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In the Court of Criminal Appeals of the State of Texas

Ex parte Jordan Bartlett Jones,
Respondent-Appellant

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

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

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INTEREST OF THE *AMICI*¹

Media Coalition Foundation, Inc., American Booksellers Association, Association of Alternative Newsmedia, Association of American Publishers, Inc., Freedom to Read Foundation and National Press Photographers Association (“Media *Amici*”) respectfully submit this Supplemental Brief as *amici curiae* in support of Respondent-Appellant Jordan Bartlett Jones. This Supplemental Brief will respond to arguments made by the Office of the Attorney General in its brief submitted March 26, 2019 (the “Attorney General’s Brief” or the “AG Br.”), and address the Ninth Court of Appeals’ recent decision in *Ex Parte Lopez*, No. 09-17-00393-CR (Court of Appeals, Ninth Dist. of Texas at Beaumont, Mar. 27, 2019), which the State Prosecuting Attorney has submitted to this Court.

Media *Amici* previously submitted a Brief as *amici curiae* (the “Media *Amici* Brief” or “Media *Amici* Br.”) on December 11, 2018, also in support of Respondent-Appellant Jones. Descriptions of the Media *Amici* and of their interest in the issues in this case are set forth in detail in the Media *Amici* Brief, to which we respectfully refer the Court.

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

ARGUMENT

— THE RELATIONSHIP PRIVACY ACT IS UNCONSTITUTIONAL

The Attorney General’s Brief, while attempting to argue that the Act is “narrowly drawn” to serve the State’s “compelling interest in protecting its citizens from the egregious harms caused by nonconsensual pornography,” AG Br. at 1, establishes just the opposite.

- An Act that is intended to make it a crime to intentionally disclose a private image without consent is not narrowly drawn where, as here, the Act makes it a state jail felony even when the person making the disclosure had a good faith belief that consent had been given.
- An Act that is intended to protect privacy is not narrowly drawn when it is not an element of the offense that the person making the disclosure knew that the depicted person had a reasonable expectation of privacy.
- An Act that is intended to serve a compelling interest in protecting citizens from “egregious harms” is not narrowly drawn where, as here, the Act makes it a state jail felony if the disclosure caused merely embarrassment.
- An Act that neither has ill intent as an element of the offense, nor contains an exception for disclosures in the public interest,

unconstitutionally criminalizes a broad range of First Amendment-protected speech by mainstream media, such as the *Media Amici* and their members.

The Act is unconstitutional because even if there is a compelling state interest in preventing the disclosure, known to be made without consent, of intimate images that is intended to cause and causes grievous harm, this Act sweeps far too broadly. The Act is facially “overbroad [because] a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010).

I. The Act Is Overbroad

A. The Act is Not Narrowly Drawn Because, as the Attorney General Concedes, the Act Criminalizes Disclosures Made With a Good Faith Belief That the Depicted Person Consented to the Disclosure and a Good Faith Belief That the Depicted Person Did Not Have a Reasonable Expectation of Privacy

Although arguing that the Act’s “requirement that the person intentionally disclosed private information is narrowly tailored to advance the state’s compelling interest in protecting its citizen’s *[sic]* most private moments,” AG Br. at 4, the Attorney General concedes that, to be convicted of a state jail felony, the defendant “need not intend the disclosure to be without consent” and need not

know whether the depicted person had a “reasonable expectation of privacy.” AG Br. at 3, 7. The Attorney General further explains:

[Media] Amici, for example, argue that “[a] defendant can be convicted even if he or she did not know that the depicted person did not ‘effectively’ consent to the disclosure or did not know the circumstance under which the image was created.” Br. of Amici Curiae Media Coalition Foundation, Inc. et al. at 9; *see also Ex parte Jones*, 2018 WL 2228888, at *6 (Tex. App. –Tyler May 16, 2018, pet. granted) (adopting similar position). But that is irrelevant. What matters is that the person must intentionally disclose intimate visual material in which the depicted person has a reasonable expectation of privacy.

AG Br. at 7. The Attorney General thus argues, in effect, that if one publishes a nude image, believing that the depicted person gave effective consent to the publication or disclosure, but it turns out that the consent was not “effective,” the publisher will have committed a crime. The Attorney General further argues, in effect, that if one publishes a nude image not knowing whether the depicted person had consented, and it turns out that there was no effective consent, the publisher will have committed a crime.

In evaluating this argument by the Attorney General, one must keep in mind that “effective consent” under the Act means effective consent to the disclosure or publication—not merely effective consent to the creation of the image. The Act is explicit in this regard:

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

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

TEX. PENAL CODE ANN. §21.16 (e). Thus, a person considering making a disclosure of an image restricted by the Act risks criminal liability unless he or she is in a position to assess, accurately and definitively, whether the depicted person gave consent to the specific disclosure or specific publication, and whether such consent was legally effective. The publication of a non-obscene nude image, done with a reasonable belief that consent to disclosure or publication had been given, is unquestionably protected by the First Amendment, but is criminalized by the Act.

Similarly, by deeming irrelevant whether the publisher “kn[e]w the circumstance under which the image was created,” AG Br. at 7, the Attorney General concedes that the Act imposes liability on a publisher who (a) did not know whether the depicted person had a reasonable expectation of privacy or (b) believed in good faith that the depicted person did not have such an expectation.

Thus, the Attorney General is simply wrong when he argues that, “importantly, if the accused did not intentionally violate the depicted person’s reasonable expectation of privacy, there is no violation.” AG Br. at 5. The only “intent” requirement of the Act is that the person intend to make a disclosure—in other words, the Act does not criminalize accidental disclosures.

The law’s impact on *Media Amici*—including booksellers, book and newspaper publishers, librarians, photographers, and videographers—is concrete and severe. Mainstream publishers of books, newspapers, and magazines often publish “intimate” images as defined in the Act. TEX PENAL CODE ANN. §21.16 (a) (1). Such images include works of art, photographs used to illustrate healthcare and medical publications, and images from conflict zones. Booksellers sell books with such images. Libraries loan books with such images. Such images appear on websites that offer publications for sale. Art galleries and museums exhibit photographs with such images. Among these many instances of publication or disclosure of “intimate” images, it would be unusual for the person making the publication or disclosure to be able to assess not only whether the depicted person consented to creation of the image, but also whether the depicted person consented to the specific disclosure. Nor could persons considering whether to make such publications or disclosure rely on the absence of other elements of the offense to be certain to stay free of criminal liability—such as whether the depicted person had a reasonable expectation of privacy, or whether the depicted person’s identity was revealed—because persons considering publication or disclosure will often not be able to assess those factors either.

Swept within the law are books of great artistic, cultural, political, and historical value. The Act threatens a felony conviction for those who reprint, sell,

share, or loan the works of the greatest American photographers, including Imogen Cunningham, Ruth Bernhard, Robert Mapplethorpe, and Edward Weston. Did the persons depicted consent to the creation of the images? That is not enough. Did the persons depicted consent to the publication, or to this particular publication? How can a librarian possibly be sure that he or she is making an accurate assessment of that issue? The Act criminalizes the publication of Nick Ut's iconic photograph of a naked Vietnamese girl fleeing a village bombed by napalm. Surely, she did not consent to the creation of the image or its publication. And a person considering publication would be hesitant to rely on the argument that she did not have a reasonable expectation of privacy, because the Act only exempts "voluntary exposure" in a public setting.² Similarly, it would be a crime to publish images of prisoners at Abu Ghraib, or of unclothed inmates at the historic Attica prison riot.

Because the "intent" requirement of the Act does not require, as elements of liability, (a) that the person making the disclosure knew that the depicted person did not consent to the specific publication or disclosure, and (b) that the person

² TEX. PENAL CODE §21.16 (f)(2) provides "It is an affirmative defense to prosecution under Subsection (b) or (d) that: ... (2) the disclosure or promotion consists of visual material depicting in a public or commercial setting only a person's voluntary exposure of: (A) the person's intimate parts; or (B) the person engaging in sexual conduct;"

making the disclosure knew that the depicted person had a reasonable expectation of privacy, the Act is overbroad and facially unconstitutional.

B. By Defending the Act Based on the “Horrible Trauma” that Depicted Persons Suffer, the Attorney General Implicitly Concedes That the Act—Which Criminalizes Disclosures That Cause Nothing More Than “Embarrassment”—Is Overbroad

The Attorney General seeks to defend the Act by arguing that

Victims of nonconsensual pornography suffer horrible trauma. They often suffer severe psychological harm, become the subject of abuse and violent threats, receive sexual solicitations from strangers, or lose or quit their jobs. ... The State has a compelling interest in protecting its citizens from the egregious harms caused by nonconsensual pornography.

AG Br. at 1. In making that argument, the Attorney General ignores the fact that the Act does not define “harm” and that the Penal Code’s regular definition of harm—“anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested,” TEX. PENAL CODE ANN. § 1.07(25)—covers far more than “egregious harms.” Indeed, in both *Ex Parte Jones* and *Ex Parte Lopez*, the Information charges that the depicted person was subject to “embarrassment”³ and no more. The Information

³ Information, *State v. Jordan Jones* (67295-A); *Ex Parte Lopez* at 2

in *Ex Parte Lopez* states that the image at issue was of a woman “with her buttocks exposed.”⁴

To defend this Act, the State Prosecuting Attorney and the Attorney General would have to argue that the State has a compelling interest in protecting privacy to prevent “embarrassment.” Neither has even attempted to make that argument. Media may and do publish material that is embarrassing. Preventing embarrassment is not a compelling State interest that warrants infringing protected speech. Assuming that the State has a legitimate interest in protecting depicted persons from “horrific trauma” or “severe psychological harm,” then the Act was not narrowly tailored to protect that interest, because it criminalizes conduct that causes nothing more than embarrassment. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-55 (1988); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)

II. The Absence of an “Intent to Harm” Element, Taken Together with the Absence of a “Public Interest” Exception, Criminalizes A Broad Range of Protected Free Speech by Mainstream Media

Finally, the Attorney General argues that the absence of an “intent to harm” element and a “public interest” exception do not render the Act unconstitutional. AG Br. at 8. But it is the absence of those provisions—combined with the absence

⁴ *Ex Parte Lopez* at 1.

of a requirement that the person making the disclosure have actual knowledge that the depicted person did not consent—that makes the Act such a severe threat to mainstream media, and results in so many unconstitutional applications of the Act. As noted above, books, newspapers, and magazines often contain “intimate” images as defined in the Act, including photographic works of art, photographs used to illustrate healthcare and medical publications, and images from conflict zones. The publishers, booksellers, librarians, and readers who print, sell, loan, read, and share such works clearly have no “intent to harm” any person depicted in the images. And the publication, sale, and dissemination of such works is in the “public interest.” Had the Act included an “intent to harm” element and/or a “public interest” exception, it would not pose a threat to this speech.

The Attorney General’s argument that an “intent to harm” element was properly excluded from the Act because “a speaker’s motivation is entirely irrelevant to the question of constitutional protection,” AG Br. at 8,⁵ fails for two reasons. First, there are circumstances under which a speaker’s motivation is properly considered in evaluating whether the speech is protected by the First Amendment. *See, e.g., Markos v. City of Atlanta, Tex.*, 364 F.3d 567, 572–73 (5th Cir. 2004) (speaker’s motive, and whether speech involves matter of “public

⁵ Quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.)

concern” may be considered in assessing whether public employee’s speech is protected by First Amendment); *Gibson v. Kilpatrick*, 838 F.3d 476, 482 (5th Cir. 2016) (evaluating whether public employee’s speech was in the “public interest”). Second, the Act includes exceptions based on the purpose of the disclosure, including “reporting unlawful activity” and “lawful and common practices of law enforcement or medical treatment.” TEX. PENAL CODE ANN. §21.16 (f)(1).

The question before this Court is not whether an Act must include all of these limitations to be “narrowly drawn.” The question is instead whether this Act, with none of these limitations, is narrowly drawn. *Media Amici* respectfully suggest that the clear answer is that it is not.

CONCLUSION

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

Dated: April 9, 2019

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the word-volume limitations of Rule 9.4(i)(2), TEX. R. APP. PROC., because this brief contains 2,429 words, excluding the parts of this brief exempted by Rule 9.4(i)(1), TEX. R. APP. PROC.

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

Dated: April 9, 2019

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CERTIFICATE OF SERVICE

Pursuant to Rule 11, TEX. R. APP. PROC., I hereby certify that on April 9, 2019, a true and correct copy of the foregoing Supplemental Brief of Amici Curiae Media Coalition Foundation, Inc. et al., has been served by email and by First Class United States Mail, postage prepaid, to counsel for all parties:

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