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

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

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

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

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

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

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

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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IN THE COURT OF CRIMINAL APPEALS

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STATE'S BRIEF ON THE MERITS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The constitutionality of a statute under the First Amendment usually depends on whether it is subject to strict scrutiny. This Court has held that strict scrutiny applies whenever you have to look at the speech to apply the law. This is wrong. The threshold question is not whether you have to look at speech but at what speech you are looking. The secondary question is the government's intent. Strict scrutiny should be reserved for when the government uses a statute to suppress one side of a debate on a matter of public concern. The "revenge porn" statute is not a tool of suppression and is constitutional under an appropriately lower level of scrutiny.

STATEMENT OF THE CASE

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

STATEMENT REGARDING ORAL ARGUMENT

The Court denied the State's request for oral argument.

ISSUES PRESENTED

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

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

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

STATEMENT OF FACTS

There is no factual record because this appeal arises out of a pretrial facial challenge to the constitutionality of the statute.

SUMMARY OF THE ARGUMENT

The primary purpose of the First Amendment is to preserve an uninhibited marketplace of ideas so that the people may discuss matters of public concern.

Government regulation designed to suppress one side of a debate on a matter of public concern is appropriately subjected to the highest level of review—strict scrutiny. All other protected speech is reviewed under intermediate scrutiny, *i.e.*, whether the regulation is justified by a substantial interest and the government's solution is narrowly tailored to serve that interest.

The statute at issue should be reviewed under intermediate scrutiny because it does not regulate speech on matters of public concern and, if it does, that regulation is incidental to the prevention of harm to someone other than the viewer. The government has a compelling interest in preventing the harm that results from these invasions of privacy and the regulation is narrowly tailored to focus on the worst violations. For similar reasons, there is not real risk that a substantial number of innocent speakers are censoring themselves such that the statute is unconstitutionally overbroad.

ARGUMENT

I. Section 21.16(b) is as constitutional as its regulation of "revenge porn."

The first step in any constitutionality analysis is to construe the statute at issue.[1]

The statute at issue

Under section 21.16(b), a person commits an offense if:

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

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[1] *Ex parte Lo*, 424 S.W.3d 10, 16 (Tex. Crim. App. 2013) (strict scrutiny); *Peraza v. State*, 467 S.W.3d 508, 514-15 (Tex. Crim. App. 2015) (separation of powers); *State v. Johnson*, 475 S.W.3d 860, 871 (Tex. Crim. App. 2015) (overbreadth).

[2] TEX. PENAL CODE § 21.16(b).

Crucial to this appeal, the State charged appellant only under the "obtained" manner and means of subsection (b)(2).[3] The constitutionality of an uncharged manner and means in subsection (b)(2) is not before the Court. The lower court's decision to strike the statute on that basis is taken up below.

"Visual material" is defined expansively to include any physical medium that shows an image or allows an image to be displayed or transmitted.[4] "Intimate parts" means "the naked genitals, pubic area, anus, buttocks, or female nipple of a person."[5] "Sexual conduct" means "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse."[6]

The defenses and affirmative defenses further define the statute's coverage. It is not a defense that the depicted person created or consented to the creation of the visual material or voluntarily transmitted it to the defendant.[7] But it is an affirmative defense that disclosure (1) occurs as part of medical, law enforcement, or legal proceedings, (2) consists of specified voluntary exposure in commercial or public

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[3] 1 CR 10 (Information appended to Appellant's pretrial motion/application).

[4] TEX. PENAL CODE § 21.16(a)(5).

[5] TEX. PENAL CODE § 21.16(a)(1).

[6] TEX. PENAL CODE § 21.16(a)(3).

[7] TEX. PENAL CODE § 21.16(e).

settings, or (3) the actor runs an "interactive computer service" and the material is provided by another person.[8]

A fair reading of the plain language of the offense charged reveals the following:

- The visual material must be of an intimate or sexual nature.
- The visual material can be created by the depicted person, created with his or her knowledge, or surreptitiously created.
- Either way, the material must have been obtained under circumstances in which the depicted person had a reasonable expectation of privacy in its contents.[9]
- Disclosure—the prohibited conduct—must be intentional. There is no other reference to the actor's intent, thoughts, or desires.
- Disclosure must be without consent.
- The depicted person must be identified through disclosure.
- Disclosure must cause harm to the depicted person.

The requirement of consent and use of the objective standard for ascertaining privacy expectations means that the actor is on actual and constructive notice that disclosure is prohibited and could cause harm. The requirement of intentional

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[8] TEX. PENAL CODE § 21.16(f).

[9] The language of subsection (b)(2) is closer to the Fourth Amendment's legitimate-expectation-of-privacy standard than the definition of "oral communication" used in TEX. CODE CRIM. PROC. art. 18.20, which this Court held incorporates the constitutional standard. *See Long v. State*, 535 S.W.3d 511, 524-25 (Tex. Crim. App. 2017), *reh'g denied* (Sept. 13, 2017), cert. denied, 138 S. Ct. 1006 (2018).

disclosure means that no amount of carelessness or even knowledge of likely disclosure will suffice. An actor need not fear that accidental disclosure—a lost phone, an errant e-mail—will result in criminal sanctions. The "identity" requirement means that a person could intentionally disclose visual material otherwise prohibited by the statute if the depicted person is not identified or identifiable by future recipients. And the requirement of harm is presumably tied to the identifiability of the depicted person.

On its face, the statute appears concerned with preventing the harm that results from having intimate or sexual images of oneself passed around without one's consent. It might be easy to conclude that the First Amendment is not implicated because the statute prohibits the conduct of disclosure. However, because this Court has held that photographs and visual recordings are inherently expressive, the discloser's freedom of speech is implicated.[10]

Legislative history

The statute's legislative history shows that the bill's supporters were focused on the harm this behavior does to the depicted persons, not any message the discloser might be attempting to convey. In the years leading to the bill's passage, "there ha[d] 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

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[10] *Ex parte Thompson*, 442 S.W.3d 325, 336 (Tex. Crim. App. 2014).

harm to the victim."[11] These images "are often posted with identifying information such as name, contact information, and links to their social media profiles."[12] "In many instances, the images are disclosed by a former spouse or partner who is seeking revenge."[13] Hence the name "revenge porn."

"Victims can suffer threats, harassment, stalking, and sexual exploitation as well as embarrassment and shame that intrude into their work, school, or personal lives."[14] Victims are sometimes fired from their jobs or forced to change schools.[15] Some even commit suicide.[16] "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."[17] And even when the ransom is paid, "[h]arm is difficult to remedy because removing images from a website rarely prevents continued

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[11] Senate Research Center Bill Analysis of SB 1135, 84th Regular Session, p.1 (available at https://lrl.texas.gov/scanned/srcBillAnalyses/84-0/SB1135ENR.PDF, last visited September 10, 2018) (Senate).

[12] *Id*.

[13] *Id*.

[14] House Research Organization Bill Analysis of SB 1135, 84th Regular Session, p. 4-5 (available at https://lrl.texas.gov/scanned/hroBillAnalyses/84-0/SB1135.PDF, last visited September 10, 2018) (House).

[15] Senate at 1.

[16] *Id*.

[17] *Id*.

distribution."[18]

The need to use criminal sanction to prevent this harm was so acute that the Legislature amended the statute the following year to increase the offense level from a Class A misdemeanor to a state jail felony.[19]

The statute reaches more than typical "revenge porn."

Section 21.16(b) covers sexual material that was created by the victim and willingly shared with the expectation it would otherwise remain private. It also covers sexual material that was created by a couple together with the same expectation. When either is shared by one partner after the relationship sours, so-called "revenge porn" happens. The statute thus addresses what primarily motivated its proponents.

But the statute goes beyond "revenge porn." It applies when the material is stolen and disclosed by someone other than the depicted person or intended recipient; a jealous "other woman" or even a hacker who is a complete stranger. It applies when the depicted person never had knowledge of the material's creation, as when a camera is surreptitiously placed in a house, public bathroom or changing room. It also applies when the discloser has no reason or intent to harm the depicted person. A

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[18] House at 5.

[19] Acts 2017, 85th R.S., ch. 858 § 16 p. 3567.
(available at https://lrl.texas.gov/scanned/srcBillAnalyses/85-0/HB2552ENG.PDF, last visited September 10, 2018). This change became effective after the alleged date of the offense.

husband who shows his friends prohibited images of his wife because he wants everyone to know how sexy she is would violate the statute if he does not obtain her consent.

But the real fight is over its regulation.

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. The intimate or sexual images are usually not inherently obscene and, unlike stolen images and secret recordings, they were consensually created and shared at some point. If typical "revenge porn" can be lawfully regulated, everything covered by the statute can. To how much protection is a purveyor of "revenge porn" entitled? That is the central question presented in this case.

II. The level of scrutiny depends on the value of the speech.

Although most speech deserves First Amendment protection, "not all speech is of equal First Amendment importance."[20] The concept of a "hierarchy of First Amendment values" was "long recognized" by 1985[21] and reaffirmed this year.[22] Given that not all speech is equal, it should be no surprise that the Supreme Court does not review all regulations of speech equally. And it is the disparate value of

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

[21] *Id*.

[22] *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018).

some speech that gives rise to disparate degrees of scrutiny of its regulation. But that is not always reflected in the way the tests are described, especially by this Court.

Three standards of review for regulation of speech

There are effectively three types of review dictated by the level of protection the First Amendment affords: no review, strict scrutiny, and, in between, intermediate scrutiny.

Some speech gets no special protection.

Despite "the unconditional phrasing of the First Amendment," history shows it "was not intended to protect every utterance."[23] The Supreme Court has recognized numerous categories of speech which do not receive any First Amendment protection from regulation. Obscenity, "fighting words," and defamation, for example, "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content . . . ."[24]

But not all protected speech is equal.

But not all speech that falls outside these proscribable categories is entitled to equal protection. Regulation of protected speech is reviewed under one of two levels

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[23] *Roth v. United States*, 354 U.S. 476, 483 (1957).

[24] *R.A.V. v. City of St. Paul*, *Minn.*, 505 U.S. 377, 383-84 (1992). The Court expressed an openness to the existence of "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law[,]" but gave the impression that it would be difficult to demonstrate. *U.S. v. Stevens*, 559 U.S. 460, 472-73 (2010). The State does not attempt it here.

of constitutional scrutiny: strict or intermediate. Both analyses are concerned with "the means chosen" to serve the government's interest.[25] "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."[26] But there are stark substantive and procedural differences between strict and intermediate scrutiny.

The highest level of review is strict scrutiny. Under strict scrutiny, a regulation of expression may be upheld only if it is narrowly drawn to serve a compelling government interest.[27] Narrow drawing (sometimes called "tailoring") is often referred to as the "least restrictive means."[28] Whereas statutes normally enjoy a presumption of constitutionality that must be rebutted by the defendant,[29] strict scrutiny forces the State to prove that it is not suppressing speech for its own sake.

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[25] *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

[26] *Id*. at 801.

[27] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011); *Ex parte Thompson*, 442 S.W.3d at 344.

[28] *See*, *e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

[29] *See Ex parte Lo*, 424 S.W.3d at 14-15 ("When the constitutionality of a statute is attacked, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily. The burden normally rests upon the person challenging the statute to establish its unconstitutionality.") (citations omitted).

This is done by making the State "specifically identify an 'actual problem' in need of solving" and prove that the curtailment of free speech is "actually necessary to the solution."[30] Having to satisfy strict scrutiny almost invariably results in a finding of unconstitutionality.[31]

All other speech gets lesser, but still rigorous, review. Under intermediate scrutiny, the statute will be upheld if it promotes a substantial (rather than compelling) interest, and "the means chosen are not *substantially* broader than necessary to achieve the government's interest."[32] "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests."[33] "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will

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[30] *Brown*, 564 U.S. at 799 (citations omitted).

[31] Although the Court has made efforts to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact[,]'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted), it has "emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. B.*, 135 S. Ct. 1656, 1665-66 (2015).

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

[33] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). A prime example is the "*Central Hudson*" test used in the commercial speech context, in which the government "must demonstrate narrow tailoring of the challenged regulation to the asserted interest-a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (citation omitted). *See generally Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[34]

The choice between the standards is nominally based on the concept of a "content-based" statute.

As recently reaffirmed, there are "two distinct but related limitations that the First Amendment places on government regulation of speech."[35] The first is prohibition based on viewpoint. "Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination."[36] The second is prohibition of speech on an entire subject. "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation."[37] "Limiting speech based on its 'topic' or 'subject' favors those who do not want to

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[34] *Ward*, 491 U.S. at 800.

[35] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2229-30 (2015).

[36] *Id.* (internal quotations and citation omitted). Similarly, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad. Sys., Inc.*, 512 U.S. at 658.

[37] *Hill v. Colorado*, 530 U.S. 703, 723 (2000). *See also Reed*, 135 S. Ct. at 2229-30 ("it is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'") (citation omitted) (alteration in *Reed*).

disturb the status quo."[38]

Courts "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."[39] "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views."[40] This is because content discrimination "'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace [of ideas.]'"[41] "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny[.]"[42] This disparate treatment is justified "because in most cases [such regulations] pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[43]

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[38] *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

[39] *Turner Broad. Sys.,* 512 U.S. at 642.

[40] *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (internal quotations and citation omitted).

[41] *R.A.V.*, 505 U.S. at 387 (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

[42] *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

[43] *Id*.

But "content-based" can be a misleading descriptor.

"Because strict scrutiny applies either when a law is content-based on its face or when the purpose and justification for the law are content-based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny."[44] A court is right to be concerned when the government seeks to suppress speech on a certain viewpoint or topic and so must challenge the government to show that suppression is unavoidable. If the State can articulate a sufficiently weighty interest, and can show that it designed a statute to serve only that interest, the statute passes strict scrutiny for being the only option. Hence the focus on the means or method of regulation; the degree to which the regulation serves the stated goal (and only the stated goal) will reveal whether it was designed to suppress public discourse.

That is why it is crucial for a reviewing court to accurately assess what a statute does and why. The Supreme Court has said that "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task."[45] But this Court has made the analysis appear to be a "simple task" by summarizing it in one sentence: "'If it is necessary to look at the content of the speech in question to decide

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[44] *Reed*, 135 S. Ct. at 2228.

[45] *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

if the speaker violated the law, then the regulation is content-based.'"[46] The Supreme Court has shown why this approach is wrong.

Content matters

The Supreme Court's jurisprudence makes clear that having to consider the content of speech before applying a law is not enough to make a statute "content-based" and thus deserving of the highest level of scrutiny. As shown below, the application of strict scrutiny is reserved for regulations of speech on matters of public concern that poses some risk that the government is suppressing, directly or indirectly, one side of the argument.

The First Amendment is primarily concerned with protecting discourse on matters of public concern.

The Supreme Court recently discussed at length the focus of a content-based regulation. "Content-based laws—those that *target* speech based on its *communicative* content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[47] The recurring themes in its summary of this test are that the speaker has a message to convey or idea to discuss and that the government acts to suppress

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[46] *Ex parte Thompson*, 442 S.W.3d at 345 (quoting *Ex parte Lo*, 424 S.W.3d at 15 n.12 (orig. op.)).

[47] *Reed*, 135 S. Ct. at 2226 (emphasis added).

that message or idea:

- "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*."[48]

- "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions *based on the message a speaker conveys*."[49]

- "[D]istinctions drawn *based on the message a speaker conveys* . . . are subject to strict scrutiny."[50]

- "[L]aws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government *because of disagreement with the message* [*the speech*] *conveys* . . . must also satisfy strict scrutiny."[51]

- "[A] speech regulation is content based if the law applies to particular speech because of the *topic discussed* or *the idea or message expressed*."[52]

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[48] *Id*. at 2227 (emphasis added).

[49] *Id*. (emphasis added).

[50] *Id*. (emphasis added).

[51] *Id*. (emphasis added) (bracketed material in original) (internal quotations and citations omitted).

[52] *Id*. (emphasis added).

This focus jibes with cases going back almost 30 years.[53] "As a *general rule*, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."[54] "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[55] And the Court reaffirmed this approach this year: "Content-based regulations 'target speech based on its communicative content.'"[56]

Does this literally mean that regulation of any speech that communicates anything is subject to strict scrutiny? No. Cases show that words like "ideas," "views," and "messages" are references to the open discussion of what the Supreme Court calls "matters of public concern."

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[53] *See, e.g., Ward*, 491 U.S. at 791 ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

[54] *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (emphasis added).

[55] *Id*.

[56] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (quoting *Reed*, 135 S. Ct. at 2226).

Expression on matters of public concern has always rested on the "highest rung."[57]

The First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[58] "It is speech on 'matters of public concern' that is at the heart of the First Amendment's protection[,]"[59] and the right to publicly criticize the stewardship of public officials its "central meaning."[60] Although "the boundaries of the public concern test are not well defined," the Supreme Court has articulated some guiding principles:

> Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.[61]

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[57] *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

[58] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[59] *Dun & Bradstreet*, 472 U.S. at 758-59 (internal citations omitted).

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

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

"The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery."[62] "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."[63] "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."[64] "The constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[65]

Conversely, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[66] "That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest[.]"[67] The same is true of regulating

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62 *Connick v. Myers*, 461 U.S. 138, 145 (1983).

63 *Garrison v. State of La.*, 379 U.S. 64, 74-75 (1964).

64 *Thornhill v. State of Alabama*, 310 U.S. 88, 101-02 (1940) (citations omitted). The Court has gone further, identifying the mode of speech that most serves this historical function: "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334, 347 (1995). "No form of speech is entitled to greater constitutional protection than [that]." *Id*.

65 *Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484).

66 *Snyder*, 562 U.S. at 452.

67 *Id*.

matters somewhere in between "purely private" and those comprising "the essence of self-government." After all, "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[68]

In this light, basing the test for applying strict scrutiny on whether it treats speech differently "on the basis of the ideas or views expressed"[69] makes perfect sense. The First Amendment was "[p]remised on mistrust of governmental power."[70] Without a public issue, as that term is defined, there is no threat to "free and robust debate," no interference with a "meaningful dialogue of ideas," and no risk that self-censorship due to the threat of liability would diminish useful public discourse.[71] When there is no "distort[ion of] the marketplace of ideas," the rationale for strict scrutiny is not present.[72] In such cases, the better policy is to defer to the legislative branch—those elected by the people to represent them—to the extent their enactments satisfy intermediate scrutiny.

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[68] *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality).

[69] *Turner Broad. Sys., Inc.*, 512 U.S. at 643.

[70] *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 340 (2010).

[71] *Snyder*, 562 U.S. at 452 (citing *Dun & Bradstreet*, 472 U.S. at 760).

[72] *See Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189-90 (2007) (upholding "reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees" because there was "no realistic possibility that official suppression of ideas is afoot") (quoting *R.A.V.*, 505 U.S. at 390).

The Supreme Court's "scrutiny" jurisprudence bears this out.

There are at least two strains of Supreme Court jurisprudence showing that a statute is not subject to strict scrutiny merely because it regulates based on content. The first examines statutes that regulate less-protected speech. The second examines statutes designed to regulate the effects of speech other than those on the listener.

1. Focusing on content for the same reasons the content is less protected is not a viewpoint restriction.

The first example of when clear reference to content does not necessarily trigger strict scrutiny is content discrimination within a class of speech that rests below the "highest rung" of the First Amendment ladder. If the government can regulate a certain category of speech subject to intermediate (or no) scrutiny, it should be able to discriminate within that category without triggering strict scrutiny. In *R.A.V.*, the Supreme Court explained why:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.[73]

It gave numerous examples of how an otherwise valid statute regulating even unprotected speech could be tainted by interjecting a more-protected content- or

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

viewpoint-based restriction. For example, government may prohibit only that obscenity which is "the most patently offensive *in its prurience* -- *i.e.*, that which involves the most lascivious displays of sexual activity," but it may not prohibit only that obscenity which includes offensive political messages.[74] And it may criminalize only those threats of violence directed against the President, but it may not criminalize only those threats against the President that mention his policy on aid to inner cities.[75] In both cases, an otherwise valid prohibition on speech falling outside the First Amendment's protections would be invalid because of a content-based focus that implicated speech on the "highest rung."

The Supreme Court went further with this argument, making it applicable to speech that receives protection under the First Amendment but does not deserve the protection of strict scrutiny, like commercial speech.[76] Thus, government may regulate price advertising in one industry but not in others because the perceived risk of fraud in the former is greater, but it may not prohibit only that commercial advertising that depicts men in a demeaning fashion.[77]

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

[75] *Id*.

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

[77] *Id.*

In each of these examples, the fact that content has to be reviewed to determine whether the statute is applicable is not the problem—it is the norm. And it does not trigger strict scrutiny until there appears to be viewpoint discrimination on a matter of public concern. There is no reason why this rationale should not apply to any regulation that is reviewed under intermediate scrutiny.

2. Regulating the "secondary effects" of a specific type of speech is "content-neutral."

The second example is the Supreme Court's "secondary effects" line of cases. As this Court has recognized, "In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content."[78] "These situations involve government regulations aimed at the 'secondary effects' of expressive activity."[79] The Supreme Court has defended this doctrine for over 30 years.

City of Renton v. Playtime Theatres

The style case for this doctrine is *City of Renton v. Playtime Theatres*.[80] In *Renton*, the Supreme Court upheld a zoning ordinance that prohibited "any 'adult motion picture theater' from locating within 1,000 feet of any residential zone, single-

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78 *Ex parte Thompson*, 442 S.W.3d at 345.

79 *Id*.

80 475 U.S. 41 (1986).

or multiple-family dwelling, church, or park, and within one mile of any school."[81] "[A]dult motion picture theater" was defined as a building used for presenting visual media "distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas[.]'"[82] Because the ordinance did not ban adult theaters altogether, the Court had no problem viewing it as a form of time, place, and manner regulation.[83] It recognized, however, that the lesser test applicable to such regulations would yield to greater scrutiny if it regulated on the basis of content.[84]

"To be sure," the Court said, "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters."[85] Enforcement of the ordinance thus depended upon the content of the films. "Nevertheless . . . the 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."[86]

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[81] *Id*. at 44.

[82] *Id*.

[83] *Id*. at 46. Time, place, and manner restrictions are measured using a variation of intermediate scrutiny that incorporates a requirement that there be ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791.

[84] *Renton*, 475 U.S. at 47.

[85] *Id*.

[86] *Id*. at 47 (emphasis in original).

"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."[87] Adopting the concurrence from a prior zoning case involving purveyors of sexually explicit materials, the Court concluded, "'We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings.'"[88]

The Court's language on this point was strong. "In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[89] And it tied the analysis back to the concern ungirding the Court's dislike of content-based regulation, *i.e.*, "that government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[90]

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87 *Id*. at 48 (citation omitted) (alterations in original).

88 *Id*. at 49 (quoting *Young*, 427 U.S. at 82 n.6 (Powell, J., concurring)).

89 *Id*. at 48 (citation omitted) (emphasis added by Court).

90 *Id*. at 48-49 (quotations and citation omitted).

Boos v. Barry

Subsequent cases elaborate on the requirement that a statute be "justified without reference to the content of the regulated speech" which, if taken literally, would invalidate the entire body of law. In *Boos v. Barry*, the Supreme Court reviewed a District of Columbia ordinance that prohibited the display of any sign within 500 feet of a foreign embassy if that sign tended to bring that foreign government into "public odium" or "public disrepute."[91] Justice O'Connor, joined by Justices Stevens and Scalia, examined *Renton* and a majority distinguished the facts of *Boos* from *Renton*.

The plurality explained that "while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech."[92] The plurality reaffirmed that the ordinance was aimed at the "secondary effects of such theaters in the surrounding community" even though those effects "are almost unique to theaters featuring sexually explicit films."[93] "In short, the ordinance in *Renton* did not aim at the suppression of free expression."[94] Put another way, "secondary effects" refers to "regulations that apply to a particular category of speech

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91 485 U.S. 312 (1988) (plurality).

92 *Id.* at 320 (plurality).

93 *Id*.

94 *Id*.

because the regulatory targets happen to be associated with that type of speech."[95] "So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters," the regulation is properly analyzed as content neutral.[96]

Applying this to the ordinance in *Boos*, a majority of the Court held that the ordinance was content-based because "[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not."[97] The ordinance was not focused on secondary effects but "on the direct impact of speech on its audience[,]" the occupants of the foreign embassies.[98] "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."[99] "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."[100] The plurality "readily"

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95 *Id*.

96 *Id*.

97 *Id.* at 318-19.

98 *Id*. at 321.

99 *Id*.

100 *Id*.

concluded that the ordinance at issue in *Boos* was "justified *only* by reference to the content of speech" because its proponents "rely on the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments."[101] "This justification focuses only on the content of the speech and the direct impact that speech has on its listeners[; t]he emotive impact of speech on its audience is not a "'secondary effect.'"[102] Justice Brennan, joined by Justice Marshall, concurred in the judgment and in Justice O'Connor's opinion to the extent it held the ordinance would fail *Renton*: "Whatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech."[103]

Reno v. Am. Civil Liberties Union

This distinction between secondary and primary effects dictated the result in *Reno v. Am. Civil Liberties Union*. In *Reno*, the government attempted to protect

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[101] *Id*. Interestingly, the plurality held that the statute was not viewpoint based because the ordinance "determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments[,]" not on what the District of Columbia finds acceptable in the abstract. *Id*. at 319. Both *Renton* and Justice O'Connor's opinion in *Boos* were cited with approval in *Ward*, which dealt with a more traditional time, place, and manner restriction. *Ward*, 491 U.S. at 792, 802.

[102] *Id*. at 321.

[103] *Id*. at 334 (Brennan, J., concurring). He was concerned that the *Renton* "creates a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Id*. at 335. But he allowed for the argument that *Renton* was defensible on the basis that some secondary effects are not amenable to direct legislation. *Id*. at 337.

minors from "indecent" and "patently offensive" communications on the Internet.[104] The government justified the regulation by claiming it constituted "a sort of 'cyberzoning' of the Internet" in the tradition of *Renton*.[105] "But the [statute] applie[d] broadly to the entire universe of cyberspace[, a]nd the purpose of the [statute wa]s to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech."[106] As such, it was a "content-based blanket restriction on speech."[107]

McCullen v. Coakley

More recently, the Supreme Court further illustrated the sometimes fine line between secondary effects and the direct impact of, or listeners' reactions to, speech. In *McCullen v. Coakley*, the Supreme Court again considered zoning limiting speech and other conduct around abortion providers.[108] Limiting speech outside abortion clinics because it "caused offense or made listeners uncomfortable" would not have been a content-neutral justification.[109] But the Court held the restrictions were

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[104] 521 U.S. at 849.

[105] *Id*. at 867-68.

[106] *Id*. at 868.

[107] *Id*.

[108] 134 S. Ct. 2518 (2014).

[109] *Id*. at 2532.

content-neutral because they were concerned with obstructed access and congested sidewalks, not the content of what the people obstructing and congesting might say.[110] The fact that the regulation would almost certainly serve to restrict speech from one side of a debate on a matter of public concern that might make listeners on the other side uncomfortable did not make the statute "content-based."

Central question: is the core concern of the First Amendment implicated?

The threshold question posed by the secondary-effects doctrine directly addresses the rationale behind strict scrutiny: is the statute designed or intended to suppress one side of a discussion on a matter of public concern? Or is it intended to prevent a harm that is collateral to the speech but requires, out of necessity, some reference to it? If the latter, the defendant should bear the burden of proving a legislature has not properly served the people.

The premium placed on matters of public concern also applies outside "scrutiny" analysis.

The First Amendment's focus on preservation of the marketplace of ideas has carried forward to other areas of law in which the government, through common-law or as an employer, seeks to limit speech. Like "scrutiny" analysis, the Supreme Court's defamation and government employment cases utilize a balancing of the State's interests against the rights of the speaker. And like "scrutiny" analysis, the

[110] *Id*. at 2531.

rights of the speaker are increasingly diminished the farther the speech is removed from the core concern of the First Amendment—speech on matters of public concern.

Immunity from defamation suit varies directly with the public nature of the person and topic.

There is no constitutional value in false statements of fact,[111] and the text of the First Amendment does not lend itself to the regulation of suits by private parties.[112] However, "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[113] State laws on defamation can produce a "'chilling' effect [that] would be antithetical to the First Amendment's protection of true speech on matters of public concern[,]"[114] and in some cases "may lead to intolerable self-censorship."[115]

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[111] *Gertz v. Robert Welch*, 418 U.S. 323, 340 (1974). The Supreme Court invalidated its prior statement based on the perceived absence of "a long (if heretofore unrecognized) tradition of proscription," *U.S. v. Alvarez*, 567 U.S. 709, 722 (2012), but that only highlights the premium placed on privacy in the defamation context.

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

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

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

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

"The need to avoid self-censorship by the news media is, however, not the only societal value at issue."[116] "The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood."[117] The State's "strong and legitimate interest" in compensating private individuals for injury to their reputation—one "a State should not lightly be required to abandon"—has repeatedly resulted in a compromise of the First Amendment interest in protecting expression.[118] The practical effect is that the freedom of the press explicit in the First Amendment provides less protection as the subject of the statement at issue moves from public to private individual, and from public to private concern.

For example, a public official may not recover damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," *i.e.*, with knowledge that it was false or with reckless disregard of whether it was false.[119] When the same speech instead involves a "public figure," *i.e.*, one who is not a public official but who has "thrust" himself into the

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[116] *Gertz*, 418 U.S. at 341.

[117] *Id*.

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

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

"vortex" of a public controversy, the media's immunity is slightly reduced.[120] However, private individuals may recover actual damages from a publisher or broadcaster when a matter of public concern is involved without showing actual malice.[121] And when the false and defamatory statements do not involve matters of public concern, the state interest in protecting private individuals adequately supports awards of presumed and punitive damages even absent a showing of actual malice.[122]

In short, 1) "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery[,]"[123] and, 2) "speech on matters of purely private concern is of less First Amendment concern."[124]

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

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

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

[123] *Gertz*, 418 U.S. at 345.

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

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

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

A person does not forfeit his right to speak by virtue of public employment. In some ways, it is the opposite; "[p]ublic employees are 'the members of a community most likely to have informed and definite opinions' about a wide range of matters related, directly or indirectly, to their employment."[125] As such, "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[126]

Be that as it may, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[127] "The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's

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

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

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

responsibilities may be affected."[128] The "public concern" test was developed to protect these "substantial government interests."[129]

When a public employee speaks or petitions as an employee on a matter of purely private concern, or his speech cannot be fairly considered as relating to a public concern, the employee's First Amendment interest must give way.[130]

Reviewing content before deciding scrutiny level makes good sense.

Justice Stevens, writing for the plurality in *Young v. Am. Mini Theatres, Inc.* over 40 years ago succinctly explained why this Court's test for content-based statutes cannot stand. He rejected the Supreme Court's prior pronouncement that, "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."[131] "This statement, and others to the same effect, read literally and without regard for the facts of the case in which it

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

[129] *Id*. at 393.

[130] *Id*. at 398; *Connick*, 461 U.S. at 146. "Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged." *Guarnieri*, 564 U.S. at 386. Nor does speaking on a matter of public concern trigger some form of scrutiny analysis that places a burden on the government to "clearly demonstrate" the speech "substantially interfered" with official responsibilities. *Connick*, 461 U.S. at 150. Instead, it is the courts' responsibility to balance "the employee's First Amendment interest . . . against the countervailing interest of the government in the effective and efficient management of its internal affairs." *Guarnieri*, 564 U.S. at 398.

[131] *Young, Inc.*, 427 U.S. at 65 (plurality).

was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication."[132]

Justice Stevens listed numerous examples. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech."[133] "Even within the area of protected speech, a difference in content may require a different governmental response[,]" as "the content of a [newspaper] story must be examined to decide whether it involves a public figure or a public issue."[134] "The measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication."[135] And prohibitions on the sale of sexually oriented materials to minors that would not be obscene if sold to adults "must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area."[136] In each instance, review of the content is required but does not necessarily trigger strict scrutiny.

Justice Stevens was prescient, as this is undeniably how the First Amendment is applied. In *Snyder v. Phelps*, for example, the Court had to determine the extent

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[132] *Id*.

[133] *Id*. at 66.

[134] *Id*. at 66-68.

[135] *Id*. at 68-69.

[136] *Id*. at 69-70.

to which the First Amendment insulated from tort liability protests by the Westboro Baptist Church at a soldier's funeral service.[137] As shown above, the ability of a State through statute or common law to provide damages for speech is predicated primarily on whether the speech is on a matter of public concern. Naturally, "[d]eciding whether speech is of public or private concern require[d the Court] to examine the content, form, and context of that speech, as revealed by the whole record."[138] It was the substance of the content that dictated the level of First Amendment protection, not the fact that it was considered.

The Court made this point more directly in *Hill v. Colorado*. In that case, a statute prohibited knowingly approaching people within a certain distance from the entrance to abortion facilities "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . ."[139] Petitioners argued it was content-based "[b]ecause the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute."[140] The Court disagreed:

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[137] *Snyder*, 562 U.S. at 447.

[138] *Id*. at 453 (quotations and citation omitted).

[139] *Hill*, 530 U.S. at 707.

[140] *Id*. at 720.

> Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.[141]

All of this is to say that any rule requiring strict scrutiny any time content must be considered runs contrary to the bulk of the Supreme Court's jurisprudence. The controlling consideration is not whether you are looking at content; the test is what content you are looking at and why.

There are always cases that cause confusion.

To be sure, there are cases in which the Supreme Court made a simplistic statement like that made by this Court in *Thompson*. In *United States v. Playboy Entm't Grp., Inc.*, the Supreme Court said, "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."[142] This statement could easily be misconstrued in isolation, but that Court made it plain to what type of content it was referring:

> The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost. It is through

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[141] *Id*. at 721.

[142] 529 U.S. 803, 817 (2000).

> speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.[143]

This is as good a description of "matters of public concern" as the Court has offered.

There are cases that are harder to explain, cases in which the Court's application of its rules are not as clear as the pronouncements of their rules. *Reed* is such a case. Despite the seeming clarity with which the Court defined what it means to be "content-based," it held that the Town of Gilbert's Sign Code merited strict scrutiny because it based its disparate treatment of signs on categories such as "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event" signs, the latter of which included religious assembly.[144] The Code was so content-based on its face, the Court claimed, that it had "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."[145] The majority called this "a paradigmatic example of content-based discrimination[,]"[146] but that is just not so. The

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[143] *Id*. (citations, quotations, and alterations omitted).

[144] *Reed*, 135 S. Ct. at 2224-25.

[145] *Id*. at 2227.

[146] *Id*. at 2230.

unfortunate result is an opinion that was written more broadly than was necessary to decide the case.

The Court could have declined to determine the applicability of strict scrutiny because, as Justice Kagan put it, the town's defense of its ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[147] The facial implausibility of a public safety justification for requiring that signs to church gatherings be smaller or more temporary than ideological or political signs should have doomed the ordinance. But the Court did not restrain itself. Its hard stance, even if taken with the best of intentions, conflicts with the case law discussed above but unmentioned by the majority. But the concurring opinions did elaborate upon it. Taken together, six justices identified the application of strict scrutiny with the suppression of matters of public concern.

Justice Alito, speaking for three justices who joined the majority, said that content-based laws merit strict scrutiny because "[s]uch regulations may interfere with democratic self-government and the search for truth."[148] Justice Kagan, speaking for another three, would also focus on how the First Amendment serves to keep "the marketplace of ideas . . . free and open" by preventing "an attempt to give one side

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[147] *Id*. at 2239 (Kagan, J., concurring).

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

of a debatable public question an advantage in expressing its views to the people."[149] "When that is realistically possible—when the restriction raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace—we insist that the law pass the most demanding constitutional test."[150] But, she concluded, when that threat is not realistically possible, clinging to strict scrutiny any time content is implicated is unnecessary: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate [the First Amendment']s intended function."[151]

Justice Breyer joined Justice Kagan's concurrence, but added his own thoughts. "[C]ontent discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny."[152] Although a "mechanical" triggering of strict scrutiny is simpler, considering whether the policies underlying the First Amendment are actually served by it in a given case "permit[s] the government to regulate speech in numerous instances where the voters

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

[150] *Id*. at 2238 (citations and quotations omitted).

[151] *Id*. at 2238.

[152] *Id*. at 2234 (Breyer, J., concurring) (emphasis in original).

have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators."[153]

But the vast majority of cases support the rule.

When determining the applicability of strict scrutiny, the decisive issue is not whether one is looking at speech but at what speech one is looking. The Supreme Court reserves its highest level of review for cases in which the core function of the First Amendment is threatened. This inevitably requires a reviewing court to consider the speech at issue. If there is no public discussion on a matter of public concern to be had or, if there is, no real risk that the government is picking sides, there is no need to place the burden on it to satisfy strict scrutiny. These are the questions a court must answer before applying strict scrutiny.

III. "Revenge porn" does not deserve strict scrutiny.

But the court of appeals did not answer these questions. It did not address them. Instead, it summarily held in two sentences that section 21.16(b) is a content-based restriction on speech because it "penalizes only a subset of disclosed images."[154] Under the proper analysis, the "subset of disclosed images" does not share the "highest rung" of the First Amendment ladder along with political debate

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[153] *Id*. at 2236.

[154] Slip op. at 5 (citing *Thompson*, 414 S.W.3d at 876, and *Playboy*, 529 U.S. at 817).

and peaceful demonstration, and so is categorically unentitled to the highest level of First Amendment protection. And because the statute does not interject any matter of public concern into its narrowing scheme, intermediate scrutiny is appropriate. "Revenge porn" is not a matter of public concern.

Even if this Court's review is limited to typical "revenge porn"—images voluntarily created with or given to someone who violates the depicted person's privacy by disclosing them—nothing about it rests "at the heart of the First Amendment's protection."[155] There is no "debatable public question"[156] about an ex-girlfriend's nipples. There are no competing viewpoints about a "dick pic" requested by a lover but later posted on the internet. Video of an ex masturbating is not "a subject of general interest and of value and concern to the public."[157] Sharing these images and identifying the depicted person is not "the essence of self-government."[158] It is unnecessary "for the bringing about of political and social changes desired by the people.'"[159] Preventing the personal shame and reputational harm that follows the publication of a sex tape does not threaten "democratic self-government" or any

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[155] *Dun & Bradstreet*, 472 U.S. at 758-59.

[156] *Reed*, 135 S. Ct. at 2237-38 (Kagan, J., concurring).

[157] *Snyder*, 562 U.S. at 453.

[158] *Garrison*, 379 U.S. at 74-75.

[159] *Roth*, 354 U.S. at 484.

"search for truth."[160] And the only "status quo"[161] being protected is a First Amendment that is applied with some measure of common sense to "speech" that has little, if any, legitimate value.

The Supreme Court's cases distinguishing public from private speech outside the traditional "scrutiny" framework illustrate the point. The Court summarized two of them in *Snyder v. Phelps*:

> In [*Dun & Bradstreet*] we held, as a general matter, that information about a particular individual's credit report "concerns no public issue." The content of the report, we explained, "was speech solely in the individual interest of the speaker and its specific business audience." That was confirmed by the fact that the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further. To cite another example, we concluded in *San Diego v. Roe* that, in the context of a government employer regulating the speech of its employees, videos of an employee engaging in sexually explicit acts did not address a public concern; the videos "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation."[162]

If a citizen's credit report created for a specific private audience is not a matter of public concern, neither is a picture of his genitals created for his former wife. And if a video recording that a police officer makes of himself masturbating and sells

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[160] *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring).

[161] *Id*.

[162] *Snyder*, 562 U.S. at 453 (citations omitted, second alteration in original).

online is not a matter of public concern,[163] neither are similar recordings made with an expectation of privacy and distributed without permission.

The potential regulation of a matter of public concern does not mandate strict scrutiny.

The only way that prohibited material might be a matter of public concern is if, for example, a public official sends a mistress a naked picture of himself and she releases it. Even if this is so, that potential does not trigger strict scrutiny unless suppression of that debate was the Legislature's intent.

First, it is unclear whether disclosure of the image is necessary for the marketplace of ideas to function. If a public official's indiscretion is a matter of public concern, its revelation should serve that purpose of encouraging robust debate without disclosing the image.

Second, this hypothetical is only valid in so far as it is the mistress who discloses the material to either the public or the press. If a phone is hacked or a hard-drive stolen, the disclosure has no protection. The Supreme Court permits the press to publish illegally obtained recordings if it took no part in the illegality, but the concurrence limited its reach to matters of public safety.[164] It is doubtful whether

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[163] *Roe*, 543 U.S. at 78.

[164] *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). In *Bartnicki*, an illegal recording of a phone conversation about public contract negotiations between a union representative and its president was (continued...)

publication under these circumstances would be protected because, as relevant to a public official's fitness for office as his sexting might be, it is no matter of public safety.

Third, and most importantly, even if the statute potentially prohibits disclosure of a matter of public concern, strict scrutiny is warranted only if it reasonably appears suppression was the Legislature's intent. Can this Court confidently say that the goal of the statute was protection of political officials by suppressing speech on their indiscretions, and that including the rest of us was a smokescreen? Of course not. The Legislature acted to protect all victims; public officials are people, too.

Viewed without the misunderstandings surrounding the term "content-based," this is a simple case. This Court does not need to create a new category of unprotected speech. It only has to recognize that the statute was not written to do what the Founding Fathers feared most when they drafted the First Amendment—suppress one side of a debate on a matter of public concern. The statute should be measured by the still-rigorous intermediate scrutiny that applies to

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[164](...continued)
ultimately provided to and aired by Vopper, a local radio host. *Id*. at 518-19. The operative part of the federal statute at issue is analogous to TEX. PENAL CODE § 16.02(b)(2), which prohibits the intentional disclosure of the contents of an oral communication if the person knows or has reason to know it was obtained in violation of the law. Justice Breyer, joined by Justice O'Connor, two of the six in the majority, "agree[d] with its narrow holding limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely, a threat of potential physical harm to others." *Bartnicki*, 532 U.S. at 535-36 (Breyer, J., concurring).

most protected speech. Any novel cases involving matters of public concern can be reviewed under an as-applied challenge.[165]

The statute satisfies the secondary effects doctrine.

If this Court is unwilling to hold that "revenge porn" is worth slightly less First Amendment protection than political debate, that does not inevitably mandate strict scrutiny. Even if the statute restricts speech at the "highest rung" of the First Amendment ladder, it does so incident to preventing the secondary effect of harm to the depicted person.

The Legislature did not seek to protect "listeners"—either the depicted person or the recipients of the visual material—from offensive or indecent images. Indeed, the depicted person need never see the images. The Legislature acted to prevent reputational and emotional harm that is "almost unique to" so-called "revenge porn."[166] It is no different than focusing on adult theaters because of the element they attract or abortion clinics because of their unique ability to draw sidewalk traffic.

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[165] There was a narrow window of time during which the Supreme Court upheld a temporal limitation on corporate political speech against First Amendment challenge under strict scrutiny but allowed individual plaintiffs to challenge it on an as-applied basis. *See Wisconsin Right to Life, Inc. v. F.E.C.*, 546 U.S. 410, 411-12 (2006) (*per curiam*) ("In upholding § 203 against a facial challenge [in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003)], we did not purport to resolve future as-applied challenges."). *Citizens United* made this exception moot.

[166] *See Boos*, 485 U.S. at 320 (despite the ordinance in *Renton* being "applied only to a particular category of speech," and aimed at "secondary effects" that are "almost unique to theaters featuring sexually explicit films," "its justification had nothing to do with that speech.").

Moreover, it is a harm that, unlike pure speech, cannot be addressed with "more speech" rather than regulation.[167]

If this analysis appears to carve too fine a distinction between primary and secondary effects, any complaints should be directed at the Supreme Court. Applying intermediate scrutiny based upon secondary effects is consistent with its cases. *Renton*, as reinforced by *Boos*, demonstrates that regulating speech because of secondary effects that inhere to that speech does not make the regulation "content-based." And *McCullen* shows that a regulation can still be content-neutral despite predominantly disadvantaging one side of a debate on a matter of public concern—abortion—and protecting the listeners on the other side from uncomfortable speech.

The doctrine is sound. Even Justice Brennan, who harbored concerns over the *Renton* framework, allowed for the argument that *Renton* was defensible on the basis that some secondary effects are not amenable to direct legislation.[168] Although more complicated, the doctrine essentially raises the same question asked above: is the

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[167] *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

[168] *Boos*, 485 U.S. at 337 (Brennan, J., concurring).

regulation aimed at suppressing one side of a matter of public concern? From either viewpoint, the answer is "no."

IV. The statute satisfies intermediate scrutiny.

Under intermediate scrutiny, the statute will be upheld if it promotes a substantial (rather than compelling) interest, and "the means chosen are not *substantially* broader than necessary to achieve the government's interest."[169] But the court of appeals did not reach this question because it held that any reference to content renders a statute subject to strict scrutiny. This was also appellant's position regarding strict scrutiny and overbreadth[170]: the statute is content-based, the prohibited material is not wholly unprotected by the First Amendment, and the State failed to satisfy strict scrutiny.[171] He thus challenged the constitutionality of the statute but never faced his burden to show that the statute does not satisfy intermediate scrutiny. It would serve no purpose to remand the case to the court of appeals for consideration of an argument that appellant never made in any court.

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

[170] It appears appellant treats the two doctrines as synonymous. *See*, *e.g.*, App. Court of Appeals Reply Br. at 10-11 ("An antonym for 'narrow' is 'broad.' A statute that is *overbroad* in violation of the First Amendment—that restricts a real and substantial amount of protected speech based on its content—is, by definition, *not narrowly tailored*.") (emphasis in original). This misunderstanding will be discussed below.

[171] 1 RR 16 (hearing); App. Court of Appeals Amended Br. at 4-5.

Moreover, analysis is fairly straightforward once this Court determines that intermediate scrutiny applies. The statute goes beyond what is required by the intermediate scrutiny test; it serves a compelling interest—privacy—and uses nearly the least restrictive means to serve that interest. It thus considers the same factors that were incorrectly applied by the court of appeals.

The freedom not to speak is a compelling interest.

The statute requires a violation of a reasonable expectation of privacy. This Court said in *Ex parte Thompson*, "Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner."[172] Whether this was intended as the threshold for compelling privacy interests is unclear, but it should not be with this statute because there is a different privacy interest at stake.

Although *Thompson* dealt with invasions of privacy through improper photography or visual recording, its test for privacy as a compelling interest was derived from the Supreme Court's "captive audience" line of cases. *Thompson* cites *Snyder*, the Westboro Baptist case discussed above. Snyder argued that "even assuming Westboro's speech is entitled to First Amendment protection generally, the

[172] 442 S.W.3d at 348. It suggested that "substantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as the home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt." *Id.*

church is not immunized from liability for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral."[173] Resolving that point came down to whether Snyder was an "unwilling listener or viewer" whom the government could protect from unwanted speech.[174]

"As a general matter," the Supreme Court "applie[s] the captive audience doctrine only sparingly to protect unwilling listeners from protected speech."[175] In most cases, the burden falls upon the listener or viewer to avert his ears or eyes.[176] The full quote, from which this Court borrowed in *Thompson*, was: "As a result, '[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'"[177]

Snyder cited *Cohen v. California*, the "Fuck the Draft" jacket case.[178] One of California's fallback arguments in *Cohen* was that, by wearing the jacket to municipal

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[173] *Snyder*, 562 U.S. at 459.

[174] *Id*.

[175] *Id*.

[176] *Id*.

[177] *Id*. (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)) (alterations in *Snyder*).

[178] *Cohen*, 403 U.S. at 16.

court, "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest."[179] The Court rejected this argument. "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech."[180] It was at this point that the Court wrote what eventually ended up, in part, in *Thompson*.

Snyder and *Cohen* thus speak to a different type of violation of privacy—the right to be left alone, to be free from unwanted speech in one's castle. And both cases dealt with protests over matters of public concern—America's morality and compelled military service. There should be a high bar for preventing speech on those matters based on a listener's desire not to hear it. But neither the violation nor type of speech at issue in those cases applies here.

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[179] *Id*. at 21.

[180] *Id*. (internal citations and quotations omitted).

The aspect of privacy protected by this statute is the freedom not to speak. First Amendment jurisprudence deals primarily with the freedom to speak but the First Amendment includes, "within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."[181] "In a democratic society[,] privacy of communication is essential."[182] "[T]he disclosure of the contents of a private conversation can be an even greater intrusion on privacy than [if it is illicitly obtained,]" and fear of disclosure "might well have a chilling effect on private speech."[183] As a result, there is a valid independent justification for prohibiting such disclosures by persons whom, for example, lawfully obtain the contents of an illegally intercepted message, even if that prohibition does not significantly prevent such interceptions from occurring in the first place.[184] This is the type of privacy problem presented in this case.

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[181] *Bartnicki*, 532 U.S. at 533 n.20 (citations and internal quotations omitted).

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

[183] *Id*. at 532-33. This rationale prompted one commentator to argue that statutes targeting "revenge porn" can be upheld on the basis that the creation and transmission of the sexual images implies a contract that they will not be disclosed without consent. *See* Paul J. Larkin Jr., Revenge Porn, State Law, and Free Speech, 48 Loy. L.A. L. Rev. 57 (2014); *cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (upholding against First Amendment challenge a confidential informant's suit against a newspaper for disclosing his identity because "[t]he parties themselves . . . determine[d] the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed.").

[184] *Bartnicki*, 532 U.S. at 532-33.

In fact, it is worse. When the visual material prohibited by the statute is disclosed, the depicted person is not belatedly compelled to speak—he or she is the speech. In the best case scenario under this statute, (1) a victim willingly shares an intimate or sexual image with someone with the expectation that it will remain between them, and (2) the other person shares both the image and the depicted person's identity with another out of pride in his partner's appearance.[185] Even if this is somehow not an example of a "substantial privacy interest" "being invaded in an essentially intolerable manner," the government has a compelling interest in preventing the harm associated with disclosure by discouraging the disclosure itself.

The statute is narrowly tailored, if not the least restrictive means.

Subsection (b), as charged, covers only what is justified by the compelling interests it serves:

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

- It requires lack of consent and that the visual material was obtained under circumstances evincing a reasonable expectation of privacy. The speaker is thus put on actual and constructive notice that intentional disclosure will violate the depicted person's rights. It also avoids criminalizing the passing along of

[185] It is no more a solution to tell people not to create or send material covered by the statute than it would be to tell them not to write deeply personal love letters or share their innermost hopes and fears with their loved ones.

amateur pornography and sexual imagery willingly and openly shared by depicted person(s).

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

By including all of these requirements, the Legislature has ensured that it restricts the speaker only to the extent the compelling interest is served. There is no other way to criminalize causing the specific harms associated with the prohibited material without criminalizing its disclosure. There is no higher mental state than "intentional." It is limited to victims who had a subjective expectation in privacy society is prepared to call "reasonable." And it does not apply to disclosed material that cannot be linked to the depicted person. The statute satisfies intermediate scrutiny.[186]

But can a statute be too narrowly tailored?

In fact, the argument has been made in lower courts that the statute fails for being underinclusive because it does not target violations of privacy other than sexual imagery. "Underinclusiveness," *i.e.*, when the statute reaches far less speech than it could, "raises serious doubts about whether the government is in fact pursuing the

[186] But for the lack of a "public matter" clause, discussed below, it would satisfy strict scrutiny.

interest it invokes, rather than disfavoring a particular speaker or viewpoint."[187] Is it suspicious that the Legislature focused on one type of violation of expectation of privacy on sexual or intimate matters but not others?

In *Brown v. Entm't Merchants Ass'n*, for example, the Supreme Court struck a ban on selling "violent video games" to minors because, among other reasons, it was "wildly underinclusive" as a means to prevent any claimed secondary effects of exposure by minors to violent imagery.[188] Why not go after movies, or television, or comic books? There was no evidence presented that violent imagery in video games had more effect on minors than those in any other source.[189]

The Court applied this reasoning this year when it granted a temporary injunction to predominantly faith-based clinics in California that would have been forced to inform patients about state-funded abortions.[190] The statute at issue exempted a large number of state and federal clinics from the notification requirements without explanation.[191] "The . . . exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future,

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[187] *Brown*, 564 U.S. at 802.

[188] *Id*.

[189] *Id*. at 801.

[190] *Becerra*, 138 S. Ct. at 2368.

[191] *Id*. at 2375-76.

demonstrates the disconnect between its stated purpose and its actual scope."[192] "If California's goal is to educate low-income women about the services it provides, then the licensed notice [requiring disclosure of state services available elsewhere] is wildly underinclusive."[193]

But the Court does not always find a narrow focus to be underinclusive. As part of its analysis in *Renton*, it rejected the argument that the city's ordinance was "under-inclusive" "in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters."[194] This was because, on the record before it, the Court had no evidence that such businesses existed or that Renton would not amend its ordinance to include them.[195] It did appear to suggest, however, that "cho[osing] first to address the potential problems created by one particular kind of adult business in no way suggests that the city has 'singled out' adult theaters for discriminatory treatment."[196]

The Court recently reaffirmed this practical viewpoint in *McCullen v. Coakley*. "States adopt laws to address the problems that confront them[;] [t]he First

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[192] *Id*. at 2736.

[193] *Id*. at 2375.

[194] *Renton*, 475 U.S. at 52.

[195] *Id*. at 52-53.

[196] *Id*.

Amendment does not require States to regulate for problems that do not exist."[197] In *McCullen*, the Court rejected the argument that Massachusetts's claimed interest in public safety and unobstructed sidewalks was a pretense because it limited the statute to areas outside abortion providers. The Court did so because there was no indication that crowding, obstruction, and violence occurred outside other types of healthcare facilities.[198] "In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution."[199]

This is what our Legislature did. In response to public outcry, it identified a particular problem and set out to address it through criminal sanctions in the only way it could. If something of value is being communicated by the intentional disclosure of visual material depicting another's intimate parts or sexual acts in violation of a reasonable expectation of privacy and without the person's consent—a big "if"—there is nothing suspicious about focusing on the increased harm that is created when the depicted is identified. Ultimately, as in *R.A.V.*, it is nothing more than regulating within a field of "lower rung" speech on the same basis that it is "lower rung" to begin with.

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[197] *McCullen*, 134 S. Ct. at 2532 (internal quotations and citation omitted).

[198] *Id*.

[199] *Id*.

The Legislature did what this Court suggested it should in *Thompson*.

If any of the discussion to this point is familiar, it is because the Legislature followed this Court's model for a content-neutral statute in *Thompson*.

In *Thompson*, this Court conducted a thorough analysis of the improper photography statute in effect at the time to determine whether it was content neutral and thus subject to intermediate scrutiny. At the time, TEX. PENAL CODE § 21.15 read, in part,

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

This Court recognized two content-neutral elements potentially raised by the statute.

The first was consent, or lack thereof.[200] A statute that penalized all non-consensual acts of visual recording would be content neutral but it would be "doubtful that such a broad prohibition would satisfy intermediate scrutiny."[201] Some narrowing would be required. Unfortunately, the only subset of non-consensual

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

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

recording the State chose to penalize was "that which [wa]s done with the intent to arouse or gratify sexual desire."[202] "By discriminating on the basis of the sexual thought that underlies the creation of photographs or visual recordings, the statute discriminates on the basis of content."[203]

The second was privacy. This Court denied that the statute truly served that interest; it applied to literally any non-consensual photography or visual recording, but it did so based on the "requisite sexual intent" of the actor and "contain[ed] no language addressing privacy concerns."[204] "[T]he only sense in which the statute *necessarily* protects privacy is by protecting an individual from being the subject of someone else's sexual desires."[205]

The statute at issue in this case appears specifically designed to pass every test the improper photography statute failed. Subsection (b)(1) explicitly requires that the disclosure be without the depicted person's consent. And it is not tainted by the requirement of a specific point of view or sexual intent; the only mental state is that attached to the act of disclosure itself. Anyone who commits the conduct is treated equally, regardless of what is in their heads. The statute also explicitly protects the

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202 *Id*.

203 *Id*.

204 *Id*. at 348.

205 *Id*. (emphasis in original).

privacy of the depicted person. The requirements of harm and the revelation of the depicted person's identity evince the State's interests and narrow the statute's application without reference to the speaker's thoughts, message, or desires. The statute thus effectively serves two content-neutral purposes without any of the drawbacks described in *Thompson*. Given how unusually the statute is worded, it is difficult to conclude it was intended to do anything else.

Comparison to Vermont's handling of its nonconsensual pornography statute is instructive on the limitations of any scrutiny analysis.

Last month, the Supreme Court of Vermont held that a statute banning disclosure of nonconsensual pornography satisfied strict scrutiny.[206] Despite recognizing much of what the State argues in this brief and ultimately upholding the statute, the opinion reveals how courts can sometimes intrude too far into the legislative process by making policy determinations reserved for the representative branch.

Vermont's statute is both less and more comprehensive than our own. Its elements are:

- "A person . . . knowingly discloses a visual image of an identifiable person"
- "who is nude or who is engaged in sexual conduct"

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[206] *State v. Van Buren*, __ A.3d __, 2018 WL 4177776, 2018 VT 95 (Vt. Aug. 31, 2018).

- "without his or her consent"
- "with the intent to harm, harass, intimidate, threaten, or coerce the person depicted"
- "the disclosure would cause a reasonable person to suffer harm"[207]

The definitions of "nude" and "sexual conduct" nearly match the Texas definitions of "intimate parts" and "sexual conduct."[208] Additionally, "[a] person may be identifiable from the image itself or information offered in connection with the image[,]" and "[c]onsent to recording of the visual image does not, by itself, constitute consent for disclosure of the image."[209] Vermont's statute does not apply to the circumstances that are affirmative defenses in Texas, with the addition that their statute explicitly does not apply to "[d]isclosures of materials that constitute a matter of public concern."[210] It is similarly inapplicable to images of voluntary nudity or sexual conduct "in a place a person does not have a reasonable expectation of privacy."[211]

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[207] 13 VT. STAT. ANN. § 2606(b)(1).

[208] 13 VT. STAT. ANN. § 2606(a)(3); 13 VT. STAT. ANN. § 2821(2).

[209] 13 VT. STAT. ANN. § 2606(b)(1).

[210] 13 VT. STAT. ANN. § 2606(d).

[211] 13 VT. STAT. ANN. § 2606(d)(1).

The Court rejected the State's argument that the statute categorically regulates only obscenity.[212] It also declined to create a new category of unprotected speech, due to the Supreme Court's "recent emphatic rejection of attempts to name previously unrecognized categories" and its "oft-repeated reluctance . . . to adopt broad rules dealing with state regulations protecting individual privacy as they relate to free speech."[213]

Instead, the Court applied strict scrutiny.[214] Importantly, and relevant to the State's primary argument in this case, the Court did not initially question what level of scrutiny is appropriate. But the question arose because it found a compelling interest in part because of "the U.S. Supreme Court's recognition of the relatively low constitutional significance of speech relating to purely private matters."[215] Relying on defamation cases discussed above and *Snyder v. Phelps*, the Vermont Court found it significant that the proscribed speech "had no connection to matters of public concern."[216] Circling back to what should have been a threshold question, it declined to subject matters of purely private concern to intermediate scrutiny "[b]ecause the

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212 *Van Buren*, 2018 WL 4177776 at *6-7.

213 *Id*. at *12 (citing *Stevens*, *Brown*, and *Alvarez*).

214 *Id*.

215 *Id*.

216 *Id*. at *13-14.

Supreme Court has not expressly adopted an intermediate scrutiny framework for evaluating content-based restrictions that apply to low-value, purely private speech."[217] This is curious, given that it recognized that "content-based restrictions on speech to prevent [confidential health or financial] disclosures are uncontroversial and widely accepted as consistent with the First Amendment."[218]

It also gets that analysis backwards. While the Supreme Court has made it clear that exemption from the protections of the First Amendment is categorical in nature, it has never made any such claim regarding the choice of appropriate level of scrutiny. The question should not be whether there is a defined category of speech fit for intermediate scrutiny. The question should be whether the core purpose of the First Amendment is served by application of strict scrutiny. If there is no risk that the government is suppressing one side of a debate on a matter of public concern, strict scrutiny is unnecessary (and unfair). Any descriptor of an intermediate scrutiny "framework"— "commercial speech," "secondary effects"—only serves to describe why the core function of the First Amendment is not implicated.

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[217] *Id*. at *13 n.9.

[218] *Id*. at *15. *See also id.* ("From a constitutional perspective, it is hard to see a distinction between laws prohibiting nonconsensual disclosure of personal information comprising images of nudity and sexual conduct and those prohibiting disclosure of other categories of nonpublic personal information."), *id*. at *13 n.9 ("[A]s a practical matter, in light of the [Supreme] Court's statements about the relatively lower constitutional value ascribed to such speech, application of strict scrutiny to restrictions on nonconsensual pornography may not look significantly different than an intermediate scrutiny analysis.").

Putting the threshold determination aside, Vermont's application of strict scrutiny reveals the potential to confuse a legislature's stated aim with (in)adequate tailoring. For example, the Court notes that the statute goes beyond knowing disclosure to include a specific intent to harm, harass, *etc*., but then disclaims any opinion "as to whether this narrowing element is essential to the constitutionality of the statute."[219] How can that be? The legislature would not have included it if it did not intend to narrow the statute's scope based on intent.[220] And if that was their aim (and strict scrutiny applies) then that element is essential to make the statute the least restrictive means of accomplishing that goal. Compare this to the Court's treatment of the "reasonable person would be harmed" element. The Court says "[t]he statute is not designed to protect overly fragile sensibilities[,]" as it does not criminalize disclosure "unless disclosure would cause a reasonable person to suffer harm."[221] True, but this is no more apparent than the purpose behind the inclusion of the intent element the Court says may be unnecessary.

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[219] *Id*. at *16, 16 n.10.

[220] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("We focus on the literal text also because the text is the only definitive evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law.").

[221] *Van Buren*, 2018 WL 4177776 at *16.

What this inconsistency shows is how easy it is to misidentify the legislature's aim and thereby taint the tailoring analysis. Misidentification is understandable because there can be more than one way of looking at any societal problem. But while assessing the narrowness of the legislature's solution is the court's duty, choosing *what* problem to address is the legislature's prerogative. This distinction is why element-by-element comparison to another legislature's statute is not always useful. The Texas and Vermont statutes illustrate this.

Texas requires actual harm but does not require the intent to harm. Vermont requires the intent to harm but not actual harm. Requiring both intent and actual harm would be narrower, of course, but would it serve the respective state interests? In other words, is Texas permitted to focus only on harm that occurs rather than what is in the actor's mind? Is Vermont permitted to focus on the motivation behind the disclosure so long as harm was reasonably possible, even if no one is actually harmed? If the answer to these questions is "yes," the presence or absence of these elements is not important in the abstract; all that matters is that a State's statute "does not penalize more speech than necessary to accomplish its aim"[222] as defined by the terms of the statute itself. If "no," then any statute related to nonconsensual disclosure of sexual or intimate images must have every element that any one of them

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[222] *Id*. at *18.

does or else it will fail strict scrutiny. That cannot be the right answer.

The one aspect of Vermont's statute absent from the Texas statute which could be important is Vermont's disclaimer of any application to matters of public concern. The Vermont court was right to repeatedly emphasized this feature[223] as its inclusion should have meant that intermediate scrutiny was proper. But is its absence fatal to the Texas statute?

If the sexual image of a public figure (rather than the fact of its existence) is essential to the marketplace of ideas, and if strict scrutiny applies, then the Texas statute likely fails that test. This Court would have to strike the statute because the Legislature did not account for the unique possibility that the statute could be applied to a sexual image of a public official. That is why it is crucial to take the time at the outset to make sure that the rationale for applying strict scrutiny is present.

Conclusion

"We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate [the First Amendment']s

[223] *Id*. at *14 ("The proscribed speech in this case has no connection to matters of public concern."), *16 (it includes "an express exclusion of images warranting greater constitutional protection"), *17 ("The Legislature has made every effort to ensure that its prohibition is limited to communication of purely private matters with respect to which the State's interest is the strongest and the First Amendment concerns the weakest."), *18 (the statute "does not risk chilling protected speech on matters of public concern").

intended function."[224] This Court should uphold the statute under intermediate scrutiny and reserve strict scrutiny for that rare occasion when it is warranted. The Legislature did the best job that could be done to create a statute that narrowly targets a real problem in Texas. It did such a good job that it not only satisfies the appropriate test, it should satisfy strict scrutiny, as well. This Court should take the opportunity to uphold it so that prosecutions can go forward and, through that deterrence, the targeted harm might be avoided.

V. The statute is not constitutionally overbroad.

The offense as charged also satisfies the overbreadth test. The court of appeals disagreed for the same reasons it found the statute fails strict scrutiny, *i.e.*, it can be charged to apply to people who had no knowledge or reason to know of the circumstances under which the visual material was created.[225] The propriety of invalidating a statute based on a manner and means not charged is addressed below. What is important here is that the court of appeals appears to view overbreadth and scrutiny analysis as roughly co-extensive. This view is wrong, and can have profound consequences for defendants. Viewed properly, overbreadth serves an important function that is distinct from satisfying some level of scrutiny.

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

[225] Slip op. at 10.

The overbreadth doctrine is strong medicine to be used sparingly.

The overbreadth doctrine is an exception to the normal rules for facial challenges.[226] "[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment."[227] The Supreme Court "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[228] When people who would otherwise be permitted to speak choose to abstain rather than face potential litigation and sanction, the result harms not only them "but society as a whole, which is deprived of an uninhibited marketplace of ideas."[229] "Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech."[230]

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[226] *Virginia v. Hicks*, 539 U.S. 113, 118 (2003).

[227] *Johnson*, 475 S.W.3d at 864-65.

[228] *Hicks*, 539 U.S. at 119.

[229] *Id*.

[230] *Id*.

But there are "substantial costs" to interfering with legitimate government interests.[231] Because of the heavy cost this imposes, the overbreadth doctrine is generally not applied unless the defendant can show the overbreadth of a statute is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[232] "The statute must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'"[233] This "'strong medicine'" is thus "to be employed with hesitation and only as a last resort."[234]

Overbreadth is not "scrutiny" analysis.

Importantly, the overbreadth doctrine is legally distinct from "scrutiny" analysis. Both the Supreme Court and this Court have distinguished them.[235] Both

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[231] *Id*.

[232] *Johnson*, 475 S.W.3d at 865 (citation omitted).

[233] *Id.*

[234] *Ex parte Thompson*, 442 S.W.3d at 349 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

[235] Writing for the majority in *R.A.V.*, Justice Scalia noted the difference between "a technical 'overbreadth' claim – *i.e.*, a claim that the ordinance violated the rights of too many third parties" and "the contention that the ordinance was 'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based." 505 U.S. at 381 n.3. *See also Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 585 (2002) (rejecting one overbreadth argument but expressly declining to decide whether the statute suffers from substantial overbreadth for other reasons or, *inter alia*, whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis); *McCullen*, 134 S. Ct. at 2548 n.9 ("Because (continued...)

courts have also shown a lack of care when using these terms of art.[236] Some confusion is understandable because a statute that is not narrowly tailored will cover far more protected speech than it needs to. It may be that a statute that fails strict scrutiny will always fail overbreadth analysis.[237] But "substantial overbreadth" is not the legal opposite of "narrowly tailored." The two approaches to challenging the facial constitutionality of a statute are designed to serve different interests and so employ very different methods.

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[235](...continued)
we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners' overbreadth challenge."). Relying on *R.A.V.*, this Court questioned whether, having found a statute to be an invalid content-based restriction, it needed to address overbreadth. *Ex parte Thompson*, 442 S.W.3d at 349.

[236] In *Reno v. ACLU*, for example, the Supreme Court mentioned over the span of two paragraphs how "[t]he breadth of [a] content-based restriction" places a burden on the government to show why a "less restrictive provision" would not work, that it is "persuaded that the [statute] is not narrowly tailored if that requirement has any meaning at all[,]" and that the statute thus suffers from "facial overbreadth." 521 U.S. at 879. This Court has also merged the two analyses in much more explicit fashion in *Ex parte Lo*, in which this Court struck part of the online solicitation statute. Although the opinion began by purporting to apply strict scrutiny's presumption of invalidity that inheres to content-based regulations of speech and concluded that the statute is not narrowly drawn to serve a compelling interest, its internal analysis relies heavily on "technical" overbreadth cases like *Virginia v. Hicks*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the classic *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *Ex parte Lo*, 424 S.W.3d at 14, 18-24.

[237] *See*, *e.g.*, *Free Speech Coal.*, 535 U.S. at 262 (O'Connor, J., concurring) ("The Court concludes that § 2256(8)(D) is overbroad, but its reasoning also persuades me that the provision is not narrowly tailored. The provision therefore fails strict scrutiny.") (citations omitted). In *Van Buren*, the Vermont Supreme Court distinguished between strict scrutiny and overbreadth but said its "analysis does not ultimately turn on which standard of review we apply to this facial challenge." 2018 WL 4177776 at *5.

Scrutiny analysis is a question of fit meant to limit suppression of viewpoints. Overbreadth analysis reveals whether a statute, however narrowly drawn for content, still restricts far more speech than it should. Where scrutiny analysis focuses on method, overbreadth focuses on the results in practice. It is a question of ratio. Assuming the statute is otherwise valid—the government drafted it as carefully as required to serve its substantial or compelling interest—does it still go too far?

Another way of looking at it is the purpose of the remedy. Strict scrutiny is used to strike a statute when it appears the government is attempting to suppress one side of a debate on a matter of public concern. It punishes the State. Overbreadth is used to strike a statute when innocent speakers would be too afraid to express themselves. It protects them. The result is the same in both—guilty people go free—but the impetus could not be more different.

There are two big procedural differences, as well. First, the overbreadth doctrine does not concern itself with "content." One merely discerns the sweep of the statute and determines whether the "strong medicine" is warranted. Second, and as a result, there are no presumptions or shifting of burdens under any circumstances. The burden to prove overbreadth rests on the challenger in all cases.[238]

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[238] If there is a case in which the government had to disprove overbreadth because the statute is content-based, the State cannot find it.

Finally, and perhaps most importantly, treating the two doctrines as flipsides of the same coin does a disservice to defendants. Whereas a traditional facial challenge requires a defendant to show the statute is unconstitutional as applied to him, overbreadth allows him to stand in the shoes of a chilled third party despite having committed an act that is clearly proscribable.[239] This is a boon to defendants. The chance for success under the overbreadth doctrine is limited by design (if the analysis is done properly) but it is higher than zero. And it is the best chance many defendants have.

Any protected speech incidentally restricted is insubstantial relative to the statute's plainly legitimate sweep.

Because overbreadth is a function of ratio, the statute's reach must be identified so that it can be determined whether any "innocent" speakers might self-censor for fear of prosecution. The discussion over the appropriate level of scrutiny was limited to typical "revenge porn" because it is the least objectionable activity the Legislature sought to deter; it at least includes an element of consent at the outset. But the statute covers far worse.

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[239] *Johnson*, 475 S.W.3d at 864–65 ("[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment.").

The prohibited material also includes images that were surreptitiously recorded by a partner, a step-father, or even a stranger. It includes images that were consensually created but later intercepted, through hacking or otherwise. It also includes images that are obscene—in the traditional sense[240] or because it appeals to a prurient voyeuristic interest[241]—and/or child pornography, even if either are created voluntarily, as with teenagers experimenting with their cell phones.

On the other hand, it is difficult to conceive of "speech" that is covered by the statute but not justifiably restricted.[242] The requirements of consent and an expectation of privacy, and the definition of "visual material" removes from consideration all of the other types of communication and media swept up by the

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[240] Under *Miller v. California*, 413 U.S. 15, 24 (1973), to be "obscene" the regulated material must depict or describe sexual conduct, 2) the conduct must be defined by statutory or common law, and 3) the material must be such that, "taken as a whole, [it] appeal[s] to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value."

[241] *See Perkins v. State*, 394 S.W.3d 203, 209-10 (Tex. App.–Houston [1st Dist.] 2012, pet. ref'd) ("Jurors are permitted to rely on their common sense to conclude that these images of a teenage girl—who had undressed in the belief that she had privacy in the bathroom—were created and preserved to appeal to deviant and voyeuristic interests of the viewer, and thus the images are intended or designed to elicit a sexual response. Both the objective content of the images and the circumstances of their creation contribute to their voyeuristic quality, and a rational jury could have determined such images to be lewd.").

[242] Appellant argued that nearly everything covered by the statute is protected speech, App. Amended Br. to Court of Appeals at 10-12, and "[t]here can be no compelling state interest in restricting constitutionally protected speech[,]" *id*. at 14, and the court of appeals concluded the statute was overbroad based mostly on its potential application under an uncharged manner and means. Slip op. at 10-11.

statute in *Ex parte Lo*.[243] Most visual material would be well within the realm of lawful pornography but for the fact that it was not intended or approved for disclosure by the person depicted; the consent requirement ensures that no lawful pornographers are chilled. Any other hypotheticals involving injured third parties are fanciful. Pictures of little children taken at bath time by their parents and posted on Facebook, for example, could scarcely cause harm to the depicted person and, regardless, would be disclosed by someone with the ability to consent on the child's behalf.[244]

The only chance that an "innocent" speaker might be chilled is when the covered material is comprised of a true matter of public concern, as with a public official's sex tape. Even if that were the case, any such incidents would be dwarfed by the legitimate applications of the statute and could be dealt with on an as-applied basis. There is simply no risk that a substantial amount of protected expression is being chilled. This is not a promise of non-enforcement[245]—this is the plain language of the statute.

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[243] 424 S.W.3d at 20 (listing examples).

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

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

VI. Review should be limited to the offense charged.

The court of appeals used the wrong test to measure the constitutionality of the statute. But it also used the wrong application of the statute, basing its analysis on a manner and means that was never alleged.

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

> The visual material
>
> > (a) was
> >
> > > (i) obtained by the person
> > > or
> > > (ii) created
> >
> > (b) under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private.[246]

The court acknowledged that a party who was made aware of the privacy expectation at the time he obtained the material could be lawfully charged.[247] That is what appellant is charged with. But the court of appeals found it "problematic" that "obtained" "is modified by the adverbial prepositional phrase 'by the person'" but

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

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

"created" is not.[248] "As a result, the statute can apply under circumstances where a person uninvolved in the creation of the offending visual material obtains that visual material without knowledge of the circumstances surrounding its creation, under which the depicted person's privacy expectation arose."[249] This potential application undergirded both its scrutiny and overbreadth analyses.

But it is just a potential application. It is possible, even likely, that charging someone for disclosing an amateur video or nude photo he received using the "created under" language when he had no idea of the circumstances under which it was created would fail an as-applied challenge. At this point, however, it is an interesting hypothetical question. In this case, the State alleged only that the visual material was "obtained" by appellant.

This Court has long held that "it is incumbent upon an accused to show that he was convicted or charged under that portion of the statute the constitutionality of which he questions."[250] Although this Court has not said it expressly in recent cases, it has largely confined itself to reviewing the constitutionality of offenses that have

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[248] Slip op. at 8, 8 n.11.

[249] Slip op. at 8 n.11.

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

actually been charged.[251] This comports with the basic concept of ripeness, which is part of justiciability.[252] The court of appeals ignored this rule by striking a statute on the basis of a potential charging decision that was not made.[253]

It could be that the court was confused by the nature of facial challenges. The name suggests that the challenger is alleging that the statute under which he is charged is in all cases unconstitutional. And because a defendant is entitled to stand in the shoes of an uncharged third party by alleging overbreadth, there is an element of the analysis that is not tied to the party involved. But that is far different from allowing a defendant to challenge an application—in effect, an offense—for which

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

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

[253] Moreover, if it is the "created" charging option that offends, it should have considered whether severance would have saved the remainder of subsection (b)(2), *i.e.*, the manner and means charged. The Code Construction Act requires it. TEX. GOV'T CODE § 311.032(c).

he has not been charged. Despite this being a facial challenge, review should have been confined to the offense alleged.

VII. Conclusion

The most important step in reviewing the constitutionality of a statute is to decide the standard of review. This decision should respect the Legislature's work on behalf of the people by forcing the State to satisfy strict scrutiny only when it attempts to suppress one side of a debate on a matter of public concern. The court of appeals made a decision but it got it wrong. Section 21.16(b) should be reviewed under intermediate scrutiny. It should be upheld because it satisfies that standard and, in this case, because appellant never attempted to prove it did not.

The second most important step is to apply the standard to the offense actually charged. The court of appeals did not do this. Its consideration of an uncharged manner and means dictated its overbreadth analysis and likely would have doomed its scrutiny analysis under the proper standard. But once it is determined that intermediate scrutiny applies, the rest of the analyses are easy. Rather than force the entire State to wait for this case to be remanded and possibly reviewed again, this Court should approve this important statute.

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,

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 18,744 words.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of September, 2018, a true and correct copy of the State's Brief on the Merits has been eFiled or e-mailed to the following:

Michael J. West
Smith County Assistant 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

Courtesy Copy Provided:
Texas Solicitor General Scott A. Keller
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711
scott.keller@oag.texas.gov

andrew.davis@oag.texas.gov

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