

No. 22-138

IN THE
Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

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

**BRIEF OF COLES WHALEN AS *AMICUS*
CURIAE IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Interest of <i>Amicus Curiae</i>	1
Statement	2
Argument.....	16
I. Reversing Counterman’s Conviction Would Allow Egregious Conduct To Go Unpunished and Leave Innocent Victims Unprotected.	16
II. The State’s Objective Standard Protects Victims Without Offending The First Amendment.	19
Conclusion	24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940).....	20
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	20
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	20
<i>Elonis v. United States</i> , 575 U.S. 723 (2015).....	17, 20, 21
<i>Kansas v. Boettger</i> , 140 S. Ct. 1956 (2020).....	17
<i>People v. Cross</i> , 127 P.3d 71 (Colo. 2006)	17
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	16, 21
<i>United States v. Counterman</i> , No. 5:02-cr-484 (N.D.N.Y. Sept. 29, 2003)	8, 9
<i>United States v. Counterman</i> , No. 5:11-cr-133 (N.D.N.Y. Nov. 22, 2011)	9, 10
<i>United States v. Jeffries</i> , 692 F.3d 473 (6th Cir. 2012).....	20
Statutes & Other Authorities	
18 U.S.C. § 875	3, 7
<i>About Brush with Life, Inc.</i> (2013)	7
<i>About Coles Whalen</i> , OurStage (2013)	3, 7

Allie Gregory, <i>Billie Eilish Granted Five-Year Restraining Order against Stalker,</i> Exclaim (Mar. 8, 2021).....	19
<i>Artist Profile—Coles Whalen,</i> Greg Bennett Design	5
Brad Callas, <i>Ariana Grande Stalker Arrested after Violating Restraining Order by Breaking into Singer’s House on Her Birthday,</i> Complex (June 28, 2022)	19
Caryn Robbins, <i>Rising Country Musician Coles Whalen Takes Math to a New Level,</i> Broadway World (Mar. 4, 2013)	5, 7
<i>Elle: A Modern Cinderella Tale— Soundtracks, IMDb</i>	7
Emmanuelle Plante, <i>Le Bon Air d’Une Émission,</i> Le Journal de Montréal (Dec. 13, 2012).....	7
Heather M. Stearns, <i>Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars,</i> 35 Santa Clara L. Rev. 1027 (1995).	17
<i>Interview: Coles Whalen,</i> The Denver Post (Sept. 29, 2009)	5
<i>IWMF Starts September Right,</i> ACCESSline (Sept. 2012)	5, 6
Jenn Cohen, <i>Coles Whalen: I Wrote This for You [LP],</i> Colorado Music Buzz (Mar. 1, 2012)	6

Jon Solomon, <i>Coles Whalen</i> , Westword (July 23, 2013)	7
Katrina Baum et al., <i>Stalking Victimization in the United States</i> , U.S. DOJ Bureau of Justice Statistics (Jan. 2009)	20
Lincoln, <i>Coles Whalen Live at the Grizzley Rose</i> , No Depression (Apr. 6, 2010).....	3
Malcolm Gladwell, <i>Complexity and the Ten-Thousand-Hour Rule</i> , The New Yorker (Aug. 21, 2013)	2
Maria A. Brusco, <i>Note, Read This Note or Else!:</i> <i>Conviction under 18 U.S.C. § 875(c)</i> <i>for Recklessly Making a Threat</i> , 84 Fordham L. Rev. 2845 (2016)	19
<i>New Public Television Series Passport &</i> <i>Palette Holding a Free One-day</i> <i>Paint-out in Denver, CO</i> , Newswire (June 5, 2010),	7
Patricia Tjaden & Nancy Thoennes, <i>Stalking in America: Findings from the</i> <i>National Violence Against Women Survey</i> , Nat'l Inst. of Just. & Ctrs. for Disease Control & Prevention (Apr. 1998)	18
Samantha Ibrahim, <i>Taylor Swift's Terrifying Stalker History:</i> <i>From Deadly Love Letters to Break-ins</i> , N.Y. Post (Jan. 11, 2022)	19

Samantha Whidden, <i>Kelly Clarkson Stalker Arrested outside Her Home after 12 Restraining Order Violations,</i> Outsider (Jan. 26, 2023)	19
Stephen B. Reed, <i>The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers,</i> 17 New Eng. J. on Crim. & Civ. Confinement 337 (1991).....	18
Tracy McVeigh, <i>Lily Allen on Being Stalked: ‘I Was Asleep. He Steamed into the Bedroom and Started Screaming,’</i> The Guardian (Apr. 16, 2016).....	19
U.S. DOJ Violence Against Women Office, <i>Report to Congress: Stalking and Domestic Violence</i> (2001)	17

**BRIEF FOR *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

INTEREST OF *AMICUS CURIAE**

Coles Whalen is a professional singer-songwriter who has released six records and toured extensively throughout the United States and Canada. She is also the survivor of a terrifying years-long stalking campaign by petitioner Billy Raymond Counterman, who sent her thousands of disturbing, alarming, and threatening messages.

The messages were life threatening and life altering. Terrified she was being followed and that Counterman would show up at one of her live performances to make good on his threats, Coles had no choice but to step back from her dream—a music career she had worked hard to build on the road and in the recording studio for decades.

Coles is grateful that when she reported Counterman's alarming and threatening messages, law enforcement took them seriously. She's also grateful that law enforcement and the district attorney's office had the tools they needed to incapacitate Counterman, free her from his cycle of threats and harassment, and afford her the time and space she needed to begin rebuilding her life without being in constant fear of harm to herself or her loved ones.

* Pursuant to Supreme Court Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amicus* or her counsel made a monetary contribution to the preparation or submission of this brief.

Coles has an interest not only in seeking justice for herself but also in ensuring that other victims who are stalked, threatened, and harassed can receive the same protection and support that she did.

Since the stalking, Coles has found passion and purpose in other things. But she should have had the opportunity to use her gifts and talents in the way *she* chose. It wasn't for Counterman to take that choice away from her.

STATEMENT

“Mientras más lo hacemos, mejor será”

The more we do it, the better it'll be

That's the motto of singer-songwriter Coles Whalen.¹ It's also an apt description of the first ten years of her professional career—at least until Billy Raymond Counterman entered her life.

By 2014, Coles had dedicated a decade to building the career of her dreams. She released six albums and played nearly a thousand shows across the United States and Canada—from headlining her own shows to opening for Joan Jett, Pat Benatar, and Paula Cole. Her music appeared in a feature film and television shows. One music critic described her as “truly inspirational”—“talented, approachable, and extremely loyal to her fans.”² Another pegged her as “one of the

¹ Coles' motto reflects her dedication to the idea that gaining mastery of a complex task requires 10,000 hours of deliberate practice—a goal she doggedly pursued, touring the country and playing more than a hundred live shows a year. See Malcolm Gladwell, *Complexity and the Ten-Thousand-Hour Rule*, *The New Yorker* (Aug. 21, 2013), <https://t.ly/qxaM>.

² J.A. 431.

best alt country performers out there right now”—with others agreeing Coles was “[t]he next big thing.”³

Counterman—by contrast—spent half of the decade leading up to 2014 in federal prison and the other half on supervised release after pleading guilty twice (in 2003 and 2011) to violating the federal criminal threat statute, 18 U.S.C. § 875(c), by threatening to injure at least four different women.

Starting in 2014—while still on supervised release from his 2011 conviction—and continuing until his arrest in 2016, Counterman stalked, harassed, and threatened Coles, sending her thousands of unsolicited messages that only intensified in frequency and hostility over time. Things came to a head in spring 2016, after Counterman told Coles to “[d]ie, don’t need you,” to “[f]uck off permanently,” and that “[s]taying in cyber life is going to kill you.” Pet. App. 7a; J.A. 85, 111, 177–78. He also made clear that he’d been watching her—describing her car and the people around her. Pet. App. 7a; J.A. 85, 111, 177–78.

The born performer who felt most at home on stage found herself constantly looking over her shoulder and, for the first time in her life, crippled by stage fright—worried that Counterman could be out there, blending in with the audience, waiting to make good on this threats. Facing that fear night after night eventually proved too much. The meet-and-greets with fans went first. Then the anxiety became so crippling that it forced Coles to leave the stage in the middle of a performance. She started cancelling shows

³ See Lincoln, *Coles Whalen Live at the Grizzley Rose*, No Depression (Apr. 6, 2010), https://t.ly/A4_L; *About Coles Whalen*, OurStage (2013), <https://t.ly/x-mo>.

and stopped scheduling new ones. The joy of touring the country, playing music, and selling albums gave way to the terror inflicted by Counterman—along with isolation, sleepless nights, and a newly acquired concealed-carry permit.

Coles eventually sought help—first from family and an attorney, and then from law enforcement, who arrested Counterman in May 2016. After a three-day trial, the jury found beyond a reasonable doubt that Counterman had knowingly communicated with Coles in a manner that would cause a reasonable person to suffer serious emotional distress, and the court sentenced him to four and a half years in prison.

Counterman's incarceration enabled Coles to begin putting her life back together—knowing that she was finally safe from the stalker who for years sent her thousands of threatening and harassing messages. But the damage was done. Coles has yet to resume touring or regular public performances. And it took years before she could even return to the recording studio (just last year).

Nothing can turn back time to 2014, with the buzz and momentum of an artist on the cusp of making it big. And nothing can restore Coles to the person she used to be. But this Court can affirm that nothing in the First Amendment requires Counterman's threatening messages to take precedence over Coles' physical safety—and that nothing about the rigorous, objective standard applied in this case to convict Counterman poses any danger to free speech. If anything, Counterman's campaign of terror silenced Coles' own voice as an artist, a musician, and a songwriter for far too long. The Court should affirm.

1. Coles Whalen has always loved performing. Before she turned 10, she was touring internationally with the award-winning Colorado Children’s Chorale. By 13, she had taken up jazz piano and was playing Denver’s local jazz clubs, where she spent the next five years honing her musical chops. She then attended the University of Southern California on a scholarship to study in its world-renowned jazz department.⁴

After graduating, Coles went all in on her dreams: she sold everything she owned, recorded her first EP (*Coles Whalen EP*), bought a camper, and began touring the country. That year she played 150 shows across 10 western States and sold more than 2,000 copies of her EP from the back of that camper.⁵

In 2006, Coles recorded her first full-length album, *Gee Baby*, and found her way into Borders bookstores, where she played several shows a day in stores across the country—building a following and selling over 10,000 albums, still out of the back of the camper.⁶

The next year, Coles signed with an independent record label and released her second full-length album, *Nothing is Too Much*. Despite strong sales and a successful year of touring to support the album, the label—which owned Coles’ masters—refused to press

⁴ *Interview: Coles Whalen*, The Denver Post (Sept. 29, 2009), <https://t.ly/qdL6Q>; Caryn Robbins, *Rising Country Musician Coles Whalen Takes Math to a New Level*, Broadway World (Mar. 4, 2013), <https://t.ly/I3MS>.

⁵ *IWMF Starts September Right*, ACCESSline 26 (Sept. 2012), <https://bit.ly/3LGbveG>; *Artist Profile—Coles Whalen*, Greg Bennett Design, <https://t.ly/-ZeD>.

⁶ *IWMF Starts September Right* at 26.

more CDs. Out of options and still owing the label another two albums, Coles regrouped, bought out the rest of her contract, and began again—moving to Nashville to sharpen her songwriting skills.⁷

Coles maintained a busy touring schedule—hitting the road to play more than a hundred shows a year. She also wrote, recorded, and released her fourth album, 2009’s *The Whistle Stop Road Record*. Coles and her band toured extensively in support of *Whistle Stop*, playing over a hundred shows and festivals—headlining her own shows, and opening for Pat Benatar, Kellie Pickler, and Joan Jett (before 30,000 people).⁸

During breaks in her touring schedule, Coles returned to the studio to record her fifth album, *I Wrote This for You*, which was released to critical acclaim in 2012. One music critic described the album as “easily her best release” with “content, lyrically and musically, [that] is profound” and “showcases what a formidable talent Whalen has become.”⁹

Coles’ talents were showcased on the big and small screens. She composed and performed the soundtrack for the PBS series *Passport & Palette*. Her song *How Do You Do This to Me* was recorded for and performed in the feature film *Elle: A Modern Cinder-*

⁷ *Ibid.*

⁸ *Ibid.*; see also J.A. 117 (“The largest show that I played was the opening show for Joan Jett, 30,000 people. * * * But not too infrequently I’ll play for 2,500 or 3,000 people.”).

⁹ Jenn Cohen, *Coles Whalen: I Wrote This for You [LP]*, Colorado Music Buzz (Mar. 1, 2012), <https://t.ly/G1XEY>.

ella Tale. Radio-Canada featured her song *Paper Airplane* in its hit series *La Galère*. And the music video for her signature song *Call on Me* received airtime on the *Country Music Channel* in Australia (home to international country music star Keith Urban).¹⁰

On the heels of these successes—and extensive touring in support of *I Wrote This for You*—Coles signed with a Colorado Springs–based independent record label and began working on her sixth album, *Come Back, Come Back*, which was released in July 2013. It was the first album Coles self-produced and the first time she took her live band into the studio with her. After an album release concert in Denver, Coles and her band hit the road, embarking on a national tour to support the album.¹¹

2. While Coles spent the decade building her career, Counterman spent it in federal prison or on supervised release for leaving threatening voicemails for at least four women (including his former wife, her sisters, and his niece by marriage). See J.A. 26, 401, 420, 434.

In 2002, Counterman was charged with ten counts of violating 18 U.S.C. § 875(c), the federal criminal-

¹⁰ See *About Brush with Life, Inc.* (2013), <https://t.ly/umQN>; *New Public Television Series Passport & Palette Holding a Free One-day Paint-out in Denver, CO*, Newswire (June 5, 2010), <https://t.ly/vkMB>; *Elle: A Modern Cinderella Tale—Soundtracks*, IMDb, <https://t.ly/V77U>; Emmanuelle Plante, *Le Bon Air d'Une Émission*, *Le Journal de Montréal* (Dec. 13, 2012), <https://t.ly/xmkC>; Robbins, *Rising Country Musician*.

¹¹ Jon Solomon, *Coles Whalen*, Westword (July 23, 2013), <https://t.ly/SdDtf>; *About Coles Whalen*, OurStage.

threat statute.¹² Counterman told two of the women that “people in this position that I’m in right now have been [known] to have gone and killed people. Take nine millimeters and blow their heads off and shit like that. * * * I know where you’re all living.”¹³ He told another woman that he “ha[d] all your addresses and guess what? You ever heard of a letter bomber? Guess what I’ll be comin at ya with kerosene.”¹⁴

Counterman pleaded guilty to all ten counts of making threatening interstate phone calls and was sentenced to 27 months in prison and 3 years of supervised release.¹⁵

In January 2010, Counterman messaged Coles for the first time, falsely claiming to be a promoter who was organizing a benefit concert for Haiti. Coles replied twice, indicating she was interested in participating, inquiring about dates, and asking to be kept in the loop. When Coles realized the messages about promoting a benefit concert were lies, she didn’t engage again.¹⁶

¹² See 2002 Indictment, *United States v. Counterman*, No. 5:02-cr-484 (N.D.N.Y. Dec. 18, 2002), ECF No. 1 (also available at pp. 77–82 of the trial court’s file in this case, 16CR2633, filed Jan. 27, 2017).

¹³ *Id.* at 2.

¹⁴ 2002 Indictment at 5–6.

¹⁵ Judgment, *Counterman*, No. 5:02-cr-484 (N.D.N.Y. Sept. 29, 2003), ECF No. 24; see also ECF No. 27.

¹⁶ It was only after Counterman’s arrest in 2016 that Coles realized that the person who began stalking and harassing her in 2014 was the same person who had lied about being a promoter in 2010. J.A. 186–89, 333–35; see also J.A. 228, 241, 484–92.

In March 2011, a grand jury indicted Counterman for violating the federal criminal-threat statute again.¹⁷ This time he was charged with leaving a woman a voicemail saying: “I’m coming back to New York by the way, OK? Maybe this month in March OK. I may be coming back this month or next month. I don’t know which. I’m looking forward to meeting up with you. I will rip your throat out on sight.”¹⁸

The district court ordered Counterman detained pending trial, finding “clear and convincing evidence that [Counterman] will endanger the safety of others and the community through continuing offenses involving threats of violence, and that no condition or combination of conditions will reasonably assure the safety of others and the community.”¹⁹

Counterman pleaded guilty and was sentenced to 32 months’ imprisonment and 3 years’ supervised release. The court also recommended that Counterman “participate in a mental health treatment program while in custody.”²⁰ At sentencing, the court noted that “the fact that an individual would continue to terrorize the people that he would hope to be closest to him is just an indication of how much treatment he

¹⁷ See 2011 Indictment, *United States v. Counterman*, No. 5:11-cr-133 (N.D.N.Y. Mar. 16, 2011), ECF No. 1.

¹⁸ *Ibid.* (“I will put your head on a fuckin sidewalk block and I’ll bash it in.”).

¹⁹ Detention Order Pending Trial at 1, *Counterman*, No. 5:11-cr-133 (N.D.N.Y. Apr. 29, 2011), ECF No. 10.

²⁰ Guilty Plea, *Counterman*, No. 5:11-cr-133 (N.D.N.Y. June 28, 2011), ECF No. 11; Judgment at 1–3, *Counterman*, No. 5:11-cr-133 (N.D.N.Y. Nov. 22, 2011), ECF No. 18; see also ECF No. 27.

needs.”²¹ But the court also expressed dismay that, particularly given the years-long duration of the threats and harassment in that case, it was “not only unbelievable, but unacceptable that these people would have to live in this manner and put up with this.”²²

3. Within nine months of his release from federal prison—and while still on supervised release—Counterterman embarked on a campaign of stalking, harassing, and threatening Coles Whalen. Over the next two years, he would send her thousands of messages containing threats, insults, evidence that he was following and stalking her, and delusional suggestions that they were in an intimate relationship together.

Counterterman’s stalking and harassment began with a string of unsolicited messages in spring 2014. Coles had never met Counterterman, and had no idea who he was or what he looked like. J.A. 118, 135. From the beginning, Counterterman would send “[d]ozens and dozens” of messages a day. J.A. 118, 129.

Concerned that “engaging in any way would just make [him] more aggressive,” Coles didn’t respond to Counterterman. J.A. 130. Instead, she tried to ignore his messages and block his accounts—which she did no fewer than four times. J.A. 138. But that wasn’t enough to deter him—he created new profiles to resume messaging her and turned to other platforms, like the contact function on her website. J.A. 138–39, 480–82.

²¹ Sentencing Tr. at 7, *Counterterman*, No. 5:11-cr-133 (N.D.N.Y. Nov. 30, 2011), ECF No. 22.

²² *Ibid.*

Counterman's messages vacillated between bizarre and delusional to aggressive and threatening. Some messages contained overt threats, which stayed with Coles for years: "Die, don't need you"; "Fuck off permanently." Pet. App. 7a; J.A. 85, 111. Others were more insidious: "Staying in cyber life is going to kill you." J.A. 177–78. Still others insinuated that he was following her around and stalking her in the real world—not just online:

Knock, knock....

five years on FB. I miss you, only a couple physical sightings, you've been a picker upper for me more times then I can count....

J.A. 456; see also J.A. 451. Counterman sent Coles messages describing her car, who she was with, and what she was doing. J.A. 86, 136, 140, 143–44, 178, 448, 455, 477 (referencing Coles' "white Jeep," ordering her to "[t]ell your friend to get lost," and complaining about a "fine display with your partner"). And he sent messages to her friends, including bandmate (and bassist) Kim O'Hara, trying to "get to" Coles. J.A. 432–33 ("He messaged my best friend and asked her if she could please get to me. We were both so freaked out"); see also J.A. 280–82 (O'Hara) ("[T]he first message that I ever received said, 'I'm trying to get ahold'—'I'm trying to get ahold of [Coles].' And I didn't respond. And the next message said, 'WTF?' Which means, 'What the fuck?' 'She's not responding' or something.").

Another factor that made Counterman's threats particularly "terrifying" was the fact that he could be in the crowd at Coles' shows and she'd have no idea because she didn't know who he was or what he looked

like. J.A. 135, 141–42 (one of the “scariest part[s]” was not knowing if, when, “where,” or “how often” Counterman was “seeing [her] in person”). After all, Counterman claimed in his messages to have watched her perform before. J.A. 107. And Coles couldn’t just lay low—she earned her livelihood by getting up on stage and playing her songs for hundreds and thousands of fans. See J.A. 207.

4. For eighteen months while Counterman stalked, harassed, and threatened her, Coles managed to continue performing and touring. But as time went on, and the frequency and intensity of Counterman’s messages continued to escalate, things got “more and more scary.” J.A. 172.

The tipping point for Coles came in early 2016. By that point Counterman “had mentioned physical sightings, the color of [her] car, he had threatened [her] saying things like staying in cyberspace will kill you and telling [her] to fuck off and die.” J.A. 433.

The endless barrage of Counterman’s messages took its toll and severe anxiety began to set in. Coles stopped going places alone. She began sleeping with a light on (when she could manage to sleep at all). J.A. 195, 200–01. She started carrying mace and applied for a concealed handgun permit. J.A. 206.

Coles did what she could to continue performing—she asked bouncers to help protect her, hired bodyguards when she could, and tried to perform in “secure” venues (with limited ingress and egress). J.A. 204, 248–53. But the fear and anxiety of not knowing whether Counterman was in the crowd became too much. J.A. 207.

For the first time in her life, Coles felt afraid when she stood on stage. Her chest tightened, her palms got clammy, and she started shaking as she was “always thinking about who could be out there.” J.A. 195, 207, 434.

Before, Coles never cancelled or turned down shows, J.A. 203, but—paralyzed by anxiety and fear—she began cancelling shows and turning down new opportunities, first in Denver, then elsewhere. J.A. 201–02, 239. For an up-and-coming performer like Coles, that wasn’t just a missed paycheck, J.A. 117, 202–03, but a major career setback. Staying “in the spotlight” is critical to “maintain[ing] popularity” in the music business—it’s “how you guarantee that you can get a bunch of fans to the show,” which is “why people hire you.” J.A. 203.

Things came to a head at a relatively small show in Dallas. As Coles’ friend and bass player Kim O’Hara explained, Counterman’s threats and harassment led to Coles “leav[ing] the stage” in the middle of a show “for the first time in her 10 year career.” J.A. 431. Twenty minutes into the show, Coles “was shaking and breathing shallowly”—she looked over at Kim and told her “she was terrified that Bill Counterman was there and that he intended to hurt her or [Kim].” *Ibid.* Coles “got through one more song sitting down,” but then “got up and walked off the stage.” *Ibid.* When Kim finally found her backstage, Coles “was embarrassed, deeply upset, and * * * worried that she might not ever be able to play shows again without fear.” *Ibid.*

In Coles’ words: “I got so nervous that I started feeling nauseous. I almost fainted and I had to leave

the stage. I've never left a stage in my life. I've never even had a little stage fright. But I was shaking and I was crying so badly that I didn't come out for an hour and when I finally did, I just spent the night with security." J.A. 434.

5. Coles eventually sought help—turning first to her aunt, who is also an attorney. J.A. 433. That's when Coles first learned about Counterman's two prior convictions for "stalking and threatening women." J.A. 428. That's also when she and her aunt decided it was time to get law enforcement involved. *Ibid.*

Thankfully, law enforcement took Coles—and Counterman's threats—seriously. Coles got a restraining order and kept copies in her car, at her workplace, and at her parents' house, along with a photograph of Counterman. J.A. 185, 242. Shortly after that, Counterman was arrested. J.A. 325–26.

At trial, Coles took the stand—mere feet from the man who had wreaked so much havoc on her life. Testifying was "one of the most terrifying things" she had ever done, because she had to "describe in detail some of my worst fears in front of somebody who's been terrorizing me for years." J.A. 197, 432; see also J.A. 174. Testifying forced Coles to expose and relive her "deepest fears" about what Counterman might do to her—giving him "the worst ammunition that this man could possibly have." J.A. 193. Cross-examination meant that Coles was essentially on trial herself, as Counterman's attorney sought to show that she was just being dramatic and overwrought and didn't reasonably believe that Counterman's thousands of messages over the years were truly threatening. J.A. 267, 288, 387–88, 432.

After a three-day trial, the jury convicted Counter-
terman of stalking under Colorado law. Pet. App. 5a.
In addition to her trial testimony, Coles gave a victim-
impact statement at sentencing, describing how
Counterterman's threats, stalking, and harassment
robbed her of her livelihood, the decade of career mo-
mentum she had worked so hard to build, and her very
identity as a performer:

[T]his stalking has had a crippling [e]ffect on
me for six years. I was terrified that he
would hurt me or hurt someone that I loved.
I was nervous to meet new people, to go
places alone. The past year has been far
worse. I stopped performing. I played almost
no shows. I used to play dozens in a year. I
couldn't meet my fans. I was too frightened
to travel alone. I got a concealed carry per-
mit so I could carry a gun. I often had trouble
sleeping. The terror and isolation that this
has caused me is real and has had real con-
sequences * * * * I truly believe I could eas-
ily be the victim of serious physical harm at
his hands.

J.A. 434–35; see also J.A. 203.

She concluded her statement by imploring the
court to protect her by putting Counterterman in prison.
J.A. 435. The court sentenced Counterterman to four
and a half years.

Counterterman's incarceration provided time and
space for Coles to begin rebuilding her life without be-
ing in constant fear. But some things will never be
the same. She still hasn't returned to touring or reg-
ular public performances and knows that—after so

long out of the spotlight—it will be “difficult * * * to restart [her] career.” J.A. 203. And she will never be the same person, on or off the stage, that she was before Counterman injected himself and his years-long barrage of life-threatening (and life-altering) messages into her life.

ARGUMENT

I. REVERSING COUNTERMAN’S CONVICTION WOULD ALLOW EGREGIOUS CONDUCT TO GO UNPUNISHED AND LEAVE INNOCENT VICTIMS UNPROTECTED.

Preventing States from punishing egregious conduct like Counterman’s—which spanned years of repeated contacts and thousands of harassing and threatening messages—would not only provide special protections for otherwise unprotected speech. It would also significantly hinder States’ ability to protect their most vulnerable citizens “from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

But that is precisely the position Counterman and his *amici* ask this Court to adopt. They contend that, because he claims he didn’t specifically intend to cause Coles to feel threatened, he can’t be punished—even though his conduct placed Coles in reasonable apprehension of serious bodily injury and nearly derailed her career and calling as a performer, artist, and songwriter.

That cannot be right. Adding a specific intent requirement to the true threat doctrine “would lead to the absurd result that a defendant who is so out-of-touch with the objective reality of his behavior would

escape criminal liability for his or her conduct,” *People v. Cross*, 127 P.3d 71, 78 (Colo. 2006), while “mak[ing] threats one of the most protected categories of unprotected speech.” *Elonis v. United States*, 575 U.S. 723, 766 (2015) (Thomas, J., dissenting); see also *Kansas v. Boettger*, 140 S. Ct. 1956, 1956 (2020) (Thomas, J., dissenting from denial of certiorari) (“the Constitution likely permits States to criminalize threats even in the absence of any intent to intimidate”); *id.* at 1958 (“none of this Court’s precedents have held that the First Amendment requires States to include intent to intimidate as an element in criminal threat statutes”).

The State’s approach (like most other jurisdictions’) appropriately reflects the reality that stalkers commonly harbor dangerous delusions or other mental conditions that underlie their obsessive contacts with their victims. Heather M. Stearns, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 Santa Clara L. Rev. 1027, 1029–30 (1995). Accepting Counterman’s position would mean that the more delusional the stalker, the harder for the State to protect victims. Nothing in the First Amendment requires such a perverse result.

In addition to preventing States from punishing *delusional* stalkers, adopting Counterman’s position would also create a dangerous roadmap that would enable *devious* stalkers to inflict terror with impunity. To evade prosecution, a devious, sophisticated stalker need only intersperse his threats (e.g., “Die, don’t need you”) with purportedly delusional messages. See U.S. DOJ Violence Against Women Office, *Report to Congress: Stalking and Domestic Violence 2–3* (2001), <https://t.ly/565e> (describing sophisticated tactics used

by stalkers). In that situation, a specific-intent requirement would not only make an arrest warrant harder to get but also erect a near-insurmountable hurdle for prosecutors who must show a subjective intent to threaten beyond a reasonable doubt.

Requiring specific intent in stalking cases would exacerbate an already life-threatening situation by making it even harder to protect victims and vindicate *their* rights. This case proves the point. Coles' experience reflects how anti-stalking laws permit society "to protect itself from dangerous criminals by removing the offenders from the community." Stephen B. Reed, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 *New Eng. J. on Crim. & Civ. Confinement* 337, 359 (1991). "By placing the defendant behind bars, [stalkers are] prevented from committing additional crimes," namely, from continuing to harass and intimidate the targets of their threatening contacts or escalating their threats into physical violence. *Ibid.* Counterman's incarceration allowed Coles to feel safe enough, for long enough, to rebuild her life. J.A. 253. That wouldn't have been possible otherwise.

It's no answer to say that victims may secure their safety by seeking protective orders. See Pet. Br. 41 n.4. Unsurprisingly, stalkers routinely violate protective orders. Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey*, Nat'l Inst. of Just. & Ctrs. for Disease Control & Prevention 14 (Apr. 1998), <https://t.ly/tIc3> (70 percent of protective orders against

stalkers are violated).²³ And because various States link the availability of a protective order to proof of a criminal threat, requiring evidence that the abuser acted with specific intent will make it “even more difficult for victims of domestic violence” to obtain protective orders. Maria A. Brusco, Note, *Read This Note or Else!: Conviction under 18 U.S.C. § 875(c) for Recklessly Making a Threat*, 84 Fordham L. Rev. 2845, 2874–75 (2016).

II. THE STATE’S OBJECTIVE STANDARD PROTECTS VICTIMS WITHOUT OFFENDING THE FIRST AMENDMENT.

Punishing egregious conduct like Counterman’s, while necessary to protect victims and vindicate *their* rights, poses no threat to free speech.

Like fighting words, the messages sent to Coles Whalen for years by her stalker “by their very utterance inflict injury,” form “no essential part of any exposition of ideas,” and “are of such slight social value

²³ Coles is far from the only musician to face similar threats. E.g., Tracy McVeigh, *Lily Allen on Being Stalked: ‘I Was Asleep. He Steamed into the Bedroom and Started Screaming,’* The Guardian (Apr. 16, 2016), <https://t.ly/bIpd> (“It started with a tweet. It ended with a stranger breaking into her bedroom as she slept, intending, he told police later, to stick a knife through her face”); Samantha Whidden, *Kelly Clarkson Stalker Arrested outside Her Home after 12 Restraining Order Violations*, Outsider (Jan. 26, 2023), <https://t.ly/PIIUn>; Brad Callas, *Ariana Grande Stalker Arrested after Violating Restraining Order by Breaking into Singer’s House on Her Birthday*, Complex (June 28, 2022), <https://t.ly/P03W>; Samantha Ibrahim, *Taylor Swift’s Terrifying Stalker History: From Deadly Love Letters to Break-ins*, N.Y. Post (Jan. 11, 2022), <https://t.ly/zXC4p>; Allie Gregory, *Billie Eilish Granted Five-Year Restraining Order against Stalker*, Exclaim (Mar. 8, 2021), <https://t.ly/TJFu>.

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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

As this Court observed long ago, “personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940). No different than fighting words, true threats aren’t defined by the perpetrator’s subjective beliefs but by the harm they inflict on “ordinary citizen[s].” *Cohen v. California*, 403 U.S. 15, 20 (1971).

Requiring the State to prove that a defendant’s statements, taken in context, are objectively threatening to another person strikes the appropriate balance between safeguarding free speech and protecting innocent victims. That standard effectively winnows out protected speech by “forc[ing] jurors to examine the circumstances in which a statement is made.” *Elonis*, 575 U.S. at 766 (Thomas, J., dissenting) (quoting *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012)). The State properly convicted Counterman of stalking Coles based on a relentless, years-long campaign of harassment that included threatening and abusive messages. That conviction—which is consistent with long-existing laws in most States—poses no threat to free speech.

Stalkers like Counterman threaten millions of victims across the country each year. Katrina Baum et al., *Stalking Victimization in the United States*, U.S. DOJ Bureau of Justice Statistics 1, 6–7 (Jan. 2009),

<https://t.ly/-jR>. Threats and intimidation are among their “favored weapons.” *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting in part). Such conduct is “outside the First Amendment,” and States can “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *R.A.V.*, 505 U.S. at 388.

“And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.” *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part). “[W]hether or not the person making a threat intends to cause harm, the damage is the same.” *Ibid.*

This case bears that out. Over the course of a decade, Coles Whalen built a career as a singer and songwriter. J.A. 114. Being vulnerable on stage was essential to her performances. As Coles explained at trial, “part of what I love about being artistic is just being able to get lost and really emote.” J.A. 207. Coles embraced that connection with her audiences, spending hours after shows meeting people. J.A. 424, 430.

But Counterman’s stalking made all that “impossible,” as Coles increasingly feared “who could be out there” in the crowd. J.A. 207. Counterman’s purported “sightings” of her were a warning that she was being followed. J.A. 181, 433. He insisted on contacting her, often repeatedly in a single day, despite her attempts to block his messages. J.A. 129–30, 284–85, 432. He even resorted to trying to “get to” Coles

through her friend and bandmate Kim O'Hara. J.A. 432–33; see also J.A. 280–82. And he harbored unsettling delusions that made Coles especially fearful of what he would do next. J.A. 148, 172. Counterman himself told Coles that his being “unsupervised” meant that “the possibilities [were] endless.” J.A. 84. No doubt.

Coles understandably feared the worst—there’s “no way to protect yourself from something that you can’t be sure of.” J.A. 194–96. She feared not only for her own life, but also for the safety of her friends and family, including her grandmother and younger sister and cousin, with whom she lived. J.A. 198, 431; see also J.A. 422 (“A stalker may also develop jealousy and animosity for persons who are in relationships with the victim, including family members * * * and friends.”).

The constant threat of danger was life altering. J.A. 199. She grew afraid to speak with strangers at performances and was constantly checking in with security. J.A. 431. The performer who played for more than 30,000 people when opening for Joan Jett could no longer get through a small show for 100 people. J.A. 431–34. Before long, she stopped singing in public altogether. J.A. 434. And when she did go out in public, she was always looking over her shoulder and afraid to travel alone; she slept with the lights on at night; and she obtained a concealed carry permit so that she could arm herself with a gun. J.A. 379, 434.

For years, Coles tried to elude Counterman by not responding to his messages and blocking him multiple times. J.A. 432. After his messages escalated and “got so scary”—“Die, don’t need you”; “Fuck off permanently”; “Staying in cyber life is going to kill you,”

Pet. App. 7a; J.A. 85, 111, 177–78—Coles finally asked the State for help. J.A. 433; see also J.A. 185. Coles explained in her victim-impact statement that “my concern is my safety and the safety of my family. This man is a disturbed person. * * * I truly believe I could easily be the victim of serious physical harm at his hands and I’m just asking the court to protect me.” J.A. 435.

Threats like those Counterman repeatedly sent Coles inflict great harm regardless of the perpetrator’s intent in making those threats. Focusing on the threats’ objective impact on the victim, in context, safeguards free speech, protects victims, and keeps communities safe. A contrary rule would unduly burden victims and communities in favor of speech with little or no social value.

* * *

A jury properly put an end to Counterman’s years-long campaign of stalking, harassing, and threatening Coles through thousands of frightening and abusive messages. His actions inflicted grave harm, as Coles feared that this stranger—whom she had never met or even seen—could emerge at any moment from the crowd to hurt her or someone she loved. The constant fear and threat of danger forever changed Coles’ life and cost her years of a music career that she can never get back. “The terror and isolation” Coles experienced was “real and has had real consequences.” J.A. 434. The First Amendment isn’t offended by insisting that Counterman be held responsible for those consequences.

CONCLUSION

For these reasons, the judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted.

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