No. PD-0552-18

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Ex parte Jordan Bartlett Jones, Appellant

Appeal from Smith County

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STATE'S REPLY BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully presents to this Court its reply brief.

ARGUMENT

The parties disagree on nearly every facet of this case. Some disagreements were anticipated by the State in its opening brief. But appellant has made some unanticipated statements and arguments that fundamentally distort how the case should be viewed.

The choice between protected and unprotected speech is a false one.

Appellant makes five statements that confuse the legal framework. The first two deal with the government's power to regulate speech of any First Amendment value:

- "The restriction of protected speech is *never* legitimate."[1]
- "Whether as-applied or as-written, the application of a content-based restriction to protected speech is impermissible."[2]

Protected speech can plainly be restricted, even based on content. If that were not so, strict scrutiny would not exist and every First Amendment case would end once it is determined whether the speech at issue is categorically unprotected.

Appellant makes similar statements about overbreadth:

- "The overbreadth doctrine prohibits the government from banning *speech within one of the recognized categories of historically unprotected speech* if a substantial amount of *speech not within one of the recognized categories of historically unprotected speech* is prohibited or chilled in the process."[3]
- "The *legitimate sweep* of the statute comprises only *constitutionally unprotected speech*."[4]

The legitimate sweep of a statute also includes speech that is protected but constitutionally restricted. If it did not, any statute designed to restrict protected speech under the appropriate level of scrutiny would automatically fail overbreadth because it would have no legitimate sweep. That cannot be right. There are numerous statements from the Supreme Court which, out of context, lend support to

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1 App. Br. at 36.

2 App. Br. at 36 n.70.

3 App. Br. at 32 (emphasis in original).

4 App. Br. at 35 (emphasis in original).

appellant's argument,[5] but ultimately this Court's recent formulation is correct: "The question is whether the applications of such a statute that do implicate (and violate) the First Amendment are so substantial that the statute must be held invalid on its face."[6] In short, there can be no unconstitutional chilling effect when the "protected" speech at issue is lawfully restricted as determined by the proper level of scrutiny.[7]

Appellate also says:

> "So the [Supreme] Court has, in no uncertain terms, rejected an argument that speech protection depends on its value . . . ."[8]

Speech protection depends on its value. If it did not, there would not be categories of unprotected speech, varying levels of scrutiny based on content (commercial

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[5] *See*, *e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 254 (2002), cited by appellant at p. 58 of his brief: "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." That statement is true, but it was made in response to the Government's argument that it must be able to ban computer-generated child pornography in order to restrict real child pornography because they are difficult to tell apart. *Id*. at 254-55.

[6] *State v. Johnson*, 475 S.W.3d 860, 873 (Tex. Crim. App. 2015).

[7] That is why construction of a statute is always required and a scrutiny analysis is sometimes necessary. In some cases, the scope of permissible restriction has been previously established and the case can be decided on the ratio of legitimate sweep to incidental restriction. *See id*. at 873-74 (discussing the Supreme Court's treatment of Texas's previous flag-destruction statute). In other cases, the government's ability to restrict a certain subset of the speech covered is immaterial because the statute covered so much protected speech. *See U.S. v. Stevens*, 559 U.S. 460, 462-63 (2010) ("The Court therefore does not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. [The statute at issue] is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.").

[8] App. Br. at 41.

speech), or disparate treatment based on the contribution the speech makes to the marketplace of ideas (defamation, employment law).

Collectively, the five misstatements above explain why appellant reduces an argument over the standard of review to the simple question of whether everything covered by the statute falls outside of First Amendment protection.[9] It might also explain why he characterizes the State's articulation of a test to discern the proper level of scrutiny as an impermissible "value-of-speech argument" that the speech at issue is unprotected.[10] The State makes no such argument. It merely suggests that the harmful dissemination of sexual visual materials without consent and in violation of a reasonable expectation of privacy does not deserve the highest level of scrutiny. Appellant's overarching argument is a straw man.

"Public concern" is a valid test for applying strict scrutiny.

Appellant is correct that the Supreme Court has not used a "public concern" test to determine whether strict scrutiny applies. But the State did not invent the concept of "matters of public concern"—that Court did.[11] And the State does not

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[9] App. Br. at 39.

[10] App. Br. at 36. Such a test has been repeatedly rejected. *See Stevens*, 559 U.S. at 470; *U.S. v. Alvarez*, 567 U.S. 709, 717 (2012).

[11] *See*, *e.g.*, *Thornhill v. State of Alabama*, 310 U.S. 88, 101-02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent (continued...)

claim that the test explains all of even the Supreme Court's most prominent strict scrutiny cases. What the State offers is a theory of law that explains the largest number of cases in a principled way. In statistical terms, it is the "line of best fit."[12] As explained in the State's opening brief, a "public concern" test is the best fit for multiple reasons:

- It honors the Supreme Court's repeated explanations for the central purpose of both the First Amendment and strict scrutiny.
- It best explains why so many statutes that literally require inquiry into the content of the speech regulated are not subject to strict scrutiny.
- It brings scrutiny analysis in line with the public/private dichotomy drawn by the Supreme Court in other areas of First Amendment law.
- It jibes with the opinions of six concurring justices in the Supreme Court's last "content-based" case,[13] five of whom are still on that Court.

Again, the State is not arguing that speech not encompassed by the broad definition of "public concern" is unworthy of protection. The State argues only that speech that

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[11](...continued)
punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

[12] "A line of best fit (or 'trend' line) is a straight line that best represents the data on a scatter plot. This line may pass through some of the points, none of the points, or all of the points." https://mathbits.com/MathBits/TISection/Statistics1/LineFit.htm.

[13] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

is not essential for the marketplace of ideas to function properly is not entitled to the highest level of protection afforded by the First Amendment. Not even appellant claims that the speech at issue in this case is necessary for a vibrant democracy.

The level of scrutiny desired by appellant would unduly interfere with democracy.

Assuming that strict scrutiny is the proper test, appellant's argument over what legislative response to speech of this ilk is the least restrictive means shows how quickly necessary judicial oversight can devolve into impermissible micro-management of a coequal branch of government.

Appellant raises numerous ways in which the statute could be narrower, but misses that it is tailored precisely to the problem it sought to fix. The perceived problem in this case is privacy violations of a specific type—harmful non-consensual disclosure of sexual material deserving of privacy that could not be otherwise effectively remedied. The Legislature's solution was to criminalize those violations. The solution could not more narrowly fit the perceived problem.

The Legislature could have done any number of things differently, but did it have to as a matter of constitutional law? As Justice Breyer said, "An 'alternative' is 'less restrictive' only if it will work less First Amendment harm than the statute

itself, while at the same time similarly furthering the 'compelling' interest that prompted Congress to enact the statute."[14] How would this apply in this case?

Consider appellant's claim that civil remedies are less restrictive. The consequences of "violation" are perhaps better—eliminating the possibility of incarceration but exposing oneself to big monetary damages—but if they cover the same material they would be equally restrictive of one's speech. Even then, do civil remedies similarly further the State's interest? Should the Legislature have to demonstrate the number of suits that would go uninitiated (due to lack of resources and the inability of civil litigants to track some online offenders) and the illusory nature of unsatisfiable monetary judgments? Or is the Legislature permitted to conclude, on principle and/or common sense, that civil causes of action are insufficient to vindicate the rights of victims of this conduct?[15]

Consider the reality that other states' analogous statutes have different elements. Are the people's representatives allowed to define both the problem and its solution through legislation?[16] Or, if a criminal sanction is permissible, should the

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[14] *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 677 (2004) (Breyer, J., dissenting).

[15] Would anyone say the crime of murder is unnecessary in light of wrongful death suits? The victim is just as dead in both cases.

[16] *See Burson v. Freeman*, 504 U.S. 191, 207 (1992) (plurality) ("States adopt laws to address the problems that confront them."); *Ludwig v. State*, 931 S.W.2d 239, 241 (Tex. Crim. App. 1996) ("After all, the plain language of a statute is the best evidence we have of the legislative intent.").

Texas Legislature have to frame the problem the way appellant suggests by including every conceivable element a privacy-based offense could contain? If it did, would the speech at issue be any less restricted?[17] And could a court say with any confidence that the State's interests would be similarly furthered?

Although none of the Supreme Court's cases neatly illustrate the full scope of "the least restrictive means," none support the level of unilateral policy (re)determination suggested by appellant. In cases from the last decade, the means chosen were obviously incongruent with the government's stated interest:

- The Town of Gilbert's sign-regulation regime based on topics was "hopelessly underinclusive" because the distinctions drawn between types of signs had no relationship on the asserted aesthetic and traffic safety interests.[18]

- The Affordable Care Act's contraceptive mandate was not necessary for providing cost-free access because the government had the options of offering an accommodation for religious beliefs (done elsewhere in the ACA) or simply providing contraceptive services itself.[19]

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[17] Making additional elements a fact question, as appellant suggests, App. Br. at 55, does nothing to diminish the fear that one could be prosecuted because of a prosecutor's reasonable belief (probable cause) that the additional elements could be established beyond a reasonable doubt.

[18] *Reed*, 135 S. Ct. at 2231-32.

[19] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780-82 (2014) (freedom of religion case).

- The federal government could have protected the integrity of the military awards system by creating a database of Congressional Medal of Honor recipients.[20]

- California could not show a direct causal link between violent video games and harm to minors—its asserted interest in banning its sale or rental to minors—nor could it explain why it "singled out the purveyors of video games for disfavored treatment . . . compared to booksellers, cartoonists, and movie producers."[21]

In some, the scheme would have also failed intermediate scrutiny. But none of these cases purport to allow a court to determine not only the proper means but the problem itself.

The application of strict scrutiny to a statute like the one at issue should not result in a single, one-size-fits-all solution when the perceived scope of the problem varies so much across jurisdictions and even time. Moreover, the resources spent trying to determine what the legislative branch is allowed to do about speech of this relative unimportance to society proves Justice Kagan right: when the threat of a regulation effectively driving certain ideas or viewpoints from the marketplace "is not realistically possible, we may do well to relax our guard so that entirely reasonable laws imperiled by strict scrutiny can survive."[22]

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[20] *Alvarez*, 567 U.S. at 729.

[21] *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799-802 (2011).

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

The burden in an overbreadth challenge is always on the challenger.

When this Court reaches overbreadth, it should reject appellant's argument that the State has a burden if the statute is content-based. Not only do the cases upon which appellant relies—*Stevens* and *Alvarez*[23]—not support his argument, they illustrate that overbreadth and scrutiny analysis are distinct legal doctrines.

Stevens dealt with a statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty.[24] The Third Circuit rejected the argument that the restricted speech was categorically unprotected by the First Amendment and held the statute failed strict scrutiny because it served no compelling interest and was not narrowly tailored.[25] In a closing footnote, the Third Circuit suggested the statute might also be overbroad but was "satisfied to rest [its] analysis on strict scrutiny grounds alone."[26]

The Supreme Court agreed that the restricted speech was not categorically unprotected and recognized the Third Circuit's decision not to consider overbreadth.[27] But it declined to revisit the strict scrutiny analysis and did overbreadth anyway,

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[23] App. Br. at 38-39.

[24] 559 U.S. at 464.

[25] *U.S. v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008), *aff'd*, 559 U.S. 460 (2010).

[26] *Id*. at 235 n.16.

[27] 559 U.S. at 467-72.

calling it "*a second type of facial challenge*."[28] "Strict scrutiny" was mentioned only in the Supreme Court's recitation of the Third Circuit's holding.[29] The idea that content-based statutes are presumptively invalid was mentioned, but only in the portion of the opinion explaining why the restricted speech was not categorically unprotected.[30] The case was decided, as the Supreme Court said it would be, on the statute being "substantially overbroad" because the impermissible applications of the statute "far outnumber[ed] any permissible ones."[31]

Alvarez dealt with a violation of the Stolen Valor Act, which criminalized lying about receiving the Congressional Medal of Honor.[32] A plurality found the statute did not "satisfy exacting scrutiny,"[33] which looks and operates much like strict scrutiny even though the plurality did not mention it by name.[34] Two concurring

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[28] *Id*. at 473 (internal citations omitted, emphasis added). The decision to "review" a type of facial challenge not decided in the court below met resistance, but only because striking a statute as overbroad should be a last resort; no court had determined if the statute was unconstitutional as applied to Stevens. *Id*. at 484 (Alito, J., dissenting).

[29] *Id*. at 467.

[30] *Id*. at 468.

[31] *Id*. at 481-82.

[32] *Alvarez*, 567 U.S. at 713-14.

[33] *Id*. at 724.

[34] The plurality recognized the Government's compelling interest "in protecting the integrity of the Medal of Honor," calling it "beyond question," but held the Government failed to show that its "chosen restriction" on speech was "actually necessary to achieve its interest" through "a direct (continued...)

justices would have held that "intermediate scrutiny" applied.[35] Neither the plurality nor the concurring justices considered overbreadth. The portion of *Alvarez* cited by appellant is part of its explanation for why the lies at issue were not categorically exempt from First Amendment protection.[36]

Conclusion

The Legislature limited its reach to so-called "revenge porn" and other non-consensual disclosures of sexual content that harm the depicted person.[37] This Court could adopt a "public concern" test and conclude that strict scrutiny is a poor fit for such a statute. It could find that the statute merits intermediate scrutiny because it does not regulate the effect of the speech on the listener. If necessary, it could find that the statute satisfies strict scrutiny because the Legislature focused its compelling interest to restrict only the speech it deemed most harmful. However it does so, it should reverse the court of appeals and allow these prosecutions to proceed.

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[34](...continued)
causal link" between it and the injury to be prevented. *Id*. at 725 (internal quotations omitted). The Government also failed to show "why counterspeech would not suffice to achieve its interest." *Id*. at 726-28. The plurality found, "[i]n addition," that the restriction was not the "least restrictive means among available, effective alternatives." *Id*. at 729.

[35] *Id*. at 731-32 (Breyer, J., concurring) (joined by Justice Kagan).

[36] App. Br. at 39 (citing *Alvarez*, 567 U.S. at 722).

[37] Appellant agrees that the statute at issue is intended to protect the depicted person. App. Br. at 51.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,884 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of November, 2018, a true and correct copy of the State's Reply Brief has been e-served on the following:

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