No. 22-430

In the Supreme Court of the United States

CHARLES BARTON and NATHAN SANDERS,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit civil liberties organization that has worked for more than thirty years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online. EFF has filed many amicus briefs in lower courts challenging overbroad harassment laws.

SUMMARY OF ARGUMENT

1. The Texas harassment statute upheld below is facially broad:

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

Tex. Penal Code § 42.07(a)(7). If *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), arose today, and

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. The parties received notice at least 10 days before the deadline and have given express consent to the filing of this brief.

involved two issues of an electronic newsletter rather than one issue of a magazine, the speech there would have been a crime under the Texas law. It would have been very likely intended to harass, annoy, abuse, torment, or embarrass Jerry Falwell. It would have been sent in a manner reasonably likely to do so—note that the statute does not require that the communications be likely to offend *the recipient*, but only to offend *someone*. And it would have involved repeated electronic communications. That alone should indicate that the Texas statute is overbroad, and that the overbreadth cannot be avoided by relabeling such electronic mailings as "non-speech conduct." Pet. 14a.

But there is no need for hypotheticals, because similar statutes throughout the country have already been used to suppress speech, including speech about political officials, police officers, religious figures, lawyers, and activists, as well as about former lovers or friends or acquaintances. And many of these laws target or threaten online speakers speaking in the "the 'vast democratic forums of the Internet,'" *Packingham v. N.C.*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

To be sure, many of the courts in these cases have rejected such broad applications on First Amendment grounds, whether by striking down the statutes as overbroad or holding them unconstitutional as applied. Some of these decisions have echoed then-Judge Alito's conclusion that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001); *see also Catlett v. Teel*, 477 P.3d 50, 59 (Wash. Ct. App. 2020); *TM v. MZ*, 926 N.W.2d 900, 909 (Mich. Ct. App. 2018); *State v.*

Burkert, 174 A.3d 987, 1000 (N.J. 2017). Yet the Texas decision below categorically rejects such a First Amendment analysis, by recharacterizing such a "harassment" law as dealing solely with "non-speech conduct."

2. Speech also does not lose its protection because of a speaker's bad motives. *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead opinion); *id.* at 495 (Scalia, J., concurring in part and concurring in the judgment). This is because speech motivated at least in part by an intention to annoy, harass, alarm, or embarrass is often important in public debate, particularly where a speaker is claiming wrongdoing by a prominent community member, politician, or business. And punishing speech based on its motive risks deterring even well-intentioned speech, because speakers will reasonably worry that prosecutors, judges, or juries may misperceive their intentions.

3. This Court has also long recognized a distinction between unwanted speech to an unwilling listener, which may sometimes be restricted, and unwanted speech about an unwilling subject, which is generally constitutionally protected, *see, e.g.*, *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Yet overbroad harassment statutes, including the Texas law, regularly restrict speech to the public about a person.

These statutes thus routinely threaten constitutionally protected speech across the country, and are often misused to target speech online that is fundamentally different from pre-digital communications via the telephone or other forms of direct communication. This Court should grant certiorari to vindicate the First Amendment's constraints on such laws.

ARGUMENT

I. Texas's Harassment Law, and Similar State Laws, Wrongly Cover a Broad Range of Fully Protected Speech

Harassment statutes have often been applied to a wide range of speech about politicians, police officers, activists, businesspeople, and more. Some cases have involved statutes labeled "harassment" bans and some have involved statutes labeled "cyberstalking" bans. Some used those statutes in criminal prosecutions and others in injunctive proceedings. Yet all illustrate that, true to their broad text, such statutes are potentially quite broad in application. This section will offer just a small subset of examples; for more, see Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking*," 107 Nw. U. L. Rev. 731 (2013), and Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 Harv. J. of L. & Pub. Pol'y 147 (2022).

A. Criticism of Politicians

Speech that is sharply critical of political figures has been the target of "harassment" claims. For instance, Florida State Senator Lauren Book obtained an anti-"cyberstalking" injunction against Derek Logue, prohibiting Logue "from posting *anything* related to [Senator Book], even statements that would unquestionably constitute pure political speech." *Logue v. Book*, 297 So. 3d 605, 620 (Fla. Dist. Ct. App. 2020) (en banc). Book was a public figure and longtime advocate of sex offender laws; Logue, himself a former sex offender, opposed sex offender registries. *Id.* at

607. The injunction was based on Logue's protest of a march organized by Book, his aggressive questioning at a screening of a documentary that featured Book and Logue, and his sharp criticisms on a website, which included a picture of Book in her home, her address, and purchase price taken from public records. *Id.* at 608-09.

Florida law criminalizes "a course of conduct . . . directed at . . . a specific person" that "caus[es] substantial emotional distress to that person and serv[es] no legitimate purpose." Fla. Stat. Ann. § 784.048. That same statute also allows injunctions against such conduct, including speech, *id.* § 784.0485; though Senator Book sought an injunction against Logue rather than a criminal prosecution, the legal analysis for the two would have been largely the same. The trial court found that Logue's criticisms were indeed "directed at" Senator Book, *Logue*, 297 So. 3d at 610, and the appellate court agreed, concluding that the statute "only requires that the course of conduct be *directed at* a specific person, not necessarily *directed to* a specific person." *Id.* at 611.

Despite that, the appellate court did vacate the injunction, because it concluded that even restrictions aimed at preventing "cyberstalking" were subject to First Amendment scrutiny, *id.* at 616, including when the speech was "offensive," "insulting," or "annoying," *id.* at 619, 620. Yet while the Florida court rightly held that such speech could not be constitutionally prohibited, the Texas Court of Criminal Appeals' reasoning would have labeled such speech "conduct"—at least so long as it was communicated with an intent to "annoy . . . or offend another"—and would have allowed it to be punished. *See also, e.g.*, *Matthews v. Heit*, No. 14-

817732-PH (Mich. Cir. Ct. Oakland Cty. Mar. 11, 2014) (anti-harassment order based on criticism of an elected judge); *Serafinowicz v. Bernstein*, No. CV154034547S, 2015 WL 3875108, at *2, *4 (Conn. Super. Ct. May 28, 2015) (likewise, based on criticism of a gubernatorially appointed board member), *aff'd sub nom. Stacy B. v. Robert S.*, 140 A.3d 1004, 1007 (Conn. App. Ct. 2016); *Van Liew v. Stansfield*, 47 N.E.3d 411, 413-414 (Mass. 2016) (temporary anti-harassment order based on criticism of a planning board member). (All these orders are discussed in more detail at Volokh, 45 Harv. J.L. & Pub. Pol. at 154-57; none of the cases cited in this brief were limited to true threats or libel or other unprotected categories of speech.)

Another example comes from a New Jersey anti-harassment statute that was used to prosecute a man for criticizing a political candidate. In 2011, town council candidate Philip Speulda mailed a campaign flyer featuring a picture of his opponent, a sitting town councilman, in a hot tub with two other men. *See* Complaint-Summons, *State v. Speulda*, No. 1604-S-2011-000159 (Hawthorne Bor. Mun. Ct. June 9, 2011), *available at* https://perma.cc/399A-YKG5 (discussed in more detail at Volokh, 107 Nw. U. L. Rev. at 732-33). The picture had previously been posted online by the opponent. Speulda used the photograph to suggest that his opponent should not be elected because he might be gay, or at least, because it was inappropriate for the opponent to post the picture. *Id.* Speulda was prosecuted for violating New Jersey's criminal harassment law that prohibited communications made "with purpose to harass another" and are "likely to cause

annoyance or alarm." *Id.* (relying on N.J. Stat. Ann. § 2C:33-4 (West 2005)).

The charges were eventually dropped, and the law was eventually narrowed on First Amendment grounds by the New Jersey Supreme Court. *State v. Burkert*, 174 A.3d 987 (N.J. 2017). But if this case had occurred in Texas today, and the speech happened online and on at least two occasions, Speulda's speech would likely be treated as punishable "conduct" under the Texas statute. After all, the Texas law (like the then-existing New Jersey law) criminalizes communications "in a manner reasonably likely to harass, annoy, alarm, . . . embarrass, or offend another." Tex. Penal Code § 42.07(a). Speulda's speech may have been unfair and offensive, but outside of the few recognized exceptions, the First Amendment prohibits restricting speech based on content or viewpoint. Yet the New Jersey prosecution targeted Speulda precisely because of the offensive content of his message; and the Texas law would authorize the same sort of prosecution.

B. Criticism of Police Officers

Likewise, anti-harassment statutes have been used to restrict criticism of police officers. In *Neptune v. Lanoue*, Florida police officer Philip Lanoue got an "injunction against stalking" (under the same Florida statute as in *Logue v. Book*) that barred Patrick Neptune from "posting anything on the Internet regarding [Lanoue]." 178 So. 3d 520, 521 (Fla. Dist. Ct. App. 2015). Neptune had criticized Lanoue on the site copblock.org based on what he thought was an improper traffic stop, sent public officials several letters criticizing Lanoue, and sent three letters to Lanoue's home address. *Id.* The trial court issued the injunction

ostensibly to "protect the Officer from harassment and stalking." *Id.* at 523.

Again, the appellate court vacated the injunction because it violated the First Amendment. Whether or not it may have been permissible to prohibit sending letters to Lanoue's personal address, the injunction unconstitutionally barred "Appellant's online posting[, which] was exclusively about an alleged abuse of power by the Officer acting in his official capacity as a police officer." *Id.* at 522. Under the reasoning of the Texas Court of Criminal Appeals, though, this injunction would have been upheld as being focused on "conduct" rather than speech.

Anti-harassment criminal statutes can also burden constitutionally protected speech by authorizing searches aimed at unmasking political commenters. In Washington state, for instance, a city prosecutor launched a criminal investigation against an anonymous cartoonist for a series of internet videos that were disseminated to the public. *In re King County Search Warrants* 11-1172, No. 11-2-12056-2 KNT (Wash. Super. Ct. King Cty. July 28, 2011), *available at* https://perma.cc/M7LZ-BESG (discussed in more detail at Volokh, 107 Nw. U. L. Rev. at 734). These videos alluded to various real incidents involving Renton police officers, including some with a sexual component. *Id.* The city prosecutor concluded that these videos violated Washington's anti-"cyberstalking" law that at the time criminalized "mak[ing] an electronic communication to [another] person . . . with intent to harass, intimidate, torment, or embarrass." Wash. Rev. Code Ann. § 9.61.260 (then-effective version, as quoted in *Rynearson v. Ferguson*, 355 F. Supp. 3d 964, 969 (W.D. Wash. 2019)).

The prosecutor ultimately dropped the effort to identify the cartoonist, after the search warrant was publicized and publicly criticized (*e.g.*, Jeff Hodson, *Renton Drops Court Quest to Find 'Mrfuddlesticks,'* Seattle Times, Aug. 11, 2011, at B). There was thus no occasion for a court to decide in that case whether the anti-"cyberstalking" law violated the First Amendment. But in *Rynearson v. Ferguson*, 355 F. Supp. 3d 964 (W.D. Wash. 2019), the court did preliminarily enjoin the Washington statute on First Amendment grounds, reasoning that, under the law, "even public criticisms of public figures and public officials could be subject to criminal prosecution and punishment if they are seen as intended to persistently 'vex' or 'annoy' those public figures, or to embarrass them." *Id.* at 969-970. The state did not appeal the injunction.

Here again, the Texas law is very similar to Washington's then-existing statute. Like the Washington law, the Texas statute restricts "electronic communications" made "with intent to harass, annoy, alarm, abuse, torment, or embarrass another." While the Renton cartoonist may have intended to embarrass the police, speech with such an intention is constitutionally protected. *See infra* Part II. Indeed, even speech intended to embarrass can have substantial social value: Voters may find it valuable to learn about unprofessional behavior by police officers who are entrusted with maintaining safety, and embarrassing speech can help deter such behavior. Yet such speech could be restricted under the Texas law.

C. Criticism of Religious Figures

Or consider the federal prosecution of William Cassidy for posting hundreds of insulting tweets about

Alice Zeoli, a leading American Tibetan Buddhist religious figure. *United States v. Cassidy*, 814 F. Supp. 2d 574, 578-579 (D. Md. 2011). The prosecutors in that case argued that the tweets violated a federal statute prohibiting "a course of conduct [using the mail or interactive computer services] that caused substantial emotional distress to a person . . . with the intent to harass and cause substantial emotional distress." *Id.* at 580.

Yet the court concluded that the statute was "invalid as applied" to Cassidy's speech. *Id.* at 587. The court noted that the messages were sent to a broad audience rather than being "e-mails or phone calls directed to a victim." *Id.* at 585-86. It further explained that the statute "sweeps in the type of expression that the Supreme Court has consistently tried to protect." *Id.* at 586. "[T]he Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern." *Id.* at 582 (citing, among other cases, *Hustler v. Falwell* and *Snyder v. Phelps*).

The *Cassidy* court therefore held, correctly, that the First Amendment protected Cassidy's speech. But again, the Texas Court of Criminal Appeals' reasoning would authorize punishing such speech under the Texas statute, simply by labeling it "conduct."

D. Criticism of Political Activists

Harassment laws have likewise been used to restrict speech criticizing political activists. Thus, for instance, a Washington state district court recently concluded that a political activist's criticism of a former fellow activist could be harassment that would justify

a broad restriction on speech. *See Scarlett v. Gjovik*, No. 22-2-03849-7 SEA, 2022 WL 4541046, at *4 (Wash. Super. Ct. Sep. 26, 2022). Cher Scarlett and Ashley Gjovik had co-founded a whistleblower campaign against Apple, *id.* at *2, but had a falling out, and Scarlett sought an anti-harassment order based on Gjovik's public online speech about her. *Id.*

The district court concluded that Gjovik's speech was "clearly designed to upset Ms. Scarlett," that "[f]ree speech can be curtailed in many ways," and that a "course of conduct" can be restricted when it is "designed to alarm, annoy, or harass." *Id.* at *4. Because of this, the court granted an injunction barring Gjovik from "mak[ing] any statements or posts or other publications" about Scarlett on "any social media or internet or other medium." *Id.* And the court did not rely on any finding that the speech was libelous: Rather, it reasoned that, "[w]hether it's true or not doesn't matter in an antiharassment order." *Id.*

But on appeal, the Superior Court vacated the order:

> The lower court in this matter seemed to require a "lawful purpose" behind the Respondent's postings of public records. But our state constitution does not allow for that consideration or restriction on free speech . . . . There is no categorical "harassment exception to the First Amendment's free speech clause."

Id. at *6 (citations omitted). Under the Texas decision below, such First Amendment protections would be unavailable, again because such speech would be labeled unprotected "conduct." *See also McCauley v. Phillips*, No. 2016-70000487 (Cal. Super. Ct. Sacra-

mento Cty. Sept. 8, 2016) (issuing a similar anti-harassment injunction on behalf of one political activist against another), *appeal dismissed on procedural grounds*, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018); Volokh, 45 Harv. J.L. & Pub. Pol. at 158 (discussing *McCauley* in more detail).

E. Criticism of Professionals or Businesses

Overbroad anti-harassment statutes are also used to silence criticism of professionals and businesses, in violation of the First Amendment. In *Welytok v. Ziolkowski*, for instance, a Wisconsin man attempted to publicize an attorney's record of having been suspended for three years from the practice of law for defrauding a client. 312 Wis. 2d 435, 446 (2008). Wisconsin's harassment statute restricts speech that has "no legitimate purpose" and is "inten[ded] to harass or intimidate another person." *Id.* at 453. The appeals court affirmed the trial court's injunction against the speech, *id.* at 459, on the grounds that the defendant was motivated by hostility arising out of a past real estate lawsuit in which the defendant was defeated by the plaintiff. *Id.* at 460-61. *See also* Civil Harassment Restraining Order, *Gabueva v. Romanenko*, No. CCH-19- 581819, at 2 ¶ 6.a.4 (Cal. Super. Ct. S.F. Cty. July 26, 2019) (involving a similar anti-harassment injunction issued on behalf of a lawyer, against another lawyer who had been criticizing her); Volokh, 45 Harv. J.L. & Pub. Pol. at 158-59 (discussing *Gabueva* in more detail).

Yet accurate information about an attorney's disciplinary record like that in *Welytok* is generally constitutionally protected, and potentially valuable to consumers. Business review sites such as Yelp are

popular precisely because people need information about businesses, professionals, and others. And Texas law would likewise authorize criminal punishment of such speech, so long as its "purpose" and likely effect is found to be culpable.

F. Criticism of Exes

Of course, harassment laws are also used to restrict people's abilities to discuss their former friends, acquaintances, lovers, and spouses—even when that criticism conveys accurate information or constitutionally protected opinion.

For example, in *Coleman v. Razete*, an Ohio trial court issued a five-year civil stalking protection order that commanded Razete to "remove all references to [her ex-husband] from [any] internet or social-networking sites that she operates or controls" and prevented Razete from "post[ing] any comment about [her ex-husband]." 137 N.E.3d 639, 641, 646 (Ohio Ct. App. 2019). Shortly before her divorce, Razete had posted items about her ex-husband alleging that he stole money from her and had lied to his audience about donating his public-speaking proceeds to charity. *Id.* at 642.

In issuing the protection order, the trial court held that Razete's conduct violated Ohio's anti-"cyberstalking" statute. *Id.* at 646. The statute (which was functionally similar to the Texas harassment statute) prohibited "a pattern of conduct" that "knowingly cause[s] another person to believe the offender will . . . cause mental distress to the other person" by "post[ing]" "any message or information, whether truthful or untruthful, about an individual." *Id* at 644. While the order preventing Razete from "pos[ting] any comment about

[her ex-husband]" was reversed as an unconstitutional prior restraint on appeal, the order commanding Razete to delete all her online statements about her ex-husband was sustained with no finding that they were defamatory or threatening. *Id.* at 646-47.

Like the Ohio statute, the Texas statute prevents people from airing grievances about their former spouses to the extent such speech is intended and reasonably likely to "embarrass" or "annoy" the former spouse. That is not constitutional, even as to speech that lacks much social or political significance. "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *United States v. Stevens*, 559 U.S. 460, 479 (2010).

Similarly, a trial court in Missouri issued an anti-harassment order barring a woman "from post[ing], plac[ing] or includ[ing] any derogatory, demeaning, disparaging, degrading, and/or belitt[l]ing, comments, remarks, pictures or similar 'postings' about [her ex-boyfriend] . . . that would reveal [the ex-boyfriend's] identity." *E.D.H. v. T.J.*, 559 S.W.3d 60, 63 (Mo. Ct. App. 2018). Missouri law classifies harassment as a "purposeful or knowing course of conduct involving more than one incident . . . that alarms or causes distress." *Id.* at 65. The woman had posted several items on social media about her ex-boyfriend after learning that he had been married to another woman (with whom he had children) during their relationship. *Id.* at 63.

Ultimately, the order was vacated on appeal, but only because the evidence that a few of the ex-

boyfriend's friends saw posts depicting him in a negative light was insufficient to establish that he suffered substantial emotional distress. *Id.* at 65. This reading of the statute makes it quite possible that similar messages, reaching a larger group of friends, can be suppressed as "harassment." *Cf. Delgado v. Miller*, 314 So. 3d 515, 518 (Fla. Ct. App. 2020) (vacating, on First Amendment grounds, an anti-harassment order restricting a woman from speaking about her ex-lover, a Trump campaign adviser who was slated to be Trump's White House Communications Director but withdrew when his affair with the woman—herself a political commentator and former Trump campaign advisor—came to light); Volokh, 45 Harv. J.L. & Pub. Pol. at 161 (discussing *Delgado* in more detail).

Likewise, Texas law would presumably restrict the speech about the ex-boyfriend posted online in *E.D.H. v. T.J.* (at least if it reached a larger group of friends). But the First Amendment permits people to air their personal grievances about a former relationship, for instance to warn others in their social circle about certain people, or for the sake of sharing their experiences. People should be free to speak candidly about their lives, and speech about former romantic partners is often a source of important self-expression.

II. An Overbroad Harassment Statute Like Texas's Is Not Saved Simply Because It Requires an "Intent to Harass"

Nor can restrictions on such speech be justified on the theory that the speakers are ill-intentioned.

Even when someone "speak[s] out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Garrison v. Louisiana, 379 U.S. 64, 73 (1964). Thus, in *Garrison*, this Court held that reputation-injuring speech could not be restricted based on the motives of a speaker (as opposed to based on evidence of knowledge or recklessness as to falsity), even when there was evidence of a "desire to injure." *Id.* at 78. The same logic applies to speech supposedly spoken out of a desire to "harass, annoy, alarm, abuse, torment, [or] embarrass." Tex. Penal Code § 42.07(a)(7) (at least setting aside speech that is "alarm[ing]" in the narrow sense of being a true threat).

Indeed, setting aside a few narrow exceptions (such as incitement), a speaker's intent is "entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead opinion) (cleaned up); *id.* at 495 (Scalia, J., concurring in part) (likewise rejecting an intent-based test to determine whether speech was constitutionally protected). "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (applying *Hustler* to private figures). Indeed, legitimate criticisms of a person often stem from bad experiences with that person. Such bad experiences provide the speaker with useful information about the subject, but also often generate ill will.

Thus, even an intent to inflict emotional distress, coupled with the infliction of severe emotional distress, does not suffice to strip speech of First Amendment protection. *Hustler*, 485 U.S at 56; *Snyder*, 562 U.S. at 460-461. The same must be true for intentions merely to "annoy," "embarrass" or even "harass," "abuse," or

"torment." And even if this logic is viewed as limited to speech on matters of public concern, Texas Penal Code §42.07(a)(7) and many other state harassment laws do not include any exceptions for speech on such matters.

Intent tests also tend to chill speech, because of the difficulty of teasing apart the various intentions that a speaker may harbor. Under an intent-based statute, "[n]o reasonable speaker would choose to" engage in speech potentially covered by the statute, "if its only defense to criminal prosecution would be that its motives were pure." *Wis. Right to Life*, 551 U.S. at 468 (lead opinion). "[T]est[s] that [are] tied to the public perception, or a court's perception, of . . . intent" are "ineffective to vindicate the fundamental First Amendment rights" of those against whom the intent-based law is applied. *Id.* at 492 (Scalia, J., concurring in part and concurring in the judgment).

Any effort to distinguish restricted speech from unrestricted speech "based on intent of the speaker . . . would 'offe[r] no security for free discussion,' and would 'compe[l] the speaker to hedge and trim.'" *Id.* at 495. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." *Garrison*, 379 U.S. at 73.

III. Unwanted Speech Said *About* a Person to Willing Listeners Is Generally Protected

To be sure, there are some familiar categories of "harassment" laws—telephone harassment laws are the most common example—that are constitutional. But this is so because they forbid unwanted speech *to an unwilling recipient*, perhaps on the theory that "no one has a right to press even 'good' ideas on an

unwilling recipient." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970).

This cannot justify restrictions on unwanted speech *about an unwilling subject*, particularly when that speech often occurs online in digital forums that do not resemble phone calls or other mediums of one-on-one communication. Thus, in *Organization for a Better Austin v. Keefe*, this Court held that distributing leaflets to the public about an unwilling subject was constitutionally protected, even if the "views and practices of the petitioners [were] no doubt offensive to others," including to the person being criticized. 402 U.S. 415, 419 (1971). *Rowan* was not applicable to such a situation, this Court held, because Keefe was "not attempting to stop the flow of information into his own household, but to the public." *Id.* at 420. And, of course, *Hustler* and *Snyder* similarly held that the intentional infliction of emotional distress tort cannot be used to stop the flow of criticism and even ridicule of a person to the public. The logic of these decisions likewise applies to online communications that are similarly directed to the broader public.

Because the Texas statute prohibits repeated electronic communication intended and reasonably likely to annoy or harass "another" (and not just the recipient), it is not limited to harassing speech directed *to* an unwilling listener. Instead, it broadly applies to speech *about* a person, even when the speech is directed at potentially willing listeners. Under the law, "[i]t would often be unnecessary for the target of the actor's intent to even receive or read the electronic communication." Pet. 27a (Keller, P.J., dissenting). The Texas law thus does precisely what *Keefe* said the law cannot do:

restricts the flow of information about an unwilling subject to the public.

CONCLUSION

Texas Penal Code § 42.07(a)(7), like many other state anti-harassment laws, is unconstitutionally overbroad. It potentially covers a wide range of speech that criticizes politicians, police officers, activists, businesspeople, and others. It cannot be saved by the requirement of an "intent to harass, annoy, alarm, abuse, torment, or embarrass another." And it is not limited to speech (such as traditional telephone harassment) said to an unwilling listener. This Court should grant certiorari to consider whether this is constitutional, and to apply then-Judge Alito's correct conclusion that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204.

Respectfully submitted,

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