No. 22-____

IN THE

Supreme Court of the United States

SLADE ALAN MOORE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

Petitioner Slade Alan Moore petitions from judgments in three related cases issued by the Eighth Court of Appeals in Texas, with the Court of Criminal Appeals refusing discretionary review.

Sanders was the applicant for a writ of habeas corpus in the County Court of Andrews County, Texas, the appellant at the Eighth Court of Appeals of Texas, and the Petitioner at the Texas Court of Criminal Appeals. Respondent State of Texas opposed Mr. Moore's habeas application in the county court, was the appellee at the Eighth Court of Appeals, and was the respondent at the Court of Criminal Appeals.

RELATED PROCEEDINGS

Court of Criminal Appeals of Texas:

Ex Parte Barton, No. PD-1123-19 (Tex. Crim. App. Apr. 6, 2022) (to be reported at --- S.W.3d ---; available at 2022 WL 1021061);

Ex Parte Sanders, No. PD-0469-19 (Apr. 6, 2022) (--- S.W.3d ---; 2022 WL 1021055).

Eighth Court of Appeals of Texas:

Ex Parte Moore, No. 08-20-00064-CR (Tex. App. Feb. 4, 2022) (not designated for publication);

Ex Parte Moore, No. 08-20-00065-CR (Tex. App. Feb. 4, 2022) (not designated for publication);

Ex Parte Moore, No. 08-20-00066-CR (Tex. App. Feb. 4, 2022) (not designated for publication);

Andrews County Court, Andrews County, Texas:

State v. Moore, No. 19-0135, 19-0237, and 19-0258, (unpublished) (order denying defendant's motion to quash information).

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INTRODUCTION

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

A 5-4 majority of the Texas Court of Criminal Appeals held in two related cases, *Ex parte Barton* and *Ex parte Sanders*, that an "electronic communication" made with the "intent to engage in the legitimate communication of ideas" can nevertheless be considered "non-communicative" and judicially declared "not speech." *Sanders*, 2022 WL 1021055 at *4. While those cases were pending decision, the Eighth Court of Appeals upheld the trial court's denial of relief to Mr. Moore, and Mr. Moore petitioned the Court of Criminal Appeals for discretionary review. When *Barton* and *Sanders* were decided, this case was decided with them. As both *Barton* and *Sanders* have been brought to this Court's attention via a petition for a writ of certiorari, so too does Mr. Moore make the same presentation.

The Eighth Court of Appeals, in its opinion, noted that their opinion "with additional discussion of the issues would add nothing new to what is already pending before the Texas Court of Criminal Appeals." App. 6a.

In the proceedings in the Court of Criminal Appeals, over an incredulous dissent, the *Barton/Sanders* court held that a Texas law criminalizing "electronic communications" intended and reasonably likely to "harass, annoy, alarm, abuse, torment, or embarrass," does not implicate the protections of the First Amendment in any way and thus is not susceptible to a facial challenge for vagueness or overbreadth. *Barton*, 2022 WL 1021061 at *2-*4.

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

The Texas law upheld below does not punish speech related to non-speech criminal conduct; *speaking* is the conduct targeted by the electronic communications harassment statute. Nor does the law apply to speech without regard to its content; repeated speech is made criminal, *inter alia*, when its *content* is alarming, embarrassing, or offensive to the recipient. And the law, as written, contains no exception for political speech or speech on matters of public concern. Under controlling precedent of this Court, it is impossible to conclude that the Texas law presents no First Amendment issue. *See*, *e.g*., *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Alvarez*, 567 U.S. 709 (2012).

Nor do this Court's precedents allow such a law targeting speech to be exempted from any facial challenge for overbreadth and vagueness. In *United States v. Stevens*, this Court declared that a law is facially overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." 559 U.S. 460, 473 (2010). The Texas court refused even to take up the issue, instead expediently declaring the repeated sending of an electronic communication not to involve speech at all. To allow the ruling to stand will open a Pandora's box of unreviewable First Amendment harms in the form of self-censorship and opportunities

for discriminatory enforcement against disfavored speech.

Troublingly, the Texas Court of Criminal Appeals is not alone in holding that a statue criminalizing harassment through communications does not implicate the First Amendment. While most state courts of last resort and federal circuits recognize that such harassment laws are necessarily subject to First Amendment scrutiny for vagueness and overbreadth, a number of courts have reached the same conclusion as the Texas court here. But in so doing, courts have applied a range of inconsistent theories and approaches. This issue warrants review by this Court to clear up an existing confusion in the lower courts over how to account for First Amendment issues unavoidably imbedded in laws criminalizing harassment by communication.

Today, most Americans use the Internet every day to talk politics and religion, organize family chores, and connect with friends. Like all speech, online speech is sometimes annoying, embarrassing, alarming, or otherwise unpleasant—and often intentionally so. Threatening criminal penalties for repeated speech that is unwelcomed by the recipient will inhibit robust communication on our primary means of communicating. The issue presented is one of exceptional significance, and the Court should grant *certiorari* for this reason as well.

OPINIONS AND ORDERS BELOW

The Texas Eighth Court of Appeals opinion in *Ex parte Moore* is available at No. 08-20-00064-CR, 2022 WL 336776 (Tex. App. Feb. 4, 2022). The Court of Criminal Appeals June 22, 2022, denial of the petition for discretionary review is unpublished. The orders denying the writ of habeas corpus and motion

to quash the information on February 14, 2020, are also unpublished.

JURISDICTION

The Texas Eighth Court of Appeals issued is opinion on February 4, 2022. App. Doc 6a. The Texas Court of Criminal Appeals denied discretionary review on June 22, 2022. On September 13, 2022, and October 5, 2022, Justice Alito extended the time for filing Moore's petition for certiorari to and including November 7, 2022. *See* No. 22A219.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

> . . .
>
> (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

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

STATEMENT OF THE CASE

A. The Trial Court Denies Petitioner's Facial Challenges To The Texas Electronic Communications Harassment Law

Petitioner Slade Alan Moore was charged by information with violating Texas Penal Code § 42.07(a)(7) in Cause Nos. 19-0135, 19-0237, and 19-0258 in the County Court of Andrews County, Texas. This law is violated if a person sends repeated "electronic communications" with an "intent to harass, annoy, alarm, abuse, torment, or embarrass another," and their communications have the intended effect, or simply "offends." *Id.* The law defines an "electronic communication" broadly to include any transfer of writing, images, sounds, data or "intelligence of any nature" that is "transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system." *Id.* § 42.07(b)(1). Expressly included within this definition are any communications "by electronic mail, instant message, network call, or facsimile machine," or "made to a pager." *Id.*

The three charges are related. In each of them, Petitioner is alleged to have sent electronic communications to one Kimberly McCurdy in a manner reasonably likely to and intended to harass, alarm, annoy, abuse, torment, embarrass, or offend McCurdy. App. 8a, 9a, 10a, 11a, 12a, and 13a.

Petitioner moved to quash the information and for a pretrial writ of habeas corpus in each case, which was denied. App. 7a.

B. Intermediate Appellate Courts Disagree On The Law's Constitutionality

Moore appealed the denials of habeas corpus to the Texas Courts of Appeals for the Eighth District. Because *Barton* and *Sanders* were then pending at the Texas Court of Criminal Appeals, and their disposition would control Moore's case, the Eighth Court of Appeals affirmed the trial court's decisions. App. 6a.

C. The Court of Criminal Appeals Decided *Barton* And *Sanders* Adverse To Moore And Refused Discretionary Review

The Texas Court of Criminal Appeals, by a vote of 5 to 4, reversed in *Barton* and affirmed in *Sanders*, on the ground that the electronic communications harassment statute does not implicate the First Amendment and is thus not susceptible to a facial First Amendment challenge.

The five-judge majority based its ruling on the holding in *Scott v. State* that the same "harassing conduct" proscribed by the telephone harassment law "is not speech." *Sanders*, 2022 WL 1021055 at *4-*5.[1] The court reasoned that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at the shopping mall—but such a kernel is not sufficient to bring the activity within

[1] The court described *Scott*'s passage concerning communicative conduct causing an intolerable invasion of privacy, on which the Seventh District relied, as "an alternative theory." *Sanders*, 2022 WL 1021055 at *7.

the protection of the First Amendment." *Id.* at *8 (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)). The court found the electronic-harassment statute at issue here "the same [as the telephone-harassment statute at issue in *Scott*] for First Amendment purposes." *Id*.

The court acknowledged that a law regulating "non-protected speech nevertheless still implicates the First Amendment," but found this principle inapplicable because the conduct implicated by the harassment laws "is noncommunicative." *Sanders*, 2022 WL 1021055 at *6. It thus declined to exercise any First Amendment scrutiny because § 42.07(a)(7) addresses "non-speech conduct that does not implicate the First Amendment." *Id*. at *12.

The court also recognized that § 42.07(a)(7) on its face applied to "traditional categories of communication" such as "a writing, an image, and a sound," *Sanders*, 2022 WL 1021055 at *13, but found this irrelevant. According to the court, laws like § 42.07(a)(7) do not implicate the First Amendment even when one has an "intent to engage in the legitimate communication of ideas," if there is also a proscribed intent, for example, an intent to "annoy." *Id*. A communicative intent "does not convert non-expressive conduct into expressive conduct." *Id*. The court noted that one could also violate the statute without expressing anything, "by the repeated sending of communications containing no speech at all," or sending "computer code . . . entirely indecipherable and meaningless to humans." *Id*. That such plainly non-expressive conduct violates § 42.07(a)(7), reinforced the court's conclusion that the law does not implicate the First Amendment.

Four judges dissented in *Barton*.[2] Writing for herself and Judge Keel, Presiding Judge Keller disputed the majority's holding that the statute does not regulate speech. In her view, "[t]he term 'electronic communications' alone suggests that the regulated conduct is speech, but the statutory definition of the term makes it clear that the regulated conduct is indeed speech." *Barton*, 2022 WL 1021061 at *9 (Keller, P.J., *dissenting*). Presiding Judge Keller recognized that the First Amendment does not protect every act that has a kernel of expressive activity, but disagreed that that principle applies to § 42.07(a)(7). This law is "concerned with *communications*" in general, and the "inherently communicative aspect of electronic communications" in particular. *Id*. at *10.

Presiding Judge Keller also took issue with the majority's analysis regarding the possibility of violating the statute by sending "data [that] could be meaningless." *Id*. at *10. In her view, these possibilities do not negate the First Amendment entirely, but instead inform whether the law "reaches a substantial amount of First Amendment conduct in relation to its legitimate sweep" so as to render it overbroad. *Id.* at *12.[3]

In that vein, Presiding Judge Keller observed that the statute "encompasses a truly enormous amount of speech." *Barton*, 2022 WL 1021061 at *11 (Keller, P.J.,

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[2] Judges Slaughter and McClure dissented without opinion.

[3] While not endorsing *Scott*—from which she dissented—Presiding Judge Keller argued that the electronic harassment statute goes further than the statute *Scott* addresses. The "usual case" of telephonic harassment might be noncommunicative, but the same cannot be said for electronic communications. *Barton*, 2022 WL 1021061 at *11-12 (Keller, P.J., *dissenting*) (quoting *Scott*, 322 S.W.3d at 669).

dissenting). This is so despite the statute's intent requirement. After all, alarming, annoying, or embarrassing someone "could be the point of the communication." *Barton*, 2022 WL 1021061 at *12. She gave the following examples:

- A citizen could intend to "alarm" others by drawing attention to a devastating judicial decision. Presiding Judge Keller noted that her own dissenting opinion could be a crime. *Id.* at *11.
- As in the Bible's parable of the persistent widow, a citizen could repeatedly petition an unjust judge to "annoy" them into granting relief. *Id*. at *11 (citing Luke 18:1-5).
- A journalist could intend to "embarrass" a politician by repeatedly exposing their indiscretions, as in Andrew Breitbart's coverage of Anthony Weiner. *Id*. at *11.

Having found that § 42.07(a)(7) implicates the First Amendment, Presiding Judge Keller would have conducted the overbreadth analysis the majority declined to perform. In her view, the statute "punishes a substantial amount of protected speech in relation to its legitimate sweep."[4] *Barton*, 2022 WL 1021061 at *12 (Keller, P.J., *dissenting*). So she would have held it unconstitutional.

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[4] No court has yet addressed what the "plainly-legitimate sweep" of a statute which restricts speech is. Logically, the answer must be only the **unprotected** speech restricted by the statute; but Texas courts have interpreted it more in the vein of speech the Legislature intended to prohibit that is also deleterious or harmful. *See Barton*, 2022 WL 1021061 at *7-8.

Mr. Moore did not file for rehearing from the denial of discretionary review in his case. *Barton* and *Sanders* are now pending before this Court.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT'S HOLDINGS DEFY THIS COURT'S FIRST AMENDMENT PRECEDENTS IN MUTIPLE RESPECTS

This case, as per the ruling of the Texas Eighth Court of Appeals, was decided in line with the Texas Court of Criminal Appeals' decisions in *Barton* and *Sanders*. App. 5a, 6a. In *Barton* and *Sanders*, the Texas Court of Criminal Appeals held that the First Amendment is not implicated by a law imposing criminal sanctions for the repeated sending of electronic communications—emails, text messages, tweets—with (a) an intent "to harass, annoy, alarm, abuse, torment, or embarrass" and (b) in a manner "reasonably likely" to have that effect, or otherwise simply to "offend" the recipient. Tex. Penal Code Ann. § 42.07(a)(7). Because the law *could* be applied to non-expressive communications, such as repeatedly sending a blank email, the court held that the law on its face presented no First Amendment issue. And this is so, the court said, even if an electronic communication is also sent with an intent to convey an idea, express an opinion, or engage in political confrontation. The repeated sending of such a message was declared to be "non-communicative conduct," so that criminalizing it raised no constitutional concern. This holding, and the court's refusal to entertain a facial overbreadth challenge, fundamentally contradict this Court's precedent in multiple respects.

A. The Texas Court Refused To Apply Any First Amendment Analysis To A Statute It Found To Penalize "Expressive Speech"

The Texas court concluded that one can violate § 42.07(a)(7) "by the repeated sending of communications containing expressive speech," but nonetheless held that the law "does not implicate the First Amendment." *Barton*, 2022 WL 1021061 at *7. The notion that the First Amendment has no bearing on a statute that criminalizes "expressive speech" broadly ignores this Court's First Amendment jurisprudence.

The Supreme Court Reports are replete with cases applying First Amendment scrutiny to statutes, like the Texas law at issue, that facially ban speech—including speech made by electronic communication. In *Reno v. ACLU*, the Court applied the First Amendment to a statute criminalizing the use of an "interactive computer service" to display a "patently offensive" "communication." 521 U.S. 844, 860 (1997). It held that the statute "abridges 'the freedom of speech' protected by the First Amendment" *Id*. at 849 (quoting U.S. Const. Amend. 1). In *Ashcroft v. ACLU*, the Court again considered a law prohibiting the posting of materials "harmful to minors," defined as "any communication" sharing one of several properties, such as being designed to "pander to . . . the prurient interest." 542 U.S. 656, 661 (2004). The Court held this law, too, to be an invalid "content-based speech restriction." *Id*. at 665. More recently, this Court subjected to First Amendment scrutiny a law prohibiting sex offenders from using social media. The Court held this law unconstitutional because it prevented citizens from "speaking and listening in the

modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

In each case, reasonable minds differed on the answer to the First Amendment question presented. But all agreed there was a question to be asked. *See Reno*, 521 U.S. at 892 (O'Connor, J., concurring in the judgment in part and dissenting in part) (concluding that the Communications Decency Act should be struck down in part because its "forced silence impinges in the First Amendment rights of adults to make and obtain [prohibited] speech"); *Ashcroft*, 542 U.S. at 676 (Scalia, J., dissenting) (objecting that "strict scrutiny" was the wrong standard of review); *id*. at 676 (Breyer, J., dissenting) (subjecting statute to "the most exacting scrutiny" but finding that it met that standard); *Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring in the judgment) (concluding that "the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur"). The Texas court flouted these precedents by refusing even to *apply* First Amendment analysis to a law it acknowledged to impose criminal penalties on "expressive speech." *Barton*, 2022 WL 1021061 at *6; *Sanders*, 2022 WL 1021055 at *8.

Even while admitting that the law reaches "expressive speech," the Texas court refused to engage in any facial First Amendment analysis, instead focusing on the law's prohibition of the repeated "sending" of those "communication[s]," which it declared to be non-expressive "conduct." *Barton*, 2022 WL 1021061 at *6-*7. This flies in the face of *Reno* and *Ashcroft*, in which this Court found electronic "communication[s]" sent on the Internet are "speech." *Reno*, 521 U.S. at 849; *Ashcroft*, 542 U.S. at 665. Its approach also conflicts with *Bartnicki v. Vopper*, which held that a statute

criminalizing the "disclos[ure]" of an intercepted "electronic communication" is a "regulation of pure speech." 532 U.S. 514, 520 n.3, 526 (2001).

The Texas court identifies no alchemy by which speech is transformed into non-expressive conduct simply by its repetition. Its conclusion that the statute on its face presents *no* First Amendment question simply refuses to follow this Court's repeated holdings on speech generally and electronic communications.

B. The Texas Court's Rationale For Refusing To Apply Any First Amendment Scrutiny Specifically Contravenes This Court's Precedent

The Texas Court of Criminal Appeals relied on two aspects of the electronic-communications harassment law to support its finding that the law on its face presents no First Amendment issue. Both rationales directly contradict this Court's precedent.

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

The Texas court concluded that § 42.07(a)(7) did not implicate the First Amendment even though it penalizes "expressive speech," because it is not specifically necessary to communicate an idea to violate the law. The court reasoned that because one could, for example, "send[] several emails containing only the letter 'B' . . . or e-mails containing nothing," *Sanders*, 2022 WL 1021055 at *13, the statute prohibits conduct rather than speech, and the First Amendment has no application. This Court's precedents reject this rationale for avoiding First Amendment scrutiny.

In *City of Houston v. Hill* this Court held that laws facially proscribing speech implicate the First Amendment even if they also reach some non-expressive conduct. In *Hill,* an ordinance made it unlawful to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." 482 U.S. 451, 455 (1987). The Court flatly rejected Houston's argument that "the ordinance does not inhibit the exposition of ideas," and held that it "deals not with core criminal conduct, but with speech." *Id*. at 459, 460. Even though people could be—and were—convicted for the non-expressive conduct of disobeying an officer's order to leave the scene, this Court found the law facially overbroad under the First Amendment. *See id*. at 467. *See also Hill v. City of Houston*, 789 F.2d 1103, 1113 (5th Cir. 1986) (en banc) (collecting examples of convictions under the ordinance), *aff'd*, 482 U.S. 451 (1987).

Hill is not the only ruling by this Court flouted by the holding of the Texas Court of Criminal Appeals. This Court has held repeatedly that laws facially regulating *conduct* implicate the First Amendment when they can also apply to expression. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991). This principle applies *a fortiori* to a statute that bans speech on its face, as the Texas law here does. And even if the Texas law were properly viewed as facially proscribing conduct, the Texas court's acknowledgment that it also applies to "expressive speech" necessarily compels a First Amendment analysis.

In *Holder v. Humanitarian Law Project,* for example, organizations and individuals seeking to provide humanitarian support to two groups identified as terrorist organizations brought a facial overbreadth and vagueness

challenge to portions of the USA Patriot Act proscribing "material support" for terrorists. 561 U.S. 1, 7-8 (2010). Though the Court concluded that material support "most often does not take the form of speech at all," it still subjected the statute to First Amendment scrutiny. *Id*. at 26, 28.

Likewise, in *McCullen v. Coakley*, the Court invalidated on First Amendment grounds a statute imposing a 35-foot buffer zone outside abortion facilities. *McCullen v. Coakley*, 573 U.S. 464, 497 (2014). Even though one could imagine non-expressive violations less farfetched than repeatedly sending emails with only the letter "B"—sitting on a bench and minding one's own business, say—these hypothetical possibilities did not obviate First Amendment analysis.[5]

The Texas court offered no coherent explanation for its departure from this Court's precedent. It did cite cases indicating that laws regulating conduct with no significant expressive component do not implicate the First Amendment. *See Sanders*, 2022 WL 1021055 at *8, *citing Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986); *Virginia v. Hicks,* 539 U.S. 113, 123 (2003); *Rumsfeld v. Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 66 (2006); and *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 119, 121 (2011). But in three of those cases, the challenged statute prohibited *only* non-expressive conduct—unlike the Texas law, which is targeted specifically at "communications." *See Arcara*, 478 at 705 (holding that the proscribed activity, prostitution and its solicitation, "manifests

[5] The statute contained certain exceptions, including for using the sidewalk to get to another area. *See McCullen*, 573 U.S. at 472. Sitting on a bench and minding one's own business would violate the statute if one came and left from the same direction.

absolutely no element of protected expression"); *Rumsfeld*, 547 U.S. at 65-66 (holding that the regulated acts, refusing to allow military recruiters onto a law school campus, are not speech, and that they are "conduct" that "is not inherently expressive"); *Carrigan*, 564 U.S. at 126 (declining to apply the First Amendment to a recusal statute because "the act of voting symbolizes nothing"). In the fourth case, the Court did not dispute that the statute implicated the First Amendment. *See Hicks*, 539 U.S. at 124 (reversing lower court's finding of substantial overbreadth but noting that applications of the challenged policy "that violate the First Amendment can still be remedied through as-applied litigation").

The Texas court also sought support in its earlier decision upholding a law criminalizing the act of repeatedly causing a person's telephone to ring or repeatedly making anonymous telephone calls with the same intent as proscribed in the electronic communications law. In that case, the conduct regulated was held to be "essentially non-communicative" and thus "not speech at all," *Sanders*, 2022 WL 1021055 at *5 (citing *Scott v. State,* 322 S.W.3d 662 (Tex. Crim. App. 2010)). In addressing the telephone harassment statute, the Texas court deemed the "usual case" of a statutory violation to be where the person "will not have an intent to engage in the legitimate communication of ideas, opinions, or information." *Scott*, 322 S.W.3d at 670. It reasoned that the sending of repeated emails or text messages is the analogue of repeated telephone hang-ups, and found the electronic communications statute similarly to proscribe conduct, not speech. *Id*. at *10-*11.

But whatever the merits of *Scott*'s analysis of the telephone law,[6] the usual case addressed by the electronic communications law is not an "email containing nothing," but one containing a communication. Tex. Penal Code Ann. § 42.07(b)(1).[7] And unlike repeated telephone hang ups and anonymous calls—whose harassing nature depends on factors like how frequently the phone rings, where, and at what time—whether an email, text message or tweet is reasonably likely to harass, alarm, embarrass, etc. will generally depend on its *content*: its effect on the recipient is "because of" the "message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The Texas rulings thus contradict this Court's repeated holdings that regulations dependent upon the content of a communication *necessarily* trigger First Amendment scrutiny. *See, e.g.*, *id.*; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

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

The Texas court also reasoned that the law's requirement of an intent to harass, annoy, alarm, abuse, torment or embarrass, removed it from First Amendment scrutiny because the law punishes only those with no "intent to engage in the legitimate

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[6] As Presiding Judge Keller noted in her *Barton* and *Scott* dissents, the statute is not limited to the "usual case," and those other cases may well involve speech. *See Barton*, 2022 WL 1021061 at *11-*12 (Keller, P.J., dissenting); *Scott*, 322 S.W.3d at 676 (Keller, P.J., dissenting).

[7] The law's definition of "electronic communications" as "includ[ing] *a communication initiated through* the use of electronic mail," texts, and social media posts, further bolsters this conclusion. *Id.* (emphasis added).

communication of ideas, opinions, or information." *Barton*, 2022 WL 1021061 at *5 (quoting *Scott* at 670). This rationale, too, conflicts with this Court's holdings, specifically the repeated instruction that laws targeting speech implicate the First Amendment even when that speech is motivated by a wrongful intent.

In *Cohen v. California*, the Court considered a California statute prohibiting "maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." 403 U.S. 15, 16 (1971). Despite the willfulness requirement, the Court found the statute unconstitutional as applied to the defendant, who worse a jacket saying "Fuck the draft" in a municipal courtroom. *Id*. at 26.

In *R.A.V. v. City of St. Paul*, this Court assessed a law banning cross-burning "which one knows or has reasonable grounds to know arouses anger, alarm or resentment"—construed as fighting words—"on the basis of race, color, creed, religion or gender." 505 U.S. 377 (1992). Even though fighting words are constitutionally proscribable, this Court found the law facially unconstitutional because it made the prohibited speech a "vehicle[] for content discrimination unrelated to" the reason the speech was proscribed, which constituted impermissible "content" and "viewpoint discrimination." *Id*. at 383-34, 391.

And in *Texas v. Johnson*, a defendant was convicted of "intentionally or knowingly" desecrating a flag by burning it. 491 U.S. 397, 400 n.1 (1989). The Court reasoned that the conviction would implicate the First Amendment if the defendant had "[a]n intent to convey a particularized message was present, and [if] the likelihood was great that the message would be understood by those who viewed it." *Id*. at 404. It found

such intent and likelihood present and reversed the conviction. *Id*. at 420.

Just that intent and likelihood will often inhere in violations of § 42.07(a)(7) as written. The Texas court recognized that the law punishes one who sends a message with a wrongful intent even if also intending "to engage in the legitimate communication of ideas, opinions, information or grievances," *Barton*, 2022 WL 1021061 at *5, including when the communication is easily understood as "expressive speech," *Sanders*, 2022 WL 1021055 at *13. Still, the Texas court concluded that "even accepting that a person who violates" the law "may harbor, alongside an intent to harass, an additional intent to engage in the legitimate communication of ideas, that fact does not convert non-expressive conduct into expressive conduct." *Barton*, 2022 WL 1021061 at *6. That rationale is fundamentally inconsistent with *Cohen, R.A.V.*, and *Johnson*, and gets the analysis exactly backwards. All these cases hold that expression implicates the First Amendment whether or not accompanied by a wrongful intent.

Simply put, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.). The holding and rationale of the Texas rulings fundamentally contradict this Court's precedent.

C. The Texas Court's Refusal To Conduct An Overbreadth Analysis Upholds A Law That Cannot Survive An Overbreadth Analysis Under This Court's Precedent

In upholding the law, the Texas rulings simply ignore this Court's First Amendment overbreadth jurisprudence, which renders improper the law's broad criminalization of repeated "electronic communication" that induce a multiplicity of reactions and emotions. *See, e.g.*, *United States v. Stevens*, 559 U.S. at 473 (holding that a law is overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").

In *Stevens*, the Court held overbroad a statute prohibiting depictions of animal cruelty—many of which would "alarm," "torment," or "offend" in violation of the Texas law—absent a serious redeeming value. *Id*. at 482. The Texas law governing electronic communications is broader in that it expressly *lacks* any exception for speech with redeeming social value or the "legitimate communication of ideas." *Barton*, 2022 WL 1021061 at *5-*6. The holding directly conflicts with this Court's overbreadth precedents.

As the dissenting judges recognized below, the overbreadth of the law is obvious and staggering. "Suppose," they wrote,

> a citizen, unhappy with an opinion from this Court, sent repeated emails to a group of like-minded citizens, saying "Texas is in trouble" and "This is arguably the most devastating ruling I have ever received from a court" and "It's time to get serious and get on the phone, write letters, etc to EVERYONE

> YOU KNOW to make them aware of what's happening. Name names on this court! If this stands we lose Texas. It's do or die this time." Has that citizen committed a crime? Under the Court's decision today, the answer is "Yes."

Barton, 2022 WL 1021061 at *9 (Keller, P.J., and Keel, J., dissenting).

Political campaigns repeatedly email potential voters using language expressly intended and likely to "alarm" them. Children text their parents over and over to "annoy" them into responding. Citizens routinely tweet at celebrities and political figures, hoping to "embarrass" them. These communications are unquestionably constitutionally protected, and yet all could be subject to prosecution under the Texas law. The law imposes a chill on a large swath of protected electronic speech that is far from imaginary when all that stands between a speaker and criminal prosecution is the whims of a prosecutor. *Virginia v. Hicks*, 539 U.S. at 119 (mere "threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech").

These problems are especially pronounced given the breadth of the statute's intent requirement. There is no limiting construction that the Texas Court of Criminal Appeals might have chosen as it would add an element that the Legislature did not include. Instead, the court held that a person *with* such an intent can be punished under the law if they also have a forbidden intent. By that reading, it is a crime in Texas for a priest to intentionally "alarm" his flock via repeated electronic newsletters, emails, Facebook posts, tweets, Instagram Reels, TikTok videos, or the like that sinning could damn them to hell, even if his main goal is to save their souls.

In contrast to these everyday examples of forbidden speech protected by the First Amendment, the Texas court majority offered a smattering of far-fetched hypotheticals where the law could conceivably apply to what it viewed as unprotected conduct including blank or nonsense communications. *See Sanders*, 2022 WL 1021055 at *13;

The unconstitutional applications dwarf the arguably permissible ones. The statute's overbreadth is "substantial . . . judged in relation to its plainly legitimate sweep." *Stevens*, 559 U.S. at 460.

Although the Court of Criminal Appeals did not directly address the overbreadth challenge, that challenge is still ripe for this Court's review. There is no reason to remand to state court to potentially limit the law because "the possibility of a limiting construction appears remote." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Texas's highest criminal court has already definitively construed the statute, and has done so broadly. In *Scott*, the court construed the intent requirement the telephonic harassment law shares with § 42.07(a)(7):

> "Harass" means "to annoy persistently." "Annoy" means to "wear on the nerves by persistent petty unpleasantness." "Alarm" means "to strike with fear." "Abuse" means "to attack with words." "Torment" means "to cause severe distress of the mind." "Embarrass" means "to cause to experience a state of self-conscious distress." "Offend" means "to cause dislike, anger, or vexation."

Scott, 322 S.W.3d at 669 n.13 (quoting Webster's Ninth New Collegiate Dictionary 47, 68, 88, 405, 552, 819, & 1245 (1988)). With a definitive but broad state

court construction on a facial challenge, this Court is perfectly placed to address the statute's overbreadth.

In short, the decisions in *Barton* and *Sanders*, implicitly stated to be the basis of the decision of the Texas Eighth Court of Appeals in upholding the decision of the trial court and the Texas Court of Criminal Appeals's rationale for refusing discretionary review in this case, directly contradict this Court's precedents in multiple ways. The Court should grant *certiorari*.

II. LOWER COURTS ARE DEEPLY SPLIT ON THE CONSTITUTIONALITY OF LAWS CRIMINALIZING COMMUNICATIONS MADE WITH A PROSCRIBED INTENT

Lower courts are split on two critical issues pertaining to laws criminalizing telephonic and electronic communications made with certain proscribed intents, such as an intent to harass, alarm, embarrass. First, some courts disagree that these laws implicate the First Amendment at all. Second, even when a First Amendment analysis is applied, courts widely differ on the proper analysis and whether the relevant law is constitutional.

This Court has recognized that it is "intolerable to leave unanswered" and in "uneasy and unsettled constitutional posture," questions concerning First Amendment protections. *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974). Yet the conflicting decisions of state courts of last resort and the federal circuits concerning harassment laws targeting speech do just that. The Court should step in to right the ship before another court follows down the erroneous path followed here by the Texas court and endangers free expression in "the 'vast democratic

forums of the Internet.'" *Packingham*, 137 S. Ct. at 1735 (quoting *Reno*, 521 U.S. at 868).

A. A Minority Of Courts Have Held That Laws Criminalizing Electronic Or Phone Communications Made With Proscribed Intents Raise No First Amendment Issue

The Texas Court of Criminal Appeals joined a minority of courts in concluding that laws targeting electronic or telephone communications made with a proscribed intent are exempt from First Amendment scrutiny because they regulate conduct and not speech. Many of the courts found the laws' intent requirements central to that rationale.

For instance, in *Gormley v. Director, Connecticut State Department of Probation*, the Second Circuit construed a law criminalizing the "mak[ing of] a telephone call" to another person with "intent to harass, annoy, or alarm" as targeting conduct rather than speech, reasoning that the law regulated the making of the call itself. 632 F.2d 938, 941–42 (2d Cir. 1980). Similarly, in *Thorney v. Bailey*, the Fourth Circuit concluded that a West Virginia statute barring the "mak[ing of] repeated telephone calls, during which conversation ensues, with intent to harass" merely "prohibits conduct and not protected speech." 846 F.2d 241, 243 (4th Cir. 1988). In so doing, the court followed the West Virginia Supreme Court's analysis of the same statute. *See State v. Thorne*, 333 S.E.2d 817, 819–20 (W. Va. 1985) (upholding the statute because "harassment is not . . . protected speech"); *accord State v. Calvert*, No. 15-0195, 2016 WL 3179968, at *4 (W. Va. June 3, 2016).

The Ninth Circuit has twice concluded that electronic and telephone harassment statutes do not

implicate the First Amendment. In *United States v. Osinger*, the court upheld a prior version of the federal cyberstalking statute as constitutional, reasoning that the law targeted "a course of conduct that causes substantial emotional distress" rather than speech. 753 F.3d 939, 944 (9th Cir. 2014). The court further reasoned that "[b]ecause the statute requires both malicious intent on the part of the defendant and substantial harm to the victim, it is difficult to imagine what constitutionally-protected speech would fall under these statutory prohibitions." *Id.* (quoting *United States v. Petrovic,* 701 F.3d 849 at 856 (8th Cir. 2012)). And in *United States v. Waggy*, the Ninth Circuit reached an analogous holding in concluding that a Washington telephonic harassment statute "regulates nonexpressive conduct and does not implicate First Amendment concerns." 936 F.3d 1014, 1019 (9th Cir. 2019) (citing *State v. Dyson*, 872 P.2d 1115, 1119 (Wash. Ct. App. 1994)).[8]

Some state courts of last resort have adopted much the same approach. In *Commonwealth v. Hendrickson*, the Pennsylvania Supreme Court concluded that Pennsylvania's telephone harassment statute, which prohibited telephone calls made "with intent to harass another" containing "any lewd, lascivious or indecent words or language," "does not punish constitutionally

[8] Even still, the Ninth Circuit recently came to the opposite conclusion when considering the federal telecommunications harassment statute. In an unpublished opinion, the court stated that 47 U.S.C.A. § 223(a)(1)(C), which prohibits anonymously "utiliz[ing] a telecommunications device, whether or not conversation or communication ensues, . . . with intent to abuse, threaten, or harass any specific person. . .criminalizes speech," and thus "must be interpreted with the commands of the First Amendment clearly in mind." *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, at *2 (9th Cir. Dec. 27, 2021) (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)).

protected conduct," even where the defendant's calls "contained political speech." 724 A.2d 315, 318 (Pa. 1999). And, in *State v. Camp*, the North Carolina Court of Appeals upheld a statute which forbade persons from calling another "repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying or embarrassing any person at the called number," reasoning that the statute proscribed unprotected conduct rather than speech. 295 S.E.2d 766, 769 (N.C. Ct. App. 1982). *See also Thorne*, 333 S.E.2d at 819–20.

These results are at stark odds with the majority of federal and state courts that recognize the straightforward proposition that laws targeting communications regulate speech and thus implicate the First Amendment.

B. Most Courts Hold The Opposite, With All But One Granting Relief Under The Overbreadth Doctrine

A large majority of courts have recognized that the First Amendment applies to statutes criminalizing electronic or phone communications made with a proscribed intent. Many simply take as a given that these laws regulate speech. *See, e.g.*, *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, at *2 (9th Cir. Dec. 27, 2021) (stating that because the federal telecommunications harassment statute, § 223(a)(1)(C), "criminalizes speech" it must be subject to First Amendment scrutiny). Others explicitly consider whether these laws do regulate speech, and readily conclude that they do. Most recently, in *United States v. Yung* the Third Circuit rejected the argument that the federal cyberstalking statute "focuses on conduct, not speech," finding that the law plainly regulates "a lot of speech, [including] emails, texts, and social media posts." 37 F.4th 70, 77 (3d Cir. 2022). *See also, Matter*

of Welfare of A.J.B., 929 N.W.2d 840, 849 (Minn. 2019) (holding that Minnesota's anti-stalking statute that proscribes, *inter alia*, sending electronic communications that made one feel "frightened, threatened, oppressed, persecuted, or intimidated," Minn. Stat. § 609.749(2)(6), reaches "purely expressive" communications and not just conduct).

While most courts agree that electronic harassment statutes like the Texas law here regulate speech, they diverge on the proper First Amendment analysis to apply to such laws. Many courts have struck down such laws as unconstitutionally overbroad; others have chosen instead to apply a narrow construction to salvage their constitutionality; and at least one has upheld a statute after applying First Amendment scrutiny. The lower courts are equally inconsistent in their approach to telephonic harassment statutes.

1. Three state high courts have held electronic harassment statutes to be unconstitutionally overbroad. In *People v. Golb*, the New York Court of Appeals held overbroad a statute almost identical to the Texas law. 15 N.E.3d 805, 810 (N.Y. 2014). The statute proscribed communicating with a person "with intent to harass, annoy, threaten, or alarm . . . in a manner likely to cause annoyance or alarm." N.Y. Penal Law § 240.30(1)(a). The court emphasized that the statute swept "in broad strokes," and its terms did not suggest "constitutionally necessary limitations on its scope." *Id.* at 813.[9]

[9] Several federal judges had already found the statute unconstitutional, with one going so far as to describe it as "utterly repugnant to the First Amendment." *Schlagler v. Phillips*, 985 F. Supp. 419, 421 (S.D.N.Y. 1991) (Brieant, J.); *see also Vives v. City of New York*, 305 F. Supp. 2d 289, 299 (S.D.N.Y. 2003) (Scheindlin, J.), *rev'd on other grounds*, 405 F.3d 115 (2d Cir.

The Minnesota Supreme Court reached a similar conclusion with respect to two statutes in *Matter of Welfare of A.J.B.* The court invalidated as overbroad an anti-stalking statute that proscribed the sending of electronic communications that caused someone to feel "frightened, threatened, oppressed, persecuted, or intimidated," among other things. Minn. Stat. § 609.749(2)(6). It also found overbroad a mail-harassment statute that proscribed, "with the intent to abuse, disturb, or cause distress, repeatedly mail[ing] or deliver[ing] or caus[ing] the delivery by any means, including electronically, of letters, telegrams, or packages." Minn. Stat. § 609.795(1)(3) (2018). The court severed "disturb" and "cause distress" to cure the statute's overbreadth, leaving proscribed only those communications made with an "intent to abuse." *Id*. at 863.[10]

The Colorado Supreme Court similarly found portions of its electronic harassment statute unconstitutionally overbroad (but severed other provisions). *See People v. Moreno*, 506 P.3d 849, 857 (Colo. 2022). That statute reached the sending of electronic communications "with intent to harass, annoy or alarm" and in a manner "intended to harass or threaten bodily injury or property damage," among other things. Colo. Rev. Stat. § 18-9-111(1). As the court explained, "people often legitimately communicate in a manner 'intended to harass' by persistently annoying or alarming others to emphasize an idea or prompt a desired response."

2005); *Vives v. City of New York*, 405 F.3d 115, 123–24 (2d Cir. 2005) (Cardamone, J., concurring in part, dissenting in part).

[10] Though Texas Penal Code § 42.07(a)(7) does not contain the words "disturb" or "cause distress," the Court of Criminal Appeals has construed each of the proscribed acts as "types of emotional distress." *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010).

Id. at 855. This includes speech that warns people of impending dangers, such as

> communications made by email or social media about the need to combat a public health threat, or to seek shelter from an imminent tornado, or to respond to an active-shooter situation," or core political speech like "diatribes posted on public officials' social media accounts by disgruntled constituents.

Id. The court severed the overbroad provisions, leaving only those parts that prohibited "true threats and obscenity." *Id*. at 856.[11] Other courts have similarly struck down communications harassment laws found to be facially overbroad. *See Moreno*, 506 P.3d at 857.

2. Three federal courts of appeal have taken a different approach, upholding the federal cyberstalking statute after finding it facially overbroad by construing it narrowly to apply only to categorically unprotected speech. The federal law criminalizes sending electronic communications "with the intent to

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[11] Many state courts have deemed analogous telephonic harassment statutes to be overbroad. *See, e.g.*, *State v. Brobst*, 857 A.2d 1253, 1254 (N.H. 2004) (striking down as facially overbroad a law criminalizing the "[making of] a telephone call, whether or not a conversation ensues, with a purpose to annoy or alarm another"); *People v. Klick*, 362 N.E.2d 329, 332 (Ill. 1977) (striking down as overbroad a law which criminalized the making of a phone call "[w]ith intent to annoy another"); *Bolles v. People*, 541 P.2d 80, 81–83 (Colo. 1975) (invalidating telephone harassment statute as overbroad); *State v. Vaughn*, 366 S.W.3d 513, 519–20 (Mo. 2012) (concluding that a provision defining "harassment" to occur when a person "[k]nowingly makes repeated unwanted communication to another person" was overbroad and severing the provision accordingly).

kill, injure, harass, intimidate, or place under surveillance," if the course of conduct, *inter alia*, "would be reasonably expected to cause substantial emotional distress." 18 U.S.C. § 2261A(2). The Third Circuit, for example, recognized that the intents to "harass" and "intimidate" could naturally be read to include "nonviolent and nonthreatening speech," and that criminalizing such speech "would collide with the First Amendment." *United States v. Yung*, 37 F.4th 70, 77, 78 (3d Cir. 2022). It thus construed the law's intent requirement narrowly to capture only "true threats" and "speech integral to a crime." *Id.* at 80. *See also United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (construing "intimidation" as a "true threat" to "avoid a serious constitutional threat") (cleaned up); *United States v. Fleury*, 20 F.4th 1353, 1363 (11th Cir. 2021) (finding *Ackell*'s overbreadth analysis "particularly persuasive"). The Eighth Circuit recently overturned a conviction on similar grounds in an as-applied challenge. *See United States v. Sryniawski*, No. 21-3487, 2022 WL 4005336 at *3–5 (8th Cir. Sept. 2, 2022) (holding that "the First Amendment prohibits Congress from punishing political speech intended to harass or intimidate" and construing the law narrowly to apply only to categories of unprotected speech).[12]

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[12] Several state courts have applied a similar narrowing construction to analogous telephonic harassment statutes. *See, e.g.*, *State v. Moulton*, 78 A.3d 55, 71–72 (Conn. 2013) (construing harassment statute to extend only to categorically unprotected speech, such as true threats). And the Supreme Court of Maryland, the Alaska Court of Appeals, and the New Mexico Court of Appeals have taken a related tack, limiting their states' telephonic harassment laws to only apply to calls whose sole purpose is to harass, and to exclude calls that have some "legitimate purpose." See *Galloway v. State*, 781 A.2d 851, 878–80 (Md. 2001); *McKillop v. State*, 857 P.2d 358, 364–65 (Alaska

3. Charting an entirely different path, the Supreme Court of Montana has recognized the First Amendment implications of an electronic harassment statute but fully upheld it against an overbreadth challenge. The Montana law proscribed electronic communications made "with the purpose to terrify, intimidate, threaten, harass, annoy, or offend us[ing] obscene, lewd, or profane language . . . or threaten[ing] to inflict injury or physical harm to the person or property of the person." Mont. Code. Ann. § 45-8-13(1)(a) (West 2021). It 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. § 45-8-13(1)(a) (West 2012). The court severed the prima facie evidence provision as overbroad but, without discussion, upheld the proscription on electronic communications. *See State v. Dugan*, 303 P.3d 755, 772 (Mont. 2013).

By holding that the Texas statute targeted non-expressive conduct, the Texas court necessarily concluded that the statute is not overbroad. The court's decisions thus deepened the split of authority. This split, which will likely only grow as similar statutes proliferate, creates a public discourse slanted toward citizens on the pro-First Amendment side of the split. In New York, an atheist may freely tweet at a Christian in a deliberately alarming manner. How is the Christian to respond? It depends on where they live; Texas would require them to turn the other cheek.

Ct. App. 1993); *State v. Stephens*, 807 P.2d 241, 244 (N.M. Ct. App. 1991).

III. THE ISSUE PRESENTED IS A MATTER OF EXCEPTIONAL IMPORTANCE

In stark contrast to the majority of lower courts, the Texas Court of Criminal Appeals embraced the untenable proposition that no First Amendment issue is presented by a law imposing criminal penalties on the repetition of speech that "annoys," "alarms," "offends," or has other nebulous impacts on the recipient of that speech. As a result, it found that no judicial scrutiny of the law for overbreadth or vagueness is proper, unless and until the law is applied in an allegedly unconstitutional way. If permitted to stand, this holding and its transformative approach to speech as conduct threaten a far-reaching impact.

The Texas law does not punish speech integral to criminal conduct as in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). To the contrary, *speaking* is the conduct targeted by § 42.07(a)(7). Nor does the law apply to speech without regard to its content as in *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994). Rather, repeated speech is made criminal when its *content* is alarming, embarrassing, or offensive, and this is so regardless of whether the communication is political or addresses a matter of public concern. To hold that a law punishing the repeated sending of electronic communications cannot be facially challenged for overbreadth and vagueness, upends settled law and threatens to permit an array of unreviewable First Amendment harms from the self-censorship and discriminatory enforcement generated by overbroad restrictions on speech.

Under the rationale of the Texas court, laws punishing the repeated sending of political fundraisers, unwelcome romantic appeals, or hate speech could all lead to criminal liability under broadly worded

statues. The chilling effect would be wide and real, with no prospect of facial judicial review. *See Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 450-51 (5th Cir. 2022) (discussing the chilling effects of regulatory schemes on protected expression).

Such unreviewable laws not only chill, they create opportunities for misuse and abuse by low level officials with discretion to apply the vague terms creating criminality. As this Court warned in *Thornhill v. Alabama,*

> The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.

310 U.S. 88, 97–98 (1940) (Murphy, J.). The preclusion of any facial review of a law criminalizing repeated speech intended to alarm threatens just this result.

This holding by the Texas court threatens far-reaching consequences. Removing established First Amendment limits to punishment that may be imposed for sending electronic communications has the potential to impact the daily lives of countless Americans.

The principle this Court elucidated in *Stevens* is that all speech that does not fall into historically unprotected categories of speech is, *a fortiori*, protected, and that only this Court may declare a new category of unprotected speech. In the twelve years since *Stevens* was decided, this Court has not declared such a new category.

The internet also provides an increasingly crucial space for political discussion. Citizens depend on electronic communication to express their political views. Core political speech often consists of "vehement, caustic, and sometimes unpleasantly sharp attacks." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Texas statute forbids much of it.

Similar trends can be found within religious organizations across the country, as they increasingly take advantage of the Internet's accessibility to spread their beliefs. They also use these media to express their religious viewpoints on "broad issues of interest to society at large." *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). Some may find such speech may be "insulting, and even outrageous," but it is still protected by the First Amendment. *Id*.

Moreover, finding no need to conduct an overbreadth analysis on a facial challenge to a law proscribing certain electronic communications allows government officials to selectively apply vague prohibitions to target unpopular people and groups. Almost any online speech could be perceived as annoying, abusive, harassing, and the like, opening the door for prosecutors to charge citizens for exercising their free speech rights. This could include, for instance, repeatedly expressing approval or disapproval of this Court's decision in *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (June 24, 2022) to partisans holding the opposite view.

Even if those prosecutions would ultimately fail on an "as applied" analysis, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected

speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 335 (2010).

Whether a criminal law punishing the repeated transmission of speech with a proscribed intent implicates the First Amendment is a significant issue that warrants a definitive resolution by this Court, particularly given the confusion and disagreement that currently exists among state courts of last resort and the federal circuits.

Unless reversed by this Court, the rejection of fundamental First Amendment principles by the Texas Court of Criminal Appeals threatens to broaden criminal liability for otherwise-protected speech so long as some court somewhere can, by its own ipse dixit, declare that speech is "non-communicative" because the court finds that content of the speech objectionable. That is the very soul of a content-based restriction, and no inferior court should be allowed to circumvent this Court's precedent by declaring speech to be "non-speech" based on its content or the intent behind the speech.

CONCLUSION

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

Respectfully submitted,

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November 7, 2022

APPENDIX

APPENDIX A

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

6/22/2022
COA No. 08-20-00066-CR
MOORE, EX PARTE SLADE ALAN Tr. Ct. No. 19-0258
PD-0072-22

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

LANE HAYGOOD
HAYGOOD LAW FIRM
522 NORTH GRANT
ODESSA, TX 79761
DELIVERED VIA E-MAIL

APPENDIX B

2022 WL 336776
Only the Westlaw citation
is currently available.

SEE TX R RAP RULE 47.2
FOR DESIGNATION AND
SIGNING OF OPINIONS.

(Do Not Publish)
Court of Appeals of Texas, El Paso.

EX PARTE Slade Alan
MOORE, Appellant.

No. 08-20-00064-CR

February 4, 2022

Discretionary Review
Refused June 22, 2022

Appeal from the County Court of Andrews County, Texas (TC# 19-0135)

Attorneys and Law Firms

Mark W. Bennett, *Lane A. Haygood*, for Appellant.

Sean Galloway, for State of Texas.

Before *Rodriguez*, C.J., *Palafox*, and *Alley*, JJ.

OPINION

JEFF ALLEY, Justice

*1 This appeal arises from Appellant Slade Alan Moore's pretrial habeas-corpus proceeding challenging the information charging Moore with harassment under *Tex.Penal Code Ann. § 42.07(a)(7)*. In his application for writ of habeas corpus and associated motion to quash, Moore argued that he was being illegally restrained because *section 42.07(a)(7)* is facially

unconstitutional under the U.S. Constitution due to the statute's overbreadth and vagueness. The trial court denied Moore's writ application and motion to quash information, and he now appeals the trial court's order denying his writ application. For the reasons below, we affirm the trial court's order and remand the cause to the trial court.

I. Background

The State charged Moore with harassment under *section 42.07(a)(7)*, alleging that on or about April 19, 2019, Moore:

> did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass [K.M.],[1] hereafter styled the complainant, cause the telephone of the complainant to ring repeatedly and did send repeated electronic communications to the complainant in a manner reasonabl[y] likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, namely [K.M.].

Moore filed a pretrial application for writ of habeas corpus and motion to quash the information, arguing that he was illegally confined or restrained and that the information should be quashed because the statute under which he was charged, *section 42.07(a)(7)*, was unconstitutionally overbroad and vague under the First Amendment of the U.S. Constitution. In particular, Moore contended that *section 42.07(a)(7)'s* prohibitions against certain speech constituted content-based restrictions on speech of the type that did not fall into any previously recognized category of unprotected

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[1] To protect the complainant's identity, we refer to her as "K.M." *See* Tex.R.App.P. 9.10.

speech. Moore further contended that *section 42.07(a)(7)* was unconstitutionally vague because of the uncertain meaning of what constitutes "repeated" communications.

The trial court denied Moore's writ application and motion to quash by written order. Moore appealed the court's order denying his writ application and motion to quash, and this Court first dismissed the appeal for want of jurisdiction. *See Ex parte Moore, No. 08-20-00064-CR, 2020 WL 1809169, at *1 (Tex.App.--El Paso Apr. 9, 2020, no pet.) (mem. op., not designated for publication)* (*Moore I*), *superseded by Ex parte Moore, No. 08-20-00064-CR, 2020 WL 2079215, at *1 (Tex.App.--El Paso Apr. 30, 2020, no pet.)* (mem. op. on reh'g, not designated for publication) (*Moore II).* On rehearing, Moore argued that he was appealing the denial of his writ application, and because denial of a pretrial habeas corpus writ application is a final appealable order, we withdrew our original opinion and issued an opinion reinstating the appeal for consideration of *section 42.07(a)(7)'s* constitutionality. *See Moore II, 2020 WL 2079215, at *1.* This issue now prompts this appeal.

II. Discussion

*2 At the outset, we note that this Court decided the facial constitutionality of *section 42.07(a)(7)* in *Ex parte Hinojos, No. 08-17-00077-CR, 2018 WL 6629678, at *5-6 (Tex.App.--El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication)*. In *Hinojos*, we held that *section 42.07(a)(7)* is not facially unconstitutional on the grounds of being overbroad or unduly vague. *Id.* at *5; *see also Torres v. State, No. 08-19-00209-CR, 2021 WL 3400598, at *7 n.1 (Tex.App.--El Paso Aug. 4, 2021, no pet.) (not designated for publication)* (Alley, J., concurring) (recognizing *Hinojos).* These are essentially the same matters Appellant raises in this appeal.

Generally, an intermediate appellate court has an obligation to follow its own precedent unless it expressly overrules it. *See Kiffe v. State, 361 S.W.3d 104, 116 (Tex.App.--Houston [1st Dist.] 2011, pet. ref'd), citing Rose v. State, 752 S.W.2d 529, 555 (Tex. Crim. App. 1988)* (op. on reh'g) (Teague, J., concurring). Because we find no reason to expressly overrule *Hinojos*, we follow its holding here. *See id.* We therefore conclude that Appellant's facial challenge to *section 42.07(a)(7)* must fail.

Finally, we note that several cases directly raising the facial constitutionality of *section 42.07(a)(7)* are pending before the Texas Court of Criminal Appeals. Three of our sister courts have found *section 42.07(a)(7)* to be facially unconstitutional. *Griswold v. State, No. 05-19-01561-CR, 2021 WL 6049853, at *3-4 (Tex.App.--Dallas Dec. 21, 2021, mot. reh'g en banc filed); State v. Chen, 615 S.W.3d 376* (Tex.App.--Houston [14th Dist.] 2020, pet. filed); *Ex parte Barton, 586 S.W.3d 573 (Tex.App.--Fort Worth 2019, pet. granted)* (op. on reh'g). Three of our other sister courts have upheld the constitutionality of the statute. *State v. Grohn, 612 S.W.3d 78 (Tex.App.--Beaumont 2020, pet. filed); Ex parte McDonald, 606 S.W.3d 856 (Tex.App.--Austin 2020, pet. filed)*; *Ex parte Sanders, No. 07-18-00335-CR, 2019 WL 1576076 (Tex.App.--Amarillo Apr. 8, 2019, pet. granted) (mem. op., not designated for publication).* Elongating this opinion with additional discussion of the issues would add nothing new to what is already pending before the Texas Court of Criminal Appeals. We adhere to our prior precedent and overrule Appellant's Issue One.

III. Conclusion

The trial court's order is affirmed. We remand this case to the trial court for further proceedings consistent with this opinion.

All Citations

Not Reported in S.W. Rptr., 2022 WL 336776

APPENDIX C

IN THE COUNTY COURT OF
ANDREWS COUNTY, TEXAS

Cause No. 19-0135, 19-0237; and 19-0258

STATE OF TEXAS

v.

SLADE ALAN MOORE

ORDER ON DEFENDANT'S MOTION TO QUASH INFORMATION

On this day, the Court considered Defendant's Motion to Quash Information. Having reviewed the motion and brief attached to the motion, the Court finds that the motion should be DENIED.

It is, therefore, ORDERED, that the Defendant's Motion to Quash is DENIED.

SIGNED this 14th day of February, 2020.

/s/ [Illegible]
JUDGE PRESIDING

APPENDIX D

CAUSE #19-0258

INFORMATION - HARASSMENT 42.07(c) Class B Misdemeanor, CBS No.13160012

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

Cassandra Moholt Cheek, Assistant County Attorney of the County of Andrews, State of Texas, at this, the January Term, A.D. 2019 of the Andrews County Court, comes in behalf of the State of Texas, and in connection with the complaint of Chris Davis herein filed, presents in and to said County Court that in said County and State, on or about the 20th day of June, 2019 and before the making and filing of this information, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse torment, or embarrass Kimberly McCurdy, hereafter styled the complainant, threaten the complainant in a manner reasonably likely to alarm the complainant, to inflict bodily injury on the injured party;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

APPENDIX E

CAUSE #19-0258

COMPLAINT HARASSMENT 42.07(c) Class B Misdemeanor, CJIS No. 13160012

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

I, Chris Davis, do solemnly swear that I have good reason to believe, and do believe, that on or about the 20th day of June, 2019 and before the making and filing of this complaint, in the County of Andrews, and State of Texas, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse torment, or embarrass Kimberly McCurdy, hereafter styled the complainant, threaten the complainant in a manner reasonably likely to alarm the complainant, to inflict bodily injury on the injured party;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Chris Davis
Chris Davis, Affiant

Sworn to and Subscribed by, Chris Davis a credible person, before me, on this 16th day of July, 2019.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

19-0564 Escobar, Justin

APPENDIX F

CAUSE #19-0237

INFORMATION - HARASSMENT 42.07(c) Class B Misdemeanor, CJIS No.13160012

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

Cassandra Moholt Cheek, Assistant County Attorney of the County of Andrews, State of Texas, at this, the January Term, A.D. 2019 of the Andrews County Court, comes in behalf of the State of Texas, and in connection with the complaint of Chris Davis herein filed, presents in and to said County Court that in said County and State, on or about the 21st day of June, 2019 and before the making and filing of this information, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Kimberly McCurdy, hereafter styled the complainant, threaten the complainant in a manner reasonable likely to alarm the complainant, to inflict bodily injury;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

APPENDIX G

CAUSE #19-0237

COMPLAINT HARASSMENT 42.07(c) Class B Misdemeanor, CJIS No. 13160012

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

I, Chris Davis, do solemnly swear that I have good reason to believe, and do believe, that on or about the 21st day of June, 2019 and before the making and filing of this complaint, in the County of Andrews, and State of Texas, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Kimberly McCurdy, hereafter styled the complainant, threaten the complainant in a manner reasonable likely to alarm the complainant, to inflict bodily injury;

AGAINST THE PEACE AND DIGNITY OF THE STATE

/s/ Chris Davis
Chris Davis, Affiant

Sworn to and Subscribed by, Chris Davis a credible person, before me, on this 2nd day of July, 2019.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

19-0547 Rivera, Pat

APPENDIX H

CAUSE #19-0135

INFORMATION - HARASSMENT 42.07(c) Class B Misdemeanor, CJIS No.13160012

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

Cassandra Moholt Cheek, Assistant County Attorney of the County of Andrews, State of Texas, at this, the January Term, A.D. 2019 of the Andrews County Court, comes in behalf of the State of Texas, and in connection with the complaint of Chris Davis herein filed, presents in and to said County Court that in said County and State, on or about the 19th day of April, 2019 and before the making and filing of this information, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass Kimberly McCurdy, hereafter styled the complainant, cause the telephone of the complainant to ring repeatedly and did send repeated electronic communications to the complainant in a manner reasonable likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, namely Kimberly McCurdy.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

APPENDIX I

CAUSE #19-0135

COMPLAINT HARASSMENT 42.07(c) Class B Misdemeanor, CJIS No. 13160012

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

I, Chris Davis, do solemnly swear that I have good reason to believe, and do believe, that on or about the 19th day of April, 2019 and before the making and filing of this complaint, in the County of Andrews, and State of Texas, SLADE ALAN MOORE, 69996, hereafter styled the Defendant, did then and there, with intent to harass, annoy, alarm, abuse, torment or embarrass Kimberly McCurdy, hereafter styled the complainant, cause the telephone of the complainant to ring repeatedly and did send repeated electronic communications to the complainant in a manner reasonable likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, namely Kimberly McCurdy.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Chris Davis
Chris Davis, Affiant

Sworn to and Subscribed by, Chris Davis a credible person, before me, on this 3rd day of May, 2019.

/s/ Cassandra Moholt Cheek
CASSANDRA MOHOLT CHEEK
Assistant County Attorney
Andrews County, Texas

19-0344 Bishop, Eddie