No. 10-17-00047-CR

IN THE TENTH COURT OF APPEALS

WACO, TEXAS

Ex parte Richard Allen Montey Ellis

Appeal from McLennan County

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STATE PROSECUTING ATTORNEY'S
POST-SUBMISSION AMICUS BRIEF

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STATE PROSECUTING ATTORNEY'S
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TO THE HONORABLE TENTH COURT OF APPEALS:

There is a lot of confusion in this area of law. The State Prosecuting Attorney submits her *Amicus* Brief as requested with the hope that it will assist this Court. No fee has been received for this filing.[1]

The threshold point of confusion is the conflation of the overbreadth doctrine with traditional facial review. They are not two sides of the same coin. The second point of confusion is the false choice between categorically unprotected speech and content-based strict scrutiny. Both problems are avoided by eschewing *Ex parte Lo*[2] in favor of the more recent *Ex parte Thompson*.[3] In light of *Thompson*, the statute at issue is content-neutral and satisfies intermediate scrutiny. Finally, it is not overbroad as that term is properly used.

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[1] TEX. R. APP. P. 11(c).

[2] 424 S.W.3d 10 (Tex. Crim. App. 2013).

[3] 442 S.W.3d 325 (Tex. Crim. App. 2014).

ARGUMENT

I. Appellant has improperly framed the issue presented.

"Substantial overbreadth" is not the opposite of "narrowly tailored."

Appellant argues that section 21.16(b) is "facially overbroad."[4] He quotes the Court of Criminal Appeals, which said, "A statute is considered impermissibly overbroad if, in addition to prescribing activities which may constitutionally be forbidden, it sweeps within its coverage speech or conduct which is protected by the First Amendment."[5] He discusses the "sweep" of the statute's coverage and concludes, "the statute's overbreadth is real and substantial, and the statute must fail."[6] In close, he says, "Section 21.16(b) interdicts wide swaths of protected speech[,]" and "is substantially overbroad."[7]

This language directly supports his framing of the argument. "[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment."[8] Because of the heavy cost this imposes, it is generally not applied unless the defendant can show

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4 App. Br. at 3 (point of error 1).

5 App. Br. at 5 (quoting *Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984)).

6 App. Br. at 11.

7 App. Br. at 17-18.

8 *State v. Johnson*, 475 S.W.3d 860, 864-65 (Tex. Crim. App. 2015).

the overbreadth of a statute is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[9] Based on the above statements, this is exactly what appellant set out to prove.

But there is a competing argument recurring throughout his brief that muddles the issue. Appellant also argues that the statute is a presumptively invalid, content-based restriction on speech that the State has the burden of proving satisfies strict scrutiny.[10] While he sometimes makes these arguments under the "overbreadth" rubric, there is also a separate "strict scrutiny" subsection that attacks the State's lack of compelling interest or narrow drafting.[11] The framework under which he wishes to proceed is unclear.

What is clear is that a choice must be made at the outset because they are not the same. Justice Scalia summed it up in plain language:

> It was clear from the petition and from petitioner's other filings in this Court (and in the courts below) that his assertion that the St. Paul ordinance "violates overbreadth . . . principles of the First Amendment," . . . was *not* just a technical "overbreadth" claim -- *i.e.*, a claim that the ordinance violated the rights of too many third parties -- but included the contention that the ordinance was "overbroad" in the sense of restricting more speech than the Constitution permits, even in its application to

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[9] *Id*. at 865 (citation omitted).

[10] *See*, *e.g.*, App. Br. at 4, 6, 8.

[11] App. Br. at 11-14 ("The Statute Fails Strict Scrutiny").

him, because it is content based.[12]

Although the Court of Criminal Appeals similarly conflated doctrines and language in *Ex parte Lo*,[13] it subsequently recognized in *Thompson* that the strict-scrutiny analysis for content-based restrictions is distinct from overbreadth.[14] Later still, it relied on Supreme Court precedent to call the overbreadth doctrine "an exception to a prudential rule of standing" that permits, in the First Amendment context, a defendant to challenge a statute that could be constitutionally applied to him.[15]

Viewed as a whole, appellant most likely uses the word "overbroad" in its lay sense to argue the State has not satisfied strict scrutiny. The SPA will address the appropriate level of scrutiny first and conclude with a true overbreadth analysis, as is necessary with a content-neutral statute that satisfies intermediate scrutiny.

First Amendment analysis is not binary.

The second major problem with appellant's argument is that it presents this Court with a false choice: either find the speech is wholly unprotected by the First Amendment, or apply strict scrutiny. The First Amendment is not all-or-nothing. By

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[12] *R.A.V. v. St. Paul*, 505 U.S. 377, 381 n.3 (1992) (emphasis in original).

[13] For example, the opinion has application headings specifically claiming to apply "the overbreadth doctrine" and declaring the statute "unconstitutionally overbroad," *Ex parte Lo*, 424 S.W.3d at 18, 19, but the stated standard of review and subheadings identify and apply strict scrutiny. *Id*. at 14-16, 20-24.

[14] *Ex parte Thompson*, 442 S.W.3d at 349 (citing the above footnote from *R.A.V.*).

[15] *Johnson*, 475 S.W.3d at 865, 869.

1985, the Supreme Court "ha[d] long recognized that not all speech is of equal First Amendment importance."[16] There are entire categories of speech that, while not wholly unprotected, can be restricted with less-exacting scrutiny. For example, regulation of commercial speech gets intermediate scrutiny because of "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[17] Under intermediate scrutiny, the statute will be upheld if it promotes a substantial (rather than compelling) interest and "the means chosen are not *substantially* broader than necessary to achieve the government's interest."[18] This disparate treatment is not intended to diminish commercial speech as much as it is to elevate the speech at the core of the First Amendment:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[19]

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[16] *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758 (1985).

[17] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

[18] *Ex parte Thompson*, 442 S.W.3d at 345 (citations and internal quotations omitted, emphasis added).

[19] *Ohralik*, 436 U.S. at 456.

In this case, an individual's rights to privacy and reputation justify lesser scrutiny in the abstract.

II. Regulation of non-consensual violations of privacy on matters of private concern deserves intermediate scrutiny, at best.

The Supreme Court has repeatedly shown that the protections of the First Amendment are strongest where public debate is concerned and weakest when private figures are publicly harmed on matters of private concern. This results from both the recognition of the Amendment's central purpose and the individual's right to privacy.

The core of the First Amendment is debate on matters of public concern.

The First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[20] It "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[21] "It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection[,]"[22] and the right to publicly criticize the stewardship

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[20] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[21] *Id*. at 269 (internal quotations and citation omitted).

[22] *Dun & Bradstreet*, 472 U.S. at 758-59 (internal citations omitted). Although "the boundaries of the public concern test are not well defined," the Supreme Court has articulated some guiding principles:

> Speech deals with matters of public concern when it can be fairly considered as

(continued...)

of public officials its "central meaning."[23] As a result, "[p]ublic-issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' has always rested on the highest rung of the hierarchy of First Amendment values."[24]

"[R]estricting speech on purely private matters," as is the case here, "does not implicate the same constitutional concerns as limiting speech on matters of public interest."[25] This is not only because of the subject matter. It is also because the First Amendment includes, "within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[26] "In a democratic society[,] privacy of communication is essential."[27] "[T]he disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself[,]" and fear of disclosure

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[22](...continued)

> relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Snyder v. Phelps, 562 U.S. 443, 453 (2011) (internal citations and quotations omitted).

[23] *Sullivan*, 376 U.S. at 273-75.

[24] *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (internal citation omitted).

[25] *Snyder*, 562 U.S. at 452.

[26] *Bartnicki v. Vopper*, 532 U.S. 514, 533 n.20 (2001) (citations and internal quotations omitted).

[27] *Id*. at 533 (quoting The Challenge of Crime in a Free Society 202 (1967)).

"might well have a chilling effect on private speech."[28] As a result, there is a valid independent justification for prohibiting such disclosures by persons whom, for example, lawfully obtain the contents of an illegally intercepted message, even if that prohibition does not significantly prevent such interceptions from occurring in the first place.[29]

The Supreme Court has balanced these public and private interests differently based on the facts before it. As its defamation and government employment cases illustrate, the rights of the speaker are increasingly diminished the farther the speech is removed from the core of the First Amendment.

Defamation immunity varies with inversely with privacy.

There is no constitutional value in false statements of fact,[30] and the text of the First Amendment does not lend itself to the regulation of suits by private parties.[31] However, "[w]hat a State may not constitutionally bring about by means of a criminal

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[28] *Id*. 532-33.

[29] *Id*. In *Bartnicki*, an illegal recording of a phone conversation about public contract negotiations between a union representative and its president was ultimately provided to and aired by Vopper, a local radio host. *Id*. at 518-19. The operative part of the federal statute at issue is analogous to TEX. PENAL CODE § 16.02(b)(2), which prohibits the intentional disclosure of the contents of an oral communication if the person knows or has reason to know it was obtained in violation of the law.

[30] *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974).

[31] *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 777 (1986).

statute is likewise beyond the reach of its civil law of libel."[32] State laws on defamation can produce a "'chilling' effect [that] would be antithetical to the First Amendment's protection of true speech on matters of public concern[,]"[33] and in some cases "may lead to intolerable self-censorship."[34]

"The need to avoid self-censorship by the news media is, however, not the only societal value at issue."[35] "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."[36] The State's "strong and legitimate interest" in compensating private individuals for injury to their reputation—one "a State should not lightly be required to abandon"—has repeatedly resulted in a compromise of the First Amendment interest in protecting expression.[37] The practical effect is that the freedom of the press explicit in the First Amendment provides less protection as the subject of the statement at issue moves from public to private individual, and from public to private

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[32] *Sullivan*, 376 U.S. at 277.

[33] *Hepps*, 475 U.S. at 777.

[34] *Gertz*, 418 U.S. at 340. *See*, *e.g.*, *Hepps*, 475 U.S. at 777 ("[P]lacement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result[,]" producing a "'chilling' effect [that] would be antithetical to the First Amendment's protection of true speech on matters of public concern.").

[35] *Id*. at 341.

[36] *Id*.

[37] *Dun & Bradstreet*, 472 U.S. at 757.

concern.

For example, a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," *i.e.*, with knowledge that it was false or with reckless disregard of whether it was false or not."[38] When the same speech instead involves a "public figure," *i.e.*, one who is not a public official but who has "thrust" himself into the "vortex" of a public controversy, the media's immunity is slightly reduced.[39] However, private individuals may recover actual damages from a publisher or broadcaster when a matter of public concern is involved without showing actual malice.[40] And when the false and defamatory statements do not involve matters of public concern, the state interest in protecting private individuals adequately supports awards of presumed and punitive damages even absent a showing of actual malice.[41]

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[38] *Sullivan*, 376 U.S. at 279-80. It later applied this rule to public figures and public officials attempting to recover for intentional infliction of emotional distress by publication of a false statement. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

[39] *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967) ("the rigorous federal requirements of *New York Times* [*v. Sullivan*] are not the only appropriate accommodation of the conflicting interests at stake.").

[40] *Gertz*, 418 U.S. at 349. "Actual malice" is required for presumed or punitive damages. *Id*.

[41] *Dun & Bradstreet*, 472 U.S. at 761 (plurality, with Burger, C.J., and White, J., agreeing that it was not a matter of public concern).

In short, 1) "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery[,]"[42] and, 2) "speech on matters of purely private concern is of less First Amendment concern."[43]

"Public concern" also justifies the privilege of government employees to speak against their employers.

Although the roles are somewhat reversed in this area, the Supreme Court's treatment of public employment cases also shows the premium the First Amendment places on matters of public concern.

A person does not forfeit his right to speak by virtue of public employment. In some ways, it is the opposite; "[p]ublic employees are 'the members of a community most likely to have informed and definite opinions' about a wide range of matters related, directly or indirectly, to their employment."[44] As such, "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[45]

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[42] *Gertz*, 418 U.S. at 345. A commissioned article in the monthly publication for the John Birch Society falsely claimed that Gertz, an attorney representing the family of the victim of police misconduct, was a "Leninist" and connected to a movement to violently overthrow our government by undermining local police. *Id*. at 325-26.

[43] *Dun & Bradstreet*, 472 U.S. at 759.

[44] *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

[45] *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004).

Be that as it may, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[46] "The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."[47] The "public concern" test was developed to protect these "substantial government interests."[48]

When a public employee speaks or petitions as an employee on a matter of purely private concern, or his speech cannot be fairly considered as relating to a public concern, the employee's First Amendment interest must give way.[49] However, "Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged."[50] Nor does speaking on a matter of public concern trigger some form of scrutiny analysis that places a burden on the government to "clearly demonstrate" the speech "substantially interfered" with

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[46] *Pickering*, 391 U.S. at 568.

[47] *Guarnieri*, 564 U.S. at 392-93.

[48] *Id*. at 393.

[49] *Id*. at 398; *Connick v. Myers*, 461 U.S. 138, 146 (1983).

[50] *Guarnieri*, 564 U.S. at 386.

official responsibilities.[51] Instead, it is the courts' responsibility to balance "the employee's First Amendment interest . . . against the countervailing interest of the government in the effective and efficient management of its internal affairs."[52]

Again, this framework is not dependent on the idea that speech on private matters "falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish" without running afoul of the Constitution.[53] Instead, it "is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office."[54]

Creating a new category, even if permissible, is unnecessary.

In light of the preceding, it would be tempting to create a new category of speech exempt from the protections of the First Amendment, or to apply a balancing test rather than a formal "scrutiny" review of some sort. But the Supreme Court has cautioned against both. After conceding the possibility of "some categories of speech that have been historically unprotected, but have not yet been specifically identified

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[51] *Connick*, 461 U.S. at 150.

[52] *Guarnieri*, 564 U.S. at 398.

[53] *Connick*, 461 U.S. at 147.

[54] *Id*. at 154.

or discussed as such in our case law[,]" it called the idea that such categories could be recognized through a "highly manipulable balancing test" both "startling and dangerous."[55] It took some responsibility for this view's appeal, acknowledging that it has often described the recognized unprotected categories of speech in terms of the competing interests served by their prohibition.[56] In the end, it disavowed it.[57]

While finding a long-hidden exemption from First Amendment protection for invasions of privacy would be no more an act of judicial wizardry than finding the right to privacy in the first place, it is not necessary. The Supreme Court has made it clear that speech that invades the privacy and harms the reputation of private individuals on matters of private concern is simply less deserving of protection than political speech. A standard of review that is slightly less strict would reflect this judgment. Intermediate scrutiny is justified.

III. Alternatively, the statute satisfies the "secondary effects" as per *Thompson*.

Although intermediate scrutiny is justified in the abstract based on the nature of the speech and private interests at issue, the simplest solution is often the best one. *Thompson* discussed an application of intermediate scrutiny that was not based on the type of speech regulated:

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[55] *United States v. Stevens*, 559 U.S. 460, 470, 472 (2010).

[56] *Id*. at 470.

[57] *Id*. at 471.

> In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content. These situations involve government regulations aimed at the "secondary effects" of expressive activity. In this type of situation, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The government regulation at issue need only be justified without reference to the content of the regulated speech.[58]

Unfortunately, this language can lead to the misapplication of language found elsewhere in *Thompson*, *i.e.*, "If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content-based."[59]

The secondary effects framework assumes consideration of the content of the speech. If one did not determine what the speaker said, the statute's applicability could never be determined. *Thompson* cited *Renton v. Playtime Theatres*, the case that gave us the "secondary effects" test, as an example. In *Renton*, the Supreme Court upheld a zoning ordinance that prohibited adult motion picture theaters within 1,000 feet of certain buildings despite the city having to consider on a case-by-case basis what movies were shown at a given theater to decide if the speaker violated the ordinance.[60] Whether analyzed as a form of time, place, and manner regulation, or as

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[58] *Ex parte Thompson*, 442 S.W.3d at 345-46 (citations omitted).

[59] *Id*. at 345.

[60] 475 U.S. 41, 47-48 (1986).

a not-quite-content-based ordinance focused on secondary effects,[61] looking at the content of the speech, on its own, is not enough to require strict scrutiny.[62]

Thompson set the standard.

However, there are numerous ways in which the Legislature can go wrong attempting to address secondary effects. In *Thompson*, the Court of Criminal Appeals conducted a thorough analysis of the improper photography statute in effect at the time to determine whether it was content neutral and thus subject to intermediate scrutiny. That statute's failures show why the statute in this case is content neutral.

At the time, TEX. PENAL CODE § 21.15 read, in part,

> A person commits an offense if the person:
>
> (1) photographs or by videotape or other electronic means records . . . a visual image of another at a location that is not a bathroom or private dressing room:
>
> (A) without the other person's consent; and
>
> (B) with intent to arouse or gratify the sexual desire of any person.

The Court recognized two content-neutral elements potentially raised by the statute. The first was consent, or lack thereof:

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[61] *Id*. at 46-47.

[62] *See also Trans Union Corp. v. FTC*, 267 F.3d 1138, 1140-41 (D.C. Cir. 2001) (rejecting the argument that a regulation focusing on specific commercial speech requires strict scrutiny, finding it "sufficient to note that given the Supreme Court's commercial speech doctrine, which creates a category of speech defined by content but afforded only qualified protection, the fact that a restriction is content-based cannot alone trigger strict scrutiny.").

> "Consent" as a legal concept is meaningful only with respect to people. Landscapes and buildings cannot consent or withhold consent, and, legally, animals cannot do so either. Only people can consent, and even when a particular person cannot consent, because of an actual or legal lack of capacity, someone else generally has the right or duty to consent on his behalf. So, the improper-photography statute discriminates on the basis of the non-consensual nature of the defendant's activity, and that basis, *by itself*, is a content-neutral distinction.[63]

A statute that penalized all non-consensual acts of visual recording would be content neutral but it would be "doubtful that such a broad prohibition would satisfy intermediate scrutiny."[64] Some narrowing would be required. Unfortunately, the only subset of non-consensual recording the State chose to penalize was "that which [wa]s done with the intent to arouse or gratify sexual desire."[65] "By discriminating on the basis of the sexual thought that underlies the creation of photographs or visual recordings, the statute discriminates on the basis of content."[66]

The Court also rejected the argument that the improper photography statute was aimed at "secondary effects." As written, "It is the sexual content of the expression, not any secondary effect of taking photographs or making visual recordings, that the

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[63] *Ex parte Thompson*, 442 S.W.3d at 346-47 (emphasis in original).

[64] *Id*. at 347 (citing cases prohibiting the foreclosure of an entire medium of expression).

[65] *Id*.

[66] *Id*.

statute seeks to prevent."[67] Although it recognized that "[p]rivacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner[,]" it denied that the statute truly served that interest; it applied to literally any non-consensual photography or visual recording, but it did so based on the "requisite sexual intent" and "contain[ed] no language addressing privacy concerns."[68] "[T]he only sense in which the statute *necessarily* protects privacy is by protecting an individual from being the subject of someone else's sexual desires."[69]

The Legislature was paying attention.

The statute at issue in this case appears specifically designed to pass every test the improper photography statute failed. Under section 21.16(b), a person commits an offense if:

> (1) without the effective consent of the depicted person, the person intentionally discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct;
>
> (2) the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private;

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[67] *Id*. at 348.

[68] *Id*.

[69] *Id*. (emphasis in original).

> (3) the disclosure of the visual material causes harm to the depicted person; and
>
> (4) the disclosure of the visual material reveals the identity of the depicted person in any manner, including through:
>
> > (A) any accompanying or subsequent information or material related to the visual material; or
> >
> > (B) information or material provided by a third party in response to the disclosure of the visual material.[70]

Subsection (b)(1) explicitly requires that the disclosure be without the depicted person's consent. This is the content-neutral element identified in *Thompson*. Unlike *Thompson*, it is not tainted by the requirement of a specific point of view or sexual intent; the only mental state is that attached to the act of disclosure itself.

The statute also explicitly protects the privacy of the depicted person, the compelling interest that was only implicitly and incidentally served by the statute in *Thompson*. The requirement of harm and the revelation of the depicted person's identity give substance to the State's interests and narrow the statute's application without reference to the speaker's thoughts, message, or desires. The statute thus effectively serves two content-neutral purposes without any of the drawbacks described by the Court of Criminal Appeals. Given how unusually the statute is worded, it is difficult to conclude it was intended to do anything else.

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[70] TEX. PENAL CODE § 21.16(b).

Can it be wrong to punish less speech?

The only impediment to the applicability of intermediate scrutiny is the narrowing approach taken by the Legislature. Again, the Legislature appears to have learned from case law by limiting the reach of a content-neutral statute using only the basis that makes it content-neutral in the first place.

If a State can prohibit a certain type of speech, it should be able to limit only some of it as long as it does not discriminate based on viewpoint or message. This reasoning parallels that in *R.A.V.*, in which the Supreme Court addressed discrimination within an exempt class of speech:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[71]

It gave numerous examples of how an otherwise valid statute could be tainted by interjecting a content- or viewpoint-based restriction. For example, government may prohibit only that obscenity which is "the most patently offensive *in its prurience* -- *i. e.*, that which involves the most lascivious displays of sexual activity," but it may

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[71] *R.A.V.*, 505 U.S. at 388.

not prohibit only that obscenity which includes offensive political messages.[72] And it may criminalize only those threats of violence that are directed against the President, but it may not criminalize only those threats against the President that mention his policy on aid to inner cities.[73] In both cases, a prohibition on speech that otherwise fell without the First Amendment would be invalid because of a content-based focus.

The Supreme Court went further with this argument, making it applicable to speech that falls within the First Amendment, if to a lesser degree, like commercial speech.[74] Thus, government may regulate price advertising in one industry but not in others because the perceived risk of fraud is greater there, but it may not prohibit only that commercial advertising that depicts men in a demeaning fashion.[75] There is no reason why this rationale should not apply to other regulations of speech that are subject to intermediate scrutiny, such as content-neutral regulations with the secondary effect of impacting pure speech. As such, the State should be able to narrow the scope of a statute's application on the same content-neutral basis that justified the statute in the first place.

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[72] *Id*. (emphasis in original).

[73] *Id*.

[74] *Id*. at 388-89.

[75] *Id*.

If the State has any substantial or compelling interest in preventing the harm that results from non-consensual disclosures of private matters without regard to the actor's message or thoughts, it must be able to focus that interest on the violations it deems most harmful. The alternative would effectively prevent the State from protecting any such victim. On one hand, as the Court of Criminal Appeals intimated in *Thompson*, a statute prohibiting all non-consensual disclosures would be entitled to intermediate scrutiny but be so broad as to fail it.[76] On the other hand, narrowing its coverage to the worst offenses would make it content-based. If that is the case, the test set out in *Thompson* to qualify for intermediate scrutiny is pointless and the promise of protection for victims is illusory.

What would cost the State its content-neutrality in this case would be to repeat the mistake made in *Thompson* by prohibiting only the non-consensual invasions of privacy done with the intent to arouse or gratify the sexual desire of the actor (or others), or with some other "purpose or culpable mental state" the Supreme Court has held to render a statute content based.[77] But the Legislature avoided any mental state or purpose unrelated to the act of disclosure. It instead chose from the universe of non-consensual privacy violations those it deemed the most heinous. Choosing to

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[76] *Ex parte Thompson*, 442 S.W.3d at 346-47.

[77] *Id*. at 347.

limit the reach of a content-neutral statute using only the basis that makes it content-neutral cannot invalidate it.

IV. The statute satisfies intermediate scrutiny.

Under intermediate scrutiny, the statute will be upheld if it promotes a substantial (rather than compelling) interest and "the means chosen are not *substantially* broader than necessary to achieve the government's interest."[78] As shown above, the State's interest in protecting the individual from non-consensual invasions of privacy is compelling, not just substantial.[79] And the means selected to protect that interest are not substantially broader than necessary. In fact, they are the least restrictive means available.

Subsection (b) covers only what is justified by the compelling interest it serves:

- It applies only to intentional disclosure; no amount of knowledge of likely disclosure or carelessness will suffice. A speaker need not fear that accidental disclosure will result in criminal sanctions.

- It requires lack of consent and that the visual material was obtained or created under circumstances evincing a reasonable expectation of privacy. The speaker is thus put on actual and constructive notice that intentional disclosure

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[78] *Id*. at 345 (citations and internal quotations omitted, emphasis added).

[79] *Id*. at 348 ("Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner."). Appellant says, "The State has no compelling interest in forbidding constitutionally protected speech, no matter how offensive the speech." App. Br. at 12. But the entire "strict scrutiny" body of law is premised on the existence of a compelling interest that justifies forbidding constitutionally protected speech. *Thompson*, 442 S.W.3d at 344 ("Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest.").

is forbidden.

- It requires harm, presumably due to the identity of the depicted person being revealed directly or as a result of its disclosure. The speaker could intentionally disclose visual material otherwise prohibited by the statute if the depicted person is not identified or identifiable.

By including all of these requirements, the Legislature has ensured that it restricts the speaker only to the extent the compelling interest is served. For the same reasons, if the statute is content-based it satisfies strict scrutiny as well.[80]

V. Any protected speech incidentally prohibited is unsubstantial in relation to the statute's plainly legitimate sweep.

A statute that is constitutional under a normal facial analysis might still be unconstitutionally overbroad. This statute is not.

Appellant's overbreadth analysis is wrong because he starts from the conclusion that "virtually everything forbidden by section 21.16(b) is protected by the First Amendment"[81]: "The illegitimate sweep of section 21.16(b) is the rule, rather than the exception[; u]nless the images or recordings forbidden by the statute happen to be child pornography or obscenity, they are protected."[82] If appellant were right about the facial invalidity of the statute, an overbreadth analysis would be

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[80] *Ex parte Thompson*, 442 S.W.3d at 344 (statute will be upheld under strict scrutiny if it uses the least restrictive means of achieving the government's compelling interest).

[81] App. Br. at 10.

[82] App. Br. at 11.

unnecessary. It is only when a statute is not facially unconstitutional—usually because it could lawfully prohibit the defendant's actions—that overbreadth comes into play.[83] And it is at this point that the defendant would have the burden of proving a realistic probability that a substantial amount of protected speech is prohibited in relation to the statute's plainly legitimate sweep.[84] Appellant's reflexive reliance on strict scrutiny analysis, combined with the argument that the State has the burden on all constitutional challenges when the statute is content-based, explains how he got the analysis backwards.

The legitimate sweep of the statute is plain and broad, and the realistic probability that it chills third parties from speaking is virtually non-existent. Appellant concedes that it covers obscenity and child pornography, but the bulk of cases probably do not fall within those areas. Instead, most visual material would be well within the realm of lawful pornography but for the fact that it was not intended or approved for disclosure by the person depicted. The requirements of consent and "visual material," as that term is defined, removes from consideration all of the other types of communication and media swept up by the statute in *Ex parte Lo*.[85] And the

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[83] *Johnson*, 475 S.W.3d at 865.

[84] *Ex parte Thompson*, 442 S.W.3d at 349-50.

[85] 424 S.W.3d at 20:
The only material that this subsection covers that is not already covered by another
(continued...)

consent requirement ensures that no "legitimate" pornographers are chilled. Any other hypotheticals involving injured third parties are more fanciful. Pictures of little children taken at bath time by their parents and posted on Facebook, for example, could scarcely cause harm to the depicted person and, regardless, would be disclosed by someone with the ability to consent on the child's behalf.[86] This is not a promise of non-enforcement[87]—this is the plain language of the statute.

Again, there would be no need for an overbreadth analysis if the statute did not already satisfy either intermediate or strict scrutiny. The conduct it was intended to deter or punish is legitimate by necessity, and broad in reality. Appellant has failed

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[85](...continued)
penal statute is otherwise constitutionally protected speech. "Sexual expression which is indecent but not obscene is protected by the First Amendment." Subsection (b) covers a whole cornucopia of "titillating talk" or "dirty talk." But it also includes sexually explicit literature such as "Lolita," "50 Shades of Grey," "Lady Chatterly's Lover," and Shakespeare's "Troilus and Cressida." It includes sexually explicit television shows, movies, and performances such as "The Tudors," "Rome," "Eyes Wide Shut," "Basic Instinct," Janet Jackson's "Wardrobe Malfunction" during the 2004 Super Bowl, and Miley Cyrus's "twerking" during the 2013 MTV Video Music Awards. It includes sexually explicit art such as "The Rape of the Sabine Women," "Venus De Milo," "the Naked Maja," or Japanese Shunga. Communications and materials that, in some manner, "relate to" sexual conduct comprise much of the art, literature, and entertainment of the world from the time of the Greek myths extolling Zeus's sexual prowess, through the ribald plays of the Renaissance, to today's Hollywood movies and cable TV shows.

[86] *Ex parte Thompson*, 442 S.W.3d at 346 ("even when a particular person cannot consent, because of an actual or legal lack of capacity, someone else generally has the right or duty to consent on his behalf.").

[87] *Johnson*, 475 S.W.3d at 879-80 (raising and rejecting the argument that police and prosecutors will notice the glaring unconstitutionality of a statute and decline to apply it, thereby reducing any real chilling effect).

to show a realistic probability that a substantial amount of protected speech not the focus of this statute has been swept up in it, thereby chilling innocent speakers.

VI. Conclusion

The Legislature drafted section 21.16(b) to prevent the harm that comes from privacy violations of the most intimate kind. The speech that is incidentally restricted deserves reduced First Amendment protection. Intermediate scrutiny is appropriate, and the statute satisfies it. Because appellant cannot show this facially valid statute is overbroad, it should be upheld as constitutional.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that this Court find section 21.16(b), the "Revenge Porn" statute, constitutional.

Respectfully submitted,

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The undersigned hereby certifies that on this 29th day of December, 2017, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

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