No. 18-1182

In The Supreme Court of the United States

SCOTT OGLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
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

QUESTION PRESENTED

Does a statute criminalizing electronically communicated speech that is both intended and reasonably likely to annoy, alarm, or embarrass another person prohibit a substantial amount of protected speech in retaliation to the statute's legitimate sweep, thus violating the First Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 37-year history, including *Snyder v. Phelps*, 562 U.S. 443 (2011)[2], 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 – in this case, the right to engage in protected speech without risk of criminal prosecution.

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[1] *Amicus* certifies that Counsel of Record for all parties received notice at least ten days before the due date of *Amicus*'s intention to file this brief. The parties have consented to the filing of this brief in communications on file with the Clerk. 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*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

[2] *See Snyder*, 562 U.S. at 448 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

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 intended and reasonably likely to annoy, alarm, or embarrass another person violate the First Amendment. *Amicus* contends that there is no question that such statutes impermissibly abridge First Amendment rights and, left uncorrected, the decision below – as well as decisions from other courts that have upheld similar statutes – will 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 – and indeed, vital – opportunity for the Court to reaffirm the First Amendment protections afforded to speech that is intended and reasonably likely to annoy, alarm, or embarrass. Absent the 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 our citizens' liberty.

ARGUMENT

I. The Decision Below Unquestionably Abridges Petitioner's First Amendment Rights

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Accordingly, at its fundamental level, the First Amendment prohibits the state from imprisoning people for the content of their speech. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)) (alteration in original). "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 the 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 based on the content of his or her words.

Accordingly, where, as here, 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 that it restricts. *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, and 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.[3]

Such concerns are particularly implicated with intent-based statutes such as the statute at issue here. As this Court has held:

> Far from serving the values the First Amendment is meant to protect, an

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[3] This Court has struck down content-based speech restrictions in numerous contexts, including in cases involving arguably more repulsive, distasteful, or terrifying speech than at issue in this case. *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"). 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).

> 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).

Despite this Court's clear jurisprudence on the matter, Tex. Penal Code Ann. § 42.07(a)(7) provides that: "A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . . sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." The specific electronic communications at issue here are as follows: (1) Petitioner referred to one law enforcement officer as "arrogant, condescending, belligerent" and someone "who chooses to look the other way," Pet. App. 30; and (2) Petitioner criticized another officer, calling him a "little bitch" and "little state weasel," and telling that officer, "[y]ou have a Constitution to uphold, son, you're pissing on it," *id.* at 37.

However distasteful these comments may be, the First Amendment embodies the axiom that public discourse is best able to flourish when state 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). On the other

hand, when speakers have no reason to fear liability for their speech, the result is more speech. *See 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."). This is the case even when, as here, the speech may be embarrassing to some. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889-91, 910 (1982) (holding speech revealing the names of African-Americans who did not join a protest was constitutionally protected even though speech was embarrassing to some individuals whose names were revealed).[4]

The fact that the statute at issue here requires an "intent to harass, annoy, alarm, abuse, torment, or embarrass another" does not alter this conclusion or strip speech of constitutional protection. A "speaker's motivation" is, generally speaking, "entirely irrelevant to the question of

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[4] That the statute covers electronic, as opposed to verbal, communications is of no moment. First Amendment protections apply as much to written materials sent through the mails as they do to verbal communications. *See Lamont v. Postmaster Gen. of the United States*, 381 U.S. 301, 305 (1965) ("[T]the use of the mails is almost as much a part of free speech as the right to use our tongues" (citing *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting))).

constitutional protection." *Wis. Right to Life*, 551 US. at 468 (citation omitted).[5]

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

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[5] The statute does not require the electronic communications be sent to the subject of the communication. This differentiates the statute from statutes concerning speech to an unwilling listener. *Compare Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that speech about an unwilling subject is constitutionally protected) *with Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736-37 (1970) (holding speech to an unwilling recipient may be restricted).

protection" to self-censor). *See also 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" (quotations omitted)).

This is especially important where, as here, 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.").[6]

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 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

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[6] 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.

"Vives acknowledges that he intends to alarm the recipients of his mailings . . . 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. As here,

> 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 mailings are firmly protected by the First Amendment, and may not be proscribed or punished.

Id. at 300 (citation omitted).

Indeed, the *Vives* court explicitly acknowledged the chilling effect that statutes such as that implicated here have one 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*, left unchecked, the statute at issue here could sweep – and has already swept – in a vast amount of constitutionally protected speech, such as criticisms of political candidates. *See Virginia v. Black*, 538 U.S. 343, 365 (2003) (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 necessary to prevent such chilling effects.

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

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

In addition to the cases referenced in Petitioner's Brief, which *Amicus* will not repeat here, numerous federal and state court judges have already 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 intend 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.

In the Fourth Circuit, in *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011), a federal court dismissed an indictment based on hundreds of offensive Twitter messages because the "statute sweeps in the type of expression that the Supreme Court has tried to protect" and noted that such broad messages differ from "harassing telephone calls" that are "directed to a victim." *Id.* at 585.

There is thus significant confusion over when the government may prosecute individuals for their speech. 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)).

Given the split of authority on the constitutionality of statutes like Texas Penal Code Ann. § 42.07(a)(7) – and the implications of that split

on our citizen's constitutional rights – therefore militates in support of this Court granting the Petition. If the lower court's decision is allowed to stand, by contrast, the First Amendment's preference for more speech, not less, would be undone. *See, e.g.*, *Ariz. 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'").

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, the Court should grant the Petition.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, Virginia 22911
(434) 978-3888
Counsel for Amicus Curiae