted among the repeated telephone communications, we disagreed and concluded, "by way of an alternate holding," that the court of appeals's sufficiency analysis was flawed. *Id.* at 425. One reason the analysis was flawed—relevant to Appellant's case before us today—was that "the existence of evidence that may support the conclusion that the call had a facially legitimate purpose does not legally negate the prohibited intent or manner of the call." *Id.*

In Appellant's case, the court of appeals understood our alternate holding to mean that we had "acknowledged that a potential offender could have more than one intent in delivering harassing conduct." *Barton*, 586 S.W.3d at 579. Because we "did acknowledge the potential that a 'facially legitimate' reason may exist in a harassing phone call[,]" the court of appeals read *Wilson* to mean "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.* As a result, the court of appeals concluded that § 42.07(a)(4), and therefore § 42.07(a)(7), implicated the First Amendment. *Id.* at 580.

Wilson should not be read so expansively. *Wilson* dealt with a challenge to the sufficiency of the evidence. We specifically and primarily focused on what is sufficient to show the element of

"repeated." Our "alternate holding," in turn, focused on the sufficiency of the evidence to show the necessary intent, or—more accurately—the impact of evidence of some additional intent beyond the statutory requirement. Our "alternate holding" means that the existence of an intent to engage in the legitimate communication of ideas does not negate the existence of the prohibited intent to harass, annoy, alarm, abuse, torment, or embarrass another. *Wilson*, 448 S.W.3d at 425.

This point bears repeating today. Section 42.07(a)(4) makes it an offense for a person to make repeated telephone communications, where those communications are made in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend, *so long as* the person making said communications has an intent to harass, annoy, alarm, abuse, torment, or embarrass another. TEX. PENAL CODE Ann. § 42.07(a)(4). If the person harbors some extra intent in making those communications, he nevertheless still has an intent to harass, annoy, alarm, abuse, torment, or embarrass another. Unless the separate intent is specifically an intent *not to harass, annoy, alarm, abuse, torment, or embarrass another*, the existence of a separate, facially legitimate intent to communicate does not negate the prohibited intent.

That is the point of *Wilson*'s alternate holding. Our "alternate holding" in *Wilson* was *not* that § 42.07(a)(4) could regulate expressive conduct—speech implicating the First Amendment—if the repeated telephone communications were made with an additional intent to engage in the legitimate communication of ideas.

More importantly, even accepting that a person who violates § 42.07(a)(4) may harbor, alongside an intent to harass, an additional intent to engage in the legitimate communication of ideas, that fact does not convert non-expressive conduct into expressive conduct. The Supreme Court has "rejected the view that 'conduct can be labeled 'speech' whenever the person engaging in the

conduct intends thereby to express an idea.'" *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65–66 (2006) (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). Instead, First Amendment protection extends "only to conduct that is inherently expressive." *Id.* at 66.

Accordingly, *Wilson*'s recognition that a person violating § 42.07(a)(4) with an intent to harass, annoy, alarm, abuse, torment, or embarrass another may also have an additional intent to engage in the legitimate communication of ideas does nothing to the core holding of *Scott*. Section § 42.07(a)(4), the telephone harassment statute, is a restriction on conduct that is non-expressive and thus not speech. This remains true even if the offense is committed using words, and even if the person does not have the sole intent to harass, annoy, alarm, abuse, torment, or embarrass another.

VI — *Scott* Applies to § 42.07(a)(7)

Several other appellate courts concluded that *Scott*'s reasoning applies to § 42.07(a)(7), the electronic harassment statute, the same way it applies to § 42.07(a)(4), the telephone harassment statute. *See, e.g.*, *Grohn*, 612 S.W.3d at 83; *McDonald*, 606 S.W.3d at 859–61; *Lebo*, 474 S.W.3d at 407; *supra* note 4.

Those courts found that § 42.07(a)(4) and (a)(7) are the same for First Amendment purposes. As the Third Court of Appeals explained in *McDonald*:

> "[t]he free-speech analysis in Scott is equally applicable to subsection 42.07(a)(7)." . . . Although . . . the language in subsections 42.07(a)(4) and 42.07(a)(7) differs slightly in that subsection 42.07(a)(4) "provides an alternative manner of committing the offense by making repeated phone calls 'anonymously,'" . . . the slight "textual difference is inconsequential to the First Amendment analysis" and . . . the remaining statutory language in the two subsections "is identical."

McDonald, 606 S.W.3d at 860 (quoting *Blanchard*, 2016 WL 3144142, at *3). Indeed,

> all subsections of section 42.07(a) require the same specific intent, that "to harass, annoy, alarm, abuse, torment, or embarrass another." And while subsection (a)(4) is violated when the actor "makes" repeated telephone communications and (a)(7) is violated when the actor "sends" repeated electronic communications, both subsections require for guilt that the repeated communications occur "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

Sanders, 2019 WL 1576076, at *3.

We agree. For First Amendment purposes, *Scott*'s holding—that § 42.07(a)(4), the telephone harassment statute, does not implicate the First Amendment—applies equally to § 42.07(a)(7), the electronic harassment statute. The conduct regulated by § 42.07(a)(7) is non-speech conduct that does not implicate the First Amendment.

VII — Section 42.07(a)(7) is a Facially Constitutional Regulation of Non-Speech Conduct

Section 42.07(a)(7) does not implicate the First Amendment's freedom of speech protections. Accordingly, we use "the familiar 'rational basis' test" to determine whether the statute is facially unconstitutional. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981). "The default, 'general rule' or 'standard' is that state action is 'presumed to be valid' and will be upheld if it is but 'rationally related to a legitimate state interest.'" *Estes v. State*, 546 S.W.3d 691, 697 (Tex. Crim. App. 2018) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). "This general rule 'gives way, however,' when a state action either 'classifies by race, alienage, or national origin,' or 'impinge[s] on personal rights protected by the Constitution.'" *Id.* (quoting *Cleburne Living Center*, 473 U.S. at 440); *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). In applying the rational basis test:

> Above all, a court should spurn any attempt to turn rational-basis review into a debate over the wisdom, eloquence, or efficacy of the law in question. As its name would suggest, rational-basis review should focus solely on the rationality of the law or state action. Should we determine that the State has invoked a legitimate governmental purpose and, in enforcing its law, has charted a course that is "rationally related" to it, "our inquiry is at an end."

Estes, 546 S.W.3d at 698 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993)).

Is a legitimate governmental interest served by § 42.07(a)(7)? As discussed above, the conduct regulated by § 42.07(a)(7) is roughly equivalent to the conduct regulated by § 42.07(a)(4), the telephone harassment statute—at issue in *Scott*. In *Scott*, we noted that the prohibited conduct—making repeated telephone communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend—"invades the substantial privacy interests of another in an essentially intolerable manner." *Scott*, 322 S.W.3d at 668–69, 670. The State has an interest in vindicating the rights of the people which it serves and an interest in protecting the public welfare. *See State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009) ("The legislature may enact laws that enhance the general welfare of the state[.]"); *Williams v. State*, 176 S.W.2d 177, 182 (Tex. Crim. App. 1943) ("the lawmaking bodies of each State pass laws to protect the peace, health, happiness, and general welfare of society, and of the people as a whole."). These interests are legitimate, and § 42.07(a)(7) serves these interests.

Is § 42.07(a)(7) rationally related to serving those interests? Sending repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend would indeed invade the substantial privacy interests of another in an essentially intolerable manner. Undoubtedly, if the idea is to protect the people from having their privacy invaded in such a way, one of the best ways to do that is to punish those who violate that privacy

interest and deter those who would. The means chosen by the Legislature further the interest.

Thus, § 42.07(a)(7) is rationally related to a legitimate governmental interest. As for whether the statute is unconstitutionally vague, because § 42.07(a)(7) does not regulate speech and therefore "does not implicate the free-speech guarantee of the First Amendment," Appellant, "in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct. He has not done that. Therefore, his vagueness challenge fails." *See Scott*, 322 S.W.3d at 670–71. We hold that § 42.07(a)(7), the electronic harassment statute, is not facially unconstitutional.

We sustain the State's second ground for review.

VIII — Conclusion

Since § 42.07(a)(7) does not regulate speech, and therefore does not implicate the free-speech guarantee of the First Amendment, the statute is not susceptible to an overbreadth challenge. Thus, we need not address whether Appellant preserved his overbreadth issue for appellate review. As a regulation of non-speech conduct, § 42.07(a)(7) is not facially unconstitutional because it is rationally related to a legitimate governmental interest. The question of whether the statute is vague will have to wait for a proper as-applied challenge.

We reverse the judgment of the court of appeals and remand to that court for proceedings consistent with this opinion.

Delivered: April 6, 2022
Publish

In the Court of Criminal Appeals of Texas

No. PD-1123-19

EX PARTE CHARLES BARTON,

Appellant

On State's Petition for Discretionary Review
From the Second Court of Appeals
Tarrant County

YEARY, J., filed a concurring opinion.

I agree with the Court and join its opinion. The statute at issue here protects citizens from harassment—from being forced and compelled to endure the delivery of repeated electronic communications sent to them in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another, and with the specific

intent to do just that to them.[1] The conduct covered by the law applicable in this case appears to me to be limited in kind to instances in which harassing communications are directed and targeted specifically at an individual.[2] That the law would seek to defend private citizens from

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[1] Our Texas harassment law was enacted as part of the 1974 Penal Code. Acts 1973, 63rd Leg., ch. 399, § 1, p. 883, eff. Jan. 1, 1974. Since then, it has been amended nine times. *See* TEX. PENAL CODE § 42.07 (amended in 1983, 1993, 1994, 1995, 1999, 2001, 2013, 2017, and 2021).

Appellant in this case was charged by information with committing nine separate counts of harassment. The offenses were alleged to have occurred on or about dates between August 25, 2012, and November 16, 2012. During that time frame, the applicable harassment statute provided that:

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

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(a)(7)).

[2] Subsection (b) of our harassment law, during the relevant time frame, provided the following definition of "electronic communication":

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

such targeted harassment is no more surprising than that it would seek to protect them from stalking, offensive touching, or assault.

With these additional thoughts, I join the Court's opinion.

FILED: April 6, 2022
PUBLISH

See Acts 2001, 77th Leg., ch. 1222, § 1, p. 2795, eff. Sept. 1, 2001 (current version at TEX. PENAL CODE § 42.07(b)).

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1123-19

Ex parte CHARLES BARTON, Appellant

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SECOND COURT OF APPEALS TARRANT COUNTY

KELLER, P.J., filed a dissenting opinion in which KEEL, J., joined.

Suppose a citizen, unhappy with an opinion from this Court, sent repeated emails to a group of like-minded citizens, saying "Texas is in trouble" and "This is arguably the most devastating ruling I have ever received from a court" and "It's time to get serious and get on the phone, write letters, etc to EVERYONE YOU KNOW to make them aware of what's happening. Name names on this court! If this stands we lose Texas. It's do or die this time." Has that citizen committed a crime? Under the Court's decision today, the answer is "Yes." At the risk of being prosecuted myself for violating § 42.07(a)(7) of the Texas Penal Code, let me say here that the people of Texas should be alarmed by this holding.

The Court holds today that the "electronic communications" subsection of the Texas

harassment statute "does not implicate the First Amendment's freedom of speech protections" because the conduct that it regulates is non-speech conduct. I cannot agree. The term "electronic communications" alone suggests that the regulated conduct is speech, but the statutory definition of the term makes it clear that the regulated conduct is indeed speech. The statute defines "electronic communications" broadly, and the mens rea of the statute includes intent to "annoy," "alarm," or "embarrass" another. The statute encompasses a vast amount of speech that is protected by the First Amendment. And although I have been critical of *Scott v. State*[1] in the past, the statute in this case is far broader than the telephone harassment statute, and we need not overrule *Scott* to find the statute here to be unconstitutional.

> Section 42.07(a)(7) provides that a person commits an offense if:
>
> > with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he. . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.[2]

"Electronic communication" is defined expansively to mean:

> > 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.[3]

"Electronic communication" includes"a communication initiated by electronic mail, instant message, network call, communication tool, or a facsimile machine"[4] and "a communication made to a pager."[5]

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[1] 322 S.W.3d 662 (Tex. Crim. App. 2010).

[2] TEX. PENAL CODE § 42.07(a)(7) (2011).

[3] *Id.* § 42.07(b)(1).

[4] *Id.* § 42.07(b)(1)(A).

[5] *Id.* § 42.07(b)(2)(B).

A transfer of signals, writing, images, sounds, or data by an "electromagnetic system" necessarily includes use of the internet. While the telephone harassment statute was limited to communications over the telephone, the electronic-communications statute is much more expansive, encompassing anything that could be thought of as an electronic communication.

But the breadth of the electronic-communications statute does not derive solely from the variety of electronic devices that may deliver communications or the variety of formats in which communications may occur. It also derives from the scope of the intended audience. Telephone conversations are, at least most of the time, limited to one individual communicating with another. But the internet opens up very public avenues of communication. Message boards, blogs, and internet news articles can be seen by the entire world. Depending on the privacy settings, Facebook posts can be seen by a large assortment of people. Then there are Twitter, Instagram, Snapchat, Tik Tok, and many other social networking platforms.

Since most communications over the phone are one-on-one, they are in some sense private, and although there are ways to block at least some types of unwanted calls, in some sense a telephone user might be considered a "captive audience" for harassing telephone communications. Privacy and "captive audience" rationales might allow for greater leeway in regulating telephone communications.[6] But when those rationales are absent, we should be especially leery of punishing speech. As the Supreme Court explained in *Cohen v. California*: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially

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[6] *See Cohen v. California*, 403 U.S. 15, 21-22 (1971) (referring to "substantial privacy interests . . . being invaded in an essentially intolerable manner" and "the special plight of the captive auditor").

intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[7]

The Court suggests that we need not reach the issue of whether the statute can be upheld under the *Cohen* privacy rationale because the electronic-communications statute is not aimed at speech. I disagree. The Court begins with the fact that it is possible to find some kernel of expression in almost every activity a person undertakes. But the electronic-communications statute is not concerned with just any activity—it is concerned with *communications*. And the "electronic" methods of delivering communications—including the internet and social media platforms—are mediums for delivering speech. Given the inherently communicative aspect of electronic communications, at least as a general matter, the Court errs to engage in an analysis of whether otherwise non-speech conduct constitutes expression.[8] The "intent to convey a particularized message" test for determining whether conduct that is ordinarily non-speech is actually expressive has no application to something that is ordinarily speech or expression.[9]

The Court makes much of the fact that the electronic-communications statute encompasses the mere sending of data, and it concludes that the repeated sending of data could be meaningless to an individual. Someone could send emails to flood another person's inbox. The emails could contain meaningless gibberish. But it is not enough to say that it is possible to violate a statute by conduct

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[7] *Id.* at 21.

[8] *See Ex parte Thompson*, 442 S.W.3d 325, 334-36 (Tex. Crim. App. 2014) (no intent to convey a particularized message required for inherently expressive conduct such as parades, paintings, and photographs) (discussing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group,* 515 U.S. 557 (1995)).

[9] *Id.*

that does not implicate the First Amendment, if under an overbreadth analysis, the statute reaches a substantial amount of First Amendment conduct in relation to its legitimate sweep.[10]

In *Thornhill v. Alabama*, for example, an anti-loitering statute made it an offense to loiter around or picket a business with intent to influence or induce others not to patronize the business.[11] Under the language of the Alabama statute, it appears that a criminal violation could occur if a person physically blocked entry into a business. Physically blocking entry would not be speech protected under the First Amendment. But the Supreme Court nevertheless found the statute to be overbroad because its language "comprehend[ed] every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer."[12]

And in *State v. Johnson*, we acknowledged that "intentionally or knowingly damaging a United States flag is not inherently expressive" and that "a statute that proscribes such conduct will

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[10] *See See Thornhill v. Alabama*, 310 U.S. 88, 91, 99-100 (1940) (loitering/picketing at a business); *State v. Johnson*, 475 S.W.3d 860, 873 (Tex. Crim. App. 2015) (flag desecration).

[11] *Thornhill*, *supra* at 91. Specifically, the Alabama statute provided that it was an offense to:

> go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or . . . [to] picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another.

Id.

[12] *Id.* at 100.

at least theoretically apply to some circumstances that do not implicate the First Amendment."[13] But we pointed out that "[m]ost conduct that falls within the provisions of the statute and that would come to the attention of the authorities would constitute protected expression."[14] We concluded that the flag desecration statute was unconstitutionally overbroad because it, "by its text and in actual fact, prohibit[ed] a substantial amount of activity that is protected by the First Amendment, judged in relation to its legitimate sweep."[15]

If we look at the electronic-communications statute's actual sweep, we can see that its language encompasses a truly enormous amount of speech. This is so even accounting for the requisite intent to harass, annoy, alarm, abuse, torment, or embarrass. As the examples at the beginning of this opinion illustrate, alarming someone could be the point of the communication. And so could annoying and embarrassing. One can look as far back as the parable of the unjust judge in the Bible to see an example of a persistent woman who finally gets relief from an unjust judge so that she will stop bothering him.[16] As for intent to embarrass, one could look to Andrew Breitbart's disclosure of Anthony Weiner's indiscretions and Breitbart's subsequent follow-ups on that story.[17] Often, the intent specified in the statute will be a legitimate purpose of the communication. The First

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[13] *Johnson*, 475 S.W.3d at 873.

[14] *Id.* at 876.

[15] *Id.* at 882.

[16] Luke 18:1-5.

[17] *See* https://www.npr.org/2011/06/07/137042268/looking-at-breitbarts-role-in-weiners-scandal.

Amendment protects a great deal of speech that is purposefully annoying, alarming, or embarrassing.[18]

What about the *Scott* case? First, *Scott* said that the harassing phone calls would be essentially noncommunicative "in the usual case."[19] *Scott* did not hold that the harassing conduct at issue was inherently nonspeech; it held that it was usually nonspeech.[20] But the "usual case" in *Scott* was based narrowly on the use of a telephone, which ordinarily involves a private one-on-one communication. The electronic-communications statute is much broader, involving not only myriad different methods of conveying electronic communications but also involving an expanded audience—in many cases including everyone who has access to the internet or to a particular social media app.

Moreover, the *Scott* opinion explicitly contemplated that the recipient of the call would be the

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[18] *See Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) ("The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct."); *Long v. State*, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) ("The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed. Many legitimate political protests, for example, contain both of these elements.").

[19] 322 S.W.3d at 669-70 (saying it twice).

[20] Scott did not create an alternative holding when it held that harassing phone calls under the statute were not protected by the First Amendment because the conduct invaded privacy interests in an intolerable manner. Rather, it created a supplemental holding—that in the "not usual" case the conduct was still not protected by the First Amendment because the conduct was an intolerable intrusion on privacy. *See id.* at 670 ("To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct 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.").

target of the actor's intent to harass, annoy, alarm, abuse, torment, or embarrass.[21] But with many forms of electronic communications—e.g. an internet news article, a blog post, a message board post, or a social media post—there will usually be a great number of recipients of the communication who are not targets of the actor's harassing intent. In fact, it would often be unnecessary for the target of the actor's intent to even receive or read the electronic communication. When information about the target is disclosed in such a public manner, and when that information is what causes the target to be embarrassed or annoyed or alarmed, that information is speech.

And our later opinion in *Wilson v. State*[22] retreated from *Scott* in two respects: (1) by rejecting the notion that the term "repeated" was limited to situations that could be termed a single criminal episode,[23] and (2) by rejecting the notion that a facially legitimate purpose for a call negated having the requisite intent to harass, annoy, alarm, abuse, torment, or embarrass.[24] Even if the *Wilson* opinion's retreat in these two respects did not ultimately invalidate the conclusion in *Scott*, that retreat undermines any extension of the reasoning in *Scott* to the broader electronic-communications statute.

I strongly disagree with the Court's conclusion that the electronic-communications statute does not implicate the First Amendment. It follows that I also disagree with the Court's conclusion that the rational basis test provides the appropriate framework for evaluating the constitutionality of the statute. I would conduct an overbreadth analysis under the First Amendment and resolve whether

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[21] *Id.* at 669 ("First, the text requires that the actor have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient of the telephone call.").

[22] 448 S.W.3d 418 (Tex. Crim. App. 2014).

[23] *Id.* at 422-24.

[24] *Id.* at 425-26.

the statute punishes a substantial amount of protected speech in relation to its legitimate sweep. Because the Court does not answer that question, I will say here only that the breadth of the statute convinces me that the answer is "yes."

I respectfully dissent.

Filed: April 6, 2022

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APPENDIX B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
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6/8/2022 **02-17-00188-CR**
BARTON, EX PARTE CHARLES Tr. Ct. No. 1314404 **PD-1123-19**

On this day, the Appellant's motion for rehearing has been denied.
PRESIDING JUDGE KELLER WOULD GRANT

Deana Williamson, Clerk

DISTRICT CLERK TARRANT COUNTY
THOMAS WILDER
401 W. BELKNAP
FORT WORTH, TX 76196
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