No. _____

In The
Supreme Court of the United States

SCOTT OGLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Third Court Of Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Texas criminalizes the repeated sending of "electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," if those communications are sent "with intent to harass, annoy, alarm, abuse, torment, or embarrass another." TEX. PENAL CODE ANN. § 42.07(a)(7). Texas appellate courts have held that section 42.07(a)(7) is not unconstitutionally overbroad. And Texas's highest criminal court—which has upheld the telephonic-communication subsection of section 42.07(a) that includes the same intent and "reasonably likely" benchmarks—has repeatedly refused to review the electronic-communication subsection at issue here. The Supreme Court of Montana has upheld a similar statute, while the high courts of Colorado and New York have held that functionally identical statutes are unconstitutionally overbroad.

The question presented is:

Does a statute criminalizing electronically communicated speech that is both intended and reasonably likely to annoy, alarm, or embarrass another person prohibit a substantial amount of protected speech in relation to the statute's legitimate sweep, thus violating the First Amendment?

PARTIES TO THE PROCEEDINGS

Applicant Scott Ogle, a defendant in criminal proceedings in Texas state court, filed a pretrial application for a writ of habeas corpus in the Hays County Court at Law, which that court denied. He was then the appellant before the Third Court of Appeals of Texas and the appellant-petitioner before the Texas Court of Criminal Appeals, the state court of last resort for all criminal matters in Texas.

The State of Texas was the appellee in the Third Court of Appeals and the appellee-respondent before the Texas Court of Criminal Appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER MATERIALS

TABLE OF AUTHORITIES—Continued

Scott Ogle respectfully petitions for a writ of certiorari to review the judgment of the Third Court of Appeals of Texas.

INTRODUCTION

This Court should grant the petition to resolve a square and irreconcilable conflict on an important issue of First Amendment doctrine: whether states can criminalize electronically communicated speech that is intended and reasonably likely to annoy, alarm, or embarrass another person, or whether such statutes are unconstitutionally overbroad because they prohibit a substantial amount of protected speech in relation to their legitimate sweep.

Almost all fifty states prohibit some form of criminal harassment, yet states like Texas have targeted not only harassing conduct, but also communications that reach beyond unprotected speech (like obscenity or true threats) to encompass speech that is protected but disfavored because of its annoying, embarrassing, or alarming content. The decision below deepens and entrenches an enduring split on these types of content-based criminal prohibitions, which are broad enough to encompass a wide range of core protected speech—ranging from the emailed criticisms of law enforcement implicated in petitioner's case to disparaging restaurant reviews posted on Yelp.

The state high courts of New York and Colorado have struck down as unconstitutionally overbroad criminal harassment statutes that are functionally identical to Texas Penal Code section 42.07(a)(7), recognizing that such prohibitions impermissibly sweep in a substantial amount of protected speech. By contrast, the Texas court below—following precedent from the Texas Court of Criminal Appeals upholding the identical prohibition as to telephonic communications—and the Supreme Court of Montana have upheld functionally identical criminal harassment statutes, concluding that the intent requirement limits if not negates the amount of protected speech these statutes affect. As a result of the conflict, the same speech concerning the same content spoken with the same intent is protected in Colorado or New York, but could subject the speaker to prosecution in Texas or Montana. In fact, communications that are protected in Colorado or New York could result in prosecution if received in Texas or Montana.

Uncertainty over the scope of First Amendment protection in the criminal harassment context is particularly dangerous, as even innocent speakers will feel compelled to "hedge and trim" any criticisms in their electronic communications, *see Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam), fearful that some jurisdiction will ascribe criminal consequences to annoying, alarming, or embarrassing speech. And silencing criticism—especially criticism of the government or public officials—undermines the essential role of freedom of speech as a bulwark against tyranny.

See, *e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (explaining that speech on public issues "should be uninhibited, robust, and wide-open," even if it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Moreover, when, as with Texas Penal Code section 42.07(a)(7), criminal harassment statutes encompass electronic communications, the chilling effect impacts the "most important" place in today's society for "the exchange of views," namely the "vast democratic forums of the Internet." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

Because the Texas and Montana statutes, like the now-invalidated Colorado and New York statutes, criminalize speech based on its content, they are subject to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). And there is no compelling state interest to justify such broad proscriptions of annoying, alarming, or embarrassing speech when narrower alternatives exist to combat harassing conduct or extreme harassment communicated through unprotected speech like obscenity or true threats.

This case presents an excellent vehicle to resolve an important constitutional question. Petitioner raises a facial First Amendment challenge, so no material facts are in dispute. The decision below was final as to the federal issue. And the Texas Court of Criminal Appeals has repeatedly declined discretionary review of section 42.07(a)(7), leaving

Texas law entrenched. The Court should grant the petition and provide the guidance necessary to ensure that the First Amendment's meaning does not depend on the speaker's or recipient's residence.

OPINIONS BELOW

The county court at law did not issue an opinion. The Third Court of Appeals's unpublished opinion (Pet. App. 1) is available at *Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385 (Tex. App. Aug. 1, 2018). The published opinion of Presiding Judge Keller of the Texas Court of Criminal Appeals, dissenting from that court's refusal to grant the petition for discretionary review (Pet. App. 20), is available at *Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018).

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

The Fourteenth Amendment to the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

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

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

TEX. PENAL CODE ANN. § 42.07(a)(7). The text of section 42.07 in its entirety is set forth in the Appendix (Pet. App. 39-41). Also set forth in the Appendix are criminal harassment statutes from Colorado (Pet. App. 41-42), Illinois (Pet. App. 42-43), Montana (Pet. App. 44-46), and New York (Pet. App. 46-47).

STATEMENT

I. STATUTORY BACKGROUND

The Texas Penal Code prohibits sending, with the intent to harass, annoy, alarm, abuse, torment, or embarrass, "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm,

abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07(a)(7).[1]

The intent requirement in section 42.07 has shifted throughout the statute's existence. An early, 1965 harassment statute applied to "[w]hoever uses any vulgar, profane, obscene, or indecent language over or through any telephone or whoever uses any telephone in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another, except if such call be for a lawful business purpose." Act of June 17, 1965, ch. 575, § 1, 1965 Tex. Gen. Laws 1254, 1254. When later codified in the Penal Code, the statute included a slightly different mental state, requiring a defendant who "intentionally, knowingly, or recklessly annoys or alarms the recipient." *See Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983) (quoting then-effective TEX. PENAL CODE ANN. § 42.07(a)(1)). But the Fifth Circuit struck down that version of section 42.07 as unconstitutionally vague, reasoning that Texas courts had made no attempt to construe the terms "annoy" and "alarm" or to clarify whose sensibilities must be offended. *Id.* at 178.

[1] The other subsections of section 42.07(a) apply the same intent requirement ("intent to harass, annoy, alarm, abuse, torment, or embarrass another") to other forms of speech or actions, including initiating obscene communications, communicating threats, conveying alarming and false reports of injury or death, repeatedly ringing another's telephone "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," making and intentionally refusing to disengage a call, and knowingly permitting a phone under one's control to be used to commit an offense under the subsection. TEX. PENAL CODE ANN. § 42.07(a)(1)-(6).

The next enactment included what remains the current mental state in section 42.07(a), requiring "intent to harass, annoy, alarm, abuse, torment, or embarrass another" in a manner "reasonably likely" to achieve the intended effect on the recipient. *See* Act of June 17, 1983, ch. 411, § 1, 1983 Tex. Gen. Laws 2204, 2205.

In 2001, the legislature added subsection (7) to section 42.07(a), extending the harassment statute to electronic communications. *See* Act of June 15, 2001, ch. 1222, § 1, Tex. Gen. Laws 2795, 2795. "Electronic communication" is now broadly defined by the statute 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." TEX. PENAL CODE ANN. § 42.07(b)(1). As of 2017, this definition includes any communication "initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine." *Id.* § 42.07(b)(1)(A) (amended by Act of June 9, 2017, ch. 522, § 13, 2017 Tex. Gen. Laws 1400, 1407).

As to the requirement that there be "repeated electronic communications," *id.* § 42.07(a)(7), the Texas Court of Criminal Appeals has interpreted the word "repeated" to mean two or more communications.

See Wilson v. State, 448 S.W.3d 418, 425 (Tex. Crim. App. 2014). Thus, any two electronic communications that are (a) intended to harass, annoy, alarm, abuse, torment, or embarrass and (b) reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend any particular person constitute a violation of section 42.07(a)(7).[2]

II. FACTUAL AND PROCEDURAL HISTORY.

This case presents a First Amendment facial challenge to section 42.07(a)(7) of the Texas Penal Code. *See* Pet. App. 1-2, 8. Texas charged petitioner in two separate informations with harassment under section 42.07(a)(7) for allegedly sending repeated electronic communications to two police officers with the intent to harass, annoy, alarm, abuse, torment, or embarrass the officers and in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend. Pet. App. 1, 26-27, 32-33.[3]

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[2] The intent and reasonable-likelihood requirements include the same list of effects on the recipient of the communication except for "offend," which applies only to the "reasonably likely" aspect. TEX. PENAL CODE ANN. § 42.07(a)(7).

[3] Unhappy with the level of attention given to his requests for police assistance, petitioner sent multiple emails to the officers, calling one "arrogant, condescending, belligerent" and someone "who chooses to look the other way." Pet. App. 30. Petitioner also criticized the other officer, calling him a "little bitch" and "little state weasel," and telling that officer, "[y]ou have a Constitution to uphold, son, you're pissing on it." Pet. App. 37. Petitioner also served a subpoena in a separate lawsuit on one of the officers, a

In a pretrial application for a writ of habeas corpus, petitioner argued that the informations filed against him were unlawful because section 42.07(a)(7) is facially overbroad in violation of the First Amendment. Pet. App. 1-2. The county court at law denied petitioner's writ application, and petitioner appealed. Pet. App. 2.

The court of appeals affirmed the lower court's order denying petitioner's application for a writ of habeas corpus. Pet. App. 2. The court held that its ruling on section 42.07(a)(7) was governed by the Texas Court of Criminal Appeals's decision in *Scott v. State*, which rejected a facial overbreadth challenge to a different subsection of section 42.07(a). Pet. App. 12-17 (discussing 322 S.W.3d 662, 670-71 (Tex. Crim. App. 2010) (upholding section 42.07(a)(4), which prohibits a person from "caus[ing] the telephone of another to ring repeatedly or mak[ing] repeated telephone communications anonymously or 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), *abrogated on other grounds by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014)). In *Scott*, the Texas Court of Criminal Appeals characterized the subsection at issue there as "directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in

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fact included in one of the charging instruments for his prosecution. Pet. App. 26; *see also* Pet. App. 24.

a manner reasonably likely to inflict emotional distress." 322 S.W.3d at 669-70. As such, that court stated, "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.

The court below noted that it had already applied *Scott* to section 42.07(a)(7), holding that a person who violates the electronic-communication subsection has no "intent to engage in the legitimate communication of ideas, opinions, or information." Pet. App. 6-7 (quoting *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *3 (Tex. App. June 2, 2016, pet. ref'd)). Quoting *Scott*, the court below reiterated that "communications made with the specific intent to inflict one of the designated types of emotional distress 'for its own sake' invade the substantial privacy interests of the victim in an essentially intolerable manner," and thus "are not the type of legitimate communication that is protected by the First Amendment." *Id.* (quoting *Scott*, 322 S.W.3d at 670, and *Blanchard*, 2016 WL 3144142, at *3-4). The court held, therefore, that section 42.07(a)(7) was constitutional. Pet. App. 17.

Petitioner sought discretionary review in the Texas Court of Criminal Appeals. That court denied review over the dissent of Presiding Judge Keller, who described the scope of the statute as "breathtaking." Pet. App. 20 (quoting *Ex parte Reece*, 517 S.W.3d 108, 111 (Tex. Crim. App. 2017) (Keller, P.J., dissenting from refusal of petition)). As she had observed in her previous dissent from that court's refusal to address

the constitutionality of section 42.07(a)(7), the scope of the electronic communications encompassed by this statute "is not limited to emails, instant messages, or pager calls. It also applies, for example, to [F]acebook posts, message-board posts, blog posts, blog comments, and newspaper article comments." *Reece*, 517 S.W.3d at 111 (Keller, P.J., dissenting from refusal of petition).[4]

In dissenting from that court's refusal, yet again, to consider the constitutionality of section 42.07(a)(7), Presiding Judge Keller reiterated that the statute could be used to criminalize "core speech under the First Amendment—criticism of the government," Pet. App. 20: "In a prior case, involving a narrower but somewhat similar telephone harassment statute, I warned that, because the statute was not limited to phone calls made to someone's home or personal phone, the statute could encompass a 'call made to a public official at his government office.'" Pet. App.

[4] Prior to the Texas Court of Criminal Appeals's refusal to consider the constitutionality of section 42.07(a)(7) in *Reece*, it had granted the State of Texas's petition for discretionary review in *Karenev v. State* after the Fort Worth Court of Appeals had declared the statute unconstitutional. *See* 258 S.W.3d 210 (Tex. App.), *rev'd on other grounds by* 281 S.W.3d 428 (Tex. Crim. App. 2009). The Texas Court of Criminal Appeals never reached the constitutional issue, however, because it concluded that the constitutional challenge had been raised for the first time on appeal and therefore was waived. 281 S.W.3d at 434. The Texas Court of Criminal Appeals then refused the petitions in *Reece* and in petitioner's case notwithstanding Presiding Judge Keller's repeated concerns over the constitutionality of section 42.07(a)(7). *See* Pet. App. 20-22.

21 (quoting *Wilson*, 448 S.W.3d at 426 (Keller, P.J., concurring)). Now, she observed, with petitioner's case, that fear had been realized because "we have a case in which the electronic-communications harassment statute has been invoked to punish communications made to police officers." Pet. App. 21. Presiding Judge Keller concluded that "[g]iven the breadth of the electronic-communications harassment statute, and the potential to use it to suppress criticism of the government, we should grant review to address whether the statute is facially unconstitutional in violation of the First Amendment." Pet. App. 21. The refusal of the Texas Court of Criminal Appeals to do so leaves the statute in effect, and petitioner's prosecution for his communications with police officers remains pending in Hays County, Texas.

REASONS FOR GRANTING THE PETITION

I. State High Courts Are In Conflict On The Constitutionality Of Statutes That Criminalize Electronically Communicated Speech Intended And Likely To Annoy, Alarm, Or Embarrass Another Person.

States disagree about the constitutionality of criminal harassment statutes that target annoying, embarrassing, or alarming electronic communications. The court below and the Supreme Court of Montana have upheld such statutes, whereas the courts of last resort in New York and Colorado have determined that such proscriptions are facially overbroad in violation of

the First Amendment. The Illinois Supreme Court also has invalidated the portion of its statute that would have criminalized the same speech that Texas's statute prohibits. This Court should grant the petition to resolve the conflict and ensure that the scope of First Amendment protection from criminal prosecution does not vary from state to state.

A. The Decision Below Conflicts With Rulings By The High Courts Of Colorado And New York On Functionally Identical Statutes.

Colorado and New York each had criminal harassment statutes that required the same intent as the Texas statute and prohibited the same communications as the Texas statute. *See* COLO. REV. STAT. § 18-9-111(1)(e) (1973) (Pet. App. 41-42); N.Y. PENAL LAW § 240.30 (2012) (Pet. App. 46-47). The high court of each state held that the statute before it was unconstitutionally overbroad because it would sweep in a substantial amount of protected speech relative to unprotected speech or conduct. *See People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014); *Bolles v. People*, 541 P.2d 80, 83-84 (Colo. 1975).[5] The decision of the Texas court below conflicts with these two decisions.

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[5] Notably, the Colorado statute that was invalidated as overbroad in *Bolles*, 541 P.2d at 83-84, was actually less problematic than the Texas statute, because the Colorado law did not criminalize speech intended and likely merely to "embarrass" another person. *Compare* COLO. REV. STAT. § 18-9-111(1)(e) (1973), *with* TEX. PENAL CODE ANN. § 42.07(a)(7).

The Colorado statute at issue in *Bolles* stated that "(1) [a] person commits harassment if, with intent to harass, annoy, or alarm another person, he: . . . (e) Communicates 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." COLO. REV. STAT. § 18-9-111(1)(e) (1973). The Colorado Supreme Court examined the definitions of "annoy" and "alarm" and concluded that, under the statute, "one is guilty of the crime of harassment if he intends to 'alarm' another person—arouse to a sense of danger—and communicates to that other person in a manner likely to cause alarm." *Bolles*, 541 P.2d at 83. Under such a statute, the court concluded, it would "be criminal in Colorado to forecast a storm, predict political trends, warn against illnesses, or discuss anything that is of any significance." *Id.* The statute thus swept in a substantial amount of protected speech. *See id.* at 83-84.

The Colorado court rejected the core notion adopted by the Texas court below that harassment statutes are permissible when "directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another's privacy and do so in a manner reasonably likely to inflict emotional distress." Pet. App. 5-7, 17 (quoting *Scott*, 322 S.W.3d at 669-70); *see Bolles*, 541 P.2d at 83-84. Declining to exalt this type of privacy interest over freedom of speech, the Colorado court stated that "we cannot, in the face of the pronouncement of the First Amendment which

specifically protects the right to communicate, expand the parameters of the penumbral right to privacy, so as to prohibit communication of ideas by mail when the sender has not been requested to refrain from doing so." *Bolles*, 541 P.2d at 83.[6] The court concluded that, "if unsettling, disturbing, arousing, or annoying communications could be proscribed, or if they could only be conveyed in a manner that would not alarm, the protection of the First Amendment would be a mere shadow indeed." *Id.* at 83.

New York's highest court had similar concerns about that state's criminal harassment statute, which applied when a person "with intent to harass, annoy, threaten or alarm another person, . . . communicates 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." N.Y. PENAL LAW § 240.30(1)(a) (2012).[7] Like the Colorado

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[6] Although the Colorado statute invalidated in *Bolles* did not require "repeated" communications, as does section 42.07(a)(7), and the court recognized the possibility that privacy of the home, "under some circumstances, is a legitimate legislative concern," 541 P.2d at 83, the Colorado court made clear that those limited circumstances would need to turn on conduct and not communication of an annoying or alarming message. *See id.* at 83-84 (providing examples of a commercial solicitor appearing in person at one's door or "the merciless blare" of a soundtruck).

[7] Like the invalidated Colorado statute, the New York statute that was held to be overbroad in *Golb*, 15 N.E.3d at 813-14, was less problematic than the Texas statute, because it did not criminalize speech intended and likely merely to

Supreme Court, New York's highest court determined that this language covered substantial amounts of protected speech. *Golb*, 15 N.E.3d at 813-14. Indeed, "'no fair reading' of this statute's 'unqualified terms supports or even suggests the constitutionally necessary limitations on its scope.'" *Id.* at 813.

In both Colorado and New York, the state's highest court considered statutes that criminalized communications intended and reasonably likely to annoy or alarm another—the same prohibition in the Texas statute at issue below. Both those courts held that such a prohibition swept in a substantial amount of protected speech and therefore was unconstitutionally overbroad, while the court below upheld the same substantive prohibition.[8]

"embarrass" another person. *Compare* N.Y. PENAL LAW § 240.30(1)(a) (2012), *with* TEX. PENAL CODE ANN. § 42.07(a)(7).

[8] A number of state intermediate courts of appeals have also struck similar statutes as unconstitutionally overbroad. *See*, *e.g.*, *Provo City v. Whatcott*, 1 P.3d 1113, 1115-16 (Utah Ct. App. 2000) (holding unconstitutional a statute that prohibited making phone calls "with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten"); *City of Everett v. Moore*, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984) (holding unconstitutional a municipal statute that prohibited communications "by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm" when made "with intent to harass, annoy or alarm another person"); *State v. Dronso*, 279 N.W.2d 710, 711 n.1, 714 (Wis. Ct. App. 1979) (holding unconstitutional a statute that prohibited making a telephone call with "intent to annoy another").

B. The Decision Below Also Conflicts With A Decision Of The Illinois Supreme Court Holding That An Illinois Criminal Statute Covering The Same Speech As The Texas Statute Is Unconstitutionally Overbroad.

Although an Illinois statute did not use words identical to those in Texas Penal Code section 42.07(a)(7), the Illinois Supreme Court determined that the statute would cover the same speech criminalized by the Texas, Colorado, and New York statutes: speech intended to annoy the recipient that does not fall into any accepted category of unprotected speech (such as threats or obscenity). *See People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977); *cf. supra* at 12-16.

The Illinois statute provided that "[a] person commits disorderly conduct when he knowingly . . . [w]ith intent to annoy another, makes a telephone call, whether or not conversation thereby ensues." 38 ILL. COMP. STAT. § 26-1(a)(2) (1973) (Pet. App. 42-43). In holding that the statute was unconstitutionally overbroad, the Illinois Supreme Court pointed to several instances in which "one may communicate with another with the possible intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek." *Klick*, 362 N.E.2d at 331-32. Examples of protected speech swept up in the statute included a "telephone call made by a consumer who wishes to express his dissatisfaction

over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters." *Id.* The court thus concluded that the statute was unconstitutionally overbroad, observing that "First amendment protection is not limited to amiable communications." *Id.* at 332.[9]

Like the Colorado court in *Bolles*, the Illinois court considered the argument that "one's right to communicate must be balanced against another's right to privacy in his home." *Id.*; *see also Bolles*, 541 P.2d at 83-84. It rejected the argument on two grounds. First, the statute was not limited to phone calls made to a home. *Klick*, 362 N.E.2d at 332. Second, the statute was "not limited to only conduct which might be deemed 'intolerable.'" *Id.* Both of these grounds also apply to Texas Penal Code section 42.07(a)(7). Yet the Texas court below upheld section 42.07(a)(7), drawing largely on the intolerable-intrusion concept rejected by

[9] The Illinois Supreme Court upheld a later version of the statute enacted in response to *Klick* that removed "annoy" from the list of possible intents for making a telephone call. *See People v. Parkins*, 396 N.E.2d 22, 23-24 (Ill. 1979) (considering revised language criminalizing "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number"), *appeal dismissed*, 446 U.S. 901 (1980). The court stated that, as amended, "the words 'abuse' and 'harass' take color from the word 'threaten' and acquire more restricted meanings"; therefore, the statute was not overbroad. *Id.* at 24.

the Illinois Supreme Court in *Klick*. *Compare id.*, *with* Pet. App. 7 (citing *Scott*, 322 S.W.3d at 668-70).

While both Texas Penal Code section 42.07(a)(7) and the invalidated Illinois statute require intent to annoy, the Texas statute refers to "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another," TEX. PENAL CODE ANN. § 42.07(a)(7), whereas the Illinois statute required only "a telephone call." 38 ILL. COMP. STAT. § 26-1(a)(2) (1973). Nonetheless, the examples of protected speech cited by the Illinois Supreme Court as impermissibly swept in by the Illinois statute could subject someone to criminal prosecution in Texas, at least if more than one communication were made. *Compare Klick*, 362 N.E.2d at 331-32, *with* TEX. PENAL CODE ANN. § 42.07(a)(7). Thus, *Klick* signals that the protection of the First Amendment differs between Texas and Illinois.

C. The Decision Below Accords With The Montana Supreme Court's Ruling On A Statute Encompassing The Same Speech The Texas Statute Criminalizes.

The Montana Supreme Court has upheld the part of its electronic communications statute that overlaps with the Texas statute at issue below. *See State v. Dugan*, 303 P.3d 755, 772 (Mont. 2013).[10] Under the

[10] State intermediate courts of appeals have also reasoned that similar statutes criminalizing communications made with

Montana statute, "a person commits the offense of violating privacy in communications if the person knowingly or purposely: (a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by electronic communication and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person." MONT. CODE ANN. § 45-8-213(1)(a) (Pet. App. 44-45).

While the Montana statute, unlike the Texas statute, adds a requirement that the speaker use a certain type of language in the communication, *see id.*, it sweeps beyond unprotected obscene and threatening language to encompass speech that suggests a "lewd or lascivious act" or uses "lewd, or profane language" as well, *id.*, thereby overlapping with the Texas statute. *Compare* MONT. CODE ANN. § 45-8-213(1)(a), *with* TEX. PENAL CODE ANN. § 42.07(a)(7). Indeed, that overlap is exemplified by the Texas arrest warrants for petitioner. *See* Pet. App. 28-31, 35-38. They allege use of precisely the same language Montana also

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intent to harass do not offend the First Amendment. *See*, *e.g.*, *State v. Brown*, 85 P.3d 109, 111, 113 (Ariz. Ct. App. 2004) (rejecting, in dicta, arguments that the First Amendment requires invalidation of a statute that prohibits communications made "in a manner that harasses" and with the intent to harass, where harassment is defined as "conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed, or harassed"); *State v. Kronenberg*, No. 101403, 2015 WL 1255845, at *2, *6 (Ohio Ct. App. Mar. 19, 2015) (rejecting overbreadth challenge to a statute criminalizing telecommunications made "with purpose to abuse, threaten, or harass another person").

criminalizes, characterizing petitioner's criticism of two officers as "profane." *Compare* Pet. App. 29, 36, *with* MONT. CODE ANN. § 45-8-213(1)(a).[11] And like the Texas court below, the Montana Supreme Court relied on the intent requirement to uphold the state's ability to criminalize this type of speech, concluding that the intent requirement would limit the statute's reach to cover only an insubstantial amount of protected speech. *Dugan*, 303 P.3d at 772.[12] "Such communications can be proscribed," the court concluded, without violating the First Amendment. *Id.*

II. THIS CASE PRESENTS AN ISSUE OF PRESSING NATIONAL IMPORTANCE.

The scope of the First Amendment's protection of speech is an issue of compelling constitutional

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[11] Petitioner brought only a facial challenge to section 42.07(a)(7), Pet. App. 1-2, and references the allegations of "profane" communication merely to illustrate the convergence of the Texas and Montana statutes.

[12] The Montana statute had also provided that "[t]he use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend." MONT. CODE ANN. § 45-8-213(1)(a). The Montana Supreme Court struck that sentence, holding that the "prima facie evidence" aspect rendered the statute unconstitutionally overbroad. *Dugan*, 303 P.3d at 772. It let stand the rest of the statute—the portion mirroring Texas's intent focus in section 42.07(a)(7)—stating that "[w]ith the prima facie provision invalidated, Montana's Privacy in Communications statute legitimately encompasses only those electronic communications made with the purpose to terrify, intimidate, threaten, harass, annoy, or offend." *Id.*

importance. This is especially so when states over-ambitiously criminalize annoying or embarrassing electronic communications, sweeping in core speech that criticizes the government, along with numerous other forms of protected speech. Equally troubling is the different degree of protection states afford to communications made with intent to annoy or embarrass the recipient, even when such statements fall outside the limited categories of unprotected speech recognized by this Court. *See supra* at 12-21 (detailing the conflict on the question presented). And these differing degrees of protection are not the only cause for concern: Because the Texas and Montana statutes could be used to criminalize communications made or received in these states, *see* TEX. PENAL CODE ANN. § 1.04(a);[13] MONT. CODE ANN. § 46-2-101, the same communication could be protected when initiated in Colorado, New York, or Illinois, and then criminalized when received in Texas or Montana.

[13] Texas "has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if: (1) either the conduct or a result that is an element of the offense occurs inside this state." TEX. PENAL CODE ANN. § 1.04(a); *see also Carrillo v. State*, No. 08-04-00118-CR, 2005 WL 199252 (Tex. App. Aug. 18, 2005) ("[A] Texas court has territorial jurisdiction over a telephone-harassment case if the caller makes the call from within this state or the recipient of the call is within this state.").

It is "intolerable," this Court has reasoned, to leave questions of First Amendment protections in an "uneasy and unsettled constitutional posture." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). Uncertainty over the limits of First Amendment protections compels speakers to "hedge and trim" protected speech, possibly preventing useful communications on important issues—such as the quality of police services or other governmental functions. *See Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Allowing the conflict among state courts to continue leaves citizens of states with similar harassment statutes in limbo, not knowing whether and to what extent the First Amendment's free-speech guarantee will cabin the prohibitions on speech that each state may apply.

The potential chilling effect is widespread. Many states beyond those with conflicting judicial opinions, *see supra* at 12-21, have statutes that function similarly to Texas Penal Code section 42.07(a)(7) but have not yet received a judicial pronouncement as to their constitutionality under the First Amendment. Those states—including Arkansas, California, Delaware, Hawaii, Kentucky, Louisiana, New Mexico, South Carolina, Vermont, and Washington—have varying formulations of statutes that criminalize annoying or embarrassing communications without limiting the sweep to unprotected speech.[14] Citizens of those states, in

[14] *See* ARK. CODE ANN. § 5-71-209(b); CAL. PENAL CODE § 653m(b); DEL. CODE ANN. tit. 11, § 1311(a)(2); HAW. REV. STAT.

particular, face "intolerable" uncertainty over their right to communicate—electronically and otherwise—criticisms of the government and other forms of arguably annoying or embarrassing speech. *See Miami Herald*, 418 U.S. at 246 n.6.

The use of broad statutes to limit criticism of the government is not merely a theoretical possibility. Eugene Volokh has collected numerous examples of citizens who were prosecuted, and in a number of cases convicted, for communications that criticized the government. 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 (discussing, *inter alia*, *State of Wisconsin v. Smith*, No. 2013AP2516-CR, 2014 WL 2974157 (Wis. Ct. App. July 3, 2014) (unpublished decision), *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999), and *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989)). The convictions Professor Volokh discusses—for communications including a letter harshly critical of police enclosed with payment for a speeding fine, vulgar and insulting comments posted on a police-department Facebook page, or insulting voicemails left for a prosecutor—were overturned on appeal, *see id.*, but the chilling

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§ 711-1106(1)(c); KY. REV. STAT. ANN. § 525.080(1)(a); LA. STAT. ANN. § 14:285(A)(2); N.M. STAT. ANN. § 30-20-12; S.C. CODE ANN. § 16-17-430(A)(3); VT. STAT. ANN. tit. 13, § 1027(a); WASH. REV. CODE § 9.61.230.

effect is obvious. Even if all would-be critics were assured appellate reversals of convictions, the potential for prosecution and conviction in the first instance would be enough to dissuade many speakers from taking the chance.[15]

The continued existence of statutes that permit punishment of speech criticizing the government merely because it is intended to "annoy" or "offend" strikes at the heart of the purpose of the First Amendment. "Freedom of speech is a principal pillar of a free government: when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins." Benjamin Franklin, *On Freedom of Speech and the Press*, *in* 2 Memoirs of Benjamin Franklin 431 (1840). As Benjamin Franklin observed, speech provides the citizenry's check on the government—"[r]epublics and limited monarchies derive their strength and vigour from a popular examination into the actions of the magistrates." *See id.*

Uncertainty over the constitutionality of disfavored-speech-focused criminal harassment statutes has been

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[15] Several of the cases discussed in Professor Volokh's article involved statutes very similar to the Texas statute at issue here. *See Smith*, 2014 WL 2974157, at *2 n.2; *Popa*, 187 F.3d at 674; *Fratzke*, 446 N.W.2d at 782. In those cases, however, the courts either held that the statutes could not prohibit "public and political discourse" or limited their prohibitions to unprotected speech, and in each case courts determined that the defendant's speech fell within the protection of the First Amendment. *Smith*, 2014 WL 2974157, at *6; *Popa*, 187 F.3d at 677-78; *Fratzke*, 446 N.W.2d at 784-85.

brewing for decades, shows no sign of resolving on its own, and warrants this Court's review. As Justice White observed in 1980, "state courts are not in agreement concerning application of First Amendment principles in this area of the law." *Gormley v. Dir., Conn. State Dep't of Adult Probation*, 449 U.S. 1023, 1024-25 (1980) (dissenting from denial of certiorari) (citing conflicting opinions on overbreadth, vagueness, and other challenges to criminal harassment laws that vary in formulation and scope). *Gormley* involved a 1975 version of a Connecticut statute that criminalized making a telephone call with "intent to harass, annoy or alarm another person . . . in a manner likely to cause annoyance or alarm." *Id.* at 1023.[16] As Justice White reasoned, "a State has a valid interest in protecting its citizens against unwarranted invasions of privacy . . . . But it is equally clear that a State may not pursue these interests by unduly infringing on

[16] Although the intent and recipient-effect language of the Connecticut statute at issue in *Gormley* is similar to that used in Texas Penal Code section 42.0.7(a)(7), the Connecticut Supreme Court has interpreted that language over the years to cabin its reach. In *State v. Murphy*, that court upheld the written-communication subsection of the Connecticut statute, reasoning that it proscribes "harassing conduct via mail" and not the content of the mailed speech, and it therefore does not implicate the First Amendment. 757 A.2d 1125, 1130-31 (Conn. 2000), *overruled by State v. Moulton*, 78 A.3d 55 (Conn. 2013). Although the court held that the content of the communication could be considered for purposes of proving the defendant's intent, *id.* at 1131, the court later narrowed that rule when revisiting the telephone-call subsection, holding that the content of a communication may be considered as evidence of intent when that content communicates a true threat, which is unprotected speech. *See State v. Moulton*, 78 A.3d 55, 71-72 (Conn. 2013).

what would otherwise be protected speech." *Id.* at 1023-24. "It is therefore critical to recall," explained Justice White, "that speech may be 'annoying' without losing its First Amendment protection." *Id.* at 1024.

The problem identified by Justice White—unconstitutional criminalization of "annoying" speech—has persisted for nearly four decades. Indeed, Presiding Judge Keller echoed this same notion in 2017 when dissenting from the Texas Court of Criminal Appeals's first refusal to consider the constitutionality of section 42.07(a)(7), observing that protected "[c]riticism can be annoying, embarrassing or alarming, and it is often intentionally so." *Reece*, 517 S.W.3d at 111 (Keller, P.J., dissenting from refusal to grant petition). The electronic-communications context of the Texas statute heightened her concern, as its expansive reach includes "[F]acebook posts, message-board posts, blog posts, blog comments, and newspaper article comments." *Id.* "Under this statute, a person can criticize another on the internet once, but not twice. That is true even if the criticism is of the person's political views." *Id*. "[B]ut the First Amendment prohibits the government from using the coercion of the criminal law to enforce a more refined atmosphere on the internet." *Id*.

Guidance on the permissible limits of laws like section 42.07(a)(7) that restrict annoying or embarrassing electronic communications is particularly important because these laws may chill one of the most important modes of communication in our society. Through social media, users gain access to information and

communicate with one another through the "vast democratic forums of the Internet," *Reno*, 521 U.S. at 868, allowing a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Packingham*, 137 S. Ct. at 1737 (quoting *Reno*, 521 U.S. at 870). But if two "Yelp" reviews intended to annoy a business could result in a criminal harassment charge, social-media users may hesitate to use that voice. This Court should resolve the conflict over harassment statutes to ensure that protected speech, especially electronically communicated speech, is not silenced by fears of prosecution.[17]

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[17] A decision in this case also would guide lower courts on the proper application of the First Amendment not only to harassment law and similar crimes, but also to related torts. While the Court has given guidance on the application of the First Amendment to libel laws, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), and to the limits placed on the torts of intentional infliction of emotional distress and invasion of privacy when public speech or public figures are involved, *see Snyder v. Phelps*, 562 U.S. 443 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), it has not established the standard for invasive or distressing speech in other contexts, including private communications to an individual or government official, such as by email, text, or telephone call.

A decision in this case also would give important guidance regarding the proper application of the First Amendment to other areas where states regulate harassment at the intersection of conduct and speech. For example, state universities are struggling to determine what can be restricted by campus harassment policies, known as "speech codes." *See*, *e.g.*, *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247-52 (3d Cir. 2010) (holding that a university regulation prohibiting students from displaying offensive or unauthorized signs was overbroad and

III. SECTION 42.07(a)(7) VIOLATES THE FIRST AMENDMENT.

A. Section 42.07(a)(7) Is Unconstitutionally Overbroad Because It Restricts A Substantial Amount Of Protected Speech.

Section 42.07(a)(7) is overbroad and facially unconstitutional under the First Amendment because, "judged in relation to the statute's plainly legitimate sweep," it reaches "a 'substantial' amount of protected free speech." *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). As this Court noted in *United States v. Stevens*, "[t]he first step in an overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." 559 U.S. 460, 474 (2010) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). The statute at issue in this case prohibits any repeated electronic communication intended to "harass, annoy, alarm, abuse, torment, or embarrass" that is "likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07(a)(7). The scope of speech included in such a definition is extremely broad.

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unconstitutional, as was another university regulation restricting conduct that causes emotional distress because it was based on the subjective reaction of the listener).

Section 42.07(a)(7) is not saved merely because it prohibits some speech that clearly falls outside the protection of the First Amendment. To be sure, "true threats," obscenity, defamation, and fighting words are all likely to fall within the ambit of the statute to some extent, and a state may restrict those categories of unprotected speech. *Stevens*, 559 U.S. at 468-69; *Watts v. United States*, 394 U.S. 705, 708 (1969). But a state may not prohibit speech merely because it is offensive or unpleasant. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). As this Court stated in *Terminiello v. City of Chicago*, "a function of free speech under our system of government is to invite dispute." 337 U.S. 1, 4 (1949). And speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.*

Speech expressing dissatisfaction with law enforcement is not excepted from First Amendment protection. To the contrary, this Court has emphasized the importance of protecting even speech that "interrupts" police officers in their duties. *See City of Houston v. Hill*, 482 U.S. 451, 455, 471-72 (1987). As this Court stated:

> in the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are mindful

> that the preservation of liberty depends in part upon the maintenance of social order. But the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

Id. (citation omitted). If "interrupting" speech must be protected, surely no justification exists for prohibiting speech that is merely "annoying" or "embarrassing" to police officers or other government officials. *See* Pet. App. 1.

Moreover, the statute sweeps in far more than just speech critical of law enforcement. A few hypothetical examples illustrate some of the wide-ranging types of protected speech the Texas harassment statute covers. A consumer emails the seller of a defective product twice to complain about the quality of the product, intending to "annoy" the seller into replacing the product. Constituents repeatedly email their legislative representatives, intending to "annoy" or "embarrass" the legislators about votes or stances on controversial issues. A restaurant patron taken ill after eating at a local restaurant posts a number of scathing reviews on social media, hoping to "embarrass" the restaurant into improving its hygiene practices. Tenants send multiple emails to their landlord, "alarming" him by threatening to report his shoddy practices to the housing authority. The array of protected speech swept up by section 42.07(a)(7) is

broad and substantial in relation to the statute's legitimate reach, *Hicks*, 539 U.S. at 118-19, rendering the statute facially unconstitutional.

B. Section 42.07(a)(7) Is A Content-Based Regulation Of Protected Speech That Is Not Narrowly Tailored To Further A Compelling State Interest.

The intent and recipient-state-of-mind requirements in section 42.07(a)(7) do not alter the fact that the statute criminalizes speech based on its content. *See* TEX. PENAL CODE ANN § 42.07(a)(7). And any content-based regulation of speech is invalid unless the government "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). This is a "demanding standard" that will rarely be met, *id.*, and section 42.07(a)(7) cannot clear that hurdle.

The content-based focus of section 42.07(a)(7) is confirmed by the "function or purpose" test: If a regulation is based on the "function or purpose" of the speech at issue, that regulation is content-based and thus subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227. By proscribing communications intended to "annoy," "alarm," or "embarrass" others, TEX. PENAL CODE ANN. § 42.07(a)(7), Texas criminalizes speech based on its purpose and thereby its content

(alarming, annoying, or embarrassing speech). *See Reed*, 135 S. Ct. at 2227. Moreover, determining whether a communication is "reasonably likely to . . . annoy, alarm . . . [or] embarrass" requires the reasonable person to consider the "function or purpose" of the speech, and thereby its content. *See id.* Put another way, it is impossible to determine whether a communication triggers the speaker-intent and recipient-reaction prongs of section 42.07(a)(7) without examining the content of the communication. Because the statute is thus content based in multiple respects, it is constitutional only if it is narrowly tailored to serve a compelling government interest. *See Brown*, 564 U.S. at 799. The Texas statute fails that test.

Even if it were assumed that the state has a compelling interest in preventing extreme cases of harassment, the Texas statute is not narrowly tailored to those ends.[18] For a statute to be narrowly tailored to a compelling state interest, the state must show that it has an "actual problem" in need of solving, and that the curtailment of speech is "actually necessary to the solution." *Brown*, 564 U.S. at 799 (quoting in part *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)). The existence of content-neutral, alternative solutions to the problem "undercut[s] significantly" any defense of a content-based statute. *R.A.V. v. City*

[18] The state cannot have a compelling interest in preventing disputes, anger, or unpleasantness, because those effects are part of the purpose of the First Amendment. *See Terminiello*, 337 U.S. at 4.

of St. Paul, 505 U.S. 377, 395 (1992) (quoting *Boos v. Barry*, 485 U.S. 312, 329 (1988)) (alteration in original). Criminalizing the broad spectrum of protected speech that is swept in by section 42.07(a)(7) is not necessary to prevent extreme harassment.[19]

IV. This Case Presents An Excellent Vehicle For Resolving The Conflict Over An Important Issue Of First Amendment Doctrine.

This case provides an excellent vehicle to resolve a fundamental First Amendment question. The constitutionality of section 42.07(a)(7) was the only issue in the pretrial habeas proceeding, and no facts are at issue because it is a facial challenge to the statute. In addition, the Texas court's ruling was "plainly final on the federal issue." *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-86 (1975) (exercising

[19] Other state legislatures have successfully passed narrower statutes to effectuate the same purpose. *See*, *e.g.*, COLO. REV. STAT. § 18-9-111(8) (expressly exempting from the harassment statute the expression of religious, political, and philosophical views as well as any other forms of protected speech); 720 ILL. COMP. STAT. § 26.5-2(a) (limiting electronic harassment to obscenity, interrupting the phone service of others, preventing others from using their devices, targeting individuals under the age of thirteen, and threatening persons or property); N.Y. PENAL LAW § 240.30 (limiting electronic-communications harassment to threats to persons or property and phone calls made with the intent to harass with no other legitimate purpose); UTAH CODE ANN. § 76-9-201(2)(a) (requiring that the harasser have the intent to intimidate, abuse, disrupt, or threaten (as opposed to annoy or embarrass)).

jurisdiction where the state court's ruling on a federal issue raised an important First Amendment question); *see also* 28 U.S.C. § 1257(a).

Moreover, the Texas Court of Criminal Appeals is entrenched in its position on the constitutionality of section 42.07(a). Having held in *Scott* that the almost-identical telephonic-communication subsection of the statute was constitutional—concluding that the provision reaches only noncommunicative conduct or communication unprotected by the First Amendment because it "invades the substantial privacy interests of another," 322 S.W.3d at 669-70 (upholding TEX. PENAL CODE ANN. § 42.07(a)(4))—that court has repeatedly refused review of section 42.07(a)(7). It has persisted in this refusal notwithstanding the repeated protests of Presiding Judge Keller, especially as to the sweeping scope of the electronic communications targeted by the statute. Pet. App. 20-22; *Reece*, 517 S.W.3d at 110-11 (Keller, P.J., dissenting from refusal to grant petition); *Wilson*, 448 S.W.3d at 426-27 (Keller, P.J., concurring). This case squarely presents an important First Amendment question that implicates core protected speech—criticism of the government—in the vital context of electronic communications.

CONCLUSION

The petition for a writ of certiorari should be granted.

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