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 United States Court of Appeals for the Colorado Court of Appeals Division II

BRIEF OF THE NATIONAL FAMILY VIOLENCE LAW CENTER & THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Family Violence Law Center specializes in the intersection of adult and child abuse in the family and its implications for family courts. It serves as the preeminent home for national research and expert support for the growing movement seeking to improve family and other courts' ability to deliver safe and beneficial outcomes for children and other survivors of abuse.

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP), a project of Network for Victim Recovery of D.C., is committed to combatting domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience providing appellate advocacy for survivors of domestic violence and engaging in legal and policy reform efforts on their behalf and has filed many *amicus curiae* briefs in this Court.

Amici have a profound concern for survivors of domestic violence and a deep appreciation for the essential role played by the criminal and civil justice systems in protecting survivors of abuse, both of which are implicated by the Court's ruling in this case.

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[1] No party has authored this brief in whole or in part, and no one other than *Amici*, its members, and its counsel has paid for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The court below affirmed petitioner's conviction under Colorado Revised Statute § 18-3-602(1)(c) for, *inter alia*, stalking and threatening a Colorado musician, a stranger to him. His conviction was based on proof beyond a reasonable doubt that (i) he knowingly and intentionally made threats that, in context, a reasonable person would view as a serious expression of an intent to commit an act of unlawful violence, (ii) a reasonable person would suffer serious emotional distress as a result, and (iii) the victim in fact suffered serious emotional distress. Petitioner claims that the First Amendment provides an additional protection for his threat of domestic violence, namely that the government must also prove that he subjectively intended to threaten the woman he was stalking, but no such requirement is supported by law or reason.

1. Petitioner's argument is premised on a fundamental misunderstanding of First Amendment principles. Except in limited circumstances involving political speech or public defamatory speech about public officials and public figures, the First Amendment does not impose any requirement of proof of subjective intent when the speech at issue inflicts significant immediate injury. The First Amendment permits objective standards to govern the determination of whether speech constitutes fighting words, is obscene, or has a defamatory meaning. (In private figure libel cases involving speech on matters of public concern, liability for publishing a false statement of fact also is governed by an objective standard of reasonable care.) Proof of a speaker's

subjective intent is required only when core political speech on matters of public concern is at issue, such as in incitement cases and public-official and public-figure libel claims. The First Amendment grants no such special protection to individualized threats of violence or other criminal behavior like stalking.

2. Strong historical support for interpreting the First Amendment as permitting an objective evaluation of true threats is found in the common law remedy of "swearing the peace," a remedy well-known to the Framers and still recognized by several states. At common law, as Blackstone explained, persons with "just cause to fear" injury or death by reason of another's "menaces, attempts or having lain in wait for him" could apply for and obtain a "peace warrant," a type of equitable restraining order. 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803). This historical practice of employing an objective standard for equitable restraining orders (referred to herein as protection orders) indicates that the First Amendment was never seen as limiting the government's ability to intervene in response to a speaker's threats of violence if those threats, when viewed in context, were reasonably understood as a serious expression of an intent to harm the victim.

3. Imposing a constitutional requirement of a subjective intent to threaten in criminal threat cases could have far-reaching and deleterious effects on civil protection orders, which are critical to deterring and limiting domestic violence. Despite being civil orders designed to protect, not to punish, most civil

protection order cases involve conduct that is also criminal; many states require proof of a crime to obtain a civil protection order. Accordingly, there is substantial risk that these state law systems will be required to impose new barriers to civil protection orders if petitioner's view of the First Amendment prevails, deeply undermining the effectiveness of protection orders for at-risk domestic violence survivors. Should the Court decide to impose a subjective intent requirement—which it should not—the requirement should be explicitly and strictly limited to criminal cases to limit the deleterious effect on vital systems for civil protection orders.

ARGUMENT

The jury below found beyond a reasonable doubt that petitioner "knowingly":

> [r]epeatedly follow[ed], approache[d], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [the victim], * * * in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [the victim] * * * to suffer serious emotional distress.

People v. *Counterman*, 2021 COA 97, ¶ 12, 497 P.3d 1039, 1044, cert. denied, No. 21SC650, 2022 WL 1086644 (Colo. Apr. 11, 2022) (quoting Colorado Revised Statute § 18-3-602(1)(c)) (some alterations in original).

Petitioner claims that the First Amendment requires more before a stalker can be convicted of threatening a woman, a stranger to him except for his

prolonged fascination with her. According to petitioner, the government also must prove beyond a reasonable doubt that he subjectively intended his objectively threatening statements to be perceived as threats.[2] However, the First Amendment was not intended to provide "breathing space" for threats of violence, especially those targeting a private individual. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 271–72 (1964) (citation omitted); see generally *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) (focus of First Amendment was to "protect the free discussion of governmental affairs").

Petitioner's approach should be rejected. It is a dangerous, unwarranted, and perverse extension of First Amendment principles. If adopted, it not only would subvert the criminal prosecution of true threats of domestic and other violence, but also would frustrate the ability of survivors to obtain even civil legal protections based on criminal threats, which are a staple of abusive relationships.

In short, petitioner's approach would open the floodgates to even greater victimization of abuse survivors than is commonly seen today. The Constitution does not require that result, and this Court should reject it.

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[2] There is no dispute that the government need not show the defendant intended to commit the threatened crime. *Virginia* v. *Black*, 538 U.S. 343, 359–60 (2003) ("The speaker need not actually intend to carry out the threat.").

I. THE FIRST AMENDMENT DOES NOT REQUIRE PROOF OF SUBJECTIVE INTENT IN CASES INVOLVING THREATS OF VIOLENCE.

A central premise of petitioner's constitutional argument is that the First Amendment requires proof of a speaker's subjective intent before speech can be the subject of governmental sanctions. Not so. Except in limited circumstances involving political speech or defamatory public speech about public officials and public figures, the Court has not imposed any requirement of proof of subjective intent in cases where, as here, the very content of the communication inflicts a significant harm that the State rightly seeks to prevent. While speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), individualized threats of violence, like threats of other crimes, are entitled to no such protection. That is especially true here, where petitioner's threatening communications were made privately to his victim and involved no public expression at all.

A. Courts Have Long Used Objective Standards To Distinguish Protected And Unprotected Speech.

The First Amendment has long permitted courts to apply objective standards in myriad contexts, including fighting words, obscenity, and defamation, as well as in private-figure libel cases involving speech on matters of public concern. Threats of

violence made by a stalker are entitled to no greater protection.

In *Chaplinski* v. *New Hampshire*, 315 U.S. 568, 573 (1942), for example, the Court upheld a criminal conviction under a statute prohibiting the use in a public place of words "likely to cause a breach of the peace." Like petitioner, the defendant in that case claimed that the First Amendment required the trial court to permit him to testify about his "mission" at the time he uttered the offending words. *Id.* at 570. The Court rejected the argument, citing with favor the lower court's application of an objective standard for evaluating the speech at issue:

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.

Id. at 573 (quotation and alterations omitted); see generally *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'").[3]

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[3] See *United States* v. *Alvarez*, 567 U.S. 709, 717-18 (2012) (describing the "fighting words" doctrine as among the "historic and traditional categories [of expression] long familiar to the bar" and stating that the "vast realm of free speech and thought * * * can still thrive, and even be furthered, by adherence to

Obscenity prosecutions also are governed by an objective, not a subjective, standard. See generally *Miller* v. *California*, 413 U.S. 15, 24 (1973). In *Hamling* v. *United States*, 418 U.S. 87, 120 (1974), for example, the Court rejected a defendant's argument that a conviction on obscenity charges requires proof both of knowledge of the contents of the material and subjective awareness of the material's obscene character. "It is constitutionally sufficient," held the Court, "that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Id.* at 123; see also *Smith* v. *California*, 361 U.S. 147, 153 (1959) (for obscenity law to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book," not that he had knowledge that its contents were obscene); *Ginsberg* v. *New York*, 390 U.S. 629, 643–44 (1968) (requirement that defendant had "knowledge of" or "reason to know" of the character and content of the material is sufficient); *Rosen* v. *United States*, 161 U.S. 29, 41 (1896) (regardless of whether the defendant "knew or believed that such [material] could be properly or justly characterized as obscene," so long as the content of the work was obscene and the work "was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete").

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those categories") (citations omitted) (brackets in original); see also *Snyder* v. *Phelps,* 562 U.S. 443, 461–62 (2011) (Breyer, J., concurring); *id.* at 464–65 (Alito, J., dissenting).

Finally, in civil and criminal libel cases, an objective standard governs whether a statement has a defamatory meaning—*i.e.*, whether the publication "would hurt the plaintiff in the estimation of an important and respectable part of the community." *Peck* v. *Tribune Co.*, 214 U.S. 185, 190 (1909). See generally *Garrison* v. *Louisiana*, 379 U.S. 64, 65 n.1, 78 (1964); *Beauharnis* v. *Illinois*, 343 U.S. 250, 255 n.5 (1952). "The court determines whether the communication is capable of bearing the meaning ascribed to it by the plaintiff and whether the meaning so ascribed is defamatory in character." RESTATEMENT (SECOND) OF TORTS § 614, cmt. *b* (1977). The jury then determines whether the statement, if "capable of a defamatory meaning, was so understood by its *recipient*." *Id.*, § 614(2) (emphasis added). There is no First Amendment requirement that the speaker subjectively intend the statement at issue to be defamatory.

Other aspects of defamation claims also are governed by an objective standard. Even when the speech at issue is a matter of public concern, a speaker who publishes false statements about a private figure is held to the objective standard of reasonable care, such as negligence. See *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 770 (1986); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

There is no reason, historical or otherwise, to treat true threats differently than these other First Amendment exceptions. Indeed, this Court in *Watts* v. *United States*, 394 U.S. 705, 708 (1969), applied an objective standard in a true threat prosecution. In holding that a "crude offensive method of stating a

political opposition to the President" could not reasonably be construed as a true threat, the Court relied on the context in which the statement was made, the conditional language employed, and the audience's reaction. See *id.* All those factors were considered under the objective standard applied in this case and plainly satisfy constitutional requirements. Moreover, the alleged threatening message in *Watts* was conveyed during a political debate during a small political rally. If an objective, context-based standard was appropriate there, surely that standard is sufficient for petitioner's private threatening messages conveyed only to his victim.

B. Proof Of A Speaker's Subjective Intent Is Needed Only For Core Protected Speech On Matters Of Public Concern.

The Constitution requires proof of a speaker's subjective intent only in cases involving core First Amendment speech on matters of public concern. See, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 446 (1969) (Ku Klux Klan rally protesting alleged governmental "suppress[ion]" of the "Caucasian race"); *Dennis* v. *United States*, 341 U.S. 494, 497 (1951) (Communist Party organizers charged with advocating the overthrow of the United States government); *Abrams* v. *United States*, 250 U.S. 616, 620 (1919) (leaflets decrying "the President's shameful, cowardly silence about the intervention in Russia").

Consideration and comparison of true threats to incitement shows why a subjective intent requirement is not required in true threat cases. A true threat inherently inflicts injury on its intended

audience, *i.e.*, the victim placed in fear. Incitement, in contrast, creates only a possible future risk of harm to third parties against whom an inflamed audience *may* take unlawful action. Because no present, actual injury necessarily exists in incitement cases, proof of subjective intent is a reasonable safeguard against government censorship and suppression of political speech. That is not so in cases of threats of violence toward an individual by stalkers and domestic violence perpetrators, where the injury is suffered immediately upon communication of the threat.[4]

Similarly, in the civil and criminal defamation contexts, only cases involving *public* speech concerning public officials and public figures require proof of the defendant's state of mind and, even then, only with respect to the element of falsity (but not the defamatory meaning) of statements at issue. See *Sullivan*, 376 U.S. at 279–80; *Garrison*, 379 U.S. at 67; *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 134–35 (1967). This special protection exists because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and * * * may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 367 U.S. at 270. There is no comparable commitment to promoting or protecting threats of violence to an individual—especially those communicated privately to the victim—so there is no comparable justification for imposing a subjective intent requirement in cases involving private threats of violence.

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[4] This is true even when a stalker later claims that the treats were not meant to be threatening. Pet. Br. 41, 44.

Nor does *Virginia* v. *Black*, discussed at length in the parties' briefs (see Pet. Br. 24-29; Resp. Br. 23-25), require otherwise. *Black* involved a statutory requirement of proof of subjective intent. 538 U.S. at 347–48. In addition, the statute at issue in *Black* applied to only one specific mode of symbolic speech (cross-burning), a form of expression which the Court found sometimes carries a political message and sometimes is used purely for intimidation. *Id.* at 354–57.

This case, in contrast, involves a statute that applies to threats that, in context, "would cause a reasonable person to suffer serious emotional distress and d[id] cause [the victim] * * * to suffer serious emotional distress," so long as the threat was made knowingly and intentionally. In such cases, "[i]t is constitutionally sufficient that the prosecution show that [petitioner] had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123. To require further proof that he intended the reasonable consequences of his intentional conduct would amount to allowing him to escape punishment simply by claiming that he did not understand the reasonable meaning of his own words. Cf. *id.* at 123–24 (requiring proof of the defendant's subjective awareness of material's obscene character would allow a "defendant to avoid prosecution by simply claiming that he had not brushed up on the law").

II. SINCE THE FOUNDING, ORDERS TO PREVENT THREATENED VIOLENCE HAVE BEEN PERMITTED WITHOUT PROOF OF SUBJECTIVE INTENT.

Evidence of the appropriate First Amendment standard for threats can be found in the robust historical record involving orders enjoining future threatening conduct, which involved both civil and criminal aspects.[5] See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982) ("[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices."). Such orders were well established before the Constitution's adoption and were based on the victim's reasonable basis for fear, not the subjective intent of the alleged threatener.

The power to enter orders preventing threats of violence has its roots in English common law. Blackstone described a remedy that "[w]ives may demand * * * against their husbands; or husbands, if necessary, against their wives." 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE

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[5] See *Beslow* v. *Sargent*, 76 N.W. 1129, 1130 (Minn. 1898) ("[A]t common law * * *, whenever a private person had just cause to fear that another would do him injury, he might demand surety of the peace against such person, on making oath that he was actually under fear of death or bodily harms, and showing just cause for such apprehension, and that he was not doing this out of malice or mere vexation."). See generally *Melson* v. *Tindal*, 1 Del. Cas. 79, 79 (Com. Pl. 1795); *Tackett* v. *State*, 11 Tenn. 392, 393–94 (1832); *Bellows* v. *Shannon*, 2 Hill 86, 86–87 (N.Y. Sup. Ct. 1841).

FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803) (hereinafter *Blackstone*). The cause arose "only from a probable suspicion[] that some crime is intended or likely to happen." *Ibid.* It was a form of "preventive justice" that obliged those from whom there was "probable ground to suspect * * * future misbehavior[] to stipulate with and give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges and securities for keeping the peace, or for their good behavior." *Ibid.*

As Blackstone explained, at common law, anyone with "just cause to fear that another" would "do him a corporal injury, by killing, imprisoning, or beating him," had the right to "demand surety of the peace against such person." *Ibid.* All that was required was that the victim "make oath[] that he is actually under fear of death or bodily harm," and that "he has just cause * * * by reason of the other's menaces, attempts, or having lain in wait for him." *Ibid.*

This procedure was called "swearing the peace against another." *Ibid.* A party who did not produce the required sureties could "immediately be committed till he" did. *Ibid.* The sureties were "forfeited by any actual violence, or even an assault or menace, to the person[s] * * * who demanded" them. *Id.*

In short, during and after the Founding, only "just cause to fear" and actual fear were required to obtain an injunction against threatened violence.

Proceedings to "keep the peace," with elements of both criminal and civil actions, carried over into the

twentieth century. See *Fedele* v. *Commonwealth*, 138 S.E.2d 256, 259 (Va. 1964) ("A proceeding in which security is required to be given for good behavior and to keep the peace is more in the nature of a criminal, or quasi criminal, rather than civil, procedure.") (citing *State ex rel. Yost v. Scouszzio*, 27 S.E.2d 451, 453–54 (W. Va. 1943)); see also *Bradley* v. *Malen*, 164 N.W. 24, 25 (N.D. 1917) ("Such proceeding is not a prosecution for the commission of an offense, but is a criminal or quasi criminal proceeding to prevent the commission of a crime.").

Into the late twentieth century, states continued to apply an objective standard in determining whether an order to keep the peace should issue. See, *e.g.*, *Caldwell* v. *Mullins*, 553 N.E.2d 1083, 1084–85 (Ohio Ct. App. 1990); *State* v. *Gray*, 580 P.2d 765, 766 (Ariz. Ct. App. 1978); *State ex rel. Fortin* v. *Harris*, 253 A.2d 830, 830 (N.H. 1969); *Fedele*, 138 S.E.2d at 258–59; *In re Satterthwaite*, 90 P.2d 325, 325 (Cal. Ct. App. 1939); *Engler* v. *Creekmore*, 119 S.W.2d 497, 498 (Ark. 1938); *Areson* v. *Pincock*, 220 P. 503, 504 (Utah 1923); *Bradley*, 164 N.W. at 25; *Cox* v. *State*, 47 So. 1025, 1026 (Ala. 1908).

This historical practice of employing an objective standard for peace warrants indicates that legal restraints on threatening behavior, based on a purely objective, contextual inquiry into the reasonable fear of the victim of the threat, have always co-existed without implicating the First Amendment. This historical record also strongly supports *Amici*'s particular concern, discussed below, that petitioner's view of the First Amendment would undermine

protection-order practices and reduce legal protections for victims of abuse and terrorizing.

III. A RULING THAT THE FIRST AMENDMENT REQUIRES PROOF OF SUBJECTIVE INTENT TO THREATEN COULD EVISCERATE MODERN CIVIL PROTECTION ORDERS.

While "peace orders" still exist to varying degrees in some states, see, *e.g.*, *Quansah* v. *State*, 53 A.3d 492, 500–01 (Md. Ct. Spec. App. 2012); MD. CODE CTS. & JUD. PROC. § 3-1501 *et seq.*, since 1970, a more targeted type of violence-prevention order has become a dominant remedy specifically for survivors of domestic violence: civil protection orders.[6] Should this Court rule in favor of petitioner by holding that subjective intent to threaten must be proven in criminal threats prosecutions, such a ruling inevitably will carry over to the civil protection order context as well.

Even if the ruling is framed as a purely criminal law doctrine, the criminal law casts a long shadow over civil protection order practice. Indeed, many states require proof of a "crime" before a protective order may issue. See *Civil Protection Orders:*

[6] The types of relationships covered by states' protection-order laws have evolved over time, ranging from marriage to dating relationships to ex-partners and other family members. See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law,* 21 HOFSTRA L. REV. 801, 814–42 (1993) (hereinafter Klein & Orloff). In contrast, peace orders were historically not limited to particular relationships.

Domestic Violence, Statutory Summary Charts, ABA COMM'N ON DOMESTIC VIOLENCE (Mar. 2014) (hereinafter ABA Chart), *available at* https://perma.cc/J9NQ-YGAS (cataloging state laws, and noting how some require finding of crime; see also, *e.g.*, D.C. CODE § 16-1005(c) (requiring judge to find "good cause to believe the respondent has committed or threatened to commit a criminal offense"); FLA. STAT. § 741.30(6)(b) (instructing judge to consider whether "respondent has a criminal history involving violence or the threat of violence"); UTAH CODE § 78B-7-106(5) (permitting protective orders based on criminal offenses). Thus, should subjective intent be framed as a blanket First Amendment requirement, it will restrict protection order proceedings as well. These orders are critical to the deterrence and limitation of domestic violence. As a result, although this case involves a criminal prosecution, a decision in petitioner's favor would inevitably undermine this most critical remedy for victims of abuse.

A. Protection Orders Are Essential To Protect Adults And Children At Risk Of Ongoing Abuse.

While in Blackstone's time peace warrants were available—at least in theory—to husbands and wives, for most of the twentieth century domestic violence was too often treated as a private family matter not appropriate for the criminal justice system. See, *e.g.*, Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Pol'y*, 2004 WIS. L. REV. 1657, 1663–64 (2004) (hereinafter Sack).

As modern society began to turn its attention to this problem, the first and arguably most important legal remedy for domestic violence became the civil protection order. As a leading domestic violence lawyer wrote:

> A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. * * * One that could provide stability and predictability in the lives of women and children. * * * One that could afford economic support so that the abused woman would not be compelled to return to the abuser to feed, clothe and house her children. * * * One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy.

Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary & Recommendations*, 43 JUV. & FAM. CT. J., No. 4, at 23 (1992) (hereinafter Hart).[7]

First invented in the District of Columbia in 1970, civil protection orders eventually were adopted by every State, and are an essential *protective* legal remedy for victims of abuse. See Sack, *supra*, at 1667; *Cruz-Foster* v. *Foster*, 597 A.2d 927, 931 (D.C. 1991)

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[7] Names for these civil protective proceedings vary from state to state, *e.g.*, "civil protection orders," D.C. CODE § 16-1003, "protection from abuse orders," 23 PA. CONS. STAT. ANN. § 6101 *et seq.* This brief uses the terms "civil protection orders" and "protection orders" to refer to all such remedies.

(the IntraFamily Offenses Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil injunctive remedy); see also Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1503–04 (2008) (citations omitted) (hereinafter Goldfarb).

Civil protection orders are designed to offer flexible remedies, tailored to a survivor's particular circumstances. Hart, *supra*, at 23–24. They can enjoin abusers from further abusing the victim, while also containing a variety of other specific family-related remedies, including child support, temporary custody and visitation arrangements, and monetary remedies. See D.C. CODE § 16-1005; Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "the Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1108–09 (2001). In almost all states, when harm seems imminent, a victim of domestic violence can seek an emergency protection order, which is obtained through an *ex parte* hearing and is very time limited. See, *e.g.*, D.C. CODE § 16-1004(b)(2) (noting that "[a]n initial temporary protection order shall not exceed [fourteen] days"); Goldfarb, *supra*, at 1506.[8] A full adversarial

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[8] The *ex parte* process has been repeatedly found to comport with constitutional due process rights. See *Baker* v. *Baker*, 494 N.W.2d 282, 286–88 (Minn. 1992) (finding state's Domestic Abuse Act provision granting *ex parte* protection order fulfills procedural due process requirements when it requires petitioner to show "immediate and present danger of domestic abuse" and to provide an affidavit made under oath stating specific facts, and when "it is undisputed that notice to the opposing party

hearing is required to generate a full civil protection order, which, depending on the state, may extend for one or more years. See ABA Chart, *supra*; see also D.C. CODE § 16-1005(d) (civil protection order may issue for up to two years).

Like peace orders, protection orders are not aimed at punishing potential abusers, but rather at *protecting* victims by enjoining recurring threats and abuse. *Cruz-Foster*, 597 A.2d at 929 (the IntraFamily Offenses Act "was designed to protect victims of family abuse from acts and threats of violence"); see also D.C. COUNCIL, COMM. ON THE JUDICIARY, REPORT ON BILL 4-195, at 2, 10 (May 12, 1982) (adding a private right of action under the IntraFamily Offenses Act in order to enable victims to seek their own civil protection orders and to ensure that the remedy effectively protects victims); *Cloutterbuck* v. *Cloutterbuck*, 556 A.2d 1082, 1086 (D.C. 1989) (the government's interest in protection order proceedings is "to protect potential victims of domestic violence").

Protection orders alone—distinct from their enforcement[9]—effectuate the goal of prevention to a greater degree than may be widely realized. See Goldfarb, *supra*, at 1510–12 (surveying research

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could exacerbate the risk of abuse"), *superseded by statute on other grounds*, *Burkstrand* v. *Burkstrand*, 632 N.W.2d 206, 212 (Minn. 2001); accord *Kampf* v. *Kampf*, 603 N.W.2d 295, 299 (Mich. Ct. App. 1999); *Sanders* v. *Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989); *State ex rel. Williams* v. *Marsh*, 626 S.W.2d 223, 232 (Mo. 1982).

[9] In most states, violations of protection orders are punishable as a misdemeanor and/or contempt of court. See Goldfarb, *supra*, at 1509; Klein & Orloff, *supra*, at 1095–20.

indicating substantial rates of victim satisfaction as well as batterer compliance, although approximately half of batterers violated orders in some (usually non-physical) way); Victoria Holt et al., *Civil Protection Orders & Risk of Subsequent Police-Reported Violence,* 288 J. AM. MED. ASS'N 589, 593 (2002). It has become apparent that an authoritative legal and social statement that abuse is unjust and impermissible, even without sanctions, can powerfully affect both perpetrators and victims. See James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 164–66 (1999) (86% of women said protection order either stopped or reduced the abuse). "For a number of women, the restraining order process seems to have strengthened their sense that the violence was unjust," and the state's intervention reduced the batterer's power over them. *Id.* at 164–65. "[B]y taking action, they had forced a shift in the balance of power." *Ibid.*

Civil protection orders are thus a crucial—if not the most critical—legal remedy for individuals whose intimate partners or family members pose an ongoing threat to their safety and peace of mind. Goldfarb, *supra*, at 1504 (citations omitted).

B. Threats Are The Essence Of Domestic Violence And Most Protection Order Cases.

Abusers use threats as a method of intimidation and control, traumatizing and "deflat[ing] the victim's will to resist." Evan Stark, *Coercive Control*, *in* VIOLENCE AGAINST WOMEN: CURRENT THEORY & PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE &

EXPLOITATION 17, 23 (Nancy Lombard & Lesley McMillan eds. 2013) (hereinafter Stark); see also Klein & Orloff, *supra*, at 859 ("[T]hreats of violence or acts which place the petitioner in fear of imminent bodily harm * * * are acts of domestic violence because they seek to intimidate and control the petitioner."). Some victims of domestic violence may never be physically abused, "yet the threat of physical assault is so pervasive, [they reasonably] fear they will be." Pamela Powell & Marilyn Smith, *Domestic Violence: An Overview*, UNIV. OF NEV. COOP. EXTENSION, at 2 (2011), *available at* https://perma.cc/QW8B-3FD8.

As Justice Alito has rightly recognized: "Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace." *Elonis* v. *United States*, 575 U.S. 723, 748 (2015) (Alito, J., concurring).

Indeed, threats have serious and long-lasting psychological and emotional consequences for victims of domestic violence. In fact, women who are battered generally "identify psychological abuse as inflicting greater distress compared to physical acts of violence." Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NAT'L INST. OF HEALTH, at 2 (2008), *available at* https://perma.cc/6DF9-AC8U. Threats, harassing behaviors, and emotional and verbal abuse are significant contributors to post-traumatic stress symptoms in women who have been abused. *Id.* at 8. Even when assaults have not yet occurred, women

can suffer severe harm from threats because of the uncertainty of whether—or when—they will be carried out.[10] Stalking and harassment pose an "unpredictable yet omnipresent threat * * * [that] may result in hyper-vigilant behavior and symptoms of hyperarousal as a function of the unpredictable nature of the traumatic stressor." *Id.* at 10.

Finally, threats and harassment are an important predictor of actual physical attacks. Such threats often escalate and culminate in acts of physical violence. See *ibid.*; Joanne Belknap et al., *The Roles of Phones & Computers in Threatening & Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL'Y 373, 378 (2012) (indicating that abusers' threats of violence are "highly predictive of actual violence" against their victims, and that "threats of violence by former partners who are * * * stalking are an even better predictor of future violence than the prior violence used by these ex-partners"); Klein & Orloff, *supra*, at 860–61. In fact, one study found that of the women killed by their abusers, 41%–50% had previously been threatened with death, and 39% had been threatened or assaulted with a weapon. Klein & Orloff at 859. Victims' fears in response to threats are well founded.

In short, threats are integral to most domestic violence cases, are highly correlated with physical abuse, and are typically at the top of the list of behaviors that protection orders enjoin. See Lori A. Zoellner et al., *Factors Associated With Completion of*

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[10] It is also important to note that, while the vast majority of victims of domestic violence are female, there are also a small number of male victims of such violence.

the Restraining Order Process in Female Victims of Partner Violence, 15 J. INTERPERSONAL VIOLENCE 1081, 1085–88 (2000) (noting that 48% of women interviewed in a Philadelphia study were prompted to seek a civil protection order after being threatened "in such a way that they believed their life was in danger"); Susan L. Keilitz et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. DEP'T OF JUSTICE (Jan. 1998) (finding that in a study of three jurisdictions in the United States, 99% of women "had been intimidated through threats, stalking, and harassment" before receiving protection orders), *available at* https://perma.cc/K9H9-43TU; Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS & RESTRAINING ORDERS WORK? 214, 237 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (89% of women seeking restraining orders reported threats or property damage).

C. Protection Proceedings Parallel—And Are Influenced By—Criminal Law Norms.

Given that most protection order proceedings involve conduct which is independently criminal,[11] judges in these proceedings are inevitably influenced by and cognizant of the criminal implications of the civil proceedings. In fact, approximately 18 states require litigants to *prove the crime of threats* (albeit with a civil burden of proof) before receiving a *civil* protection order based on threats. See, *e.g.*, D.C.

[11] See Klein & Orloff, *supra*, at 848–74; ABA Chart, *supra*.

CODE § 16-1003(a); N.Y. Fam. Ct. Act § 812(1); 23 PA. CONS. STAT. ANN. § 6102; ABA Chart, *supra*.

Thus, it is not uncommon for judges to reference the criminal law in adjudicating a civil protection order. For instance, in *Amici*'s experience, judges have expressed concern about making findings of child abuse for purposes of visitation or protection orders because they fear their civil finding may expose the respondent to criminal prosecution. Judges sometimes express concern about civil protection proceedings being a substitute for a criminal prosecution.

Similarly, *Amici* have heard of and appeared in cases where judges considered imposing criminal defendants' procedural rights within these civil proceedings. Some courts explicitly adopt constitutional criminal procedures in civil family law proceedings, such as the confrontation right, see *In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing), or the *Strickland* ineffective assistance of counsel standard, see *In re A.P.-M.*, 110 N.E.3d 1126, 1132 (Ill. App. Ct. 2018) ("apply[ing] the same standard utilized in criminal cases to determine a parent's claim of ineffective assistance of counsel appointed under the Juvenile Court Act" in a termination-of-parental-rights case).

Thus, should this Court rule that a threat may not be prosecuted criminally unless the subjective intent of the defendant can be proven—contrary to the

history of the First Amendment and the true threat doctrine—this standard will inevitably carry over to the civil protection order context. Because defendants can be expected in most cases to deny having the requisite subjective intent, imposing such a standard will create a significant hurdle to the issuance of protection orders for the vast majority of victims in appropriate fear for their own and their loved ones' safety. Even though protection orders in no way punish or sanction the persons found to have committed the threats, such preventive and protective measures will be rendered far more difficult to obtain.

D. A First Amendment Ruling In Favor Of Petitioner Would Hamper Protection Of At-Risk Domestic Violence Victims.

Protection order proceedings will also be affected *directly* by any ruling based on the First Amendment in this case. Scholars have noted that judges sometimes restrict the scope of civil protection orders because they are especially concerned with offenders' constitutional and due process rights. Douglas L. Yearwood, *Judicial Dispositions of* Ex-Parte *& Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 161 (2005).

First Amendment challenges in protection order proceedings are not infrequent. See, *e.g.*, *Raymond* v. *Lasserre*, --- So.3d ---, 2023 WL 2362486, at *7 (La. App. 1 Cir. Mar. 6, 2023) ("We likewise find that defendant's threatening and harassing actions were

not the class of actions protected by the First Amendment right of free speech."); *CNN* v. *SEB*, --- N.W.2d ---, 2023 WL 174557, at *5 (Mich. Ct. App. Jan. 12, 2023) (reversing a trial court's grant of a protection order because defendant's conduct was protected by the First Amendment); *Hodges* v. *Pauly*, 17 Wash. App. 2d 1056 (2021) ("Hodges next argues that court-ordered participation in a domestic violence treatment program constitutes 'compelled speech' in violation of his First Amendment rights.").

Courts have used various rationales for rejecting First Amendment defenses, including the assertion that threats are not constitutionally protected in the domestic violence context, *Gilbert* v. *State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) ("We first reject any notion that the First Amendment to the United States Constitution * * * ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse."), that the context, time, and place of respondent's "picketing" render it unprotected, *Kreuzer* v. *Kreuzer*, 761 N.E.2d 77, 80 (Ohio Ct. App. 2001) (finding that although former husband's picketing activities would possibly qualify as protected speech in another context, targeting his former wife's home, located on an unlit back street, after dark, did not qualify as protected speech), and that the Constitution does not create a right to force one to endure speech over their objection in their own home, *Schramek* v. *Bohren,* 429 N.W.2d 501, 506 (Wis. Ct. App. 1988) ("Even if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it" because "[i]ndividuals are

not required to welcome unwanted speech into their own homes and the government may protect this freedom.”).

However, a ruling that the First Amendment requires proof of subjective intent in prosecutions for stalking or domestic abuse threats would jeopardize the protections afforded victims in the cases cited above, and in countless comparable situations. Judges will have more difficulty providing needed protective remedies in the face of these challenges if the standard is heightened—with real-world deleterious effects. Thus, should the Court nonetheless require proof of subjective intent in true threat prosecutions, *Amici* respectfully urge the Court to distinguish and carefully safeguard civil protection orders from its holding.

CONCLUSION

For these reasons, and those in respondent’s brief, the Court should affirm the judgment.

Respectfully submitted,

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