PD-0552-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/7/2018 5:35 PM
Accepted 12/11/2018 10:49 AM
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No. PD-0552-18

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In the Court of Criminal Appeals of the State of Texas

Ex parte Jordan Bartlett Jones,
Respondent-Appellant

On Appeal from the Twelfth Court of Appeals, Cause No. 12-17-00346-CR, Reversing Cause No. 67295 from the County Court at Law Number Two of Smith County, Texas

BRIEF OF *AMICI CURIAE* MEDIA COALITION FOUNDATION, INC., AMERICAN BOOKSELLERS ASSOCIATION, ASSOCIATION OF ALTERNATIVE NEWSMEDIA, ASSOCIATION OF AMERICAN PUBLISHERS, INC., FREEDOM TO READ FOUNDATION AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

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INTEREST OF THE *AMICI*[1]

Media Coalition Foundation, Inc.; American Booksellers Association; Association of Alternative Newsmedia; Association of American Publishers, Inc., Freedom to Read Foundation and National Press Photographers Association respectfully submit this Brief as *amici curiae* in support of Respondent-Appellant Jordan Bartlett Jones.

Amici's members (also referred to herein as "*Amici*") create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, photographs, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining. Libraries and librarians whose interests are represented by *Amicus* Freedom to Read Foundation ("FTRF") provide such materials to readers and viewers, whose First Amendment rights FTRF also defends.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials, whether textual or visual. *Amici*

[1] Pursuant to Rule 11, TEX. R. APP. PROC., counsel of record for *Amici* certifies that no person or entity other than *Amici* and their counsel made or will make a monetary contribution for the preparation or submission of this brief.

are particularly concerned with the chilling effect of any test that reverses the rule that content-based restrictions are presumptively unconstitutional.

Media Coalition Foundation, Inc. (the "Foundation") is a not-for-profit corporation, established in 2015 by The Media Coalition, an association representing individuals and organizations engaged in communication through both traditional and electronic media. The Foundation monitors potential threats to freedom of speech and engages in litigation and education to protect First Amendment rights. The Foundation strives to educate policymakers and the public about ever-evolving free speech and censorship issues, and aims to fulfill the vision of an informed American public engaged in free speech causes.

American Booksellers Association ("ABA") is a trade association dedicated to meeting the needs of its core members—independently-owned bookstores with storefront locations nationwide—through education, information dissemination, business products and services, and advocacy. ABA exists to protect and promote the interests of independent book retail businesses, as well as to protect the First Amendment rights of every American.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for approximately 110 alternative newspapers in North America including the Austin Chronicle, the Dallas Observer, the Fort Worth Weekly, the Houston Press and the San Antonio Current. AAN newspapers and their websites

provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Association of American Publishers, Inc., ("AAP"), a not-for-profit organization, represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. AAP's members range from major commercial book and journal publishers to small, non-profit, university, and scholarly presses, as well as leading publishers of educational materials and digital learning platforms. AAP's members publish a substantial portion of the general, educational, and religious books produced in the United States, some of which include images of nudity or sexual conduct. Its members are active in all facets of print and electronic media, including publishing a wide range of electronic products and services. Additionally, members of AAP maintain websites featuring and offering for sale their publications, some of which include images of persons engaged in specific sexual activities or in a state of nudity, as defined by the Act. AAP represents an industry whose very existence depends on the free exercise of rights guaranteed by the First Amendment.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First

Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

National Press Photographers Association ("NPPA") is a 501(c)(6) nonprofit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

INTRODUCTION

Texas Penal Code § 21.16(b) is a criminal statute of "alarming breadth." *United States v. Stevens,* 559 U.S. 460, 474 (2010) (holding 18 U.S.C. § 48 unconstitutional). In an effort to criminalize the publication of "revenge porn"—the malicious posting by an ex-partner of a nude or sexual image, taken during an intimate relationship and posted after the break-up to harass, intimidate, or harm the former partner—the Texas Legislature enacted what it named the

"Relationship Privacy Act."[2] The Act is an overbroad statute that makes it a state jail felony to publish non-obscene images fully protected by the First Amendment.[3] Under Section 21.16(b), a defendant can be convicted even if there was no ill intent, and even though the image is non-obscene. In other words, this "revenge porn" statute criminalizes conduct that is neither "revenge" nor "porn." Under Section 21.16(b), a defendant can be convicted even though there was no past or present relationship between the defendant and the depicted person, and even though the defendant did not know the circumstances in which the image was made and thus did not know whether the depicted person consented to the disclosure or whether the depicted person had a reasonable expectation of privacy. In other words, this "Relationship Privacy Act" is neither limited to conduct based on a relationship between the defendant and a depicted person, nor limited to images that the defendant knew to be private. The Act contains no exception for publications made in the public interest, or on matters of public concern, including artistic, historical, and newsworthy images. With an impact far beyond its

[2] "This Act shall be known as the Relationship Privacy Act." Acts 2015, 84th R.S., ch. 852 (S.B. 1135), §1, effective September 1, 2015.

[3] The Relationship Privacy Act has separate civil and criminal provisions. The civil provisions are codified at Section 98B of the Texas Civil Practice and Remedies Code. The criminal provisions are codified at Section 21.16 of the Texas Penal Code. Only Section 21.16(b), which is part of the criminal provisions, is at issue in this case. References to the "Act" are to Section 21.16, which is reproduced in the Appendix to this brief.

intended purpose, Section 21.16(b) poses a broad threat to free speech—both online and through traditional means—by photographers, publishers, booksellers, newspapers, magazines, and members of the general public.

In an attempt to sustain Section 21.16(b), the State asks this Court to ignore controlling precedents of both this Court and the United States Supreme Court that make clear that content-based restrictions on speech are "presumptively unconstitutional," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Stevens*, 559 U.S. at 468, and must be subject to "strict scrutiny." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); *Ex parte Thompson*, 442 S.W.3d 325, 345-48 (Tex. Crim. App. 2014).

> Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest. 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 (first citing *Entm't Merchs. Ass'n*, 564 U.S. at 798; then citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). The State casts aside these settled principles of First Amendment law and argues that content-based restrictions on free speech should be subject to a "lower level of scrutiny," with "[s]trict scrutiny … reserved for when the government uses a statute to suppress one side of a debate on a matter of public concern."[4] The

[4] State's Brief on the Merits [hereinafter "State Br."] 1.

principle that content-based restrictions on speech must be subject to strict scrutiny has never been so limited by the United States Supreme Court or by this Court.

This Court should decline the State's request that this Court overrule its own precedents, ignore controlling precedents of the U.S. Supreme Court, and adopt a watered-down test for evaluating content-based restrictions on free speech—a test that would pose a grave threat to free speech that goes far beyond the threat posed by this unconstitutional statute.

Section 21.16(b) cannot survive strict scrutiny, properly applied, because, among other reasons, neither ill intent nor knowledge are elements of the offense, and the statute thus is not "narrowly drawn to serve a compelling government interest," *Thompson*, 442 S.W.3d at 344, that cannot be served through a "less restrictive alternative." *Playboy*, 529 U.S. at 813 (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

THE RELATIONSHIP PRIVACY ACT

The statute at issue, Texas Penal Code § 21.16(b), is part of the Relationship Privacy Act, which was enacted as Acts 2015, 84th R.S., ch. 852 (S.B. 1135), § 3, effective September 1, 2015. The statute was amended by Acts 2017, 85th

R.S., ch. 858 (H.B. 2552), § 16(b), effective September 1, 2017, to change the offense from a Class A misdemeanor to a state jail felony.[5]

Section 21.16 appears as an Appendix hereto.

ARGUMENT
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THE RELATIONSHIP PRIVACY ACT IS UNCONSTITUTIONAL

I. The Act is a Content-Based Regulation of Speech That is Not Narrowly Tailored to the State's Interest in Protecting Relationship Privacy by Combatting "Revenge Porn"

The Relationship Privacy Act is unconstitutional as a content-based regulation of protected non-obscene speech that is not narrowly tailored to its central purpose—redressing malicious, harmful invasions of privacy. *Ashcroft v. ACLU*, 542 U.S. 656, 660-66 (2004); *Playboy*, 529 U.S. at 813-16 (2000).

A. The Act Criminalizes Speech That Is Protected by the First Amendment

Under Section 21.16(b), it is a state jail felony for a person to intentionally disclose a nude image (or an image showing sexual activity), without the

[5] Citing the Legislature's Bill Analysis, the State argues that the amendment from a misdemeanor to a felony was made because, "[t]he need to use criminal sanction to prevent . . . harm was so acute." State Br. 9. The Bill Analysis does not so state; it merely describes the amendment.

The information against Jordan Bartlett Jones, Respondent-Appellant, was based on conduct that allegedly took place on February 5, 2017, when violation of the Act was a misdemeanor. Information, *State v. Jordan Jones* (67295-A); State Br. 9 n. 19.

"effective consent" of the depicted person, if the image was created under circumstances in which the depicted person had a reasonable expectation of privacy (or obtained by the defendant under such circumstances), if the disclosure causes harm (not defined in the Act), and if the depicted person is identifiable. Thus:

- **Ill intent is not an element of the offense.** The only "intent" required by the Act is an intention to make the disclosure; thus, a defendant cannot be convicted if a disclosure was accidental. However, a defendant can be convicted even if he or she did not intend to harm the depicted person, did not act with malice, and had no ill intent.
- **Knowledge of lack of consent, and knowledge that the depicted person had a reasonable expectation of privacy, are not elements of the offense.** A defendant can be convicted even if he or she did not know that the depicted person did not "effectively" consent to the disclosure, or did not know the circumstances under which the image was created (and thus did not know that the image had been created under circumstances in which the depicted person had a reasonable expectation of privacy). Thus, a person considering making a disclosure of an image restricted by the Act risks criminal liability unless he or she is in a position to assess, accurately and definitively, whether the

depicted person gave consent, whether such consent was legally effective, and the circumstances in which the image was created.

- **A good faith belief that the depicted person gave effective consent does not negate criminal liability**. A defendant can be convicted even if he or she had a good faith belief that the depicted person had effectively consented to the disclosure, and even if he or she believed (albeit mistakenly) that the image was not created under circumstances in which the depicted person had a reasonable expectation of privacy.
- **It is irrelevant whether the disclosure or publication was of artistic, historical, or newsworthy value, or was otherwise in the public interest.** The Act provides that it is an affirmative defense if the disclosure was made in connection with lawful and common practices of law enforcement and medical treatment, reporting unlawful activity, or as part of a legal proceeding—but there is no affirmative defense for other disclosures made in the public interest.
- **Obscenity is not an element of the offense.** The Act criminalizes the disclosure of all images that meet the Act's expansive description of nudity and sexual conduct, whether or not the images are obscene.[6]

[6] Texas has separate statutes that criminalize the disclosure of obscene images. TEX. PENAL CODE ANN.§§43.22, 43.23 (2018). Those statutes are not at issue in this case.

- **"Harm" to the depicted person is an element of the offense, but the Act does not define "harm."** The absence of a definition of "harm" not only renders the Act vague, but also raises the prospect that a defendant could be convicted of a felony if the disclosure caused merely annoyance or embarrassment, and did not cause any physical harm, financial harm, or emotional distress.

This is, indeed, a statute of "alarming breadth." *Stevens,* 559 U.S. at 474. The curator of an art gallery that held an exhibition of nude photographs could be convicted of a felony if she mistakenly believed, in good faith, that persons depicted in the photographs had consented to the disclosure, and also believed that the photographs were not created under circumstances where there was a reasonable expectation of privacy. The editor, or writer, of a newspaper or magazine (in print or online) that published a review of the art exhibition, and included a photograph of one of the images, could similarly be subject to felony conviction.[7] A news photographer who took a photograph of a partially-clothed person in a conflict zone, or fleeing a natural disaster, and could not possibly

[7] If effective consent to the disclosure means effective consent to the specific disclosure, the editor, or writer, of a newspaper or magazine (in print or online) that published a review of such an art exhibition, and included a photograph of one of the images, could be subject to felony conviction if the depicted person had consented to the exhibition, but did not consent to the inclusion of a photograph in a review of the exhibition.

obtain the consent of the person depicted, could be subject to a felony prosecution unless he or she self-censored, and did not publish the photograph. Publishers could not publish, nor booksellers sell, books containing photographs of nude persons, because they would have no certain way of ascertaining the circumstances under which the photographs were taken or whether the persons depicted had given effective consent. A person browsing the web who found a non-obscene image of a nude person but knew nothing about the image (such as who was depicted, when the image was taken, or under what circumstances the image was taken), and who forwarded the image to a friend, could find herself (or himself) convicted of a felony if it turned out that the image was restricted under the Act. Given the broad sweep of the Act, it is dead wrong for the State to argue that "from a constitutional perspective, [revenge porn] is the least objectionable material covered by the statute." State Br. 10.

Photographic images are inherently expressive, and protected by the First Amendment, just as the spoken word and written word are protected.

> The inherently expressive nature of pictures is reflected by the fact that phrases like "a picture is worth a thousand words" and "every picture tells a story" are considered clichés. We conclude that photographs and visual recordings are inherently expressive, so there is no need to conduct a case-specific inquiry into whether these forms of expression convey a particularized message.

Thompson, 442 S.W.3d at 336. It cannot be disputed that the speech at issue—non-obscene images of nudity and sexual activity—is fully protected by the First Amendment. *Playboy*, 529 U.S. at 811; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene."); *Ex parte Lo*, 424 S.W.3d 10, 20 (Tex. Crim. App. 2013) ("Sexual expression which is indecent but not obscene is protected by the First Amendment.") (quoting *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989)). Nor can it be disputed that the Act seeks to regulate this non-obscene speech solely based on its content—images of nudity or specified sexual activity, under the expansive definitions in the Act. *Stevens*, 559 U.S. at 468 (statute restricting images and audio "depending on whether they depict [specified] conduct" is content-based) (citing *Playboy*, 529 U.S. at 817); *Playboy*, 529 U.S. at 811 ("The speech in question is defined by its content; and the statute which seeks to restrict it is content based.").

"Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft*, 542 U.S. at 660. Such prohibitions and regulations "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citations omitted). As a content-based prohibition of protected, non-obscene speech, the Act is "'presumptively invalid,' and the Government bears

the burden to rebut that presumption." *Stevens*, 559 U.S. at 468 (quoting *Playboy*, 529 U.S. at 817). The Act "can stand only if it satisfies strict scrutiny." *Playboy*, 529 U.S. at 813 (citing *Sable Communications.*, 492 U.S. at 126). Under strict scrutiny, the prohibition or regulation "must be narrowly tailored to promote a compelling Government interest" which cannot be served through a "less restrictive alternative." *Playboy*, 529 U.S. at 813 (first citing *Sable Communications*, 492 U.S. at 126; then citing *Reno*, 521 U.S. at 874). "To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Id*.

Here, the State cannot rebut the presumption of unconstitutionality because the Act makes no attempt to safeguard constitutionally-protected speech and is not tailored to redressing malicious, harmful invasions of privacy.

The Act reaches far more than the bad actor. As the State acknowledges, the Act "applies when the discloser has no reason or intent to harm the depicted person." State Br. 9. *Cf. Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (complainant in a fraud action must show that the defendant made a knowingly false representation of material fact "with the intent to mislead the listener, and [that he] succeeded in doing so.").

While the Act includes "causes harm" as an element of the offense, the Act does not define "harm," and is thus unconstitutionally vague. *Village of Hoffman*

Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). Absent a definition of harm, a defendant could be convicted of a felony if the disclosure caused merely annoyance or embarrassment, and did not cause any physical harm, financial harm, or serious emotional distress. "[T]he First Amendment protects annoying and embarrassing speech." *People of the State of New York v. Marquan M.*, 19 N.E.3d 480, 486-88 (2014) (cyber-bullying statute held unconstitutional because, among other reasons, the statute criminalized not only conduct intended to "inflict significant emotional harm," but also conduct intended merely to "annoy").[8]

Nor does the Act limit liability to defendants who knew that the depicted person did not consent to the disclosure or publication; instead, a defendant who had no knowledge as to whether or not there was consent, a defendant who had a good faith belief that there was effective consent, and a defendant who knew that

[8] *See also State of North Carolina v. Bishop*, 787 S.E.2d 814, 820-21 (N.C. 2016) ("The protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.").

there was consent but was not in a position to evaluate whether or not the consent was effective, may all be guilty of a felony if it turns out that there was no effective consent. Nor does the Act make any distinction based on whether the person making the publication knew whether or not the depicted person had a reasonable expectation of privacy. The Act defines nudity so expansively that it includes a baby's bare buttocks, and defines sexual activities so expansively that it includes horseplay if a woman is wearing a low-cut blouse that reveals "cleavage," or if a man is bare-chested, but the depicted persons are otherwise fully-clothed. The Act has no exception for images related to matters of public concern, including images of historical, artistic, and newsworthy content. *Erznoznik*, 422 U.S. at 213 (ordinance prohibiting outdoor drive-in movie theaters from showing certain films was unconstitutional because it "sweepingly forbids display of all films containing any uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach.").

Furthermore, the sharing and display of non-obscene adult photographs on the Internet is a popular activity, to put it mildly. The Relationship Privacy Act equally criminalizes a malicious, initial invader of privacy (such as a person who

publishes a nude image to harass a former intimate partner) as well as subsequent Internet users who share nude images with no ill intent, no knowledge as to whether the persons depicted had a reasonable expectation of privacy, and no present or prior relationship with the persons depicted.

B. "Strict Scrutiny" Applies To Content-Based Restrictions on Free Speech—and Is Not Limited to Matters of Public Concern

Unable to show that the Act meets strict scrutiny, the State asks this Court to limit the application of the "strict scrutiny" test, arguing that "[t]he level of scrutiny depends on the value of the speech" (State Br. 10), and particularly that, for strict scrutiny to apply, the restricted speech must be related to a matter of public concern (*e.g.* State Br. 17, 19, 44-45). Simply put, that is neither what the law is nor what the precedents of the U.S. Supreme Court and this Court hold.

Except for "historic and traditional categories," such as obscenity and defamation, in which the First Amendment has long permitted restrictions,[9] and except for special provisions applied to the analysis of commercial speech,[10]

[9] "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. These historic and traditional categories long familiar to the bar—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 559 U.S. at 468-69 (citations and internal quotation marks omitted).

[10] "[O]ur decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government

determining whether a restriction on speech is permissible under the First Amendment does not entail placing a value on the speech.

> The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803).

Stevens, 559 U.S. at 470. In *Stevens*, rejecting the government's argument that depictions of illegal acts of animal cruelty should be subject to a categorical ban by adding it to the "historic" categories of unprotected speech such as defamation and fraud, the Court stated,

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also *id.*, at 12. As a free-floating test for First Amendment coverage, that sentence is startling and dangerous.

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regulation, and other varieties of speech. . . . The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . . The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980) (citations and internal quotation marks omitted).

559 U.S. at 470. The Court went on to apply strict scrutiny and invalidate the statute, without any reference to whether or not the statute relates to a matter of public concern.[11]

Neither the U.S. Supreme Court nor this Court has ever limited the application of strict scrutiny to matters of public concern. Thus, for example, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), referred to extensively by the State (State Br. 14-19), the U.S. Supreme Court reviewed a town ordinance regulating the size and placement of signs based on the nature of the event, and held that "a speech regulation targeted at a specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." 135 S. Ct. at 2230 (citing *Consolidated Edison Co. of N.Y. v. Publ. Serv. Comm'n of N. Y.*, 447 U.S. 530, 537 (1980)). The Court went on to apply strict scrutiny and hold the sign ordinance in question unconstitutional without any reference to whether or not it relates to a matter of public concern. *See also United States v. Alvarez*, 567 U.S. 709, 724 (2012) (federal "Stolen Valor Act" which criminalized

[11] When the government endeavors to "suppress one side of a debate on a matter of public concern," State Br. 1, the government engages in "viewpoint discrimination," which is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-31 (1995). Viewpoint discrimination is subject to even more exacting scrutiny than other forms of content-based discrimination, because the government may not "favor one speaker over another," "discriminat[e] against speech because of its message," or target "particular views taken by speakers on a subject." 515 U.S. at 828–29.

false claims about the receipt of military medals held subject to "exacting scrutiny" and held unconstitutional); *Entm't Merchs. Ass'n*, 564 U.S. at 799, 804 (California statute regulating violent video games held subject to strict scrutiny, and held unconstitutional); *Playboy*, 529 U.S. at 812-13 (federal statute regulating cable operators that provide channels "primarily dedicated to sexually-oriented programming" held subject to strict scrutiny and held unconstitutional); *Thompson,* 442 S.W.3d at 343-44 (Texas statute that criminalized photographing persons, not in bathroom or private dressing room, if done without consent and done with intent to arouse or gratify sexual desire of any person, held subject to strict scrutiny and held unconstitutional); *Lo*, 424 S.W.3d at 19 (Texas statute that created third degree felony offense of communicating in a sexually explicit manner with a person believed to be a minor with an intent to arouse or gratify sexual desire, held subject to strict scrutiny and held unconstitutional when not narrowly drawn to achieve the State's compelling interest in protecting children from sexual predators).

As part of its argument that "strict scrutiny" of content-based regulations should be limited to matters of public concern, the State engages in an extended discussion of the secondary effects doctrine to argue that "a statute is not subject to strict scrutiny merely because it regulates based on content." State Br. 23-32. The State's argument distorts the secondary effects doctrine. In *City of Renton v.*

Playtime Theatres, Inc., 475 U.S. 41 (1986), in which the U.S. Supreme Court articulated the secondary effects doctrine, the Court held that a zoning ordinance that restricted the location of "adult" motion picture theaters was not subject to "strict scrutiny" because:

> [T]he Renton ordinance is aimed not at the *content* of the films shown at "adult motion picture theatres," but rather at the *secondary effects* of such theaters on the surrounding community. . . . The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.

475 U.S. at 47-48 (emphasis in original) (alteration in original). Thus, *Renton* did not create an exception to the rule that strict scrutiny applies to content-based regulations of speech; *Renton*, instead, held that strict scrutiny did not apply because the zoning ordinance was not content-based. Here, there can be no dispute that the Act is a content-based regulation.

The State's argument that the Act can be justified as a regulation of "secondary effect of harm" (State Br. 49) also fails, for at least two reasons. First, any argument that the reaction of the depicted person to the disclosure could be deemed a "secondary effect" is negated by the U.S. Supreme Court's decision in *Boos v. Barry*:

> Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to

> *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.

485 U.S. 312, 321 (1988) (plurality opinion). *See also Boos*, 485 at 334 (Brennan, J. & Marshall, J., concurring in part) ("Whatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech."). Second, critical to the Court's decision in *Renton* was that the zoning ordinance "does not ban adult theaters altogether," but merely restricted permissible locations for such theaters, and permitted it as a "time, place, and manner regulation." 475 U.S. at 46. Here, the Act bans—and does not merely regulate—disclosure absent effective consent. A criminal statute that states, in effect, 'at no time, in no place, in no matter,' cannot be sustained as a "time, place, and manner" regulation. *Hill v. Colorado*, 530 U.S. 703, 726 (2000) ("time, place, and manner" regulation sustained where it "leaves open ample alternative channels for communication.").

C. The Act Cannot Survive Strict Scrutiny

The Relationship Privacy Act is thus subject to strict scrutiny, and cannot survive strict scrutiny, or even the lower level of scrutiny argued by the State:

- The Act imposes criminal liability absent an intent to harm.
- The Act imposes criminal liability even if the person who published the image did not know that the depicted person did not give "effective"

consent, did not know the circumstances under which the image was made, and did not know whether the depicted person had an expectation of privacy.

- The Act contains no exceptions for images that have artistic, historical, or newsworthy value, or are otherwise in the public interest.
- The Act fails to define "harm." Absent a definition, a prosecution could be brought if the depicted person was merely annoyed or embarrassed by the disclosure.

The Legislature's central intent in enacting the "Relationship Privacy Act"[12] was to protect "relationship privacy" by combatting "revenge porn."[13] The harms of revenge porn are undoubtedly real, and a strong argument can be made that the government has a compelling interest in protecting individuals from disclosures of intimate images, made with malicious intent, where the person

[12] Acts 2015, 84th R.S., ch. 852 (S.B. 1135), §1, effective September 1, 2015.

[13] The Texas Committee Report for S.B.1135 stated, "In recent years, there has been a disturbing Internet trend of sexually explicit images disclosed without the consent of the depicted person, resulting in immediate and in many cases, irreversible harm to the victim. Victims' images are often posted with identifying information such as name, contact information, and links to their social media profiles. The victims are frequently threatened with sexual assault, harassed, stalked, fired from jobs, and forced to change schools. Some victims have even committed suicide. In many instances, the images are disclosed by a former spouse or partner who is seeking revenge. This practice has been commonly referred to as 'revenge pornography' by the media. To add insult to injury, 'revenge porn websites' are further preying on victims by charging fees to remove the sexually explicit images from the internet." TEX. COMM. REP., 84th R.S., ch. 852 (S.B. 1135) (May 27, 2015).

making the disclosure knew that the depicted person did not consent to the disclosure, and knew that the depicted person had a reasonable expectation of privacy. But Section 21.16(b), as enacted, is neither a "relationship privacy" law nor a "revenge porn" law. And while the Texas Committee Report grounds the Act on grave harm suffered by the depicted victim—"[t]he victims are frequently threatened with sexual assault, harassed, stalked, fired from jobs, and forced to change schools"[14]—the Act fails to limit liability to cases in which the victim sustained physical, financial, or serious emotional harm. The Information in this case merely charges that "the disclosure of the visual material caused harm to the complainant, namely, embarrassment."[15]

When legislatures criminalize speech, loaded phrases such as "revenge porn" cannot justify a law whose text does not narrowly address the intentionally harmful conduct claimed as motivation for the restriction. *Stevens*, 559 U.S. at 474 ("We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a 'depiction of animal cruelty' nowhere requires that the depicted conduct be cruel."). In short, criminalizing speech is an area of legislation that demands precision. *Reno,* 521 U.S. at 874.

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[14] *Id.*

[15] Information, *State v. Jordan Jones* (67295-A).

In analyzing whether Section 21.16(b) has been narrowly drawn with precision, the State tells this Court:

> The State's argument will focus on "classic" revenge porn because, from a constitutional perspective, it is the least objectionable material covered by the statute. . . . If typical "revenge porn" can be lawfully regulated, everything covered by the statute can.

State Br. 10. The State has it backwards. First, it cannot seriously be maintained that "revenge porn" is less objectionable than a broad range of publications that Section 21.16(b) makes a felony. Does the State argue that "revenge porn" is less objectionable than a newspaper publishing an image from an art gallery exhibition, when both the curator and the editor believed that the persons depicted consented to the exhibition and the publication? Second, the question is not whether "revenge porn" can be regulated; the question is whether "revenge porn" can be regulated in this manner by this Act, which does not narrowly focus on revenge porn, but instead sweeps within its prohibitions a broad range of constitutionally-protected speech.[16]

Nor can the Act be defended based on a supposition that the State would not bring prosecutions for conduct that did not bear the hallmarks of revenge porn,

[16] Even if the Act were not content-based, and thus were subject to a lower level of scrutiny, the Act could not sustain such scrutiny because the sweep of the Act is "substantially broader than necessary to achieve the government's interest." *Thompson*, 442 S.W.3d at 345 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

or a hope that the State would not bring prosecutions for newsworthy, artistic, and historic images. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480.

II. The Legislature Can Protect Relationship Privacy Without Directly Burdening Protected Speech

A. By Failing To Make Knowledge and Ill Intent Elements of the Offense, the Legislature Did Not Use the Least Restrictive Means to Serve the Act's Purpose

If the Legislature's intent was to protect "relationship privacy" and combat "revenge porn," it utterly failed to do so in a manner calculated to minimize the harms to lawful speech protected by the First Amendment. Because less restrictive, alternative means are available to address revenge porn, the Act cannot survive strict scrutiny. *Playboy,* 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (citing *Reno,* 521 U.S. at 874); *Ashcroft,* 542 U.S. at 665 (affirming preliminary injunction against Child Online Protection Act because, among other reasons, the government had not carried the burden of showing that the proposed alternatives would be less effective). The Act also fails strict scrutiny because the State cannot show—as it must—that the Act "will in fact alleviate these harms in a direct and

material way." *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 664 (1994) (plurality opinion).

The Legislature made no attempt to tailor the criminal statute to combatting revenge porn to protect relationship privacy by, *e.g.*, including, as elements of the offense, malicious intent and knowledge that the depicted person had a reasonable expectation of privacy. Including these as elements of the offense would not only line the crime up closer to its stated legislative purpose, but in so doing would dramatically reduce the risk that the Act would chill protected speech.

The State of Vermont's "revenge porn" statute recently withstood a facial challenge of unconstitutionality because it was narrowly drawn to serve the legislative purpose. *State of Vermont v. VanBuren,* No. 2016-253, 2018 WL 4177776 (Vt. Aug. 31, 2018). There were at least four critical differences between Vermont's statute and the Texas Relationship Privacy Act. First, the Vermont statute only criminalizes disclosures that were made with an intent to harm.[17] Second, the Vermont statute only criminalizes disclosures that would cause a reasonable person to suffer harm. The Vermont statute thus provides:

> A person violates this section if he or she knowingly discloses a visual image of an identifiable person who is nude or who is engaged

[17] The Vermont Supreme Court stated that the statute requires "specific intent to harm, harass, intimidate, threaten, or coerce the person depicted or to profit financially," noting that therefore it was "express[ing] no opinion as to whether this narrowing element is essential to the constitutionality of the statute." 2018 WL 4177776, at *16 & n.10.

> in sexual conduct, without his or her consent, ***with the intent to harm, harass, intimidate, threaten, or coerce the person depicted, and the disclosure would cause a reasonable person to suffer harm.***

VT. STAT. ANN. tit. 13, §2606(b)(1) (2018) (emphasis added). Third, while both the Texas statute and the Vermont statute provide that there is no liability unless the person depicted sustained "harm," the Texas statute does not define "harm," while the Vermont statute defines harm as "physical injury, financial injury, or serious emotional distress." VT. STAT. ANN. tit. 13, §2606(a)(2) (2018). Fourth, the Vermont statute, by its terms, does not apply to "[d]isclosures made in the public interest" or to "[d]isclosures of materials that constitute a matter of public concern," VT. STAT. ANN. tit. 13, § 2606(d)(2)-(3) (2018).

B. The Texas Senate and Texas House Are Considering Bills That Would Add Knowledge and Ill Intent as Elements of the Offense

The Texas Legislature is now considering amendments to Section 21.16(b) to address these issues. On November 12, 2018, bills were introduced in the Texas Senate and the Texas House to amend Section 21.16(b) to add knowledge and ill intent as elements of the offense.

- **Intent to harm.** Senate Bill 97 would amend Section 21.16(b)(1) to read: "(b) A person commits an offense if: (1) without the effective consent of the depicted person ***and with the intent to harm that person,*** the person discloses visual material depicting another person with the

person's intimate parts exposed or engaged in sexual conduct; . . . ." S.B. 97, 86th Leg. (Tex. 2018) (emphasis added). House Bill 98 would amend Section 21.16(b)(1) to read: "(b) A person commits an offense if: (1) without the effective consent of the depicted person ***and with the intent to harass, annoy, alarm, abuse, torment, or embarrass that person***, the person discloses visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct; . . ." H.B. 98, 86th Leg. (Tex. 2018) (emphasis added).[18]

- **Knowledge that the depicted person had a reasonable expectation of privacy.** Senate Bill 97 and House Bill 98 would each amend Section 21.16(b)(2) to read: "(b) A person commits an offense if: … (2) ***the person knows or has reason to believe that*** 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

[18] Both Senate Bill 97 and House Bill 98 would retain, among other elements of the offense, that "the disclosure of the visual material causes harm to the depicted person." In considering Senate Bill. 97 and House Bill 98, the Legislature can and should consider including a definition of "harm," as used in the proposed element "intent to harm" and in the existing element "causes harm." In defining "harm," the Legislature can and should consider whether, applying strict scrutiny, "intent to annoy" or "intent to embarrass" is sufficient to constitute "intent to harm," and whether "annoyance" or "embarrassment" is sufficient to constitute "harm."

would remain private; . . . .” Tex. S.B. 97 , Tex. H.B. 98 (emphasis added).[19]

The bills offer the opportunity for the Texas Legislature to do what is required for this content-based restriction on free speech to survive strict scrutiny—to make sure that the statute is “narrowly drawn to serve a compelling government interest,” by using the “least restrictive means of achieving the government interest.” *Thompson*, 442 S.W.3d at 344.

CONCLUSION

Amici respectfully request that that this Court affirm the judgment of the Twelfth Court of Appeals holding Texas Penal Code § 21.16(b) unconstitutional on its face, because it violates the First Amendment to the United States Constitution.

Dated: December 7, 2018

[19] In considering this language, the Legislature can and should consider whether “has reason to believe that” is too low a standard, and whether this element of the offense should be that “***the person knows that*** 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. . . .” (emphasis added). The Legislature can and should also consider adding knowledge of the lack of effective consent as an element of the offense.

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APPENDIX
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TEXAS PENAL CODE § 21.16

(a) In this section:

(1) "Intimate parts" means the naked genitals, pubic area, anus, buttocks, or female nipple of a person.

(2) "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.

(3) "Sexual conduct" means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse.

(4) "Simulated" means the explicit depiction of sexual conduct that creates the appearance of actual sexual conduct and during which a person engaging in the conduct exhibits any uncovered portion of the breasts, genitals, or buttocks.

(5) "Visual material" means:

(A) 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; or

(B) 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.

(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.

(c) A person commits an offense if the person intentionally threatens to disclose, without the consent of the depicted person, visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct and the actor makes the threat to obtain a benefit:

(1) in return for not making the disclosure; or

(2) in connection with the threatened disclosure.

(d) A person commits an offense if, knowing the character and content of the visual material, the person promotes visual material described by Subsection (b) on an Internet website or other forum for publication that is owned or operated by the person.

(e) It is not a defense to prosecution under this section that the depicted person:

(1) created or consented to the creation of the visual material; or

(2) voluntarily transmitted the visual material to the actor.

(f) It is an affirmative defense to prosecution under Subsection (b) or (d) that:

(1) the disclosure or promotion is made in the course of:

(A) lawful and common practices of law enforcement or medical treatment;

(B) reporting unlawful activity; or

(C) a legal proceeding, if the disclosure or promotion is permitted or required by law;

(2) the disclosure or promotion consists of visual material depicting in a public or commercial setting only a person's voluntary exposure of:

(A) the person's intimate parts; or

(B) the person engaging in sexual conduct; or

(3) the actor is an interactive computer service, as defined by 47 U.S.C. Section 230, and the disclosure or promotion consists of visual material provided by another person.

(g) An offense under this section is a state jail felony .

(h) If conduct that constitutes an offense under this section also constitutes an offense under another law, the actor may be prosecuted under this section, the other law, or both.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4, TEX. R. APP. PROC., I hereby certify that:

1. This brief complies with the word-volume limitations of Rule 9.4(i)(2), TEX. R. APP. PROC., because this brief contains 7,286 words, excluding the parts of this brief exempted by Rule 9.4(i)(1), TEX. R. APP. PROC.

2. This brief complies with the typeface requirements of Rule 9.4(e), TEX. R. APP. PROC., because this brief has been prepared in a conventional typeface using Microsoft Word in Times New Roman 14-point font (with footnotes in Times New Roman 12-point font).

Dated: December 7. 2018

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CERTIFICATE OF SERVICE

Pursuant to Rule 11, TEX. R. APP. PROC., I hereby certify that on December 6, 2018, a true and correct copy of the foregoing Brief of Amici Curiae Media Coalition Foundation, Inc. et al., has been served by email and by First Class United States Mail, postage prepaid, to counsel for all parties:

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