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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

EX PARTE RONALD THOMPSON

FROM THE FOURTH COURT OF APPEALS, SAN ANTONIO
NO. 04-13-00127-CR
ORIGINATING IN THE 379TH DISTRICT COURT, BEXAR COUNTY
NO. 2012-CR-1148-W2

BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Eugene Volokh
Samantha Booth
UCLA School of Law
First Amendment
Amicus Brief Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926

Bruce D. Brown
Gregg P. Leslie
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

J. Campbell Barker
State Bar No. 24049125
Yetter Coleman LLP
909 Fannin, Suite 3600
Houston, TX 77010
(713) 632-8000
cbarker@yettercoleman.com
Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom-of-information interests of the news media. The Reporters Committee has provided guidance, research, and representation in First Amendment and Freedom of Information Act litigation since 1970.

No fees were paid for the preparation of this brief.

SUMMARY OF ARGUMENT

Texas Penal Code § 21.15 is a content-based restriction on the creation of constitutionally protected speech. It is therefore unconstitutional unless it passes the extremely demanding "strict scrutiny" test—a test that the State of Texas has not even argued the restriction can pass.

Under § 21.15, a person commits a crime if he or she "photographs [or otherwise records] . . . a visual image of another" in any location other than "a bathroom or private dressing room," "without the other person's consent" and "with [the] intent to arouse or gratify the sexual desire" of the photographer or a third party. Tex. Penal Code § 21.15(b)(1). This focus on only a particular kind of content—"visual image[s] of an-

other”—makes this law content-based (though not viewpoint-based). No First Amendment exception justifies this sort of restriction; the law is not limited, for instance, to obscene images or to child pornography. And the First Amendment fully protects photographs generally, and the creation of photographs in public places in particular.

Moreover, the law (whether or not it is viewed as content-based) would in practice deter a wide range of speech. As the court of appeals recognized, § 21.15 would potentially apply to fans or professional photographers who photograph sports figures, cheerleaders, or celebrities—subjects who often exude sexual appeal and who might not want to be photographed, even in public places. It could apply to photographs taken by tourists, who may seek to capture the look of a city, including both its architecture and its residents. It could be used to punish any student, amateur, or professional photographer (including a journalist) who photographs figures during events containing sexual undertones, such as many gay-pride parades, Halloween celebrations, and dance parties.

And in such cases, the intent element may do little to safeguard against improper criminalization of protected speech. A police officer,

prosecutor, or jury might infer intent to arouse sexual desires from the attractiveness of a photograph's subjects, or from the fact that the subjects were dressed in revealing clothing (whether on the beach, at a sporting event, at a nightclub, or at a gay-pride parade). Even a photographer who has no sexual intentions might be worried that others will infer such intentions, and that he will face an arrest at best and a felony conviction at worst. Thus, in addition to impermissibly criminalizing a substantial amount of protected speech, § 21.15 threatens to chill still more, as some speakers avoid creating expressive works that they fear might even arguably fall within the statute's broad reach.

Partly because of this difficulty in determining the true purpose of First Amendment-protected activity, the Supreme Court has generally refused to allow such activity to be restricted simply because of a person's supposed purpose in creating expression. As Chief Justice Roberts stated in *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 468 (2007) (two-Justice lead opinion) (quoting Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001)), "'[U]nder well-accepted First Amendment doctrine, a speaker's motiva-

tion is entirely irrelevant to the question of constitutional protection.'" The three concurring Justices took a similar view.

For these reasons, this Court should affirm the judgment of the court of appeals and hold that § 21.15(b)(1) is unconstitutional.

ARGUMENT

I. Section 21.15 Is an Impermissible Content-Based Restriction on the Creation of Constitutionally Protected Speech.

A. Section 21.15 Restricts the Creation of Constitutionally Protected Speech, Rather Than Just Restricting Conduct.

Section 21.15 punishes any person who (1) "photographs or by videotape or other electronic means records, broadcasts, or transmits *a visual image of another*" (2) that is taken at *any* location other than "a bathroom or private dressing room," if such image is made (3) "without the other person's consent" and (4) "with [the] intent to arouse or gratify the sexual desire of any person"—whether the photographer or a third party. Tex. Penal Code § 21.15(b)(1) (emphasis added). This prohibition restricts the creation of constitutionally protected speech, and it does so based on the content of that speech.

Photography and videography enjoy the same First Amendment protections as other mediums of speech. *See, e.g.*, *Brown v. Entm't*

Merchants Ass'n, 131 S. Ct. 2729, 2733 (2011) (holding that even violent video games are fully constitutionally protected); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that even many photographic or video depictions of animal cruelty are fully constitutionally protected); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002) (holding that "photograph[s], film[s], [and] video[s]" are constitutionally protected, even if they "appear[]" to show "a minor engaging in sexually explicit conduct"); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995), and *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989))); *Ex parte Lo*, No. PD-1560-12, 2013 WL 5807802, at *2-*4 (Tex. Crim. App. Oct. 30, 2013) (striking down a statute that banned, among other things, "photographic or video image[s] . . . relate[d] to or describ[ing] sexual conduct," on the grounds that such law impermissibly restricted protected speech).

The government cannot circumvent this First Amendment right by claiming that it is merely regulating "conduct," when such "conduct" consists of *creating* First Amendment expression. Indeed, the conclusion that photography is mere unprotected "conduct" would strip *any* act of photography of First Amendment protection, regardless of the expression being created. Yet such a result cannot be squared with the First Amendment. Criminalizing the act of taking photographs would be as unconstitutional as criminalizing the act of putting pen to paper to write a novel, news article, or letter. As the Seventh Circuit stated in *ACLU v. Alvarez*,

> The act of *making* an . . . audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an . . . audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . . [B]anning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on . . . audiovisual recording.

679 F.3d 583, 595-96 (7th Cir. 2012); *see also Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (recognizing that the First Amendment protects the right to film in public places); *Smith v. City of Cumming*, 212 F.3d

1332, 1333 (11th Cir. 2000) (likewise recognizing a First Amendment right to photograph in public places); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (same).

B. Section 21.15 Is Content-Based (Though Not Viewpoint-Based).

The statute's singling out of photographs that capture the "visual images of another" makes it content-based. To be sure, such a distinction is not *viewpoint*-based—it does not seek to discriminate among photographers based on the photographer's "ideology," "opinion," or "perspective." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Nevertheless, it does restrict an entire class of subject matter that a speaker can portray. And such subject-matter restrictions are indeed treated as content-based under First Amendment law, even when they are viewpoint-neutral.

In *Regan v. Time, Inc.*, 468 U.S. 641 (1984), for instance, the Supreme Court struck down a statutory provision that generally banned photographic reproductions of United States currency, but exempted reproductions "for philatelic, numismatic, educational, historical, or newsworthy purposes." *Id.* at 644. The Court held that the law was content-based, because "[a] determination concerning the newswor-

thiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." *Id.* at 648. The statute was viewpoint-neutral, since it applied regardless of the ideas expressed by the visual reproductions. But it was nonetheless content-based.

Likewise, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), treated as content-based a ban on pictures and films that "appear[]" to show "a minor engaging in sexually explicit conduct," even though the law banned an entire subject matter rather than just a particular viewpoint. *Id.* at 241, 256. And *United States v. Stevens*, 559 U.S. 460 (2010), found a statute to be "explicitly" content-based because it "restricts 'visual [and] auditory depiction[s],' such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed." *Id.* at 468 (brackets in original).

Just as the prohibitions on photographs depicting currency in *Time*, children engaging in sexual conduct in *Ashcroft*, and living animals being maimed in *Stevens* focused on the content of the photograph, so too § 21.15's prohibition turns on the content of a photograph. Criminality under § 21.15 depends on whether the photograph contains

an image of a person—rather than, say, an animal, a landscape, or a building—at a location other than a fitting room or bathroom. Section 21.15 is therefore just as content-based as the statutes in *Time*, *Ashcroft*, and *Stevens*.

Nor can § 21.15 be treated as content-neutral on the theory that it focuses on the "secondary effects" of speech rather than on its content. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). "[T]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (internal quotation marks omitted); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (expressing the same view).

And the "effects" of speech that the Legislature seeks to address in enacting § 21.15 flow directly from the content of the banned photography and videography. The statute covers only those photographs that have the intended primary effect of causing sexual arousal, and it is the content of speech that would cause such arousal. Moreover, any supposed invasion of privacy or sense of sexual exploitation created by the

photograph is necessarily related to the content of the photograph—the subject of the photograph feels exploited precisely because the photograph contains a depiction of him or her. This direct "emotive impact" of the speech thus does not qualify as a "secondary effect" that would render the law content-neutral.

In erroneously concluding that § 21.15 was content-neutral, the court of appeals apparently confused the statute's viewpoint neutrality with content neutrality. The lower court held that § 21.15 was content-neutral because it "limits speech by imposing time, place, and manner restrictions that are unrelated to content," and because "subsection 21.15(b)(1) does not 'limit' or 'restrict' the substantive content of photographs—in other words, it does not favor one type of photograph over another." *Ex parte Thompson*, 414 S.W.3d 872, 878 (Tex. App.—San Antonio 2013, pet. granted).

But, as explained above, the law's restriction is indeed related to content—it does "favor one type of photograph," with one "substantive content," "over another." If the substantive content of a photograph is a landscape or building, the photograph is unrestricted. If the substantive

content of a photograph is a person, the photograph is potentially restricted.

The case cited by the court of appeals, *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622 (1994), does not support the court's position. The U.S. Supreme Court in *Turner* reasoned that the law there—which required "cable operators to carry the signals of a specified number of local broadcast television stations," *id.* at 630—did not turn at all on the content of speech, but applied regardless of the images or subject matter that the television station chose to broadcast. *Id.* at 643-45. Furthermore, the government's purpose was not to discourage any type of content over another, but rather simply to "ensure that all Americans . . . have access to free television programming—whatever its content." *Id.* at 649.

Contrary to the court of appeals' conclusion, therefore, *Turner* does not show that § 21.15 is content-neutral. Rather, § 21.15's application depends on whether a given image depicts a person, as opposed to any other subject matter. It is thus a content-based speech restriction. That means § 21.15 is presumptively unconstitutional, and the State bears the burden of rebutting the presumption by showing that § 21.15 is

narrowly tailored to a compelling government interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 817 (2000).

Though the court of appeals erred in analyzing § 21.15 as a content-neutral speech restriction, it was nonetheless correct in holding § 21.15 unconstitutional. In fact, recognizing that § 21.15 is content-based only makes it clearer that the statute violates the First Amendment. The strict scrutiny applicable to content-based restriction is a much more demanding standard than the intermediate scrutiny applicable to content-neutral restrictions. A law that fails intermediate scrutiny would therefore certainly fail strict scrutiny.

C. Section 21.15's Content-Based Restriction Cannot Be Justified as Merely Regulating a Photographer's Intent; First Amendment-Protected Activity Does Not Lose Protection Simply Because It Is Done With Allegedly Bad Intentions.

The State attempts to argue that "[t]he statute does not implicate the *First Amendment's* speech-content regulation concerns, because it 'regulates a person's intent in creating a visual record and not the contents of the record itself.'" State's Brief on the Merits at 12-13 (italics in original; citing *Ex parte Nyabwa*, 366 S.W.3d 719 (Tex. App.—Houston [14 Dist.] 2011), *superseded and withdrawn by Ex parte Nyabwa*, 2012

WL 378220 (Tex. App.—Houston [14 Dist.] 2012), *opinion withdrawn by Ex parte Nyabwa*, 366 S.W.3d 710 (Tex. Crim. App. 2012)).

The U.S. Supreme Court, however, has consistently rejected the idea that a supposedly bad intention transforms otherwise protected speech-creating conduct into unprotected conduct. In *Snyder v. Phelps*, for example, the Court held that "outrageous" speech praising the death of American soldiers was protected by the First Amendment, even when such speech was deliberately planned to coincide with the funeral of a soldier and was likely calculated to inflict emotional distress on the family. 131 S. Ct. 1207, 1210-12, 1220 (2011). The Court therefore found that the First Amendment barred the family's claim for intentional infliction of emotional distress. *Id.* at 1212.

Likewise, the government could not constitutionally punish a magazine for publishing a scurrilous attack on someone on the grounds that the law is merely punishing the publisher's intent to offend or excoriate. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 56 (1988) (concluding that the First Amendment fully protects the publication of a "gross and repugnant" parody, notwithstanding the fact that it was "intended to inflict emotional injury" on its target). And in

Garrison v. Louisiana, 379 U.S. 64 (1964), the Court similarly rejected the view that reputation-injuring speech could be more easily restricted if the court decides that the speaker spoke with the "intent . . . to inflict harm." *Id.* at 73 (recognizing that even statements motivated by hatred "contribute to the free interchange of ideas and the ascertainment of truth"). *Garrison* thus held that, "even when a speaker or writer is motivated by hatred or ill will his expression was protected by the First Amendment." *Hustler*, 485 U.S. at 53 (citing *Garrison*, 379 U.S. at 73)

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007), likewise shows that speech may not be restricted simply because of its supposedly improper motive. In *Wisconsin Right to Life*, five Justices rejected a proposed interpretation of federal elections law that would limit political ads "intended to influence elections." *See id.* at 465, 467 (Roberts, C.J., joined by Alito, J.); *id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.). Chief Justice Roberts' lead opinion noted that, "'[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection.'" *Id.* at 468 (quoting Martin Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91

(2001)). The three concurring Justices agreed, reasoning that "test[s] that [are] tied to the public perception, or a court's perception, of . . . intent" are "ineffective to vindicate the fundamental First Amendment rights" of those against whom the intent-based law is applied. *Id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.).

Invalidating intent-based speech restrictions, the Justices reasoned, is necessary to prevent the law from unduly deterring speech even by speakers who lack the forbidden intentions. "No reasonable speaker would choose to run an ad covered by [the statute] if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion." *Id.* at 468 (Roberts, C.J., joined by Alito, J.) (internal quotation marks omitted). "First Amendment freedoms need breathing space to survive," and "[a]n intent test provides none." *Id.* at 468-69 (citations omitted).

The three concurring Justices in *Wisconsin Right to Life* took a similar view. Any effort to distinguish restricted speech from unrestricted speech "based on intent of the speaker," they concluded, "would 'offe[r]

no security for free discussion,' and would 'compe[l] the speaker to hedge and trim.'" *Id.* at 495 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) (internal citations and some internal quotation marks omitted; brackets in original). All four cases—*Snyder*, *Hustler*, *Garrison*, and *Wisconsin Right to Life*—thus make clear that an intent requirement generally cannot turn fully protected speech into unprotected speech.

The "chilling effect" concern raised in *Wisconsin Right to Life* is very much applicable here. Section 21.15's *actus reus* components potentially cover—and therefore chill—a wide range of protected speech. As the court of appeals noted, § 21.15 could criminalize photographs taken of celebrities by fans or by professional photographers, even if the photo merely depicted "a fully-clothed adult walking down a public street." *Ex parte Thompson*, 414 S.W.3d at 879 (internal quotation marks omitted). The statute could likewise cover the public's photographs of cheerleaders, athletes, and models, whom some may view as sexually appealing.

The statute could cover virtually any photos taken at a public beach. It could criminalize the livelihood of "nightlife photographers," who routinely photograph attractive patrons order to promote clubs, bars, or

concert venues as "hot." It could apply to photographs taken by tourists, who may seek to capture the beauty of a city—or just its distinctive look—by photographing both the beautiful architecture and the beautiful passersby. It could cover photographs of events containing a degree of sexuality, such as many gay-pride parades, Halloween celebrations, or street performances.

And the intent element of § 21.15 provides little protection from improper criminalization of protected speech. In light of the inherent difficulty in determining another's thoughts, a police officer, prosecutor, or jury may reflexively infer an intent to gratify sexual desires of some person from the attractiveness of a photograph's subjects, or from a subject's relatively revealing apparel (even if such dress is quite normal for the depicted environment, for instance at a beach, a nightclub, or a gay-pride parade).

This is especially so because a motivation to sexually arouse may be hard to distinguish from a motivation to aesthetically please. If a photographer snaps a photograph of a beach volleyball player at the peak of physical fitness—or a dancer in a nightclub wearing a form-fitting dress—the photographer may be trying to simply depict the

perceived grace and beauty of the human body, or may also be trying to evoke the sexual arousal that may flow from appreciating such beauty.

So the broad sweep of § 21.15's *actus reus* requirement, coupled with the risk that people will misunderstand the photographer's intent, means that the law will deter a great deal of speech, especially since § 21.15 can lead to serious criminal penalties. *See Reno v. ACLU*, 521 U.S. 844, 845 (1997) (noting that criminal penalties carry an "increased deterrent effect" on speech). Knowing that the intent element offers them no safe harbor, photographers will often refrain from taking photographs—even if they lack any sexual motive—for fear that their purposes will be misjudged by police officers, prosecutors, or jurors. *Hustler* and *Wisconsin Right to Life* hold that such a broadly-speech-deterring intent test is impermissible when it provides the basis for government criminalization of otherwise constitutionally protected speech.

D. This Court's *Scott v. State* Decision Cannot Justify the Intent Requirement in § 21.15 Because Much of the Expressive Activity Covered by § 21.15 Is Constitutionally Valuable and Directed to Willing Viewers.

To be sure, in a few narrow situations, an intent element may be a permissible part of a speech restriction. This can sometimes happen when the *actus reus* elements of a crime have already narrowed the

range of punishable speech to that which has essentially no value—and is therefore unprotected—even *without* the intent requirement.

For instance, in *Scott v. State*, this Court upheld a statute that made it a crime to, "with intent to harass, annoy, alarm, abuse, torment, or embarrass another, . . . make[] repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." 322 S.W.3d 662, 669 (Tex. Crim. App. 2010) (quoting Tex. Penal Code § 42.07(a)(4)). To reach that result, though, this Court pointed out that, "in the usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas." *Id.* at 670. This Court also explained that these communications implicate no First Amendment rights of listeners, as harassing phone calls "are directed [solely] to an unwilling recipient." *Id.* at 670 n.15 (quoting *State v. Smith*, 392 N.Y.S.2d 968, 971 (App. Div. 1977)).

This Court's decision in *Scott* is consistent with the U.S. Supreme Court's view that unwanted, one-to-one speech is constitutionally unprotected, even in the absence of a malign purpose on the speaker's part. As the U.S. Supreme Court has pointed out, in upholding a statute

that did not require any bad purpose, "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970). "There simply is no right to force speech into the home of an unwilling listener." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in [the Court's] cases," *Hill v. Colorado*, 530 U.S. 703, 716 (2000), and can justify narrow restrictions on the speaker's freedom of speech to that particular person, *id.* at 730.

On the other hand, where potentially offensive speech may find a willing listener, the Court has rejected the idea that such speech loses constitutional protection. Even when hateful, bigoted speech that coincides with a soldier's funeral "inflict[s] great pain" on the soldier's family, the law "cannot react to that pain by punishing the speaker." *Snyder*, 131 S. Ct. at 1220; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is

that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

Thus, § 21.15 cannot be justified by either of the principles underlying *Scott*’s narrow exception to First Amendment protection for unwanted speech directed *only* at an unwilling listener. First, taking a photo of someone is not akin to speaking to that person; rather it is a prelude to communicating *about* that person. The listeners for First Amendment purposes are the people who view the photograph. And because § 21.15 explicitly criminalizes the “broadcast[]” or “transmi[ssion]” of photographs depicting another, *see* Tex. Penal Code § 21.15(b)(1), the statute by its very terms applies to constitutionally protected *public* speech, such as that routinely engaged in by the journalists whom amicus curiae represent.

Second, as demonstrated above, many of the photographs to which § 21.15 applies have substantial communicative value—they may, for example, record public and newsworthy events, or convey an expressive, artistic message. Section 21.15 thus contrasts sharply with the telephone harassment statute at issue in *Scott*, which by definition restricted only valueless speech.

E. The Intent Requirement in § 21.15 Also Cannot Be Justified by Analogy to the Knowledge, Recklessness, or Negligence Requirements Used in Fields Such as Libel Law.

The statute's ban on speech based on its supposedly malign purpose also cannot be justified by analogy to the *mens rea* requirements recognized in areas of First Amendment law such as libel. Determining a speaker's knowledge, recklessness, or negligence as to the falsity of his speech—which is often required under the First Amendment libel rules—is different from trying to ferret out his bad motive in engaging in the speech under an intent test like those condemned in *Wisconsin Right to Life*, *Hustler*, and *Garrison*. Indeed, *Garrison*, itself a libel case, made this clear. Though the Supreme Court in *Garrison* accepted that knowingly or recklessly false speech could be punished as libel, the Court made clear that mere bad purpose (in the absence of a showing of falsehood) cannot strip speech of constitutional protection. *Garrison*, 379 U.S. at 70-72.

And this makes sense given the underlying logic of First Amendment libel law. The lack of protection offered to libel stems from the Court's conclusion that "there is no constitutional value in false statements of fact"—whether "intentional lie[s]" or "careless error[s]." *Gertz*

v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). As a result, the *actus reus* elements of the libel tort (or of criminal libel) suffice to determine whether speech is constitutionally valueless. The *mens rea* requirement is added on top of that, to ensure that the speaker is not punished for engaging in valueless, unprotected speech by accident (since punishment for such errors would risk deterring even protected speech). *See, e.g.*, *id.* at 348-49; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 153, 161-62 (Tex. 2004). The *mens rea* element thus does not punish a speaker for his supposedly valueless purpose. It is the underlying content of the false, defamatory statement that is constitutionally valueless.

In contrast, the "intent to arouse or gratify the sexual desire of any person" element of § 21.15 seeks to punish otherwise protected speech because of a speaker's supposed valueless thoughts in making it. The statute's intent element does not merely seek to ensure that speakers are punished only if they are aware that their act of speech has gone beyond the reach of the First Amendment.

Indeed, as noted in the preceding section, much of the underlying photography banned by the *actus reus* elements of § 21.15—and thus

likely to be deterred by the threat of punishment under § 21.15—is constitutionally protected. As the court of appeals found, § 21.15 is "virtually unbounded in its potential application." *Ex parte Thompson*, 414 S.W.3d at 880 (citing *Ex parte Nyabwa*, 366 S.W.3d 710, 711 (Tex. Crim. App. 2012) (Keller, P.J., dissenting)). Section 21.15 contains no "careful delimitation of criminal conduct, but rather *anyone* who takes photographs of non-consenting persons is at risk of violating the law." *Id.* (emphasis added). Such a broad speech restriction cannot be saved by a requirement that the state show a supposedly improper purpose on the speaker's part, as explained above. *See* Part I(C), *supra*.

II. Section 21.15 Fails Strict Scrutiny.

As a content-based restriction on the creation of First Amendment-protected expression, the unauthorized-photography-and-videography statute is presumptively unconstitutional. The State bears the burden of rebutting this presumption by showing that the law nonetheless passes strict scrutiny. *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 92-93 (Tex. 2003); *see also Playboy Entm't Grp.*, 529 U.S. at 817. Under this rigorous standard, content-based speech restrictions are "rare[ly] . . . permissible." *Brown*, 131 S. Ct. at 2738; *Playboy Entm't Grp.,* 529

U.S. at 818 ("It is rare that a regulation restricting speech because of its content will ever be permissible."). Unsurprisingly, therefore, the State has not even *argued* that strict scrutiny is satisfied here.

No court has ever found a compelling government interest in protecting people from having their photographs taken in public. Indeed, courts have consistently held that the right to take such photographs "*unquestionably* exists under the First Amendment." *Crawford v. Geiger*, No. 3:13-cv-1883, 2014 WL 554469, at *8 (N.D. Ohio Feb. 10, 2014) (emphasis added) (compiling decisions by various circuits that have considered and upheld such a right, including *ACLU v. Alvarez*, *Glik v. Cunniffe*, *Smith v. City of Cumming*, and *Fordyce v. City of Seattle* (all of which are cited above in Part I(A)). And for the reasons explained above in Part I(C), a supposedly malign intent behind speech cannot justify restricting speech that is otherwise protected.

III. The Overbreadth Doctrine Allows Thompson to Mount a Facial Challenge to § 21.15 Regardless of Whether His Particular Photographs Were Constitutionally Protected, and the Court of Appeals Correctly Struck Down § 21.15 as Unconstitutionally Overbroad.

For the reasons explained above, § 21.15 covers a substantial amount of constitutionally protected First Amendment activity, far out-

side the constitutionally unprotected zones of obscenity or child pornography. The law is thus unconstitutionally overbroad on its face. And the Constitution permits such a facial challenge regardless of whether the speaker's speech could be restricted by a narrower law. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

As argued above, § 21.15 can deter even photographers who lack any sexual intention, but who are afraid that they will be confused with photographers that do have such an intention. This implicates the core concern of the overbreadth doctrine: that "the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). And the concern is exacerbated where—as here—a statute imposes criminal sanctions:

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Id. (emphasis in original; citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965)).

Moreover, the Supreme Court has held that an overbroad law cannot be saved by an assumption (or even a promise) that the government will enforce a statute narrowly: "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

The *Stevens* decision is instructive here. In *Stevens*, the Supreme Court struck down as substantially overbroad a law banning "'any . . . depiction' in which 'a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.'" *Id.* at 474, 482. And the Court did this even though the government argued that two provisions of the law substantially narrowed its scope: First, the law required that the depicted conduct be "illegal," and, second, it contained an exception for depictions that have "serious religious, political, scientific, educational, journalistic, historical, or artistic value.'" *Id.* at 475, 477-78. Reasoning that the statute, even so narrowed, could be interpreted to criminalize protected speech such as "hunting magazines and videos," *id.* at 476-79, the Court

held that the law was "substantially overbroad, and therefore invalid under the First Amendment," *id.* at 482.

If the law in *Stevens* was unconstitutionally overbroad, then, *a fortiori*, § 21.15 must also be. Section 21.15 contains *no* escape valve for photographs containing "serious . . . educational, journalistic, historical, or artistic value." Nor does it apply only to photographs depicting "illegal conduct." It therefore chills even more speech than the statute at issue in *Stevens*. In sum, the breadth of § 21.15 renders it overbroad and thus facially unconstitutional regardless of the circumstances of this particular defendant's behavior.

Though the court of appeals was mistaken in finding that § 21.15 is content-neutral, this error in no way undermines the court's ultimate holding that § 21.15 is unconstitutionally overbroad. Indeed, a content-based statute is more properly found to be overbroad than a content-neutral statute, because content-based statutes are already presumptively unconstitutional.

CONCLUSION AND PRAYER

Texas Penal Code § 21.15(b)(1) is a content-based statute. As such it fails strict scrutiny because it is not justified by a compelling govern-

mental interest. Moreover, regardless of whether § 21.15(b)(1) is viewed as content-based, it is unconstitutional on two additional, independent grounds. First, it is unconstitutionally overbroad—as the court of appeals found—because it seeks to regulate a substantial amount of protected speech. Second, § 21.15(b)(1) impermissibly seeks to punish otherwise legitimate and protected First Amendment activity solely because of a speaker's allegedly "bad" intent, a practice the First Amendment forbids. For each of these reasons, this Court should hold § 21.15(b)(1) facially invalid.

Respectfully submitted,

/s/ J. Campbell Barker

J. Campbell Barker
State Bar No. 24049125
Yetter Coleman LLP
909 Fannin, Suite 3600
Houston, TX 77010
(713) 632-8000
cbarker@yettercoleman.com
Counsel for Amicus Curiae

Eugene Volokh
Samantha Booth
UCLA School of Law
First Amendment
Amicus Brief Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926

Bruce D. Brown
Gregg P. Leslie
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, VA 22209
(703) 807-2100

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief contains 5,633 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ J. Campbell Barker
J. Campbell Barker

CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on March 18, 2014, this brief was served on the following parties, pursuant to Texas Rule of Appellate Procedure 9.5(b), through an electronic filing and service provider:

S. Patrick Ballantyne
District Attorney's Office
Paul Elizondo Tower 1
101 W. Nueva St., Seventh Floor
San Antonio, TX 78205
Counsel for the State of Texas

Donald H. Flanary, III
Goldstein, Goldstein & Hilley
Tower Life Building, Suite 2900
310 S. Mary's Street
San Antonio, TX 78205
Counsel for Ronald Thompson

/s/ J. Campbell Barker
J. Campbell Barker