No. 22-430

IN THE

Supreme Court of the United States

CHARLES BARTON AND NATHAN SANDERS,

PETITIONERS

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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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" with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another." The question presented is whether the statute facially violates the First Amendment.

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INTEREST OF THE *AMICUS CURIAE*

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. Recently, FIRE expanded its mission to protect free expression beyond colleges and universities. It currently represents plaintiffs in lawsuits seeking compensation for First Amendment violations under 42 U.S.C. § 1983.

Because of its decades of experience defending freedom of expression, FIRE is keenly aware that statutes broadly criminalizing electronic communications threaten to chill online speech over matters of public concern. FIRE submits this brief to urge this Court to grant review in these cases and reverse the decisions below, reaffirming that courts must safeguard our Nation's foundational commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.[1]

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[1] FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than FIRE or its counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief, and FIRE provided timely notice under Rule 37.2.

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari. In the decisions below, the Texas Court of Criminal Appeals held that a statute criminalizing a wide array of electronic communications, Texas Penal Code § 42.07(a)(7), is subject to no First Amendment scrutiny at all. That holding, by the highest criminal court in the second-largest state in the Union, was so egregiously wrong that the court's error alone warrants this Court's review. The court reasoned that because a person could in theory violate Section 42.07(a)(7) by sending repeated communications containing no expressive content, like blank emails, the statute regulates only conduct, not speech. But statutes that proscribe both protected speech and non-expressive conduct are still subject to First Amendment scrutiny. At most, such statutes may be deemed content-neutral, in which case they are subject to intermediate scrutiny—not zero scrutiny. Here, moreover, because liability under Section 42.07(a)(7) will typically depend in part on the subject matter of the communication, it is a content-based restriction subject to strict scrutiny. And because the statute criminalizes a substantial amount of protected speech, including core political speech, petitioners' overbreadth challenge at minimum warrants further review.

This Court's review is also needed to clarify that the Court's precedents protecting offensive speech against government regulation, especially on matters of public concern, apply with equal force to speech communicated over modern channels like social media. Americans who engage in public discussion of significant issues often seek to annoy, alarm, embarrass,

or offend politicians or other public officials—frequently through repetition calculated to elevate their viewpoints. Section 42.07(a)(7) empowers prosecutors to target such speech for criminal prosecution. That promises to accelerate a deeply concerning trend across the United States in which laws like Section 42.07(a)(7) have been invoked to prosecute citizens who criticize public officials through mockery, sarcasm, or invective. And it subjects 30 million Texans to the whim of any prosecutor who deems their public advocacy or even private correspondence offensive. This Court should grant review to clarify that the migration of public discourse to virtual spaces has not changed the bedrock First Amendment principles that undergird our democracy.

ARGUMENT

This Court should grant the petition for a writ of certiorari because the decisions below profoundly misunderstand the scope of the First Amendment and threaten to chill online speech, particularly over matters of public concern that must be openly debated in a democratic society.

I. The Decisions Below Are Egregiously Wrong.

Section 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" with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another." In the two decisions under review, the Texas Court of Criminal Appeals held that Section 42.07(a)(7) "does not implicate the First Amendment's

freedom of speech protections" at all because it proscribes only conduct, not speech. Pet. App. 14a. That holding cannot be reconciled with the settled understanding of the First Amendment. Such a fundamental error about the basic scope of the First Amendment by the highest criminal court of the Nation's second largest state warrants this Court's review.

1. The First Amendment principles relevant to these cases are well established.

First, the First Amendment's guarantee of the freedom of speech protects, at a minimum, "the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This Court has repeatedly held that this protection extends to written or oral communications made through modern, Internet-based channels of communication, such as emails, text messages, and social-media posts. See, *e.g.*, *Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 141 S. Ct. 2038, 2043, 2046–47 (2021); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017); *Ashcroft v. ACLU*, 542 U.S. 656, 661, 673 (2004); *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997). No other view is plausible.

Second, "above all else, the First Amendment means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (opinion of Kavanaugh, J.). For that reason, aside from certain narrow, historically grounded exceptions, "[c]ontent-based laws are subject to strict scrutiny." *Ibid.*

Third, even a content-neutral restriction on speech or expression is not immune from First Amendment

scrutiny. *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022). Rather, to be valid it "must be narrowly tailored to serve a significant governmental interest," a standard that has been described as intermediate scrutiny. *Ibid.* (internal quotation marks omitted).

Finally, under the overbreadth doctrine, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). That doctrine rests on the view that "[a]n overbroad statute might serve to chill protected speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). A statute can be unconstitutionally overbroad even if some of its applications do not concern First Amendment activity at all. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971).

2. In the decisions below, the Court of Criminal Appeals held that Section 42.07(a)(7) "does not implicate the First Amendment." Pet. App. 14a. That holding finds no support in this Court's precedents or in any sensible understanding of the First Amendment.

As explained above, Section 42.07(a)(7) criminalizes sending "repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another" with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another." And the statute defines "electronic communication" to include "a communication initiated through the use of electronic mail, instant message, * * * a computer, * * * text message, a social

media platform or application, an Internet website, [or] any other Internet-based communication tool * * * ." Tex. Penal Code § 42.07(b)(1)(A). That definition encompasses messages sent or posted via widely used Internet platforms like Gmail, WhatsApp, Twitter, and Facebook. The statute therefore indisputably regulates "the spoken or written word" and thus is subject to the requirements of the First Amendment. *Texas*, 491 U.S. at 404; see *Reno*, 521 U.S. at 868–70.

Section 42.07(a)(7) is also a content-based restriction. The statute "on its face draws distinctions based on the message a speaker conveys" by "defining regulated speech by its function or purpose," *i.e.*, to harass, annoy, alarm, abuse, torment, or embarrass another person. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (internal quotation marks omitted). That purpose-based classification is an unmistakable "proxy" for a "subject-matter distinction" that singles out upsetting or critical communications for disfavored treatment (indeed, for criminal prosecution). *City of Austin*, 142 S. Ct. at 1474.

Consider, for example, an activist who seeks to humiliate a politician by reminding the public of the politician's involvement in a corruption scandal—unquestionably core political speech on a matter of public concern. The activist posts the same statement about the scandal under every tweet that the politician sends. That appears to fall squarely within the reach of Section 42.07(a)(7): repeated electronic communications intended to embarrass the politician and that are made in a manner that is reasonably likely to embarrass the politician. But the only way that the activist's intent is discernible is by the content of the

messages. If instead the activist posted supportive statements about the politician in the same manner, the messages would not be made with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another," Tex. Penal Code § 42.07(a)(7).

Section 42.07(a)(7) is thus plainly a content-based restriction in countless applications. The Court of Criminal Appeals therefore should have subjected the statute to strict scrutiny—not *zero* scrutiny.

Even if Section 42.07(a)(7) were deemed content-neutral, moreover, that would mean only that the Court of Criminal Appeals should have applied intermediate scrutiny. *City of Austin*, 142 S. Ct. at 1475. Yet the court instead held that a statute that bans a wide range of electronic communications somehow escapes the First Amendment's ambit altogether. Not only did that holding ignore that the statute plainly criminalizes speech, but it also reflects a clear misapprehension of the free-speech right. The court's evident misunderstanding of the difference between a regulation of conduct and a content-neutral regulation of speech warrants this Court's intervention.

Under either strict or intermediate scrutiny, Section 42.07(a)(7) is likely fatally overbroad. As Presiding Judge Keller wrote in dissent below, the statute's "language encompasses a truly enormous amount of speech." Pet. App. 25a. Both Presiding Judge Keller's opinion and the petition for a writ of certiorari describe well the wide range of protected speech—including core political speech on matters of public concern—that falls within the plain terms of Section 42.07(a)(7). See Pet. 25; Pet. App. 20a, 25a–26a. After all, political campaigns, activists, community groups,

and concerned citizens often deploy repetitive messages designed to annoy, alarm, offend, or embarrass public officials or others in order to advance their viewpoints. And the State of Texas has pointed to no plausible governmental interest served by such a sweeping ban on electronic communications. Accordingly, whatever non-expressive conduct or unprotected speech may be covered by Section 42.07(a)(7) is dwarfed by the vast quantity of protected speech that it criminalizes.

3. The Court of Criminal Appeals declined to analyze Section 42.07(a)(7) under any level of First Amendment scrutiny on the ground that the statute regulates only non-expressive conduct, not speech. Pet. App. 59a–60a. The court concluded that because the statute could in theory be violated by an electronic communication containing no message (*e.g.*, an email that is blank or contains only the letter "B"), the statute governs only non-expressive conduct. Pet. App. 59a–60a. The court appeared to reason that since liability under Section 42.07(a)(7) can be established in some cases without reference to any expressive content contained in a communication, the statute regulates only the "conduct" of repeatedly sending messages in a particular way. See Pet. App. 60a ("[T]he repeated sending of some sort of electronic communication is pure conduct that must be explained by separate speech."); see also *id.* at 13a–14a, 59a–60a. If so, that reasoning was flawed in multiple independent respects.

Most clearly, even if liability under Section 42.07(a)(7) did not depend on the particular message expressed in the communication, that would mean only that the statute is a content-neutral restriction

on speech that must be evaluated under intermediate scrutiny. The statute still undoubtedly prohibits numerous acts of speech, *i.e.*, written messages communicating ideas. Indeed, given that the statute trains only on "electronic communications," it regulates virtually nothing but speech (the occasional blank email aside). See *Mahanoy*, 141 S. Ct. at 2046–47 (describing social-media post as "pure speech"). And the statute could not meet the requirements of intermediate scrutiny; no legitimate governmental interest justifies banning that substantial amount of speech, much of it related to matters of public concern.

Indeed, under the Court of Criminal Appeals' view, the government could presumably prohibit all oral, in-person communications made in a manner likely to annoy, alarm, embarrass, or offend another person—despite the fact that such speech is integral to protest and public discourse—on the ground that the prohibition relates only to "conduct." After all, a person can repeat the letter "B" orally just as easily as sending it in a text message. But that view cannot be correct.

At any rate, for the reasons explained above, Section 42.07(a)(7) is not content-neutral, because it focuses on electronic communications sent for one of the enumerated purposes. *Reed*, 576 U.S. at 163. While some non-expressive transmissions might reveal such a purpose—for example, one hundred blank emails sent to the same recipient over the course of an hour—the statute prohibits a large class of communications specifically because of the purpose revealed by their content. It is thus subject to strict scrutiny.

4. Because Section 42.07(a)(7) so clearly penalizes a vast amount of speech (whether or not it is deemed

content-neutral), the holding of the Court of Criminal Appeals essentially turns the First Amendment overbreadth doctrine on its head. Instead of asking whether Section 42.07(a)(7) proscribes a substantial amount of protected expression, the court determined that it targets some amount of non-expressive conduct and for that reason passes constitutional muster. No recognizable First Amendment principle supports that holding.

This Court's decision in *Coates*, *supra*, which addressed the closely related First Amendment rights of free assembly and association, illustrates the flaw in the reasoning of the Court of Criminal Appeals. In *Coates*, a city ordinance made it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves *in a manner annoying to persons passing by*," echoing the language of Section 42.07(a)(7). 402 U.S. at 611 (quoting ordinance) (emphasis added). After holding that the ordinance's "annoying" standard was unconstitutionally vague, *id.* at 614, the Court went on to hold in the alternative that the ordinance was overbroad on its face, see *id.* at 615–16.

In so holding, the Court acknowledged that "the ordinance [was] broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit," such as "blocking sidewalks, obstructing traffic, * * * or engaging in countless other forms of anti-social conduct." 402 U.S. at 614. But because the ordinance also swept up a substantial amount of protected activity, it was facially unconstitutional. The First Amendment, *Coates* explained, does not permit the government to criminalize "the ex-

ercise of the right of assembly simply because its exercise may be 'annoying' to some people." 402 U.S. at 615. "If this were not the rule," the Court continued, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." *Ibid.* Moreover, "such a prohibition * * * contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas" are "resented by the majority of their fellow citizens." *Id.* at 616.

The same is true here. Even though a subset of the communications encompassed by Section 42.07(a)(7) lack constitutional protection—true threats of violence, blank emails—the statute ranges far beyond that permissible area, criminalizing *any* repeated messages that are designed to annoy, alarm, or embarrass someone else. Under the overbreadth standard, it is hard to see how Section 42.07(a)(7) could be upheld. At a minimum, the Court of Criminal Appeals' erroneous basis for rejecting petitioners' overbreadth challenge demands further review.

5. The government has ample tools to fight online threats consistent with the First Amendment. For one, this Court has long held that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Those categories of speech include, as relevant here, true threats. See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

In addition, the federal criminal code contains a cyberstalking offense that is far more narrowly tailored than Section 42.07(a)(7): It has a narrower intent element, and it requires "a course of conduct" that places the target "in reasonable fear of death or serious bodily injury" to a person or animal or that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress." 18 U.S.C. § 2261A(2); see also 18 U.S.C. § 875(c) (federal threats offense). That more targeted prohibition demonstrates that the government can combat online true threats without penalizing a substantial amount of protected speech.

Section 42.07(a)(7), by contrast, sweeps in a substantial amount of protected speech by criminalizing repeated electronic messages that are merely sent in a manner calculated to annoy, alarm, embarrass, or offend another person. Such a broad ban on online speech facially violates the First Amendment.

II. Laws Like Section 42.07(a)(7) Threaten To Stifle Debate Over Matters Of Public Concern On Social Media And Other Modern Communication Platforms.

For the foregoing reasons, the Court of Criminal Appeals clearly erred in holding that Section 42.07(a)(7) does not implicate the First Amendment at all, and the statute self-evidently sweeps up far more protected speech than non-expressive conduct like blank emails. In addition, for the reasons set forth in the petition for a writ of certiorari, this case implicates a conflict among lower courts that is ripe for this Court's resolution. See Pet. 26–33.

Another consideration supports this Court's review as well. Section 42.07(a)(7) and similar criminal laws threaten to stifle debate and discussion on matters of great public concern. Recent years have seen prosecutors and law-enforcement officers target ordinary citizens who criticize government officials in vitriolic, sarcastic, or offensive terms through social-media posts or other channels of online communication. In seeking to punish citizens for such public criticism, some officials have lost sight of the basic constraints and purposes of the First Amendment in a misguided effort to protect people from the "harm" of upsetting speech—or simply to protect their own reputations. Granting review in this case would give this Court the opportunity to reinforce once more that the First Amendment provides online speech the same broad protection as letters, books, and speeches.

1. This Court has long understood the close connection between the vitality of American democracy and the ability of citizens to verbally attack, annoy, anger, and mock public officials and others when discussing matters of public concern. As this Court explained in *Snyder v. Phelps*, 562 U.S. 443 (2011), the First Amendment "protect[s] even hurtful speech on public issues to ensure that we do not stifle public debate." *Id.* at 461. "[S]peech concerning public affairs," the Court added, "is more than self-expression; it is the essence of self-government." *Id.* at 452 (internal quotation marks omitted). For that reason, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Ibid.* (internal quotation marks omitted).

That view is foundational in this Court's First Amendment jurisprudence. The Court has long recognized that "a function of free speech under our system of government is to invite dispute," and that the First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

For example, in *Edwards v. South Carolina*, 372 U.S. 229 (1963), students protesting segregation on State House grounds were prosecuted for stamping their feet, clapping their hands, and singing patriotic and religious songs in what was described as a "boisterous," "loud," and "flamboyant" manner. *Id.* at 233. This Court overturned the convictions, reasoning that protected speech on matters of public concern "is often provocative and challenging" and may "have profound unsettling effects as it presses for acceptance of an idea." *Id.* at 237 (quoting *Terminello*, 337 U.S. at 4–5).

The Court has reached similar holdings with respect to offensive, disturbing, or enraging expressive activities, including a magazine cartoon depicting a rape, *Papish v. University of Missouri Curators*, 410 U.S. 667 (1973); a profane public protest of the Vietnam War, *Cohen v. California*, 403 U.S. 15 (1971); an intentionally outrageous parody of a public religious figure, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); and protests at the funerals of fallen servicemembers, *Snyder*, *supra*.

Those precedents teach that the government may not, "consonant with the Constitution, * * * shut off

discourse solely to protect others from hearing" offensive speech, *Cohen*, 403 U.S. at 21, because "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinion on matters of public interest and concern." *Hustler Magazine*, 485 U.S. at 50. The freedom to "speak one's mind," this Court has observed, "is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 51. It is for that reason, among others, that the government may not outlaw speech or other First Amendment activity merely because the manner in which ideas are presented may be annoying, alarming, embarrassing, or offensive.

2. In recent times, online communications—whether through email, social-media posts, or other platforms—have become critical to the dissemination of ideas and the advocacy of politically controversial viewpoints. Indeed, they are "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737. An estimated 302 million Americans now use social media.[2] Platforms such as Twitter, Facebook, and TikTok transform a citizen with an Internet connection into "a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 870. Thus, "[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange

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[2] S. Dixon, *United States: number of social network users 2017–2027*, STATISTA (July 27, 2022), retrieved from https://www.statista.com/statistics/278409/number-of-social-network-users-in-the-united-states/.

of views, today the answer is clear": "It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." *Packingham*, 137 S. Ct. at 1735 (internal quotation marks omitted).

It should go without saying that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new medium for communication appears." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952)) (internal quotation marks omitted). Yet despite this Court's unbroken chain of precedents protecting offensive speech, in recent years a disturbing trend has emerged in which government officials have targeted offensive social-media posts for criminal prosecution. Given the central role that electronic communications now play in our democracy, the eagerness of some officials to turn their prosecutorial powers on citizens who air issues of public concern on social media is deeply troubling. A few publicly reported examples of this trend illustrate the vast and expanding scope of the problem:

- Earlier this fall, a Louisiana man posted a joke on Facebook comparing the COVID-19 pandemic to a zombie apocalypse, claiming that the local sheriff's office would soon be shooting "the infected." Police officers entered the man's home with guns drawn, arrested him, and took him to jail, asserting that his

Facebook joke violated a state anti-terrorism law. INSTITUTE FOR JUSTICE, *Waylon Bailey* (Sept. 27, 2022).[3]

➢ In New Hampshire, a police officer arrested a man for posting comments online accusing the local police chief of misconduct, including alleging that the chief had "covered up for [a] dirty cop." Officers filed a criminal complaint against the man for violating New Hampshire's criminal defamation law, though the charges were later dropped. Brian Hauss, *New Hampshire Police Arrested a Man for Being Mean to Them on the Internet*, ACLU.org (Dec. 18, 2018).[4]

➢ In Arkansas, a citizen posted a video to a community Facebook group protesting what he regarded as the improper use of tax dollars. The video showed a police officer's traffic stop with the caption "SMITH LETS A DIRTY DWI DRIVER GO," and an accompanying comment alleged that the officer had attempted to destroy evidence of the stop. In response, the officer obtained a warrant for his arrest under a state statute criminalizing "[h]arassing communications," which led to his prosecution. *Long v. Smith*, No. 2:19-cv-00061-LPR, 2022 WL 906352 (E.D. Ark. Mar. 28, 2022).

➢ In Tennessee, a man was charged with harassment after allegedly creating and sharing a fake image on social media that depicted two men urinating on what was made to look like a former officer's gravesite with a caption reading, "Just showing my

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[3] https://ij.org/client/waylon-bailey/.

[4] https://www.aclu.org/news/free-speech/new-hampshire-police-arrested-man-being-mean-them-internet.

respect to Deputy Daniel Baker from the #dicksonpolicedepartment." Law-enforcement agents visited the gravesite and quickly determined that the photograph was digitally created, but prosecutors pressed charges anyway. Nick Beres, *Charges dismissed in fake grave desecration case; District Attorney could face civil rights lawsuit*, NEWSCHANNEL5 (Feb. 4, 2021).[5]

➢ At the University of Utah, a student football fan was arrested for a post on social media stating, "if we don't win today, I'm detonating the nuclear reactor on campus." Antonio Planas, *University of Utah student arrested in alleged threat to detonate school's nuclear reactor if football team lost, officials say*, NBC News (Sept. 22, 2022).[6] She was then charged with making terroristic threats. Chris Arnold & Melanie Porter, *Engineering student arrested after threatening to 'detonate nuclear reactor' if football team lost*, Fox13 (Sept. 22, 2022).[7]

➢ Anthony Novak created a Facebook page parodying the local police department, prompting officers to arrest him for electronically "disrupting" or "interfering" with police operations. He has now asked this Court to review the Sixth Circuit's decision upholding

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[5] https://www.newschannel5.com/news/charges-dismissed-in-fake-grave-desecration-case-district-attorney-could-face-civil-rights-lawsuit.

[6] https://www.nbcnews.com/news/us-news/university-utah-student-arrested-alleged-threat-detonate-schools-nucle-rcna48993.

[7] https://www.fox13now.com/news/crime/engineering-student-arrested-after-threatening-to-detonate-nuclear-reactor-if-football-team-lost.

the dismissal of his Section 1983 claims. See Petition for a Writ of Certiorari, *Novak v. City of Parma, Ohio*, No. 22-293 (filed Sept. 26, 2022).

These examples are hardly exhaustive. Laws that broadly target electronic communications are too often invoked to punish speech on matters of public concern. And while not all charges lead to convictions, the threat of prosecution alone undermines free discourse in an open society. As this Court has long understood, "even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

Tellingly, a substantial number of criminal defamation convictions have arisen out of statements criticizing politicians or law-enforcement officials. See *Criminal libel as political tactic*, THE NEWS MEDIA AND THE LAW, Spring 2001 issue, at 17.[8] That is no coincidence. Overbroad criminal laws are ripe for discriminatory or arbitrary enforcement. *Coates*, 402 U.S. at 616. And this Court has been understandably skeptical of relying on prosecutorial discretion to keep the government within First Amendment bounds. See *Stevens,* 559 U.S. at 480 ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). That skepticism is especially justified for laws that proscribe speech critical of government officials themselves.

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[8] https://www.rcfp.org/journals/the-news-media-and-the-law-spring-2001/criminal-libel-political-ta/.

3. Particularly given the recent ascendency of social media as one of the most important arenas for public debate, this Court should grant review in this case to reaffirm that Internet-based channels of communication are subject to the same First Amendment standards as traditional forms of communication. Protecting open debate in those fora should "occup[y] the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). This case presents an ideal vehicle for the Court to say as much.

Moreover, the potential impact of the decisions below on Texas, the second most populous State in the Union, alone warrants review. The holding of the Court of Criminal Appeals empowers local police departments and elected prosecutors to target any citizen who sends repeated messages on matters of public concern in a manner that an official finds annoying, alarming, or embarrassing—or to invoke the statute as a pretext to punish the citizen for an illegitimate reason. The mere existence of the decisions below threatens to chill free and open debate online among the state's 30 million citizens. An activist group familiar with those decisions will certainly think twice before, for example, encouraging its Twitter followers to post a critical message in the comments section of a politician's post. And a concerned citizen seeking to influence the curricular choices of the local school board might justifiably fear that sending more than one critical message to board members' official email accounts could lead to her arrest.

The fear that local officials will abuse the power to target First Amendment activity is not theoretical. In Laredo, a freelance journalist (now represented by

amicus curiae FIRE) was arrested under a different section of the Texas Penal Code for merely seeking information from the police. *Villarreal v. City of Laredo, Tex.*, 44 F.4th 363, 367–368, *granting reh'g en banc and vacating*, 52 F.4th 265 (5th Cir. 2022).[9] As Judge Ho of the Fifth Circuit explained in an opinion reversing the dismissal of the journalist's Section 1983 claim, "it should be patently obvious to any reasonable police officer that the conduct alleged in the complaint constitutes a blatant violation of [the journalist's] constitutional rights." *Id.* at 371. Yet officers and prosecutors nevertheless invoked an overbroad criminal prohibition to commit an "obvious violation of the First Amendment." *Id.* at 373.

Like the criminal provision at issue in *Villareal*, Section 42.07(a)(7) gives prosecutors and law-enforcement officers the power to punish millions of people for disfavored speech on matters of public concern, including criticism of their own actions and policies. This Court should accordingly grant the petition and declare Section 42.07(a)(7) facially unconstitutional.

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[9] See Tex. Penal Code § 39.06(c) ("A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public.").

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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