No. 22-430

In The Supreme Court of the United States

CHARLES BARTON
AND NATHAN SANDERS,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

John W. Whitehead
Counsel of Record
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tireless to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's forty-year history, including *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (citing Brief for The Rutherford Institute as *Amicus Curiae*), and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens –

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[1] Counsel of record for both parties received timely notice of The Rutherford Institute's intention to file this *amicus curiae* brief in accordance with Rule 37.2(a), and both parties consented in writing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

in this case, the right to engage in protected speech without risk of criminal prosecution. The Rutherford Institute thus respectfully submits that the Court should grant the petition and then reverse the majority ruling by the Texas Court of Criminal Appeals.

SUMMARY OF THE ARGUMENT

The constitutional right to free speech is an essential aspect of liberty. The Petition squarely presents an issue of considerable practical and constitutional importance, and one that has divided courts across the nation: whether statutes criminalizing speech that is merely intended and reasonably likely to annoy, alarm, or embarrass another person, but not threatening violence or an unlawful act, violate the First Amendment. *Amicus* contends there is no question that such statutes impermissibly abridge First Amendment rights, and the decision below if left uncorrected – as well as decisions from other courts that have upheld similar statutes – will further engender confusion and unnecessarily risk criminal liability for numerous citizens. In turn, speakers will be forced to decide whether to speak and risk prosecution or refrain from engaging in constitutionally protected behavior.

Accordingly, this case presents an excellent opportunity for the Court to reaffirm the First Amendment protections afforded to speech that is annoying, alarming, or embarrassing. Absent this Court's review, the continued ambiguity over whether and when the government may criminally prosecute people for the content of their speech will result in a serious threat to citizens' liberty.

ARGUMENT

I. The Decision Below Abridges Petitioners' First Amendment Rights

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. At its fundamental level, the First Amendment prohibits the state from imprisoning people for the content of their speech. "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). It is for this reason that content-based restrictions on speech are presumed invalid, and the burden is always on the government to show that a speech regulation falls within a confined set of categories that may be subject to content-based prosecution. The Constitution's protection of free speech is accordingly at its highest when the government attempts to prosecute someone for the content of their words. Thus, "'[f]rom 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'included a freedom to disregard these traditional limitations.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)).

Accordingly, when a statute restricts speech based on its content, the Court must determine whether the statute restricts a real and substantial amount of protected speech in relation to the unprotected speech which it restricts. *See New York v. Ferber*, 458 U.S. 747 (1982). "[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few

'historic and traditional categories [of expression] long familiar to the bar.'" *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (citations omitted) (alteration in original). These categories include obscenity, defamation, fraud, incitement, speech integral to criminal conduct, "fighting words," child pornography, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. *Id*. There exists no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 559 U.S. at 472.[2]

Despite this Court's jurisprudence on the matter, Texas Penal Code § 42.07(a)(7) provides that: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he . . . sends repeated electronic communications in a

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[2] This Court has struck down content-based speech restrictions in numerous contexts, including in cases involving repulsive, distasteful, or terrifying speech. *See, e.g.*, *Alvarez*, 567 U.S. at 729-30 (false statements about receiving military honors); *Snyder*, 562 U.S. at 460 (picketing of military funerals, which was "certainly harmful"); *Stevens*, 559 U.S. at 465-66 (depictions of animal cruelty, including "crush videos" that showed "women slowly crushing animals to death"); *Texas* v. *Johnson*, 491 U.S. 397, 419-421 (1989) (flag desecration, despite the "flag's deservedly cherished place in our community"). This is because even "vituperative" language must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Watts v. United States*, 394 U.S. 705, 708 (1969).

manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."

A speaker does not lose First Amendment protections simply because he or she has an intent to harass, annoy, alarm, abuse, torment, embarrass, or offend another with their speech. As this Court has recognized:

> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the statute] . . . . An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion."

FEC v. Wis. Right to Life, Inc., 551 US. 449, 468 (2007) (citations omitted).

However distasteful such communications might be, the First Amendment embodies the axiom that public discourse is best able to flourish when the government's regulation of speech is minimal and clearly defined. As Justice Douglas wrote, when "the Government is the censor" of speech, then "administrative fiat, not freedom of choice, carries the day." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring). But when speakers have no reason to fear liability for their speech, the result is more speech. *See, e.g., Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding

principle is freedom—the 'unfettered interchange of ideas'"); *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[M]ore speech . . . [is] among the central goals of the Free Speech Clause.").

The fact that the Texas statute at issue here requires an "intent to harass, annoy, alarm, abuse, torment, or embarrass another" does not strip such speech of constitutional protection. *See Wis. Right to Life*, 551 US. at 467-69. Speech is still protected even when embarrassing or unpleasant to some. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("speech cannot be restricted simply because it is upsetting or arouses contempt"); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) ("the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-10 (1982) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.").

Nor does the fact that the Texas statute applies to electronic communications make such speech subject to less constitutional protections. As this Court has recognized, "the 'vast democratic forums of the Internet'" are now "the most important places …

for the exchange of views." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1735 (2017). Social media sites, like Facebook and YouTube, are the most important and broadly used channels of online communication and expression today, used to "debate religion and politics," "look for work," and "petition . . . elected representatives." *Id.* at 1735-36*; Elonis* v. *United States*, 135 S. Ct. 2001, 2004-05 (2015) (discussing use of Facebook); *see also* Harawa, Daniel S. *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014) ("Social media is a necessary part of modern interaction.").

The Internet provides a medium for communication, expression, and commentary to flourish at a historically unprecedented scale. Anyone with a computer or smartphone can be a publisher or a performer. But as the Internet enhances our ability to communicate and express our views, the government has tried and will keep trying to monitor, restrict, and prosecute expression on the Internet in myriad new ways. *See, e.g.*, *Packingham,* 137 S. Ct. at 1737 (state law forbidding certain people from speaking through social media). And the Internet provides those who seek to police speech with a target-rich environment—indeed, in *Packingham* and *Elonis*, law enforcement officials surveilled social media for speech to target. *Id.* at 1734; *Elonis*, 135 S. Ct. at 2006.

Because Section 42.07(a)(7) of the Texas Penal Code unquestionably infringes on protected constitutional rights, this Court should grant the Petition.

II. The Decision Below Threatens the Viability of Free Speech

As part of the First Amendment's protections, citizens have a right to speak without fear of government interference or retaliation. The presence or absence of First Amendment protection has real world effects. Accordingly, when speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined "because of [the] obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). Absent such clarity, speakers who are uncertain as to whether particular speech is permissible may refrain from exercising their First Amendment rights with respect to protected speech. *See id.* at 874 (noting that the "vague contours" of undefined statutory terms will cause "some speakers whose messages would be entitled to constitutional protection" to self-censor); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965) (holding that an overly broad and vague statute restricting speech creates a "danger zone within which protected expression may be inhibited").

Narrowly limiting and clearly defining the scope of affected speech is especially important where the regulation is a criminal statute because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images . . . . [T]his increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses great[ ]First Amendment concerns." *Reno*, 521 U.S. at 872. *See also Dombrowski*, 380 U.S. at 494 ("So long as the [vague and over broad] statute remains available to the State

the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.").[3]

Government action that chills free expression is in "direct contravention of the First Amendment's dictates." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988); *see also New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (a rule that "dampens the vigor and limits the variety of public debate . . . is inconsistent with the First and Fourteenth Amendments"). This is especially true when the regulation at issue chills speech and expression through "'fear of criminal sanctions.'" *E.g.*, *New York* v. *Ferber*, 458 U.S. 747, 768-69 (1982); *see also Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality op.) (challenged statute "chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech"). Concerns about chilling effects are at their zenith when there is a possibility that government action might stifle artistic or political expression. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 22-23 (1973) ("the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression").

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[3] The decision below, like other decisions that have upheld similar statutes, not only chills free speech, but has the effect of creating different levels of First Amendment protections in different States.

While the government may prohibit "'[t]rue threats' . . . where the speaker means to communicate a serious expression of an intent to commit an act of *unlawful violence*," and "[i]ntimidation . . . where a speaker directs a *threat* . . . *with the intent* of placing the victim in fear of *bodily harm or death*," *Black*, 538 U.S. at 359-60 (emphasis added), Texas Penal Code § 42.07(a)(7) goes far beyond those bounds by criminalizing any words which merely "harass, annoy, alarm, abuse, torment, embarrass, or offend another." No threat of unlawful violence is required to violate the statute.

For example, someone could send emails to their elected representative out of frustration because of the representative's unethical actions or support for an unfavorable bill. Without making or intending any threat of bodily harm or unlawful activity, the sender could have the specific intent to annoy, embarrass, or offend the representative by criticizing his or her actions, and the sender could be found in violation of Texas's statute and sentenced to jail simply because the representative felt annoyed by the harsh criticism.[4] The Texas statute thus threatens to chill or criminalize political speech.

Vives v. The City of New York, 305 F. Supp. 2d 289 (S.D.N.Y. 2003), *rev'd on other grounds*, 405 F.3d 115 (2d Cir. 2004), is instructive. In that case, the

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[4] As an example from a different statute, a person was convicted of cyberstalking for sending emails to a political candidate, though the conviction was then reversed on appeal for insufficient evidence "when the statute is interpreted in a way that is consonant with the First Amendment." *United States v. Sryniawski*, No. 21-3487, slip op. at 5 (8th Cir. Sept. 2, 2022).

defendant sent approximately 27,000 copies of his political and religious materials to various people. While the court did not "doubt the veracity of [the complainant's] statement [that the materials were alarming and/or annoying]" and recognized that "Vives acknowledges that he intends to alarm the recipients of his mailings," the court held that "neither the fact that Vives intends to annoy and/or alarm, nor the fact that the mailings do annoy and/or alarm the recipients, can be a basis for arresting or prosecuting Vives, because Vives has a constitutionally protected right to engage in this conduct." *Id.* at 299. The court further explained,

> Vives's mailing are nothing more than communications "that the overwhelming majority of people might find distasteful or discomforting." . . . But the Supreme Court has made very clear that such communications are fully protected speech that may not be proscribed or punished. . . . As such, Vives['s] mailings are firmly protected by the First Amendment, and may not be proscribed or punished.

Id. at 300 (citations omitted).

Indeed, the *Vives* court recognized the chilling effect which statutes such as the one implicated here have on free speech. *See id.* at 301 ("The fact that Vives was arrested pursuant to section 240.30(1) for engaging in conduct that is firmly protected by the First Amendment, and that he no longer feels free to put his name and address on his mailings, exemplifies why section 240.30(1) cannot be reconciled with the

First Amendment."). As in *Vives*, the statute at issue here could sweep in a vast amount of constitutionally protected speech, such as criticisms of political candidates. *See Black*, 538 U.S. at 365 (plurality opinion) (challenged statute "chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech"). This Court's review is therefore necessary to prevent such chilling effects.

III. The Decision Below Is Contrary to the Decisions of Other Courts Throughout the Country

This case is an excellent vehicle for the Court to provide needed guidance to lower courts across the country regarding when the government may prosecute people based on the substance of their expression.

Some federal and state court judges have held that similar statutes to Section 42.07(a)(7) of the Texas Penal Code are unconstitutional. For example, as previously discussed, in *Vives*, Judge Scheindlin found a statute similar to Section 42.07(a)(7) of the Texas Penal Code unconstitutional and held that "where speech is regulated or proscribed based on its content, the scope of the effected speech must be clearly defined." 305 F. Supp. 2d at 299. This holding is consistent with other courts within the Second Circuit. *See, e.g.*, *Schlager v Phillips*, 985 F. Supp. 419, 421 (S.D.N.Y. 1987), *rev'd on other grounds*, 166 F.3d 439 (2d Cir. 1999) (holding statute to be "utterly repugnant to the First Amendment of the United States Constitution and also unconstitutional for

vagueness"). Likewise, in *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014), the New York Court of Appeals held a cyberbullying ordinance that criminalized "any act of communicating" "with no legitimate private, personal, or public purpose" "with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person" to be unconstitutionally overbroad. *Id.* at 488. In so ruling, the court held that "the First Amendment forbids the government from deciding whether protected speech qualifies as 'legitimate.'" *Id.* at 487.

Within the Fourth Circuit, a federal district court dismissed an indictment based on offensive Twitter messages about a public figure because the "statute sweeps in the type of expression that the Supreme Court has consistently tried to protect" and was thus unconstitutional as applied to the defendant's speech. *United States v. Cassidy*, 814 F. Supp. 2d 574, 583-86 (D. Md. 2011).

The Eighth Circuit reversed a defendant's conviction for cyberstalking based on sending emails to a political candidate due to insufficient evidence "when the statute is interpreted in a way that is consonant with the First Amendment." *United States v. Sryniawski*, No. 21-3487, slip op. at 5 (8th Cir. Sept. 2, 2022). However, as the defendants in those cases unfortunately found out, one cannot rely on the police, prosecutors, or some trial courts to interpret and apply these criminal statutes in a way that is consonant with the First Amendment. So, even if there is a chance of prevailing at trial or on appeal, statutes, like the one in this case, can have a significant chilling effect on those who fear being

arrested, charged, and possibly convicted for their speech.

There is thus significant confusion over when the government may prosecute individuals for their speech, as shown by the 5-4 rulings of the Texas Court of Criminal Appeals in this matter. Such ambiguity in the criminal law is dangerous to liberty, as it requires ordinary citizens to decipher "riddles that even . . . top lawyers struggle to solve." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018). Indeed, such ambiguity contravenes the definitional requirement that, for a category of speech to fall outside of the First Amendment's broad ambit, it must be "'well defined'" and "'narrowly limited.'" *R.A.V.*, 505 U.S. at 399 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

The split of authority on the constitutionality of statutes like § 42.07(a)(7) of the Texas Penal Code – and the implications of that split on citizens' constitutional rights – shows the need for this Court to grant the Petition. If the lower court's decisions are allowed to stand, the First Amendment's preference for more speech, not less, would be undone.

CONCLUSION

For the foregoing reasons and those described by the Petitioners as well as the dissenting opinions of the Texas Court of Criminal Appeals in these two cases, the Court should grant the Petition.

Respectfully submitted,

John W. Whitehead
Counsel of Record
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Counsel for Amicus Curiae

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