

No. 22-

IN THE
Supreme Court of the United States

PEDRO LANCE SOTO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The
Tenth District Court Of Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

Lane A. Haygood
3800 E. 42nd Street,
Suite 110
Odessa, Texas 79762
Tel: 432.803.5800
lhaygood@galyen.com

Mark W. Bennett
Counsel of Record
917 Franklin Street,
Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

Counsel for Petitioner

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, such as 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 Petitioner’s facial overbreadth challenges to the criminal statute. The questions presented are:

1. Is a law that criminalizes expressive speech immunized from 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?

(ii)

RELATED PROCEEDINGS

State v. Soto, No. 10-21-00180-CR, 2022 WL 1417329 (Tex. App.—Waco May 4, 2022, pet. ref'd)

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TABLE OF AUTHORITIES

Cases

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INTRODUCTION

This case is one of several confronting the unconstitutionality of Tex. Penal Code Ann. 42.07(a)(7), Texas’s Electronic Harassment statute.

A 5-4 majority of the Texas Court of Criminal Appeals held in two 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.” *Ex parte Sanders*, No. PD-0469-19, --- S.W.3d ----, 2022 WL 1021055 at *7 (Tex. Crim. App. 2022); *Ex parte Barton*, No. PD-1123-19, 2022 WL 1021061 at *4 (Tex. Crim. App. Apr. 6, 2022); *Sanders*, 2022 WL 102055.

Before *Barton* and *Sanders* came down, though, the trial court granted Mr. Soto relief from this unconstitutional statute. App. 5a.

The Tenth Court of Appeals at Waco reversed the judgment of the trial court based on the opinion of the Court of Criminal Appeals opinion in *Ex parte Sanders*. App. 4a.

Mr. Soto petitioned the Court of Criminal Appeals for discretionary review, which that court refused. App. 1a.

As *Sanders* has been brought to this Court’s attention via a petition for a writ of certiorari in joint with *Ex parte Barton*, No. 22-430, Mr. Soto makes the same presentation. This petition incorporates by

reference the arguments of the petitioners in *Barton* and *Sanders*.

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 *1; *Sanders*, 2022 WL 102055 at *1.

The Court of Criminal Appeals 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 though it would typically be applied to expressive communications. *Barton*, 2022 WL 1021061 at *6.

This Court’s precedents do not allow such a law targeting speech to be exempted from any facial challenge.

Other courts that have upheld similar statutes 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.

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 Waco Court of Appeals opinion in *State v. Pedro Lance Soto* is available at 2022 WL 1417329 (Tex. App. May 4, 2022). The order granting the writ of habeas corpus is unpublished.

JURISDICTION

The Texas Court of Criminal Appeals refused discretionary review on September 14, 2022. App. 1a.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that “Congress shall make no law 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

Petitioner Pedro Soto was charged by information with violating Texas Penal Code § 42.07(a)(7) in Cause No. 1911968CR in the County Court at Law Number Three of Ellis 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.*

Petitioner is alleged to have sent electronic communications to Julie Ann Soto in a manner reasonably likely to and intended to harass, alarm, annoy, abuse, torment, embarrass, or offend Ms. Soto. App. 7a.

Petitioner sought a pretrial writ of habeas corpus, which was granted. App. 5a.

The State appealed to Texas’s Tenth Court of Appeals at Waco, which affirmed based on *Ex parte Sanders*. App. 2a.

Petitioner sought discretionary review with the Texas Court of Criminal Appeals, which refused review. App. 1a.

Sanders is now pending before this Court along with *Ex parte Barton*, under number 22-430. Rather than repeat their arguments, Mr. Soto here summarizes those arguments, and incorporates them by reference:

REASONS FOR GRANTING THE WRIT

- I. **The Texas court’s holdings defy this Court’s First Amendment precedents in multiple respects.**
 - A. **The Texas court refused to apply any First Amendment analysis to a statute it found to penalize “expressive speech.”**
 - B. **The Texas court’s rationale for refusing to apply any First Amendment scrutiny specifically contravenes this Court’s precedent.**
 1. **That the law reaches some non-expressive conduct does not exempt it from any First Amendment scrutiny.**
 2. **That the law requires a wrongful intent does not exempt it from any First Amendment scrutiny.**
 - 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.**
- II. **Lower courts are deeply split on the constitutionality of laws criminalizing communications made with a proscribed intent.**
 - A. **A minority of courts have held that laws criminalizing electronic or phone communications made with proscribed intents raise no First Amendment issue.**
 - B. **Most courts hold the opposite, with all but one granting relief under the overbreadth doctrine.**

III. The issue presented is a matter of exceptional importance.

CONCLUSION

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

Respectfully submitted,

Lane A. Haygood
3800 E. 42nd St.
Suite 110
Odessa, Texas 79762
Tel: 432.803.5800
lhaygood@galyen.com

Mark W. Bennett
Counsel of Record
917 Franklin Street
Fourth Floor
Houston, Texas 77002
(713) 224-1747
mb@ivi3.com

Counsel for Petitioner

December 2022

APPENDIX

1a

APPENDIX A

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

9/14/2022

COA No. 10-21-00180-CR

SOTO, EX PARTE PEDRO LANCE

Tr. Ct. No. 19-11968-CR

PD-0289-22

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

PRESIDING JUDGE KELLER AND JUDGE
MCCLURE WOULD GRANT

Deana Williamson, Clerk

MARK BENNETT

ATTORNEY AT LAW

917 FRANKLIN STREET, FOURTH FLOOR

HOUSTON, TX 77002

* DELIVERED VIA E-MAIL *

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APPENDIX B

2022 WL 1417329

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, Waco.
The STATE of Texas, Appellant

v.

Pedro Lance SOTO, Appellee
No. 10-21-00180-CR

|

Opinion delivered and filed May 4, 2022

From the County Court, Ellis County, Texas, Trial
Court No. 19-11968-CR, Hon. Joseph Ross Gallo,
Judge

Attorneys and Law Firms

Mark W. Bennett, Bennett & Bennett, Houston, Paul
Manigrasso, Manigrasso Law Firm PLLC,
Waxahachie, for Appellant.

M. Ann Montgomery, Ellis County District Attorney,
Andrea L. Westerfeld, Ellis County Asst. District
Attorney, Waxahachie, for Appellee.

Before Chief Justice Gray, Justice Johnson, and
Justice Smith

MEMORANDUM OPINION

STEVE SMITH, Justice

Pedro Soto was charged by information with the offense of harassment under Section 42.07 (a) (7) of the Texas Penal Code. *See* Tex. Penal Code Ann. § 42.07 (West). Soto filed a pretrial application for writ of habeas corpus in which he argued that Section 42.07 (a) (7) is unconstitutional under the United States Constitution. Soto specifically argued that the statute is overbroad and vague under the First Amendment of the United States Constitution. The trial court granted Soto's application for writ of habeas corpus and ordered that the information be dismissed. The State appeals from the trial court's Order. We reverse the trial court's order granting Soto's application for writ of habeas corpus and remand this case to the trial court for further proceedings.

The State argues in its sole issue on appeal that the trial court erred in finding Article 42.07 (a) (7) unconstitutionally overbroad. Section 42.07 (a) (7) provides that a person commits an offense if, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person: ... 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 (West).

In *Scott v. State*, the Court of Criminal Appeals considered Section 42.07 (a) (4) of the Texas Penal Code, the telephone harassment statute. Section

42.07 (a) (4) is nearly identical in its wording as Section 42.07 (a) (7). The Court held that Section 42.07 (a) (4) does not implicate the freedom of speech protections of the First Amendment of the United States Constitution because it prohibits non-speech conduct. *Scott v. State*, 322 S.W.3d 662, 669-70 (Tex. Crim. App. 2010), *disavowed on other grounds by Wilson v. State*, 448 S.W.3d 418, 423 (Tex. Crim. App. 2014).

In *Ex parte Sanders*, the Court of Criminal Appeals reaffirmed its holding in *Scott*. *Ex parte Sanders*, --- S.W.3d ----, 2022 WL 1021055 (Tex. Crim. App. 2022). The Court further held that Section 42.07 (a) (7) of the Texas Penal Code, the electronic harassment statute, does not implicate the freedom of speech protections of the First Amendment of the United States Constitution because it also prohibits non-speech conduct. *Id.* at 1-2. Accordingly, we find that Section 42.07 (a) (7) does not violate the First Amendment of the United States Constitution. *See Ex parte Sanders*, --- S.W.3d ----, 2022 WL 1021055. We sustain the State's sole issue on appeal.

We reverse the trial court's order granting Soto's application for writ of habeas corpus and remand the case to the trial court for proceedings consistent with this opinion.

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APPENDIX C

IN THE COUNTY COURT AT LAW NO. 3
ELLIS COUNTY, TEXAS

CAUSE NO. 19-11968-CR

THE STATE OF TEXAS vs. PEDRO LANCE SOTO

ORDER ON DEFENDANT'S
WRIT OF HABEAS CORPUS

In the above referenced cause, the State of Texas has accused the Defendant of violating Section 42.07(a)(7) of the Texas Penal Code. The Defendant has entered a plea of not guilty. The Defendant has filed a Writ of Habeas Corpus. A hearing on said Writ was held on June 9, 2021. After considering the evidence, testimony, argument of counsel, and the law in relation to this case, the Court ORDERS the Defendant's Writ of Habeas Corpus: GRANTED and the INFORMATION is hereby dismissed.

SIGNED AND ENTERED on this the 9th day of
JUNE, 2021.

/s/ Joseph R. Gallo
JOSEPH R. GALLO

Judge-Ellis County Court at Law No. 3

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APPENDIX D

CAUSE NO. 1911968CR

DA# 01-17192

THE STATE OF TEXAS

VS.

PEDRO LANCE SOTO

OFFENSE: HARASSMENT

2019 NOV 25 PM 4:25

FILED FOR RECORD

KRYSTAL VALDEZ

ELLIS COUNTY CLERK

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

BEFORE ME, the undersigned authority, on this day personally appeared LARRY GRICE, who after being by me duly sworn, on oath deposes and says that he has good reason to believe and does believe and charge that heretofore, on or about the 31st day of March, 2019, and before the making and filing of this complaint, in the County of Ellis and the State of Texas, one PEDRO LANCE SOTO, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Julie Ann Soto, send repeated electronic communications to the said Julie Ann Soto in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: by repeatedly sending unwanted and

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threatening text messages to her after she had instructed him to cease doing so, and by sending a text message to her stating that he would not stop sending such text messages to her until he had caused her to lose her job,

And it is further presented in and to said Court that, prior to the commission of the aforesaid offense, on the 7th day of February, A.D. 2017, in Criminal Action No. CR1600375, in the County Court at Law No. 2 of Hunt County, Texas, the defendant was convicted of the offense of harassment, a Class B misdemeanor,

AGAINST THE PEACE AND DIGNITY OF THE STATE

/s/ [Illegible]
COMPLAINANT

SWORN TO AND SUBSCRIBED BEFORE ME, this the 25th day of November, 2019.

PATRICK M. WILSON
COUNTY AND DISTRICT
ATTORNEY

BY: /s/ [Illegible] _____
Assistant County &
District Attorney

APPENDIX E

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

I, PATRICK M. WILSON, County and District Attorney for Ellis County, in said State, on the written affidavit of: LARRY GRICE, a competent and credible person herewith filed in the COUNTY COURT AT LAW 2, of Ellis County, Texas, do present unto said court that, on or about the 31st day of March, 2019, and before the making and filing of this complaint, in the County of Ellis and the State of Texas, one PEDRO LANCE SOTO, did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass Julie Ann Soto, send repeated electronic communications to the said Julie Ann Soto in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another, to-wit: by repeatedly sending unwanted and threatening text messages to her after she had instructed him to cease doing so, and by sending a text message to her stating that he would not stop sending such text messages to her until he had caused her to lose her job,

And it is further presented in and to said Court that, prior to the commission of the aforesaid offense, on the 7th day of February, A.D. 2017, in Criminal Action No. CR1600375, in the County Court at Law No. 2 of Hunt County, Texas, the defendant was convicted of the offense of harassment, a Class B misdemeanor,

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AGAINST THE PEACE AND DIGNITY OF THE
STATE

PATRICK M. WILSON
COUNTY AND DISTRICT
ATTORNEY

BY: /s/ [Illegible]
Assistant County &
District Attorney