

No. PD-0839-25
No. PD-0840-25

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

ISRAEL BALLESTER, II,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the Third Court of Appeals

BRIEF OF AMICI CURIAE

**NATIONAL ASSOCIATION FOR GUN RIGHTS AND TEXAS GUN
RIGHTS IN SUPPORT OF APPELLANT ISRAEL BALLESTER, II**

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INTEREST OF AMICI CURIAE

National Association for Gun Rights (“NAGR”) and Texas Gun Rights (“TGR”) are nonprofit organizations dedicated to preserving the constitutional right to keep and bear arms and the right of law-abiding people to defend themselves and others. The Supreme Court has recognized that individual self-defense is the “central component” of the Second Amendment right and a basic right deeply rooted in American tradition. *District of Columbia v. Heller*, 554 U.S. 570, 599, 628 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 767-78 (2010).

This case concerns when a jury may wholly withdraw the justification of self-defense from an armed citizen who responds to unlawful force. Amici have a substantial interest in ensuring that Section 9.31(b)(4) remains confined to its settled purpose: denying justification only to a person who deliberately manufactures an apparent need for self-defense as a pretext to harm another. The State seeks a broader, undefined provocation rule that would create uncertainty for every person who carries a firearm for lawful defense in Texas and would invite juries to turn political expression, personal disputes, or ordinary fault into a complete forfeiture of self-defense, in violation of the clear precedent of this Court, the will of the Legislature, and constitutional principles.

NAGR and TGR have paid or agreed to pay the undersigned counsel a fee for preparing this brief.

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Come now the National Association for Gun Rights and Texas Gun Rights, *Amici Curiae*, and respectfully submit this Amicus Curiae Brief in Support of the Appellant.

SUMMARY OF THE ARGUMENT

For decades, Texas law has treated “provoking the difficulty,” as embodied in Section 9.31(b)(4) of the Penal Code, as a technical doctrine meaning that the defendant intentionally manufactured the necessity for using force in self-defense as a pretext for harming the victim. In 1998, this Court in *Smith v. State* crystallized that doctrine into three factual elements and required that they be submitted to the jury as part of an instruction under Section 9.31(b)(4): (1) the defendant’s acts or words must actually cause the attack; (2) they must be reasonably calculated to cause it; and (3) they must be used for the purpose and with the intent of creating a pretext to inflict harm under the guise of self-defense. 965 S.W.2d 509, 512–14 (Tex. Crim. App. 1998).

In 2016, this Court reaffirmed all three requirements in *Elizondo v. State* and reversed a finding that the defendant had provoked an encounter under Section 9.31(b)(4) because the evidence of pretextual intent for the third element was speculative. 487 S.W.3d 185, 196–97, 201–204 (Tex. Crim. App. 2016).

That settled construction is textually and historically defensible and has remained undisturbed by this Court and the Legislature for forty-eight years. Section 9.31(b)(4) was adopted verbatim from the State Bar’s 1970 Proposed Revision to the Penal Code. The contemporaneous commentary on Section 9.31(b)(4) from the State Bar drafters states that Section 9.31(b)(4) codifies the longstanding common-law doctrine that limited the provocation-based exclusion from self-defense to one who provokes a difficulty “intending then to injure his opponent when the latter responds.” State Bar of Texas, Texas Penal Code: A Proposed Revision 89 (Final Draft 1970).

In a decision that soon followed the Legislature’s adoption of the Revised Penal Code, *Dirck v. State*, this Court relied on that Practice Commentary in concluding that Section 9.31(b)(4) codified the common law’s pretextual intent requirement. In the almost half-century since the Court began interpreting Section 9.31(b)(4) as requiring pretextual intent, the Legislature has amended Sections 9.31 and 9.32 without disturbing either subsection (b)(4) or this Court’s consistent interpretation of it. These considerations provide clear and consistent evidence of the Legislature’s intent: it adopted Section 9.31(b)(4) knowing its drafters intended it to codify the common law pretextual intent requirement, and it has left the provision alone for decades following the Court’s consistent interpretation that it does just that.

The State asks that the Court strip Section 9.31(b)(4) of its technical meaning, allowing juries to instead rely upon their colloquial understanding of the term “provoked.” But the State’s various proposals for how the term may be defined confirm why the Court’s longstanding technical definition is necessary. In its reply, the State offers multiple dictionary definitions it claims present viable interpretations, but it admits that allowing a definition of “provoked” that would include accidental causation would be absurd. In doing so, the State demonstrates the inherent problems that come from allowing a term as broad as “provoked” to go undefined.

The State insists that “provoked” may go undefined so long as its possible interpretations are confined to definitions that require the defendant’s intent to bring about his victim’s unlawful use of force. But the State’s proposed definitions have no such limitation. Instead, they consist of broad dictionary formulations that include conduct as anodyne as deliberately annoying someone merely to make them angry or behave aggressively.

The State’s proposed definitions draw no line between actions intended to bother someone into a controversy, an argument, or a shoving match, those intended to start a fistfight, and those intended to manufacture a life-and-death struggle that would necessitate the use of deadly force. Under the State’s proposal, they are all one and the same. And the State provides no barrier preventing a jury

from finding that a defendant who engaged in politically provocative speech forfeits his right to self-defense if he is attacked by a listener he merely intended to annoy but who escalates to lethal force. The State fails to recognize the dangerous potential of its own proposed definitions, treating them as if they could only authorize a jury to find provocation where a defendant's intent was to annoy another into violence, although the plain meanings of those definitions contain no such restriction. The State therefore asks the Court to reject a precise, settled technical definition of "provoked" rooted in the common law in favor of leaving courts, law enforcement, and juries with an open-ended understanding of "provoked" that the State itself acknowledges carries dangers.

Texas vagueness principles reinforce the need for objective and purpose-based limits on how "provoked" may be defined under Section 9.31(b)(4). Listener-dependent standards that rely on a finding that the defendant acted to "annoy" or "alarm" others are constitutionally dangerous when they hinge legal consequences on individual sensitivities. *Long v. State*, 931 S.W.2d 285, 287-90 (Tex. Crim. App. 1996). *Smith* supplies safeguards that the State's proposal lacks, requiring actual causation, objective standards for provocativeness, and a specific culpable purpose by the defendant to cause harm.

Those safeguards are especially important because mere words can constitute the alleged provocation. Protected expression may be provocative and

may stir listeners to anger, but the First Amendment does not permit a hostile audience to convert its own violent reaction into criminal culpability for the speaker absent narrow circumstances. *See Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949); *Coates v. City of Cincinnati*, 402 U.S. 611, 614-16 (1971).

Finally, *Smith*'s elements are not the sort of evidence-focused non-statutory jury instruction rejected in *Giesberg* or *Walters*. Texas courts permit, and sometimes require, definitions of statutorily undefined terms that possess a technical or established legal meaning. *Beltran De La Torre v. State*, 583 S.W.3d 613, 618-19 (Tex. Crim. App. 2019). *Walters* itself expressly distinguished the codified common-law doctrine of provocation from its holding that evidence-focused non-statutory instructions are impermissible.

In all, the *Smith* standards requiring juries to find three defined factual elements, including pretextual intent, before a defendant may be stripped of his right to self-defense for provoking another are supported by the intent of Section 9.31(b)(4)'s framers, almost five decades of consistent precedent, the Legislature's clear acquiescence to the Court's interpretation, and constitutional standards favoring strictly defined criminal statutes and leaving protected speech unburdened. The State's proposal to overturn *Smith* is legally unsupported, constitutionally fraught, and administratively unworkable. The Court should find for the Appellant and affirm the Third Court of Appeals accordingly.

ARGUMENT

I. *Smith* supplied a necessary technical meaning for “provoked” as used in Section 9.31(b)(4).

A. *Smith* defines a technical common-law term incorporated into the Penal Code.

Section 9.31(b)(4) of the Penal Code excludes a defendant from claiming self-defense if he “provoked the other’s use or attempted use of unlawful force,” unless he abandons the encounter, or he clearly communicates an intent to abandon the encounter when safe abandonment is not possible and the other nevertheless continues or attempts to use unlawful force. Tex. Penal Code § 9.31(b)(4). The section does not define the meaning of “provoked” and does not, on its face, clarify whether it includes mere causation of the encounter or deliberate intent to bother or stir up the other, cause the other to initiate violence generally, or cause the other to use force as a pretext for the defendant to respond with harm—the last of which has long been the common-law definition.

This Court has provided a consistent answer to this issue for almost fifty years, holding since *Dirck v. State* in 1979 that provocation under Section 9.31(b)(4) means that the defendant provoked the other’s aggression with the intent to create the violence he responded to. 579 S.W.2d 198, 203 (Tex. Crim. App. 1979).

In *Smith*, the Court affirmed this doctrine and bolstered it with added precision by holding that provocation under Section 9.31(b)(4) requires evidence from which a rational jury could find beyond a reasonable doubt three elements:

(1) that the defendant did some act or used some words which provoked the attack on him, (2) that such act or words were reasonably calculated to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.

965 S.W.2d at 513.

The first *Smith* element requires that the defendant's conduct be the actual cause of the other's attack. The second requires that the defendant's conduct satisfy an objective standard for reasonably causing the other's reaction—preventing the other's unusual, unforeseeable, or irrational response to the defendant's conduct from unilaterally foisting culpability for provocation on the defendant. And the third limits Section 9.31(b)(4)'s total exclusion from self-defense to only those situations in which the defendant has acted with calculated criminal intent—i.e., intentionally creating the violent encounter as a vehicle to harm the other while hiding himself behind a fig leaf of self-defense.

The Court found it essential that Section 9.31(b)(4) be reserved only for such deliberately wrongful conduct because the provision imposes a complete bar on the right to self-defense, rather than merely removing a presumption favorable to the defendant: “Even though a person does an act, even a wrongful act, which does

indeed provoke an attack by another, if he had no intent that the act would have such an effect as part of a larger plan of doing the victim harm, he does not lose his right of self-defense.” *Id.* at 518.

While the State claims that this central holding of *Smith* was mere dicta that can and should be disregarded, this Court clearly disagrees. In *Elizondo v. State*, the Court treated *Smith* as controlling precedent that required submission of its three factual elements in relevant jury instructions. 487 S.W.3d at 196. There, the Court analyzed whether there was evidence to support a finding of all three “Smith elements” beyond a reasonable doubt and found that an instruction on provocation was improper because the evidence for the third element—pretextual intent—could rest only on speculation. 487 S.W.3d at 200–04.

Though the defendant in *Elizondo* had exchanged angry words with others and struck at them before running to a truck while making threats to retrieve a gun and shooting an armed pursuer, the Court found those facts did not sufficiently establish that he had acted pretextually—orchestrating the events as a plot to justify killing a man he did not know. *Id.* at 202–04. The Court thus confirmed the essential and continuing importance of pretextual intent under Section 9.31(b)(4). A defendant’s conduct may be wrongful, aggressive, and cause the attack to which he believes he needs to respond, but all of that only means that the jury *may* find that his claim of self-defense is reduced or unavailing; it is only when the

defendant purposefully manufactured his need for self-defense as an excuse to inflict harm that his claim of self-defense *must* be precluded.

This distinction is part of the Legislature's coherent statutory scheme. While Section 9.31(b)(4) addresses the limited circumstance of when a defendant is absolutely barred from claiming self-defense because he pretextually concocted the violent situation, other provisions address other bases for reducing or denying self-defense claims, such as first aggression, mutual combat, the lawfulness of the other's use of force, the reasonableness of the defendant's belief that force was necessary, the proportionality of the force he used, verbal provocation, and presumptions regarding the duty to retreat. *See* Tex. Penal Code §§ 9.31(a)-(b), (e), 9.32. In this well-ordered scheme, *Smith* provides a sensible and coherent limitation on the absolute bar to self-defense imposed by Section 9.31(b)(4), while other bases for reducing or precluding self-defense are covered by other provisions.

B. Section 9.31(b)(4) has long been understood to require a finding of pretextual intent.

The Legislature adopted the modern text of Section 9.31(b)(4) in 1973 as part of the 1974 Revised Penal Code. Its language was taken verbatim from Section 9.31(b)(4) of the 1970 Proposed Penal Code drafted by the Texas State Bar. Alongside the Proposed Code, the State Bar's drafting committee published a Practice Commentary explaining the intent and meaning behind its draft

provisions. For Section 9.31(b)(4), the Practice Commentary is unambiguous, stating that the provision codifies the common law doctrine that a defendant is barred from self-defense based on provocation *only* if he acted with intent to obtain a pretext for causing harm:

One who provokes a difficulty, intending then to injure his opponent when the latter responds to the provocation, is not justified in using force against his opponent when the latter responds. This is the common law, long recognized in Texas, and it is codified in Subsection (b)(4), *Muckleroy v. State*, 310 S.W.2d 315 (Tex. Crim. App. 1957). To restore his self-defense justification, the provoker must abandon the difficulty, or if he reasonably believes he cannot safely do so, he must clearly communicate to his opponent his intent to abandon. Subsections (b)(4)(A) and (b) (4) (B) are also the present law, although the latter is not so precisely stated. *See, e. g., Burris v. State*, 30 S.W. 785 (Tex. Crim. App. 1895); *Brazzil v. State*, 13 S.W. 1006 (Tex. Ct. App.1890); *Roach v. State*, 21 Tex. Ct. App. 249 (1886). The provocation doctrine, also called the doctrine of imperfect self-defense, has primarily developed in the justifiable homicide setting and is accordingly discussed in more detail in the comment to Section 9.32.

State Bar of Texas, Texas Penal Code: A Proposed Revision 89 (Final Draft 1970).

This Court has long followed the principle that where the Legislature has adopted provisions of the State Bar’s Proposed Code in their entirety, the State Bar’s Practice Commentary provides compelling evidence of what the Legislature understood and intended those provisions to mean. *See Shipp v. State*, 331 S.W.3d 433, 439 n.35 (Tex. Crim. App. 2011) (“The Practice Commentaries derive from the Comments of the State Bar Committee on Revision of the Penal Code that

accompanied the 1970 Proposed Penal Code, which comments are ‘an important source of legislative history.’ V.T.C.A. Penal Code, Foreword (1974), at XXIV. This is especially so in this case because the forgery statute as enacted in 1973 is materially identical to the version originally proposed in 1970.”). *See, e.g., Cornwell v. State*, 471 S.W.3d 458, 464-65 (Tex. Crim. App. 2015) (relying on the Practice Commentary to resolve interpretive questions about Section 3.11 of the Penal Code); *Swenson v. State*, 707 S.W.3d 297, 304 n.53 (Tex. Crim. App. 2024) (stating that “the Practice Commentary is less persuasive when, as here, the Legislature did not follow the Texas State Bar Committee’s 1970 proposed draft.”); *Navarro v. State*, 726 S.W.3d 436, 450 (Tex. Crim. App. 2025) (noting that the Practice Commentary is helpful and persuasive where “the Legislature followed the State Bar draft exactly”).

Because the Legislature took Section 9.31(b)(4) from the Proposed Code word for word, this Court looked to the Practice Commentary when interpreting the meaning of “provoked” in *Semaire v. State* only a few years after the Revised Penal Code was adopted, finding that pretextual intent was required under Section 9.31(b)(4) just as it had been under the common law. 612 S.W.2d 528, 531 (Tex. Crim. App. 1980).

Semaire itself followed the aforementioned earlier case, *Dirck v. State*, which was decided within six years of the Revised Code’s adoption. *Semaire* and

Dirck were soon followed by *Bennett v. State*, in which the Court relied on *Semaire* in stating that pretextual intent was necessary to find provocation under Section 9.31(b)(4).

Smith thus represents a continuation of what is now almost fifty years of the Court's consistent interpretation of Section 9.31(b)(4)—an interpretation that is supported by the express intent of the provision's drafters. Accordingly, the State's efforts to cast *Smith* and the pretextual intent requirement as an aberration or judicial outlier run into the wall of half a century of this Court's jurisprudence and the clear intent of the provision's framers.

C. Stare decisis and subsequent legislative action strongly favor preserving *Smith*.

Stare decisis carries special force when precedent fixes the scope of a criminal defense. *Navarro*, 726 S.W.3d at 445–46. While the Court may overrule statutory precedent when it was indefensible from the outset, conflicts with later and better-reasoned law, proves unworkable, or produces consequences alien to its rationale, none of those circumstances are present here regarding either *Smith* or its precursor cases holding that pretextual intent is required under Section 9.31(b)(4). *Id.*; *In re Green*, 713 S.W.3d 843, 854 (Tex. Crim. App. 2025).

First, *Smith* and the prior cases in its line—e.g., *Dirck*, *Semaire*, *Bennett*—are legally defensible for the reasons stated above. The pretextual intent requirement has a long pedigree in common law; Section 9.31(b)(4)'s drafters

expressly described their intent that it codify the pretextual intent requirement in their Practice Commentary; the Court has consistently relied on that understanding in its interpretation of Section 9.31(b)(4); and *Elizondo* confirmed that the common-law intent element survived because there was no indication the Legislature intended to eliminate it. 487 S.W.3d at 201 n.39.

Second, the pretextual intent requirement is workable and reliable. It tasks juries with basic and straightforward factual questions of causation, objective tendency, and intent. The Texas Criminal Pattern Jury Charges have translated the elements into a short, comprehensible instruction:

Provoking the Use or Attempted Use of Force

To prove that the defendant provoked the other, the state must show that—

1. the defendant did some acts or used some words that caused the other person to attack the defendant; and
2. the acts or words by the defendant were reasonably calculated to provoke the attack; and
3. the defendant did the acts or used the words for the purpose and with the intent that the defendant would have a pretext for inflicting harm on the other person.

[Substitute the following for element 3 above if the prosecution is for an offense involving deadly force.]

3. the defendant did the acts or used the words for the purpose and with the intent that the defendant would have a pretext for killing the other person or inflicting serious bodily injury on him.

Texas Criminal Pattern Jury Charges: Justification Defenses CPJC 9.19 (State Bar of Tex. 2025). The State relies upon the differences between the Court’s fact-intensive analyses in *Smith* and *Elizondo* to claim they show doctrinal inconsistency and that the pretextual intent requirement is inherently unworkable. State Br. at 66–68. The State argues on this basis that the Court has indirectly acknowledged that *Smith* was decided in error and should be overturned. *Id.* The cases show nothing of the kind. All they demonstrate is the Court’s determination that the element of pretextual intent can be established by evidence in one case while being too speculative in another.

Third, the Legislature has allowed the Court’s interpretation of Section 9.31(b)(4) to stand for almost fifty years without stepping in to correct the supposed error. As the State acknowledges, the Legislature’s silence and inaction in response to the Court’s interpretation of a statute is strong evidence of its agreement with the Court for the obvious reason that “[i]f the Legislature did not agree with the judicial interpretation, it would have acted to change the statute.” State Br. at 60 (citing *In re Green*, 713 S.W.3d at 854). This principle is all the more compelling with regard to Section 9.31(b)(4) because the Legislature has let the Court’s interpretation stand since 1979 and because the Legislature has shown it is willing to make significant revisions of Sections 9.31 and 9.32 in the interim. In 2007, the Legislature substantially amended Sections 9.31 and 9.32 to expand

protections for self-defense by including provisions removing a defendant's duty to retreat before using force in self-defense. Relevant here, the new provisions repeatedly use the term "provoked," but the Legislature left Section 9.31(b)(4) unchanged. *See* Act of 2007, 80th Leg., R.S., ch. 1, secs. 2-3, 2007 Tex. Gen. Laws 1, 1-2. The State offers no explanation for why the Legislature has failed to fix the Court's supposedly wrong line of decisions for half a century despite its willingness to open up Sections 9.31 and 9.32 for major augmentative surgery relating to provocation.

Finally, reliance interests are concrete and meaningful. Though the State appears to pooh-pooh reliance in the criminal context, State Br. at 11, it is significant that trial courts, prosecutors, defense counsel, and pattern-charge authors have operated under and relied on *Smith* for nearly three decades, and have relied on the Court's related precedents interpreting Section 9.31(b)(4) for nearly five decades. All people in Texas potentially affected by how the law treats a self-defense confrontation—which is to say all people in Texas—deserve and are entitled to a stable rule based on clear and consistent precedent. Despite the State's conclusory skepticism otherwise, there is an obvious reliance interest for all members of the population in understanding when force may or may not be used and what conduct of theirs may disqualify them from claiming self-defense,

particularly when that conduct may consist of nothing more than speech acts or expression.

II. Removing the Court’s stable, technical definition of “provoked” from Section 9.31(b)(4) creates serious interpretive and constitutional problems.

A. The State’s proposed definitions show the danger inherent in allowing “provoked” to go undefined in Section 9.31(b)(4).

The State presents an unclear “ask” to the Court. At first blush, it appears that the State requests that the Court remove the technical definition for “provoked” from Section 9.31(b)(4) that was recognized in *Smith* and instead allow it to be submitted to juries undefined. This is the State’s position in its merits brief, urging that juries be allowed to use the common meaning of “provoked” rather than its definition based on the three *Smith* elements. State Br. at 68. But the State concedes in its reply that allowing juries to interpret “provoked” without restriction presents an obvious danger, admitting that one of its common meanings—“to cause”—would lead to the “absurd result” that a defendant who accidentally or unknowingly made another person angry enough to attack him would lose his right to self-defense. State Reply Br. at 7-10.

The State therefore demonstrates the unworkability of its own proposal to allow “provoked” to go utterly undefined. The State tries to retake ground by suggesting its own narrowing construction: that “provoked” must be limited to definitions that require that the defendant acted intentionally to bring about the

other's unlawful use of force. *Id.* at 7. But here too, the State presents a contradictory position with concerning results. The State presents four dictionary definitions for "provoked" that it claims are reasonable because they require some form of intent by the defendant:

- "to make or try to make a person or an animal angry"
- "To bring about deliberately; induce"
- "to say or do something that you know will annoy somebody so that they react in an angry way"
- "If you provoke someone, you deliberately annoy them and try to make them behave aggressively."

Id. at 8.

The State treats these definitions as functionally interchangeable and as if they all mean, in effect, that the defendant deliberately sought to create a violent conflict. *Id.* at 10. But the State fails to recognize that three of its definitions have no inherent relationship to causing a violent encounter—they only concern the actor's intent to be bothersome, make someone angry, or "annoy someone" into reacting angrily or behaving aggressively, but not specifically or necessarily in order to start a violent confrontation. These definitions do not distinguish what type of "angry" or "aggressive" reaction the actor intends to spark, whether a frustrated grimace, a stern rebuke, an irritated stomping off, a shouting match, an angry shove, a scandalized slap, a fistfight, or a life-and-death struggle. As

proposed by the State, conduct intended to elicit any of these various and vastly different forms of angry or aggressive reaction would equally be encompassed within Section 9.31(b)(4). The State’s proposal would treat the Socratic gadfly who pesters or needles an interlocutor for the purpose of getting a rise out of him—only to be met with a murderously violent overreaction—exactly the same as the premeditated murderer who deliberately provokes his victim to obtain a pretext for killing him.

The State’s proposal has no provision for a disparity between the angry or aggressive response intended by the defendant when “annoying” someone and the response actually received. Nor does it require that the defendant’s conduct have actually been provocative under a reasonable objective standard. It would impose the statutory requirement for the defendant to abandon the encounter regardless of whether the defendant’s intent was to make violence necessary and regardless of whether his actions were objectively capable of eliciting a violent response, even where deadly escalation occurs too suddenly to permit his withdrawal or communication.

Texas’s absurdity doctrine supplies at least a minimum floor regulating these results. A plain construction of a statute may be rejected for causing absurd results when it produces consequences the Legislature could not possibly have intended, though not based on merely harsh or anomalous policy results. *Boykin v. State*, 818

S.W.2d 782, 785-86 (Tex. Crim. App. 1991). The State has already conceded that an interpretation of “provoked” that would apply to a defendant who accidentally caused the violent encounter fails that test. State Reply Br. at 10. But the possibilities created by the State’s proposed definitions—which include allowing a jury to interpret “provoked” as encompassing a controversial speaker’s passionate rhetoric against his political opponents, to which one of them responds with gunshots—produce results that are nearly as absurd. To use modern parlance, they would result in a substantially similar form of “victim blaming” against defendants whose irritating conduct could reasonably be viewed as provoking annoyance, but not violence, and who nonetheless are attacked. The State’s proposal would make the defendant bear a consequence for his attacker’s deranged reaction.

The unresolved and dangerous ambiguities created by the State’s proposal favor maintaining the stable and precise definition of “provoked” articulated in *Smith*. As the State acknowledges, leaving the jury with only the bare word of Section 9.31(b)(4) to work from leaves open the possibility that the jury would apply a common meaning of “provoked” that has no relation to the defendant’s intent. By the State’s own admission, “provoked” cannot be left undefined and without limitation. It is telling that the State’s own proposed definitions lead back to the same problems it recognizes must be avoided, demonstrating that the

necessity of the *Smith* elements for ensuring that Section 9.31(b)(4) is applied in a coherent and sensible manner.

B. Texas vagueness principles favor Smith’s objective and purpose-based limitations.

As demonstrated by the inconsistencies among the State’s proposed common meanings for “provoked,” Section 9.31(b)(4) is woefully vague when shorn of *Smith*’s limiting definition. This vagueness presents serious constitutional issues and poses a particular threat to a defendant’s First Amendment rights. Texas courts construe ambiguous statutes, where fairly possible, to avoid serious constitutional doubt. *See State v. Doyal*, 589 S.W.3d 136, 145-47 (Tex. Crim. App. 2019).

To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement.[] When the law also implicates First Amendment freedoms, it must also be sufficiently definite to avoid chilling protected expression.[] Greater specificity is required when First Amendment freedoms are implicated because “uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked.”[] Nevertheless, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”[] A scienter requirement in the statute may sometimes alleviate vagueness concerns[] but does not always do so.[]

Id. at 146.

This Court in *Doyal* found a statute unconstitutionally vague because it had “little in the way of limiting language and notably lack[ed] language to clarify its scope.” *Id.* at 147. The Court has distinguished between mere ambiguity in a

statute on the one hand, which authorizes a legitimate inquiry into which one of its multiple possible meanings was intended by the Legislature, and vagueness on the other, which presents no ready resolution other than a “free-floating extratextual inquiry:”

Ordinarily, we are limited to the text in construing a statute, but we have latitude to address extratextual factors when a statute is ambiguous or the literal text would lead to absurd results.[] Extratextual factors can include the object of the legislation and the consequences of a particular construction.[] Language that appears vague on its face “may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context.”[] However, even when a statute is ambiguous, it is ordinarily because the actual text is reasonably susceptible to more than one interpretation.[] It is one thing to use extratextual factors to help determine which of two or more competing interpretations of the text is probably the right one. It is quite another to engage in a free-floating extratextual inquiry to determine what a statute probably means. Even assuming that we could engage in the latter sort of inquiry under some circumstances, we could not do so for a statute that proscribes a criminal offense and that implicates protected expression under the First Amendment.

Id. at 149.

Concerns about chilling expression are especially potent when a statute would effectively criminalize “conduct that was ‘annoying’ or ‘indecent’ because those terms encompass[] ‘wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.’” *Id.* at 146. *Long v. State* presents an almost direct parallel for evaluating the State’s proposed common meanings for “provoked,” several of which define the term based on the defendant’s intent to “annoy” another. In *Long*, the Court addressed a harassment

provision that prohibited conduct by a defendant intended to annoy another. 931 S.W.2d at 288. The Court found that “annoy” was an inherently vague term that the statute did nothing to further define or limit. *Id.* at 288-89.

In *Long*, the Court cited a consistent line of cases from this Court, the Fifth Circuit, and the Supreme Court holding that criminal statutes penalizing “annoying” conduct are inherently vague and undermine the First Amendment. *Id.* at 288. In *Coates v. Cincinnati*, the Supreme Court struck down an Ohio statute criminalizing assemblies of people that were “annoying to persons passing by” because it was both vague for relying on a subjective standard of what counts as “annoying” conduct and an obvious threat to the First Amendment that would hamper unpopular or disfavored expression:

[T]he vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be “annoying” to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is “annoying” because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

402 U.S. at 615-16.

In *Kramer v. Price*, the Fifth Circuit struck down a Texas harassment statute that similarly criminalized conduct that “intentionally, knowingly, or recklessly annoys or alarms the recipient.” *Kramer v. Price*, 712 F.2d 174, 176 (5th Cir. 1983). The Fifth Circuit held that the Texas statute “suffer[ed] from the same infirmities as the ordinance in *Coates*” because “Texas courts have made no attempt to construe the terms ‘annoy’ and ‘alarm’ in a manner which lessens their inherent vagueness” nor to “construe the statute to indicate whose sensibilities must be offended.” *Id.* at 178. Relying on *Coates*’s holding that “a statute is unconstitutionally vague when the standard of conduct it specifies is dependent on each complainant’s sensitivity,” the Fifth Circuit found the statute unconstitutionally vague, noting that it failed to “provide reasonably clear guidelines,” gave “officials unbounded discretion to apply the law selectively,” and subjected “the exercise of the right to speech to an unascertainable standard.” *Id.*

Kramer is particularly relevant to the present case because the State argued in *Kramer* that there was a meaningful difference between the Ohio statute considered in *Coates* and the Texas statute because the Texas statute had an intent requirement connected to the annoying conduct. *Id.* The Fifth Circuit found this was of no moment: “Specifying an intent element does not save [the provision] from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague.” *Id.*

This Court affirmed *Kramer* in *May v. State*, stating “[w]e also hold that the inherent vagueness of the [harassment] statute as it then existed, in attempting to define what annoys and alarms people, and its failure to specify whose sensitivities are relevant, causes it to be unconstitutionally vague.” 765 S.W.2d 438, 440 (Tex. Crim. App. 1989).

The same issue that beset those unconstitutional statutes besets the State’s proposal here. If the State were to have its way, “provoked” would be left undefined, open to interpretation, without anything “in the way of limiting language” and lacking “language to clarify its scope.” Defendants, law enforcement, and juries would not have a reasonable opportunity to know what conduct triggers the limitation.

The State’s lone solution for addressing this issue is to provide a general limit that “provoked” must in some manner require the defendant’s intent to bring about a reaction from the victim, but the State’s suggested potential definitions only highlight how deep the vagueness issue runs. As previously discussed, two of the State’s four example definitions rely on the defendant “annoying” the victim. Thus, even the State’s effort to add clarity is dependent on a term that this Court, the Fifth Circuit, and the Supreme Court have all found inherently vague and a threat to the First Amendment.

The risk to defendants' rights is clear. A jury using the common definitions proposed by the State could infer that the defendant's conduct was "provocative"—e.g., intended to annoy the victim into an angry reaction—from the fact that the victim reacted violently. There is no barrier to its doing so. The circular reasoning that the State's proposal would empower would make a defendant's self-defense rights contingent on the reaction of his most volatile listener. If the most unreasonable man among his audience decides the defendant's conduct was not just offensive, but worth killing over, the defendant can be made a murderer just for defending himself, regardless of his intent to do more than needle, challenge, or jest his attacker.

The three *Smith* elements prevent this and spare Section 9.31(b)(4) from unconstitutional vagueness. The first element, actual causation, connects the defendant's conduct to the attack. The second element, reasonable calculation, supplies an objective standard to evaluate the defendant's conduct independent of the victim's temperament. The third element, pretextual intent, identifies a specific mens rea to commit violence that justifies a complete forfeiture of the defendant's self-defense rights. Together, those elements provide defendants, law enforcement, and juries fair and administrable limits with adequate notice of what conduct is prohibited.

C. The State's proposal would violate the First Amendment by empowering the heckler's veto.

The issue with the State's proposal is not that it allows for words or mere expressive acts to constitute provocation under Section 9.31(b)(4). *Smith* acknowledged that words can constitute provocation but, crucially, only if the defendant intended them to incite the victim's use of force as a pretext for committing harm. 965 S.W.2d at 513. The issue with the State's proposal is that it would allow words or expressive acts to constitute provocation based on nothing more than a listener taking offense to them and reacting with unlawful force.

The First Amendment protects expression not only *when* it is provocative, unsettling, or offensive, but *especially* when it is such:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello, 337 U.S. at 4 (internal citations omitted). Mere offensiveness, mere calculation to cause outrage, mere violation of sensitivities have never been enough to warrant criminalizing or prohibiting speech absent limited exceptions

because it is precisely these frontiers of expression that go beyond the “allowable” that must be defended for the First Amendment to have any force: flag burning, hateful political advocacy, and other deliberately offensive expression are protected for this reason. *See Texas v. Johnson*, 491 U.S. 397, 405-06 (1989).

Even conduct as outrageous and historically connected to violence and provocation as cross burning is protected by this standard, with the Supreme Court rejecting a statute that provided juries a shortcut that permitted them to infer intent to intimidate from the mere fact of a cross burning alone. *Virginia v. Black*, 538 U.S. 343, 365-67 (2003). As the Court noted, the same expressive act of cross burning could constitute an unlawful true threat or protected, though maligned, ideological expression depending on its purpose and context. *Id.* The First Amendment requires a strict legal line, not the audience’s anger, to control when expression is curtailed.

Other courts have recognized the same danger in the self-defense setting. The Washington Supreme Court avoided a free-speech problem by holding that mere words, without more, cannot support a first-aggressor instruction. *State v. Riley*, 137 Wn.2d 904, 910-11 (1999). The Colorado Supreme Court acknowledged an argument that using mere words to trigger a provocation instruction could create vagueness and overbreadth concerns and trespass the First Amendment, although it

declined to decide the issue because the provocation at issue included physical conduct. *Galvan v. People*, 476 P.3d 746, 750-51 (Colo. 2020).

The State’s proposal to reduce “provoked” to its common meaning removes the necessary intent that would distinguish between a defendant’s expression that shows motive or intent to cause violence and protected expression intended to “stir up,” offend, or challenge an audience. A defendant’s right to express unpopular or offensive ideas cannot be made contingent on how his audience reacts, especially not when it is the audience that first initiates violence to shut down his ability to express them.

D. Other jurisdictions confirm that *Smith* is a recognized model, not a Texas anomaly.

The State portrays *Smith* as an eccentric judicial overreach, but *Smith*’s interpretation of Section 9.31(b)(4) is in accord with other states. Several jurisdictions expressly define their statutes establishing the provocation exclusion for self-defense based on the defendant’s intent to manufacture an excuse for violence. Utah denies justification when the actor initially provokes force “with the intent to use force as an excuse to inflict bodily harm.” Utah Code Ann. § 76-2-402(3)(a)(i) (“An individual is not justified in using force ... if the individual ... initially provokes the use of force against another individual with the intent to use force as an excuse to inflict bodily harm upon the other individual”). Illinois and Kansas separately distinguish pretextual provocation from a person who

“otherwise” provokes force. 720 Ill. Comp. Stat. 5/7-4(b)-(c); Kan. Stat. Ann. § 21-5226(b)-(c). Wisconsin likewise distinguishes provocation intended as an excuse to cause death or great bodily harm from other provocation. Wis. Stat. § 939.48(2).

These statutes, like the Court’s interpretation of Section 9.31(b)(4) under *Smith*, thus recognize that deliberately starting a disagreement or a low-level scuffle is not morally or legally identical to manufacturing a pretext to use grievous or lethal force. Other states use different lines, including intent to injure, intent to cause serious injury, initial aggression, or withdrawal. The national landscape contains no single ordinary meaning that compels the State’s construction or marks it out as especially reasonable or inherent.

III. *Smith*’s elements defining “provoked” do not conflict with *Giesberg* and *Walters*.

A. This Court has consistently held that definitions of technical terms are necessary and appropriate to instruct the jury properly.

The State argues that the *Smith* elements are impermissible under this Court’s holdings in *Giesberg v. State* and *Walters v. State*. The charge to the jury must set forth the law applicable to the case in terms the jury can understand and apply. While statutory words ordinarily receive their common meaning, special instructions may be given for terms that have an established technical, legal, or common-law meaning. *Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000). Providing an express definition to the jury is particularly appropriate when

jurors are otherwise at risk of arbitrarily applying an inaccurate meaning or when a definition is necessary for a fair understanding of the evidence. *Grotti v. State*, 273 S.W.3d 273, 281 (Tex. Crim. App. 2008); *De La Torre*, 583 S.W.3d at 618-19.

Such a technical definition is appropriate here because, as the State admits, a jury would be at risk of reaching an absurd result if it were able to apply a common meaning for “provoked” without limitation. State Reply Br. at 10. “Provoked” in ordinary conversation can mean “annoyed,” “stirred,” “challenged,” “angered,” “incited,” or even simply “caused.” In Section 9.31(b)(4), for a defendant to have “provoked” his victim’s unlawful use of force carries the consequences of a complete legal forfeiture of his self-defense rights based on a doctrine that Texas courts have developed in common law for generations—a doctrine that the Practice Commentary for the Proposed Code explicitly states was codified in the modern provision. A trial judge therefore should not be free to simply provide jurors the statutory shorthand for Section 9.31(b)(4) shorn of its decades of technical meaning.

The State argues that some judicial definitions that are used when reviewing sufficiency of evidence are not placed in a charge to the jury. State Br. at 46–48. While that is true as a general matter, it is also beside the issue. Definitions such as anatomical explanations or operational glosses may be evidentiary aids rather than elements the jury must separately find. *See Green v. State*, 476 S.W.3d 440, 447

(Tex. Crim. App. 2015); *De La Torre*, 583 S.W.3d at 618. *Smith*, by contrast, frames its three requirements as necessary factual elements, and it conditions their submission to the jury on their being sufficient evidence to permit a rational jury to find each element beyond a reasonable doubt. 965 S.W.2d at 513-14. The *Smith* elements do not provide simple evidentiary guidance to the jury; they set a definition for a load-bearing technical term and require strict proof of three factual requirements that a jury could not arrive at on its own.

B. *Giesberg* and *Walters* do not prohibit the *Smith* definition.

Giesberg v. State rejected a special alibi instruction because alibi was not a separately codified defense and the presumption of innocence and burden of proof already allowed the jury to consider the evidence. 984 S.W.2d 245, 249-51 (Tex. Crim. App. 1998). *Walters v. State* rejected a requested instruction highlighting a victim's prior verbal threats because the general self-defense charge already encompassed apparent danger and the special instruction improperly directed attention to a single type of evidence. 247 S.W.3d 204, 212-14 (Tex. Crim. App. 2007). Neither case stands for the proposition that the *Smith* elements are impermissible.

The State argues that *Giesberg* and *Walters* silently overruled *Smith* because they prohibit non-statutory special jury instructions that are not grounded in the Penal Code, are already covered by the general jury charge, and focus the jury's

attention on a specific type of evidence that may support an offense or defense. State Br. at 44 (quoting *Walters*, 247 S.W.3d at 212). The *Smith* elements differ from this description in every material respect.

First, provocation is expressly codified in Section 9.31(b)(4)—it is not extra-textual like the alibi defense in *Giesberg* or the prior verbal threats instruction in *Walters*. Second, the bare charge for provocation under Section 9.31(b)(4) does not encompass the *Smith* elements and, as the State acknowledges, no jury would be reasonably expected to come up with them on its own. State Br. at 50. By contrast, the alibi defense of *Giesberg* was inherent “in a general charge to the jury that the defendant is presumed innocent until he or she is proven guilty beyond a reasonable doubt,” 984 S.W.2d at 250, and the prior verbal threats instruction in *Walters* was already encompassed within the instruction on apparent danger, 247 S.W.3d at 212–13. Third, the *Smith* elements do not tell jurors what particular evidence to credit, nor do they otherwise single out one particular type of evidence above all the others; they identify the facts the State *must* prove before the self-defense exclusion applies. Compare this to *Giesberg*, where the alibi instruction only served to “needlessly draw a jury’s attention to the evidence which raised alibi,” 984 S.W.2d at 250, and *Walters*, where the prior verbal threats instruction “improperly [told] the jury how to consider certain evidence before it” by “focus[ing] the jury’s attention on a specific type of evidence that” the defendant

claimed “made the victim’s actions appear dangerous to him,” 247 S.W.3d at 213–14.

Walters itself directly rebuts the State’s claim that it silently overruled *Smith*. In discussing when instructions derived from prior law remain appropriate under the Revised Penal Code, the *Walters* Court stated that “[j]ury instructions on various statutory presumptions, when raised by the evidence, are appropriate, even though they focus the jury’s attention on certain evidence” and that “[t]he same can be said for the instruction on the common-law doctrine of provocation which was codified in Section 9.31(b)(4) of the Penal Code.” 247 S.W.3d at 212 n.35. There is no reconciling the Court’s clear statement in *Walters* affirming jury instructions based on the common-law tradition that was codified in Section 9.31(b)(4) with the State’s claim that *Walters* overruled *Smith*. This is particularly true because the Court again affirmed *Smith* in *Elizondo*, years after both *Giesberg* and *Walters*, without a single mention of either case.

CONCLUSION AND PRAYER

In the 1974 Revised Penal Code, the Legislature adopted Section 9.31(b)(4), a provision expressly intended by its framers to codify the common-law tradition that “provoking the difficulty” requires that the defendant act with pretextual intent. For just shy of fifty years, this Court has interpreted Section 9.31(b)(4) in line with its framers’ intention, defining the provision as a strict rule against

manufactured self-defense, not a standardless doctrine that strips defendants of their right to self-defense based on comparative fault.

In *Smith*, this Court developed its interpretation of Section 9.31(b)(4) further, giving its use of “provoked” a precise legal meaning rooted in the Texas common law, the Penal Code’s drafting history, and decades of precedent. *Smith*’s elements provide clarity and constitutional safeguards, distinguishing a defendant’s calculated plan to create a cover for causing harm from the unintended consequences of his ordinary expressive conduct that offends, upsets, annoys, or challenges his audience and leads to an unforeseen escalation.

The State’s proposal to strip Section 9.31(b)(4) of its technical definition and leave “provoked” undefined presents myriad practical and constitutional issues—issues that the State only partially acknowledges while failing to reckon with the rest. The State’s proposed common meanings for “provoked” carry within them the same issues of vagueness and harm to protected expression that this Court, the Fifth Circuit, and the Supreme Court have consistently rejected time and again. The State’s proposal for Section 9.31(b)(4) would, like the statutes in those cases, penalize defendants simply for expression that others find offensive.

The Court should affirm the judgment of the Third Court of Appeals and hold that, when Section 9.31(b)(4) is submitted to a jury, the jury must be

instructed on the legal elements of provocation—including pretextual intent—
required by *Smith* and *Elizondo*.

Respectfully submitted,

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