

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

IVAN ISHO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's decision below violated the standard this Court announced in *Counterman*—that true threats prosecutions require a mental state of recklessness—by affirming Petitioner's conviction even though the jury was instructed it could convict based on an objective standard of how a reasonable person would perceive Petitioner's speech?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

- *United States v. Isho*, No. 18-CR-00233, U.S. District Court for the Eastern District of California. Judgment entered June 23, 2022.
- *United States v. Isho*, No. 22-10150, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Jan. 12, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ivan Isho respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The memorandum opinion of the United States court of appeals appears in the Appendix. *See* App-1.

JURISDICTION

Petitioner was convicted of wire fraud (18 U.S.C. § 1343), false impersonation of a federal officer (18 U.S.C. § 912), and stalking (18 U.S.C. § 2261A(2)(B)), in the United States District Court for the Eastern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, and affirmed in a memorandum disposition on January 12, 2024. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2261A

18 U.S.C. § 2261A provides, in part:

Whoever –

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with the intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that –

...

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person ...

shall be punished as provided in section 2261(b) or section 2261B, as the case may be.

STATEMENT OF THE CASE

1. Petitioner is prosecuted for sending thousands of communications to an ex-girlfriend under the federal stalking statute.

At Petitioner's trial, the prosecution presented evidence that Petitioner had repeatedly called and left a substantial number of voicemails for his ex-girlfriend over several years. At the time of their relationship, his ex-girlfriend was married, and eventually she ended the relationship with Petitioner and continued living with her husband. Petitioner was upset that their relationship had ended, and that, according to him, his ex-girlfriend was still engaging in extra-marital relationships with other men besides him.

He expressed his anger and disapproval to her in the voicemails he left her. His communications often used graphic and disparaging language, and Petitioner told his ex-girlfriend she should be ashamed of herself. While his ex-girlfriend testified that she felt scared, intimidated, and ashamed, Petitioner testified that his intent was to vent his anger about the relationship ending, as well as share his view that his ex-girlfriend was ruining her family's reputation and bringing shame on herself by engaging in extra-marital affairs.

2. The jury was not required to find that Petitioner acted recklessly in sending the communications, nor that he had any other subjective intent to threaten the recipient.

The trial court instructed the jury that, to convict Petitioner of stalking, it had to find two elements relevant here—one for Petitioner's mental state and one for the effect of Petitioner's speech.

Regarding Petitioner's mental state, the jury was instructed it had to find that "the defendant acted with the intent to injure, harass, or intimidate [the victim]." In the Ninth Circuit, "harass" covers an intent to "annoy" or "shame" another. *See United States v. Osinger*,

753 F.3d 939, 945 (9th Cir. 2014). The court also instructed the jury about the required effect of Petitioner's statements: "the defendant's course of conduct caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to [the victim.]"

The jury returned guilty verdicts on all counts, including the stalking charge, and Petitioner appealed.

3. The Ninth Circuit affirmed Petitioner's conviction, finding that the district court sufficiently instructed the jury that the stalking statute contained a "mental-state element."

On appeal, Petitioner challenged the jury instruction, arguing it had not required the jury to find a mental state that satisfied the requirement for true threats. Requiring the prosecution to prove that Petitioner had acted with the intent to "injure, harass, or intimidate," this was insufficient given the Ninth Circuit law interpreting "harass," the least egregious of the three ways to violate the statute. "Harass" in the Ninth Circuit included an intent to annoy or shame, *see id.*, and intending to cause someone shame didn't rise to the level of conveying that violence would be used, which was required for a true threat. Further, the part of the instruction allowing for conviction if Petitioner's speech "would be reasonably expected to cause substantial emotional distress" was an objective, reasonable person standard that didn't require the jury to find anything about Petitioner's mental state. Petitioner argued that the jury instructions failed to require the jury to find his conduct rose to the level of an unprotected "true threat," so his prosecution ran afoul of the First Amendment.

The Ninth Circuit affirmed Petitioner's conviction. It assumed that true-threats law applied in Petitioner's case, and held that "the district court did not err in providing its

instructions on the federal stalking charge.” *See* App.-2. The court reasoned that “the instructions contained a ‘mental-state element’ that survives a First Amendment challenge” because the court instructed the jury that Petitioner had the intent not to threaten but to “kill, injure, harass, [or] intimidate” when repeatedly contacting the victim.¹ *See id.*

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit’s opinion below, on the important federal question of the federal stalking statute’s mental state, conflicts with *Counterman*.

As this Court well knows, the First Amendment protects a broad range of speech, and it only permits “restrictions upon the content of speech in a few limited areas.” *Counterman v. Colorado*, 600 U.S. 66, 73 (2023). One of those categories is true threats of violence, where the speech conveys “a real possibility that violence will follow.” *See id.* at 74.

But the need to protect individuals and society from the “profound harms” of unprotected true threats must be weighed and balanced against the First Amendment’s protections. *Id.* at 80. “Prohibitions on speech,” like criminal statutes prohibiting true threats, always “have the potential to chill, or deter, speech outside their boundaries.” *See id.* at 75. In order to “reduce[] the prospect of chilling fully protected expression,” *see id.*, this Court has held that not all true threats are subject to prosecution. *See id.* The First Amendment shields “some true threats from liability.” *Id.*

¹ While the statute includes an “intent to kill,” the jury instructions did not include this alternative way of violating the statute, and included only “injure, harass, or intimidate.”

Last term, the Court held in *Counterman* that to reduce the danger of deterring non-threatening speech, *see id.* at 78, true threats cannot be prosecuted unless the statute contains a subjective intent element. *See id.* In the true threats context, that subjective intent must meet a recklessness standard, *id.* at 82, meaning the speaker is aware that others could see his statements as threatening but he “delivers them anyway.” *See id.* at 79 (citing *Elonis v. United States*, 575 U.S. 723, 746 (2015)).

In *Counterman*, the recklessness mens rea meant that the Court vacated the defendant’s conviction because the Colorado threats statute at issue didn’t require proof of anything about the speaker’s intent when making the statement and instead contained only an objective standard about the effect of the speaker’s words. The prosecution only had to show that a “reasonable person would understand the statements as threats.” *See id.* at 82-83.

The Ninth Circuit’s decision in Petitioner’s case conflicts with *Counterman*. The reasoning this Court employed to vacate the conviction in *Counterman* is directly applicable in Petitioner’s case, as his jury instructions similarly did not require the jury to find any subjective awareness on his part that his communications would be received as a threat. One part of the instruction employed almost the same objective formulation this Court rejected in *Counterman*, as Petitioner’s jury was instructed that it only had to find whether his speech “would be reasonably expected to cause substantial emotional distress.” This is almost the same instruction the jury received in *Counterman*: whether a reasonable person would have viewed the defendant’s messages as threatening. 600 U.S. at 71. In both instances, the

conviction turned on how a reasonable person would perceive the speech, and not on the defendant's subjective awareness of his speech's effect.

Further, the other part of the jury instruction in Petitioner's case also failed to require the jury to find a subjective mens rea for conviction. While the instruction required the jury to find that Petitioner had acted with the intent to "injure, harass, or intimidate," this does not require a subjective awareness on Petitioner's part that his communication will be taken as a threat. At first blush, the listed acts—injure, harass, or intimidate—seem like they might satisfy *Counterman's* standard that the speaker "is aware that others could regard his statements as threatening violence and delivers them anyway." 600 U.S. at 79. But the least of these alternative acts—intending to harass—does not convey any threat of violence, under the Ninth Circuit's interpretation of that word in the statute. In the Ninth Circuit, harassment includes words or actions that cause substantial emotional distress, including shame. *See Osinger*, 753 F.3d at 945. This means that if Petitioner acted with the intent to shame the recipient of his communications, he could be convicted under the statute. But subjective awareness that he was causing shame doesn't rise to the mental state requirement in *Counterman*, that the speaker act recklessly by disregarding his subjective awareness that his statements could be taken as threatening violence. 600 U.S. at 79. There is a large gap between violence and shame, and the jury instruction in Petitioner's case allowed for a conviction based on less than the required mental state for a true threats prosecution.

Accordingly, the Ninth Circuit's decision below conflicts with this Court's decision in *Counterman* and runs afoul of First Amendment principles regarding protected speech. *See* Sup. Ct. R. 10(c).

2. Petitioner's case presents an ideal vehicle for addressing this issue.

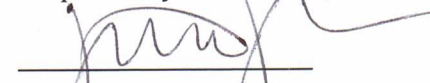
The mental state required for the federal stalking statute, § 2261A, was raised by Petitioner and addressed by the Ninth Circuit below. See App-2. Further, given the trial record in this case, a decision from this Court affirming that the recklessness mental state announced in *Counterman* applies to § 2261A would affect the outcome in Petitioner's case. The jury more than likely convicted Petitioner based on a finding that he acted with the intent to shame his victim. Though Petitioner repeatedly testified that he had no intent to threaten his ex-girlfriend, he stated that he intended to make her feel ashamed and expose her affairs after she broke up with him. His intent to shame his ex-girlfriend would have been for the jury to convict under the jury instructions, but doesn't pass the standard articulated in *Counterman*, as there was no awareness that his communications would be taken as threatening violence. If the Court were to grant the petition, therefore, and hold that the *Counterman* standard applies to §2261A, it would affect the outcome in Petitioner's case.

CONCLUSION

This Court should grant the writ to address the important question of federal law and ensure uniform application of its decision.

Date: March 29, 2024

Respectfully submitted,



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