



**IN THE
TENTH COURT OF APPEALS**

No. 10-17-00047-CR

EX PARTE RICHARD ALLEN MONTEY ELLIS

**From the County Court at Law No. 1
McLennan County, Texas
Trial Court No. 20160008HC8**

OPINION

Richard Allen Montey Ellis was charged under Texas Penal Code § 21.16(b) with the offense of Unlawful Disclosure or Promotion of Intimate Visual Material. TEX. PENAL CODE ANN. § 21.16(b) (West Supp. 2017). Ellis filed an Application for Writ of Habeas Corpus arguing that Section 21.16(b) is unconstitutional on its face. The trial court denied relief, and Ellis appeals the trial court's order denying relief. We affirm.

In two issues, Ellis argues that Section 21.16(b) is unconstitutional on its face because it is overbroad and vague under the First Amendment to the United States Constitution. Whether a statute is unconstitutional on its face 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 constitutionality of a statute is attacked, we 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.* Content-based regulations are presumptively invalid, and the government bears the burden to rebut that presumption. *Id.*

CONTENT-BASED LAWS

Under the First Amendment, a government, “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *See Reed v. Town of Gilbert*, 565 U.S. 155, 162, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Id.* We begin by determining whether Section 21.16 is a content-based restriction.

Section 21.16(b) provides:

(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.

TEX. PENAL CODE ANN. § 21.16(b) (West Supp. 2017).

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. *Town of Gilbert*, 135 S.Ct. at 2227. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Id.* Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter. Others are more subtle, defining regulated speech by its function or purpose. *Id.* Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. *Id.* The Texas Court of Criminal Appeals stated, “If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content-based.” *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014); *Ex parte Lo*, 424 S.W.3d at 15 n. 12.

Section 21.16(b) prohibits a person from disclosing visual material depicting another person with the person's intimate parts exposed. On its face Section 21.16(b) draws distinctions based on the message a speaker conveys. The statute defines speech based upon the subject matter, intimate images, and also restricts speech based upon its function and purpose, causing harm. *See Town of Gilbert*, 135 S.Ct. at 2227. Further it is necessary to look at the content of the speech in question to decide if the speaker violated the law. *See Ex parte Thompson*, 442 S.W.3d at 345. One would have to look at the visual material to determine if intimate parts were exposed and if the material reveals the person's identity. We find that Section 21.16(b) is a content-based regulation requiring strict scrutiny.

We note that in a post-submission *Amicus Curiae* Brief, the State Prosecuting Attorney's Office argues that the "secondary effects" doctrine allows this Court to apply intermediate scrutiny rather than strict scrutiny. In *Ex parte Thompson*, the Court of Criminal Appeals stated:

In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content. These situations involve government regulations aimed at the "secondary effects" of expressive activity. In this type of situation, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." The government regulation at issue need only be justified without reference to the content of the regulated speech. (citations omitted)

Ex parte Thompson, 442 S.W.3d at 345. However, *Ex parte Thompson* was decided prior to *Reed v. Town of Gilbert*. In *Town of Gilbert*, the Court stated, “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Town of Gilbert*, 135 S.Ct. at 2228. An innocuous justification cannot transform a facially content-based law into one that is content neutral. *Id.* The Court noted that we must determine whether a law is content neutral on its face before turning to the law’s justification or purpose. *Id.*

The Court of Criminal Appeals cited *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed. 2d 661 (1989) as authority for the secondary effects doctrine. In *Town of Gilbert*, an *Amicus Curiae* brief cited *Ward* as authority for its argument that a law was content neutral, even if it expressly draws distinctions based on the communicative content, if those distinctions can be justified without reference to the content of the regulated speech. *Town of Gilbert*, 135 S.Ct. at 2228. The Court found that the Court of Appeals and the *Amicus* misunderstood the decision in *Ward* as suggesting that a government’s purpose is relevant even when a law is content based on its face. *Id.* The Court stated that *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban and that *Ward*’s framework applies only if a statute is content neutral. *Id.* at 2228 and 2229. Because Section 21.16(b) is content based on its face, we must apply strict scrutiny rather than intermediate scrutiny.

STRICT SCRUTINY

To satisfy strict scrutiny, a law that regulates speech must be (1) necessary to serve a (2) compelling state interest and (3) narrowly drawn. *Ex parte Lo*, 424 S.W.3d at 15. A law is narrowly drawn if it employs the least restrictive means to achieve its goal and if there is a close nexus between the government's compelling interest and the restriction. *Id.* 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. *Id.* at 15-16.

Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. *Ex parte Thompson*, 442 S.W.3d at 348. In *Ex parte Thompson*, the Court found that substantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as the home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt. *Id.* Similar to the privacy interest involved in a person being photographed without consent in a private place or a photograph of an area of a person not exposed to the general public, Section 21.16(b) protects a person's privacy interest in the disclosure of intimate visual material without effective consent. We find that the privacy interest is invaded in an intolerable manner when a person discloses visual material without effective consent depicting intimate body parts or sexual conduct that the person depicted expected would remain private.

We must now determine whether the statute is narrowly drawn. A regulation is "narrowly drawn" if it uses the least restrictive means of achieving the government interest. *Ex parte Thompson*, 442 S.W.3d at 344. In *Ex parte Thompson*, the Court noted that Section 21.15(b)(1) of the Texas Penal Code contained no language addressing privacy concerns. *Id* at 348. The Court found that Section 21.15(b)(1) was not narrowly drawn to protect the privacy interests in question. *Id*. The Court noted, however, that Section 21.15(b)(2) of the Texas Penal Code is an example a provision that is in fact narrowly drawn to protect substantial privacy interests. *Id*. at 348-349. In *In the Matter of D.Y.*, the Fort Worth Court of Appeals held that Section 21.15 (b)(2) of the Texas Penal Code satisfies strict scrutiny. *In the Matter of D.Y.*, No. 02-16-00294-CV, 2017 WL 2178877 at *4 (Tex. App. – Fort Worth May 18, 2017, pet. den'd)(mem. op., not designated for publication).

Section 21.16(b) contains language narrowing the statute to address privacy concerns by requiring that the visual material was obtained or created under circumstances in which the depicted person had a reasonable expectation of privacy. *See Ex parte Thompson*, 442 S.W.3d at 348. Section 21.16(b) is further narrowly drawn to address privacy concerns because it only prohibits visual material that reveals the identity of the depicted person rather than broadly prohibiting disclosure of all intimate images without the consent of the depicted person.

The statute allows for situations in which the creation of the visual image was consensual, but the disclosure is without consent. This protects the privacy interest at stake while limiting criminal liability to intentional disclosures of the material. The statute does not criminalize accidental disclosures, but rather requires that the disclosure be intentional and without the effective consent of the depicted person. Section 21.16(b) further requires that the disclosure of the visual material causes harm to the depicted person. While it may be difficult to prove harm to the depicted person, this requirement narrows the statute to only criminalize intentional disclosures that cause harm to the depicted person. We find that the privacy interests are compelling, and the statute is narrowly drawn to protect those interests. Section 21.16(b), therefore, satisfies the strict scrutiny test.¹

OVERBREADTH

The overbreadth doctrine is "strong medicine" to be employed with hesitation and only as a last resort. *Ex parte Thompson*, 442 S.W.3d at 349. The "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* To be held unconstitutional under the overbreadth doctrine, a statute must be found to prohibit a substantial amount of protected expression. *Id.* at 350.

¹ In *Ex parte Jones*, No. 12-17-00346-CR, 2018 Tex. App. Lexis 3439 (Tex. App. — Tyler May 16, 2018, pet. granted) the Tyler Court of Appeals held, "But because Section 21.16 (b) does not use the least restrictive means of achieving what we have assumed to be the compelling government interest of preventing the intolerable invasion of a substantial privacy interest, it is an invalid content-based restriction in violation of the First Amendment." *Ex parte Jones* * 13-14.

A statute is likely to be found overbroad if the criminal prohibition it creates is of "alarming breadth." *Id.*

Section 21.16(b) applies only to visual images depicting intimate parts or engaging in sexual conduct, obtained or created under circumstances with a reasonable expectation of privacy, disclosed intentionally without consent, identifying the depicted person, and causing harm to the depicted person. The sweep of the statute is limited by the intent of the person disclosing the images and the requisite harm that the potential victim must show. We find that Section 21.16(b) is not overbroad.²

VAGUENESS

A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not permit arbitrary and discriminatory enforcement. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007); *Gerron v. State*, 524 S.W.3d 308, 316 (Tex.App.—Waco 2016, pet. ref'd). A statute is unconstitutionally vague if persons of common intelligence must necessarily guess at its meaning and differ about its application. *Ex parte Maddison*, 518 S.W.3d 630, 640 (Tex.App. —Waco 2017, no pet.). A statute need not be mathematically precise; it must only provide fair warning in light of common understanding and practices. *Id.*

² In *Ex parte Jones*, the Court found Section 21.16 (b) to be overbroad. *Ex parte Jones* * 16.

Ellis does not argue that any specific terms of Section 21.16(b) are unconstitutionally vague. Ellis's argument on vagueness states only that "Section 21.16(b) as written is plain and overbroad. If this Court were to narrow its interpretation to save it from overbreadth, such an interpretation would necessarily render it unconstitutionally vague."

We found that the statute is not overbroad because the sweep of the statute is limited by the intent of the person disclosing the images and the requisite harm to that depicted person. Both intent and harm are defined in the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 1.07 (25) & § 6.03 (a) (West 2011 & West Supp. 2017). However, a statute is not unconstitutionally vague merely because it fails to define words or phrases. *Gerron v. State*, 524 S.W.3d at 316. Instead, undefined terms in a statute are to be given their plain and ordinary meaning. *Id.* We find that 21.16(b) defines the criminal offense so that ordinary people could understand the prohibited conduct.

Having found that Section 21.16(b) satisfies strict scrutiny and is not unconstitutionally overbroad or vague, we overrule Ellis's first and second issues on appeal.

CONCLUSION

We affirm the trial court's judgment.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
(Chief Justice Gray dissenting with opinion)
Affirmed
Opinion delivered and filed August 31, 2020
Publish
[CR 25]

