

No. ____

IN THE
Supreme Court of the United States

JAMES RYAN EARL,
PETITIONER,
v.

THE STATE OF TEXAS,
RESPONDENT.

On Petition For Writ Of Certiorari To The Court of
Appeals for the Third District of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Texas Penal Code § 42.07(a)(7) makes it a crime to “send[] repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another” when done with intent to produce any of those same effects. The Texas Court of Criminal Appeals has repeatedly held that the statute does not even “implicate” the First Amendment because it regulates “non-speech conduct.” *Ex parte Barton*, 662 S.W.3d 876, 884 (Tex. Crim. App. 2022); *Ex parte Sanders*, 663 S.W.3d 197, 215–16 (Tex. Crim. App. 2022). Yet last year, the same court held the same statute unconstitutional as applied because the messages prosecuted under it were “speech.” *Owens v. State*, 728 S.W.3d 155, 167 (Tex. Crim. App. 2025). These positions are inconsistent; either the means of committing the offense as described by the statute are “speech” (and thus implicate the First Amendment) or the only conduct which can be constitutionally forbidden under the statute is the non-content, non-speech part of the offense.

The question presented is thus:

Whether Texas Penal Code § 42.07(a)(7), which criminalizes repeated electronic communications sent with intent to and reasonably likely to annoy, alarm, embarrass, or offend another person, is overbroad under the First Amendment.

(ii)

PARTIES TO THE PROCEEDING

Petitioner is James Ryan Earl, defendant-appellant below

Respondent is the State of Texas.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual. No corporate disclosure statement is required under this Court's Rule 29.6.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

State v. Earl, No. C-1-CR-18-501959, County Court at Law No. 4 of Travis County, Texas (order denying pretrial application for writ of habeas corpus and motion to quash entered Aug. 8, 2022; order of deferred adjudication entered July 6, 2023).

Earl v. State, No. 03-23-00427-CR, Court of Appeals for the Third District of Texas at Austin (memorandum opinion affirming entered June 27, 2025).

Earl v. State, No. PD-0519-25, Texas Court of Criminal Appeals (petition for discretionary review refused Jan. 15, 2026; Judge McClure would grant).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of Rule 14.1(b)(iii).

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INTRODUCTION

OPINIONS AND ORDERS BELOW

The memorandum opinion of the Court of Appeals for the Third District of Texas at Austin (App. A, 1a–13a) is unpublished and available at 2025 WL 1773011. The order of the Texas Court of Criminal Appeals refusing Petitioner’s petition for discretionary review (App. B, 14a) is unreported. The order of the County Court at Law No. 4 of Travis County denying Petitioner’s pretrial motion to quash and application for writ of habeas corpus (App. C, 15a–16a) is unreported.

JURISDICTION

The Texas Court of Criminal Appeals refused Petitioner’s petition for discretionary review on January 15, 2026. On April 16, 2026, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 30, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: “Congress shall make no law ... abridging the freedom of speech.” The First Amendment is applied to the States through the Fourteenth Amendment. The relevant provisions of Texas Penal Code § 42.07, including subsections (a)(4), (a)(7), (a)(8), and (b)(1), are set forth in full in Appendices F and G.

STATEMENT OF THE CASE

Texas makes it a crime to send more than one email, more than one text message, or more than one social-media post with the intent to annoy, embarrass, or offend someone else, if it is reasonably likely to do so. Tex. Penal Code § 42.07(a)(7). Because the statute turns on the intent with which a communication is sent and the emotional reaction it is likely to provoke—classic hallmarks of a content-based restriction, *see Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015)—every state and federal court applying ordinary First Amendment principles would—or should—subject it to strict scrutiny.

But the Texas Court of Criminal Appeals has repeatedly held that the statute does not even “implicate” the First Amendment. *Ex parte Sanders*, 663 S.W.3d 197, 215 (Tex. Crim. App. 2022); *Ex parte Barton*, 662 S.W.3d 876, 884 (Tex. Crim. App. 2022). On that theory, repeated electronic communications are treated as “non-speech conduct,” regardless of their content, and the legitimacy of the prosecution is tested under rational-basis review alone. *Barton*, 662 S.W.3d at 884.

That rule cannot be reconciled with this Court’s decisions; or, as of June 2025, with the Texas Court of Criminal Appeals’ own decisions. In *Owens v. State*, the very court that decided *Barton* and *Sanders* reversed a conviction under § 42.07(a)(7) because, as the court put it, “the messages themselves are speech” and “the prosecution in this case was based on Appellant’s speech, not his action.” 728 S.W.3d 155, 167 (Tex. Crim. App. 2025). Texas’s criminal

jurisprudence now contain two mutually contradictory propositions about the same statute: it does not implicate the First Amendment at all (*Barton/Sanders*), and it impermissibly regulates speech (*Owens*). This Court's review is necessary to resolve that conflict and to correct the underlying First Amendment error and the emerging circuit split among lower courts. This case presents the ideal vehicle for doing so because it is a clean appeal following a guilty plea of whether the prosecution may secure a conviction without violating a defendant's First Amendment rights.

I. Statutory Background

Texas Penal Code § 42.07 is a generalized harassment statute addressed to several discrete means of harassing another person, including obscene communication (§ 42.07(a)(1)), threats (§ 42.07(a)(2)), false reports of death or serious injury (§ 42.07(a)(3)), and repeated telephone calls (§ 42.07(a)(4)). Subsection (a)(7), enacted in 2001, criminalizes a category of communicative conduct that did not exist when the harassment statute was first adopted: repeated electronic communications. It provides:

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 § 42.07(a)(7). The statute defines “electronic communication” as “a transfer of signs, signals, writing, images, sounds, data, or intelligence

of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system,” and specifies that the term includes communications made by electronic mail, instant message, network call, facsimile machine, or pager. *Id.* § 42.07(b)(1). By its plain text, the statute reaches every medium of modern digital expression, from email, text message, direct message, social-media post, blog comment, and podcast upload to video, so long as (i) the communication is “electronic,” (ii) it is one of at least two sent to the complainant, (iii) the sender intends any of the enumerated reactions, and (iv) it is “reasonably likely” to produce any of those reactions.

Three features of the statute are critical. First, the subjective mental state in recipients it targets (to harass, annoy, alarm, abuse, torment, embarrass, or offend) are exactly the reactions that protected speech often provokes. Political criticism is meant to annoy; investigative journalism is meant to embarrass; religious and moral exhortation is often meant to alarm. *See, e.g., Cohen v. California*, 403 U.S. 15, 16, 26 (1971); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 55 (1988). Second, the statute turns on the speaker’s subjective intent and the recipient’s emotional response. That dual focus on the speaker’s purpose and the audience effect is the paradigm of a content-based regulation. *Reed*, 576 U.S. at 163–64. Third, the “reasonably likely” standard means that conviction depends on the factfinder’s assessment of how a reasonable recipient would react to the content of the

message. Jurors cannot perform that assessment without evaluating what the message says.

That feature was not lost on the Texas Legislature. When it added § 42.07(a)(8) in 2021, it chose to limit liability for published electronic communications to those not made “in connection with a matter of public concern.” Tex. Penal Code § 42.07(a)(8); Act of May 12, 2021, 87th Leg., R.S., ch. 178, § 1, 2021 Tex. Gen. Laws 385, 386. That exception would be meaningless unless the Legislature understood subsection (a)(8)—and, necessarily, the text it closely tracks in subsection (a)(7)—to regulate speech.

II. Factual and Procedural Background

On December 19, 2018, the complainant asked Petitioner by email to “cease all communication.” App. 3a. Later that day, Petitioner sent three text messages, expressing in harsh terms that the complainant was a “horrible human,” a “liar,” a “cheater,” and “vile.” *Id.* App. 3a. Petitioner was charged with a single count of electronic harassment under § 42.07(a)(7). App. 3a.

Proceeding pro se at that stage, Petitioner filed a combined pretrial application for writ of habeas corpus and motion to quash the information, arguing that § 42.07(a)(7) was facially overbroad and void for vagueness. The trial court denied the motion by written order, adopting findings prepared by the State that *Barton* and *Sanders* (then recently decided) controlled. App. C, 15a–16a. Counsel then entered an appearance, and Petitioner pleaded no contest in exchange for a twelve-month deferred adjudication, reserving the right to appeal the constitutionality of

the statute. App. D, 17a–27a. The trial court certified that reserved right. App. E, 28a–30a.

The Court of Appeals affirmed. It recognized the force of Petitioner’s arguments under *Counterman* and this Court’s content-discrimination cases, but held itself bound by *Barton*, *Sanders*, and its own prior decision in *Ex parte McDonald*, 606 S.W.3d 856 (Tex. App.—Austin 2020, pet. ref’d). App. 10a–12a. The court acknowledged that “even if we were to agree that *Counterman*, and cases before it, cut against the Court of Criminal Appeals’ determination that section 42.07(a)(7) does not implicate the First Amendment,” it “remain[s] bound to follow it.” App. 12a. The court invited resolution by a higher court.

The Texas Court of Criminal Appeals refused discretionary review on January 15, 2026. App. B, 14a. Judge McClure noted that he would grant. *Id.* On April 16, 2026, Justice Alito granted Petitioner’s application to extend the time to file this petition to and including April 30, 2026. This petition follows.

REASONS FOR GRANTING THE WRIT

This case presents an unusually clean opportunity to correct a serious First Amendment error. Texas treats some of the most common forms of modern speech—emails, text messages, tweets, and social-media posts—as categorically outside the First Amendment when they are repeated and sent with a disfavored intent. That position contradicts a long line of decisions from this Court holding that the government cannot evade strict scrutiny merely by relabeling content-based regulations as regulations of “conduct.” It conflicts with the way federal courts of appeals have

read materially indistinguishable statutes. And it is now openly inconsistent with the Texas Court of Criminal Appeals' own recent decision in *Owens v. State*. The petition should be granted for four reasons, each independently sufficient.

III. The Texas Court of Criminal Appeals has abrogated First Amendment scrutiny of an enormous category of speech through a doctrinal innovation that conflicts with this Court's precedent.

This Court has repeatedly confirmed that the First Amendment protects speech even when the speech is annoying, embarrassing, or alarming; even when the speaker intends to annoy, embarrass, or alarm; and even when the government seeks to regulate only a particular subset of such speech. *See, e.g., Cohen*, 403 U.S. at 16, 26; *Hustler Magazine*, 485 U.S. at 50, 55; *Snyder*, 562 U.S. at 458; *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 713 (1992) (Souter, J., concurring); *Counterman v. Colorado*, 600 U.S. 66, 73–80 (2023). The Texas Court of Criminal Appeals has departed from that bedrock principle in a manner that cannot be reconciled with this Court's precedent.

A. Section 42.07(a)(7) punishes protected speech based on its content.

Section 42.07(a)(7) regulates the content of speech in two distinct and overlapping ways. First, it punishes speech based on its *function* or *effect*, that is, its likelihood of producing one of seven enumerated emotional reactions. Second, it punishes speech based

on the speaker’s *purpose*: their intent to produce one of those same reactions. Under *Reed*, regulations that define the regulated speech “by particular subject matter,” or by “its function or purpose,” are “content based on [their] face” and are “presumptively unconstitutional.” 576 U.S. at 163–64.

The Texas Court of Criminal Appeals has escaped that conclusion through a lateral move found nowhere in this Court’s First Amendment cases. It reasons that because Section 42.07(a)(7) could, in theory, be violated by the “sending of communications containing no speech at all,” such as gibberish or computer code, the entire statute regulates “non-speech conduct.” *Sanders*, 663 S.W.3d at 215–16; *Barton*, 662 S.W.3d at 884. Because the statute regulates “non-speech conduct,” the court concludes, it does not even “implicate” the First Amendment. *Id.* While there is a veneer of logic to this, it is inconsistent with this Court’s First Amendment overbreadth jurisprudence as well as with the fact that the vast majority of prosecutions, including the one in this case, turn not on the manner in which the electronic communications were sent but on their explicit content.

As this Court recently reiterated, the overbreadth doctrine exists to police statutes that regulate “a substantial amount of protected speech relative to [their] plainly legitimate sweep,” even when the statute also reaches unprotected speech or non-speech conduct. *United States v. Hansen*, 599 U.S. 762, 769–70 (2023); *United States v. Stevens*, 559 U.S. 460, 473 (2010). The *Barton/Sanders* rule (that a statute escapes First Amendment scrutiny altogether if it is

conceivable that it could be violated without speech) stands that doctrine on its head. It would allow legislatures to immunize content-based speech restrictions by writing them to also cover some imaginable species of non-expressive conduct.

The resulting rule is stunning in its breadth. On its face, Section 42.07(a)(7) would reach:

- Repeated investigative journalism about a public official calculated to embarrass him, as with the reporting that ultimately drove Representative Anthony Weiner from office. *See Barton*, 662 S.W.3d at 889 (Keller, P.J., dissenting).
- Repeated online criticism of a judge intended to pressure her into granting relief, as in the Biblical parable of the persistent widow. *Id.*
- A dissenting judicial opinion, circulated electronically, intended to alarm the bar about the majority's reasoning. *Id.*
- Repeated emails to a government official criticizing agency policy in terms the official finds offensive. *Cf. Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385, at *1 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd).
- Repeated political tweets directed at a candidate calling for her defeat in terms likely to alarm or embarrass her.
- Repeated text messages to a former romantic partner containing emotionally laden breakup recriminations—the facts of this case.

Each of those examples describes core protected speech. Each lies within the plain text of Section 42.07(a)(7). And each can be prosecuted in Texas notwithstanding the First Amendment because the court below has held that the First Amendment simply does not apply.

B. The “implication” framework contradicts this Court’s decisions in *Counterman*, *Stevens*, *Alvarez*, and *Reed*.

The Texas court’s “implication” theory runs headlong into four pillars of this Court’s modern First Amendment jurisprudence.

In *Counterman*, this Court confronted a Colorado statute that criminalized repeated “communication[s]” that “would cause a reasonable person to suffer serious emotional distress.” 600 U.S. at 70. The statute, like § 42.07(a)(7), reached communicative conduct that the prosecuting authorities believed caused emotional harm. This Court did not suggest for a moment that the statute regulated “non-speech conduct” or that the First Amendment was unimplicated. Instead, the Court held that even a statute targeting a historically unprotected category (true threats) must incorporate a “subjective mental-state requirement” to “provide[] ‘breathing space’ for protected speech.” *Id.* at 75 (quoting *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring)). That holding is inexplicable if the Texas court’s “implication” theory is right, because on that theory the Colorado statute in *Counterman* (like § 42.07(a)(7)) would not “implicate” the First Amendment at all.

Second, *Stevens* squarely rejects the premise that a legislature can create a new category of unprotected speech by declaring certain intents or effects off-limits. 559 U.S. at 470–72. But that is what Texas has done. The Texas Legislature has not declared any new category of speech unprotected; the Texas Court of Criminal Appeals has simply held that repeated electronic communications with disfavored intent are not speech at all. The result is exactly the ad hoc category creation *Stevens* forbids.

Third, *Alvarez* held that even demonstrably false statements—statements with objectively no social value—enjoy First Amendment protection and cannot be criminalized outside historically unprotected categories. 567 U.S. at 717–22. If false statements qualify as protected speech, it is inconceivable that *true* statements uttered with the intent to embarrass or annoy are somehow reclassified as non-speech.

Finally, in *Reed*, this Court held that a restriction is content-based whenever it depends on “the function or purpose” of the communication. 576 U.S. at 163–64. Section 42.07(a)(7) depends on both. Its function-based axis is the enumerated emotional reactions the communication is reasonably likely to produce. Its purpose-based axis is the enumerated reactions the speaker intends. A prosecutor cannot evaluate either axis without examining content.

None of this is new. More than four decades ago, Justice White wrote in dissent from denial of certiorari in *Gormley v. Director, Connecticut State Department of Adult Probation*, that “speech may be ‘annoying’ without losing its First Amendment

protection.” 449 U.S. 1023, 1024 (1980). Justice Souter concurred in *Int’l Society for Krishna Consciousness*, that “[t]he First Amendment inevitably requires people to put up with annoyance and uninvited persuasion.” 505 U.S. at 713. The Court in *N.A.A.C.P. v. Claiborne Hardware* rejected the proposition that “[s]peech does not lose its protected character ... simply because it may embarrass others.” 458 U.S. at 910. And in *Snyder v. Phelps*, the Court protected speech uttered with undeniable intent to annoy, harass, and alarm a grieving family. 562 U.S. at 458.

The Texas Court of Criminal Appeals has tried to thread a needle that has no eye. It concedes that Section 42.07(a)(7) applies to “traditional categories of communication” like writings, images, and sounds, *Sanders*, 663 S.W.3d at 215; but insists that such applications do not trigger First Amendment scrutiny so long as the statute also requires a prohibited intent such as “annoy” or “alarm.” *Id.* at 215–16. That is, in essence, a holding that the First Amendment is off when the prosecutor declares the speaker’s mental state distasteful. No decision of this Court supports that proposition; every modern decision rejects it.

IV. The Court of Criminal Appeals own decision in *Owens v. State* has exposed *Barton* and *Sanders* as doctrinally incoherent.

Between the Court of Appeals’ decision below and the Texas Court of Criminal Appeals’ refusal of discretionary review, something important happened. On June 4, 2025, the Court of Criminal Appeals decided *Owens v. State*, 728 S.W.3d 155 (Tex. Crim. App. 2025). The majority opinion held that §

42.07(a)(7) was unconstitutional as applied to Owens because—as the court itself put it—“[s]ending messages is an act, but the messages themselves are speech, and the prosecution in this case was based on Appellant’s speech, not his action. It was the content of the messages, not the manner of their sending, that drove the prosecution.” *Id.* at 167.

That sentence is flatly irreconcilable with *Barton* and *Sanders*. Those decisions rested on a single premise: that “speech is not necessary for commission of the offense,” that § 42.07(a)(7) therefore “proscribes non-speech conduct,” and that as a result the statute “does not implicate and does not violate the First Amendment.” *Barton*, 662 S.W.3d at 883–84; *Sanders*, 663 S.W.3d at 215–16. *Owens* rests on exactly the opposite premise: that a prosecution under § 42.07(a)(7) can turn on the content of the defendant’s speech, triggering strict scrutiny. *Owens*, 728 S.W.3d at 168–69.

Judge Yearly’s *Owens* dissent identified the problem directly. “Today the Court declares that the same statute was applied in such a way that it infringed upon Appellant’s First Amendment free-speech guarantee,” he observed. “Why? Because elements of speech were, in fact, employed to commit the offense. It seems to me that many, if not most, instances in which the statutory provision will have been violated will employ some elements of speech.” *Owens*, 728 S.W.3d at 181 (Yearly, J., dissenting). Judge Yearly is right that the holdings cannot coexist. If speech “will have been” employed in “most” prosecutions under the statute—as *Owens* itself concedes and as every common-sense reading of the statute confirms—then

the *Barton/Sanders* premise that the statute “does not implicate the First Amendment” is simply false.

The result is a Texas Penal Code provision whose constitutionality is now a mystery to the people it governs, to the lower courts applying it, and to the prosecutors enforcing it. Under *Barton/Sanders*, the statute is categorically outside the First Amendment and receives rational-basis review. Under *Owens*, the statute is subject to strict scrutiny when its application turns on the content of the communications prosecuted—which is, as Judge Yeary pointed out, most of the time. Those two propositions cannot both be true.

The Court of Criminal Appeals’ refusal of discretionary review in this case did not resolve that contradiction. The only alternative path to resolution runs through this Court. If *Owens* is right that § 42.07(a)(7) can regulate speech based on content, then *Barton* and *Sanders* are wrong to hold that the statute does not implicate the First Amendment at all. And if *Barton* and *Sanders* are wrong on that fundamental point, the statute must be evaluated under the ordinary overbreadth doctrine, which, for the reasons set out above, it cannot survive.

V. The decision below deepens a conflict with federal courts of appeals over how to construe similarly worded harassment statutes.

Texas is not the only jurisdiction that has enacted a repeated-electronic-communication harassment statute in the last two decades. Nearly identical statutes have been adopted by Congress and by sister

states, and federal courts of appeals have taken a markedly different approach to the constitutional questions those statutes raise.

The Third Circuit’s decision in *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022), is illustrative. There, the court construed 18 U.S.C. § 2261A(2)(B)—the federal cyberstalking statute, which similarly punishes repeated electronic communications with intent to “harass” or “intimidate”—to apply only to “true threats and speech integral to a crime.” *Id.* at 77–80. The court reached that construction because, in its view, a broader reading would render the statute “facially overbroad” under the First Amendment. *Id.* at 78. The First Circuit took the same approach in *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018), reading “intimidation” as requiring a “true threat” in order to “avoid a serious constitutional threat.”

The contrast with Texas is stark. Where the Third and First Circuits recognized that repeated-electronic-communication harassment statutes raise “serious” First Amendment problems and read those statutes narrowly to avoid them, Texas has held that its materially identical statute does not raise any First Amendment problem at all. Same statutory architecture; opposite constitutional result.

That kind of conflict is cert-worthy on its own terms. *See* Sup. Ct. R. 10(b), (c). But the conflict here is worse than a simple split of authority. The federal courts of appeals have undertaken to *avoid* an overbreadth problem by narrowly construing the statutory terms. The Texas court has declined to do any such narrowing, because on its view no constitutional

problem exists to begin with. The practical consequence is that speech that is categorically protected in the Third Circuit is punishable by up to a year in jail in Texas. The Constitution should not mean such different things in the Lone Star State and in Pennsylvania.

Nor is this a hypothetical concern. In 2017, Texas materially expanded the definition of “electronic communication” to include “a transfer of signs, signals, writing, images, sounds, data, or intelligence ... transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system,” a formulation that reaches virtually every digital utterance. Tex. Penal Code § 42.07(b)(1). The Houston Fourteenth Court of Appeals has since held that the 2017 expansion does not disturb the *Barton/Sanders* framework. *Ex parte Ordonez*, 693 S.W.3d 419, 424 (Tex. App.—Houston [14th Dist.] 2023, no pet.). The combination of sweeping statutory reach plus an interpretive rule that excludes such prosecutions from First Amendment review is a recipe for systemic overbreadth.

Despite this Court’s ruling in *Reno* and its progeny that the First Amendment applies fully to online speech, courts have struggled to apply First Amendment principles to disfavored speech posted online or sent through electronic means such as social media in two main ways: first, courts have reached different conclusions about whether the First Amendment applies to online harassment statutes such as Sec. 42.07(a)(7); and second, courts subjecting these laws to First Amendment scrutiny have differed

regarding whether and when such laws are constitutionally overbroad.

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). The conflicting decisions of state courts of last resort and the federal circuits concerning harassment laws targeting online speech threaten to do just that. This Court should clarify the issue before more courts tread down the erroneous path blazed by Texas, endangering free expression in the “vast democratic forums of the Internet.” *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

In *Barton* and *Sanders*, Texas joined a minority of courts in concluding that laws targeting electronic or telephonic communications made with a disfavored intent are exempt from First Amendment scrutiny because they regulate non-communicative conduct. Many of these courts found the laws’ intent requirements central to that rationale even when the law applied, as here, to speech of public concern.

A. A minority of courts hold that laws criminalizing electronic or telephonic communications made with a disfavored intent raise no First Amendment issue.

For instance, in *Thorne 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, 242 n.1, 243 (4th Cir. 1988). In so holding, the court accepted the West Virginia Supreme Court’s analysis of the same statute, over a dissent that understood *Falwell* to hold that “[s]peech does not lose its protected character,” simply because one “intends to distress.” *Id.* at 247 (Butzner, J., dissenting). See also *State v. Thorne*, 333 S.E.2d 817, 819-20 (W. Va. 1985); accord *State v. Calvert*, No. 15-0195, 2016 WL 3179968, at *4 (W. Va. June 3, 2016).

Similarly, in *Gormley v. Director, Connecticut State Department of Probation*, the Second Circuit construed a law criminalizing phoning 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).

The Ninth Circuit has twice concluded that electronic communication and telephone harassment statutes do not implicate the First Amendment. In *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014), the court upheld a prior version of the federal cyberstalking statute, which at the time prohibited using an interactive computer service to engage in a “course of conduct” causing substantial emotional distress with the intent to “kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress.” 18 U.S.C. § 2261A(2)(A). The court held that the law targeted a course of “harassing and intimidating conduct” rather than speech. 753 F.3d 939, 944 (9th Cir. 2014). 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,” even where the incriminating telephone call “included some criticism” of the government.” 936 F.3d 1014, 1019 (9th Cir. 2019).

Some state courts of last resort have adopted a similar approach. For instance, 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-protected conduct,” even where the defendant’s calls “contained political speech.” 724 A.2d 315, 317-18 (Pa. 1999); *see also Thorne*, 333 S.E.2d at 819-20.

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. § 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)).

B. Most courts hold the opposite, but not all have granted relief under the overbreadth doctrine.

A large majority of Courts have held to the contrary the First Amendment is implicated by laws criminalizing electronic or telephonic communications made with a disfavored intent. Many 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 the question and come to the same conclusion.

Most recently, in *United States v. Yung*, the Third Circuit rejected the argument that the current version of 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). Similarly to the Texas law, the federal statute criminalizes sending electronic communications with the intent to “harass [or] intimidate.” 18 U.S.C. § 2261A(2)(A). *See also Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 849 (Minn. 2019) (holding that a stalking statute that reached, *inter alia*, electronic communications that made one feel “frightened, threatened, oppressed, persecuted, or intimidated,” sanctioned “purely expressive” communications and not just conduct).

While these courts agree that electronic harassment statutes like § 42.07(a)(7) regulate speech, they diverge on the proper First Amendment analysis to apply. Most courts recognize the overbreadth problems inherent in such laws and respond by invalidating them, narrowly construing them, or severing problematic parts. But at least one state high court has flatly rejected an overbreadth challenge to an electronic harassment law on the merits.

Finding overbreadth. Three state high courts have held electronic harassment statutes unconstitutionally overbroad. The New York Court of Appeals invalidated a statute proscribing communication “with intent to harass, annoy, threaten, or alarm” “in a manner likely to cause annoyance or alarm.” *People v. Golb*, 15 N.E.3d 805, 810, 813 (N.Y. 2014). The Minnesota Supreme Court struck down a stalking law proscribing electronic communications causing someone to feel “frightened, threatened, oppressed, persecuted, or intimidated.” *Matter of Welfare of A.J.B.*, 929 N.W.2d at 852-53. The same court severed “disturb, or cause distress” from a different harassment law that proscribed the electronic and physical “mail[ing] . . . of letters” with “the intent to abuse, disturb, or cause distress.” *Id.* at 857, 862-63.¹ And the Colorado Supreme Court severed part of a statute prohibiting electronic communications sent with the “intent to harass,

¹ 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).

annoy or alarm,” leaving only those parts that proscribed “true threats and obscenity.” *People v. Moreno*, 506 P.3d 849, 855-57 (Colo. 2022). The court found the statute to apply to huge swaths of “protected communications, including forecasting a storm or engaging in political discourse.” *Id.* at 854.

Likewise, four federal courts of appeal have found that the federal cyberstalking statute would be overbroad on a plain-language reading, but upheld it by narrowly construing its terms to apply only to categorically unprotected speech. This law is identical to the prior version except that one can violate it with an intent to “intimidate” and through conduct “reasonably expected to cause” emotional distress. 18 U.S.C. § 2261A(2). *See Yung*, 37 F.4th at 76 (comparing versions). Along with the First, Third, and Eleventh Circuits, the Eighth Circuit has construed the law narrowly to apply only to categories of unprotected speech. The Eighth Circuit concluded that the law was unconstitutional as applied to a defendant who repeatedly sent offensive emails to a political campaign email address that urged the candidate to “bow out of the race.” *United States v. Sryniawski*, 48 F.4th 583, 585, 589 (8th Cir. 2022); *see also Yung*, 37 F.4th at 77, 78-81 (construing the law to capture only “true threats” and speech “integral to crime” to avoid a “colli[sion] with the First Amendment”); *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (construing “intimidation” as a “true threat” to “avoid [the] serious constitutional threat” that the statute would forbid “speech on a matter of public concern”) (cleaned up); *United States v. Fleury*,

20 F.4th 1353, 1363 (11th Cir. 2021) (finding *Ackell*'s overbreadth analysis "particularly persuasive").

Rejecting overbreadth. Charting a different path, the Supreme Court of Montana recognized the First Amendment implications of an electronic harassment statute but upheld it against an overbreadth challenge without narrowing or severing it. 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). 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." *Id.* 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).

Without guidance from this Court, the existing disagreements about whether the First Amendment is implicated by laws like § 42.07(a)(7) and, if so, how an overbreadth analysis should apply will only grow and further exacerbate the differing treatment of online speech by citizens of differing states. In New York, an atheist may freely tweet at a Christian in a deliberately alarming manner. But how a Christian may respond depends on where they live. If in New York, they may fight fire with fire. If in Texas, they must turn the other cheek.

VI. This case is an ideal vehicle: the earlier ripeness objection is gone, and the question is outcome-determinative.

This Court denied certiorari in the prior § 42.07(a)(7) cases—*Barton*, *Sanders*, and *Moore*—each of which came up from a pretrial denial of habeas relief. *See Moore v. Texas*, 143 S. Ct. 776 (2023) (mem.); *Barton v. Texas*, 143 S. Ct. 774 (2023) (mem.); *Sanders v. Texas*, 143 S. Ct. 774 (2023) (mem.). In each of those cases, the State argued to this Court that the question was not ripe because there had been no conviction, only a trial-court denial of interlocutory habeas relief followed by appellate affirmance. That objection, whatever its merits, is unavailable here.

Petitioner pled no contest to the single charged offense. The trial court imposed a twelve-month deferred adjudication. App. D, 17a–27a. The trial court certified Petitioner’s right to appeal the constitutional question. App. E, 28a–30a. The Court of Appeals for the Third District of Texas reviewed that question on direct appeal from the order of deferred adjudication, fully briefed and argued, and resolved the question on the merits. App. A, 1a–13a. The Texas Court of Criminal Appeals refused discretionary review. App. B, 14a. The question is final in the Texas courts. 28 U.S.C. § 1257(a).

The question is also outcome-determinative. Petitioner’s conviction rests solely on the validity of § 42.07(a)(7). If the statute is facially unconstitutional, the prosecution must be dismissed. There are no antecedent state-law questions, no ancillary factual disputes, no procedural complications. This is the

clean vehicle the *Barton*, *Sanders*, and *Moore* petitioners lacked.

It is also the right time. The question presented is now squarely fit for decision. *Counterman* has made clear that content-based restrictions on electronic communications remain content-based restrictions, and that statutes reaching speech require a subjective mental-state analysis. *Counterman*, 600 U.S. at 73–80. The Texas Legislature has signaled its own understanding that § 42.07(a)(7) restricts speech by writing a public-concern carve-out into subsection (a)(8). And the Texas Court of Criminal Appeals has acknowledged in *Owens* that § 42.07(a)(7) can regulate speech, even as it clings to its contrary facial-challenge precedents. The predicate doctrinal developments that justified earlier denials have all run their course.

Finally, the stakes extend well beyond Petitioner. The Texas Court of Criminal Appeals issues guidance for a state of thirty million people and an indeterminate number of others who post, tweet, email, or text into Texas from elsewhere. Under current Texas law, every one of those communicators is on notice that a repeated digital message calculated to “annoy” or “embarrass” a Texan is a criminal offense, with no First Amendment safety net. That is a consequential rule of law, and it is wrong.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April __, 2026

APPENDIX

1a

Appendix A

Memorandum Opinion of the Court of Appeals for
the Third District of Texas

Filed June 27, 2025

TEXAS COURT OF APPEALS, THIRD DISTRICT,
AT AUSTIN

NO. 03-23-00427-CR

James Earl, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 4 OF
TRAVIS COUNTY

NO. C-1-CR-18-501959, THE HONORABLE
DIMPLE MALHOTRA, JUDGE PRESIDING

Chari L. Kelly, Justice

Before Justices Triana, Kelly, and Crump

MEMORANDUM OPINION

James Earl appeals the trial court's deferral of adjudication of guilt and supervision order, arguing that Texas's electronic harassment statute (a subsection of the harassment statute) is

unconstitutionally overbroad because it punishes a substantial amount of protected speech in relation to its legitimate sweep. Earl acknowledges the Texas Court of Criminal Appeals upheld the subsection against First Amendment challenges in *Ex parte Barton*, 662 S.W.3d 876 (Tex. Crim. App. 2022), and *Ex parte Sanders*, 663 S.W.3d 197 (Tex. Crim. App. 2022), but argues those cases were wrongly decided for the reasons set out in Presiding Judge Keller’s dissents. Earl further argues that the holdings do not survive *Counterman v. Colorado*, 600 U.S. 66 (2023), or the Texas Legislature’s adoption of Texas Penal Code section 42.07(a)(8), *see* Act of May 12, 2021, 87th Leg., R.S., ch. 178, § 1, 2021 Tex. Gen. Laws 385, 386. We affirm.

BACKGROUND

Because Earl makes a facial challenge to section 42.07(a)(7), the specific facts of the case are irrelevant. *Ex parte Lo*, 424 S.W.3d 10, 14, n.2 (Tex. Crim. App. 2013). We nevertheless set out the probable cause affidavit for context:²

12.19.18/0900, Victim, [A.S.], came to a scheduled interview with me, after reporting her ex-boyfriend, Mr. Earl was [s]talking her. During this interview, [s]he told me on 11.15.18, she was on the phone with Mr. Earl when she asked him to stop contacting her. Since then he has continued to contact her, and assaulted her on 12.11.18 when he came to her residence and refused to let her shut the door.

See Ex parte Lowry, 693 S.W.3d 388, 391 (Tex. Crim. App. 2024) (doing same).

During the interview, I had her email Mr. Earl, “I want you to cease all communication with me via phone, text messages, emails and any social media platform. Do not contact me anymore, [A.S.]”

12.19.18/12:21 PM, she received a text from him stating “This is why I was checked out for so long in our relationship, why I didn’t want to go deeper with you. I knew you would do this [A.S.], you’re trash.” She received another text from him at 17:35 PM, stating “You are a horrible human and deserve the way [your] body is falling apart. Rot in a hell you vile piece of shit.”

Then at 17:47, she received another text stating “You’re a liar, a cheater, and hopefully soon to be a cripple. Fuck you, you terrible person.”

Not only has Mr. Earl’s behavior alarmed [A.S.], but it’s also annoyed her and caused her to fear for her safety and life.

This offense does involve Family Violence as the victim and suspect are related by: Dating Relationship.

The information, tracking the applicable statute, alleged that Earl “on or about the 19th day of December, 2018, with the intent to harass, annoy, alarm, abuse, torment, and embarrass another, sent repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend [A.S.]”

Earl filed a combined pretrial application for habeas corpus and motion to quash challenging the statute as facially unconstitutional under the First Amendment.

The State filed an answer and proposed findings and conclusions, asserting that *Barton* and *Sanders* controlled the outcome. The trial court adopted the State’s findings and conclusions and denied the combined application and motion. Earl thereafter pled no contest to electronic harassment in exchange for one year of deferred adjudication, reserving the right to appeal the constitutionality of the statute.

ANALYSIS

The Electronic Harassment Statute as Overbroad

Earl argues that the electronic harassment statute punishes so much protected speech that it cannot be applied to anyone, including him.

Applicable Law and Standard of Review

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” *United States v. Hansen*, 599 U.S. 762, 769 (2023). Generally, this means that the government cannot restrict expression because of its message, its ideas, its subject matter, or its content. *United States v. Stevens*, 559 U.S. 460, 468 (2010). However, there are some “well-defined and narrowly limited classes of speech” that have been recognized as falling outside the protection of the First Amendment. *Id.* at 468–72. These include child pornography, obscenity, defamation, fighting words, incitement, true threats of violence, fraud, and speech integral to criminal conduct. *Id.* Speech not within one of these narrowly defined categories is protected under the First Amendment, even if a legislature “concludes certain speech is too harmful to be tolerated.” *Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (“new categories of unprotected speech may not be

added to the list by a legislature that concludes certain speech is too harmful to be tolerated”). Such restrictions of speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). But even if a law restricting speech were to satisfy strict scrutiny, it may still be facially overbroad in violation of the First Amendment. *Stevens*, 559 U.S. at 472–73; *Ex parte Nuncio*, 662 S.W.3d 903, 920 (Tex. Crim. App. 2022). In the First Amendment context, a court may invalidate a law as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep. *Stevens*, 559 U.S. at 473.

“An overbreadth challenge is unusual.” *Hansen*, 599 U.S. at 769. “For one thing, litigants have standing to assert the constitutional rights of third parties.” *Id.* “For another, litigants do not have to establish that no set of circumstances exists under which the statute would be valid.” *Id.* Instead, the “overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.” *Id.*

The Supreme Court has “justified this doctrine on the ground that it provides breathing room for free expression.” *Id.* “Overbroad laws may deter or chill constitutionally protected speech, and if would-be speakers remain silent, society will lose their contributions to the marketplace of ideas.” *Id.* at 769–70 (cleaned up). “To guard against those harms, the overbreadth doctrine allows a litigant (even an

undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak." *Id.* at 770. "If the challenger demonstrates that the statute prohibits a substantial amount of protected speech relative to its plainly legitimate sweep, then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid." *Id.* (cleaned up). "Because it destroys some good along with the bad, invalidation for overbreadth is strong medicine that is not to be casually employed." *Id.* (cleaned up). "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Id.* "In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *Id.*³

In *Owens v. State*, 728 S.W.3d 155 (Tex. Crim. App. 2025), the court found section 42.07(a)(7) unconstitutional as applied to Owens, who had been convicted of harassment for sending thirty-four communications to his former therapist. He had sent the messages via her publicly accessible commercial accounts and done so over a three-month period. *Id.* at 167–68. The court specifically noted that in *Barton* and *Sanders*, it had upheld the facial constitutionality of the statute on the grounds that it prohibits non-speech conduct, and stated, "The question before us now is narrower: was the statute unconstitutional as it was applied to [Owens]?" *Id.* at *163. The Court concluded that it was. *Id.* at 169. The State had
cont.

Whether a statute is facially constitutional is a question of law we review de novo. *Ex parte Lowry*, 693 S.W.3d 388, 406 (Tex. Crim. App. 2024).

Application

The statute at issue reads: “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 § 42.07(a)(7). The statute defines “electronic communication” as “a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system” and states the term includes: “communication initiated by electronic mail, instant message, network call, or facsimile machine” and “a communication made to a pager.” *Id.* § 42.07(b)(1)(A)(B). In *Scott v. State*, the Court of Criminal Appeals upheld another, and nearly identical, subsection of the harassment statute, section 42.07(a)(4), against a First Amendment overbreadth challenge—finding that the subsection targets noncommunicative conduct. 322 S.W.3d 662, 670 (Tex. Crim. App. 2010), *abrogated by Wilson v.*

prosecuted Owens based on the content of his speech in circumstances where (1) “there was no invasion to the home”; (2) no “captive audience”; and (3) no “invasion of substantial privacy rights in an essentially intolerable manner.” *Id.* at 167.

Earl has not raised an as-applied challenge here.

State, 448 S.W.3d 418 (Tex. Crim. App. 2014). That subsection provides, “(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person ... causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.” Tex. Penal Code § 42.07(a)(4). The Court noted the text requires that the actor intend to inflict emotional distress and to act in a manner likely to do so but does not require that the actor use spoken words at all. *Id.* at 670. The Court held that to the extent that it applies to communicative conduct, that communicative conduct is not protected by the First Amendment because it invades the substantial privacy interests of the recipient in an essentially intolerable manner. *Id.* Finding the statute regulates non-speech conduct, the Court overruled the overbreadth challenge. *Id.*

In 2020, this Court upheld section 42.07(a)(7) against an overbreadth challenge, relying on *Scott*, and two prior unpublished opinions from this court. *Ex parte McDonald*, 606 S.W.3d 856, 860 (Tex. App.—Austin 2020, pet. ref’d). And in *Barton* and *Sanders*, the Court of Criminal Appeals relied on *Scott* to do the same thing, reasoning:

- the gravamen of the section 42.07(a)(7) offense is the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;
- speech is not necessary for commission of the offense; the statute is equally violated by the repeated sending of communications containing expressive

speech as it is by the repeated sending of communications containing no speech at all;

- even accepting that a person who violates section 42.07(a)(7) 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 protective expressive conduct; the First Amendment affords no protection to communicative conduct whereby one individual invades the substantial privacy interests of another in an essentially intolerable manner;

- because the statute proscribes non-speech conduct, it does not implicate the protections of the First Amendment, although elements of speech may be employed to commit the offense; and

- on its face, section 42.07(a)(7) does not implicate and does not violate the First Amendment of the United States Constitution.

Barton, 662 S.W.3d at 883–84; *Sanders*, 663 S.W.3d at 215–16.⁴

The applicable version of the statute is the 2017 version. Act of May 26, 2017, 85th Leg., R.S., ch. 522, §§ 13, 14, 2017 Tex. Gen. Laws 1400, 1407. Although the Texas Legislature has twice amended the statute since then, this subsection has not changed. Act of May 12, 2021, 87th Leg., R.S., ch. 178, § 1, 2021 Tex. Gen. Laws 385, 386; Act of May 24, 2023, 88th Leg., R.S., ch. 839, § 7, 2023 Tex. Gen. Laws 2614, 2619; Act of May 18, 2023, 88th Leg., R.S., ch. 1118, § 1, 2023 Tex. Gen. Laws 3472, 3473. The versions of the sub-

cont.

Earl argues that Presiding Judge Keller got it right because the statute encompasses a truly enormous amount of speech and statements made with a disfavored harassing intent are still protected unless they fall into a historically recognized category of unprotected speech. But we are bound by *Barton*, *Sanders*,⁵ and *McDonald*. Texas courts follow vertical stare decisis (lower courts must follow the precedents of all higher courts) and horizontal stare decisis (three-judge panels must follow materially

statute at issue in the *Barton* (2001) and *Sanders* (2013) cases were virtually identical to the 2017 versions. Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, 2001 Tex. Gen. Laws 2795, 2796; Act of May 24, 2013, 83rd Leg., R.S., ch. 1278, § 1, 2013 Tex. Gen. Laws. 3231, 3231. But the definition of “electronic communication” was narrower. It was defined as “a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system” and to include “a communication initiated by electronic mail, instant message, network call, or facsimile machine” and “a communication made to a pager.” Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, 2001 Tex. Gen. Laws 2795, 2796; Act of May 24, 2013, 83rd Leg., R.S., ch. 1278, § 1, 2013 Tex. Gen. Laws. 3231, 3231.

The Supreme Court of the United States denied certiorari in both cases. *Barton v. Texas* and *Sanders v. Texas*, 143 S. Ct. 774 (2023). Earl states that this case is uniquely ripe for the grant of certiorari, unlike *Barton* and *Sanders*—which were appeals from rulings on pre-trial applications alone.

indistinguishable decisions of earlier panels of the same court unless a higher authority has superseded that prior decision). *Mitschke v. Borromeo*, 645 S.W.3d 251, 256 (Tex. 2022).

Earl argues *Barton* and *Sanders* are undermined by a line of cases from the United States Supreme Court—most recently *Counterman v. Colorado*. In *Counterman*, the Court held that the First Amendment requires that the State must prove, in a true-threats case, that the defendant was aware that others could regard his statements as threatening and delivers them anyway. 600 U.S. at 73, 79–80. The Court acknowledged that such a standard will necessarily impede some true-threat prosecutions of morally culpable defendants. *Id.* at 80. But the Court explained that the imposition of a subjective mens rea of recklessness is necessary to account for true threat prosecutions’ chilling effects. *Id.*

Houston’s Fourteenth Court of Appeals rejected the argument that *Counterman* has any effect on *Barton* or *Sanders* because it is a “true threats” case and did not “specifically examine whether the sending of repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another was noncommunicative[.]” *Ex parte Ordonez*, 693 S.W.3d 419, 424 (Tex. App.—Houston [14th Dist.] 2023, no pet.) (rejecting argument that 2017 expansion of definition of electronic communication effects holding in *Barton* and *Sanders* that the electronic harassment statute does not implicate First Amendment because gravamen of offense itself did not change).

But even if we were to agree that *Counterman*, and cases before it, cut against the Court of Criminal

Appeals' determination that section 42.07(a)(7) does not implicate the First Amendment, that determination by the higher court still stands, and we remain bound to follow it.

Next, Earl notes that the Texas Legislature added to section 42.07(a) another means of committing harassment: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another ... the person publishes on an Internet website, including a social media platform, repeated electronic communications in a manner reasonably likely to cause emotional distress, abuse, or torment to another person, unless the communications are made in connection with a matter of public concern." Tex. Pen. Code § 42.07(a)(8); Act of May 12, 2021, 87th Leg., R.S., ch. 178, § 1, 2021 Tex. Gen. Laws 385, 386. Earl notes that the Legislature's attempt to limit the forbidden speech based on its content, is proof the Legislature recognized that the statute restricts speech based on its content, and attempted to avoid constitutionality concerns by limiting its application to matters of public concern. That may be so, but the Legislature did not simultaneously remove or amend subsection 42.07(a)(7). Cf., *Texas Mut. Ins. v. Laird*, 706 S.W.3d 421, 425 (Tex. App.—Austin 2024, no pet.) (stare decisis not applicable because Texas Legislature removed statutory language essential to prior panel's interpretation of statute).

We conclude we are bound by the decisions of the Court of Criminal Appeals and this Court. *Mitschke*, 645 S.W.3d at 256; see *Lost Pines Groundwater Conservation Dist. v. Lower Colorado River Auth.*, No. 03-23-00303-CV, 2024 WL 3207472, at *5 (Tex. App.—

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Austin June 28, 2024, pet. filed) (mem. op.) (absent decision from higher court or this court sitting en banc that is on point and contrary to prior panel decision or intervening and material change in statutory law, this court is bound by prior holding of another panel of this court).

CONCLUSION

We overrule Earl's sole issue and affirm the judgment of the trial court.

Chari L. Kelly, Justice

Before Justices Triana, Kelly, and Crump

Affirmed

Filed: June 27, 2025

Do Not Publish

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Appendix B

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

1/15/2026

COA No. 03-23-00427-CR

EARL, JAMES RYAN

Tr. Ct. No. C-1-CR-18-501959

PD-0519-25

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

JUDGE MCCLURE WOULD GRANT

Deana Williamson, Clerk

LANE HAYGOOD
ATTORNEY AT LAW
620 N GRANT AVE SUITE
913
ODESSA, TX 79761
* DELIVERED VIA E-
MAIL *

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Appendix C

Order Denying Pretrial Application for Writ of
Habeas Corpus and Motion to Quash, County Court
at Law No. 4 of Travis County, Texas

Signed August 8, 2022

CAUSE No. C-1-CR-18-501959

THE STATE OF TEXAS

v.

JAMES EARL

IN THE COUNTY COURT

AT LAW NUMBER 4

TRAVIS COUNTY, TEXAS

ORDER

On this the 8th day of August 2022, the Court adopts the State's Proposed Findings of Fact and Conclusions of Law and finds that the relief James Earl ("Defendant") requests in his companion Pretrial Application for Writ of Habeas Corpus and Motion to Quash be denied.

IT IS HEREBY ORDERED that Defendant's Pretrial Application for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Quash is DENIED.

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IT IS FINALLY ORDERED that the State's
Proposed Findings of Fact and Conclusions of Law are
ADOPTED by this Court.

SIGNED on the 8th day of August, 2022.

/s/ Dimple Malhotra

Honorable Dimple
Malhotra

Judge Presiding

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Appendix D

Order of Deferred Adjudication, County Court at
Law No. 4 of Travis County, Texas

Signed July 6, 2023

CAUSE NO. C-1-CR-18-501959

OFFENSE DATE: 12/19/18

THE STATE OF TEXAS

vs.

JAMES EARL

IN THE COUNTY COURT AT LAW NO. 4

TRAVIS COUNTY, TEXAS

DEGREE: CLASS A MISDEMEANOR

**DEFERRAL OF ADJUDICATION OF GUILT
AND SUPERVISION ORDER**

On the 6th day of July, 2023, the Defendant having been charged in the above cause for the misdemeanor offense of harassment, and this cause being called for trial, the State appeared by her County Attorney and the Defendant appeared in person and by counsel; both parties announced ready for trial. The said Defendant elected to proceed under Article 42.12 § 3d(a) of the Texas Code of Criminal Procedure and in open court, no jury having been demanded, the Defendant waived arraignment and formal reading of

the information and pleaded nolo contendere to the said charge.

On the 6th day of July, 2023, and after considering said plea and arguments of counsel, the Court finds the best interests of society and of the Defendant would be served by deferring proceedings without entering an adjudication of guilt and by placing the Defendant on supervision in this cause.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the proceedings be and are hereby deferred without an adjudication of guilt thereon, and that said Defendant be, and is hereby placed on supervision in this cause for a period of one year from this date, on the following terms and conditions, to-wit:

- (1) Commit no offense against the laws of this or any State or of the United States.
- (2) Avoid injurious or vicious habits.
- (3) Avoid the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.
- (4) Report to the supervision officer as directed by the judge or the supervision officer or by mail as reported and obey all orders of the Court and the rules and regulations of the Community Supervision and Corrections Department.
- (5) Refrain from disorderly conduct, abusive language, or disturbing the peace while present at the office of the Department.
- (6) Permit the Supervision Officer to visit you at your home or elsewhere.
- (7) Work faithfully at suitable employment as far as possible.

(8) Do not change residence without permission and report changes of employment to supervision officer as directed.

(9) Remain within Travis County unless given permission to depart by the Supervision Officer.

(10) While on community supervision, you must have on your person at all times a current, valid Texas Department of Public Safety photo identification card or a valid Texas Department of Public Safety photo driver's license. You must obtain this photo identification within thirty (30) days of the date of your community supervision.

(11) Support your dependents.

(12) Submit urine/breath/saliva specimen at the direction of the Supervision Officer or randomly and pay all costs if required.

(13) Pay to and through the Centralized Collections of the Travis County Tax Office, in one lump sum or in installments, as set forth in the collection schedule, the following: a. Court Costs \$TBD; b. Fine \$___; c. Attorney Fees \$___. Pay to and through the Community Supervision and Corrections Department of Travis County, Texas, in one lump sum or in installments, as set forth in the collection schedule: d. Supervision Monthly Reimbursement Fee of \$60.00; e. Restitution \$___ to ___.

(14) Do not operate a motor vehicle without a valid Texas Driver's License and proof of automobile liability insurance.

(15) Surrender your driver's license for a term of ____.

**ADDITIONAL CONDITIONS OF COMMUNITY
SUPERVISION**

(16) Participate in, and comply with the rules of the following program(s) [not selected].

(17) Complete ____ hours of Community Service Restitution at a place approved and designated by the Community Supervision and Corrections Department.

(18) Report to, cooperate with, and participate in all programs (until successfully discharged), and pay all costs for the following classes and services [checked: m. Other as determined by the Supervising Officer].

(19) Report to the supervision office for an evaluation for the following programs or services and follow the recommendations and pay costs incurred while in the program [checked: b. Counseling/Treatment designated by the Supervision Officer].

(20) Assigned to the following specialized unit until the level of supervision is changed by the court and/or Supervision Officer and follow the department guidelines for the caseload [not selected].

(21) Register with and remain registered with the Travis County Domestic Relations Office, if ordered by the Court and/or your Community Supervision Officer.

(22) Serve ____ days in the Travis County Jail, on or before ____; straight time/work release/weekends/credit for back time/SWAP Program.

(23) Do not open or maintain a checking account until approved, in writing, by the Court and/or your Supervision Officer.

(24) Have no contact with [A.S.], either in writing, in person, by phone, electronically or through third parties and stay 200 yards from where they live, work or any place they may be.

(25) Have no threatening or harassing communication/contact with [not selected].

(26) Show proof of a high school diploma within ninety (90) days or obtain GED within ____ year(s).

(27) Have no contact with gangs or gang members during term of community supervision.

(28) Pursuant to Texas Government Code Sec. 411.072 case could be applicable.

(29) Do not possess any firearms/weapons while on community supervision.

(30) Do not refuse breath or blood tests when requested by any law enforcement officer.

(31) Provide documentation of income/expenses to the community supervision officer/complete Financial Study.

You are hereby advised that under the law of this State, the Court shall determine the terms and conditions of your community supervision and may at any time during the period of community supervision, alter or modify the conditions of your community supervision. The Court also has the authority at any time during the period of your community supervision

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to revoke your community supervision for violation of any of the conditions set out above.

Date of Sentence: July 6, 2023

Judge Presiding
Honorable Dimple
Malhotra

Defendant
Community Supervision
Officer

PLEA AGREEMENT

Comes now the State of Texas and the Defendant, having discussed the merits of the case and entered into a negotiated plea bargain. The parties agree that the interests of justice will be served by and pray the Court to accept the following agreement for the disposition of the aforementioned case.

Defendant: deferred adjudication; no SOR requirement.

JURY WAIVER AND PLEA AGREEMENT

I am the defendant accused in this case. I have talked to my lawyer about my case. In open Court I make the following voluntary statement:

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- I am the person charged.
- I am mentally competent and I understand the nature of the charges against me.
- I am aware that any plea bargaining agreement among the State, myself, and my attorney is not binding on the court.
- I understand that I have a right to have a jury decide whether I am guilty and what my punishment should be, whether I plead guilty, not guilty, or nolo contendere, and I hereby give up this right.
- I have the right to be confronted with the witnesses against me.
- I have the right to remain silent. If I choose to speak, anything I say can be used against me.
- My attorney has communicated the State's plea offer of deferred adjudication, one year probation, with no SOR requirement, court costs and an additional class discussed to me and I accept it.

**PLEA OF GUILTY OR NO CONTEST,
ADMONISHMENTS, VOLUNTARY
STATEMENTS, WAIVERS, AND
STIPULATIONS**

I. ADMONISHMENTS. You are admonished in writing that: Class A Misdemeanor.

1. Charge: You are pleading NO CONTEST to the charged offense described above.

2. Punishment Range: The range of punishment for the charged and/or plea-bargained offense is: CLASS A MISDEMEANOR: Confinement in jail for a

term not to exceed one year, a fine not to exceed \$4,000, or both such fine and confinement.

3. Plea Agreement: The prosecutor's punishment recommendation is not binding on the Court. If a plea agreement exists, the Court will inform you in open court before making any finding on your plea whether it will follow the plea agreement.

4. Un-negotiated Plea: If there is not a plea agreement, then all non-jurisdictional defects are waived, and you have no right to appeal except for jurisdictional matters. If you are convicted in a non-negotiated plea you have the right to appeal jurisdictional matters to the appropriate Court of Appeals of Texas, and the right to be represented on appeal by an attorney, but if you cannot afford to pay for such, the court will, without expense to you, provide an attorney and a proper record for such an appeal.

5. Negotiated Plea & Appeal: If the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by you and your attorney, you must receive the Court's permission before you may appeal any matter except matters raised by written motion(s) filed prior to trial.

6. Citizenship: If you are not a citizen of the United States of America or you do not have lawful immigration status, you should tell your lawyer. A plea of guilty or no contest, regardless of findings of guilt or innocence, may result in detention, removal, deportation, exclusion from the United States, or denial of naturalization/citizenship or other immigration benefits pursuant to federal law. A plea to certain crimes, including but not limited to domestic violence, drug possession, theft, burglary of

a vehicle will have an adverse impact on your immigration status.

7. Deferred Adjudication: If the Court grants you deferred adjudication/community supervision, you could be arrested and detained if you violate any condition of your probation. You will then be entitled to a hearing without a jury limited to the determination by the Court of whether to proceed with an adjudication of guilt on the original charge. Upon such adjudication of your guilt, the Court may assess your punishment at any length of time and any fine within the range of punishment allowed by law. Be further advised that under federal immigration law, a deferred adjudication of a removable offense under Texas law is considered a conviction.

8. Misdemeanor Involving Family Violence as defined by Section 71.004, Family Code: If you are convicted of a misdemeanor offense involving violence where you are or were a spouse, intimate partner, parent, or guardian of the victim or are or were involved in another, similar relationship with the victim, it may be unlawful for you to possess or purchase a firearm, including a handgun or long gun, or ammunition, pursuant to federal law under Title 18 U.S.C. Section 922(g)(9) or Section 46.04(b), Texas Penal Code.

9. Conditions of Community Supervision: The judge may impose any reasonable condition of community supervision beyond those specified in the statute if the plea is accepted. The judge may reverse, alter, or modify the conditions of community supervision at any time during the probation period.

10. Driver's License Suspension and Surrender: The Transportation Code provides that the

Department of Public Safety may suspend a driver's license and require payment of surcharges for certain offenses, including Driving While Intoxicated, Driving While License Invalid, Suspended, Cancelled, or no license, possession of certain controlled substances, possession of marijuana, and others.

VOLUNTARY STATEMENTS

NOW COMES the Defendant in open court in the above styled and numbered cause and after consulting with counsel makes the following voluntary statements:

- I was sane at the time of the offense, and am presently competent to stand trial.
- I understand the nature of the charge(s) against me and the plea agreement, if any.
- I understand the admonishments set out in this document and I am aware of the consequences of my plea of guilty or my plea of no contest.

WAIVERS

After consulting with my attorney, I freely, knowingly, and voluntarily waive the following rights:

- Reading of the indictment or information.
- The right to a jury trial, in all forms; the right to a jury for sentencing; arraignment; the right to file motions or special pleas; appointment of counsel; the

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right that 10 days or any other statutory period must elapse before trial.

- The right to a trial by jury, and I request the written consent and approval of the Court and prosecuting attorney for the waiver.

- The right to confront and cross-examine witnesses against me and any objection to the evidence accompanying this waiver.

- My right to require the State to produce testimony of witnesses, evidence sufficient to establish my guilt.

- The right to subpoena witnesses to testify for myself.

- The right to remain silent and not testify against myself.

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Appendix E

Trial Court's Certification of Defendant's Right of
Appeal

Signed July 6, 2023

No. C-1-CR-18-501959

THE STATE OF TEXAS

v.

JAMES EARL

IN THE COUNTY COURT AT LAW NUMBER 4

TRAVIS COUNTY, TEXAS

**TRIAL COURT'S CERTIFICATION OF
DEFENDANT'S RIGHT OF APPEAL**

I, Dimple Malhotra, Judge of the above Trial Court, certify this criminal case:

☐ is not a plea-bargain case, and the defendant has the right of appeal.

☐ is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal.

☒ is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal.

☐ is a plea-bargain case, and the defendant has NO right of appeal.

☐ the defendant has waived the right of appeal.

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☐ the notice of appeal was not timely filed, and the defendant has NO right of appeal.

SIGNED This 6th day of July, 2023.

/s/ Dimple Malhotra
Judge Presiding

I understand that an appeal is perfected by timely filing a sufficient notice of appeal in writing and filed with the trial court clerk. I also understand the notice of appeal must be filed: (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or (2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely files a motion for new trial.

I, James Earl, DEFENDANT in the above styled and numbered cause, have received a copy of this certification. I have also been informed of my rights concerning any appeal of this criminal case, including any right to file a pro se petition for discretionary review pursuant to Rule 68 of the Texas Rules of Appellate Procedure. I have been admonished that my attorney must mail a copy of the Court of Appeals' judgment and opinion to my last known address and that I have only 30 days in which to file a pro se petition for discretionary review in the Court of Appeals. Tex. R. App. P. 68.2. I acknowledge that, if I wish to appeal this case and if I am entitled to do so, it is my duty to inform my appellate attorney, by written communication, of any change in address at

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which I am currently living or any change in my current prison unit. I understand that, because of appellate deadlines, if I fail to timely inform my appellate attorney of any change in my address, I may lose the opportunity to file a pro se petition for discretionary review.

Defendant

Mailing address: [on file]

Attorney for Defendant

Telephone #: (432) 279-0411

Fax #: (432) 201-2002

State Bar Card #:

[Haygood — 00792970
MWB]

Appendix F

Texas Penal Code § 42.07

Effective September 1, 2017 to August 31, 2021

§ 42.07. Harassment

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

(1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section; or

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

(b) In this section:

(1) “Electronic communication” means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. The term includes:

(A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and

(B) a communication made to a pager.

(2) “Family” and “household” have the meaning assigned by Chapter 71, Family Code.

(3) “Obscene” means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

(c) An offense under this section is a Class B misdemeanor, except that the offense is a Class A misdemeanor if:

(1) the actor has previously been convicted under this section; or

(2) the offense was committed under Subsection (a)(7) and:

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(A) the offense was committed against a child under 18 years of age with the intent that the child:

(i) commit suicide; or

(ii) engage in conduct causing serious bodily injury to the child; or

(B) the actor has previously violated a temporary restraining order or injunction issued under Chapter 129A, Civil Practice and Remedies Code.

Appendix G

Texas Penal Code § 42.07

Effective December 4, 2025

§ 42.07. Harassment

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

(1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene;

(2) threatens, in a manner reasonably likely to alarm the person receiving the threat, to inflict bodily injury on the person or to commit a felony against the person, a member of the person's family or household, or the person's property;

(3) conveys, in a manner reasonably likely to alarm the person receiving the report, a false report, which is known by the conveyor to be false, that another person has suffered death or serious bodily injury;

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another;

(5) makes a telephone call and intentionally fails to hang up or disengage the connection;

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(6) knowingly permits a telephone under the person's control to be used by another to commit an offense under this section;

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

(8) publishes on an Internet website, including a social media platform, repeated electronic communications in a manner reasonably likely to cause emotional distress, abuse, or torment to another person, unless the communications are made in connection with a matter of public concern;

(9) tracks or monitors the personal property or motor vehicle of another person, without the other person's effective consent, including by:

(A) using a tracking application on the person's personal electronic device or using a tracking device; or

(B) physically following the other person or causing any person to physically follow the other person; or

(10) makes obscene, intimidating, or threatening telephone calls or other electronic communications from a temporary or disposable telephone number provided by an Internet application or other technological means.

(b) In this section:

(1) "Court employee" means an employee whose duties relate to court administration, including a court clerk, court coordinator, court administrator, juvenile case manager, law clerk, or staff attorney. The term does not include a judge.

(1-a) “Electronic communication” means a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:

(A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and

(B) a communication made to a pager.

(2) “Family” and “household” have the meaning assigned by Chapter 71, Family Code.

(3) “Obscene” means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

(4) “Utility” has the meaning assigned by Section 22.01(e).

(c) An offense under this section is a Class B misdemeanor, except that the offense is:

(1) a Class A misdemeanor if:

(A) the actor has previously been convicted under this section;

(B) the offense was committed under Subsection (a)(7) or (8) and:

(i) the offense was committed against a child under 18 years of age with the intent that the child:

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- (a) commit suicide; or
- (b) engage in conduct causing serious bodily injury to the child; or
- (ii) the actor has previously violated a temporary restraining order or injunction issued under Chapter 129A, Civil Practice and Remedies Code;
- (C) the offense was committed against a person the actor knows or reasonably should know is an employee or agent of a utility while the person is performing a duty within the scope of that employment or agency; or
- (D) the offense was committed against a person the actor knows is a court employee;
- (2) a state jail felony if the offense was committed against a person the actor knows is:
 - (A) a court employee and the actor has previously been convicted under this section; or
 - (B) a judge; and
- (3) a felony of the third degree if the offense was committed against a person the actor knows is a judge and the actor has previously been convicted under this section.
- (d) In this section, “matter of public concern” has the meaning assigned by Section 27.001, Civil Practice and Remedies Code.
- (e) For purposes of Subsection (a)(9), it is presumed that a person did not give effective consent to the actor’s conduct if:
 - (1) an application for a protective or restraining order against or with respect to the actor has been filed by or on behalf of the person under Subchapter

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A, Chapter 7B, Code of Criminal Procedure, Article 17.292, Code of Criminal Procedure, Section 6.504, Family Code, or Subtitle B, Title 4, Family Code, or an order has been issued against or with respect to the actor under one of those provisions; or

(2) the person is married to the actor and a petition for dissolution of marriage has been filed, or the person was previously married to the actor and the marriage has been dissolved.