No. 22-138

IN THE

Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Court of Appeals, Division II

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state may define speech to be a "true threat," unprotected by the First Amendment from content-based regulation, if it would be regarded by a reasonable person as a true threat, or whether the First Amendment requires a state to prove that the speaker subjectively intended it to be a threat.

2. Whether the above question applies to the statute at issue in this case at all, given that it expressly regulates manner and not content, and the jury was instructed consistently with the statute.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, a requirement that a stalker must be proved to have a subjective intent to threaten before his repetitive, intrusive, and intimidating speech can be restrained would severely limit the ability of the States

1. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to protect their people from such behavior. It is unnecessary to protect the freedom to express ideas. Such a severe and unnecessary limitation would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 2014, Petitioner, Billy Raymond Counterman, sent a Facebook friend request to a Colorado singer-songwriter named C.W. App. to Pet. for Cert. 3a. C.W. had two Facebook accounts—one private for her personal use and one public used for promoting her music. *Ibid.* Even though C.W. did not know Counterman, as an aspiring musician trying to grow her business, she accepted his friend request. *Id.*, at 17a. This was common practice for C.W. *Ibid.*

Over the next two years, Counterman sent numerous private messages to C.W.'s Facebook accounts. *Id.*, at 3a. C.W. felt that many of these messages were "weird" and "creepy" and did not respond to any of them. *Ibid.* During this period, C.W. attempted to block Counterman from her Facebook accounts several times to prevent him from sending her more messages, but Counterman would create new Facebook accounts and continued to message C.W. *Id.*, at 3a, 18a.

As time passed without a response from C.W., Counterman's private messages to C.W. became more angry and alarming. Counterman asked her, "How can I take your interest in me seriously if you keep going back to my rejected existence?" *Id.*, at 7a. He further told her, "Your arrogance offends anyone in my position," and "You're not being good for human relations. Die. Don't need you," and to "Fuck off permanently." *Ibid.* Counterman also told C.W., "Staying in cyber life is going to kill you." *Ibid.*

In 2016, C.W. talked to a family member about Counterman's messages, stating she was "fearful" and that his messages caused her "serious" concern. *Id.,* at 4a. She was "extremely scared" of being hurt or killed by Counterman after he sent her a message stating that he wanted her to die. *Ibid*. Counterman's messages also alluded to making physical sightings of C.W. in public. *Ibid*. In April 2016, C.W. contacted an attorney to discuss what actions she could take to protect herself from Counterman. *Ibid*. During this time, C.W. discovered that Counterman was on probation for a federal offense.[2] *Ibid*. C.W. subsequently reported Counterman to law enforcement and obtained a protective order against him. *Ibid*. Because C.W. was worried Counterman would show up at her scheduled concerts, she cancelled several of them. *Ibid*. Counterman was arrested on May 12, 2016. *Ibid*.

Counterman was charged with one count of stalking (credible threat), Colo. Rev. Stat. § 18-3-602(1)(b), one count of stalking (serious emotional distress), Colo. Rev. Stat. § 18-3-602(1)(c); and one count of harassment, Colo. Rev. Stat. § 18-9-111(1)(e). App. to Pet. for Cert. 4a. Before trial, the People dismissed the stalking (credible threat) count. *Ibid*. Counterman filed a motion to dismiss the two remaining counts. *Ibid*. He argued that both statutory sections, if applied to his Facebook messages, would violate his right to free speech under the First Amendment to the United States Constitution and under Article II, section 10 of the Colorado Constitution. *Id*., at 5a. Counterman argued that his messages to C.W. were not "true threats" and therefore his speech was protected from criminal prosecution. *Ibid*.

2. Counterman had two prior threat convictions, in 2002 and 2011, and was sentenced to prison for those crimes. Brief for Petitioner 11; J. A. 439-440.

The trial court held that a jury could find them to be "true threats" and denied his motion. *Ibid*.

On the first day of trial, the People dismissed the harassment count, leaving only one count of stalking (serious emotional distress) under Colorado Revised Statute § 18-3-602(1)(c). App. to Pet. for Cert. 5a. To convict Counterman, the People were required to prove, beyond a reasonable doubt, that "directly or indirectly through another person" Counterman "knowingly . . . [r]epeatedly follow[ed], approache[d], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [C.W.], . . . in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [C.W.] to suffer severe emotional distress." *Ibid*. A jury found Counterman guilty, and he was sentenced to 4½ years in prison. *Ibid*.

On appeal, Counterman again argued that Colorado Revised Statute § 18-3-602(1)(c) was unconstitutional as applied to his Facebook messages because they were protected speech, not unprotected "true threats." *Id.*, at 6a. The Colorado Court of Appeals reviewed relevant federal and state law to determine whether Counterman had engaged in unprotected "true threats," and affirmed his conviction. *Id.*, at 39a. The Colorado Supreme Court denied Counterman's petition for review. *Id.*, at 40a. This Court granted certiorari on January 13, 2023.

SUMMARY OF ARGUMENT

Those who stalk cause significant harm to their victims regardless of whether they subjectively intend to induce fear. The "true threats" doctrine, like other historically unprotected categories of speech, does not depend on what the speaker's inner subjective purpose was in making the communication. Evaluating a speak-

er's mental state under an objective knowing standard is all that is constitutionally required.

Requiring proof of a stalker's subjective intent beyond a reasonable doubt would permit stalkers to escape criminal liability merely by claiming they were "just kidding" or "simply expressing feelings." A stalker's common detachment from reality is the prime reason why an objective standard is necessary to punish those who inflict harm on their victims.

The section of the Colorado statute of which Counterman was convicted did not include a "credible threat" element. Rather, Colorado Revised Statute 18-3-602(1)(c) says nothing about the content of the communication, and instead addresses several types of conduct conducted "in a manner that would cause a reasonable person to suffer severe emotional distress." Counterman's conviction therefore does not depend on his communication being a "true threat." Colorado's stalking law protects victims from a repetitive course of emotionally distressing conduct that significantly impacts quality of life, and if left unchecked, can quickly escalate into violence, injury, or even death. With the substantial interests of the state weighing heavily in the balance, there is no doubt that the Colorado law at issue is a valid content neutral, time, place, manner regulation, and is constitutional.

ARGUMENT

I. Proof of a speaker's subjective intent to threaten another is not required to exclude a "true threat" from the protection of the First Amendment.

The First Amendment, made applicable to the states by the Fourteenth Amendment, provides that "Con-

gress shall make no law . . . abridging the freedom of speech . . . .” U. S. Const., Amdt. 1; *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925). “From 1791 to the present, however, our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ ” *R.A.V.* v. *City of St. Paul*, 505 U. S. 377, 382-383 (1992) (quoting *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)). This Court has repeatedly recognized that threats are one such limited area that falls outside the protection of the First Amendment. *Id.*, at 388; *Watts* v. *United States*, 394 U. S. 705, 707-708 (1969).

In most free speech cases, the harm caused by the speech is a diffuse one, affecting society in general but not causing harm to a particular person. Threats, whether express or implied, that are directed to a specific person are quite different. Prohibiting “true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’ ” *Virginia* v. *Black*, 538 U. S. 343, 360 (2003) (quoting *R.A.V.*, 505 U. S., at 388).

Threats, regardless of form, inflict great harm, have little or no social value, contribute nothing to the marketplace of ideas, may lead to violence, and may cause serious emotional distress to the target of the threat. See *Elonis* v. *United States*, 575 U. S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part). Threats, especially when considered within the stalking context, cause a person to live in fear and can detrimentally impact a person’s quality of life. Victims of threats may avoid public appearances, move or quit

jobs, alter their daily routine, disguise their appearance, or withdraw from social activity. Few, if any, kinds of speech cause more acute harm merely by their utterance than do threats. See *ibid*.

Threats can be expressed or implied in many different ways. Regardless of how threats are conveyed or what the speaker was subjectively intending while making the threats, the harmful effect on the target of the threats is the same, and these threats are constitutionally proscribable.

A. An Objective Standard for Assessing Knowledge is Constitutionally Sufficient.

1. Watts, Black, and Elonis.

This Court established the "true threats" exception in *Watts*. 394 U. S., at 707-708. In that case, the 18-year-old defendant, who had recently been drafted to serve in the Vietnam War, was arrested at a public anti-war rally for stating, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id*., at 706. Both the defendant and the crowd laughed after he made the statement. *Id.,* at 707. The defendant was subsequently convicted of violating a federal statute that prohibited "any person from 'knowingly and willfully . . . [making] any threat to take the life of or to inflict harm on the President of the United States.' " *Id.*, at 705. On appeal, the defendant argued that his conviction violated the First Amendment.

This Court agreed with the Government's argument that it has a compelling interest in protecting the President, and the statute upon which the defendant was convicted was "constitutional on its face." *Id*., at 707. However, because the statute made "criminal a form of pure speech," this Court "interpreted [it] with the commands of the First Amendment clearly in mind." *Ibid*. In so doing, this Court did not examine the

defendant's statement in isolation, but rather within the context in which it was made based on the totality of the circumstances. *Id*., at 708.

Because the defendant was a recently drafted young man who was taking part in an anti-war rally on the grounds of the Washington Monument proclaiming his anger at being drafted, and declaring that he would not report for duty, this Court examined his statement " 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " *Ibid*. (quoting *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)). This Court then reversed the defendant's conviction, finding that his statement was not a "true threat" but rather mere "political hyperbole" considering its "expressly conditional nature" and the "reaction of the listeners" (laughing). *Ibid*. Thus, *Watts* instructs that context matters. More particularly, *Watts* instructs that how a statement would be understood by listeners within its context matters.

Three decades later, this Court reaffirmed the "true threats" exception in *Virginia* v. *Black*, 538 U. S. 343 (2003). At issue in that case was the constitutionality of a Virginia statute that banned cross burning with "an intent to intimidate a person or group of persons." *Id*., at 347. The law further stated that the act of cross burning alone "shall be prima facie evidence of an intent to intimidate . . . ." *Id*., at 348. This Court held that Virginia did not run afoul of the First Amendment by criminalizing cross burning done with an intent to intimidate. *Id*., at 363. However, with respect to the latter part of the statute, a plurality of this Court concluded that the "prima facie evidence provision . . .

render[ed] the statute unconstitutional." *Id*., at 364. This distinction is important because Petitioner contends that *Black* "put intent front and center." Brief for Petitioner 26.

Early in the opinion, this Court discussed First Amendment principles and reiterated that the protections afforded by the amendment are not absolute. *Black*, *supra*, 538 U. S., at 358-359. This Court then focused its attention on the "true threats" doctrine stating that "'[t]rue threats *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*., at 359 (emphasis added). This Court also clarified that "[t]he speaker need not actually intend to carry out the threat." *Id*., at 359-360.

As noted, *supra*, this Court held that because cross burning "is a particularly virulent form of intimidation," a state may ban such an act when done with the "intent to intimidate" without violating the First Amendment. *Id*., at 363. This Court explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a *type* of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*., at 360 (emphasis added). Petitioner focuses on these statements as authority that subjective intent is required to prove a "true threat." Brief for Petitioner 26-27. These statements, however, do not provide that authority. First, this Court's use of the words "encompass" and "type" strongly imply that there are other types of true threats that may be constitutionally proscribable under a different statutory scheme utilizing a different mental state element. Second, these statements must be considered within the backdrop of the case as a whole and within the frame-

work in which the *Black* Court analyzed the issues. This Court addressed the two parts of the Virginia statute separately—first, whether it was unconstitutional to criminalize cross burning with the intent to intimidate, and second, whether the prima facie evidence provision, as interpreted by the instructions given to the jury, was unconstitutional on its face.[3]

By making it a crime to burn a cross with an "intent to intimidate," *Black, supra*, 538 U. S., at 347, the Virginia statute required that the person accused of burning the cross do so with a particular purpose in mind. Legislatures, if they so choose, can include a requirement of purpose, but the discussion of that element in *Black* does not elevate purpose to a constitutional requirement.

The *Black* Court's analysis of the prima facie evidence provision of the statute focused on the elimination of the government's burden to prove that the defendant acted with the specific subjective intent to intimidate. A plurality of this Court was troubled by the fact that the statute authorized the state "to arrest, prosecute, and convict a person based solely on the fact of cross burning itself," *Black*, 538 U. S., at 365, and it noted that cross burnings may or may not be done with a specific intent to intimidate (as required by the statute). *Id.*, at 357. "The prima facie evidence provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Id.*, at 367 (plurality opinion). Thus, *Black* did not address whether a "true threat" in all circumstances must be examined under a subjective standard or an objective standard to deter-

3. The jury was instructed that " '[t]he burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.' " *Black*, *supra*, 538 U. S., at 364.

mine whether it is constitutionally proscribable. Rather, *Black* instructs that when a statute criminalizing speech or expressive conduct requires a showing of specific subjective intent to intimidate, then the government cannot be relieved of its burden to prove the mental element as required by the statute. Otherwise, there is a great risk that constitutionally protected speech may be swept in without such a contextual, fact intensive analysis of the speaker's subjective intent.

This Court recently had the opportunity to apply the "true threats" doctrine to statements communicated over the internet in *Elonis* v. *United States*, 575 U. S. 723 (2015). In that case, this Court addressed a federal law that "makes it a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another.' " *Id*., at 726. The statute has no express mental element but only requires that the defendant transmit a communication and that the communication contain a threat. *Id*., at 732. It does "not indicate whether the defendant must intend that his communication contain a threat." *Ibid*. The question before this Court was "whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing." *Id*., at 726.

Similar to this case, the defendant argued that a "threat" by definition requires proof of a speaker's subjective intent to cause harm, *id*., at 732-733, whereas the government argued that the defendant need only know the contents. *Id*., at 738. This Court ultimately decided the case on statutory interpretation grounds and did not consider any First Amendment issues holding that the lack of a explicit mental state element in the threat statute permits a jury to find the defendant criminally liable based solely on the results of the

defendant's acts without considering his mental state. *Id.*, at 740. Because " 'wrongdoing must be conscious to be criminal,' " the government must prove that the defendant acted with purpose, knowledge, or possibly recklessness that his statements would be viewed as threats. *Ibid*. (quoting *Morissette* v. *United States*, 342 U. S. 246, 252 (1952)). This Court then reversed and remanded the case for further proceedings consistent with the opinion.

Both Justices Alito and Thomas authored separate opinions addressing the broader First Amendment intent query. Justice Alito, concurring in part and dissenting in part, agreed with the majority that "we should presume that criminal statutes require some sort of *mens rea* for conviction." Justice Alito was of the opinion that requiring proof of at least recklessness would pass constitutional muster. *Id*., at 748.

Justice Alito further rejected the defendant's argument that threats are constitutionally protected if the speaker does not subjectively intend to cause harm to the target of the threats. *Id*., at 746-747. It was the defendant's contention that threats made for a "therapeutic purpose" or a "cathartic benefit" are shielded by the First Amendment. Justice Alito disagreed, stating "whether or not the person making the threat intends to cause harm, the damage is the same." *Ibid*.

Justice Thomas's dissent delved deeper into the First Amendment intent issue. *Id*., at 765-767. Justice Thomas also rebuffed the defendant's subjective intent to threaten argument stating "adopting Elonis' view would make threats one of the most protected categories of unprotected speech." *Id*., at 766. Justice Thomas pointed to other areas of "historically unprotected categories of speech" in which a heightened mental state had generally not been required, concluding that he saw "no reason why [this Court] should give threats

pride of place among unprotected speech." *Id*., at 766-767.

What light, if any, did *Elonis* shed on the intent issue? First, consistent with *Black*, *Elonis* instructs that the Government cannot be relieved of its burden of proving a defendant's mental state in threat prosecutions. Second, according to the majority, when a statute is silent on *mens rea* the speaker's mental state must be something more than negligence, although the constitutional minimum was not decided. And third, Justices Alito's and Thomas's separate opinions reiterate that context matters, an objective knowing mental state is constitutionally sufficient, and why a specific intent to threaten is not a constitutionally required mental state.

2. Knowledge and purpose.

The proposition that knowledge (general intent) and not purpose (specific intent) is sufficient to exclude a statement from the protection of the First Amendment can be seen in the classic hypotheticals of obviously unprotected statements. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." *Schenck* v. *United States*, 249 U. S. 47, 52 (1919). Would it matter what his purpose was in falsely shouting fire? Of course not. It does matter, obviously, that he had knowledge of the basic fact that there was no fire, but purpose is irrelevant.

Similarly, publishing the sailing dates of troop transports was so obviously unprotected speech shortly after World War I as to require no discussion. See Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 939 (1919). Would it matter if the newspaper publisher had the innocent purpose of enabling the soldiers' families to see them off, rather than the nefarious purpose of assisting German U-boats

to sink the ships? Of course not. Subjective purpose would matter if the publisher were charged with treason for aiding the enemy, cf. *Haupt* v. *United States*, 330 U. S. 631, 641 (1947), but it does not matter for the purpose of determining whether the publication is constitutionally protected from any government restraint.

The classic "fighting words" case, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), provides a close parallel to the present case. This Court's brief opinion found that Chaplinsky's words were unprotected "fighting words" likely to cause a breach of the peace. *Id*., at 574. The Court also rejected a claim that the statute was too vague, *ibid*., referring to the New Hampshire Supreme Court's opinion for the meaning of the statute. See *id.*, at 572-573. There, Chaplinsky made an argument very similar to the one made in this case. The passage from the New Hampshire court was quoted in part by this Court. *Id.*, at 573. The paragraph preceding this Court's quote is also worth noting in the context of the present case:

> "The defendant further says that our statute is invalid because it is so vague and indefinite that one coming within its purview may not know what is prohibited. In this connection, the claim is made that the test of what is offensive is purely subjective in the sense that it is to be determined by the way the addressee reacts to it. The defendant therefore argues that nobody can know what is offensive language, since one man may be offended by words to which another man would take no exception. We have never construed the statute by any such test. The word 'offensive' is not to be defined in terms of what a particular addressee thinks. The legislature had no such vague, shifting test in mind. As was long ago said, they had in mind the tendency of

> words, not their actual result. The analogy was that of the distinction between civil and criminal libel. *State* v. *Brown*, 68 N. H. 200."
>
> "The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." *State* v. *Chaplinsky*, 91 N. H. 310, 320, 18 A. 2d 754, 762 (1941).

In affirming this decision on the vagueness challenge, quoting the "men of common intelligence" standard, this Court rejected the idea that an objective, "reasonable person" standard for determining whether speech is protected gives insufficient protection to speech or insufficient notice to speakers.

Chaplinksy makes clear that the test for unprotected speech may be how a reasonable person would judge the statement. Any claim that the objective, reasonable person standard at issue in this case is unconstitutional because a person might misjudge which side of the line a borderline threat falls on is unsupportable in light of *Chaplinsky*.

A common thread in all the hypotheticals and cases is that the defendant's inner purpose in speaking has nothing to do with the reason the speech is unprotected. The harms of a panic in a theater, sinking a troop transport, or starting a brawl are the same regardless of *why* the speaker did it. Some mental state element is required to avoid punishing innocent persons, such as the bookstore owner who does not know what is in an allegedly obscene book on his shelf, see *Smith* v. *California*, 361 U. S. 147, 152-153 (1959), but the most culpable mental state, subjective purpose, is far beyond what is constitutionally required.

3. Federal and state court guidance.

Both before and after *Elonis*, nine of eleven federal circuit courts have adopted and applied an objective

standard for determining whether speech qualifies as a "true threat." Only the Ninth and Tenth Circuits apply a test that focuses on the speaker's subjective intent.[4]

In 2020, the Colorado Supreme Court thoroughly examined the "true threats" doctrine as it related to a high school student's public social media posts that were directed specifically at other high school students in a heated exchange over a recent high school shooting in the area. *People ex rel. R.D.*, 464 P. 3d 717, 721 (Colo. 2020). The Colorado Supreme Court acknowledged that social media and similar methods of online communication "complicates the constitutional inquiry," and took the opportunity to refine their analytical framework for addressing "whether a statement is a true threat, taking into account this altered communication landscape." *Id.*, at 729-730.

The court was conscious of the fact that "[w]ords communicated online and without the interpretive aid of body language are easily misconstrued . . . [and] [t]he chance of meaning being lost in translation is heightened by the potential for online speech to be read far outside its original context." *Id.*, at 730. However, the court was also cognizant of the far-reaching ramifications online threats can have on a listener if left unregulated. *Ibid.* ("With the click of a button . . . , a threat made online can inflict fear on a wide audience"). The court specifically found that "[o]nline communication—in particular, the ability to communicate anonymously—enables unusually disinhibited communication, magnifying the danger and potentially destructive impact of threatening language on victims. . . . In short, technological innovation has provided apparent license

4. See Renee Griffin, Note, Searching for Truth in the First Amendment's True Threats Doctrine, 120 Mich. L. Rev. 721, 730, and nn. 76, 77 (2022) (collecting cases).

and a ready platform to those wishing to provoke terror." *Id*., at 731.

With these principles in mind, the Colorado Supreme Court defined a "true threat" as: "a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence." *Ibid*. With this definition in place, the Colorado Supreme Court enunciated five contextual factors for reviewing courts to consider when analyzing whether a statement is a "true threat":

> "(1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s)." *Ibid*.

The Colorado Supreme Court "articulated an enhanced context-driven objective test, specifically requiring assessment of the context, manner, medium, the parties' relationship (if any), and the recipient's subjective reaction, while simultaneously cautioning against reading too much into a recipient's subjective reaction." Brief in Opposition 23. This objective inquiry and the analytical framework adopted by the Colorado Supreme Court in *R.D.,* and as applied to the statute under which Counterman was convicted, is wholly consistent with *Watts* and *Black*, and with Justices Alito's and Thomas's separate opinions in *Elonis*.

B. The Problem of Proving Subjective Intent in Stalking Cases.

"It is a fundamental principle, long established, that the freedom of speech . . . does not confer an absolute right to speak . . . , without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of people who abuse this freedom." *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

Requiring the state to prove beyond a reasonable doubt a stalker's subjective intent would undoubtedly permit stalkers to "abuse this freedom" by giving them an "unrestrained and unbridled license" to say or do whatever they want to the target of their sights without consequence in direct violation of this "long established" "fundamental principle" of this Court's First Amendment jurisprudence.

Those who stalk cannot be pigeonholed into one particular type of person. Stalkers are motivated by a myriad of reasons. Stalkers may be driven by anger/hostility, control/power, intimidation, revenge, jealousy, delusions, and/or obsession. Hall, The Victims of Stalking, in The Psychology of Stalking: Clinical and Forensic Perspectives 121-123 (J. Meloy ed. 1998) ("Hall").

A stalker's behavior towards and interaction with his or her victims is not a one-time innocuous encounter, but rather a continuous crime measured in terms of months or even years. See, e.g., *United States* v. *Shrader*, 675 F. 3d 300, 302 (CA4 2012) ("more than three decades"); Meloy, Psychology of Stalking, in The Psychology of Stalking: Clinical and Forensic Perspectives 5 (J. Meloy ed. 1998). The victim-offender relationships in these cases vary greatly. They can range between strangers (e.g., celebrity, political figure,

complete stranger), see, e.g., *State* v. *Cardell*, 723 A. 2d 111, 112 (N. J. Super. Ct. App. Div. 1999); non-intimate acquaintances (e.g., coworkers, neighbors, roommates, clients, patients, schoolmates, disgruntled litigants), see, e.g., *Commonwealth* v. *Schierscher*, 668 A. 2d 164, 166 (Pa. Super. Ct. 1995); *People* v. *Halgren*, 61 Cal. Rptr. 2d 176, 177 (Cal. Ct. App. 1996); or, most common, those in prior intimate relationships (e.g., spouses, domestic partners, romantic partners). See, e.g., *Shrader*, 675 F. 3d, at 300.

Even though a stalker's behavior, motivation, profile, and pursuit patterns vary greatly from one to another, the one constant that remains the same throughout every situation is the profound effect of the stalker's persistent troubling course of conduct upon his or her victim. *Id*., at 312 ("The cumulative effect of a course of stalking conduct may be greater than the sum of its individual parts"); see also Hall, *supra*, at 133-135.

In many stalking situations, it is the fear of the unknown that is so profoundly fear inducing. In this case, C.W. testified that she was "not sure . . . what the next thing [was] that [was] going to happen. . . . Where it [was] going to happen. How bad it could be. And . . . the unknowing part of it is what ma[de] it twice as terrifying. There [was] no way to protect [her]self from something that [she could not] be sure of." J. A. 196. She was further "worried that [Counterman] would be near [her]. Near enough to [her] to do something. And after that, . . . Hurt [her]. Hurt somebody [she] was with." J. A. 205. The direct messages Counterman sent to C.W. "ma[d]e [her] think that [Counterman was] living in some kind of alternate reality, and it's unpredictable what somebody in that kind of alternate reality might do. Might think they can do." *Ibid*. C.W. was afraid to go out alone, cancelled concerts which nega-

tively affected her income, hired her own private security, obtained a restraining order, started carrying pepper spray and mace with her, and took steps to obtain a concealed carry permit for protection. J. A. 202-206. Thus, as evidenced in this case, the harm caused in these type of situations remains the same regardless of whether or not the stalker subjectively intended to cause fear. See Hall, *supra*, at 133 (the stalking experience "is akin to psychological terrorism").

The statutory provision under which Counterman was convicted provides:

> "(1) A person commits stalking if directly, or indirectly through another person, the person *knowingly* . . . . (c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress. . . ." Colo. Rev. Stat. § 18-3-602(1)(c) (emphasis added).

Colorado's statute, as construed by its supreme court, requires a contextual focus on objective criteria scrupulously protecting the constitutional rights of both the accused and of his or her victims. In *People* v. *Cross*, 127 P. 3d 71 (Colo. 2006), the Colorado Supreme Court construed the statutory definition of "knowingly" as used in the stalking provision of which Counterman was convicted.[5] The question for the court in *Cross* was whether the Legislature's use of the word "knowingly"

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5. The prior version of the statute, Colo. Rev. Stat. former § 18-9-111(4)(b)(III), was moved in 2010 to § 18-3-602 without substantial change. See *People* v. *Beauvais*, 405 P. 3d 269, 276 n. 4 (Colo. App. 2014), rev'd on other grounds, 393 P. 3d 509 (Colo. 2017).

within the stalking context requires the speaker to subjectively intend to cause severe emotional distress to the target of his or her conduct. *Id*., at 77-79. The answer to that question was no. *Ibid*.

In *Cross*, the court carefully examined the Colorado Legislature's intent, finding that it "employed language that clearly demonstrates its conscious choice to (1) employ an objective reasonable person standard for the purpose of narrowing the statute's potential reach, so as not to criminalize innocuous acts because they were directed at an unusually sensitive person . . . ." *Id*., at 77. Further, "the legislature recognized that the stalker in pursuing the victim may be oblivious to objective reality . . . ." *Ibid.* The speaker's detachment from reality is the primary reason why analyzing a speaker's subjective intent in threat prosecutions would allow many stalkers to escape criminal liability, and would do nothing to address or deter the harm stalkers inflict on their victims.

Colorado's stalking statute closely parallels the Model Anti-Stalking Code for States published as part of a report by the National Institute of Justice ("NIJ"). U. S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Project to Develop a Model Anti-Stalking Code for States (Oct. 1993). In this report, the NIJ "developed the model antistalking code as an example of antistalking legislation that would effectively combat stalking crimes and also withstand constitutional scrutiny." Christine B. Gregson, Comment, California's Antistalking Statute: The Pivotal Role of Intent, 28 Golden Gate U. L. Rev. 221, 242 (1998). In this report, the drafters published a model code that embraced a general intent standard because it was their conclusion that it "was preferable to a specific intent standard because it forces the criminal

justice system to focus on the behavior of the accused stalker, rather than his motivation." *Id*., at 262-263.

Gauging the stalker's intent from an objective standard helps ensure that those who "engage in stalking behavior do not escape liability because they did not specifically intend to cause the victim to be afraid, even if the fear was the probable and knowable consequence of the accused stalker's actions." Gregson, 28 Golden Gate U. L. Rev., at 263. The NIJ's report focuses on a stalker's actions and its "emphasis is on threats 'implied by a 'course of conduct' which, when taken in context, would cause a reasonable person to fear for [his or] her safety." *Id*., at 244. The section of the Colorado's stalking statute of which Counterman was convicted closely parallels the Model Code. Focusing on a stalker's actions and behavior, and evaluating the stalker's mental state under an objective knowing standard eliminates the possibility of a stalker asserting an "I was just expressing my feelings" defense. See *id*., at 245; see also *Elonis*, *supra*, 575 U. S., at 747 (Alito, J., concurring in part and dissenting in part) ("fig leaf of artistic expression").

Furthermore, "[w]hile stalking behavior may be manifested by seemingly benign gestures (e.g., gifts, letters) meant to be symbols of the stalker's affection, ... Repeated rejection by the victim may lead to escalation of the stalker's behavior to overt threats or violence (e.g., assault, rape, murder) toward the victim." Kienlen, Developmental and Social Antecedents of Stalking, in The Psychology of Stalking: Clinical and Forensic Perspectives 51 (J. Meloy ed. 1998).

This escalating pattern of behavior can be seen in Counterman's messages to C.W. See App. to Pet. for Cert. 7a. Anti-stalking laws exist to "provid[e] law enforcement officials with a means of intervention in potentially dangerous situations before actual violence

occurs." *State* v. *Ruesch*, 571 N. W. 2d 898, 903 (Wis. Ct. App. 1997). All 50 states and the federal government have enacted stalking laws. Gregson, 28 Golden Gate U. L. Rev., at 221. A constitutionally mandated subjective *mens reas* requirement would effectively thwart this national consensus, giving stalkers the power to avoid liability regardless of how outrageous his or her course of conduct may have been.

Finally, explaining why the common law required the "concurrence of an evil-meaning mind with an evil-doing hand," see *Morissette* v. *United States*, 342 U. S. 246, 251 (1952), Blackstone said, "no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know." 4 W. Blackstone, Commentaries 21 (1st ed. 1769). This limitation, along with the requirement of proof beyond a reasonable doubt and the constitutional prohibition of presumptions shifting the burden of proof, is further reason why a subjective intent *mens rea* requirement in "true threats" prosecutions would render the doctrine futile to victims.

II. The subdivision of the statute at issue is a manner restriction, not a content restriction, and it neither has nor needs a "threat" element.

The statute in this case, Colo. Rev. Stat. § 18-3-602, provides three ways a person can commit stalking in subdivision (1). Paragraphs (a) and (b) require a "credible threat," a content-based restriction which requires a "true threat" analysis. See *People* v. *Chase*, 411 P. 3d 740, 755 (Colo. App. 2013). Paragraph (c), on the other hand, says nothing about the *content* of communication and addresses several types of conduct,

including "mak[ing] any form of communication," "in a *manner* that would cause a reasonable person to suffer serious emotional distress . . . ." (Emphasis added). Petitioner was originally charged with both (b) and (c), but he was ultimately convicted only of (c).

Most of the briefs to date appear to take as given that this case involves a content-based restriction of speech. See, e.g., Brief for Petitioner 13. Yet on both the face of the statute and the jury instructions, see J. A. 411, Inst. 10, ¶4, Counterman was convicted for the *manner* of his communications and other actions.

A. Propriety of Considering This Issue.

Petitioner's Question Presented in this case asks only what constitutes a "true threat," not whether his communications in this case need to qualify as a true threat for his conviction to be valid. Generally, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a). There are some qualifications to that rule, however.

First, necessary predicates to the resolution of the question are "fairly included." *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994). In that case, because a federal court in habeas corpus was required to address a non-retroactivity defense before reaching the merits, the retroactivity issue was fairly included in a question on the merits. In the present case, "true threat" is an exception to the general rule that *content-based* restrictions are invalid absent an exception. See Brief for Petitioner 13-14. A legal analysis cannot get to the exception without first finding the case within the scope of the general rule.

Second, Supreme Court Rule 24.1(a) provides that "the Court may consider a plain error not among the

questions presented but evident from the record and otherwise within its jurisdiction to decide." Proceeding directly to the true threat question without stopping to consider if a content-based regulation is involved is a plain error.

Consideration of this issue in the present case is important, because a decision in this case that proceeds directly to the true threat issue could be taken to imply that stalking statutes are limited to true threats. The statute in this case and similar stalking statutes throughout the nation would be imperiled, and the value of their protection to stalking victims would be largely eliminated.

B. Time, Place, or Manner.

This Court recognizes that in some circumstances, the government may regulate protected speech. *Hill* v. *Colorado*, 530 U. S. 703, 719 (2000). There is a "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id*., at 715-716. The latter type, as in *Hill*, are often time, place, or manner limitations. In such cases particularly, " '[t]he principal inquiry in determining content neutrality, . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.' " *Id*., at 719 (quoting *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989)).

Paragraphs (a) and (b) of § 18-3-602(1) involve the content of threatening people, but paragraph (c) is devoid of any content requirement at all. Much of what it prohibits is conduct, not speech. It prohibits a person from knowingly and repeatedly following, approaching, contacting, surveilling, or communicating with another person in a manner that would cause serious emotional distress in a reasonable person and does cause that

person to suffer serious emotional distress. It was not adopted because the Colorado Legislature disagreed with the content of the statements conveyed by the speaker. To the contrary, because " 'stalkers do not always threaten their victim verbally or in writing,' " this section of the statute[6] focuses on a stalker's manner of behavior towards an unwilling target. U. S. Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Stalking in America: Findings from the National Violence Against Women Survey 8 (April 1998) (quoted in *People* v. *Cross*, 127 P. 3d 71, 76 (Colo. 2006)). It regulates the medium, not the message.

The Colorado Legislature left no doubt of its purpose, and it was not disagreement with any message. See Colo. Rev. Stat. § 18-3-601. The legislature's purpose demonstrates that subdivision (c) does not focus on the content of speech nor the message conveyed. It applies equally to any person whose repeated course of conduct falls within its statutory provisions regardless of viewpoint, and thus it is content neutral. The most pertinent of the legislative declarations is subdivision (1)(e): "Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim." It does not matter whether this "intensity, persistence, and possessiveness" is manifested in conduct, as in *Cross*, 127 P. 3d, at 73, a mixture of conduct and speech, as in this case, or speech alone.

Repetitiveness, the first requirement of paragraph (c), is a matter of time and manner. Choosing a place that victims cannot avoid without disrupting their lives is also characteristic of stalkers. Cross came to the victim's workplace in a public mall. Counterman pursued C.W. on Facebook, a practical necessity for

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6. See note 5, *supra*, regarding renumbering of the statute.

many people for both social and business reasons. Counterman's manner of communication in evading C.W.'s efforts to block him is also a factor. See J. A. 225-226.

Analyzed according to the standards in *Hill* and other time, place, or manner cases, there is no doubt that this statute is constitutional. Such a regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests" and " 'promote[] a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward* v. *Rock Against Racism*, 491 U. S. 781, 798 (1989) (quoting *United States* v. *Albertini*, 472 U. S. 675, 689 (1985)).

There is no doubt that protecting people from the extremely intrusive and unwanted communication in stalking is a substantial government interest. "[T]he protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, *supra*, 530 U. S., at 716. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; . . . and none of the recognized exceptions includes any right to communicate offensively with another." *Rowan* v. *United States Post Office Dep't*, 397 U. S. 728, 737 (1970). This statute does not have a needlessly broad sweep. See *Cross*, *supra*, 127 P. 3d, at 79 (rejecting overbreadth challenge). It is difficult to see how to draft it to prohibit substantially less speech without negating its effect in protecting people from stalking.

In summary, this statute is so clearly a valid time, place, or manner regulation that the answer to petitioner's question of whether his speech was a true threat has no effect on the constitutionality of his conviction. If this Court chooses not to address this issue, *amicus* CJLF respectfully requests that the Court

expressly state that the question remains open. Well-established and repeatedly upheld antistalking laws across the nation should not be called into question by any implication that repetitive, intrusive, abusive behavior cannot be banned if it comes in the form of speech and is not a "true threat."

CONCLUSION

The judgment of the Colorado Court of Appeals should be affirmed.

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Respectfully submitted,

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