No. 18-1182

In the Supreme Court of the United States

SCOTT OGLE, PETITIONER

v.

STATE OF TEXAS

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Texas Legislature has chosen to protect the citizens of Texas by criminalizing a variety of harassing conduct, including the sending of repeated electronic communications that are intended to "harass, annoy, alarm, abuse, torment, or embarrass another" and that are reasonably likely to do so. Tex. Penal Code § 42.07(a)(7). Numerous state courts have rejected First Amendment attacks on similar laws, holding that the laws penalize harassing conduct, not protected speech, and are otherwise justified by the States' interest in preventing intolerable invasions of privacy.

In this interlocutory appeal, Petitioner asks the Court to declare three words in section 42.07(a)(7) overbroad: the words "annoy," "alarm," and "embarrass." Pet. i. A ruling in his favor would not resolve anything, as Petitioner could still be tried under the unchallenged portion of the statute.

The questions presented are:

1. Does the Court have jurisdiction over a non-final judgment from a state court when Petitioner does not seek to invalidate the entire law under which he has been charged, meaning that further state-court proceedings will be required regardless of how the Court rules?

2. Does the First Amendment prohibit Texas from criminalizing the intentional act of sending repeated electronic communications to someone for the purpose of inflicting emotional distress?

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INTRODUCTION

Texas's harassment law is not unusual or unconstitutional. Laws like it have been upheld across the country as permissible restrictions on conduct, not speech. The face of Texas's law—its specific-intent requirement, requirement of repeated communications, and use of a reasonable-person standard—demonstrates that its focus is on conduct, regardless of the message communicated. Texas's law also prevents intolerable invasions of privacy from those who would seek to do other Texans harm. That narrow focus fits comfortably within the constitutional limits on state power.

But the Court should not even reach that question because the Court lacks jurisdiction in this case. Petitioner has not been tried or convicted, so this case comes to the

Court in an interlocutory posture. Because the relief Petitioner seeks—invalidating three words in the statute—will not preclude further proceedings in state court, the decision of Texas's Third Court of Appeals cannot be considered final for purposes of 28 U.S.C. section 1257(a). The Court should, therefore, deny the petition.

JURISDICTION

Although Petitioner has challenged the validity of a Texas statute under the First Amendment, for the reasons described below, the underlying decision is not a final judgment from the highest court in Texas. 28 U.S.C. § 1257(a); *see infra* pp. 10-15. The Court, therefore, lacks jurisdiction.

STATEMENT

I. Texas's Criminal Harassment Statute

A. Like most other States, Texas has a criminal harassment statute: Texas Penal Code section 42.07. Section 42.07 criminalizes a variety of harassing behavior, including making obscene proposals, threatening an individual with bodily injury, conveying a false report that someone has died, causing a telephone to ring repeatedly, making harassing telephone communications, and, at issue in this case, sending repeated, harassing electronic communications.

In order to be criminally liable under section 42.07, an individual must have the specific intent to "harass, annoy, alarm, abuse, torment, or embarrass another." *Id.* § 42.07(a). Under Texas law, "[a] person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious

objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a).

Subsection (a)(7), the subsection Petitioner is charged with violating, prohibits an individual with the requisite specific intent from "send[ing] repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." *Id.* § 42.07(a)(7). As confirmed by the Third Court of Appeals in this case, the "reasonably likely" standard refers to the "average person." Pet. App. 5.

At the time Petitioner sent the allegedly harassing electronic communications, "electronic communication" was defined as "a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, 2001 Tex. Gen. Laws 2795, 2795 (codified at Tex. Penal Code § 42.07(b)(1)). The term included:

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

Id.

The violation of any portion of section 42.07 is typically a Class B misdemeanor, Tex. Penal Code § 42.07(c), the punishment of which may include a fine of up to $2000, confinement in jail of up to 180 days, or both a fine and jail time, *id.* § 12.22. The violation is raised to a Class A misdemeanor, however, if it is an individual's second

conviction under section 42.07. *Id.* § 42.07(c)(1). A Class A misdemeanor permits a fine of up to $4000, jail time of up to one year, or both a fine and jail time. *Id.* § 12.21.

In 2017, the Texas Legislature incorporated section 42.07(a)(7) into new anti-bullying legislation, known as David's Law, that passed with overwhelming bipartisan support. Act of May 27, 2017, 85th Leg., R.S., ch. 522, 2017 Tex. Gen. Laws 1400, 1400-08. David's Law expanded the definition of "electronic communication" to also include "a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, [or] any other Internet-based communication tool." Tex. Penal Code § 42.07(b)(1)(A). The Legislature also made a violation of section 42.07(a)(7) a Class A misdemeanor when (1) the offense was committed against a child under 18 years of age with the intent that the child commit suicide or engage in conduct causing serious bodily injury to the child; or (2) if the individual has previously violated a temporary restraining order or injunction issued to stop that individual from cyberbullying a child. *Id.* § 42.07(c)(2); Tex. Civ. Prac. & Rem. Code ch. 129A. David's Law became effective on September 1, 2017. Act of May 27, 2017, *supra*, § 18, 2017 Tex. Gen. Laws at 1407.

B. Prior to this case, the Third Court of Appeals in Texas had already held that section 42.07(a)(7) was not overbroad in violation of the First Amendment. *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *4 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication). Section 42.07(a)(7) had also withstood other First Amendment challenges in Texas state courts. *See 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); *Lebo v. State*, 474 S.W.3d 402, 408 (Tex. App.—San Antonio 2015, pet. ref'd); *Duran v. State*, Nos. 13-11-00205-CR, -00218-CR, 2012 WL 3612507, at *2-3 (Tex. App.—Corpus Christi Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication).

Each of the courts of appeals' decisions upholding section 42.07(a)(7) relied on the Texas Court of Criminal Appeals' decision in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). *Scott* concerned an overbreadth challenge to Texas Penal Code section 42.07(a)(4) which criminalizes, among other things, making repeated telephone communications with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another," and "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." The court rejected the First Amendment challenge.

The court first concluded that section 42.07(a)(4) was not aimed at "communicative conduct that is protected by the First Amendment," but rather "noncommunicative" conduct, which receives no such protection. *Scott*, 322 S.W.3d at 669-70. The court pointed to four features of the statute that indicated it was focused on noncommunicative conduct, rather than speech:

1) the actor must have the specific intent to harass, annoy, alarm, abuse, torment, or embarrass the recipient,
2) there must be repeated calls,
3) the actor must make the calls in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend an average person, and
4) the actor is not required to use spoken words.

Id. at 669.[1] Given that statutory text, the court concluded that "the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words." *Id.* at 670; *see also id.* (noting that violators "will not have an intent to engage in the legitimate communication of ideas, opinions, or information," but "only the intent to inflict emotional distress for its own sake").

Relying on *Cohen v. California*, 403 U.S. 15, 21 (1971), the court also recognized that States may lawfully proscribe communicative conduct that invades the substantial privacy interests of another in an essentially intolerable manner. *Scott*, 322 S.W.3d at 668-69. Thus, even if the statute could be applied to communicative conduct, the court reasoned that such communicative

[1] With respect to the requirement of "repeated" calls, the court has since clarified that the statute simply requires more than one call. *Wilson v. State*, 448 S.W.3d 418, 424 (Tex. Crim. App. 2014).

conduct "is not protected by the First Amendment because . . . that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.* at 670.

The Texas courts of appeals that have considered the constitutionality of section 42.07(a)(7) prior to this lawsuit have relied heavily on the *Scott* decision, finding no reason to distinguish harassing telephone communications from harassing electronic communications. *See, e.g.*, *Blanchard*, 2016 WL 3144142, at *3 (holding the "free-speech analysis in *Scott* is equally applicable to subsection 42.07(a)(7)"); *Lebo*, 474 S.W.3d at 407 (same). The Thirteenth Court of Appeals specifically noted the similarities between subsections (a)(4) and (a)(7): both require (1) a specific intent, (2) repeated communications, and (3) communications made in a manner "reasonably likely" to harass the average person. *Duran*, 2012 WL 3612507, at *2. Thus, those courts concluded that section 42.07(a)(7) does not implicate protected speech and is, therefore, constitutional. *See, e.g.*, *Ex parte Reece*, 2016 WL 6998930, at *3; *Blanchard*, 2016 WL 3144142, at *3-4.

II. Factual and Procedural History

A. According to the arrest-warrant affidavits, Petitioner Scott Ogle contacted the Hays County Sheriff's Office numerous times and used "profane, insulting, obscene and disrespectful language." Pet. App. 29, 36. Lieutenant Skrocki advised Petitioner by email to cease such communications, otherwise the Sheriff's Office would pursue criminal charges. Pet. App. 29, 36. Peti-

tioner nevertheless continued to send harassing electronic communications to Deputy Paris and Lieutenant Skrocki. Pet. App. 30, 37.

Consequently, Petitioner was charged in two separate informations with violating Texas Penal Code section 42.07(a)(7). Pet. App. 26-27, 34-35. Specifically, it was alleged that Petitioner "with intent to harass, annoy, alarm, abuse, torment, or embarrass" the recipients "sen[t] repeated electronic communications to [the recipients] in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: repeated phone calls, calls for service, emails, and/or subpoenas many of which contained offensive or disparaging language." Pet. App. 26; *see also* Pet. App. 34 (containing same charge but excluding reference to subpoenas). Although the affidavits reveal a portion of some of the allegedly unlawful communications, the contents of most of the communications are not included. Pet. App. 30, 37.

Petitioner filed an application for a pretrial writ of habeas corpus, challenging the constitutionality of section 42.07(a)(7) under the First Amendment.[2] Pet. App. 1-3. The trial court denied his application for habeas relief. Pet. App. 23.

B. Petitioner sought interlocutory review of the denial of his pretrial habeas petition in the Third Court of

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[2] Although Petitioner was released on bail, *see* Clerk's Record at 32, confinement, for purposes of habeas relief, includes any restraint on personal liberty, including release on bail. *See, e.g.*, *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001).

Appeals in Austin, Texas. Pet. App. 1-2. The court began by reviewing the Texas Court of Criminal Appeals' decision in *Scott*, as well as its own decision in *Blanchard* and the other Texas appellate court decisions upholding section 42.07(a)(7). Pet. App. 4-8.

Petitioner urged the court to depart from those rulings, asserting that, under *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), Texas's statute was an unlawful content-based restriction on speech. Pet. App. 9-11. The court rejected this argument, holding that section 42.07(a)(7) criminalized harassing conduct, not speech, and the statute was focused on the "manner" of the communication, not its "content." Pet. App. 12. Relying on *Cohen*, 403 U.S. at 21, the court also recognized that Texas has an interest in proscribing even communicative conduct, if that conduct invades the substantial privacy interests of another in an essentially intolerable manner. Pet. App. 13. The court construed section 42.07(a)(7) as "being directed at people repeatedly using electronic communications to invade the personal privacy of another with the intent to inflict emotional distress." Pet. App. 17.

The court, therefore, affirmed the trial court's decision to deny Petitioner's habeas application. Pet. App. 18.

C. Petitioner filed a petition for discretionary review with the Texas Court of Criminal Appeals, which denied the petition. Pet. App. 19. Presiding Judge Keller wrote a short dissent from the denial in which she reiterated her previous position that section 42.07(a)(7) was overbroad and could be abused by government officials. Pet. App. 20-22.

D. Petitioner then filed this cert petition. Significantly, Petitioner is no longer challenging all of section 42.07(a)(7) as overbroad under the First Amendment. Instead, Petitioner has limited his overbreadth argument to the words "annoy," "alarm," and "embarrass." Pet. i, 29-34. He makes no argument as to the remainder of the statute (referring to communications made with the intent to harass, abuse, or torment).

ARGUMENT

I. This Case Is a Poor Vehicle Because the Court Lacks Jurisdiction and There Is an Insufficient Record to Decide the Overbreadth Issue.

Petitioner bears the burden to demonstrate that the Court has jurisdiction to review the judgment of the lower court. *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). Because this case arises from a Texas state court, the Court has jurisdiction only if Petitioner seeks review of a "[f]inal judgment[] or decree[] rendered by the highest court of a State." 28 U.S.C. § 1257(a). Compliance with section 1257 is an "essential prerequisite" to the Court deciding the merits of a case brought under that section. *Johnson*, 541 U.S. at 431.

Petitioner cannot meet that burden here. The judgment Petitioner asks this Court to review is interlocutory, and none of the circumstances identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-85 (1975), which permit the Court to treat certain interlocutory appeals as effectively final, apply. Because Petitioner challenges only a portion of the statute under which he has been charged, further state-court proceedings will be

necessary regardless of what this Court holds, so the Texas court's decision is not "final."

Regardless, this case is a poor vehicle to decide the question presented, as further factual development is necessary to make an overbreadth determination. The overbreadth doctrine should not be used unless section 42.07(a)(7) can validly be applied to Petitioner, which is unknown on this record. Moreover, there is no factual record as to how electronic communications, the internet, and web-based companies even operate in this context—what tools are available to harass or stop harassment. Deciding a facial overbreadth challenge with such a lack of relevant information would require the Court to base its constitutional decision on speculation about electronic communications and the internet generally. The Court should not endeavor to make such a significant ruling without a record.

A. Because a ruling in Petitioner's favor will not preclude further proceedings, the Court lacks jurisdiction.

The Court's jurisdiction over appeals from state-court judgments is limited to final judgments. 28 U.S.C. § 1257(a). In the context of a criminal prosecution, "[t]he general rule is that finality . . . is defined by a judgment of conviction and the imposition of a sentence." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *see also Arceneaux v. Louisiana*, 376 U.S. 336, 338 (1964) (per curiam). Petitioner has not yet been tried, convicted, or sentenced. Instead, he is seeking interlocutory review

of the denial of his pretrial habeas petition.[3] Pet. App. 1-2.

There are four circumstances identified by the Court in which a non-final state-court judgment will be treated as final for purposes of section 1257. *Cox*, 420 U.S. at 476-85. Petitioner asserts without explanation that the fourth category permits review here. Pet. 34-35 (citing *Cox*, 420 U.S. at 482-86). Under that category, a judgment may be considered "final" if

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in the Supreme Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and . . . reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than

[3] In Texas, there is little difference at the trial level between a pretrial habeas petition and other vehicles to raise legal issues before trial. *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005) (per curiam). But there is a significant difference in terms of appellate rights as interlocutory appeal is available only for the denial of pretrial habeas petitions. *Id.* Consequently, pretrial habeas petitions are limited to situations, like facial constitutional challenges, in which granting the petition would result in immediate release. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016). When he was in state court, Petitioner sought to have section 42.07(a)(7) declared unconstitutional as a whole, which would have led to his immediate release from his conditions of bail.

> merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Cox, 420 U.S. at 482-83. If these circumstances are present, and a refusal to immediately review the state-court decision would "seriously erode federal policy," the Court may consider the interlocutory ruling to be final as to the federal issue. *Id.*

In each of the examples listed in *Cox* of this fourth category, including *Cox* itself, a favorable ruling by this Court would have ended the litigation. *See, e.g.*, *id.* at 485-86 (unconstitutional cause of action); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (unconstitutional cause of action); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (exclusive venue provision); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963) (exclusive jurisdiction of NLRB). The same holds true for cases decided since *Cox* that rely on the fourth category. *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988) (federal preemption of state cause of action); *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (compelled arbitration).

In the unique circumstances presented by this case, however, granting Petitioner the relief he seeks—invalidation of *three words* in section 42.07(a)(7), Pet. i—would not be "preclusive of any further litigation on the relevant cause of action," but would "merely control[] the nature and character of . . . the state proceedings still to come." *See Cox*, 420 U.S. at 482-83. Petitioner was charged with violating section 42.07(a)(7) in its entirety,

including having the intent to "harass, annoy, alarm, abuse, torment, or embarrass another" and sending electronic communications in a manner reasonably likely to do so. Pet. App. 26-27, 34-35. Yet before this Court, Petitioner seeks limited relief: a holding that the words "annoy," "alarm," and "embarrass" make the statute overbroad. Pet. i, 29-34. He provides no argument or analysis regarding the remaining words in the statute (harass, abuse, and torment). Any remedy then, should the Court reach that stage, would be limited to partial invalidation of section 42.07(a)(7) with a remand to determine whether Petitioner may be found guilty for violating the unchallenged portion.

As recognized by this Court, it is an "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Even when a statute is determined to be overbroad under the First Amendment, invalidation of the offending provision permits a State to enforce the remaining portion of the statute. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Indeed, the Court in *Reno v. American Civil Liberties Union* severed the overbroad phrase "or indecent" from the prohibition on "obscene or indecent" communications in order to preserve the remainder of the Communications Decency Act. 521 U.S. 844, 882-83 (1997).

Here, the harassment statute is phrased in the disjunctive—"or"—meaning that Petitioner could still be convicted if his communications were harassing, abusing,

or tormenting, rather than alarming, annoying, or embarrassing. Tex. Penal Code § 42.07(a)(7). And the underlying presumption in Texas law is that statutory provisions are severable. Tex. Gov't Code § 311.032(c). The only relief Petitioner seeks, and therefore the only relief Petitioner could obtain, is partial invalidation of the statute and a remand for further proceedings under the portion of the statute that remains enforceable. In the circumstances presented here, the state-court decision is not final. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 658-60 (2003) (Stevens, J., concurring) (noting that jurisdiction under fourth *Cox* category was lacking because further proceedings would not necessarily be precluded).

The finality requirement of section 1257(a) serves several purposes, including avoiding piecemeal review of state-court decisions and limiting federal intrusion into state affairs. *N.D. State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). Those purposes would not be served by concluding that jurisdiction exists in this case. The Court lacks jurisdiction and should deny the petition.

B. This case is a bad vehicle to adjudicate the facial validity of Texas's electronic-communications harassment law.

For the same reason the Court lacks jurisdiction, this case would be a poor vehicle to address the constitutionality of section 42.07(a)(7). Only a portion of the statute is being challenged, and further proceedings will be necessary whatever this Court decides. And a jury could well find Petitioner not guilty of harassment.

Moreover, the Court has previously noted that it is "not the usual judicial practice" nor is it "generally desirable" to "proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989). At this stage, the record does not reveal the specific circumstances surrounding Petitioner's electronic communications. There is no way to determine whether section 42.07(a)(7) would condemn his conduct or whether a court would conclude that his communications were protected by the First Amendment. Thus, "for reasons relating both to the proper functioning of courts and to their efficiency," the constitutionality of section 42.07(a)(7), as applied to Petitioner, should be decided prior to any overbreadth challenge. *See id.* at 485.

Further, an overbreadth challenge is "ordinarily more difficult to resolve" than an as-applied challenge, because it requires the "consideration of many more applications than those immediately before the court." *Id.* (citing *Broadrick*, 413 U.S. at 615). This Court has already noted that the innovations presented by the internet complicate any constitutional analysis. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (stating that the Court "cannot appreciate yet [the internet's] full dimensions and vast potential" and that "courts must be conscious that what they say today might be obsolete tomorrow"); *see also id.* at 1744 (Alito, J., concurring) (agreeing that the Court should be "cautious in applying [its] free speech precedents to the internet"). This case magnifies those concerns.

Because of the manner in which this case has arrived at the Court (a single overbreadth question with no factual development), much about the use and regulation of electronic communications is unknown. There is no factual record regarding, for example, options the recipients of harassing communications may use to block the sender, what tools internet companies have used to combat misuse of their products, and whether harassers can create new online identities and continue their harassment. And the privacy concerns that are implicated by electronic communications, when one's phone or watch serves as a portable computer to be taken anywhere and everywhere, deserve further development from the lower courts. If the Court is to determine whether an electronic-communications harassment statute is overbroad, or narrowly tailored, such information is essential. And it is entirely absent from this record.

The Court should refrain from making new law regarding the intersection of the First Amendment and the internet with so little information and precedent to guide it. This is yet another reason to deny the petition even if the Court believes it has jurisdiction.

II. Petitioner's Purported Split Is Illusory.

Harassment laws like Texas's have been upheld in numerous States—far more than identified by Petitioner. *See, e.g.*, *State v. Gattis*, 730 P.2d 497, 501 & n.1 (N.M. Ct. App. 1986) (listing cases). And many of those statutes includes the words challenged here: annoy, alarm, and embarrass.

The reason most of the courts have upheld these types of statutes is that, like the Texas state courts, they

have concluded that these laws do not implicate the First Amendment because they penalize conduct, not speech. These courts also take into account this Court's admonition that States can prevent even communicative conduct that substantially invades an individual's privacy in an essentially intolerable manner.

Petitioner's cases that find these statutes unconstitutional either (1) ignore the conduct/speech analysis entirely, or (2) reach a different conclusion based on the unique features of the law at issue. Consequently, there is no real split among the state courts that requires this Court's resolution.

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

1. Petitioner would have the Court skip the essential question in this case—the question that has proven dispositive in many of the state-court cases on this issue: Does the statute criminalize speech or conduct? If section 42.07(a)(7) criminalizes conduct, then there is no need to conduct a First Amendment analysis, as criminal conduct is not protected by the First Amendment, even if it is carried out through speech. *See, e.g.*, *Packingham*, 137 S. Ct. at 1737 ("Specific criminal acts are not protected speech even if speech is the means for their commission.").

Harassing conduct receives no First Amendment protection. This Court indicated as much in *Cantwell v. Connecticut* when it stated that "[r]esort to epithets or personal abuse is not in any proper sense communication

of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." 310 U.S. 296, 309-10 (1940). Multiple state courts considering First Amendment challenges to harassment laws have concluded the same. The West Virginia Supreme Court of Appeals has determined that "[p]rohibiting harassment is not prohibiting speech, because harassment is not protected speech." *State v. Thorne*, 333 S.E.2d 817, 819 (W. Va. 1985). And the Supreme Judicial Court of Massachusetts has likewise noted that "the United States Supreme Court held that speech or writing used as an integral part of conduct in violation of a valid criminal statute is not protected by the First Amendment." *Commonwealth v. Johnson*, 21 N.E.3d 937, 946 (Mass. 2014) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

The West Virginia Supreme Court of Appeals, therefore, upheld a statute prohibiting repeated telephone calls made "with intent to harass or abuse another," quoting *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), for the proposition that it has "'never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Thorne*, 333 S.E.2d at 819 & n.4.

Similarly, upheld by the Supreme Judicial Court of Massachusetts upheld as a limitation on conduct, rather than speech, *Johnson*, 21 N.E.3d at 946-47, a statute that penalized "willfully and maliciously" engaging in a

"knowing pattern of conduct or series of acts" that "seriously alarms" a person and "would cause a reasonable person to suffer substantial emotional distress." Mass. Gen. Laws ch. 265, § 43A(a). The unlawful conduct was defined to include the use of a telecommunication device or electronic communication device. *Id.*

The Florida Supreme Court has, likewise, upheld Florida's harassment statute (which focused on telephone calls made with the intent to "annoy, abuse, threaten, or harass") against an overbreadth challenge, holding that it was "not directed at the communication of opinions or ideas, but at conduct." *State v. Elder*, 382 So.2d 687, 690 (Fla. 1980).

A number of intermediate state appellate courts have also reached the conclusion that harassment statutes aimed at either telephone or electronic communications—many of which use language similar to Texas's law—do not implicate the First Amendment because they concern conduct, not speech. *See, e.g.*, *State v. Brown*, 85 P.3d 109, 114 (Ariz. Ct. App. 2004) (requiring "intent to harass"); *State v. Richards*, 896 P.2d 357, 362 (Idaho Ct. App. 1995) (requiring "intent to annoy, terrify, threaten, intimidate, harass or offend"); *von Lusch v. State*, 387 A.2d 306, 310 (Md. Ct. Spec. App. 1978) (requiring "intent to annoy, abuse, torment, harass, or embarrass"); *Gattis*, 730 P.2d at 502 (requiring "intent to terrify, intimidate, threaten, harass, annoy or offend"); *State v. Camp*, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982) (requiring a "purpose of abusing, annoying, threatening, terrifying or embarrassing"); *State v. Kronenberg*, No. 101403, 2015 WL 1255845, at *2, *6 (Ohio Ct. App. Mar.

19, 2015) (requiring a "purpose to abuse, threaten, or harass").[4]

Several federal circuit courts have also ruled that harassment statutes, like Texas's, are permissible regulations of conduct, not speech. The Second Circuit upheld Connecticut's harassment statute that prohibited making telephone calls "with intent to harass, annoy or alarm" and "in a manner likely to cause annoyance or alarm." *Gormley v. Dir., Conn. State Dep't of Probation*, 632 F.2d 938, 941 (2d Cir. 1980) (holding that "[c]learly the Connecticut statute regulates conduct, not mere speech."). The Fourth Circuit, likewise, upheld the West Virginia statute discussed above, reasoning that "[b]ecause the telephone is normally used for communication does not preclude its use in a harassing course of conduct." *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988); *see also United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978) (upholding federal statute that criminalized telephone calls made "solely to harass any person at the called number").

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[4] Ruling on constitutionality of: Ariz. Rev. Stat. § 13-2921(A)(1) (regarding "communicat[ing] or caus[ing] a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means"); Idaho Code § 18-6710(1) (regarding telephone calls when caller makes obscene or lewd comments, threatens physical harm, or disturbs the peace); Md. Code, Crim. Law § 3-804(a)(2) (regarding repeated telephone calls); N.M. Stat. § 30-20-12(A) (regarding telephone calls made to annoy or disturb); N.C. Gen. Stat. § 14-196(a)(3) (regarding repeated telephone calls); Ohio Rev. Code § 2917.21 (regarding telecommunications).

2. When determining whether a harassment statute targets speech or conduct, the courts considering First Amendment claims look for (1) a specific-intent requirement, (2) a requirement of repeated communications, and (3) whether the communications would be harassing to the average person.

Most significant is the specific-intent requirement, as it narrows the applicability of such statutes to acts intended to cause emotional distress, as opposed to communications intended to convey a message. The Supreme Judicial Court of Massachusetts noted that the "scienter requirement" undermined any argument that an individual could be liable "if his actions were accidental." *Johnson*, 21 N.E.3d at 945 ("[A]s the statute requires both malicious intent on behalf of the perpetrator and substantial harm to the victim, 'it is difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions.'"). The West Virginia Supreme Court of Appeals has similarly noted that, by requiring an intent to harass, "[p]hone calls made with the intent to communicate are not prohibited." *Thorne*, 333 S.E.2d at 819.

Other high courts have agreed. The Supreme Court of Montana stated that the specific-intent requirement "removes the danger of criminalizing protected speech." *State v. Dugan*, 303 P.3d 755, 769 (Mont. 2013) (criminalizing certain communications made with a "purpose to terrify, intimidate, threaten, harass, annoy, or offend"). And the Supreme Court of New Hampshire upheld a law prohibiting "repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose to annoy or alarm another," in part because of

the specific-intent requirement. *State v. Gubitosi*, 958 A.2d 962, 968-69 (N.H. 2008).

The specific-intent requirement answers many of Petitioner's concerns about the hypothetical breadth of Texas's law. Pet. 31. As explained by an intermediate court in Idaho,

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

Richards, 896 P.2d at 362. An appellate court in California has likewise concluded that a specific-intent requirement serves to narrow the law and excludes those who act under mistake of fact or accident. *People v. Astalis*, 172 Cal. Rptr. 3d 568, 573 (Cal. App. Dep't Super. Ct. 2014) (requiring "intent to annoy or harass"); *see also City of Montgomery v. Zgouvas*, 953 So.2d 434, 443 (Ala. Crim. App. 2006) (requiring "intent to harass or alarm"); *Brown*, 85 P.3d at 113 (requiring "intent to harass").[5]

In addition to a specific-intent requirement, some courts have also noted that a requirement of repeated

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[5] Ruling on constitutionality of: Ala. Code § 13A-11-8(b)(1) (regarding telephone, mail, and electronic communications); Cal. Penal Code § 653m(b) (regarding repeated telephone calls or contact through an electronic communications device).

communications also serves to limit the scope of any harassment law—one harassing call or email will not suffice. *Astalis*, 172 Cal. Rptr. 3d at 573 ("[P]rudence may justify a hands-off policy for single calls made with the intent to harass, but as harassing calls are repeated the state interest in intervening to protect the recipient becomes more compelling."); *see also Gubitosi*, 958 A.2d at 968-69. And, as recognized by the Texas Court of Criminal Appeals, the number and frequency of communications can bear on the intent of the sender, as well as the question whether they are reasonably likely to cause the requisite distress. *Wilson*, 448 S.W.3d at 424.

Finally, Arizona and Texas state courts that have considered the constitutionality harassment laws have found it significant when they employ a reasonable-person standard, such that an individual cannot be found guilty unless his communications would have caused emotional distress to the average person. *Brown*, 85 P.3d at 113; *Scott*, 322 S.W.3d at 669; Pet App. 5.

B. Privacy interests permit the States to regulate some communicative conduct.

To the extent electronic or telephone harassment laws reach communicative conduct, courts also balance the speaker's right to communicate with the recipient's right to be left alone and the State's ability to protect essential privacy interests. This reasoning finds its origin in two cases from this Court.

First, in *Rowan v. United States Post Office Department*, the Supreme Court upheld against a First Amendment challenge a federal law that allowed individuals to bar mail from senders they found objectionable. 397 U.S.

728, 729-30 (1970). Balancing the right of an individual "to be let alone" with the right of others to communicate, the Court held that "a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail," and that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The Court concluded that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.* at 738.

Second, courts have referenced this Court's discussion of privacy interests in *Cohen*, in which the Court stated that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." 403 U.S. at 21.

Quoting *Rowan*, a Kentucky appellate court upheld a harassment statute prohibiting telephonic and written communications made with the "intent to harass, annoy or alarm," holding that "[t]his form of communication intrudes upon a justifiable privacy interest of the recipient and therefore, this right to communicate must be considered in light of a person's right 'to be left alone.'" *Yates v. Commonwealth*, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988). The Texas Court of Criminal Appeals has similarly relied on *Cohen* to justify any restriction on communicative conduct. *Scott*, 322 S.W.3d at 668-69; *see also State v. Kipf*, 450 N.W.2d 397, 407-09 (Neb. 1990) (citing *Cohen* and upholding prohibition on telephone and electronic communications that used obscene language and were

made with "intent to terrify, intimidate, threaten, harass, annoy, or offend").

The Supreme Court of South Carolina concluded that the use of the telephone involves "substantial privacy interests" and that the State has a "legitimate interest in prohibiting obscene, threatening or harassing telephone calls." *State v. Brown*, 266 S.E.2d 64, 65 (S.C. 1980). A California appellate court has also agreed that the government has an "important interest in protecting the substantial privacy interests of individuals from being invaded in an intolerable manner." *Astalis*, 172 Cal. Rtpr. 3d at 572 (citing *Cohen*); *see also Thorne*, 846 F.2d at 243 ("The government has a strong and legitimate interest in preventing the harassment of individuals."); *Gattis*, 730 P.2d at 502 (citing *Cohen*).

These privacy interests remain unchanged no matter the form of the communication, be it by mail, *see, e.g.*, *Rowan*, 397 U.S. at 736; by telephone, *see, e.g.*, *Brown*, 266 S.E.2d at 65; or by email, *see, e.g.*, *Astalis*, 172 Cal. Rptr. 3d at 572.

C. The cases cited by Petitioner either fail to conduct the relevant analysis or are distinguishable.

The Third Court of Appeals in this case followed the analysis just described, concluding that section 42.07(a)(7) was focused on conduct, not speech, and that any limitation on communicative conduct was justified by preventing an invasion of privacy interests. *See supra* pp. 18-26. The Montana Supreme Court case cited by Petitioner also concluded that the specific-intent requirement in the Montana statute limited its application to conduct alone. *Dugan*, 303 P.3d at 769. But the cases

cited by Petitioner on the other side of the purported split either ignore the precedent regarding conduct or reach a different conclusion based on the unique features of the law at issue.

1. The Colorado Supreme Court in *Bolles v. People* failed entirely to consider whether Colorado's statute, which prohibited communications made with the "intent to harass, annoy, or alarm," prohibited conduct, rather than speech. 541 P.2d 80, 82-83 (1975). Indeed, an Alabama appellate court chose not to follow *Bolles* because it failed to take into account the Colorado statute's specific-intent requirement. *Zgouvas*, 953 So.2d at 443 n.2. Because the Colorado court did not consider whether the statute was aimed at conduct, concluding instead that it was directed solely at speech, the remainder of the analysis was a foregone conclusion. A blanket restriction on speech could not be justified by privacy interests alone. *Bolles*, 541 P.2d at 83-84.

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

In short, the two primary cases on which Petitioner relies to create his split fail to perform the analysis used by most courts considering these types of laws. The split, then, does not reflect different legal conclusions on the

same question, but rather a failure by two courts to consider all of the relevant constitutional arguments.

2. The remaining cases cited by Petitioner concern unique statutes that could reasonably be construed to impact speech, rather than conduct. Pet. 16-19. The Illinois statute struck in *People v. Klick*, for example, criminalized a single phone call made with an intent to annoy. 362 N.E.2d 329, 330 (Ill. 1977). Even under the analysis discussed above, a court could reasonably construe the statute as aimed at speech: it had a minimal intent requirement, no requirement of repeated calls, and no reasonable-person standard.

In *Provo City v. Whatcott*, the Utah statute's specific-intent requirement included not only "intent," but also "recklessly creating a risk" that the phone call would "annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten any person." 1 P.3d 1113, 1115-16 (Utah Ct. App. 2000). The court reasonably concluded that the language "recklessly creating a risk" opened the statute to far more applications than are constitutionally permissible. *Id.*

Washington's harassment statute did not require repeated communications, did not use a reasonable-person standard, and was also unconstitutionally vague. *City of Everett v. Moore*, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984). And a Wisconsin appellate court found overbroad a statute that, like the one in Illinois, criminalized a single phone call with only the intent to annoy and had no reasonable-person standard. *State v. Dronso*, 279 N.W.2d 710, 711 n.1, 714 (Wis. Ct. App. 1979).

These cases do not reflect a nationwide split among state courts, as the statutes considered and rejected are

different from Texas's in significant ways. Although there may be room for argument around the edges of any particular statute, there is no irresolvable split that requires the Court's intervention.

III. This Is Not an Issue of National Importance.

Petitioner's assertion that this case is one of national importance rests primarily on assertions that First Amendment rights are foundational to democracy. Pet. 25-28. Texas does not deny that. But Petitioner has not shown that Texas's law, and others like it around the country, preclude a substantial amount of protected speech such that this Court needs to intervene.

As noted by Petitioner, most States have some form of criminal harassment statute. Pet. 1. Yet Petitioner has identified only a handful of cases over the past 30 years that he claims demonstrate the overbreadth problem—and the cases he cites were all remedied on appeal.[6] Pet. 24 (citing *State v. Smith*, No. 2013AP2516-CR, 2014 WL 2974157 (Wis. Ct. App. July 3, 2014) (unpublished); *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999); *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989)).

Left without proof that these statutes are being used to prohibit a substantial amount of protected speech, Pe-

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[6] The same holds true for most of the cases cited in Eugene Volokh's article. Eugene Volokh, *Can you be prosecuted for repeated unwanted emails to government offices or officials?* THE VOLOKH CONSPIRACY (Sept. 13, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/13/can-you-be-prosecuted-for-repeated-unwanted-emails-to-government-offices-or-officials.

titioner suggests that the citizens of some States face intolerable uncertainty regarding the constitutionality of their harassment laws. Pet. 23-24. First, some of those States have had an intermediate court opine on the constitutionality of their laws. *Astalis*, 172 Cal. Rptr. 3d at 573; *Yates*, 753 S.W.2d at 875; *Gattis*, 730 P.2d at 502. Second, it is mere speculation that citizens of those States are remaining silent for fear of violating a harassment law. Indeed, if there is a credible threat of prosecution, a citizen of any State could bring a declaratory judgment claim and challenge the constitutionality of the law. *See, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-31 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974).

Finally, Petitioner hypothesizes that individuals in New York or Colorado may be found guilty for sending harassing communications to individuals in Texas or Montana that they are free to send in their own States. Pet. 22. Again, this is pure speculation. Moreover, if any State attempts to convict someone for speech that is actually protected by the First Amendment, the conviction should be overturned under the First Amendment, no matter what a state statute says.

In sum, Petitioner fears that speakers will "hedge and trim" their comments, Pet. 23, but can only hypothesize instances in which that might happen. The absence of cases demonstrating harm and the presence of remedies to address such concerns demonstrate that this issue is not one that needs to be addressed by the Court at this time.

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

A. For the reasons described by the Third Court of Appeals, section 42.07(a)(7) is constitutional. Pet. App. 11-12. It criminalizes conduct, not protected speech, as evidenced by (1) the specific-intent requirement, (2) the requirement of repeated communications, and (3) the reasonable-person standard. Tex. Penal Code § 42.07(a)(7). To the extent any communicative conduct is included, such limitations are justified to prevent intolerable intrusions into significant privacy interests. Pet. App. 12-13.

The specific-intent requirement, in particular, eliminates much of Petitioner's concern about prohibiting protected speech that might have the effect of annoying, alarming, or embarrassing someone. Again, under Texas law, "intent" requires proof that it is the individual's "conscious objective or desire to engage in the conduct or cause the result." Tex. Penal Code § 6.03(a). And the Texas Court of Criminal Appeals has determined that this intent requirement means that the individual must have the goal of "inflict[ing] emotional distress for its own sake." *Scott*, 322 S.W.3d at 670; Pet. App. 5-6.

Petitioner's examples dilute this requirement by mistaking the possible effect or byproduct of the communication with the goal of the communication (the intent). Pet. 31. For example, Petitioner suggests someone might email the seller of a defective product intending to "annoy" it into replacing the product. Pet. 31. But the intent of the email is to obtain a replacement product—not to annoy the seller for the sake of annoying the seller. Petitioner's other hypotheticals are similar: voicing displeas-

ure with a legislative representative, trying to get a restaurant to improve its hygiene practices, and trying to get a landlord to improve his shoddy practices. Pet. 31. All seek to communicate an idea or persuade the listener—not to cause emotional distress for its own sake.

Texas's statute, including the words alarm, annoy, and embarrass, is a permissible regulation of conduct that does not implicate the First Amendment.

B. Even if the Court concludes that Texas's statute limits speech, rather than conduct, it is still constitutional because it is content-neutral. Petitioner asserts that section 42.07(a)(7) criminalizes speech based on its "function or purpose." Pet. 32-33 (citing *Reed*, 135 S. Ct. at 2227). But the face of section 42.07(a)(7) makes no such distinctions. *See Reed*, 135 S. Ct. at 2228 (judging whether law is content-based on its face).

Section 42.07(a)(7) does not criminalize electronic communications based on their content, but on the intent of the sender and the effect on a reasonable recipient *regardless* of the content of what is said. For example, "I love watching you sleep" would be a sweet exchange between newlyweds, but alarming (and potentially criminally harassing) if coming from an abusive ex-spouse. Sharing an embarrassing college photograph could be good-natured reminiscing among old friends or an attempt to intimidate or threaten someone. While the content of the communication may be relevant to the intent and effect, it does not determine whether the speech is prohibited.

The Texas Court of Criminal Appeals took this view in *Wilson*, in which a defendant convicted of harassment by telephone argued that he could not be guilty because

the content of his telephone calls was benign. 448 S.W.3d at 425. The court held, however, that "[b]enign content does not always prove benign intent." *Id.* Instead, the content of the communication is simply evidence to support whether it was sent with the requisite unlawful intent and whether it would be reasonably likely to cause emotional distress. *See id.*

Regarding Connecticut's harassment statute, the Second Circuit has similarly reasoned that "[a] recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet." *Gormley*, 632 F.2d at 941. The Third Circuit, considering a federal telephone harassment statute, noted that "the nature of the conversation can have no bearing on the constitutionality of the section since its narrow intent requirement precludes the proscription of mere communication." *Lampley*, 573 F.2d at 787. And the Fourth Circuit found West Virginia's harassment statute "even-handed and neutral." *Thorne*, 846 F.2d at 244.

If the Court concludes that section 42.07(a)(7) regulates speech, it should also hold that section 42.07(a)(7) is content-neutral. As such, like other time, place, and manner restrictions, it need only be narrowly tailored to serve a legitimate government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). As described above, preventing harassment and protecting privacy are legitimate government interests that support harassment laws. *See supra* pp. 18-26. And section 42.07(a)(7)'s specific-intent requirement, requirement for repeated communications, and reasonable-person standard make it narrowly tailored to serve that purpose.

C. Even if the Court concludes that the law is content-based, it is narrowly tailored to serve a compelling government interest. *Reed*, 135 S. Ct. at 2226. As described above, there can be no question that the States possess a compelling interest in protecting their citizens from harassing conduct that is intended to cause emotional distress. *See supra* pp. 18-26; *see also Lampley*, 573 F.2d at 787 (stating that "Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives"). Texas certainly has an interest in protecting its citizens, but section 42.07(a)(7) is also used to protect its most vulnerable population—children who are being bullied. *See supra* p. 4. Texas's interest is compelling and, for the reasons stated above, section 42.07(a)(7) is narrowly tailored to serve that interest.

D. Finally, Petitioner has not shown that the sweeping relief of facial invalidation under the overbreadth doctrine is appropriate here. Instead, any alleged First Amendment violations can be remedied through as-applied relief. *See, e.g.*, *Kipf*, 450 N.W.2d at 409 ("To the extent that an overbreadth problem should arise in isolated cases, the appropriate remedy is to handle such cases on an individual basis.").

As the Court has recognized, the overbreadth doctrine is "less rigid" when dealing with "conduct in the shadow of the First Amendment." *Broadrick*, 413 U.S. at 614-15. In other words, the use of a facial overbreadth claim "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure

speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615.

Texas's statute, along with others around the country like it, applies to harassing conduct, not speech. *See supra* pp. 18-24; Pet. App. 11-17. Consequently, any overbreadth must be "real" and "substantial" when judged in relation to the statute's "plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Petitioner's speculation about what could happen under Texas's law is insufficient to meet that burden. *See Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("It is clear . . . that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). Thus, even if Texas's law presented constitutional concerns, Petitioner will be unable to show that it is facially overbroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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