No._____

In the Supreme Court of the United States

AMY GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DAVID MATUSIEWICZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Sixth Amendment requires unanimity in jury verdicts. The question presented is: Whether juries must unanimously agree on the *actus reus* element of offenses as a step preliminary to determining if a defendant is guilty of a charged crime.

2. Whether 18 U.S.C. § 2261A is unconstitutionally overbroad, and as applied, so that its application violates the standards announced in *Elonis v. United States*, 135 S.Ct. 2001 (2015), *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), *Reno v. ACLU*, 521 U.S. 844, 870 (1997), *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, (1988), *Watts v. United States*, 394 U.S. 705, 708(1969), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)?

3. Whether a person can be convicted for stalking resulting in death based on jury instructions that blended two causation theories, and did not require the jury to find or agree on the scope of the person's actions or predicate conduct.

4. Whether the admissibility of a civil judicial opinion containing derogatory findings and assessments of the defendant's character, mental state, and motivations unfairly prejudices a defendant in a criminal prosecution involving jury findings on the same issues.

5. Whether sentencing courts may continue to violate the Sixth Amendment's jury-trial guarantee, and the Fifth Amendment's Due Process Clause, by imposing sentences that, but for judge-found facts, would be substantively unreasonable.

6. Whether *Crane v. Kentucky*, 476 U. S. 683, 690 (1986) and *Rock v. Arkansas,* 483 U.S. 44, 61, (1987) require admission of polygraph results in the defense case-in-chief to rebut admission of polygraph evidence in the government's case-in-chief.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Amy Gonzalez and David Matusiewicz, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in Case Nos. 16-1559 and 16-1540 on September 7, 2018.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 905 F.3d 165 (2018) and contained in Appendix A. A copy of the Third Circuit's orders denying rehearing are contained in Appendix B.

The district court's opinion denying petitioners' motion to dismiss the indictment on First Amendment and Fifth Amendment grounds is reported at 84 F.Supp.3d 363 (D. Del. 2015) and contained in Appendix C. The district court's opinion on the proof required to establish petitioners' conduct caused the victim's death is reported at 165 F. Supp. 3d 166 (D. Del. 2015) and contained in Appendix D.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides, in part: "No person shall be … deprived of life, liberty, or property, without due process of law …."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …."

18 U.S.C. §2261A states:

Whoever--

> (1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--
>
> (A) places that person in reasonable fear of the death of, or serious bodily injury to--
>
> (i) that person;
>
> (ii) an immediate family member (as defined in section 115) of that person;
>
> (iii) a spouse or intimate partner of that person; or
> (iv) the pet, service animal, emotional support animal, or horse of that person; or
>
> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or
>
> (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic

communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

18 U.S.C. § 2261(b)(2):

(b) Penalties.--A person who violates this section or section 2261A shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the victim results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the victim results;

(3) for not more than 10 years, if serious bodily injury to the victim results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case,

or both fined and imprisoned.

(6) Whoever commits the crime of stalking in violation of a temporary or permanent civil or criminal injunction, restraining order, no-contact order, or other order described in section 2266 of title 18, United States Code, shall be punished by imprisonment for not less than 1 year.

STATEMENT OF THE CASE

On February 11, 2013, David Matusiewicz arrived at the New Castle County Courthouse for a scheduled family court hearing to address his child support arrearages. Thomas, his father, accompanied him.

As David waited in the security line, Thomas walked up to the line and signaled for the car keys so he could leave. David gave the keys to Thomas, cleared security, and went to his hearing.

Minutes later, chaos erupted in the courthouse lobby. Thomas shot Christine Belford, David's ex-wife, and her friend, as they arrived for the hearing. During the subsequent shootout, Thomas shot and wounded two police officers before committing suicide. Ms. Belford and her friend died from their injuries.

The courthouse was evacuated in the ensuing chaos. A responding officer wondered, upon learning Ms. Belford was the victim, "where's David?"

A bitter history

The investigation immediately focused on petitioners because of the history between David and his ex-wife. The former couple engaged in a custody dispute over their three children after their 2006 divorce.

During the dispute, David alleged Ms. Belford was unfit and suffered from mental health disorders. On February 13, 2007, following a psychological evaluation, Delaware's family court awarded joint custody of the children

In 2007, David and his mother Lenore kidnapped the children and fled the country. After the kidnapping, the family court awarded Ms. Belford sole custody of the children.

In March 2009, federal agents located David, Lenore, and the children in Nicaragua. Agents arrested David and Lenore, and returned the children to Christine. During David's federal prosecution for kidnapping and bank fraud charges, he accused Ms. Belford of neglect and sexually or physically abusing the children. On December 10, 2009, the district court sentenced David to 48 months of imprisonment.

The "No Mr. Nice Guy" letter

On December 22, 2009, David wrote his sister, Amy Gonzalez, what became known as the "No More Mr. Nice Guy" letter. The letter stated, in part:

> Please send whatever contacts you make my way. I can definitely see the DE Courts and DYFS sweeping my case (and [the children's] as well) under the carpet and patting themselves on the back for a job well done in teaching people not to take the law into their own hands. Feel free to distribute copies of the enclosed letters to anyone who will listen (except that slimeball Cris Barrish @ the News Journal). Ask Ed next time you talk with him if it would be appropriate (or advisable) to sue DYFS &/or the State of DE to require them to evaluate the girls for sexual abuse. I'm done playing Mr Nice Guy.
>
> Lastly, if nothing changes during January (a typical 'low' month for Chris) please begin making complaints anonymously and repeatedly to DYFS. Ask Linda Morris, Courtney, Christine (the good Christine!) and anyone you trust to help. Also make sure M'Linda's website is up, and has the true story on it and is well publicized. Sorry I can't help much from in here. At the very least, if Chris's attorney sues us for slander we can use that as a springboard to push forward Laura's eval. As it will not be deemed slander once it's found that our story is true.

David also wrote: "The State of DE DYFS has now been told of [the] abuse by at least 3 people. Why aren't they acting? A suit is likely to get action ...."

The Matusiewicz family contacts state authorities and publicizes the abuse allegations

Beginning in December 2009, Amy, Thomas, and Lenore made a series of complaints to Delaware's Division of Youth and Family Services, and enlisted others to make anonymous complaints. The family also made direct complaints to the agency, which did not investigate the claims.

The Matusiewicz family published a website, "A Grandmother's Impossible Choice," that identified Ms. Belford and the children, alleged sexual and physical abuse claims, and requested pro bono legal representation. The website was registered to a Matusiewicz relative.

In March and April 2011, Amy uploaded YouTube videos about the allegations. The videos included secret recordings taken by a private investigator during the 2006 custody proceedings, and images of polygraph test results supporting the family's claims. Ms. Belford, and her daughter from a prior relationship, exchanged comments in the YouTube comment section. Amy requested help and linked to the family's website.

The Matusiewiczs mailed letters about the allegations to prominent state officials and media outlets, and to Ms. Belford's family, neighbors, employer, church, community members, and the children's school. These letters requested assistance in proving the abuse allegations.

David Matusiewicz's parental rights are terminated

During David's incarceration, Ms. Belford filed a Petition for Termination of Parental Rights. The family court held hearings and issued a 42-page opinion terminating David's parental rights.

The court rejected David's abuse claims, finding they were not credible and made up to provide a defense to his criminal proceedings. The court detailed its findings through the use of the following captions: "Father's Limited Remorse;" "Father's Deceit and Manipulation;" "Distrust of authority;" "Father's stubborn insistence on his view, notwithstanding evidence to the contrary;" "Father's Disregard for the Rights of Others;" and "Father's Willingness to Take Risk."

The opinion repeatedly called David a "liar," "deceitful," and "manipulative;" discussed his psychological makeup and "personality traits;" and expressed concern about the children's development and vulnerability 'to be manipulated by someone with [Mr. Matusiewicz's] disconcerning personality traits." For example, the court stated: "Father has demonstrated that he does not follow court orders, distrusts authority generally, can be deceitful and manipulative, listens to the negative influence of his mother, disrespects Mother's rights, and is willing to take gigantic risks." The Delaware Supreme Court affirmed the court's decision.

Private communications about Ms. Belford

The Matusiewiczs wrote numerous private letters and emails to each other about the abuse allegations, their outreach efforts, and their negative feelings about, and views of, Ms. Belford. The family also communicated with relatives and friends about their outreach and feelings about Ms. Belford.

One individual was Cindy Bender, David's former girlfriend. Ms. Bender regularly communicated with Amy and David during and after David's incarceration.

In her emails and texts, Ms. Bender expressed her deep feelings for David, and strong dislike for Ms. Belford. Ms. Bender engaged in a sexting relationship with David, and sometimes volunteered information about Ms. Belford or the children. On one occasion, Ms. Bender suggested, without prompting, that David use her Facebook login and password to see pictures of his children, but she later changed her mind.

Despite these proclamations of love and friendship, Ms. Bender friended Ms. Belford on Facebook, shared her negative views of the Matusiewiczs, and incited Ms. Belford's fears about the Matusiewicz family.

David also engaged in private communications with Amy and other individuals about his legal efforts to restore parental rights. One of these individuals advised David about his case and shared his deep religious convictions. They discussed Bible verses over email, and related the Bible to David's situation. These biblical discussions, among other private communications, would later be used against petitioners at trial, and to establish a murderous intent at sentencing.

Direct communications and alleged surveillance

The family also acted independently, and without advance notice to each other. Sometimes, Amy sent greeting and birthday cards or gifts to the Matusiewicz children, expressing her hope to maintain a connection with the children. Ms. Belford returned the cards to Ms. Gonzalez.

On November 15, 2011, David sent a card to Ms. Belford requesting an update about the children. On November 20, 2011, Ms. Belford responded with a letter, pictures, and updates. She discussed letters she received from his mother, and stated she would only speak to David and Amy. Ms. Belford called David, a former optometrist, an excellent doctor and concluded:

> When our daughters speak of you, know that they do express love for you. Although they don't know it all, they know some things and have many questions. Perhaps one day, you will be able to address those questions.
>
> I am sure this 'update' you requested is probably much longer than you expected or ever wanted. I am also sure you do not particularly wish to hear from me. No offense taken. However, until time passes and legal processes complete themselves, you will be stuck with me as your information source.
>
> I do wish you peace and safety as you approach the end of your sentence.

In November 2011, Lenore wrote Ms. Belford about "irreplaceable" items belonging to Ms. Belford. Lenore suggested a meeting in the presence of a police officer so she could return the items.

Thomas and Lenore traveled to Ms. Belford's Delaware home with a private investigator, who accompanied Thomas to the door to trade or return the items while Lenore stayed in the car. This incident was captured by Ms. Belford's surveillance cameras. During the visit, Thomas told the investigator he was trying to gather information for grandparent or custody rights, and took photographs of the residence during the visit. He also asked the investigator to run a car tag, but the investigator refused. Thomas told David about the visit on December 11, 2011, after it occurred.

In June 2012, Ms. Belford requested no further contact with the family.

Thomas and Lenore enlisted several friends to look up real estate information for Ms. Belford, her boyfriends, and attorney, and to take pictures of Ms. Belford's home and vehicles. One friend stated Thomas requested this information because he "wanted to keep track of it." Two friends stated Thomas was "very worried," "very distraught and concerned about who his grandchildren were being exposed to," and very upset with Ms. Belford. One friend drove by Ms. Belford's home on one occasion at Amy's request.

Mr. Matusiewicz's post-release activities and the trip to Delaware

On September 5, 2012, David was released from a halfway house in Texas, where his family lived, and began his supervised release term. He owed child support to Ms. Belford, and payments were a condition of release.

In September 2012, the probation office denied David's request to travel to New Jersey because he was newly released. On October 29, 2012, the probation office denied David's request to travel to New Jersey to assist his grandmother because of Hurricane Sandy.

On November 5, 2012, David filed a petition to reduce the child support. Delaware's family court ordered mediation. On December 2, 2012, David asked to participate by telephone because he was on federal probation and could not afford to travel to Delaware. Ms. Belford also appeared by phone because of her comfort level.

The mediation was civil, but the parties could not agree on David's income and payments. The court scheduled a hearing for February 11, 2013. The mediator

advised Mr. Matusiewicz he could file a financial hardship motion to participate by telephone.

In January 2013, the probation office approved David's request to travel to Delaware for the hearing. The request stated he would travel alone in his parents' 2005 white Honda CRV, and stay with relatives in New Jersey. The probation officer required David to report within 24 hours of his return. He did not tell the officer he could participate by phone, or that his parents were joining him.

The 2013 Delaware trip

On February 4, 2013, David and his parents drove to Delaware in two cars. Thomas drove separately, but had to leave his car with family friends in Maryland because it had broken down. Ms. Gonzalez remained in Texas.

The Matusiewiczs arrived in New Jersey on February 7, 2013, and stayed with relatives until February 10, 2013. During the trip, Thomas emailed Amy about the family's plans, and that they would be leaving "right after Dave[']s court session as he needs to be back by the 15th." Thomas also discussed summer travel plans with a relative.

The family left New Jersey earlier than expected because of a coming winter storm, and stayed with their Maryland friends the night before the hearing. The next day, Thomas and David drove to the courthouse for the hearing.

The courthouse shooting investigation

David was immediately arrested after the shooting. He had a folder containing: paystubs; court paperwork; a mediation guide; information about his social security

benefits application; articles about parental rights; a May 2011 board examiner's opinion revoking his optometry license; a letter from Ms. Gonzalez, the polygraph results; and his father's Honorable Discharge and DD214 form. Mr. Matusiewicz's wallet contained $520 and a key, and he also had an envelope containing $1,011.

Officers found death certificates for Ms. Belford and her attorney, a gun, and a derogatory poem about Ms. Belford on Thomas's body. They also searched the car father and son drove to the hearing, and found, *inter alia*, Thomas's personal travel bag, which contained clothing, a ballistic investigator, handcuffs, ammunition, a knife, bulletproof vest, a cattle prod, and binoculars.

A red notebook fell from Thomas's bag during the search. The front cover was marked "Important Info for David Matusiwicz." The notebook contained pages of handwritten notes about Mr. Matusiewiz's case, Ms. Belford, and real estate listings for her home with handwriting marking the children's bedrooms.

Officers searched Thomas's car in Maryland. It contained gas cans and shovels in the interior, and firearms and ammunition in the trunk.

The day after the shooting, officers searched the family's Texas home. They seized firearms and ammunition from the home and storage sheds, and numerous documents. They also found a veterans benefits book on top of a cabinet marked "Tom Matusiewicz, REC'D 1/16/2013," and Thomas's handwritten suicide note, which was contained in an envelope marked "Amy," and "Key." The note stated:

> Amy: ... 956-464-1029 ... Owner ... Knows me as Tom Matusiewicz. You came with me to this one, near Valverde & Hwy 83 ... Storage key to locker 406 under Jesse Bowman (my 'brother-in-law) Paid to Mar 1st ... All my guns, take them/protect them. They will be your only freedom in

> the coming years under what was once my gov't. When gov't takes your grandchildren away it ceases then being your gov't. Do not sell/get rid of guns ... Get rid of Juanito ...

The letter provided combinations to a safe, the location of a key for a truck, and instructions for feeding horses. The letter concluded, "Hopefully we can end this BS now—up to Dave ... Dad ... Pop-pop ... TOM ... VA Book ... Important 4 You."

Investigators searched Ms. Belford's home and found a security system. They seized surveillance video, the letters and cards exchanged between Ms. Belford and the Matusiewicz family, and Ms. Belford's personal diary.

The federal prosecution

The government prosecuted petitioners on the theory that David, Amy, and their family repeatedly tried to obtain sole custody of the Matusiewicz children and engaged in a stalking campaign as these attempts failed, leading to Ms. Belford's death. Most of the trial evidence centered on: the abuse allegations, with the government seeking to prove the falsity of the accusations; public and private communications; Thomas' and Lenore's surveillance activities; and evidence of Ms. Belford's fears based on her statements to third parties such as her therapist and lawyer. The government did not provide evidence of an intent under the stalking statutes, arguing in closing that the jury only had to reach intent to harass because "that's the easiest."

After a five-week trial, a jury convicted petitioners of conspiracy and stalking charges, and found the stalking offenses resulted in death. The district court sentenced petitioners to life in prison after finding they committed the stalking

offenses with the intent to kill. In making this finding, the district court noted it did not fault the government for the absence of an intent to kill in the jury's verdict.

REASONS FOR GRANTING THE PETITION

This petition concerns the first federal prosecution for stalking resulting in death. It occurred in the absence of any direct threats to the victim, who was killed by petitioners' father, or evidence petitioners agreed to, or intended to kill the victim. It occurred because of a bitter family history, which fueled some of the victim's present-day feelings, and because of petitioners' private and public statements expressing their beliefs and views about the victim.

This petition presents important constitutional issues, and issues the Court must resolve because of circuit splits or because they involve important federal questions. Petitioners respectfully request the Court's review.

I. The Court should resolve the circuit split on whether juries must unanimously agree on the *actus reus* element of offenses.

The Sixth Amendment requires unanimity in jury verdicts. *Andres v. United States*, 333 U.S. 740, 748 (1948). This unanimity requirement "extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Id.* The Court, however, also stated that juries need not always be unanimous on which of several possible sets of facts make up a particular element—the possible means a defendant uses to commit the element. *Richardson v. United States*, 526 U.S. 813 (1999). *See also*, *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016); *Schad v. Arizona*, 501 U.S. 624 (1991) (plurality opinion).

Under the cyberstalking statute, the government must, *inter alia*, establish that a defendant engaged in a course of conduct that placed a person in reasonable fear of death or serious bodily injury, or caused substantial emotional distress, either to the person or to a partner or immediate family member, "with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate" that person. 18 U.S.C. § 2261A(2). The interstate stalking statute contains similar provisions.

On appeal, petitioners argued the district court's failure to provide a specific unanimity instruction violated the Sixth Amendment right to a unanimous jury verdict because the jury was not required to be unanimous on the *actus reus* element of the stalking offenses. The Third Circuit held that the district court was not required to issue a specific unanimity instruction because "[n]either the mens rea requirements of § 2261A(2) nor the individual acts which constituted the statute's 'course of conduct' requirement constitute distinct elements of the offense." (App. 27a).

Although this Court recognized there is no general requirement that juries reach agreement on the preliminary factual issues underlying verdicts, it similarly recognized an exception. *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990). Citing opinions from several courts of appeal, including the Third Circuit, the Court stated there is general agreement "that '[u]nanimity ... means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying

a specified offense.'" *Id.* at n. 5 (citing *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), *United States v. Ferris*, 719 F.2d 1405 (9th Cir. 1983); *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988); *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987); and *United States v. Schiff*, 801 F.2d 108 (2d Cir. 1986)).

In *Schad*, the Court stated it saw no reason why the rule that juries need not agree on the *actus reus* element of an offense should not apply to alternative means of satisfying the *mens rea* element of an offense. The Court, however, stated, that this is not to say "that the Due Process Clause places no limits on a State's capacity to define different courses of conduct, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course or state actually occurred." *Id.* at 633.

The Court identified the "problem of describing the point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *Id.* Because the Court had never attempted to define "what constitutes an immaterial difference as to mere means and what constitutes a material difference requiring separate theories of crime to be treated as separate offenses subject to separate jury findings," it reviewed the Fifth Circuit's *Gipson* decision. *Id.* at 633-34.

In *Gipson*, 553 F.2d at 453, the Fifth Circuit reversed a conviction under 18 U.S.C. § 2313, which prohibited knowingly receiving, concealing, storing, bartering, selling, or disposing of a stolen vehicle or aircraft moving in interstate commerce. The

Fifth Circuit noted the government presented evidence that the defendant performed each of the six acts, but the "district court's challenged instruction authorized the jury to return a guilty verdict ... even though there may have been significant disagreement amount the jurors as to what he did." *Id.* at 458-59. The circuit explained:

> Like the "reasonable doubt" standard, which was found to be an indispensable element in all criminal trials in [*In re Winship*, 397 U.S. 358 (1970)] the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue". [Id. at 397.] The unanimity rule thus requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged. Requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required.

Id.

Though tempted, this Court did not follow *Gipson—or* reject it.

As noted in *McKoy*, some circuits follow the *Gipson* rule. The Third Circuit previously adopted the *Gipson* rule in *United States v. Beros*, 833 F.2d at 455, expressing concerns about case complexity or the genuine possibility of jury confusion or convictions that occur when different jurors conclude a defendant committed different acts—while dismissing its application to this case.

The Tenth Circuit assumes that juries unanimously reached a decision as to all factual predicates because a general instruction on unanimity "suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States v. Phillips*, 869 F.2d 1361, 1366-67 (10th

Cir. 1988). The Eleventh Circuit dismissed *Gipson* because it was "discredited" by *Schad*. *United States v. Verbitskaya*, 406 F.3d 1324 (11th Cir. 2005).

The Third Circuit's decision splits with the Fifth Circuit, and others, on whether juries must be unanimous on the *actus reus* element of an offense. This case presents the problem identified in *Schad*: the point where the difference between means becomes so important that they cannot be viewed as alternatives to a common end. The Court should grant review to resolve this issue.

II. The Court should review whether the federal cyberstalking statute is unconstitutional as applied to speech that: (a) publicly or privately expresses personal opinions, views, or beliefs about an individual; or (b) does not contain "true threats" outside the scope of the First Amendment.

Petitioners raised a First Amendment challenge to the cyberstalking statute on overbreadth and as applied grounds, arguing the government criminalized speech expressing sincerely held beliefs and opinions about Ms. Belford's parental suitability and custody of the children, and that these communications were not "true threats." *See e.g.*, *Watts v. United States*, 394 U.S. 705 (1969).

The Third Circuit rejected petitioners' arguments because it concluded the speech was not protected. (App. 43a). The circuit stated:

> Here, what makes the defendants' conduct violative of § 2261A(2) is not that they simply made statements expressing their beliefs about Belford, but that these statements were sent to Belford, the children, and third parties as part of an extensive, and successful, campaign to threaten, intimidate, and harass Belford. As our sister Courts of Appeals have concluded, it is the intent with which the defendants' engaged in this conduct, and the effect this conduct had on the victims, that makes what the defendants did a criminal violation. *See* [*United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015); *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014); *United States v. Sayer*, 748 F.3d 425, 435

(1st Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012)].

(App. 47a). Thus, the circuit based its ruling on two First Amendment exceptions: false or defamatory statements, and speech integral to criminal conduct.

Petitioners recognized that not all speech is protected, and that some limitations may be placed on speech. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). But the panel's opinion is in error.

First, while the circuit categorized petitioners' conduct as false, the jury never found beyond a reasonable doubt that petitioners' conduct was false or defamatory. Additionally, the circuit premised its analysis on a finding that the statements were made as part of an extensive, and successful, campaign to threaten, intimidate, and harass Ms. Belford. The jury made no such findings of intent. Thus, while the circuit determined the allegations were false, it did so in the absence of intent and full consideration of the First Amendment's application when speech is said *about* a person expressing personal views to willing listeners, even if distasteful or insulting *See e.g.*, Eugene Volokh, "One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and 'Cyberstalking,'" 107 Nw. U.L. Rev. 731 (2013).

Second, the circuit cases involving the constitutionality of the cyberstalking statute on First Amendment grounds are distinguishable. In *Conlan*, 786 F.3d at 380, the defendant engaged in a "year-long campaign of escalating sexual innuendo, threats of physical violence, and unwanted contacts with [the victim's] family, friends, and colleagues, culminating in an interstate trip to his victims' house." *Id.* at 386.

In *Osinger*, 753 F.3d at 939, the defendant made threats, created a False Facebook page with sexually explicit photographs of the victim, and emailed those pictures to the victim's coworkers and friends. The Ninth Circuit found this evidence demonstrated an intent to harass, and that the defendant's unrelenting harassment and intimidation of the victim was not based on conduct that he could not have known was illegal. *Id.* at 945.

In *Sayer*, 748 F.3d at 425, the defendant created numerous false social media accounts, posted explicit pictures of the victim along with her contact information, and represented the victim in encouraging viewers to contact her for encounters. The defendant admitted to engaging in a four-year course of conduct where he deceptively enticed men to the victim's home and put her in danger and at risk of physical harm. *Id.* at 434.

Petrovic, 701 F.3d at 849, involved the defendant's attempts to blackmail the victim into resuming their relationship. When the victim declined, the defendant: carried out his threat of sending postcards with explicit sexual pictures of the victim to her friends, family, and workplace; created a pornographic website featuring explicit videos and pictures of the victim; placed the website on postcards portraying a photo of the victim; and attempted to extort the victim.

These cases, which did not involve co-conspirators, stand in stark contrast to the circumstances of this case. There were no threats or public conduct clearly intended to harass the victim. The evidence involved public outreach to a variety of professionals, politicians, mandatory abuse reporters, and media figures about the

family's beliefs that the children had been abused, and that the family sought legal help to address the claims. Indeed, nearly all of the negative statements about Ms. Belford were privately stated between petitioners, or privately stated to willing listeners.

This Court's review is warranted to address the First Amendment's application to the federal cyberstalking statute when it involves private and public speech about a person, rather than just to a person.

III. The Court should review the Third Circuit's decision on how to define for the jury the proof required to establish a defendant's conduct resulted in death under the federal stalking statutes.

The issue of how to define the proof required to prove resulting in death under the federal stalking statutes was one of first impression for a federal court. At trial, the district court provided a special interrogatory for the jury to determine whether the stalking offenses resulted in death:

> A person's death 'results' from an offense only if that offense caused, or brought about, that death. In determining whether the particular offenses charged in Counts 3 or 4 caused Christine Belford's death, you must affirmatively answer two questions. First, would Christine Belford's death have occurred as alleged in the Indictment in the absence of the particular offense? Stated differently, you should decide whether Ms. Belford would have died at the New Castle County Courthouse on February 11, 2013, but for the particular offense. Second, was Christine Belford's death the result of the particular offense in a real and meaningful way? This includes your consideration of whether her death was a reasonably foreseeable result of the particular offense and whether her death could be expected to follow as a natural consequence of the particular offense.

(App. 32a) The court further instructed that if the jury found petitioners guilty of the conspiracy count, it was not necessary to find that a particular defendant's personal

actions resulted in death because of the legal rule that one act of a co-conspirator may be treated as the act of all. (App. 32a-33a).

The instruction listed four requirements based on this rule, and further instructed the jury: "The Government does not have to prove that the defendant specifically agreed or knew that Ms. Belford's death would result. However, the Government must prove that Ms. Belford's death was reasonably foreseeable to the defendant, as a member of the conspiracy, and within the scope of the agreement as the defendant understood it." (App. 34a). Thus, the instruction set forth two ways petitioners' actions resulted in Ms. Belford's death: (1) death resulted from the petitioners' personal actions if those actions were the actual and proximate cause of death; *and* (2) petitioners were responsible for Ms. Belford's death under co-conspirator liability.

During deliberations, the jury asked the following question about the special interrogatory:

> On page 46 and 47 of the jury instructions there is confusion about the first and second question on page 46, second paragraph from the bottom. Page 47 has four requirements. First talks about members of, of the conspiracy [,] it seems confusing. The interrogatory refers to counts three and four. The page 47 talks about conspiracy, page 46, first refers to the 'particular offense.' To which offense is it referring? Which is the 'but for'?

The parties disagreed over the meaning of the question. The court modified the instruction over the defense's objection.

On appeal, petitioners argued, citing *Burrage v. United States*, 134 S. Ct. 881 (2014) and *Paroline v. United States*, 134 S. Ct. 1710 (2014), that the interrogatory

confused the jury, causation could not be determined if the scope of the agreement or predicate conduct is unknown, and it was impossible to find causation if the jury was instructed it did not have to find an agreement to cause death. The Third Circuit held that the instruction was not error, and that the district court properly followed *Burrage* and *Paroline*.

In *Burrage*, 134 S. Ct. at 881, the Court examined the concept of causation and the definition of "results from," stating that a "thing results' when it '[a]rise[s] as an effect, or outcome *from* some action. . . 'Results from' imposes, in other words, a requirement of actual causality. 'In the usual course,' this requires proof 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *Id.* at 887-88 (quoting *University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013)).

In *Paroline*, 134 S. Ct. at 1710, the Court examined the concept of proximate causation. The Court explained:

> Every event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result. The idea of proximate cause, as distinct from actual cause or cause in fact, defies easy summary. It is 'a flexible concept,' ... that generally 'refers to the basic requirement that ... there must be 'some direct relation between the injury asserted and the injurious conduct alleged ... The concept of proximate causation is applicable in both criminal and tort law, and the analysis is parallel in many instances ... Proximate cause is often explicated in terms of foreseeability or the scope of risk created by the predicate conduct ... A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.

Id. at 1719 (internal citations omitted).

The Third Circuit affirmed the use of a resulting-in-death instruction that confusingly joined two alternative theories without requiring the jury to find or agree on the cause or scope of petitioners' actions or predicate conduct. The jury either found Ms. Belford's death was the but-for cause of some unknown action, or that her death was reasonably foreseeable to petitioners based on their undetermined predicate conduct. The court's review is necessary to resolve this matter.

IV. The Court should resolve the circuit split on whether the use of facts found in a judicial opinion unfairly prejudices a defendant within the meaning of the Federal Rules of Evidence.

At trial, the district court admitted the highly prejudicial family court opinion that included derogatory assessments of Mr. Matusiewicz's character and mental health. Citing *United States v. Sine,* 493 F.3d 1021 (9th Cir. 2007), Mr. Matusiewicz argued, on Rule 403 and Rule 404(b) grounds, that the danger of unfair prejudice substantially outweighed any arguable relevance because the family court opinion carried the "implicit stamp" of judicial approval, and allowed "a judicial thumb to be placed on the Government's side of the scale regarding intent," effectively relieving the government of its higher burden in a criminal case. He repeatedly, but unsuccessfully sought further redactions of the opinion to eliminate its highly prejudicial content before it was sent to the jury during deliberations.

The Third Circuit concluded the opinion was highly relevant and key evidence because the government argued the opinion terminating Mr. Matusiewicz's parental rights was one of the motivating factors that spurred Ms. Belford's killing. It also

concluded the district's court's cautionary instruction mitigated the opinion's prejudicial effects, with little analysis of the Rule 404(b) concerns.

In *Sine*, 493 F.3d at 1021, the defendant was prosecuted for mail fraud. At trial, the Government's cross-examination of witnesses revealed that the defendant had been the subject of state court civil proceedings, and that the state judge found: (1) the defendant had "aided and abetted a series of fraudulent schemes;" (2) the defendant's "claims of ignorance and confusion are not plausible;" and (3) the record of the defendants' conduct was "rife with chicanery, mendacity, deceit and pretense." *Id.* at 1028-29. On appeal, the defendant argued that the "adverse, derogatory factual findings and comments in the [state court] opinion before the jury created too great a danger of unfair prejudice" and violated Rule 403.

The Ninth Circuit agreed, stating: "We have previously observed that factual testimony from a judge unduly can affect a jury... Similarly, jurors are likely to defer to findings and determinations relevant to credibility made by an authoritative, professional factfinder rather than determine those issues for themselves." *Id.* at 1033-34. Citing other circuits, the Ninth Circuit explained, "This is because judicial findings of fact 'present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice." *Id.* (internal citations omitted). *See also*, *U.S. Steel LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287-88 (11th Cir. 2001) ("The district court abused its discretion[under Rule 403] in admitting [the] opinion. The jury, not [the judge], was charged with making factual findings . . . .").

Here, the family court opinion about Mr. Matusiewicz was highly adverse and derogatory. The government used these findings to argue in closing that "[t]he judge ... found that the father's accusations weren't credible and were made up," and the judge expressed concern about David's "pattern of deceit and manipulation." Cautionary instructions could not mitigate this damaging judicial opinion.

The Circuit's decision stands in direct conflict with the Ninth Circuit. The Court's review is warranted.

V. The Court should resolve whether the Sixth Amendment is violated when courts impose sentences that, but for judge-found facts, would be reversed for substantive unreasonableness.

Petitioners received life sentences because the district court determined, by a preponderance of the evidence, that they committed the stalking offenses with intent to kill. The government, however, neither advanced that theory at trial nor proved it to the jury beyond a reasonable doubt. This sentencing scheme violates the Sixth Amendment.

A court's "authority to sentence derives wholly from the jury's verdict." *Blakely v. Washington*, 542 U.S. 296, 304 (2004). This Court has repeatedly stated that any fact increasing the statutory maximum penalty or exposing defendants to a greater potential sentence must be submitted to a jury and proven beyond a reasonable doubt. *See Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013) ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."); *Cunningham v. California*, 549 U.S. 270, 280 (2007) ("This Court has repeatedly held

that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (concluding that any "fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable a reasonable doubt.")). The Court, however, has never determined whether the Sixth Amendment is violated if a sentence driven by judicial factfinding is within the statutory range.

In *Jones v. United States*, 135 S. Ct. 8, 9 (2014), the late Justice Antonin Scalia, joined by Justices Thomas & Ginsburg, wrote in the dissent from the denial of a petition for certiorari:

> It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.
> . . .
>
> For years, however, we have refrained from saying so. In *Rita v. United States,* we dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness… Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range.

Id. at 8-9. *See also*, *Gall v. United States*, 552 U.S. 38, 60 (2007) (Scalia, J., concurring) ("The door remains open for a defendant to demonstrate that his sentence, whether

inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury."). Defendants continue to knock on this door, seeking review of sentences that, while based on advisory Sentencing Guidelines, are often driven by penalty-enhancing facts that were never found by a jury.

Petitioners were sentenced to life in prison because one judge determined they intended to kill the victim. The jury's verdict alone did not authorize this sentence, as the court recognize, and the factfinding imposing the longer term violated the Sixth Amendment. *See Cunningham*, 549 U.S. at 290.

The Third Circuit, as circuit courts continue to do, affirmed the sentence because it believes it is bound by non-existent precedent. It is time, as the dissenting justices stated in *Jones*, for this Court "to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively unreasonable." *Id.*

VI. The Court should review whether the denial of the admission of polygraph results violated the Sixth Amendment and this Court's rulings in *Crane v. Kentucky*, 467 U.S. 683 (1986) and *Rock v. Arkansas*, 483 U.S. 44 (1987).

The exclusion of testimony about Petitioner Gonzalez's polygraph and polygraph results deprived her of her fundamental constitutional right under the Due Process Clause of the Fourteenth Amendment and the Compulsory Process or Confrontation Clauses of the Sixth Amendment to a fair opportunity to present a defense. "[T]he Constitution guarantees criminal defendants 'a meaningful

opportunity to present a complete defense,'" *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) *citing Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The issue in Ms. Gonzalez's case did not exclusively have to do with whether a polygraph itself is reliable or had an accepted scientific basis for the admission of the evidence, but rather her ability to rebut the challenges to her veracity in the polygraph raised by the prosecution throughout their case-in-chief.

The Third Circuit has held that a polygraph examination can be introduced on rebuttal: "Since case law shows that evidence concerning a polygraph examination may be introduced to rebut an assertion of coercion of a confession, [citations omitted] the district court correctly instructed appellant's counsel as to possible consequences of his actions and clearly could have admitted the polygraph evidence if appellant had "opened up" the issue of the circumstances of the examination." *United States v. Johnson*, 816 F.2d 918, 923 (3d Cir. 1987) citing *United States v. Kampiles*, 609 F.2d 1233, 1245 (7th Cir. 1979). There is no per se exclusion of polygraph evidence within the Third Circuit. *United States v. Lee*, 315 F.3d 206, 214 (3d Cir. 2003) (citing *United States v. Johnson*, 816 F.2d at 923)).

The right to present a defense "is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or

disproportionate only where it has infringed upon a weighty interest of the accused.")). Precluding admission of the the polygraph evidence, whilst having permitted the prosecution to attack the veracity of Ms. Gonzalez's polygraph on multiple fronts, infringed on a "weighty interest," to wit, the appellant's fundamental constitutional right under the Fifth Amendment and Sixth Amendment to a fair opportunity to present a defense. The Court should grant review on this issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 7, 2018.

Respectfully submitted,

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