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No._____

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

**Ex parte Jordan Bartlett Jones, Appellant**

Appeal from Smith County

* * * * *

# STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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## NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Jordan Jones.

*The cases were tried before the Honorable Randall Lee Rogers, County Court at Law No. 2, Smith County, Texas.

*Counsel for Appellant at trial and on appeal was Mark W. Bennett, Bennett & Bennett, 917 Franklin Street, Fourth Floor, Houston, Texas 77002, and Mishae M. Boren, 216 W. Erwin St. Suite 300, Tyler, Texas 75702.

*Counsel for the State at trial were Kevin Hayes and Madeline Porter, Smith County Assistant District Attorneys, Smith County Courthouse, 100 North Broadway, Tyler, Texas 75702.

*Counsel for the State in the court of appeals was Michael J. West, Smith County Assistant District Attorney, 4th Floor, Courthouse, 100 North Broadway, Tyler, Texas 75702, and John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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No._____

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EX PARTE JORDAN BARTLETT JONES, Appellant

* * * * *

**STATE'S PETITION FOR DISCRETIONARY REVIEW**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This Court is once again called upon to determine whether a statute violates the First Amendment. The "revenge porn" statute was created to protect an interest that this Court has deemed "compelling." It was drafted to avoid the problems this Court has identified in prior statutes deemed unconstitutional. By doing so, it deserves intermediate scrutiny but satisfies strict scrutiny. For the same reasons, it is not overbroad.

## STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument. As with most First Amendment facial challenges, there are any number of factual scenarios that could affect the Court's analysis. The litigants cannot think of all of them. They should have the opportunity to respond to whatever aspects of this case most interest the Court.

## STATEMENT OF THE CASE

Appellant was charged with one violation of section 21.16(b) of the Texas Penal Code. The trial court denied his pretrial application for writ of habeas corpus, which alleged a violation of the First Amendment. The court of appeals reversed. It held that the statute is content-based, subject to strict scrutiny, and both fails strict scrutiny and is overbroad.

## STATEMENT OF PROCEDURAL HISTORY

The court of appeals first reversed in a published opinion on April 14, 2018.[1] The State filed a motion for rehearing. It was overruled on May 16, 2018, but the court of appeals withdrew its previous opinion and issued a new published opinion.[2] The State's petition is due on or before June 15, 2018.

## GROUNDS FOR REVIEW

1. **Is TEX. PENAL CODE § 21.16(b) a content-based restriction on speech that is subject to strict scrutiny?**

2. **May a court of appeals find a statute unconstitutional based on a manner and means that was not charged?**

3. **Is TEX. PENAL CODE § 21.16(b) facially constitutional?**

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[1] *Ex parte Jones*, No. 12-17-00346-CR (opinion of April 14, 2018, withdrawn).

[2] *Ex parte Jones*, __ S.W.3d __, No. 12-17-00346-CR (Tex. App.–Tyler 2018).

## ARGUMENT AND AUTHORITIES

Section 21.16 is entitled "unlawful disclosure or promotion of intimate visual material." Subsection (b) says, in full:

> (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;
> >
> > (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.

As limited by the charging instrument, appellant was charged with disclosing visual material he obtained and revealing the identity of the depicted person through accompanying or subsequent information he provided.[3]

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[3] The Information is appended. Sensitive data has been redacted.

## I. Consideration of the content of speech does not mandate strict scrutiny.

In two sentences, the court of appeals held that section 21.16(b) is a content-based restriction on speech because it "penalizes only a subset of disclosed images."[4] This Court has summarized the test in one sentence: "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."[5] And both courts hold that a content-based restriction requires strict scrutiny.[6] But this formulation is overly simplistic, as shown generally by considering the purpose of the First Amendment and specifically by exceptions like the secondary-effects doctrine.

*Revenge porn does not deserve the highest First Amendment protection.*

"[N]ot all speech is of equal First Amendment importance."[7] "It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection[,]"[8] and the right to publicly criticize the stewardship of public officials that is its "central meaning."[9] "[R]estricting speech on purely private matters does

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[4] Slip op. at 5.

[5] *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014) (quoting *Ex parte Lo*, 424 S.W.3d 10, 15 n.12 (Tex. Crim. App. 2013) (orig. op.)).

[6] Slip op. at 5; *Ex parte Thompson*, 442 S.W.3d at 344.

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

[8] *Id*. at 758-59 (internal citations omitted).

[9] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273-75 (1964).

not implicate the same constitutional concerns as limiting speech on matters of public interest."[10]

The Supreme Court has applied this reasoning to various areas of law touching the First Amendment. For example, the press enjoys less protection from defamation suits as the subject of the statement at issue moves from public to private individual, and from public to private concern.[11] And review of adverse employment actions based on the speech of government employees "is grounded" in part, in the "longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern[.]"[12] This Court has agreed with this premise: "Government has greater leeway to regulate when a nonpublic forum is involved or when serious privacy interests are implicated."[13]

This reasoning should be applied in this case. Section 21.16(b) is plainly directed at prohibiting the non-consensual disclosure of visual material in which society recognizes a reasonable expectation of privacy. Barring corner cases that can

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[10] *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

[11] *Compare Sullivan*, 376 U.S. at 279-80 (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"), *with Dun & Bradstreet*, 472 U.S. at 761 (plurality) (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).

[12] *Connick v. Myers*, 461 U.S. 138, 147 (1983).

[13] *Ex parte Thompson*, 442 S.W.3d at 343.

be dealt with on an as-applied basis, there is no First Amendment interest in private sexual visual material that demands review under the highest level of scrutiny.

*Consideration of content is not the end-all*.

Nor does the statute's consideration of content necessitate strict scrutiny. The Supreme Court recently offered a thorough analysis of what it means to be "content based" that shows reference to content is not enough. In *Reed v. Town of Gilbert*, it characterized "content-based laws" as "those that target speech based on its *communicative* content."[14] This focus appears repeatedly in *Reed*.[15] Review of all the opinions in *Reed* shows agreement that the shorthand definition of "content based" is short on substance.

Six justices would tie the application of strict scrutiny to "core" speech. Justice Alito, speaking for three of the *Reed* majority's six Justices, supported strict scrutiny for content-based laws because "[l]imiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo[; s]uch regulations may

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[14] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (emphasis added).

[15] *Id*. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."), *id*. ("This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."), *id*. ("[D]istinctions drawn based on the message a speaker conveys . . . are subject to strict scrutiny."), *id*. at 2231 ("A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea."). *But see id.* at 2227 ("[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys . . . must also satisfy strict scrutiny.") (bracketed material in original) (internal quotations and citations omitted).

interfere with democratic self-government and the search for truth."[16] Justice Kagan, speaking for another three Justices, said the First Amendment keeps "the marketplace of ideas . . . free and open" by preventing "an attempt to give one side of a debatable public question an advantage in expressing its views to the people."[17] Although she accepted that "the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm," she argued that the Court could "administer [its] content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[18]

Moreover, both Justices Breyer and Kagan pointed out the many circumstances under which the content of speech must be examined "but where a strong presumption against constitutionality [justifying strict scrutiny] has no place."[19] One of them is the secondary-effects doctrine applied in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[20]

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[16] *Id*. at 2233 (Alito, J., concurring).

[17] *Id*. at 2237-38 (Kagan, J., concurring) (citations and quotations omitted).

[18] *Id*. at 2238 (Kagan, J., concurring).

[19] *Id.* at 2235 (Breyer, J., concurring) (discussing various regulations, commercial speech, and "government speech"); *id*. at 2238 (Kagan, J., concurring) (citing cases in which the Supreme Court declined to apply strict scrutiny to facially content-based laws). They expressed a similar view in *United States v. Alvarez*. 567 U.S. 709, 731 (2012) (Breyer, J., concurring) ("Regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near-automatic approval (as is implicit in 'rational basis' review).").

[20] *Reed*, 135 S. Ct. at 2238 (Kagan, J., concurring) (citing *Renton*).

In *Renton*, the Supreme Court upheld a zoning ordinance that prohibited adult movie theaters within 1,000 feet of certain buildings despite the city having to consider on a case-by-case basis what movies were shown to decide if the speaker violated the ordinance.[21] The Supreme Court upheld the statute because it was "by its terms" designed to prevent crime, protect the city's retail trade, maintain property values, and generally preserve quality of life, "not to suppress the expression of unpopular views."[22] Whether analyzed as a form of time, place, and manner regulation, or as a not-quite-content-based ordinance focused on secondary effects,[23] looking at the content of the speech was not enough to require strict scrutiny.

Thus the threshold question that should be asked when determining if a statute's consideration of content requires strict scrutiny is the very question posed by the secondary-effects doctrine: Does the statute at issue 1) restrict communication of a message or idea for its own sake, or 2) prevent a harm that is collateral to the speech but requires, out of necessity, some reference to the speech incidentally prohibited?

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[21] 475 U.S. at 47-48.

[22] *Id*. at 48.

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

*Section 21.16(b) deserves no more than intermediate scrutiny.*

Revenge porn serves no core First Amendment purpose. There are no "debatable public questions" or any "search for truth" implicated by such images, and their prohibition does not threaten "democratic self-government." In short, nothing covered by the statute deserves the protection of strict scrutiny. Limiting the statute's scope to privacy violations of the most intimate kind does not change that.[24]

Intermediate scrutiny is also appropriate because the statute satisfies the secondary-effects framework suggested by this Court in *Thompson*. In *Thompson*, this Court 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. It recognized two content-neutral elements potentially raised by the statute: consent (or lack thereof)[25] and the secondary effect of certain privacy violations.[26] But there was a problem: the statute's applicability was narrowed based on the "requisite sexual intent" of the actor, and it "contain[ed] no language addressing privacy concerns."[27] "[T]he only sense in which the statute *necessarily*

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[24] *See R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (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 not prohibit only that obscenity which includes offensive political messages) (emphasis in original).

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

[26] *Id*. at 348.

[27] *Id*.

protect[ed] privacy [wa]s by protecting an individual from being the subject of someone else's sexual desires."[28] It created, in essence, a thought crime.

Section 21.16(b) appears specifically designed to pass every test the improper photography statute failed. It explicitly requires that the disclosure be without the depicted person's consent. It also explicitly protects the privacy of the depicted person. And 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, intended message, or desires—the only mental state is that attached to the act of disclosure itself.

The court of appeals's decision to apply strict scrutiny should be reviewed.

## II. Review should be limited to the offense charged.

The court of appeals focused on subsection (b)(2). In its second opinion, it agreed that subsection (b)(2), when "[b]roken down into its elements," reads:

> The visual material
>
> (a) was
> (i) obtained by the person
> or
> (ii) created
>
> (b) under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.[29]

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

[29] Slip op. at 7 n.7 (emphasis omitted).

It found this disjunctive structure—obtained by the person *or* created—"problematic" because it could lead to the conviction of someone with no knowledge of the circumstances surrounding the material's creation or the depicted person's privacy expectation arising thereunder.[30] The court acknowledged that a party who was made aware of the privacy expectation at the time he obtained the material could be lawfully charged.[31] It thus appears the court was concerned that the State could charge someone who was not involved with the creation of the visual material using the "created" (but not "obtained") manner and means of subsection (b)(2).[32]

Whether the statute's failure to explicitly require that the person charged had either obtained or created the material presents a constitutional problem is an interesting hypothetical question, but it is just that. In this case, the State alleged only that the visual material was obtained by appellant.[33] Despite this being a facial challenge, review should have been confined to the offense alleged.

This Court has long held that "it is incumbent upon an accused to show that he was convicted or charged under that portion of the statute the constitutionality of

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[30] Slip op. at 8-9.

[31] Slip op. at 8, 8 n.10.

[32] The court emphasized in another footnote that "obtained" "is modified by the adverbial prepositional phrase 'by the person'" but "created" is not. Slip op. at 8 n.11. "As a result, the statute can apply under circumstances where a person uninvolved in the creation of the offending visual material obtains that visual material without knowledge of the circumstances surrounding its creation, under which the depicted person's privacy expectation arose." Slip op. at 8 n.11.

[33] *See* Information (appended).

which he questions."[34] Although this Court has not said it expressly in recent cases, it has largely confined itself to reviewing the constitutionality of offenses that have actually been charged.[35] This comports with the basic concept of ripeness, which is part of justiciability.[36] The court of appeals ignored this rule by striking a statute on the basis of a potential charging decision that was not made.

The court of appeals's decision, in essence a declaratory judgment, should be reviewed.

## III. The statute is constitutional by any measure.

Because the court of appeals did not pass on the constitutionality of the offense actually charged, there is no ultimate "decision" to be reviewed. But the standard of review was decided by the court, and the constitutionality of the offense at issue is easily decided once the proper standard of review is identified. This Court's policy against reviewing undecided issues has proven flexible enough to do so here.

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[34] *Ex parte Usener*, 391 S.W.2d 735, 736 (Tex. Crim. App. 1965).

[35] *See Ex parte Perry*, 483 S.W.3d 884, 904 (Tex. Crim. App. 2016) (confining overbreadth review to the definition of "coercion" alleged in the indictment); *Ex parte Thompson*, 442 S.W.3d at 330, 351 (finding prior version of TEX. PENAL CODE § 21.15 unconstitutional "to the extent it proscribes the taking of photographs and the recording of visual images" as charged in the indictment; the same subsection also proscribed the broadcast or transmission of such). *But see Ex parte Lo*, 424 S.W.3d at 13 n.1, 27 (finding prior version of TEX. PENAL CODE § 33.021(b) unconstitutional even though defendant was charged under § 33.021(b)(1) but not (b)(2)).

[36] *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations omitted); *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 504-05 (Tex. Crim. App. 2011) (rejecting the fitness for pretrial determination of the adequacy of a mitigation case that could be presented upon future conviction).

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."[37] As this Court said in *Thompson*, the State's interest in protecting the individual from non-consensual invasions of privacy is compelling, not just substantial.[38] And the means selected to protect that interest are not substantially broader than necessary. In fact, they are the least restrictive means available.

The statute applies only to intentional disclosure; no amount of carelessness or even knowledge of likely disclosure will suffice. The "under circumstances" clause ensures that intentional disclosure is forbidden only when a reasonable expectation of privacy is apparent to the actor. And the statute requires harm that is presumably related to the revelation of the depicted person's identity; the actor 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 restricted the speaker only to the extent the compelling interests are served.[39]

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

[38] *Id*. at 348 ("Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner.").

[39] For the same reasons, the statute also satisfies strict scrutiny.

Furthermore, appellant has not shown a realistic probability that a substantial amount of protected speech is prohibited in relation to the statute's plainly legitimate sweep.[40] The legitimate sweep of the statute is plain and broad, yet the requirements of consent and violation of privacy remove from consideration "legitimate" pornography and all of the other types of communication and media swept up by the statute in *Ex parte Lo*.[41] The number of potential violations that implicate a matter of public concern is so insignificant in comparison as to warrant as-applied challenges if they occur.

## IV. Conclusion

There are at least three other cases on this statute pending in the courts of appeals.[42] Not only may those courts choose to see what happens in this case, there are offices around the state that are reluctant to move forward with prosecutions knowing how many statutes are struck down for violation of the First Amendment. Given the significance of the offense, this Court should not wait for a critical mass of opinions to decide the proper standard of review and the constitutionality of the statute as charged.

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[40] *Id*. at 349-50.

[41] 424 S.W.3d at 20.

[42] *Ex parte Lopez*, No. 09-17-00393-CR (submitted 3/14/18); *Ex parte Mora*, No. 01-17-00661-CR (submitted 2/13/18); *Ex parte Ellis*, No. 10-17-00047-CR (submitted 11/8/17).

## PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review and reverse the judgment of the court of appeals.

Respectfully submitted,

/s/ John R. Messinger
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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool the applicable portion of this document contains 4,116 words.

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

## CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of June, 2018, the State's Petition for Discretionary Review was served electronically on the parties below:

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/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney

# APPENDIX

Exhibit A

INFORMATION

THE STATE OF TEXAS

VS.

JORDAN JONES

2 81417 17

IN THE COUNTY COURT

AT LAW

SMITH COUNTY, TEXAS

**IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS**

I, KEVIN HAYES, Assistant Criminal District Attorney of Smith County, State of Texas here in the County Court at Law of said County present that heretofore, to-wit, on or about the 5th day of February, 2017 and anterior to the filing of this information, in the County of Smith and the State of Texas, one JORDAN JONES did, then and there intentionally or knowingly without the effective consent of ASHLEY BOYKIN, hereafter styled the complainant, intentionally disclose visual material, namely, photograph, depicting the complainant with her naked genitals exposed, and the visual material was obtained by the defendant under circumstances in which the complainant had a reasonable expectation of privacy that the visual material would remain private, and the disclosure of the visual material caused harm to the complainant, namely, embarrassment, and the disclosure of the visual material revealed the identity of the complainant, through accompanying or subsequent information provided by defendant;

And it is further presented that, prior to the commission of the charged offense, on the 5th day of May, 2011, in cause number CR-67833, in the County Court at Law of Wise County, Texas, the defendant was convicted of the offense of Driving While Intoxicated 2nd, a Class A misdemeanor;

against the peace and dignity of the State.

Assistant Criminal District
Attorney of Smith County, Texas

CHARGE: PUBLISH/THREAT TO PUBLISH INTIMATE VISUAL MATR
DATE OF BIRTH: [redacted]
RACE: White Male
ADDRESS: [redacted]
AGENCY:

# NO. 12-17-00346-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

| | | |
|---|---|---|
| | § | *APPEAL FROM THE* |
| ***EX PARTE:*** | § | *COUNTY COURT AT LAW NO. 2* |
| ***JORDAN BARTLETT JONES*** | § | *SMITH COUNTY, TEXAS* |

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***OPINION***

The State filed a motion for rehearing,[1] which is overruled. We withdraw our opinion dated April 18, 2018, and substitute the following opinion in its place.

Jordan Bartlett Jones was charged with unlawful disclosure of intimate visual material in violation of Texas Penal Code, Section 21.16(b), commonly known as the "revenge pornography" statute. This is an appeal from the trial court's denial of Jones's pretrial Application for Writ of Habeas Corpus, in which he alleged that Section 21.16(b) is unconstitutional on its face because it violates the First Amendment to the United States Constitution. Jones raises two issues on appeal. We reverse and remand.

## BACKGROUND

Because this appeal presents a facial challenge to a statute, a detailed rendition of the facts is unnecessary for its disposition. We therefore provide only a brief procedural history.

Jones was charged by information with unlawful disclosure of intimate visual material. On September 6, 2017, Jones filed an Application for Writ of Habeas Corpus, in which he argued that Texas Penal Code, Section 21.16(b) is unconstitutional on its face. On October 23, 2017, the trial court denied Jones's application, and this appeal followed.

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[1] The Office of the Attorney General for the State of Texas filed a Brief of Amicus Curiae in support of the State's motion for rehearing. Jack Roady and Alan Curry of the District Attorney's Office of Galveston County Texas filed an additional Brief of Amicus Curiae in support of the State's motion.

## CONSTITUTIONALITY OF TEXAS PENAL CODE, SECTION 21.16(b)

In his first issue, Jones argues that Section 21.16(b) is facially overbroad under the First Amendment to the United States Constitution. Section 21.16(b) sets forth, in pertinent part, as follows:

> 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;
>
> (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[.]

TEX. PENAL CODE ANN. § 21.16(b) (West Supp. 2017). Under this section, "intimate parts" means "the naked genitals, pubic area, anus, buttocks, or female nipple of a person." ***Id.*** § 21.16(a)(1). "Visual material" includes "any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide." ***Id.*** § 21.16(a)(5)(A). It further includes "any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method." ***Id.*** § 21.16(a)(5)(B).

### Standard of Review

A claim that a statute is unconstitutional on its face may be raised by a pretrial writ of habeas corpus. ***Ex Parte Weise***, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001). Habeas corpus preconviction proceedings are separate criminal actions, and the applicant has the right to an immediate appeal before trial begins. ***Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.***, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005).

We review a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse of discretion standard. *See* ***Ex parte Wheeler***, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); ***Ex parte Thompson***, 414 S.W.3d 872, 875 (Tex. App.–San Antonio 2013),

*aff'd*, 442 S.W.3d 325 (Tex. Crim. App. 2014). However, when the trial court's ruling and determination of the ultimate issue turns on the application of the law, such as the constitutionality of a statute, we review the trial court's ruling de novo. ***Ex parte Peterson***, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by* ***Ex parte Lewis***, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007); *see* ***Thompson***, 414 S.W.3d at 875–76.

Furthermore, we review the constitutionality of a criminal statute de novo. ***Byrne v. State***, 358 S.W.3d 745, 748 (Tex. App.–San Antonio 2011, no pet.). When a statute is attacked on constitutional grounds, we ordinarily presume the statute is valid and that the legislature has not acted unreasonably or arbitrarily. ***State v. Rosseau***, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). The burden rests upon the individual who challenges the statute to establish its unconstitutionality. ***Id.*** However, when the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded to legislative enactments is reversed. ***United States v. Playboy Entm't Grp., Inc.***, 529 U.S. 803, 817, 120 S. Ct. 1878, 1888, 146 L. Ed. 2d 865 (2000); ***Thompson***, 414 S.W.3d at 876. Content-based regulations are presumptively invalid, and the government bears the burden to rebut that presumption. ***Ashcroft v. Am. Civil Liberties Union***, 542 U.S. 656, 660, 124 S. Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004); ***Thompson***, 442 S.W.3d at 348.

Lastly, a question of statutory construction presents a question of law, which we review de novo. *See* ***Liverman v. State***, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). In construing a statute, we give effect to the plain meaning of its language, unless the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended. ***Id.*** In determining plain meaning, we employ the rules of grammar and usage, and we presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible. ***Id.*** If a word or a phrase has acquired a technical or particular meaning, we construe the word or phrase accordingly. ***Id.*** If, after using these tools of construction, the language of the statute is ambiguous, we can resort to extratextual factors to determine the statute's meaning. ***Id.*** "Ambiguity exists when the statutory language may be understood by reasonably well-informed persons in two or more different senses." ***Id.***

**First Amendment - The Statute's Regulation of Free Speech**

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST., Amend. 1. We first must determine whether that right to

freedom of speech is implicated in this case. The free speech protections of the First Amendment are implicated when the government seeks to regulate protected speech or expressive conduct. *See* ***Scott v. State***, 322 S.W.3d 662, 668–69 (Tex. Crim. App. 2010). It is the obligation of the person desiring to engage in allegedly expressive conduct to demonstrate that the First Amendment applies. ***Clark v. Cmty. for Creative Non-Violence***, 468 U.S. 288, 294 n.5, 104 S. Ct. 3065, 3069 n.5, 82 L. Ed. 2d 221 (1984).

The Texas Court of Criminal Appeals has concluded that photographs and visual recordings are inherently expressive and that there is no need to conduct a case-specific inquiry into whether these forms of expression convey a particularized message. *See* ***Thompson***, 442 S.W.3d at 336. The court further concluded that a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves. ***Id.***; *see also* ***Brown v. Entm't Merch. Ass'n***, 464 U.S. 786, 792 n.1, 1311 S. Ct. 2729, 2734 n.1, 180 L. Ed. 2d 708 (2011) (noting that under First Amendment analysis, there is no distinction whether government regulation applies to "creating, distributing, or consuming" speech).

In the instant case, Section 21.16(b) proscribes the disclosure of certain visual material, including any film, photograph, or videotape in various formats. Because the photographs and visual recordings are inherently expressive and the First Amendment applies to the distribution[2] of such expressive media in the same way it applies to their creation, we conclude that the right to freedom of speech is implicated in this case. *See* ***Thompson***, 442 S.W.3d at 336; *see also* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1.

**Statute's Regulation of Speech - Content-Based or Content-Neutral**

We next must determine whether the statute regulates speech in a content-based or content-neutral manner. As a general rule, laws that, by their terms, distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based, whereas laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content neutral. ***Turner Broad. Sys., Inc. v. F.C.C.***, 512 U.S. 622, 642, 114 S. Ct.

[2] Based on our reading of Section 21.16(b), we conclude that there is no difference under First Amendment analysis between the act of disclosing visual material and the act of distributing written works. *Cf.* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1; *Compare Disclose*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011) ("disclose" means "to expose to view" or "to make known or public") *with Distribute*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011) ("distribute" means "to give out or deliver"). The fact that an act of disclosure may relate to something previously unknown does not, without more, implicate that the unknown thing carries an expectation of privacy.

2445, 2459, 129 L. Ed. 2d 497 (1994); ***Thompson***, 442 S.W.3d at 345. If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, the regulation is content-based. *See* ***Thompson***, 442 S.W.3d at 345 (citing ***Ex parte Lo***, 424 S.W.3d 10, 15 n.12 (Tex. Crim. App. 2013)). The result of this inquiry dictates the standard of scrutiny under which we analyze the statute. Courts review content-based laws that suppress, disadvantage, or impose differential burdens on speech because of its content under a strict scrutiny standard. ***Turner Broad. Sys., Inc.***, 412 U.S. at 642, 114 S. Ct. at 2459. In contrast, content-neutral laws that govern expression but do not seek to restrict its content are subject to intermediate scrutiny. ***Id.***

In the instant case, the State conceded at oral argument that Section 21.16(b) properly is subject to strict scrutiny analysis.[3] We agree. Here, Section 21.16(b)(1) does not penalize all intentional disclosure of visual material depicting another person. *See* TEX. PENAL CODE ANN. § 21.16(b)(1). Rather, Section 21.16(b)(1) penalizes only a subset of disclosed images, those which depict another person with the person's intimate parts exposed or engaged in sexual conduct. *See* ***id.*** § 21.16(a)(1), (3), (b)(1). Therefore, we conclude that Section 21.16(b)(1) discriminates on the basis of content. *Cf.* ***Thompson***, 442 S.W.3d at 347.

**Obscene by Context**

Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression. ***United States v. Alvarez***, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012); ***Morehead v. State***, 807 S.W.2d 577, 580 (Tex. Crim. App. 1991). New categories of unprotected speech may not be added to the list based on a conclusion that certain speech is too harmful to be tolerated. ***Brown***, 464 U.S. at 791, 1311 S. Ct. at 2734. Among the categories of unprotected speech are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See* ***United States v. Stevens***, 559 U.S. 460, 468–69, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010).

The State argues in its brief that the expectation of privacy and the nonconsensual nature of the disclosure causes any visual material covered by Section 21.16(b) to be unprotected speech because it is contextually obscene.[4] We disagree. For more than forty years, the issue of

[3] On rehearing, the State disregards its concession made at oral argument and argues for the first time that the statute is subject to intermediate scrutiny.

[4] As noted above, the State conceded during oral argument that Section 21.16(b) appropriately is subject to strict scrutiny analysis. It is unclear whether the State, in so conceding, intended to waive its obscenity argument, to which it made no reference in its allotted time for argument. We address the issue out of the abundance of caution.

whether a matter is obscene, and, thereby, constitutes unprotected speech, has been a determination to be made initially by the trier of fact. *See* ***Miller v. California***, 413 U.S. 15, 23, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973); *see also* ***Ashcroft v. Am. Civil Liberties Union***, 535 U.S. 564, 576, 122 S. Ct. 1700, 1708, 152 L. Ed. 2d 771 (2002); ***R.A.V. v. City of St. Paul, Minn.***, 505 U.S. 377, 418, 112 S. Ct. 2538, 2562, 120 L. Ed. 2d 305 (1992); ***Pope v. Illinois***, 481 U.S. 497, 500, 107 S. Ct. 1918, 1920–21, 95 L. Ed. 2d 439 (1987); ***Smith v. U.S.***, 431 U.S. 291, 300-01, 97 S. Ct. 1756, 1764–65, 52 L. Ed. 2d 324 (1977); *but see* ***Jenkins v. Georgia***, 418 U.S. 153, 160–61, 94 S. Ct. 2750, 2755, 41 L. Ed. 2d 652 (1974) (noting that even though what appeals to the prurient interest or what constitutes patent offensiveness are questions of fact, juries do not have unbridled discretion in determining what is patently offensive, and appellate court may conduct independent review of constitutional claims when necessary, e.g., when a jury unanimously determines that defendant's depiction of a woman with a bare midriff is patently offensive).

Here, Section 21.16 does not include language that would permit a trier of fact to determine that the visual material disclosed is obscene. Moreover, if, as the State argues, any visual material disclosed under Section 21.16(b) is obscene, the statute is wholly redundant in light of Texas's obscenity statutes. *See* TEX. PENAL CODE ANN. §§ 43.22, 43.23 (West 2016). Thus, we decline to overstep our role by concluding that any visual material disclosed under Section 21.16(b) is obscene by its context.

**Strict Scrutiny**

Having held that the statute regulates speech on the basis of its content, we next must determine whether Section 21.16(b) satisfies strict scrutiny. Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content ever will be permissible. *See* ***Sorrell v. IMS Health Inc.***, 564 U.S. 552, 571, 131 S. Ct. 2653, 2667, 180 L. Ed. 2d 544 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory"); ***Thompson*** 442 S.W.3d at 348; *see also* ***Brown,*** 564 U.S. at 799, 131 S. Ct. at 2738. Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. ***Thompson*** 442 S.W.3d at 344; *see also* ***Brown,*** 564 U.S. at 799, 131 S. Ct. at 2738. In this context, a regulation is "narrowly drawn" if it uses the least restrictive means of achieving the

government interest. ***Thompson***, 442 S.W.3d at 344; *see also* ***Playboy Entm't Grp., Inc.***, 529 U.S. at 813, 120 S. Ct. at 1888.

Here, the State argues that there is a compelling government interest in protecting an individual from a substantial invasion of his/her privacy. Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. *See* ***Snyder v. Phelps***, 562 U.S. 443, 459, 131 S. Ct. 1207, 1220, 179 L. Ed. 2d 172 (2011). "Substantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as a home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt." ***Thompson***, 442 S.W.3d at 348. It is apparent from the statute that the legislature sought to apply this statute to instances where the depicted person had a reasonable expectation that the visual material, would remain private. *See* TEX. PENAL CODE ANN. § 21.16(b)(2).[5] And by its reference to "intimate parts," it apparently sought to apply the statute to visual material depicting body parts ordinarily covered by clothing. Yet, even assuming without deciding that Section 21.16 was enacted to protect this sort of substantial privacy interest, the outcome would not differ.

As set forth previously, under its plain, unambiguous[6] meaning, Section 21.16(b)(1) applies where the visual material was obtained under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private or created under such circumstances. *See* ***id.*** § 21.16(b)(2).[7] The unambiguous language of Section 21.16(b)(2) is

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[5] However, we note that the statute can apply in situations where the depicted party created or consented to the creation of the visual material or voluntarily transmitted the visual material to the actor. *See* TEX. PENAL CODE ANN. § 21.16(e).

[6] The parties do not argue that the plain language of the statute is ambiguous. We likewise conclude that the plain language of the statute is unambiguous.

[7] Broken down into its elements, the plain, unambiguous language of Section 21.16(b)(2) reads as follows:

> The visual material
> (a) was
> (i) obtained *by the person*
> **or**
> (ii) created
> (b) under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.

*See* ***id.*** (emphasis added). On rehearing, the State argues that this is the correct grammatical interpretation of Section 21.16(b)(2). We agree.

written disjunctively.[8] The problematic result of the disjunctive structure of Section 21.16(b)(2) is best illustrated by way of the following hypothetical:[9]

> Adam and Barbara are in a committed relationship. One evening, in their home, during a moment of passion, Adam asks Barbara if he can take a nude photograph of her. Barbara consents, but before Adam takes the picture, she tells him that he must not show the photograph to anyone else. Adam promises that he will never show the picture to another living soul, and takes a photograph of Barbara in front of a plain, white background with her breasts exposed.
>
> A few months pass, and Adam and Barbara break up after Adam discovers that Barbara has had an affair. A few weeks later, Adam rediscovers the topless photo he took of Barbara. Feeling angry and betrayed, Adam emails the photo without comment to several of his friends, including Charlie. Charlie never had met Barbara and, therefore, does not recognize her. But he likes the photograph and forwards the email without comment to some of his friends, one of whom, unbeknownst to Charlie, is Barbara's coworker, Donna. Donna recognizes Barbara and shows the picture to Barbara's supervisor, who terminates Barbara's employment.
>
> Meanwhile, Adam also emails the picture to Ed. This time, however, Adam writes in the body of the email, "She thought I never would show anyone." Ed reads the email and forwards it with the attachment to several friends.

In this scenario, Adam and Ed can be charged under Section 21.16(b),[10] but so can Charlie and Donna. Charlie has a First Amendment right to share a photograph. *See* ***Thompson***, 442 S.W.3d at 336; *see also* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1 (noting that under First Amendment analysis, there is no distinction whether government regulation applies to "creating, distributing, or consuming" speech). Charlie had no reason to know that the photograph was created under circumstances under which Barbara had a reasonable expectation that the photograph would remain private.[11] Charlie was not aware of Barbara's conditions posed to Adam immediately prior to the photograph's creation, nor did he receive the photograph with

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[8] A "disjunctive allegation" is a "statement in . . . [an] indictment that expresses something in the alternative, [usually] with the conjunction 'or[.]'" *Disjunctive allegation*, BLACK'S LAW DICTIONARY (10th ed. 2009).

[9] The persons named in this hypothetical scenario are not intended to depict any actual persons. The naming convention chosen uses the first letter of each name occurring in an alphabetical pattern determined by the hypothetical person's order of appearance.

[10] Adam had knowledge of the circumstances surrounding the creation of the photograph and Barbara's privacy expectation. Ed obtained the photograph under circumstances in which he was made aware that Barbara expected the photograph would remain private.

[11] Unlike the verb "obtained," which is modified by the adverbial prepositional phrase "by the person," the verb "created" contains no such modifying language. As a result, the statute can apply under circumstances where a person uninvolved in the creation of the offending visual material obtains that visual material without knowledge of the circumstances surrounding its creation, under which the depicted person's privacy expectation arose.

any commentary from Adam that would make him aware of this privacy expectation on Barbara's part. In fact, there is nothing to suggest that Charlie could not reasonably have believed that Adam found this picture on a public website[12] or had been given permission by the depicted person to share the image with others. Further still, Charlie did not intend to harm[13] the depicted person.[14] Lastly, Charlie did not and could not identify the depicted person because he did not know Barbara.[15] Yet, under the disjunctive language used in Section 21.16(b)(2), Charlie nonetheless is culpable despite his having no knowledge of the circumstances surrounding the photograph's creation or the depicted person's privacy expectation arising thereunder.

We remain mindful that content-based regulations are presumptively invalid. *See* ***Thompson***, 442 S.W.3d at 348. At the very least, Section 21.16(b)(2) could be narrowed by requiring that the disclosing person have knowledge of the circumstances giving rise to the depicted person's privacy expectation. But because Section 21.16(b) does not use the least restrictive means of achieving what we have assumed to be the compelling government interest of preventing the intolerable invasion of a substantial privacy interest, it is an invalid content-based restriction in violation of the First Amendment. *See* ***id.***

**Overbreadth**

Having found the statute to be an invalid content-based restriction, we question whether we need to address overbreadth. ***Id.*** (citing ***R.A.V.***, 505 U.S. at 381 n.3, 112 S. Ct. at 2542 (contrasting technical "overbreadth" claim-that regulation violated rights of too many third parties-with claim that statute restricted more speech than the constitution permits, even as to the defendant, because it was content based)). In an abundance of caution, we address whether the unconstitutional reach of the statute is substantial enough to warrant a holding of facial invalidity, despite any legitimate applications of the statute. *See* ***Thompson***, 442 S.W.3d at 349.

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[12] "Privacy interests fade once information already appears on the public record." ***Thompson***, 442 S.W.3d at 343–44.

[13] "Harm" is defined broadly as "anything reasonably regarded as loss, disadvantage, or injury." TEX. PENAL CODE ANN. § 1.07(a)(25) (West Supp. 2017).

[14] The statute does not require that there be an intent to cause harm to the depicted person. *See* TEX. PENAL CODE ANN. § 21.16(b)(1). Instead, it requires only that the disclosure be intentional. *See* ***id.***

[15] The statute does not require that the disclosing person identify the depicted person. *See* TEX. PENAL CODE ANN. § 21.16(b)(4). Rather, it provides that the disclosure of the visual material may reveal the identity of the depicted person by, among other ways, subsequent information or material related to the visual material or information or material provided by a third party in response to the disclosure of the material. *See* ***id.***

As we explained above, Section 21.16(b) can apply to a situation in which (1) a photograph is taken depicting a person's intimate parts, (2) the circumstances of its creation indicate that the depicted person has a reasonable expectation of privacy, and (3) the photograph ultimately is shared by persons who had no knowledge or reason to know of the circumstances surrounding its creation, under which the depicted person's reasonable expectation of privacy arose.

The overbreadth doctrine is "strong medicine" to be employed with hesitation and only as a last resort. *See* ***Thompson***, 442 S.W.3d at 349 (citing ***New York v. Ferber***, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113 (1982)). The overbreadth of a statute not only must "be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." ***Ferber***, 458 U.S. at 770, 102 S. Ct. 3361–62. To be held unconstitutional under the overbreadth doctrine, a statute must be found to "prohibit[ ] a substantial amount of protected expression." ***Ashcroft***, 535 U.S. at 244, 122 S. Ct. at 1399. The danger that the statute will be unconstitutionally applied must be "realistic." ***Regan v. Time, Inc.***, 468 U.S. 641, 651 n.8, 104 S. Ct. 3262, 3268 n.8, 82 L. Ed. 2d 487 (1984).

Today, a person can share a photograph or video with an untold number of people with a mere click of a button.[16] The daily sharing of visual material, for many, has become almost ritualistic. And once the act of sharing is accomplished, it is highly questionable whether that act ever can be completely rescinded. But assuming that the visual material is not otherwise protected, these persons are acting within their rights when they share visual material with others. *See* ***Thompson***, 442 S.W.3d at 336, 343–44.

A statute likely is to be found overbroad if the criminal prohibition it creates is of "alarming breadth." *See* ***Stevens***, 559 U.S. at 474, 130 S. Ct. at 1588. Such is the case with the current statute. Section 21.16 is extremely broad, applying to any person who discloses visual material depicting another person's intimate parts or a person engaged in sexual conduct, but where the disclosing person has no knowledge or reason to know the circumstances surrounding the material's creation, under which the depicted person's reasonable expectation of privacy arose. Furthermore, its application is not attenuated by the fact that the disclosing person had no intent to harm the depicted person or may have been unaware of the depicted person's identity.

[16] In our hypothetical, we focused on sharing photographs via email. However, a Facebook user with her account settings set to share posts as "public" can share a picture to her Facebook page that not only can be viewed by the nearly two billion Facebook users, but also by any other person with internet access whose access to Facebook is not otherwise restricted.

Accordingly, we conclude that the criminal prohibition Section 21.16(b) creates is of "alarming breadth" that is "real" and "substantial." *See* ***Stevens***, 559 U.S. at 474, 130 S. Ct. at 1588; ***Ferber***, 458 U.S. at 770, 102 S. Ct. at 3361–62.

**Summation**

We have concluded that Section 21.16(b) is an invalid content-based restriction and overbroad in the sense that it violates rights of too many third parties by restricting more speech than the Constitution permits. Accordingly, we hold that Texas Penal Code, Section 21.16(b), to the extent it proscribes the disclosure of visual material, is unconstitutional on its face in violation of the Free Speech clause of the First Amendment. Jones's first issue is sustained.[17]

## DISPOSITION

Having sustained Jones's first issue, we ***reverse*** the trial court's order denying Jones's Application for Writ of Habeas Corpus and ***remand*** the matter to the trial court ***with instructions*** that it ***dismiss the information***.

**JAMES T. WORTHEN**
Chief Justice

Opinion delivered May 16, 2018.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)

[17] Because we have sustained Jones's first issue, we do not consider his second issue concerning whether a narrow interpretation of the statute will render it unconstitutionally vague. *See* TEX. R. APP. P. 47.1.

# NO. 12-17-00346-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

| | | |
|---|---|---|
| | § | *APPEAL FROM THE* |
| ***EX PARTE:*** | § | *COUNTY COURT AT LAW NO. 2* |
| ***JORDAN BARTLETT JONES*** | § | *SMITH COUNTY, TEXAS* |

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***OPINION***

Jordan Bartlett Jones was charged with unlawful disclosure of intimate visual material in violation of Texas Penal Code, Section 21.16(b), commonly known as the "revenge pornography" statute. This is an appeal from the trial court's denial of Jones's pretrial Application for Writ of Habeas Corpus, in which he alleged that Section 21.16(b) is unconstitutional on its face because it violates the First Amendment to the United States Constitution. Jones raises two issues on appeal. We reverse and remand.

## BACKGROUND

Because this appeal presents a facial challenge to a statute, a detailed rendition of the facts is unnecessary for its disposition. We therefore provide only a brief procedural history.

Jones was charged by information with unlawful disclosure of intimate visual material. On September 6, 2017, Jones filed an Application for Writ of Habeas Corpus, in which he argued that Texas Penal Code, Section 21.16(b) is unconstitutional on its face. On October 23, 2017, the trial court denied Jones's application, and this appeal followed.

## CONSTITUTIONALITY OF TEXAS PENAL CODE, SECTION 21.16(b)

In his first issue, Jones argues that Section 21.16(b) is facially overbroad under the First Amendment to the United States Constitution. Section 21.16(b) sets forth, in pertinent part, as follows:

> 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;
>
> (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[.]

TEX. PENAL CODE ANN. § 21.16(b) (West Supp. 2017). Under this section, "intimate parts" means "the naked genitals, pubic area, anus, buttocks, or female nipple of a person." ***Id.*** § 21.16(a)(1). "Visual material" includes "any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide." ***Id.*** § 21.16(a)(5)(A). It further includes "any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method." ***Id.*** § 21.16(a)(5)(B).

**Standard of Review**

A claim that a statute is unconstitutional on its face may be raised by a pretrial writ of habeas corpus. ***Ex Parte Weise***, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001). Habeas corpus preconviction proceedings are separate criminal actions, and the applicant has the right to an immediate appeal before trial begins. ***Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.***, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005).

We review a trial court's decision to grant or deny an application for writ of habeas corpus under an abuse of discretion standard. *See* ***Ex parte Wheeler***, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); ***Ex parte Thompson***, 414 S.W.3d 872, 875 (Tex. App.–San Antonio 2013), *aff'd*, 442 S.W.3d 325 (Tex. Crim. App. 2014). However, when the trial court's ruling and determination of the ultimate issue turns on the application of the law, such as the constitutionality of a statute, we review the trial court's ruling de novo. ***Ex parte Peterson***, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled in part on other grounds by* ***Ex parte Lewis***, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007); *see* ***Thompson***, 414 S.W.3d at 875–76.

Furthermore, we review the constitutionality of a criminal statute de novo. ***Byrne v. State***, 358 S.W.3d 745, 748 (Tex. App.–San Antonio 2011, no pet.). When a statute is attacked on constitutional grounds, we ordinarily presume the statute is valid and that the legislature has not acted unreasonably or arbitrarily. ***State v. Rosseau***, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013). The burden rests upon the individual who challenges the statute to establish its unconstitutionality. ***Id.*** However, when the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded to legislative enactments is reversed. ***United States v. Playboy Entm't Grp., Inc.***, 529 U.S. 803, 817, 120 S. Ct. 1878, 1888, 146 L. Ed. 2d 865 (2000); ***Thompson***, 414 S.W.3d at 876. Content-based regulations are presumptively invalid, and the government bears the burden to rebut that presumption. ***Ashcroft v. Am. Civil Liberties Union***, 542 U.S. 656, 660, 124 S. Ct. 2783, 2788, 159 L. Ed. 2d 690 (2004); ***Thompson***, 442 S.W.3d at 348.

**First Amendment - The Statute's Regulation of Free Speech**

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST., Amend. 1. We first must determine whether that right to freedom of speech is implicated in this case. The free speech protections of the First Amendment are implicated when the government seeks to regulate protected speech or expressive conduct. *See* ***Scott v. State***, 322 S.W.3d 662, 668–69 (Tex. Crim. App. 2010). It is the obligation of the person desiring to engage in allegedly expressive conduct to demonstrate that the First Amendment applies. ***Clark v. Cmty. for Creative Non-Violence***, 468 U.S. 288, 294 n.5, 104 S. Ct. 3065, 3069 n.5, 82 L. Ed. 2d 221 (1984).

The Texas Court of Criminal Appeals has concluded that photographs and visual recordings are inherently expressive and that there is no need to conduct a case-specific inquiry into whether these forms of expression convey a particularized message. *See* ***Thompson***, 442 S.W.3d at 336. The court further concluded that a person's purposeful creation of photographs and visual recordings is entitled to the same First Amendment protection as the photographs and visual recordings themselves. ***Id.***; *see also* ***Brown v. Entm't Merch. Ass'n***, 464 U.S. 786, 792 n.1, 1311 S. Ct. 2729, 2734 n.1, 180 L. Ed. 2d 708 (2011) (noting that under First Amendment analysis, there is no distinction whether government regulation applies to "creating, distributing, or consuming" speech).

In the instant case, Section 21.16(b) proscribes the disclosure of certain visual material, including any film, photograph, or videotape in various formats. Because the photographs and visual recordings are inherently expressive and the First Amendment applies to the distribution[1] of such expressive media in the same way it applies to their creation, we conclude that the right to freedom of speech is implicated in this case. *See* ***Thompson***, 442 S.W.3d at 336; *see also* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1.

**Statute's Regulation of Speech - Content-Based or Content-Neutral**

We next must determine whether the statute regulates speech in a content-based or content-neutral manner. As a general rule, laws that, by their terms, distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based, whereas laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are content neutral. ***Turner Broad. Sys., Inc. v. F.C.C.***, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497 (1994); ***Thompson***, 442 S.W.3d at 345. If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, the regulation is content-based. *See* ***Thompson***, 442 S.W.3d at 345 (citing ***Ex parte Lo***, 424 S.W.3d 10, 15 n.12 (Tex. Crim. App. 2013)). The result of this inquiry dictates the standard of scrutiny under which we analyze the statute. Courts review content-based laws that suppress, disadvantage, or impose differential burdens on speech because of its content under a strict scrutiny standard. ***Turner Broad. Sys., Inc.***, 412 U.S. at 642, 114 S.Ct. at 2459. In contrast, content-neutral laws that govern expression but do not seek to restrict its content are subject to intermediate scrutiny. ***Id.***

In the instant case, the State conceded at oral argument that Section 21.16(b) properly is subject to strict scrutiny analysis. We agree. Here, Section 21.16(b)(1) does not penalize all intentional disclosure of visual material depicting another person. *See* TEX. PENAL CODE ANN. § 21.16(b)(1). Rather, Section 21.16(b)(1) penalizes only a subset of disclosed images, those which depict another person with the person's intimate parts exposed or engaged in sexual conduct. *See* ***id.*** § 21.16(a)(1), (3), (b)(1). Therefore, we conclude that Section 21.16(b)(1) discriminates on the basis of content. *Cf.* ***Thompson***, 442 S.W.3d at 347.

[1] Based on our reading of Section 21.16(b), we conclude that there is no difference under First Amendment analysis between the act of disclosing visual material and the act of distributing written works. *Cf.* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1; *Compare Disclose*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011) ("disclose" means "to expose to view" or "to make known or public") *with Distribute*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011) ("distribute" means "to give out or deliver"). The fact that an act of disclosure may relate to something previously unknown does not, without more, implicate that the unknown thing carries an expectation of privacy.

**Obscene by Context**

Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression. ***United States v. Alvarez***, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012); ***Morehead v. State***, 807 S.W.2d 577, 580 (Tex. Crim. App. 1991). New categories of unprotected speech may not be added to the list based on a conclusion that certain speech is too harmful to be tolerated. ***Brown***, 464 U.S. at 791, 1311 S. Ct. at 2734. Among the categories of unprotected speech are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *See* ***United States v. Stevens***, 559 U.S. 460, 468–69, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010)

The State argues in its brief that the expectation of privacy and the nonconsensual nature of the disclosure causes any visual material covered by Section 21.16(b) to be unprotected speech because it is contextually obscene.[2] We disagree. For more than forty years, the issue of whether a matter is obscene, and, thereby, constitutes unprotected speech, has been a determination to be made initially by the trier of fact. *See* ***Miller v. California***, 413 U.S. 15, 23, 93 S. Ct. 2607, 2615, 37 L. Ed. 2d 419 (1973); *see also* ***Ashcroft v. Am. Civil Liberties Union***, 535 U.S. 564, 576, 122 S. Ct. 1700, 1708, 152 L. Ed. 2d 771 (2002); ***R.A.V. v. City of St. Paul, Minn.***, 505 U.S. 377, 418, 112 S. Ct. 2538, 2562, 120 L. Ed. 2d 305 (1992); ***Pope v. Illinois***, 481 U.S. 497, 500, 107 S. Ct. 1918, 1920–21, 95 L. Ed. 2d 439 (1987); ***Smith v. U.S.***, 431 U.S. 291, 300-01, 97 S. Ct. 1756, 1764–65, 52 L. Ed. 2d 324 (1977); *but see* ***Jenkins v. Georgia***, 418 U.S. 153, 160–61, 94 S. Ct. 2750, 2755, 41 L. Ed. 2d 652 (1974) (noting that even though what appeals to the prurient interest or what constitutes patent offensiveness are questions of fact, juries do not have unbridled discretion in determining what is patently offensive, and appellate court may conduct independent review of constitutional claims when necessary, e.g., when a jury unanimously determines that defendant's depiction of a woman with a bare midriff is patently offensive).

Here, Section 21.16 does not include language that would permit a trier of fact to determine that the visual material disclosed is obscene. Moreover, if, as the State argues, any visual material disclosed under Section 21.16(b) is obscene, the statute is wholly redundant in light of Texas's obscenity statutes. *See* TEX. PENAL CODE ANN. §§ 43.22, 43.23 (West 2016).

[2] As noted above, the State conceded during oral argument that Section 21.16(b) appropriately is subject to strict scrutiny analysis. It is unclear whether the State, in so conceding, intended to waive its obscenity argument, to which it made no reference in its allotted time for argument. We address the issue out of the abundance of caution.

Thus, we decline to overstep our role by concluding that any visual material disclosed under Section 21.16(b) is obscene by its context.

**Strict Scrutiny**

Having held that the statute regulates speech on the basis of its content, we next must determine whether Section 21.16(b) satisfies strict scrutiny. Content-based regulations are presumptively invalid, and it is rare that a regulation restricting speech because of its content ever will be permissible. *See* ***Sorrell v. IMS Health Inc.***, 564 U.S. 552, 571, 131 S. Ct. 2653, 2667, 180 L. Ed. 2d 544 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory"); ***Thompson*** 442 S.W.3d at 348; *see also* ***Brown,*** 564 U.S. at 799, 131 S. Ct. at 2738. Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. ***Thompson*** 442 S.W.3d at 344; *see also* ***Brown,*** 564 U.S. at 799, 131 S. Ct. at 2738. In this context, a regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest. ***Thompson***, 442 S.W.3d at 344; *see also* ***Playboy Entm't Grp., Inc.***, 529 U.S. at 813, 120 S. Ct. at 1888.

Here, the State argues that there is a compelling government interest in protecting an individual from a substantial invasion of his/her privacy. Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. *See* ***Snyder v. Phelps***, 562 U.S. 443, 459, 131 S. Ct. 1207, 1220, 179 L. Ed. 2d 172 (2011). "Substantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as a home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt." ***Thompson***, 442 S.W.3d at 348. It is apparent from the statute that the legislature sought to apply this statute to instances where the depicted person had a reasonable expectation that the visual material, would remain private. *See* TEX. PENAL CODE ANN. § 21.16(b)(2).[3] And by its reference to "intimate parts," it apparently sought to apply the statute to visual material depicting body parts ordinarily covered by clothing. Yet, even assuming without deciding that Section 21.16 was enacted to protect this sort of substantial privacy interest, the outcome would not differ.

[3] However, we note that the statute can apply in situations where the depicted party created or consented to the creation of the visual material or voluntarily transmitted the visual material to the actor. *See* TEX. PENAL CODE ANN. § 21.16(e).

As set forth previously, Section 21.16(b)(1) applies where "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." ***Id.*** § 21.16(b)(2) (emphasis added). The unambiguous language of Section 21.16(b)(2) is written disjunctively.[4] The problematic result of the disjunctive structure of Section 21.16(b)(2) is best illustrated by way of the following hypothetical:[5]

> Adam and Barbara are in a committed relationship. One evening, in their home, during a moment of passion, Adam asks Barbara if he can take a nude photograph of her. Barbara consents, but before Adam takes the picture, she tells him that he must not show the photograph to anyone else. Adam promises that he will never show the picture to another living soul, and takes a photograph of Barbara in front of a plain, white background with her breasts exposed.
>
> A few months pass, and Adam and Barbara break up after Adam discovers that Barbara has had an affair. A few weeks later, Adam rediscovers the topless photo he took of Barbara. Feeling angry and betrayed, Adam emails the photo without comment to several of his friends, including Charlie. Charlie never had met Barbara and, therefore, does not recognize her. But he likes the photograph and forwards the email without comment to some of his friends, one of whom, unbeknownst to Charlie, is Barbara's coworker, Donna. Donna recognizes Barbara and shows the picture to Barbara's supervisor, who terminates Barbara's employment.

In this scenario, Adam can be charged under Section 21.16(b), but so can Charlie and Donna. Charlie has a First Amendment right to share a photograph. *See* ***Thompson***, 442 S.W.3d at 336; *see also* ***Brown***, 464 U.S. at 792 n.1, 1311 S. Ct. at 2734 n.1 (noting that under First Amendment analysis, there is no distinction whether government regulation applies to "creating, distributing, or consuming" speech). Charlie had no reason to know that the photograph was created under circumstances under which Barbara had a reasonable expectation that the photograph would remain private. Charlie was not aware of Barbara's conditions posed to Adam immediately prior to the photograph's creation, nor did he receive the photograph with any commentary from Adam that would make him aware of this privacy expectation on Barbara's part. In fact, there is nothing to suggest that Charlie could not reasonably have believed that Adam found this picture on a public website[6] or had been given permission by the depicted

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[4] A "disjunctive allegation" is a "statement in . . . [an] indictment that expresses something in the alternative, [usually] with the conjunction 'or[]'" *Disjunctive allegation*, BLACK'S LAW DICTIONARY (10th ed. 2009).

[5] The persons named in this hypothetical scenario are not intended to depict any actual persons. The naming convention chosen uses the first letter of each name occurring in an alphabetical pattern determined by the hypothetical person's order of appearance.

person to share the image with others. Further still, Charlie did not intend to harm[7] the depicted person.[8] Lastly, Charlie did not and could not identify the depicted person because he did not know Barbara.[9] Yet, under the disjunctive language used in Section 21.16(b)(2), Charlie nonetheless is culpable despite his having no knowledge of the circumstances surrounding the photograph's creation or the depicted person's privacy expectation arising thereunder.

We remain mindful that content-based regulations are presumptively invalid. *See* ***Thompson***, 442 S.W.3d at 348. At the very least, Section 21.16(b)(2) could be narrowed by requiring that the disclosing person have knowledge of the circumstances giving rise to the depicted person's privacy expectation. But because Section 21.16(b) does not use the least restrictive means of achieving what we have assumed to be the compelling government interest of preventing the intolerable invasion of a substantial privacy interest, it is an invalid content-based restriction in violation of the First Amendment. *See* ***id.***

**Overbreadth**

Having found the statute to be an invalid content-based restriction, we question whether we need to address overbreadth. ***Id.*** (citing ***R.A.V.***, 505 U.S. at 381 n.3, 112 S. Ct. at 2542 (contrasting technical "overbreadth" claim-that regulation violated rights of too many third parties-with claim that statute restricted more speech than the constitution permits, even as to the defendant, because it was content based)). In an abundance of caution, we address whether the unconstitutional reach of the statute is substantial enough to warrant a holding of facial invalidity, despite any legitimate applications of the statute. *See* ***Thompson***, 442 S.W.3d at 349. As we explained above, Section 21.16(b) can apply to a situation in which (1) a photograph is taken depicting a person's intimate parts, (2) the circumstances of its creation indicate that the depicted person has a reasonable expectation of privacy, and (3) the photograph ultimately is

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[6] "Privacy interests fade once information already appears on the public record." ***Thompson***, 442 S.W.3d at 343–44.

[7] "Harm" is defined broadly as "anything reasonably regarded as loss, disadvantage, or injury." TEX. PENAL CODE ANN. § 1.07(a)(25) (West Supp. 2017).

[8] The statute does not require that there be an intent to cause harm to the depicted person. *See* TEX. PENAL CODE ANN. § 21.16(b)(1). Instead, it requires only that the disclosure be intentional. *See* ***id.***

[9] The statute does not require that the disclosing person identify the depicted person. *See* TEX. PENAL CODE ANN. § 21.16(b)(4). Rather, it provides that the disclosure of the visual material may reveal the identity of the depicted person by, among other ways, subsequent information or material related to the visual material or information or material provided by a third party in response to the disclosure of the material. *See* ***id.***

shared by persons who had no knowledge or reason to know of the circumstances surrounding its creation, under which the depicted person's reasonable expectation of privacy arose.

The overbreadth doctrine is "strong medicine" to be employed with hesitation and only as a last resort. *See* ***Thompson***, 442 S.W.3d at 349 (citing ***New York v. Ferber***, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113 (1982)). The overbreadth of a statute not only must "be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." ***Ferber***, 458 U.S. at 770, 102 S. Ct. 3361–62. To be held unconstitutional under the overbreadth doctrine, a statute must be found to "prohibit[ ] a substantial amount of protected expression." ***Ashcroft***, 535 U.S. at 244, 122 S. Ct. at 1399. The danger that the statute will be unconstitutionally applied must be "realistic." ***Regan v. Time, Inc.***, 468 U.S. 641, 651 n.8, 104 S. Ct. 3262, 3268 n.8, 82 L. Ed. 2d 487 (1984).

Today, a person can share a photograph or video with an untold number of people with a mere click of a button.[10] The daily sharing of visual material, for many, has become almost ritualistic. And once the act of sharing is accomplished, it is highly questionable whether that act ever can be completely rescinded. But assuming that the visual material is not otherwise protected, these persons are acting within their rights when they share visual material with others. *See* ***Thompson***, 442 S.W.3d at 336, 343–44.

A statute likely is to be found overbroad if the criminal prohibition it creates is of "alarming breadth." *See* ***Stevens***, 559 U.S. at 474, 130 S. Ct. at 1588. Such is the case with the current statute. Section 21.16 is extremely broad, applying to any person who discloses visual material depicting another person's intimate parts or a person engaged in sexual conduct, but where the disclosing person has no knowledge or reason to know the circumstances surrounding the material's creation, under which the depicted person's reasonable expectation of privacy arose. Furthermore, its application is not attenuated by the fact that the disclosing person had no intent to harm the depicted person or may have been unaware of the depicted person's identity. Accordingly, we conclude that the criminal prohibition Section 21.16(b) creates is of "alarming breadth" that is "real" and "substantial." *See* ***Stevens***, 559 U.S. at 474, 130 S. Ct. at 1588; ***Ferber***, 458 U.S. at 770, 102 S. Ct. at 3361–62.

[10] In our hypothetical, we focused on sharing photographs via email. However, a Facebook user with her account settings set to share posts as "public" can share a picture to her Facebook page that not only can be viewed by the nearly two billion Facebook users, but also by any other person with internet access whose access to Facebook is not otherwise restricted.

**Summation**

We have concluded that Section 21.16(b) is an invalid content-based restriction and overbroad in the sense that it violates rights of too many third parties by restricting more speech than the Constitution permits. Accordingly, we hold that Texas Penal Code, Section 21.16(b), to the extent it proscribes the disclosure of visual material, is unconstitutional on its face in violation of the Free Speech clause of the First Amendment. Jones's first issue is sustained.[11]

## DISPOSITION

Having sustained Jones's first issue, we ***reverse*** the trial court's order denying Jones's Application for Writ of Habeas Corpus and ***remand*** the matter to the trial court ***with instructions*** that it ***dismiss the information***.

**JAMES T. WORTHEN**
Chief Justice

Opinion delivered April 18, 2018.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)

[11] Because we have sustained Jones's first issue, we do not consider his second issue concerning whether a narrow interpretation of the statute will render it unconstitutionally vague. *See* TEX. R. APP. P. 47.1.

# COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

# JUDGMENT

**APRIL 18, 2018**

**NO. 12-17-00346-CR**

**EX PARTE: JORDAN JONES**

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Appeal from the County Court at Law No. 2
of Smith County, Texas (Tr.Ct.No. 67295-A)

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THIS CAUSE came to be heard on the oral arguments, appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment be **reversed** and the cause **remanded** to the trial court **with instructions** that it **dismiss the information**; and that this decision be certified to the court below for observance.

James T. Worthen., Chief Justice.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*