Reversed and Rendered and Majority and Concurring Opinions filed November 16, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00445-CR
NO. 14-19-00446-CR

EX PARTE JULIE ANN FAIRCHILD-PORCHE, Appellee[1]

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 1581954 & 1627541

M A J O R I T Y O P I N I O N

The State of Texas appeals the trial court's granting of appellee's application for pre-trial habeas-corpus relief, in which the trial court implicitly concluded that Penal Code section 21.16(b), as it existed in 2017, is unconstitutional on its face and facially overbroad in violation of the First Amendment. Interpreting section 21.16(b) as alleged in the indictment, we hold that the statute only covers the intentional

[1] We have given this appeal the style that accords with the nature of the proceeding and the appeal. *See Ex parte Anderson*, 902 S.W.2d 695, 695 n.1 (Tex. App.—Austin 1995, pet. ref'd).

disclosure of sexually explicit material by a third party when the third party (1) obtained the material under circumstances in which the depicted person had a reasonable expectation that the image would remain private; (2) knew or was aware of but consciously disregarded a substantial and unjustifiable risk that the third party did not have effective consent of the depicted person; and (3) knowingly or recklessly identified the depicted person and caused that person harm through the disclosure. Properly interpreted, the statute does not violate the First Amendment. In each appeal we reverse the trial court's judgment and render judgment that the appellee's application for pre-trial habeas-corpus relief be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellee Julie Ann Fairchild-Porche was charged by indictment with unlawful disclosure of intimate visual material, under the 2017 version[2] of Penal Code section 21.16(b) ("the Statute"), commonly known as the "revenge pornography" statute. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 852, § 3, 2015 Tex. Sess. Law Serv. 2723, 2725 (current version codified at Penal Code § 21.16).

Appellee filed an application for pre-trial habeas-corpus relief, in which she asserted that the Statute is a content-based restriction of speech that violates the First Amendment and is unconstitutional on its face. Appellee also asserted that the Statute is facially overbroad in violation of the First Amendment.[3] Appellee relied

[2] In 2019 the Texas Legislature amended Penal Code section 21.16(b), but the amended version applies only to offenses committed on or after September 1, 2019 and is not at issue in today's case. *See* Act of May 19, 2019, 86th Leg., R.S., ch. 1354, §§ 2, 3(b), 4, 2019 Tex. Sess. Law Serv. 4985, 4985–86.

[3] A claim that a statute is unconstitutional on its face may be raised by an application for pre-trial habeas-corpus relief because the invalidity of the statute would render the charging instrument void. *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001). Although an application for pre-trial habeas-corpus relief may be used to bring a facial challenge to the constitutionality of a statute, it may not be used to advance an "as applied" challenge. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010).

heavily on the Twelfth Court of Appeals's opinion in *Ex parte Jones*. See — S.W.3d—, —, 2018 WL 2228888, at *2–8 (Tex. App.—Tyler May 16, 2018), *rev'd*, 2021 WL 2126172 (Tex. Crim. App. May 26, 2021) (not designated for publication).

The State responded in opposition. The trial court signed an order granting the requested habeas-corpus relief, and the State timely filed a notice of appeal. Pretrial habeas-corpus proceedings are separate criminal actions that should be filed under a cause number different from the cause number of the underlying criminal prosecution.[4] But appellee gave her application for pre-trial habeas-corpus relief the cause number from the underlying criminal prosecution, and the trial court clerk docketed the habeas proceeding together with the underlying criminal prosecution. When applicants for habeas relief and court clerks make this mistake, the habeas application is deemed to have been filed as an action separate from the underlying criminal prosecution.[5] Thus, even though appellee's application, the trial court's order granting relief, and the State's notice of appeal from this order bore the cause number from the underlying criminal prosecution, we deem these items to have been

[4] *See Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005); *Enard v. State*, 513 S.W.3d 206, 211 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

[5] *See Ex parte Fusselman*, 621 S.W.3d 112, 115–16, 123 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd) (treating applications for pre-trial habeas-corpus relief filed in the underlying criminal cases as separate criminal actions and entertaining appeal from denial of those applications even though no final judgment had been rendered in underlying cases); *Ex parte Smith*, 486 S.W.3d 62, 64 n.4 (Tex. App.—Texarkana 2016, no pet.); *Kelson v. State*, 167 S.W.3d 587, 590, 593–94 (Tex. App.—Beaumont 2005, no pet.) (concluding that notice of appeal filed in underlying criminal proceeding, if timely filed, would have perfected appeal from denial of application for pre-trial habeas relief that was given the same cause number as the underlying criminal prosecution and stating that habeas corpus proceedings are separate and that an appeal from an order denying relief is not an interlocutory appeal from the underlying case); *Ex parte Bui*, 983 S.W.2d 73, 75 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

filed in a separate criminal case.[6]

After the State filed its notice of appeal, the trial court clerk assigned a new cause number to appellee's application for pre-trial habeas-corpus relief. Acting in the separate case with the new cause number, the trial court then signed a second judgment granting habeas-corpus relief in the new case with the separate cause number. The trial court signed the second judgment more than thirty days after signing the first judgment granting habeas-corpus relief. The State timely filed a second notice of appeal from the trial court's second judgment. We do not construe the second judgment as vacating or setting aside the first ruling. Thus, these appeals involve the review of two judgments in two different cases separate from the underlying criminal prosecution in which the trial court granted the same pre-trial habeas-corpus relief.[7] The State, as appellant, challenges the trial court's granting of this relief.

II. ISSUES AND ANALYSIS

The State argues on appeal that the Statute does not violate the First Amendment and that the Statute is not unconstitutionally overbroad. The State argues that the Statute is subject to intermediate scrutiny, but that the Statute does not violate the First Amendment even if it is subject to strict scrutiny.

Whether a statute is facially constitutional is a question of law that we review *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When the

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[6] *See Ex parte Fusselman*, 621 S.W.3d at 115–16, 123; *Ex parte Smith*, 486 S.W.3d at 64 n.4; *Kelson*, 167 S.W.3d at 590, 593–94; *Ex parte Bui*, 983 S.W.2d at 75.

[7] Because the effect of each of these habeas-corpus judgments is to dismiss the indictment in the underlying criminal prosecution, this court has jurisdiction over the State's appeal from each judgment under article 44.01(a)(1) of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(1) (West, Westlaw through 2021 R.S.); *Alvarez v. Eighth Court of Appeals of Tex.*, 977 S.W.2d 590, 593 (Tex. Crim. App. 1998); *State v. Young*, 810 S.W.2d 221, 222–23 (Tex. Crim. App. 1991).

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. *Id*. at 14–15. The burden normally rests upon the person challenging the statute to establish its unconstitutionality. *Id*. at 15. However, when the government seeks to restrict and punish speech based on its content, the usual presumption of constitutionality is reversed. *Id*. A content-based regulation is presumptively invalid, and the government bears the burden to rebut that presumption and show that the regulation satisfies strict scrutiny. *Id*.

We have a duty to employ, if possible, a reasonable narrowing construction to avoid a constitutional violation, such a construction should be employed only if the statute is readily susceptible to such a construction. *See State v. Johnson*, 475 S.W.3d 860, 872 (Tex. Crim. App. 2015). If a statute is not readily subject to a narrowing construction, we may not rewrite the statute because such a rewriting would constitute a serious invasion of the legislative domain and would sharply diminish the Legislature's incentive to draft a narrowly tailored statute in the first place. *Id*. We act in accordance with our usual rules of statutory construction and construe a statute in accordance with its unambiguous language absent a finding of absurd results. *Id*.

The Statute, under which appellee was charged, specified that:

> (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.

Act of May 26, 2015, 84th Leg., R.S., ch. 852, § 3, 2015 Tex. Sess. Law Serv. 2723, 2725 (current version codified at Penal Code § 21.16). "Intimate parts" means "the naked genitals, pubic area, anus, buttocks, or female nipple of a person." Tex. Penal Code Ann. § 21.16(a)(1) (West, Westlaw through 2021 R.S.). "Sexual conduct" means "sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse." *Id*. §21.16(a)(3). "Visual material" includes "any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide;" or "any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method." *Id*. § 21.16(a)(5).

A. Should this court limit its analysis to the manner and means charged in the indictment?

Under the indictment, appellee faces an accusation under the Statute that implicates some parts of the Statute and not others. In holding the Statute facially invalid under the First Amendment, the Twelfth Court of Appeals construed parts of the Statute that were not implicated by the indictment in the present case. *See Ex parte Jones*, —S.W.3d at —, 2018 WL 2228888, at *5–7. Judicial restraint counsels courts against anticipating a constitutional issue before it is necessary to decide the issue or formulating a constitutional rule broader than required by the facts before

the court. *See United States v. Grace*, 461 U.S. 171, 175, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983) (limiting review of statute's constitutionality under First Amendment to the part of the statute under which defendants were charged); *Ex parte Thompson*, 442 S.W.3d 325, 330, 351 (Tex. Crim. App. 2014) (construing only the part of the statute under which defendant had been charged); *Ex parte Lo*, 424 S.W.3d at 14 (construing only the specific subsection of the statute that the defendant alleged was unconstitutional). In addition, "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." *Ex parte Usener*, 391 S.W.2d 735, 736 (Tex. Crim. App. 1965). This limit helps courts avoid issuing advisory opinions. *See id*.; *Armstrong v. State*, 805 S.W.2d 791, 794 (Tex. Crim. App. 1991). And it encourages upholding the constitutionality of statutes when reasonably possible. *See Ex parte Thompson*, 442 S.W.3d at 339. We conclude that we should limit our review to the parts of the Statute implicated by the indictment in this case.

The indictment alleges in pertinent part that appellee:

> on or about December 28, 2017, did then and there . . . intentionally disclose visual material, namely, photographs, which depicted the Complainant with the Complainant's naked genitals exposed, and said visual material was obtained by [Appellee] under circumstances in which the Complainant had a reasonable expectation that said visual material would remain private, and the disclosure of said visual material caused harm to the Complainant, namely, by nude photos of [Complainant] were [sic] sent to co-workers at his job, and the disclosure of said visual material revealed the identity of the Complainant, namely, by nude photos of [Complainant] depicting his face.

The indictment alleges that appellee obtained, rather than created, a prohibited photograph under circumstances in which the depicted person in the photograph had a reasonable expectation that the photograph would remain private. So, appellee cannot be convicted under this accusation based solely on someone else having

created the photograph under circumstances that were unknown to appellee. The indictment also alleges that appellee revealed the identity of the depicted person through his disclosure, as opposed to the identity being revealed through someone else's disclosure. So, appellee cannot be convicted under this accusation for a third party's disclosure. In these respects, this accusation avoids at least some of the parts of the Statute that the Twelfth Court of Appeals considered most troubling in *Ex parte Jones*. *See* —S.W.3d at —, 2018 WL 2228888, at *5–7.

Appellee raises a constitutional challenge to the terms of the Statute, as well as a facial First Amendment challenge based on overbreadth. With regards to the former, our analysis focuses on whether prosecution of the charged conduct violates the First Amendment. With the charged statutory elements of the offense in mind, we first consider whether the Statute is content based and, if so, whether this application of the Statute survives strict scrutiny. We then analyze whether the Statute violates the First Amendment under the overbreadth doctrine.

B. Is the Statute a content-based restriction on speech that is subject to and satisfies strict scrutiny?

1. Classifying the Statute

The First Amendment protects, among other things, the freedom of speech. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech"). The First Amendment right to freedom of speech applies to the states by virtue of the Fourteenth Amendment. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638–39, 63 S.Ct. 1178, 1185–86, 87 L.Ed. 1628 (1943). The First Amendment generally prohibits laws that "restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 1707, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). Such laws are content based and presumptively invalid.

See Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015); *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992); *Ex parte Thompson*, 442 S.W.3d at 348. Consequently, when a litigant challenges a content-based restriction under the First Amendment, the government bears the burden to rebut that presumption by showing its constitutionality under a strict-scrutiny analysis. *See Ashcroft*, 542 U.S. at 660, 665, 124 S.Ct. at 2788, 2791; *Ex parte Lo*, 424 S.W.3d at 15.

In *Reed v. Town of Gilbert, Arizona*, the Supreme Court of the United States laid out a "commonsense" understanding of what it means for a speech regulation to be facially content based: "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."[8] *Reed*, 576 U.S. at 163, 135 S.Ct. at 2227. 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. *See Ex parte Thompson*, 442 S.W.3d at 345.

In some situations, a regulation can be deemed content neutral if it is justified without reference to the content of the regulated speech. *See id*. Courts have analyzed this issue in two common situations: analysis of general "time, place, or manner" restrictions and analysis of the "secondary effects" of the expressive activity. *See Ward*, 491 U.S. at 791, 109 S.Ct. at 2753–54. A time, place, or manner restriction is permissible so long as it does not discriminate on the basis of the ideas expressed. *See id*. In contrast, an apparent time, place, or manner restriction that may not "fit neatly into either the 'content-based' or the 'content-neutral' category," may nevertheless be deemed content neutral if it is aimed at the secondary effects of the

[8] *Reed* dealt with a First Amendment challenge to a city ordinance rather than a statute like the one at issue in this case. *Id.*, 576 U.S. at 159, 135 S.Ct. at 2224. No one argues that cases involving First Amendment challenges to administrative regulations or city ordinances are inapplicable to First Amendment challenges to statutory provision.

limited expressive activity. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 47, 106 S.Ct. 925, 928–29, 89 L.Ed.2d 29 (1986). Under both frameworks, the central consideration remains whether the regulation can be justified without reference to the content of the regulated speech. *See Ex parte Thompson*, 442 S.W.3d at 345.

The Statute is content based on its face. It does not penalize all intentional disclosure of visual material depicting another person. Rather, it penalizes only a subset of disclosed images—those which depict another person with the person's intimate parts exposed or engaged in sexual conduct. *See* Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725. That subset is drawn according to the subject matter—nudity and sexual conduct. At the same time, the Statute places absolutely no restriction on non-sexual utterances that violate another person's privacy interests. Therefore, the Statute "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163, 135 S.Ct. at 2227.

The Statute cannot be saved as a content-neutral time, place, and manner restriction or under an analysis of its secondary effects. The justification for the Statute is to prevent the harm that results from having intimate images of oneself shared without one's consent. We cannot say that this has nothing to do with content. The sexually explicit nature of the images is inextricable from the regulation; the harm results from the intimate nature of the content.

2. Construing the Statute As Charged

Having found that the statutory provision at issue is content based, we conclude that the Statute is subject to strict scrutiny. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 1886, 146 L.Ed.2d 865 (2000); *Ex parte Lo*, 424 S.W.3d at 15–16. Under a strict-scrutiny analysis, a regulation is justified only if it is narrowly tailored to serve a compelling government interest. *See Reed*, 576 U.S. at 163, 135 S.Ct. at 2226. In this context, a regulation is "narrowly

drawn" if it uses the least restrictive means of achieving the government interest. *See Playboy*, 529 U.S. at 813, 120 S.Ct. at 1886; *Ex parte Lo*, 424 S.W.3d at 15–16, 19. If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny. *See Ex parte Lo*, 424 S.W.3d at 15–16.

The State argues that there is a compelling government interest in protecting an individual from a substantial invasion of privacy. Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. *See Ex parte Thompson*, 442 S.W.3d at 348. "[S]ubstantial 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*.

We conclude that the privacy interest in the Statute is a compelling government interest. First, privacy in general has been recognized and protected by the common law, statutory law, and the United States Constitution. *See* Tex. Penal Code Ann. § 16.02(b) (West, Westlaw through 2021 R.S.) (defining offenses for intercepting communications); *Katz v. Jones*, 389 U.S. 347, 360–61, 88 S.Ct. 507, 516–17, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring) (laying out the Fourth Amendment "reasonable expectation of privacy" test); *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex. 1973) (recognizing tort of invasion of privacy). And particularly, the interest in sexual privacy is substantial. Sexual behavior is "the most private human conduct[.]" *Lawrence v. Texas*, 539 U.S. 558, 567, 123 S.Ct. 2472, 2478, 156 L.Ed.2d 508 (2003). Violations of sexual privacy are intrinsically harmful because sex is inherently private. The consequences of violations of sexual privacy can be serious and include harassment, job loss, and suicide. Victims of revenge porn

cannot counterspeak their way out of a violation of their most private affairs and bodily autonomy or the serious harms that may accompany that violation. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 726–28, 132 S.Ct. 2537, 2549–50, 183 L.Ed.2d 574 (2012) (discussing counterspeech as a remedy for lies and "speech we do not like"). The Legislature recognized the severity of these harms and passed this law to protect against them.

Second, disclosing visual material when the depicted person reasonably expected it would remain private is an intolerable invasion of privacy, especially when the visual material shows the depicted person's intimate parts or sexual conduct. Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725; *Ex parte Thompson*, 442 S.W.3d at 348. Although the government's interest in protecting sexual privacy is compelling in this case, the Statute's speech restriction must nevertheless be narrowly tailored to serve that interest. *See Reed*, 576 U.S. at 163, 135 S.Ct. at 2226–27. Under the Court of Criminal Appeals's usual rules of statutory construction, we must give the Statute's text its plain meaning, read the words in context, and construe them according to rules of grammar and common usage. *See Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014); *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991). If this examination reveals a meaning that should have been plain to the legislators who voted on the Statute, we ordinarily give effect to that meaning. *See Timmins v. State*, 601 S.W.3d 345, 348 (Tex. Crim. App. 2020). We look beyond the Statute's text and context to discern its meaning only if the text does not bear a plain contextual meaning or if the text's unambiguous meaning would lead to "'absurd consequences that the legislature could not possibly have intended.'" *Timmins*, 601 S.W.3d at 348 (quoting *Boykin*, 818 S.W.2d at 785). In those events, a court may consider extra-textual factors like legislative history, the object of the statute, and the consequences of a particular construction. *See State v. Doyal*, 589 S.W.3d 136, 149 (Tex. Crim. App. 2019); *Boykin*, 818 S.W.2d at 785–

86. When construing a statute in the face of a First Amendment challenge, courts have a duty to employ a reasonable, narrowing construction of a statute to avoid a constitutional violation if the statute at issue is readily susceptible to one. *See Ex parte Thompson*, 442 S.W.3d at 339.

Intentionally disclosing intimate visual material is, by itself, not only a lawful act but a constitutionally protected one. *See Ex parte Lo*, 424 S.W.3d at 19–20. The Statute criminalizes such disclosure only under certain privacy-invading circumstances—where the depicted person: (1) has not consented, (2) has a reasonable expectation of privacy, and (3) is identified. *See* Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725; Tex. Penal Code Ann. § 6.03 (delineating three possible "conduct elements": nature of, result of, and circumstances surrounding conduct) (West, Westlaw through 2021 R.S.); *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011) (circumstances-of-conduct offenses prohibit otherwise innocent behavior that becomes criminal only under specific circumstances). Unless a culpable mental state applies to at least one of those surrounding circumstances, the offense would effectively be a strict-liability crime. *See McQueen v. State*, 781 S.W.2d 600, 603–04 (Tex. Crim. App. 1989) ("[W]here otherwise innocent behavior becomes criminal because of the circumstances under which it is done, a culpable mental state is required as to those surrounding circumstances."). Such absolute liability would "raise serious constitutional doubts"; therefore, it is incumbent on this court to read the Statute to eliminate those doubts so long as the Statute is reasonably susceptible to such a construction. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 472, 130 L.Ed.2d 372 (1994).

a. Lack of Effective Consent

We first consider the lack-of-consent element in subsection (b)(1). The Statute places the culpable mental state "intentional" after the lack-of-consent element: "A person commits an offense if (1) without the effective consent of the depicted person,

the person intentionally discloses . . .” Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725. The lack-of-consent element is the first phrase of (b)(1) and is offset from the rest of (b)(1) by a comma. The culpable mental state “intentionally” is in the phrase that immediately follows, and it is the only culpable mental state that explicitly appears in the Statute. Both “without the effective consent” and “intentionally” plainly modify “discloses,” the conduct being addressed. But we cannot read the adverb “intentionally” to modify the effective-consent clause because reading “intentionally” backwards up the Statute goes against the plain reading of the text in context under common grammar and usage rules. The placement of adverbs in a sentence affects their substantive meaning. *See* Bryan A. Garner, The Redbook: A Manual on Legal Style § 20, at 150 (West, 1st ed. 2002). In ordinary English usage, placing a modifier before one word or phrase but after another limits the modifier. And, subsection (c), unlike subsection (b), places “intentionally” before the non-consent element. *See* Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725. Because we attempt to give effect to the whole statute, the distinction between the use of “intentionally” in subsections (b) and (c) appears to be a meaningful one.

Finally, it would have made no sense for the Legislature to apply an “intentional” culpable mental state to the non-consent element because an intentional culpable mental state, by definition, cannot apply to a circumstance surrounding conduct. Penal Code Section 6.03 sets out the definitions of culpable mental states, and that section specifically limits the applicability of the “intentional” mens rea to the nature of conduct and the result of conduct. *See* Tex. Penal Code Ann. § 6.03(a). The “knowing” and “reckless” mens reas, on the other hand, can apply to a circumstance surrounding conduct such as a lack of effective consent. *See* Tex. Penal Code Ann. § 6.03(b).

Without a culpable mental state attached to the lack-of-consent element, the text has broad applicability. The lack-of-consent element is a circumstance surrounding the conduct of disclosure that serves to separate the material based upon its incriminating character. The Statute separates non-obscene pornography which may be constitutionally regulated from non-obscene pornography which may not. If the culpable mental state only attaches to the act of disclosure, the lack of a culpable mental state for the non-consent element effectively results in a constitutionally impermissible strict-liability offense. Some form of culpability must apply. *See McQueen*, 781 S.W.2d at 604 (explaining that some form of culpability must apply to those "conduct elements" which make the overall conduct criminal).

Even though the Statute's use of "intentionally" cannot grammatically be read to modify the phrase "without effective consent," that does not end the inquiry. Under precedent from the Court of Criminal Appeals, we can infer a requisite culpable mental state—even though the text does not expressly provide for one—to avoid the Statute becoming an unconstitutional strict-liability crime. *See* Tex. Penal Code Ann. § 6.02(b) (West, Westlaw through 2021 R.S.) (stating "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element."); *Robinson v. State*, 466 S.W.3d 166, 172 (Tex. Crim. App. 2015) (reading into the failure-to-register-as-a-sex-offender statute "knowledge" and "recklessness" culpable mental states to the circumstance of the conduct—a person's duty to register); *Aguirre v. State*, 22 S.W.3d 463, 477 (Tex. Crim. App. 1999) (holding that municipal adult business ordinance required culpable mental state even though it did not so state); *Long v. State*, 931 S.W.2d 285, 291 (Tex. Crim. App. 1996) (stating that "[u]nder some circumstances, a mental state may be required even though not expressly prescribed by a statute's plain wording."); *McQueen*, 781

S.W.2d at 603–04 (assigning culpable mental state of "knowledge" to lack-of-consent conduct element in the unauthorized-use-of-a-motor-vehicle statute even though the culpable mental state prescribed by the statutory language did not "syntactically modify" the circumstances surrounding the conduct—operation without the effective consent of the owner—but instead preceded the act of operating a vehicle). A statute is reasonably susceptible to such an interpretation because we presume that some form of mental culpability must apply when otherwise innocent behavior becomes criminal under the surrounding circumstances. *See McQueen*, 781 S.W.2d at 604. Both the Court of Criminal Appeals and the United States Supreme Court have done so on more than one occasion. For example, in *Morissette v. United States*, the federal embezzlement statute at issue read in relevant part, "Whoever embezzles, steals, purloins, or knowingly converts to his use . . . ." 342 U.S. 246, 248, 72 S.Ct. 240, 242, 96 L.Ed. 288 (1952). The *Morissette* court had no problem reading a knowledge requirement backwards up the statute to apply to conduct that was not modified by a culpable mental state. *See Morissette*, 342 U.S. at 270–73, 72 S.Ct. at 253–55. The *Morissette* court justified this construction by noting that the requirement of mental culpability was so ingrained that it requires no statutory affirmation. *See Morissette*, 342 U.S. at 252, 72 S.Ct. at 244.

Similarly, in *United States v. X-Citement Video*, the Supreme Court read a knowledge requirement into the Protection of Children Against Sexual Exploitation Act of 1977. 513 U.S. 64, 70–78, 115 S.Ct. 464, 468–72, 130 L.Ed.2d 372 (1994). In that case, the owner of the business sold and then shipped multiple copies of movies featuring an under-aged girl. *See id*., 513 U.S. at 66, 115 S.Ct. at 466. The government charged the owner with shipping child pornography, and the proper grammatical reading of the statute did not require proof that the person shipping the pornography knew the material featured a child. *See id*., 513 U.S. at 66–69, 115 S.Ct. at 466–467. The Supreme Court of the United States noted that reading the statute

according to the rules of grammar would mean the government would only have to prove that the person knew he shipped something, not that he knew that what he shipped was child pornography. *See id.* The Court relied upon its decision in *Morissette* and the presumption of a culpable mental state even when the statute, by its terms, does not contain one. *See id.*, 513 U.S. at 70, 115 S.Ct. at 468. The Court noted that the child-pornography statute was more like the common-law offenses against "the state, the person, property, or public morals" in which a culpable mental state was presumed and required. *See id.*, 513 U.S. at 71–72, 115 S.Ct. at 469. And though the defendant in that case made a First Amendment overbreadth challenge to the statute, the Court resolved the claim as a matter of statutory construction relying upon precedent that presumed a culpable mental state to avoid constitutional issues generally. *See id.*, 513 U.S. at 70–78, 115 S.Ct. at 468–72.

The problem with the statute at issue in *X-Citement Video* is analogous to the statutory issue in this case. There, the concern was knowledge of the illicit character of the shipped material, namely the performer's age. *See id.*, 513 U.S. at 68, 115 S.Ct. at 467. Without knowledge of that circumstance surrounding the shipping of the materials, the conduct would have been otherwise innocent. *See id.*, 513 U.S. at 69, 115 S.Ct. at 467. The high court noted that it would be odd for Congress to create a distinction between someone who inadvertently mailed what he knew to be child pornography and someone who intentionally mailed what he did not know to be child pornography. The same problem exists in this case with regard to the possible inadvertent spread of private material without the victim's consent. And, just as the United States Supreme Court recognized that a culpable mental state could be presumed regarding the character of the shipped materials in *X-Citement Video*, we may presume the attachment of a culpable mental state to the character of the material to be disseminated in this case. *See id.*, 513 U.S. at 70–78, 115 S.Ct. at 468–72; *McQueen*, 781 S.W.2d at 603–04. Doing so is harmonious with the Court of

Criminal Appeals's practice of interpreting a statute such that its constitutionality is supported and upheld. *See Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015); *Luquis v. State*, 72 S.W.3d 355, 365 n.26 (Tex. Crim. App. 2002). The Statute is susceptible to a narrowing construction as a matter of statutory interpretation that allows it to survive a constitutional challenge. *See X-Citement Video*, 513 U.S. at 70–78, 115 S.Ct. at 468–72; *Morissette*, 342 U.S. at 270–73, 72 S.Ct. at 253–55. Consequently, we may presume the Legislature intended the existence of the requisite culpable mental state of knowledge or recklessness as to the lack-of-consent element. *See Sanchez v. State*, 995 S.W.2d 677, 685 n.7 (Tex. Crim. App. 1999) (construing the explicit "intentional" culpable mental state of the official-oppression-by-sexual-harassment statute, as it applied to the "unwelcome-sexual-advances" definition of sexual harassment, to require no greater scienter than an awareness—that is, knowledge—by the actor that his sexual advances were unwelcome).

b. Expectation of Privacy

We next construe the reasonable-expectation-of-privacy element in subsection (b)(2). The Statute, as charged here, requires proof that the visual material was "obtained by the person . . . under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private[.]" Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725. The Statute does not provide a culpable mental state for this expectation-of-privacy element. Although this element is downstream of "intentionally," it appears in its own subsection and does not have a clear grammatical or syntactical relationship with "intentionally." Furthermore, "intentionally" does not apply to circumstances surrounding conduct but only to nature or result of conduct. *See* Tex. Penal Code Ann. § 6.03(a).

In light of the common-law presumption of a culpable mental state, we could presume the Legislature intended that a culpable mental state applies to this element,

as we did with the element of effective consent. However, it is unnecessary to do so. The plain language itself requires the State to prove the circumstances under which the material was obtained by the defendant, circumstances in which the depicted person has a reasonable expectation that the material would remain private. The proof necessary to establish "circumstances in which the depicted person had a reasonable expectation that the material would remain private" will necessarily be the same proof that would be necessary to establish that the defendant knew or was at least aware of a substantial risk that the victim reasonably believed the material would be kept private. In this manner, the text of the Statute limits the scope of the Statute in the same manner as applying a culpable mental state. *See Febus v. State*, 542 S.W.3d 568, 572–73, 576 (Tex. Crim. App. 2018).

For example, if a defendant obtained the material by means of a promise to keep it private, the defendant would have fostered the expectation of privacy, and if the defendant obtained the material by means of a crime like breach of computer security, then the defendant would have intentionally violated it. On the other hand, if the material simply appeared in the defendant's inbox with nothing to indicate that the depicted person expected the material to remain private, the State would not be able to prove the defendant obtained the material under circumstances that the victim reasonably expected the material to remain private. Either way, proof of the circumstances under which the defendant obtained the material would necessarily be the same proof that would be used to establish the culpable mental state of knowledge or recklessness. *See id*. By proving the "circumstances" element, the State will necessarily present the same facts that would serve to establish a knowledge element. If the State cannot prove that the defendant obtained the material under circumstances in which a victim had an expectation that the material would remain private, it necessarily would not be able to prove knowledge. In this

manner, the Statute's text excludes the type of innocent third-party disclosures that could raise constitutional issues. *See id*.

The Statute further protects against inadvertent or unknowing dissemination through its incorporation of a reasonable expectation of privacy as an element. The Statute requires the State to prove that the victim's expectation was reasonable, suggesting an expectation that an ordinary person would recognize under the circumstances. *See Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) (discussing objective and subjective requirements of the reasonable expectation of privacy in the suppression context); *Long v. State*, 535 S.W.3d 511, 519 (Tex. Crim. App. 2017) (same). It would be insufficient to prove a merely subjective expectation by the depicted person; the evidence would have to demonstrate that the expectation was objectively reasonable under the circumstances. If, for example, the material was obtained by photographing a person who was purposely displaying the person's naked genitals in public, an ordinary person would not recognize as reasonable any expectation of privacy by the depicted person. But if the photo was taken in private with a promise of keeping it confidential, then an ordinary person would recognize a reasonable expectation of privacy.

Thus, the Statute, as charged here under "obtained" rather than "created," requires proof that the material was obtained by the defendant under circumstances in which the depicted person had a reasonable expectation of privacy in the material, and proving such circumstances obviates the need to presume a knowledge requirement. This meaning should have been plain to the legislators who voted on that part of the Statute. Consequently, we cannot say that the Statute, as charged here, requires a culpable mental state with regard to the expectation-of-privacy element. Nevertheless, the Statute's terms are narrowly tailored to avoid prosecution of otherwise unknowing disclosure of material that a victim reasonably expects to

remain private.

c. Identification of the Victim

Lastly, we construe the identification element in subsection (b)(4)(A). The Statute, as charged here, requires that the disclosure "reveals the identity of the depicted person in any manner," including through "any accompanying or subsequent information." *See* Act of May 26, 2015, 2015 Tex. Sess. Law Serv. at 2725. Appearing in its own subsection, it does not have a grammatically or syntactically meaningful relationship with "intentionally." Moreover, the disclosure itself, not the defendant, is the subject of the sentence, and it satisfies the Statute if the disclosure reveals the identity of the depicted person in "any manner, including through any accompanying or subsequent information." The words "any manner" and "including" suggest a non-exhaustive list; the only thing that matters is that the depicted person is identified, regardless of how. The defendant may have intentionally, knowingly, recklessly, or negligently included the identifying information, and this part of the Statute encompasses all of those possibilities. Under this view, the Statute dispenses with a mental state with respect to identification.

On the other hand, the defendant must intentionally disclose the material, and it is that intentional disclosure—at least as charged in this case—that must reveal the identity of the depicted person. *See id*. In addition, revealing the depicted person's identity in "any manner" does not refer to a mental state but to the means of identification, including "accompanying or subsequent information[.]" *Id*. Given this context, subsection (b)(4)(A) of the Statute does not unambiguously impose strict liability on the identification element but can be plausibly read as imposing a culpable mental state on that element. Because there are two plausible readings of this portion of the Statute, we should choose the reading that has fewer constitutional issues associated with it. See *Clark v. Martinez*, 543 U.S. 371, 380–81, 125 S.Ct.

716, 723–24, 160 L.Ed.2d 734 (2005) (explaining that if one possible, plausible construction of a statute would "raise a multitude of constitutional problems, the other should prevail"). Consequently, we hold that the State must prove that the defendant knowingly or recklessly revealed the identity of the depicted person. *See Sanchez*, 995 S.W.2d at 685 n.7 (construing the explicit "intentional" culpable mental state of the official-oppression-by-sexual-harassment statute, as it applied to the "unwelcome-sexual-advances" definition of sexual harassment, to require no greater scienter than an awareness — that is, knowledge—by the actor that his sexual advances were unwelcome).

3. Strict Scrutiny Determination

Under the charging instrument here and as we construe the Statute, the Statute criminalizes the disclosure of intimate visual material when the defendant (1) knowing or being aware of a substantial and unjustifiable risk that the defendant lacked the depicted person's effective consent (2) intentionally discloses such material (3) obtained by the defendant under circumstances known to the defendant in which the depicted person had a reasonable expectation of privacy in the image, and through that disclosure the defendant (4) knowingly or recklessly identifies and (5) harms the depicted person. We find that the Statute, under this construction, is narrowly tailored—that is, it is the least-restrictive means of serving the government's compelling interest in protecting sexual privacy.

First, in addition to the requirement that the disclosure be intentional, the lack-of-consent element narrows the Statute's reach to an actor who intentionally discloses visual material despite knowing or being aware of a substantial and unjustifiable risk that the depicted person did not effectively consent to the disclosure. In those cases, the actor has, at the very least, some objective fair warning that the sensitive and potentially harmful speech the actor is about to utter is contrary

to the wishes of the person who might be harmed by it. Providing criminal penalties for speech made in disregard of this fair warning is a narrowly tailored means to deter that speech—and only that speech—thereby vindicating, to the greatest extent constitutionally permissible, the depicted person's expectation of privacy.

Second, the expectation-of-privacy element further narrows the Statute's scope, even without an express culpable mental state, because (1) the reasonable expectation of privacy requirement provides adequate protection; and (2) as a practical matter, the evidence needed to prove the circumstances under which the defendant obtained the material would necessarily satisfy a culpable mental state of knowledge. And, when this element is read with the lack-of-consent element, the Statute only punishes those who knew or were aware of but consciously disregarded a substantial and unjustifiable risk that the circumstances gave rise to a reasonable expectation by the depicted person that the material would be private.

Third, the identification element narrows the Statute's reach to those who knowingly or recklessly reveal the identity of the depicted person through disclosure. Such a requirement means that the Statute does not apply to a person who intentionally discloses visual material otherwise prohibited by the Statute if the depicted person is not identified or identifiable by future recipients. But we reiterate that, because of the language in her indictment and how we construed the Statute above, appellee cannot be convicted for disclosure of a photograph whose subject was identified by a third party. Consequently, the Statute, as it is charged here, is narrowly tailored to serve the government's compelling interest in protecting sexual privacy.

We acknowledge that those who receive intimate photos and forward them to others without knowing the disclosure lacks effective consent fall outside the Statute's narrowed scope. However, the subjects of such material are not wholly

without protection in those circumstances. Copyright law can provide an adequate vehicle for curbing these third-party disclosures. This body of law protects original works of authorship fixed in any tangible medium of expression, including photographs. *See Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, — U.S.—,—, 139 S. Ct. 881, 887, 203 L.Ed.2d 147 (2019); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547, 105 S.Ct. 2218, 2223–24, 85 L.Ed.2d 588 (1985) (citing *Sarony* for the proposition that "originator of a photograph may claim copyright in his work"); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56–61, 4 S.Ct. 279, 280–82, 28 L.Ed. 349 (1884) (photographs can be protected by copyright law); Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. of Intell. Prop. & Ent. Law 422, 440 (2014). An author of an original work "gains 'exclusive rights' in her work immediately upon the work's creation, including rights of reproduction, distribution, and display." *Fourth Estate Pub. Benefit Corp.*, — U.S. at —, 139 S. Ct. at 887. If copyright law applies and no exceptions are implicated, a third-party consumer of a "revenge porn" photograph could be subject to copyright infringement because they are not the copyright holder.[9] Further, copyright law also provides a legal avenue for the victim of "revenge porn" to stop the third-party spread of their intimate visual material.

Lastly, other alternatives are not as effective in achieving the government's compelling interests. *See Ex parte Lo*, 424 S.W.3d at 15–16 (stating "If a less restrictive means of meeting the compelling interest could be at least as effective in achieving the legitimate purpose that the statute was enacted to serve, then the law in question does not satisfy strict scrutiny"). First, the argument that civil liability is a less-restrictive means of achieving the governmental interest here is unpersuasive

[9] Exceptions might include "fair use" or use under a blanket license. *See, e.g.*, 17 U.S.C. § 107; *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 4, 99 S.Ct. 1551, 1554, 60 L.Ed.2d 1 (1979).

because a civil remedy, though less heavy-handed, is also generally less effective than a criminal remedy. Furthermore, if this argument were valid, no criminal statute could ever touch speech. But courts have not struck criminal statutes on that summary basis, instead analyzing them under conventional First Amendment doctrines. *See Ex parte Hamilton*, 599 S.W.3d 312, 315–20 (Tex. App.—Houston [14th Dist.] 2020, pet. ref'd).

Second, alternatives such as requiring the elements of "physical intrusion or a wiretap" would not address the harm that the Statute was intended to address because intimate visual material is often supplied by the depicted person or created with his cooperation and consent. Another alternative might be to require an element like "highly offensive to a reasonable person." But "highly offensive to a reasonable person" is essentially encompassed in an obscenity determination, and we have already said that material regulated by the Statute is non-obscene. *See Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973).

Another potential less-restrictive means would be to punish only intentional, serious harm, rather than merely "harm." That would likely make the law less restrictive, but it would also not address the governmental interest in preventing the intrinsic harm from violations of bodily and sexual privacy. Lastly, one might argue that basing liability only on the defendant's actions would be a less-restrictive means. Because we have determined that a culpable mental state either implicitly attaches to a necessary circumstances-surrounding-conduct element or that the statutory terms already provide the same level of protection that implying a culpable mental state would, this argument is without merit.

Appellee relies upon the Twelfth Court of Appeals's opinion in *Ex parte Jones*, in which the court concluded that the Statute does not satisfy strict scrutiny and violates the First Amendment. *See Ex parte Jones*, —S.W.3d—, —, 2018 WL 2228888, at *2–8 (Tex. App.—Tyler May 16, 2018), *rev'd*, 2021 WL 2126172 (Tex.

Crim. App. May 26, 2021) (not designated for publication). An opinion from a sister court of appeals is not binding on this court. In addition, after the briefing was submitted in today's case, the Court of Criminal Appeals reversed the Twelfth Court of Appeals's judgment in *Ex parte Jones* and issued an unpublished opinion. *See Ex parte Jones*, 2021 WL 2126172, at *1 (Tex. Crim. App. May 26, 2021) (not designated for publication). Unpublished opinions of the Court of Criminal Appeals have no precedential value and must not be cited as authority by counsel or by a court. Tex. R. App. P. 77.3; *Skinner v. State*, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009). Though courts may cite an unpublished opinion of the Court of Criminal Appeals to show the procedural history of the case, courts may not use an unpublished opinion from the Court of Criminal Appeals as authority of any sort, whether binding or persuasive. Tex. R. App. P. 77.3; *Skinner*, 293 S.W.3d at 202 & n.19. We note the procedural history of *Ex parte Jones*, in which the Court of Criminal Appeals reversed the judgment the court of appeals and remanded the case so that the court of appeals could consider an issue that the court of appeals did not address in its disposition of the appeal. *See Ex parte Jones*, 2021 WL 2126172, at *17 (not designated for publication). We do not use the high court's opinion in *Ex parte Jones* as authority. *See* Tex. R. App. P. 77.3; *Skinner*, 293 S.W.3d at 202.

In summary, there is no way to adequately prevent the harm from disclosure of intimate material without restricting the disclosure of intimate material. As charged, the Statute targets intentional, identifying disclosures that cause harm by requiring the defendant be knowing or reckless about the depicted person's lack of consent and that the State show there was a reasonable expectation of privacy under known circumstances giving rise to that expectation. Conversely, the Statute, as charged in this case, does not reach identifying disclosures that were made consensually, less than intentionally, or without violating a reasonable expectation of privacy or causing harm. Therefore, it is narrowly tailored to those situations

where the compelling interest is at stake. The Statute, as charged here, satisfies strict scrutiny. *See Ex parte Ellis*, 609 S.W.3d 332, 337–38 (Tex. App.—Waco 2020, pet. ref'd) (concluding that the Statute satisfies strict scrutiny and does not violate the First Amendment); *Ex parte Hamilton*, 599 S.W.3d at 315–20 (concluding that the 2015 version of Penal Code section 21.15(b)(1) satisfies strict scrutiny and does not violate the First Amendment).

We conclude that the trial court erred in impliedly determining that the Statute violates the First Amendment and is unconstitutional on its face. *See Ex parte Ellis*, 609 S.W.3d at 337–38; *Ex parte Hamilton*, 599 S.W.3d at 315–20.

C. Is the Statute facially overbroad?

Even if a law satisfies strict scrutiny, it may still be facially overbroad in violation of the First Amendment. *See United States v. Stevens*, 559 U.S. 460, 472–73, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797–99, 104 S.Ct. 2118, 2124–2125, 80 L.Ed.2d 772 (1984). Appellee asserts, and the trial court implicitly found, that the Statute is facially overbroad in violation of the First Amendment.

The overbreadth doctrine allows a litigant to benefit from a statute's unlawful application to someone else; the litigant asserts not that the law is unconstitutional with respect to the litigant's case, but with respect to so many third-party cases that the law will chill free speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612, 615 93 S.Ct. 2908, 2916–18, 37 L.Ed.2d 830 (1973); *State v. Johnson*, 475 S.W.3d 860, 865 (Tex. Crim. App. 2015). The Court of Criminal Appeals has applied the overbreadth doctrine, but it is "strong medicine" that is used "sparingly and only as a last resort." *See Johnson*, 475 S.W.3d at 865; *Ex parte Thompson*, 442 S.W.3d at 349–50. Accordingly, we will only strike a law as overbroad if no limiting construction can be placed on the statute. *See Broadrick*, 413 U.S. at 613, 93 S.Ct.

at 2916.

The overbreadth of a statute must be "'substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.'" *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) (quoting *United States v. Williams*, 553 U.S. 285, 292, 128 S.Ct. 1830, 1838, 170 L.Ed.2d 650 (2008)). 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." *Ex parte Perry*, 483 S.W.3d at 902 (internal quotations omitted). The person challenging the statute must demonstrate from its text and from actual fact "'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'" *Ex parte Perry*, 483 S.W.3d at 902 (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1 (1988)).

The first step in an overbreadth analysis is to construe the challenged statute, which we have already done above. *See Ex parte Perry*, 483 S.W.3d at 902. The plainly legitimate sweep of the Statute is its application to cases where a defendant, who knows or is aware of, but consciously disregards, a substantial and unjustifiable risk that the defendant does not have effective consent of the depicted person, intentionally discloses a sexually explicit image obtained by the defendant under circumstances known to the defendant in which the depicted person had a reasonable expectation that the image would remain private, and through this disclosure the defendant knowingly or recklessly identifies the depicted person and causes the person harm. This is a legitimate application of the Statute because, as discussed above, it is narrowly tailored to serve a compelling governmental interest in protecting privacy. *See Ex parte Ellis*, 609 S.W.3d at 337–38.

In the trial court and on appeal, appellee has based her overbreadth argument on her broad construction of the Statute, under which the Statute has a much wider

scope. We have declined to adopt appellee's construction of the Statute, as discussed above. The issue under the overbreadth analysis is whether the Statute reaches a substantial number of cases outside the Statute's plainly legitimate sweep. *See Ex parte Perry*, 483 S.W.3d at 902. We conclude that it does not. *See id.*; *Ex parte Ellis*, 609 S.W.3d at 339 (concluding that the Statute is not facially overbroad in violation of the First Amendment); *Ex parte Hamilton*, 599 S.W.3d at 320–21 (concluding that the 2015 version of Penal Code section 21.15(b)(1) is not facially overbroad in violation of the First Amendment). Appellee has not demonstrated that a substantial number of instances exist in which the Statute cannot be applied constitutionally. *See Ex parte Perry*, 483 S.W.3d at 902. We conclude that the trial court erred in impliedly sustaining appellee's overbreadth challenge and in impliedly determining that the Statute is facially overbroad in violation of the First Amendment. *See Ex parte Ellis*, 609 S.W.3d at 339; *Ex parte Hamilton*, 599 S.W.3d at 320–21.

III. CONCLUSION

Although the Statute is a content-based restriction, it is nevertheless narrowly tailored to serve a compelling governmental interest, namely, protecting sexual privacy. To prove the violation of the Statute, as charged in this case, the State must show that: (1) appellee intentionally disclosed a sexually explicit image obtained by her under circumstances in which the depicted person had a reasonable expectation that the image would remain private; (2) appellee knew or was aware of but consciously disregarded a substantial and unjustifiable risk that she did not have effective consent of the depicted person; and (3) appellee knowingly or recklessly identified the depicted person and caused that person harm through the disclosure. Further, the Statute, as properly construed, is not overbroad. The trial court reversibly erred in granting appellee's application for pre-trial habeas-corpus relief in each of the separate criminal cases. Therefore, in each of the appeals, we reverse

the trial court's judgment and render judgment that appellee's application for pre-trial habeas-corpus relief be denied. We reinstate the indictment in trial court cause number 1581954 so that the trial court may conduct further proceedings on this indictment.

/s/ Randy Wilson
Justice

Panel consists of Justices Jewell, Spain, and Wilson (Spain, J., concurring).

Publish — Tex. R. App. P. 47.2(b).