No. 10-17-00047-CR

IN THE COURT OF APPEALS FOR THE
TENTH JUDICIAL DISTRICT OF TEXAS, AT WACO

Ex parte Richard Allen Montey Ellis

On Appeal from the 19th District Court of McLennan County, Texas Trial Court in Cause Number 2016-0008-HC8

Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae*

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Identity of Parties and Counsel

Pursuant to Rule 38.1(a), Rules of Appellate Procedure ("Tex.R.App.Pro."), the following is a complete list of the names and addresses of all parties to the trial court's final judgment and their counsel in the trial court, as well as appellate counsel, so the members of the Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision in the case and so that the Clerk of the Court may properly notify the parties to the trial court's final judgment or their counsel, if any, of the judgment and all orders of the Court of Appeals.

Presiding Judge

The Honorable Vikram Deivanayagam
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Statement of the Case

The parties have adequately stated the nature of the case.

Issues Presented

By Appellant: One: Section 21.16(b) is facially overbroad under the First Amendment to the United States Constitution.

Two: If the statute is interpreted narrowly not to be overbroad, such interpretation will render it unconstitutionally vague.

By the State: Penal Code § 21.16(b) is not facially unconstitutional. The statute is not overbroad as a content-based restriction of speech; it is not void for vagueness, so as to deprive an accused of due process.

By Amicus Curiae: The State relies upon a constitutionally-deficient standard in determining whether a content-based restriction on free expression is constitutional, and, if unchecked, will significantly impair the First Amendment freedoms of Texans.

Statement Pursuant to Rule 11, Tex.R.App.Pro.

The Texas Criminal Defense Lawyers Association ("TCDLA") is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and to the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as seeking to assist the courts by acting as *amicus curiae*.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which brief complies with all applicable provisions of the Rules of Appellate Procedure, and copies have been served on all parties listed above.

No. 10-17-00047-CR

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Brief for the Texas Criminal Defense Lawyers Association as *Amicus Curiae*

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the Texas Criminal Defense Lawyers Association ("TCDLA"), *Amicus Curiae*, and respectfully submits this *amicus curiae* brief supporting Relator. TCDLA asserts that, for the reasons stated herein, Applicant's case is one of extreme significance to the bench and bar in Texas. TCDLA, mindful of its purpose of both ensuring individual rights and the furtherance of the administration of criminal justice, would therefore show the Court as follows:

Facts of the Case

TCDLA takes no position on the facts, other than to note that nothing in the State's response takes issue with the facts as alleged by Appellant.

Issue as Framed by *Amicus Curiae* Restated

The State Relies upon a Constitutionally-Deficient Standard in Determining Whether a Content-Based Restriction on Free Expression is Constitutional, and, If Unchecked, Will Significantly Impair the First Amendment Freedoms of Texans.

Jurisdiction

The threshold question in any original mandamus proceeding is whether the Court has original jurisdiction to entertain relator's application for writ of mandamus. Under Article V, Section 6, of the Texas Constitution, the Courts of Appeals "have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law." McLennan County is within this Court's jurisdiction.

Relevant Facts

This is a facial challenge to the constitutionality of the statute; all relevant facts are procedural.

Summary of the Argument

The State relies upon the "implication" test from ***Scott v. State***, 322 S.W.3d 662 (Tex.Cr.App. 2010), instead of the content-based regulation test announced in ***Ex parte Lo***, 424 S.W.3d 10 (Tex.Cr.App. 2013). The "implication" test is not constitutionally sound and does not derive from stated principles of First Amendment review announced by the United States Supreme Court.

Because this "implication" test confuses the issue, the State has not adequately responded to the Constitutional challenge raised by Appellant, this Court should strike down Penal Code section 21.16 as an unconstitutional restraint on free expression because the statute is overbroad (in that it restricts protected speech) and vague (in that a person of ordinary caution, applying

the plain meaning of the statutory terms cannot determine whether his conduct will be prohibited by the statute).

Argument & Authorities

A.

This Court should apply the rule of *Ex parte Lo*

This Court faces the question of whether Penal Code section 21.16(b) is unconstitutional based on the doctrine of overbreadth. TCDLA asserts that it is.

The question of whether a statute is overbroad is one the Court reviews *de novo*. See ***Ex parte Lo***, 424 S.W.3d at 14-15. In the normal course of such a review, the reviewing court must presume the statute valid and that the Legislature has not acted unreasonably or arbitrarily. ***Ex parte Lo***, 424 S.W.3d at 14-15, citing ***Rodriguez v. State***, 93 S.W.3d 60, 69 (Tex.Cr.App. 2002). Where the government seeks to restrict and punish speech based on its content, however, no presumption of constitutionality attaches. ***Rodriguez***, 93 S.W.3d at 69, citing ***United States v. Playboy Entertainment Group, Inc.***, 529 U.S. 803, 817 (2000)

("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions").

Content-based regulations are presumptively invalid, and the State must rebut that presumption. ***Ex parte Lo***, 424 S.W.3d at 15. Reviewing courts must apply the strictest scrutiny to regulations which restrict content. ***Ex parte Lo***, 424 S.W.3d at 15.

B.

The Statute at Issue Is a Content-Based Restriction, and the Court Should Reject Any Approach Which Inquires into Whether the Statute "Implicates" the First Amendment.

To determine if a statute is a content-based restriction, this Court should apply the test from ***Ex parte Lo***, as suggested by Appellant. That test is based on common sense and the plain meaning of "content-based." It states: "If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content based." ***Ex parte Lo***, 424 S.W.3d at 15, n.12, citing ***Gresham v. Peterson***, 225 F.3d 899, 905 (7th Cir. 2000).

The State attempts, in its original brief, to argue that section 21.16 does not "implicate" the First Amendment because this section reaches only conduct, rather than speech. This canard arises from the Court of Criminal Appeals' decision in ***Scott***, *supra*. In ***Scott***, the majority, citing to ***Cohen v. California***, 403 U.S. 15 (1971), created a new category of so-called "unprotected" speech in dicta.

In ***Cohen***, the defendant wore a jacket with a profane, anti-draft slogan. ***Cohen***, 403 US. at 16. The government argued that "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers" and that California might therefore legitimately restrict Cohen's free expression. ***Cohen***, 403 U.S. at 21. The United States Supreme Court noted that the government may prohibit the intrusion of otherwise-objectionable ideas into the sphere of the home which would otherwise be constitutionally protected in public, stated that the government may, in the course where it was shown that "substantial privacy interests" were

invaded in "an essentially intolerable manner," restrict otherwise-protected speech. ***Cohen***, 403 U.S. at 21.

Ultimately, however, the United States Supreme Court held that profanity-sporting jacket worn by the defendant **was** constitutionally protected. The Court stated, in dicta:

> It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistent with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.

Cohen, 403 U.S. at 26.

From the dicta quoted, the Court of Criminal Appeals divined that, at least insofar as Texas's telephonic harassment statute (Penal Code section 42.07) was concerned, otherwise-protected speech that invades a substantial privacy interest in an essentially intolerable manner loses its First Amendment protections. ***Scott***, 322 S.W.3d at 668-669. In doing so, the ***Scott*** Court rendered an opinion totally and completely incompatible with the Court's later decision in ***Ex parte Lo***, and Texas jurisprudence has been grappling with the manifest contradiction ever since. See, e.g., ***Ex parte Reece***, 517 S.W.3d 108 (Tex.Cr.App. 2017)(Keller, P.J.,

dissenting from the denial of discretionary review, and suggesting that ***Scott*** should be re-examined following the narrowing of the Court's holding in ***Wilson v. State***, 448 S.W.3d 418, 420-423 (Tex.Cr.App. 2014); ***Ex parte Thompson***, 442 S.W.3d 325, 342-343 (Tex.Cr.App. 2014); ***Ex parte Bradshaw***, 501 S.W.3d 665, 674 (Tex. App. - Dallas 2016).

The State, in its original brief, attempts to import the "implication" test from ***Scott*** to the present case and say that, through ***Scott***'s peculiar brand of Constitutional alchemy, a content-based restriction can nevertheless fall outside the ambit of the First Amendment because of some concerns regarding privacy. However, it is important to note that, apart from ***Scott***, which has been roundly criticized, the United States Supreme Court has never held that expression which allegedly invades privacy is a class of unprotected speech.

An important factor in the ***Scott*** decision was the majority's insistence that the telephonic harassment statute reached only "noncommunicative" conduct. ***Scott***, 322 S.W.3d at 670 ("Given

that plain text, we believe that the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative . . .”). The majority attempted to save its rule by claiming that the telephonic harassment statute did not proscribe communicative conduct, and was therefore not content-based. Based on this ruling, the ***Scott*** majority concluded that section 42.07 did “not implicate the free-speech guarantee of the First Amendment,” and Texas jurisprudence has been saddled with the “implication” test ever since. ***Scott***, 322 S.W.3d at 670-671.

In her concurrence in ***Wilson***, Presiding Judge Keller stated that the Court of Criminal Appeals ought to re-examine ***Scott***’s holding as the basis for the majority’s decision were rapidly evaporating. ***Wilson***, 448 S.W.3d at 426-427 (Keller, P.J., concurring). Then, in her dissent in ***Reece***, Presiding Judge Keller noted that under the Court of Criminal Appeals’ analysis, the government was free to use the “coercion of criminal law” to enforce a “more refined atmosphere” in the areas in which

attempted to regulate expressive conduct. See ***Reece***, 517 S.W.3d at 111 (Keller, P.J., dissenting).

Reasonable minds do not differ on the lack of value in "revenge porn." Such conduct is entirely reprehensible, and the persons who engage in the posting of such visual material are understandably derided as people of the lowest moral character. However, being of low moral character is neither a necessary nor a sufficient condition for exposure to criminal liability, and the First Amendment often shields a great deal of what our society scorns as immoral, indecent, and/or wrong. See ***Ex parte Lo***, 424 S.W.3d at 19-20.

To permit the State to use the "implication" test from ***Scott*** to argue that a content-based regulation, such as section 21.16, is a permissible restriction on free expression because it reaches the conduct of publishing the visual material, abandons decades of United States Supreme Court jurisprudence in favor of creating, as Appellant suggests, an entirely new category of unprotected speech based on an invasion of a privacy interest.

The genealogy of such a category finds its basis in ***Cohen***, but as the high Court decided, in ***Cohen***, that the speech at issue was permissible, the "invasion of privacy" language is dicta that has found its way into our jurisprudence. Neither ***Cohen*** nor its progeny have ever established a privacy exception to the First Amendment, except to state that the government may forbid entry of certain speech into the home that would be otherwise permissible in the public sphere. See ***Rowan v. U.S. Post Office Department***, 397 U.S. 728, 737 (1970).

The communications at issue under section 21.16, however, are not the same as those at issue in ***Rowan***. They are more like the offensive anti-draft slogan in ***Cohen***. The publication of such visual material may be upsetting to the person depicted. It may be vulgar and despicable. It may be humiliating and carry with it societal sanction for violation of our sexual mores. Protected expressive conduct, however, does not lose its First Amendment protection simply because it is vulgar, despicable, humiliating, harmful, or upsetting. We would not, for example, find that the

journalists who published stories about Anthony Weiner's sexual misconduct violated the First Amendment. Nor would we say that a tabloid magazine that shows an unflattering picture of a movie star's inadvertently-exposed undergarments should be subject to criminal sanction for publishing the picture.

What section 21.16 seeks to end is the abusive practice of sharing what was originally intended to be a private exchange between the parties who consented to the production of the visual material. Such intent notwithstanding, that practice cannot be prohibited without doing more violence to the First Amendment protections that all citizens enjoy. If the price of the First Amendment is that Americans must permit people to have offensive opinions, to publish vulgar and disgusting material, or to say, in public, offensive things, then so must the First Amendment protect the person who posts "revenge porn" from criminal sanction, as upsetting and offensive as that may be to people of sound moral judgment.

The State cannot, and must not, be permitted to rely on ***Scott***'s misunderstanding of the principles of the First Amendment to say that expressive conduct, such as publishing visual material, loses its protection because it is expressive conduct as opposed to expressive speech. In ***Ex parte Lo***, the Court saw the truth of that when it held that reviewing courts must determine whether a regulation is content-neutral or content-based, and if content-based, apply the appropriate standard to determine whether the statute at issue passes constitutional muster. This Court should apply the ***Ex parte Lo*** rule.

C.

Scott v. State Was Wrongly Decided and Has Been Significantly Criticized; this Court Should Not Rely upon It.

The reason for the State's insistence that this Court should review the overbreadth of Penal Code section 21.16 under ***Scott***'s "implication" analysis, rather than ***Ex parte Lo***'s "content-based" analysis, is that the ***Scott*** analysis alleviates the State from the

burden of defending the unconstitutional statute. If indeed invasion of someone's privacy interest forms the basis for cutting off First Amendment protections, then the State is essentially correct in that Penal Code section 21.16 is not overbroad. While the ***Cohen*** dicta is frequently cited, when the United States Supreme Court considers whether the statute at issue meets ***Cohen***'s standard, it typically finds the statute at issue to run afoul of the First Amendment's protection. See, e.g., ***Erznoznik v. City of Jacksonville***, 422 U.S. 205, 210 (1975)(holding that a local ordinance prohibiting a drive-in theater from showing scenes with nudity was unconstitutional as a content-based restriction); see also ***State v. Dugan***, 303 P.3d 755, 768 (S.C. Montana 2013) (finding that the Supreme Court has "sparing[ly]" applied the ***Cohen*** privacy rationale and that the statute at issue was overbroad).

In adopting the rule of ***Ex parte Lo***, the Court of Criminal Appeals embraced Presiding Judge Keller's suggestion that ***Scott*** should be re-examined, particularly after the ruling in ***Wilson***,

and harmonize the decisions of the Court of Criminal Appeals. Greater clarity and guidance will result, not only for citizens accused of violating various content-based statutes and regulations of the State of Texas, but also for legislators and prosecutors as they amend and improve Texas's laws and seek to enforce those laws.

Therefore, this Court should adopt the rule of ***Ex parte Lo*** that the statute at issue is content-based, and that the State must satisfy strict scrutiny if the statute is to be found constitutional. The entire thrust of the State's argument, found at pages 15 and 16 if its brief, is that because section 21.16 does not "implicate" the First Amendment, it cannot be overbroad. Respectfully, if this Court sees the error of ***Scott***'s implication analysis, then this argument must fail *a fortiori*. Section 21.16 is overbroad on its face because it prohibits otherwise protected speech.

To hold otherwise would be to start down a dangerous path, the one the State invites this Court to take in recognizing, as it suggests in post-submission brief, an entirely new category of

unprotected speech. The United States Supreme Court has always been careful to state that the categories of unprotected speech are limited in extent due to concerns regarding the danger of over-regulation. See ***R.A.V. v. City of St. Paul***, 505 U.S. 377, 383-384 (1992). In that case, the late Justice Scalia, writing for the majority, wrote that "a limited categorical approach has remained an important part of our First Amendment jurisprudence," and that the Supreme Court's jurisprudence did not "establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression." ***R.A.V.***, 505 U.S. at 383-384. For example, Justice Scalia discussed how, although child pornography is a category of unprotected speech, Vladimir Nabokov's classic novel *Lolita*, which features sexual scenes with a minor child, would be protected and not obscene.

> There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment . . . the conduct to be prohibited must be adequately defined by the applicable state law . . . the nature

> of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age.

New York v. Ferber, 458 U.S. 747, 763-764 (1982)(emphasis in original).

In ***United States v. Stevens***, 559 U.S. 460 (2010), the United States Supreme Court once again cautioned against the free creation of new categories of unprotected speech simply because of an "ad hoc balancing of the relative social costs and benefits." ***Stevens***, 559 U.S. at 471. Chief Justice Roberts, writing for the majority, stated that the Court's existing First Amendment jurisprudence "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." ***Stevens***, 559 U.S. at 472. In finding that deplorable depictions of animal cruelty such as so-called "crush videos" were entitled to First Amendment protections, the high Court stated that the statute at issue was overbroad because it swept protected speech within its prohibition. While everyone might agree that the cases of extreme cruelty shown in such videos were without merit and despicable in the extreme, the law

could not prohibit them without also prohibiting protected expression, and for that reason, the statute had to be struck down. ***Stevens***, 559 U.S. at 481.

A statute that forbids some protected speech is unconstitutional unless it satisfies the strict scrutiny standard. ***Ex parte Lo***, 424 S.W.3d at 14-15. "[W]hen a statute is content-based, it may be upheld only if it is the least restrictive means of achieving the compelling government interest in question." ***Thompson***, 442 S.W.3d at 348.

Section 21.16(b) prohibits the disclosure of "visual material depicting another person with the person's intimate parts exposed or engaged in sexual conduct." There can be no doubt that this phrase describes what might be called, generally, "pornography" or "erotica." Such material is constitutionally-protected speech. See ***Ashcroft v. American Civil Liberties Union***, 535 U.S. 564 (2002).

The question of overbreadth is then whether anything about section 21.16(b) distinguishes it from a statute generally

prohibiting the publishing of pornographic or erotica material. The State may choose to argue, as it does for the first time in its post-submission brief, that the publishing of "non-consensual pornography of a private individual" is an "entirely new category of unprotected speech" (see State's Post-Submission brief at pages 6-7). However, this term is in and of itself vague. There is a difference between photography of an unwilling or unaware person (as discussed in ***Ex parte Thompson***) and consensually-made private photographs or videos which are leaked or published without the depicted person's specific consent (as is at issue in section 21.16).

Consider the case of a famous pornographic publication such as *Hustler* magazine, which has both an offline, print version and an online component. If a photographer took nude shots of a model for the print publication, but later republished them online without obtaining specific permission to do so, and the later online publication caused the depicted person harm and revealed his or her identity, then the *Hustler* magazine photographer could be

prosecuted successfully under section 21.16(b), so long as the jury believed that the model had a "reasonable expectation" of privacy in the magazine photographs.

It could be argued that the model consented to the publication of the photographs in the magazine, and therefore should not have had a reasonable expectation of privacy, but the same question would arise as when an ex-boyfriend, bereft of common morals and possessing a small and spiteful character equal to his ethical deficiency (and thus an ex-boyfriend), publishes an ex's intimate boudoir photography on social media in revenge for some perceived slight. Does the paramour who takes boudoir photography enjoy a "reasonable expectation of privacy" once he or she has disclosed them to a partner?

Plainly, these questions pose a significant danger to the constitutionally-permitted sweep of the statute, one that the State has heretofore failed to address by sidestepping the issue in its reliance on ***Scott*** and the flawed "implication" analysis. The First Amendment, however, cannot tolerate such prevarication. Section

21.16 takes aim squarely at otherwise-protected speech, and the State asks this Court to excuse legislation which restricts free expression because there may exist an "entirely new" category of unprotected speech, speech which invades privacy. So long as the statute itself attempts to use the concept of "privacy" to define what is, and what is not, permissible speech, it will be overbroad and therefore constitutionally deficient.

D.

Section 21.16 is Unconstitutionally Vague.

The doctrine of facial unconstitutionality for vagueness states that a statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." ***State v. Holcombe***, 187 S.W.3d 496, 499 (Tex.Cr.App. 2006). As with the doctrine of overbreadth, the State must bear the burden of establishing the constitutionality of the statute in the face of a vagueness challenge when the statute at issue is content-based. See ***Delacruz v. State***, No. 07-15-

00230-CR (Tex. App. - Amarillo; June 29, 2017)(not designated for publication)(*citing* ***Ex parte Lo***).

As discussed *supra*, section 21.16 does not define the term "private" or the term "reasonable expectation" from subsection (b)(2). Nor does it define "harm" from subsection (b)(3) (although harm is generally defined in the Penal Code) or the term "identity" in (b)(4). In the absence of specific statutory definitions, these terms are to be given their ordinary and plain meaning. ***Ex parte Ellis***, 279 S.W.3d 1, 6 (Tex. App. - Austin 2008); affirmed, ***Ex parte Ellis***, 309 S.W.3d 71 (Tex.Cr.App. 2010).

E.

The Undefined Terms in the Statute Render Unclear What Conduct Is Prohibited.

The failure of the statute to define when a person has a reasonable expectation that the visual material will remain private is fatal to the constitutionality of the statute. The United States Supreme Court has held that where a statute acts to "authorize and even encourage arbitrary and discriminatory enforcement,"

that statute is unconstitutionally vague. See ***City of Chicago v. Morales***, 527 U.S. 41, 56 (1999).

If, for example, the term "private" were defined as "the subject depicted in the visual material and its intended recipient," that would at least permit a potential defendant some guidance as to the scope of what "private" means. As it stands, questions arise as to who falls within the circle of "privacy" to which such visual material may be disclosed.

- Is it the initial recipient?
- What if the person depicted has provided the material to two or more people?
- Does the visual material then lose its protected status under section 21.16?
- What if the visual material is inadvertently seen by a third party, such as a roommate or a new romantic partner?
- At which point does supposedly "private" visual material lose its cloak of privacy protection and become simple consensually-made erotica?

These questions cannot be answered by reading the statute; they would confound, in their way, experts and scholars of the law. No ordinary person could determine, based on a reading of

the statute, what conduct was prohibited and what conduct was permissible.

Furthermore, following ***Morales***, the law itself is subject to arbitrary and discriminatory enforcement. At issue in ***Morales*** was a criminal law that made it a crime for known street gang members to loiter in public. Justice Stevens, writing for the majority, found that the ordinance did not "provide sufficiently specific limits on the enforcement discretion of the police" in order to be found constitutional. ***Morales***, 527 U.S. at 63-64. Because the statute at issue here likewise does not provide limits on the ability of the State to prosecute people it finds have invaded a nebulous "privacy" interest that causes some undefined "harm" by revealing some undefined fact of "identity" of the person depicted, section 21.16 is a tool for oppression and prosecution of persons. Because of that fact, the statute must be determined to be unconstitutionally vague.

F.

This Court Should Not Permit the State to Rely on the General Definition of "Harm" Against a Vagueness Challenge.

The State may argue that because "harm" is specifically defined in the general definitional section of the Penal Code that this is sufficient to rescue the statute from a constitutional deficiency. See ***Ex parte Harrington***, 499 S.W.3d 142, 148-149 (Tex. App. - Houston [14th] 2016)(holding that the general definition of harm was sufficient to uphold the identity theft statute).

It should be noted that Penal Code section 1.07(a)(25), the general definitional section, defines harm as "anything reasonably regarded as loss, disadvantage, or injury." In the context of otherwise-protected speech, this definition loses its clearly-defined edges (such as they are) and forms more of the misty penumbra which renders section 21.16 subject to a vagueness challenge.

Consider: if, at the time the visual material was made, it was for "private" use and consumption between the person or persons

depicted and those person or persons with whom it was initially shared. Such material itself was not harmful at the time it was made or initially shared. A later disclosure may inflict some loss, disadvantage, or injury, if the disclosure was made to a person who would object to the visual material, e.g., an employer or a spouse. But the character of the speech at issue has not changed, only the circumstances of some potential future viewer.

For example, if an ex-boyfriend uploads a photograph of his former boyfriend to a website, rather than mailing it to his employer or parents, and the photograph is later seen because his employer happens to browse websites where such photographic material is shared, it could potentially have deleterious effects on the victim's employment. More questions arise:

- What control did the ex-boyfriend have over who would be browsing the website?
- In that instance, did the ex-boyfriend have the intent that the victim suffer harm?
- Or does the ex-boyfriend have a defense that the fact that the victim's employer found the photograph was entirely incidental to the ex-boyfriend's own conduct?

The statute does not criminalize the reckless disclosure of such visual material; nor does it prohibit negligent disclosure. It attempts to limit such disclosures to intentional ones, but without more guidance being given due to the vague wording of the statute, a person of ordinary prudence might reform his or her conduct to avoid violating the statute, and in doing so, forgo otherwise-protected First Amendment expression. Because this possibility is intolerable in a society which values free expression at the expense of the government's power to criminalize such actions, the statute must be regarded as vague, and struck down for that vagueness.

Conclusion

For these reasons, the amicus curiae of the Texas Criminal Defense Lawyers' Association respectfully request this Court to find that Penal Code section 21.16 is unconstitutional as drafted because it is overbroad and vague, and to uphold the protections of the First Amendment, afforded to all Texans by the Fourteenth Amendment.

Prayer

WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, *amicus curiae* in the above styled and numbered cause respectfully prays that, for the reasons set out herein, the Court will sustain Appellant's challenge and find that Penal Code section 21.16 is unconstitutional as drafted.

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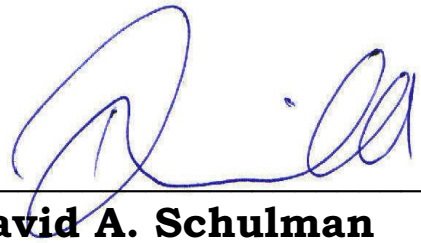

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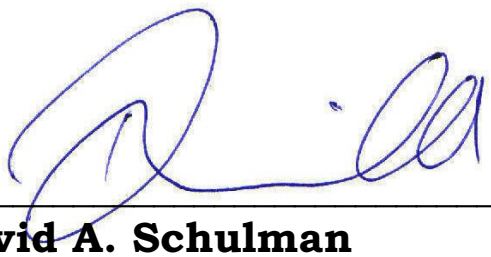

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