No. 25-

In the Supreme Court of the United States

MARK JOSEPH UHLENBROCK,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a Federal Cyberstalking prosecution pursuant to 18 U.S.C. § 2261A be used to target repeated communications on the sole basis that they would be "reasonably expected to cause substantial emotional distress" in accordance with the First Amendment?

2. Whether a defendant's conviction under § 2261A may be affirmed by an appellate court based on a defamation theory not charged in the indictment or submitted to the jury.

3. Whether the Fifth Circuit's defamation finding in *Uhlenbrock* conflicts with the *mens rea* standards articulated in *Counterman v. Colorado* and *Garrison v. Louisiana*.

RELATED PROCEEDINGS

United States v. Mark Joseph Uhlenbrock, No. 5:16-cr-389-XR (September 1, 2023), United States District Court for the Western District of Texas.

United States v. Mark Joseph Uhlenbrock, No. 5:21-cr-84-XR (September 6, 2023), United States District Court for the Western District of Texas.

United States v. Mark Joseph Uhlenbrock, No. 23-50664 consolidated with 23-50714 (December 31, 2024), United States Court of Appeals for the Fifth Circuit.

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Petitioner Mark Joseph Uhlenbrock respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit issued in the appeal of his conviction in the Western District of Texas.

INTRODUCTION

The United States Government prosecuted, and a jury convicted Mark Uhlenbrock of cyberstalking under the theory that his communications should have reasonably been expected to cause his ex-romantic partner substantial emotional distress. The conviction stemmed from a series of public Reddit posts containing non-consensually published pornographic photos of his ex-romantic partner. These posts were not addressed to the complainant who only became aware of their existence when a family friend alerted her to them. The posts did not contain the complainant's current name, or threats of violence, and there was no

evidence that she was ever identified or publicly linked to these postings.

Still, under the second prong of § 2261A—which criminalizes courses of conduct that "cause[] or would be reasonably expected to cause substantial emotional distress" delivered with an "intent to harass or intimidate"—a jury found that these postings constituted criminal stalking.

On appeal, Uhlenbrock argued that the District Court erred by denying his First Amendment motion to dismiss and that there was insufficient evidence to support a stalking conviction. His appeal relied heavily on *Counterman v. Colorado*, 600 U.S. 66, (which concerned a parallel state stalking statute that prohibits repeated communications that "cause [a] person to suffer serious emotional distress"), arguing that a "reasonable expect[ation] [of his postings] caus[ing] substantial emotional distress" was not a sufficient basis for which to exclude the communications from First Amendment protection. In *Counterman*, this Honorable Court reversed and remanded a defendant's stalking conviction under an emotional-distress prong because the postings were not found to be a true threat that met a minimum *mens rea* of recklessness.

Although Uhlenbrock's postings (as the Government conceded) did not convey a true threat, the Fifth Circuit affirmed his stalking conviction by going outside the trial court record: finding that Uhlenbrock's Reddit posts constituted "unprotected defamation". The Fifth Circuit made this finding by applying the RESTATEMENT (SECOND) OF TORTS § 558 which defines defamation as requiring a "false […] statement concerning another" made with "fault amounting to at least negligence on the part of the publisher." App. 6a.

Based on that standard, the court found that Uhlenbrock's posts were false, that he knew they were false, that they concerned the complainant, and that they were defamatory. *Id*., at 6a–8a. The Fifth Circuit made this finding without citing any precedent that supported the use of defamation to justify a cyberstalking prosecution and without citing any trial court finding of defamation.

In addition to being incorrectly decided at the Appellate Court level, the Fifth Circuit's decision provides this Honorable Court an opportunity to resolve an emerging split in the circuits and among State Courts of Appeal regarding the proper application of *Counterman* to stalking prosecutions. While the Fifth Circuit ruled that Uhlenbrock's stalking conviction could be affirmed on the basis of defamation, other courts have since read *Counterman* to require that stalking speech be proscribed according to a true-threat standard. Following *Counterman*, the Second Circuit held that for § 2261A(2)(B) "to be constitutionally applied the government had to prove that [the defendant] communicated and intended to communicate true threats." *United States v. Dennis*, 132 F.4th 214 (2d Cir. 2025). The Second Circuit found that the First Amendment "protects much speech causing, and intending to cause, worry or distress, even substantial emotional distress" and if such a thing were not limited by a true-threat qualification (as Uhlenbrock's was not) it would constitute error. *Id*., at 236.

The Ninth Circuit, in contrast—affirming a 2261A conviction of a defendant who made "threats to his ex-wife's coworkers" and "disseminated nude photos of his ex-wife without consent"—ruled, in an unpublished decision, that the "cyberstalking statute cover[ed] more than true threats" and thus the nude

photos the appellant had disseminated were "relevant to the charge, even if they were not threatening." *United States v. Crawford*, No. 23-2532, 2025 U.S. App. LEXIS 10382 (9th Cir. 2025) (unpublished).

With *Uhlenbrock*, the Fifth Circuit diverges from both, establishing that defamation can be used as a basis to proscribe a defendant's "stalking" speech. According to the Fifth Circuit's *Uhlenbrock* opinion a defendant does not even need to contact a complainant directly to be charged with "stalking." Posting *about* someone online repeatedly is enough to qualify as "stalking" if the posts can reasonably be expected to cause substantial emotional distress and those postings are also deemed to be defamatory by an appellate court.

In 2025, speech is largely conducted on social media and other interactive platforms. This speech is often hurtful and insulting as Americans divide into their various political and social tribes. The Fifth Circuit's opinion is dangerous because it allows those different tribes to prosecute each other for stalking offenses if their speech is reasonably expected to cause substantial emotional distress. However, the *Uhlenbrock* opinion offers this Honorable Court an opportunity not only to resolve a split between the federal appellate courts, but also to stop the decision's potentially harmful unintended consequences. The Fifth Circuit's decision suggests that an alleged stalker whose conduct consists of "repeated defamations" would be held to a lesser *mens rea* standard for his posts (negligence) than a stalker who violently threatens his victim; perversely, this gives potential stalkers an incentive to threaten violence rather than make negligently defamatory posts online concerning a victim. Thus, granting Uhlenbrock's writ of certiorari

will both provide courts further clarity as to how to treat criminal stalking cases that involve speech, resolve a split in appellate court opinions, and serve to avoid the potential harmful consequences of the *Uhlenbrock* decision.

OPINION BELOW

The Fifth Circuit's opinion is reported at 125 F.4th 217 and is reproduced at App. 1a–19a. The Fifth Circuit's order denying rehearing *en banc*, App. 20a, is unpublished. The District Court's order denying Uhlenbrock's first motion to dismiss, App. 22a–26a, is unpublished.

JURISDICTION

The Fifth Circuit entered its judgment on December 31, 2024, and denied rehearing *en banc* on January 28, 2025. On April 22, 2025, Justice Samuel Alito extended the time to petition for a writ of certiorari to May 28, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law […] abridging the freedom of speech[…]."

Section 2261A(2)(b) of Title 18 of the United States Code provides, in relevant part: "Whoever […] with the intent to kill, injure, harass, intimidate […] uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce […] to engage in a course of conduct that […] causes, attempts to cause, or would be reasonably expected to cause

substantial emotional distress to a person […] shall be punished[…]"

STATEMENT

I. Legal Background.

The Fifth Circuit's *Uhlenbrock* decision creates a dangerous First Amendment precedent allowing the Federal Government to prosecute someone for cyberstalking when they engage in non-threatening behavior that is reasonably expected to cause substantial emotional distress. The decision, however, gives this Honorable Court the opportunity to provide clear guidance as to how this prong of the cyberstalking statute can be prosecuted consistently with the First Amendment, and to update cyberstalking jurisprudence so that it can be consistently applied in the internet age.

A. *Uhlenbrock* Conflicts with Prior Supreme Court Decisions and Exposes a Split in Federal Appellate Courts.

United States v. Stevens, 559 U.S. 460 (2010) held that the Government cannot "imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." *Id.*, at 471. The First Amendment only permits restrictions on "historic categories of speech" that include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.*, at 460.

R. A. V. v. St. Paul, 505 U.S. 377 (1992) provided guidance as to how laws should target these historically unprotected categories; the categories "are not entirely invisible to the Constitution[] and [cannot] be made the vehicles for content discrimination

unrelated to their distinctively proscribable content." *Id.*, at 383-4. Instead, communications that fall within these unprotected categories should be regulated "*because of their constitutionally proscribable content*." *Id.*, at 384.

The Federal Stalking statute, 18 U.S.C. § 2261A on its face targets "conduct," but the courses of conduct that have been prosecuted under the statute often criminalize repeated communications (given that the statute targets uses of the "mail[…], interactive computer service[s], electronic communication service[s] [and] electronic communication system[s] of interstate commerce"). *Id.*, at (2). Conduct deserves First Amendment protection when it is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 937, 404 (1989) (citation omitted). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 4 (2010) (the "conduct triggering coverage under the statute [can often] consist[] of communicating a message").

Courts have acknowledged that the emotional-distress prong of § 2261A—which requires that the jury find a defendant's "intent to harass" or "intimidate" and that the speech was "reasonably expected to cause substantial emotional distress"—may in certain circumstances reach protected speech. *See United States v. Sryniawski*, 48 F.4th 583, 587 (8th Cir. 2022) ("[e]ven where emotional distress is reasonably expected to result, the First Amendment prohibits Congress from punishing political speech intended to harass or intimidate in the broad senses"); *United States v. Ackell*, 907 F.3d 67, 77 (1st Cir. 2018) ("acknowledging that § 2261A(2)(B) could have an unconstitutional application"); and *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) ("rare application[s] of the

statute that offend[] the First Amendment 'can […] be remedied through as-applied litigation'").

Courts have offered differing approaches to deal with First Amendment challenges to the cyberstalking statute, which by a plain reading could sweep up examples of protected speech. Some appellate courts have tried to salvage the law by offering narrow readings of § 2261A's express terms to guarantee that the emotional-distress prong can't reach protected speech. *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022), for example, analyzed the terms "harass" and "intimidate" within the cyberstalking statute's intent element, and stated that narrow readings of these terms could "save the statute." *Id.*, at 77-80. Thus, for the Third Circuit, "[t]o 'intimidate,' [meant that] a defendant must put the victim in fear of death or bodily injury. And to 'harass' he must distress the victim by threatening, intimidating or the like." *Id.*, at 80.

This approach corresponds to other appellate-court interpretations of the cyberstalking statute. The First Circuit, for example, narrowed the scope of the statute by ruling that the term "substantial emotional distress" should not be taken out of context from the rest of the statute's terms "kill, injure, harass, or intimidate." *United States v. Sayer*, 748 F.3d 425, 435 (1st Cir. 2014).

Similarly, the Fifth Circuit (previous to *Uhlenbrock*) also provided a narrowing construction to the statute's potentially unconstitutional scope, stating that § 2261A could not impact protected speech because "to violate the statute one must both intend to cause victims serious harm and in fact cause a reasonable fear of death or serious bodily injury." *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015).

These courts' approaches—narrowing the cyberstalking statute's scope to require fear of death or serious bodily injury—naturally gear the statute to target certain forms of unprotected speech. The Third Circuit and the First Circuit, for example, cite *Black*—a leading case in describing the objective criterion of a true threat—to elaborate § 2261A's reference to intimidation within the statute. *United States v. Yung*, 37 F.4th 70, 78 (3d Cir. 2022) (emphasis theirs) ("intimidation in the constitutionally proscribable sense of the word … places the victim in fear of bodily harm or death"); *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018) (cleaned up) ("interpreting the statute to avoid a serious constitutional threat […] points to reading the statute as referring to '[i]ntimidation in the constitutionally proscribable sense of the word[, which] is a type of true threat"). *See Virginia v. Black*, 538 U.S. 343 (2003).

The Supreme Court, in *Counterman v. Colorado*, 600 U.S. 66 (2023), concerning a prosecution under the emotional-distress prong of Colorado's stalking statute, reversed and remanded the conviction there because the defendant's speech did not meet a true-threat standard. While the principal ruling in *Counterman* may have been to define the necessary *mens rea* (recklessness) required to make a threat a "true threat," this decision took place in the context of a stalking conviction, providing further credence to the interpretation that stalking prosecutions that target pure speech must contain speech amounting to a true threat, ie. "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Counterman v.*

Colorado, 600 U.S. 66, 70 (2023); *Virginia v. Black*, 538 U.S. 343, 359 (2003).

Following *Counterman*, *United States v. Dennis*, 132 F.4th 214 (2d Cir. 2025) remanded the specific counts of the defendant's conviction that did not represent a true threat and stated that a properly instructed jury would have been read an instruction to require a finding of a true threat. *Id.*, at 3. For the Second Circuit, designating the prosecuted speech as a true threat resolved "concerns that might arise from construing the statute's intent and causation requirements too broadly." *Id.*, at 22. Requiring that the jury find the speech to be a true threat to prosecute communications under the statute was consistent with the "bedrock principle underlying the First Amendment i.e.. that government may not prohibit speech because some persons find its content 'offensive or disagreeable.'" *Id.*, at 24. At the same time, Dennis's opinion explicitly did not consider how other classes of unprotected speech might (or might not) be applicable to stalking: "Because the parties here focus on the government's proof of 'true threats', we need not decide in what circumstances other classes of speech falling outside First Amendment protection can support a cyberstalking conviction under § 2261A(2)(B)." *Id.*, at 24, n.6.

The D.C. Circuit meanwhile adopted a more open-ended approach in attempting to reconcile cyberstalking prosecutions of speech with the First Amendment. Concerning a D.C. statute that prosecutes courses of conduct that involve communications "one knows or should know would reasonably cause another to suffer emotional distress," the D.C. Circuit held that the only way to "save the District's stalking statute from unconstitutionality" was to require that any speech

prosecuted under the statute also "fit[] within the well-defined and narrowly limited classes of speech [that include] threats, obscenity, defamation, fraud, incitement, and speech integral to conduct." *Mashaud v. Boone*, 295 A.3d 1139, 1144 (D.C. Cir. 2023). Thus, a type of 'parallel approach' to stalking-speech prosecutions was established by the D.C. Circuit: speech needed to violate the law and at the same time fit one of these unprotected speech categories. Without this key second step, in the view of the D.C. Circuit, the stalking law had "glaring" constitutional problems because people should "generally [be] allowed to say things that they know or should know [would] cause others emotional distress." *Id.*, at 1144.

Compare the approaches of the D.C. Circuit and the Second Circuit to that of the Ninth Circuit. Affirming a § 2261A conviction of a defendant who made "threats to his ex-wife's coworkers" and "disseminated nude photos of his ex-wife without consent," the Ninth Circuit ruled, in an unpublished decision, that the "cyberstalking statute cover[ed] more than true threats" and thus the nude photos the appellant had disseminated were "relevant to the charge, even if they were not threatening." *United States v. Crawford*, No. 23-2532, 2025 U.S. App. LEXIS 10382 (9th Cir. 2025) (unpublished). *Crawford* follows the logic of the Ninth Circuit's previous ruling that the appellant's cyberstalking speech was unprotected because it was "'integral to criminal conduct' in [that it was] intentionally harassing, intimidating or causing substantial emotional distress." *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014).

B. State Appellate Courts Are Also Conflicted After *Counterman*.

State Courts of Appeal are equally conflicted as to how *Counterman* might be applicable to their own state stalking statutes[1] and anti-harassment laws. These state appellate decisions range from holding stalking speech to a true-threat standard to deeming *Counterman* not applicative to stalking courses of conduct except in limited circumstances: Nevada employed a true-threat test as suggested by *Counterman* when affirming a stalking conviction involving repeated postings to Twitter. *Carter v. State*, 553 P.3d 1001 (Nev. 2024). Wisconsin's highest court invalidated a law that prohibited "harassing" speech because it employed a standard less demanding than that required in *Counterman*. *Kindischy v. Aish*, 2024 WI 27, No. 2020AP1775 (Wis. 2024). Delaware meanwhile interpreted *Counterman* to demand that their stalking statute (when applied to speech-prosecutions) be revised to include a subjective-intent requirement. *Jewell v. State*, 2025 Del. LEXIS 124, No. 394 (Del. 2023). Other decisions, by contrast, have avoided

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[1] State stalking statutes can vary greatly from state to state in terms of both their harm and their intent provisions. *Cf. e.g.* New Mexico's harm provision requiring "reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint," N.M. STAT. ANN. § 30-3A-3, with e.g. Wyoming's broader requirement of "a reasonable person […] suffer[ing] substantial emotional distress; […] substantial fear for their safety or the safety of another person; or [….] substantial fear for the destruction of their property." WYO. STAT. ANN. § 6-2-506; and *e.g.* Colorado's statute containing no express intent requirement other than "reasonable person" standard, COLO. REV. STAT. ANN. § 18-3-602, versus Massachusetts' requiring a "willfully and maliciously engag[ing] in a knowing pattern of conduct". MASS. GEN. LAWS ANN. CH. 365 § 43(a).

Counterman and found that a true-threat standard did not apply to the particular stalking prosecutions in question, with Colorado and Maine ruling that these cases did not rest on content-based speech restrictions that implicated the First Amendment. *People v. Crawford*, 2025 CO 22, No. 24SA226 (Colo. 2025); *State v. Labbe*, 314 A.3d 162 (Me. 2024), at 30. In sum, the state-court decisions after *Counterman* reveal a fractured doctrinal field for prosecutions of stalking speech, with conflicting guidance as to when a categorical approach to speech proscription—or a true-threat standard for criminalized speech—is to be utilized.

C. The Fifth Circuit's *Uhlenbrock* Opinion Will Exacerbate the Disagreements Between the Various Appellate Courts and Substantially Lower the Bar for What Can Constitutionally Be Prosecuted as Cyberstalking.

The Fifth Circuit's affirmation of Uhlenbrock's cyberstalking conviction exacerbates disagreements present in both the federal appellate circuits and in state appellate courts described above. Uhlenbrock's conviction was affirmed by the Fifth Circuit on the basis that his speech constituted unprotected defamation; thus, while § 2261A is not an anti-defamation law on its face, here, for the 5th Circuit, it is functioning as one. This represents a new frontier in criminal prosecutions for 'objectionable' speech. Criminal defamation was more common in the 19th and early 20th centuries but was eventually eclipsed by the preference for the civil remedy. *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964). "[U]nder modern conditions […] it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation."

Ibid. There was also no federal circuit-court jurisdiction for common-law libel cases, because there was no statute prohibiting libel or defamation in the federal code. *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812).

When evaluating state prosecutions of criminal libel, the Supreme Court established a standard for prosecuting criminal defamation in *Garrison v. Louisiana*: criminal defamation must be committed with actual malice; further, criminal libel should only be prosecuted in cases with "speech likely to cause a breach of the peace and 'calculated' to do so." *Id.*, 379 U.S. 64, at 69.

The Fifth Circuit's application of defamation for the first time on appeal also creates procedural problems and dangers. Criminal prosecutions of defamation and libel have not historically been disguised within a prosecution for something else entirely: all parties should be aware that libel is the factual element to be proved or disproved by the jury. *Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952). Critically, the defense should be able to raise the defense of truth so that the "courts below [can] consider[] and dispose[] of this offer in terms of ordinary criminal libel precedents." *Ibid*. *See also United States v. Keerikkattil*, 313 A.3d 591, 604-5 (D.C. Cir. 2024) (declining to make a defamation finding at appellate-court level because it would involve "factual determinations that the jury needed to make").

Thus, the Fifth Circuit in its *Uhlenbrock* opinion exacerbated a split in the Federal Appellate Circuits and created a new justification for prosecutions under § 2261A by making a defamation finding at the Appellate Court level. This Honorable Court should grant

the Writ of Certiorari so that it can mend the split in the circuits, reverse an incorrectly decided matter, and avoid the significant consequences that may be coming as the result of using § 2261A as a criminal defamation statute.

II. Proceedings Below.

Uhlenbrock was charged with a count of stalking, under § 2261A(2)(B), for, "with the intent to kill, injury, harass, intimidate […] another person [,][…] us[ing] [an] interactive computer service and electronic communication service […] to engage in a course of conduct that caused, attempted to cause, or would be reasonably be expected to cause emotional distress to that person." C.A. ROA.23-50714 at 14.

Uhlenbrock's conduct consisted of his posting nude photos and videos of the complainant to public Reddit subreddits dedicated to the sharing of pornographic materials, without her consent. Alongside some of the images were fantasy stories told in the first person, imagining exhibitionist behavior and masturbation. It was uncontested that Uhlenbrock never contacted his ex-partner and that his ex-partner took no steps to notify the various platforms that Uhlenbrock was posting non-consensual pornography or harassing material.

Uhlenbrock filed two motions to dismiss the indictment on First Amendment grounds, which the trial court denied. *Id.*, at 64-79, 105-9, and 225-8. The Government, in its response to the first motion to dismiss, briefly raised the defamation issue as one of their arguments as to why Uhlenbrock's First Amendment claim should be denied. *Id.*, at 98. Still, the trial court denied Uhlenbrock's motion when the judge below concluded that the statute did not prosecute

protected speech as applied to the defendant, and therefore made no ruling on the "content of any 'stories' the [d]efendant may have published." App. 26a; C.A. ROA.23-50714, at 108.

After a jury trial, and a Rule 29 motion for acquittal, the jury convicted Uhlenbrock of cyberstalking.

On appeal, Uhlenbrock sought review of his First Amendment challenge. The Fifth Circuit agreed that he was being prosecuted for his speech; however, the panel affirmed his conviction by finding that his speech constituted unprotected defamation. App. 6a-8a.

The Fifth Circuit cited the RESTATEMENT (SECOND) OF TORTS § 558 (Am. Law Inst. 1977) to evaluate Uhlenbrock's speech, requiring that his communications represent:

> (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm. App. 6a, citing RESTATEMENT (SECOND) OF TORTS § 558 (Am. Law Inst. 1977).

The panel made several factual findings that were not present in the trial record, writing:

> Uhlenbrock's speech was false. He claimed that YT had authored his internet posts, though she had not. [...] He also falsely called her an "addicted" "exhibitionist." [...] His speech also

> "concern[ed]" YT. [...] the images and videos showed her face. He signed the posts with her real maiden name, real occupation, real employer, and real state of residence. People could, and did, link the posts to YT. […] He "published" his speech to a third party when he posted to the internet. He knew that his statements were false. And his speech was actionable without "special harm" because it imputed "lascivious or grossly immodest conduct" to her. *Id.*, at 6a-8a.

Thus, Uhlenbrock's conviction was affirmed. *Id.*, at 19a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided Over The Scope Of A Fundamental Constitutional Right When It Is Applied To The Federal Cyberstalking Statute.

Circuit courts have commonly acknowledged the risk that anti-stalking statutes—particularly those criminalizing conduct that causes "emotional distress"—could infringe on constitutionally protected speech. *See United States v. Sryniawski*, 48 F.4th 583, 587 (8th Cir. 2022); *United States v. Ackell*, 907 F.3d 67, 77 (1st Cir. 2018); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012); and *Mashaud v. Boone*, 295 A.3d 1139, 1143 (D.C. Cir. 2023).

In addressing this concern, courts have advanced divergent approaches to reconciling the First Amendment's protections with statutes that penalize "emotional[ly] distress[ing]" speech made with the intent to harass or intimidate. The resulting split has created a

fragmented and unpredictable legal framework governing the First Amendment and the prosecution of speech-based stalking offenses.

Several circuit courts have chosen to limit the scope of speech prosecutions by narrowly construing the statute's express terms, effectively aligning the statute's reach with true threats. The Third Circuit required that the statute's term "intimidate" within the intent provision involve fear of death or bodily harm, and "harass" involve threats or similarly severe conduct. *United States v. Yung*, 37 F.4th 70 (3d Cir. 2022). The First Circuit and (before the *Uhlenbrock* decision) the Fifth Circuit narrowly read the terms of § 2261A to require intent to cause serious harm and an actual fear of bodily injury in a victim. *United States v. Sayer*, 748 F.3d 425, 435 (1st Cir. 2014); *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018); *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015). Following this Court's ruling in *Counterman* (which remanded a stalking conviction for not including an intent requirement within the jury's true threat instruction), the Second Circuit also required that the counts of a stalking conviction that did not contain a true threat within the prosecuted speech be reversed. *United States v. Dennis*, 132 F.4th 214 (2d Cir. 2025).

Other circuit courts, however, have allowed broad reading of the "emotional distress" prong of the stalking statute in speech prosecutions. For these courts, emotionally distressing speech can be prosecuted so long as the speech also happens to fall into any one of historical categories for unprotected speech. The D.C. Circuit held that any speech prosecuted under the district's stalking statute must also "fit[] within the well-defined and narrowly limited classes of speech [of] threats, obscenity, defamation, fraud, incitement, and

speech integral to conduct." *Mashaud v. Boone*, 295 A.3d 1139, 1144 (D.C. Cir. 2023). Now, with *Uhlenbrock*, the Fifth Circuit has aligned itself with this interpretation, affirming a stalking conviction for a course of conduct consisting of "emotional[ly] distress[ing]" speech that was unprotected only because it was also found to be defamatory.[2] App. 6a-8a.

A third approach skirts the question entirely by deeming all speech prosecuted under § 2261A unprotected per se, categorizing the speech uniformly as "integral to criminal conduct." The Ninth Circuit classified a defendant's stalking speech as "integral to criminal conduct" in that it was "intentionally harassing, intimidating or causing substantial emotional distress to [a victim]." *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014). *See also United States v. Crawford*, No. 23-2532, 2025 U.S. App. LEXIS 10382 (9th Cir. 2025) (unpublished) (finding that *Counterman* does not disturb a ruling that the defendant's speech could be proscribed as "integral to criminal conduct"). The Eighth Circuit proscribed a defendant's speech from First Amendment protection on a similar basis; his communications were "integral to this criminal conduct as they constituted the means of carrying out his extortionate threats." *United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012).

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[2] The Fifth Circuit differs with the D.C. Circuit, however, about whether an appellate court can make factual determinations so as to proscribe speech according to the categorical exclusions for the first time on appeal without a developed record. *United States v. Keerikkattil*, 313 A.3d 591, 604-5 (D.C. Circuit 2024). In a case such as this, the D.C. Circuit would only affirm the stalking conviction by imagining the course of conduct if it had been presented to the jury without the "content" of his communications. *Id.*, at 605-9.

This reasoning, however, is often tautological: the speech is criminalized because the statute deems it so. Courts themselves have cautioned against this logic, emphasizing that the "integral to criminal conduct" exception applies only where the speech is part of a broader, independently unlawful course of conduct. *See United States v. Syrniawski*, 48 F.4th 583, 88 (8th Cir. 2022) ("to qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech"); *United States v. Osinger*, 753 F.3d 939, 950 (9th Cir. 2014) (the defendant "committed the offense by engaging in both speech and unprotected non-speech conduct") (Watford, J., concurring). Thus, for a defendant like Uhlenbrock—whose course of conduct consisted exclusively of public postings to Reddit—an "integral to criminal conduct" designation is inappropriate.

* * *

The courts of appeals are sharply divided on how to handle cyberstalking prosecutions involving speech—divisions that have only deepened in the wake of *Counterman*. This Court's intervention is necessary to clarify the scope of the First Amendment's protections in the context of emotional-distress stalking prosecutions.

II. The Fifth Circuit's *Uhlenbrock* Decision Is Wrong And Conflicts With Supreme Court Precedent.

The Fifth Circuit's decision is wrong on multiple levels: First, prosecuting speech because it "reasonably could be expected to cause substantial emotional distress" flouts the precedent of this Court. Second, the Fifth Circuit's defamation finding was erroneous

according to historical precedent for criminal defamation cases and was unsupported by the trial record. Finally, the *mens rea* standard of negligence pointed to by the Fifth Circuit in its defamation finding may perversely encourage potential stalkers who employ speech to engage in threatening behavior rather than restricting their speech to defamation because the *mens rea* standard for true threats (recklessness) is now more rigorous than that for criminal defamation.

A. Cyberstalking Prosecutions That Target Speech Exclusively Based on a Reasonable Expectation of Substantial Emotional Distress Violate First Amendment Jurisprudence.

Uhlenbrock's prosecution assumed that his postings warranted criminalization because they were emotionally distressing and were committed with an intent to harass. C.A. ROA.23-50714 at 14. The Fifth Circuit's affirmation of the conviction on this basis (with an ancillary finding of defamation to provide constitutional authority to their decision) conflicts with this Court's precedent.

The First Amendment prohibits the Government from policing speech based on its perceived offensive or outrageous character. Speech that might be seen as distasteful may be in fact still protected by the First Amendment. *See e.g. Snyder v. Phelps*, 562 U.S. 433, 448 (2011); *United States v. Stevens*, 559 U.S. 460 (2010). Prohibiting speech based on the emotional reaction of a reader is antithetical to the First Amendment. *See Forsyth County, Ga. V. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). § 2261A's selecting of speech for criminal prosecution

based on the sole criteria of whether it "causes […] or would be reasonably expected to cause substantial emotional distress" would violate this bedrock principle. *See Matal v. Tam*, 582 U.S. 218, 223 (2017) ("preventing speech expressing ideas that offend […] strikes at the heart of the First Amendment").

Thus far, circuit courts have declined to use the "strong medicine" of overbreadth to invalidate the statute's emotional-distress prong; a "limiting construction" may be preferable. *Broadrick v. Oklahoma*, 413 U.S. 601, 613-4 (1973). § 2261A may be saved if its intent provisions—that the speech be delivered "with the intent to kill, injure, harass, intimidate"—are read narrowly in speech prosecutions so that the statute's reach is limited to the historical categories of unprotected speech. *See United States v. Stevens*, 559 U.S. 460 (2010).

Counterman v. Colorado, 600 U.S. 66 (2023), provided a model for analyzing speech prosecuted under an emotional-distress prong of a cyberstalking statute: the speech should be proscribed as a true threat because this would indicate the gravity of the fear and intimidation intended and induced by the stalking speech and would ensure that it was commensurate to the level of threatening speech that is required by the First Amendment. *Ibid*. *See also Virginia v. Black*, 538 U.S. 343, 359 (2003).

The Fifth Circuit chose to proscribe Uhlenbrock's speech on an alternative basis (defamation), but proscription along those lines was nowhere suggested within the actual provisions of the stalking statute or in the indictment. App. 6a-8a; C.A. ROA.23-50714 at 14.

Contrary to the Fifth Circuit's decision, this Court has indicated that unprotected speech should be targeted for prosecution solely because of its unprotected features. *R. A. V. v. St. Paul*, 505 U.S. 377 (1992). Here, however, the defamation finding was ancillary to the original stalking prosecution and only made by an appellate court so it could retroactively provide supposed imprimatur to the lower court's judgment. If the Fifth Circuit's decision is allowed to stand, the stalking statute will begin to function as a "catch-all enactment" used to prosecute emotionally distressing speech on an arbitrary basis. *Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952). *See also Grayned v. City of Rockford*, 408 U.S. 104 (1972) (cautioning against arbitrary enforcement of speech restrictions).

B. The Fifth Circuit's Defamation Finding for the First Time on Appeal Independently Violates Due Process, Robbing Uhlenbrock of the Key Legal Safeguards That Ensure Defamation Remains a Duly Proscribed Category Outside First Amendment Protection.

When the trial court denied Uhlenbrock's pre-trial motions to dismiss, it declined to opine on whether his postings constituted unprotected defamation; the lower court implied that the speech was unprotected because it was integral to criminal conduct:

> This Court makes no conclusions about the content of any "stories" the Defendant may have published. *See United States v. Gonzalez*, 905 F.3d 165, 192 (3d Cir. 2018) ("As our sister Courts of Appeals have concluded, it is the intent with which the defendants' engaged in

> this conduct, and the effect this conduct had on the victims, that makes what the defendants did a criminal violation."); *see also United States v. Ackell*, 907 F.3d 67, 78 (1st Cir. 2018) ("§ 2261A(2)(B) is not an impermissible content- or viewpoint-based restriction on speech"). App. 26a; C.A. ROA.23-50714, at 108.

Additionally, the topic of defamation was not addressed during subsequent testimony at trial. The evidence instead focused on the emotional impact the postings had on the complainant and Uhlenbrock's alleged intent to harass or intimidate. The jury heard, for example, testimony from the complainant about how the posts affected her mental state. C.A. ROA.23-50714, at 403-05.

Tellingly, the testifying special agent agreed that neither he nor the complainant ever addressed the offensive material with the various platforms that were publishing Uhlenbrock's posts. Instead of seeking to take down the material, the Government/Complainant sought criminal prosecution even though the special agent acknowledged that contacting the platforms would take the material down faster. C.A. ROA 23-50714, at 381-386.

Despite an undeveloped record on the topic of defamation, the Fifth Circuit still managed to fashion a defamation finding using faint traces culled from the record, assembled piecemeal: to support its finding that "[Uhlenbrock] falsely called [the complainant] an 'addicted' 'exhibitionist,'" the Fifth Circuit wrote that the complainant "became 'reclusive and paranoid' and 'hid[] out under a baseball hat[,]' [which] is not the reaction of an addicted exhibitionist." App. 7a. This

extrapolation of the complainant's testimony is one of many such factual leaps present within the Fifth Circuit's opinion.[3] Defamation involves many factual elements that an appellate court is unequipped to address for the first time on appeal. *United States v. Keerikkattil*, 313 A.3d 591, 604-5 (D.C. Cir. 2024). The Fifth Circuit stood in place of factfinder in *Uhlenbrock*; instead of being able to rely on an appropriately developed record, it substituted intuition and assumption.

By making the defamation finding at the Appellate level, the Fifth Circuit denied Uhlenbrock the opportunity to engage in much of the legal work that allows defamation suits to remain consistent with the First Amendment. For instance, an alleged defamatory defendant can raise the defense of truth at the trial-court level in a criminal defamation case. *See Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952) ("The defendant offered evidence tending to prove the truth of parts of the utterance, and the courts below considered and disposed of this offer in terms of ordinary criminal libel precedents"). Uhlenbrock was denied

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[3] Other such examples of factual mistakes: the opinion claims, "people could, and did, link the posts to [the complainant]," App. 7a, but there is no evidence that she was recognized in public due to these postings. The opinion also states that the postings were false because Uhlenbrock "claimed that [the complainant] had authored his internet posts, though she had not," App. 6a-7a; however, this is not corroborated by the record. The postings were sometimes written in the first person, but there is no indication that anyone would have believed that they were actually written by the person within the photos; or whether instead, the first-person was being used as a type of self-conscious device recognizable to the Reddit readers as such. Finally, the opinion states Uhlenbrock "knew that his statements were false" but provides no evidence to support this conclusion. App. 8a.

this opportunity: at trial, Uhlenbrock could not have reasonably assumed that he was in the middle of a defamation case in disguised as a cyberstalking allegation. *See Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952) (a libel law should not be "catchall enactment left at large" but must be understood by all parties to be a "form of criminal libel law.")

Finally, it is important to underline that § 2261A targeted Uhlenbrock's speech for causing "substantial emotional distress" with an "intent to harass." A finding of defamation—used by the Fifth Circuit to retroactively authorize the prosecution—has only tangential relation to the underlying stalking charge. Would the allegedly defamatory speech (the lewd fantasies that accompanied the images) have been any more or any less emotionally distressing if the statements had been factual in nature and had been proven to be true? Whether the speech was defamatory was beside the point for the prosecution at the trial-court level. The appellate court's defamation finding cannot obscure the fact that the speech was flagged for prosecution because it was perceived to be "emotionally distressing" to a reader; and as such the defamation finding conflicts with precedent.

To make matters worse, the Fifth Circuit utilized RESTATEMENT (SECOND) OF TORTS § 558 to determine whether Uhlenbrock's postings constituted defamation. Among its criteria cited by the court was "fault amounting to at least negligence on the part of the publisher." App. 5a.

This *mens rea* standard directly conflicts with this Court's precedent for criminal defamation cases. Defamation in a criminal case must involve a finding of "actual malice"—defined as the publication of a false

statement of fact made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964), citing *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). The speech in criminal defamation cases must also be "calculated" to cause a breach of the peace. *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964). Negligence is the standard for civil defamation cases involving private individuals. *Gertz v. Robert Welch*, 418 U.S. 323 (1974).

The Fifth Circuit's opinion asserts that the negligence requirement was "comfortably satisf[ied]" because Uhlenbrock "knew that his statements were false." App. 6a. This factual finding, however, is uncorroborated by the trial record: defamation was not adjudicated at the lower-court level; whether Uhlenbrock knew he was making false assertions of a factual nature was never addressed by the trial court. Thus, the Fifth Circuit's *mens rea* analysis contains multiple errors: the negligence standard is incorrect for criminal defamation, and the state of mind alleged in the opinion has no evidentiary basis.

III. This Is A Critically Important And Recurring Question.

Following the expansion of the federal stalking statute's prohibitions to include communicative conduct that "cause[s] substantial emotional distress" in 2006 and that would be "reasonably expected to cause substantial emotional distress" in 2018, appellate cases dealing with challenges to this law have become increasingly frequent. 18 U.S.C. § 2261A. A representative sampling of the most recent decisions—even those that follow 2023's *Counterman* ruling—reveals a fragmented and often convoluted legal landscape

when it comes to stalking prosecutions of speech. Until this Honorable Court intervenes to determine whether the stalking statute can apply to speech other than true threats, this legal uncertainty will undoubtedly persist.

The *Uhlenbrock* decision is the first decision of the internet era that criminalizes on-line speech without any direct contact between the parties solely based on the emotional impact that speech had on one of the parties. This precedent will have significant unintended consequences. It is possible that everyone who finds themselves in a bitter public internet dispute could use the *Uhlenbrock* precedent to justify calling the authorities and insist on a prosecution based on § 2261. Those who engage in unsavory internet speech now may have an unintended incentive to directly contact and threaten their targets so that they can avoid the low negligence standard for criminal defamation as set forth in *Uhlenbrock*. This Honorable Court can address these unintended consequences by reviewing the Fifth Circuit's *Uhlenbrock* decision.

IV. This Case Is An Ideal Vehicle For Addressing This Question.

Uhlenbrock presents an ideal opportunity to face these issues head-on: all parties have acknowledged that Uhlenbrock's speech was not a true threat, yet the prosecution was affirmed by the Fifth Circuit on an alternative legal basis. In addition, if this Honorable Court does decide that defamation represents a viable predicate for a stalking charge, this case provides an additional opportunity to clarify how criminal defamation is to be appropriately adjudicated without violating due process and the First Amendment.

Finally, Uhlenbrock's course of conduct—repeated non-consensual publishing of intimate photos to Reddit that did not represent a true threat—was an egregious example of someone using speech to cause substantial emotional distress. Thus, it represents a limit case for this type of behavior: Uhlenbrock in a prior matter had pled guilty to stalking for this same type of posting and was on supervised release when he was arrested a second time for cyberstalking. C.A. ROA.23-50664, at 60-5 and 71. Thus, if this Court decides that this pattern of public internet posting does not fall within the purview of the stalking statute without violating the First Amendment, it will represent an authoritative decision on the topic, and send a clear message as to the importance of defending freedom of speech in the context of the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX