No. PD-0552-18

In the Court of Criminal Appeals of the State of Texas

EX PARTE JORDAN BARTLETT JONES

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 AMICUS CURIAE THE OFFICE OF THE ATTORNEY GENERAL IN SUPPORT OF THE STATE

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

ANDREW B. DAVIS
Assistant Solicitor General

Counsel for the Office of the Attorney General

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Interest of Amicus Curiae

The Office of the Attorney General defends Texas statutes that are challenged under the Constitution of the United States. By requiring parties to notify the Office of the Attorney General of an action challenging the constitutionality of a state statute when the attorney general is not a party to or counsel involved in the litigation, Tex. Gov't Code § 402.010 (requiring notice in civil suits); *see also* Tex. Const. art. V, § 32 (permitting notice in criminal cases), the State has explicitly recognized this interest.

No fee has been paid for the preparation of this brief.

To the Honorable Court of Criminal Appeals:

Victims of nonconsensual pornography suffer horrific trauma. They often suffer severe psychological harm, become the subject of abuse and violent threats, receive sexual solicitations from strangers, or lose or quit their jobs.[1] Some victims take their own lives. And the problem is far from contained, with one recent study finding that "roughly 10.4 million Americans"—the vast majority of them women and girls—"have been threatened with or experienced the posting of explicit images without their consent." *State v. VanBuren,* 2018 VT 95, ¶ 3 (Vt. 2018).

These traumas should not just be "part of life," as the defendant would have it. Br. 50. The State has a compelling interest in protecting its citizens from the egregious harms caused by nonconsensual pornography. As the Supreme Court of the United States has long recognized, "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass." *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 252 (1891).

Penal Code § 21.16(b) serves this compelling interest without being unconstitutionally overbroad. Far from criminalizing innocent disclosures protected by the First Amendment, it makes unlawful the disclosure of intimate material *only* if the victim had a reasonable expectation of privacy in the material and the perpetrator

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[1] *See* Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How A Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 Chi.-Kent L. Rev. 247, 248-50 (2015).

intentionally disclosed the material. Because any potential unconstitutional applications are exceedingly rare and dwarfed by the statute's legitimate sweep, the law is facially constitutional.

ARGUMENT

I. Texas Penal Code § 21.16(b) Is Narrowly Drawn.

"The first step in overbreadth analysis is to construe the challenged statute: it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). The statute here is not nearly as broad as the Twelfth Court or the defendant read it to be. It is closely tied to the government's compelling interest in protecting privacy because it only criminalizes nonconsensual and intentional disclosures of exceedingly private visual material.

Subsection 21.16(b) explicitly limits itself to protecting privacy. It provides that disclosing intimate visual material is a criminal offense *only* if: "th[at] 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." Tex. Penal Code § 21.16(b)(2). Put differently, the statute applies only when, under the relevant circumstances, (a) the depicted person subjectively intended to keep the visual material private and (b) this intention, if it existed, was objectively reasonable. *Cf. Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996) (interpreting "reasonable expectation" of privacy in the context of searches and seizures to have

subjective and objective components). The statute does *not* cover disclosures of intimate visual material that do not violate a person's reasonable expectation of privacy. If the person depicted in visual material could not reasonably expect for the image to remain private—for example, because the image shows him voluntarily exposing his intimate parts or engaging in sexual conduct "in a public or commercial setting," Tex. Penal Code § 21.16(f)(2)—or the disclosure does not substantially infringe a person's privacy because the material does not "reveal[]" his "identity," *id.* § 21.16(b)(4)—then even nonconsensual disclosure is not prohibited by this law.

By the same token, the disclosing person must *intend* to disclose this exceedingly private visual material. Although the person need not intend the disclosure to be without consent, *see* Tex. Penal Code § 21.16(b)(1) ("without the effective consent of the depicted person, the person intentionally discloses . . ."), he must intend the disclosure of intimate visual material in which the depicted person has a reasonable expectation of privacy. This is because the statute prohibits only the intentional disclosure of "visual material" that "was obtained by the person or created under circumstances in which the depicted person" had a reasonable expectation of privacy. *See id.* § 21.16(b)(1), (2). *Cf. Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) ("courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element").[2] If the person does not intend to disclose private information and thus does

[2] At the very least, the Court should adopt this construction to save the statute's constitutionality. *See Osborne v. Ohio*, 495 U.S. 103, 112-21 (1990) (savings construction can be used to save a statute from overbreadth challenge); *Ex parte Thompson*, 442 S.W.3d 325, 339 (Tex. Crim. App. 2014) (courts should "employ a reasonable narrowing construction").

not intend to violate the depicted person's reasonable expectation of privacy, he cannot be held criminally liable under section 21.16(b). The statute is closely drawn to protect individual privacy by keeping private what was meant to be private unless the depicted persons consents to disclosure.

II. Subsection 21.16(b) Is Not Unconstitutionally Overbroad.

"In the First Amendment context . . . a law may be invalidated as [facially] overbroad if a *substantial* number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted) (emphasis added). That is not this statute. The overwhelming majority of subsection 21.16(b)'s applications are constitutional because the statute's requirement that the person intentionally disclosed private information is narrowly tailored to advance the state's compelling interest in protecting its citizen's most private moments. The few hypothetical applications of subsection 21.16(b) that would contradict the First Amendment do not render the statute unconstitutionally overbroad and can be dealt with—if they ever occur—through as-applied challenges.

A. Criminalizing intentional disclosures of intimate visual material in which a person has a reasonable expectation of privacy is constitutional.

Assuming for the moment that strict scrutiny applies, when subsection 21.16(b) is correctly construed as criminalizing only intentional disclosures of exceedingly private visual material, it satisfies even strict scrutiny because it "is narrowly drawn to

serve a compelling government interest." *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014).

That the State has a compelling interest in preventing the substantial harms caused by the nonconsensual public disclosure of private, sexually explicit material should be beyond doubt. Over a century ago, the Supreme Court recognized that "[t]o compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass." *Union Pac. Ry.*, 141 U.S. at 252. Modern precedents echo this by recognizing the importance of privacy with regard to sexual matters and exposure of intimate areas. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Ex parte Thompson*, 442 S.W.3d at 348 ("[S]ubstantial privacy interests are invaded in an intolerable manner when a person is photographed . . . with respect to an area of the person that is not exposed to the general public, such as up a skirt."). Indeed, given the devastating harm—including lost employment, depression, and even suicide—caused by nonconsensual pornography, it is difficult to imagine a more compelling privacy interest.

Subsection 21.16(b)—when correctly construed—advances this compelling interest by criminalizing only exceedingly harmful invasions of privacy. If the disclosure is not visual material of the most intimate kind—depictions of another person's intimate parts exposed or engaged in sexual conduct, there is no violation; if the disclosure does not reveal the identity of the depicted person, there is no violation; if the disclosure does not cause harm, there is no violation; and, importantly, if the accused did not intentionally violate the depicted person's reasonable expectation of privacy, there is no violation. *See* Tex. Penal Code § 21.16(b)(1)-(4), (f).

These limits ensure that citizens still have "ample alternative channels" for the disclosure of sexually explicit visual material, should they so wish. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). No person stands to be convicted under subsection 21.16(b) simply by sharing an explicit image, without more, and every person remains able to share explicit images consistent with the First Amendment.[3] All subsection 21.16(b) does is assure every person in Texas that no one can spread intimate images of them across the community and internet without their consent—an assurance that generally *encourages* private speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) ("[T]he fear of public disclosure of private conversations might well have a chilling effect on private speech.").

By criminalizing nonconsensual pornography in which the victim has a reasonable expectation of privacy, while leaving individuals free to disclose the very same images if they receive consent, subsection 21.16(b) easily complies with the First Amendment.

[3] For example if two persons, each without effective consent, disclose the same image and create the same harm, but one of them obtained the image under circumstances in which the depicted person had an expectation of privacy (say, a hacker who steals the image from the victim's phone), while the other obtained it under circumstances in which the victim did not have an expectation of privacy (say, a person who sees the image on a public website that does not indicate the source of the image), only the former could have violated the statute. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (concluding that a protective order allowing a party to "disseminate the identical information covered by the . . . order as long as the information [wa]s gained through means independent of the court's processes" did not offend the First Amendment).

B. Extraordinarily few applications of subsection 21.16(b) are unconstitutional under current doctrine, especially when compared to the law's legitimate sweep.

Subsection 21.16(b) is also not unconstitutionally overbroad. Overbreadth is "strong medicine" that applies only when the statute "prohibit[s] a substantial amount of protected expression." *Ex parte Thompson*, 442 S.W.3d at 349-50. It is not needed here, where the possible unconstitutional applications of subsection 21.16(b) are very rare, particularly compared to the law's legitimate sweep.[4]

The defendant, the court of appeals, and amici disagree largely because they misunderstand the statute's scope and purpose. Amici, for example, argue that "[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 circumstance under which the image was created." Br. of Amici Curiae Media Coalition Foundation, Inc. et al. at 9; *see also Ex parte Jones*, 2018 WL 2228888, at *6 (Tex. App.—Tyler May 16, 2018, pet. granted) (adopting similar position). But that is irrelevant. What matters is that the person must intentionally disclose intimate visual material in which the depicted person has a reasonable expectation of privacy. *See supra*. And a person may intentionally violate the depicted person's reasonable expectation of privacy without knowing the circumstances of the image's creation if he obtained the

[4] To the extent that the defendant argues that a statute's only legitimate sweep is the criminalization of *unprotected* speech, such as obscenity and child pornography, he is mistaken. *Cf.* Br. 37. A law's "legitimate sweep" includes all *constitutional* applications, *see Stevens*, 559 U.S. at 473 (comparing legitimate sweep to unconstitutional applications), including, as here, applications to protected speech that are constitutional because they satisfy the appropriate level of scrutiny, *see supra*.

material under circumstances that communicated its private nature. *See* Tex. Penal Code § 21.16(b)(2).

Similarly, amici argue that the statute is overbroad because "[i]ll intent is not an element of the offense." Media Coalition Br. 9. But "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.); *see also id.* at 492 (Scalia, J., concurring in part and concurring in the judgment) (agreeing that motivation is "ineffective to vindicate the fundamental First Amendment rights" of speakers). Moreover, including a motive element could both raise issues of viewpoint discrimination and undercut the law's ability to protect victims of nonconsensual pornography. *See* Justin Pitcher, *The State of the States: The Continuing Struggle to Criminalize Revenge Porn*, 2015 B.Y.U.L. Rev. 1435, 1455 (2015) ("Motive requirements tend to ignore the reality that many perpetrators are motivated not by an intent to distress but by a desire to entertain, to make money, or achieve notoriety.").

The only potentially unconstitutional applications of the statute raised in the briefing are to disclosures made in the public interest. Media Coalition Br. 10. It will be quite rare, however, for a disclosure of nonconsensual pornography to be in the public interest. Given the sheer magnitude of nonconsensual pornography that continues to proliferate and that subsection 21.16(b) constitutionally criminalizes, the rare cases of disclosures in the public interest do not warrant facial invalidation of the law. As even the defendant recognizes, relatively rare applications—as public

interest disclosures would be—can "be dealt with in as-applied challenges" if they ever arise. Br. 42 (citing *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)).

III. If this Court Determines that Subsection 21.16(b) Cannot Survive Strict Scrutiny, It Should Make Clear that Immediate Scrutiny Applies.

The level of scrutiny is not dispositive if the Court agrees that subsection 21.16(b) satisfies strict scrutiny. If the Court were to disagree, however, it should decide which level of scrutiny applies and hold that subsection 21.16(b) is subject at most to intermediate scrutiny because—except in the rarest of circumstances—it criminalizes speech on matters of purely private significance and is aimed at the secondary effects of that speech, not the speech itself.

A. The Supreme Court has repeatedly recognized that "not all speech is of equal First Amendment importance, [ ] and where matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (cleaned up). That is because a law limiting speech on matters of purely private significance "is no threat to the free and robust debate of public issues"—the core concern of the First Amendment. *Id.* (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (opinion of Powell, J.)). Accordingly, whether "speech is of public or private concern" may often be dispositive because it determines the level of protection the First Amendment affords. *Id.* at 451.

And the diminished protection afforded to speech without any public value is further lessened where that speech runs up against substantial privacy concerns. "Privacy of communication is an important interest," *Bartnicki*, 532 U.S. at 532, that

is protected by the Constitution, *see Lawrence*, 539 U.S. at 564-67 (describing privacy interests protected by Due Process Clause.). *See also Ex parte Thompson*, 442 S.W.3d at 348. That is why *Bartnicki* explicitly limited its holding that the First Amendment protects the publication of wiretapped private conversations to circumstances where the discloser is *innocent* and the conversation is on a "matter[] of *public importance*." *Bartnicki*, 532 U.S. at 525, 534 (emphasis added); *id.* at 535-36 (Breyer, J., concurring) ("I agree with [the Court's] narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully . . . and (2) the information publicized involved a matter of unusual public concern.").

Because the State's nonconsensual-pornography law targets speech of purely *private* concern, *cf. Dun & Bradstreet*, 472 U.S. at 762 (information about a particular individual's "credit report concerns no public issue"), in which the depicted person had an expectation of privacy, Tex. Penal Code § 21.16(b)(2), the law is, *at most*, subject to intermediate scrutiny. Any higher level of scrutiny incorrectly protects this speech at the same level as public speech on a public concern.

That courts and juries must "look at the content of the speech in question to decide if the speaker violated the law," *Ex parte Thompson*, 442 S.W.3d at 345, does not require this Court to apply heightened scrutiny. A law is content-based and subject to strict scrutiny only when it "distinguishes 'favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994)); *see also Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("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."). Whether courts and juries must "look at the content" of the speech is a good proxy for determining whether the law distinguishes between favored and disfavored speech—but it is not perfect.

This is a case in point. Although subsection 21.16(b) applies only to sexually explicit content, it is content-neutral because "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue"—private speech of purely private concern—receives lesser First Amendment protection. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Just as a State may "prohibit only that obscenity which is the most patently offensive in its prurience," *id.* (emphasis omitted), it can limit laws protecting private speech of private concern to the *most* private speech (images in which a person has an expectation of privacy) on the *most* private concern (images of a person's intimate parts exposed or engaged in sexual conduct) without raising the level of protection afforded to those general categories of less-protected speech.

More than that, subsection 21.16(b) is content-neutral because it singles out speech "by virtue of the source, rather than the subject matter." *Bartnicki*, 532 U.S. at 526; *see also Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 950 (7th Cir. 2015) (holding that law prohibiting publication of personal information obtained from motor vehicle records was content-neutral). Although subsection 21.16(b) applies only to sexually explicit visual material, it permits disclosure of that very same material if it is obtained or created in a way that does not violate a reasonable expectation of privacy. Because the law's focus is the source of the information, not its subject matter, it is content-neutral and not subject to strict scrutiny.

B. Subsection 21.16(b) is also content-neutral because it is aimed at the "secondary effects" of disclosing material that depicts an *identifiable* person's intimate parts exposed or engaged in sexual conduct. *Renton v. Playtime Theaters*, 475 U.S. 41, 47 (1986). In *Renton*, the Supreme Court upheld a law that treated "theaters that specialize in adult films differently from other kinds of theaters," *id.*, because even though that law applied only to certain speech content, it was justified without reference to that content. Specifically, it was justified by the desire to prevent adverse effects such as crime, lowered property values, and deterioration of residential neighborhoods. *Id.* at 48; *see also McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (holding that law prohibiting standing near abortion facilities was content-neutral).

The same is true here. Even though subsection 21.16(b) applies only to specific speech content, it specifically targets the serious and irreparable harms caused when a person discloses intimate visual images of another person without consent. It does not simply ban the disclosure of sexually explicit images—it bans only those disclosures that "reveal[] the identity of the depicted person," cause that person "harm," and violate the depicted person's reasonable expectation of privacy. Tex. Penal Code § 21.16(b). These limiting elements demonstrate that the law's target is not the content of the speech, but the negative consequences of violating a depicted person's reasonable privacy interests without his or her consent.

Prayer

The Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
/s/ Kyle D. Hawkins
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

ANDREW B. DAVIS
Assistant Solicitor General

Counsel for the Office of the Attorney General

Certificate of Service

On March 26, 2019, a true and correct copy of the foregoing was electronically filed and served on the following counsel of record:

Kevin Hayes
Michael J. West
Smith County District Attorney
4th Floor, Courthouse
100 North Broadway
Tyler, Texas 75702
mwest@smith-county.com

Mark W. Bennett
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002
MB@ivi3.com

Stacey M. Soule
State Prosecuting Attorney
John R. Messinger
Assistant State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

Microsoft Word reports that this brief contains 3,297 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
Kyle D. Hawkins