No. 22-138

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

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

BRIEF OF FIRST AMENDMENT SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Mary Anne Franks
1311 Miller Drive
Coral Gables, FL 33146
786.860.2317
Counsel for Amici Curiae

Jeffrey A. Mandell*
Erin K. Deeley
Carly Gerads
STAFFORD ROSENBAUM LLP
222 West Washington Ave.
#900
P.O. Box 1784
Madison, WI 53701
608.256.0226
jmandell@staffordlaw.com
**Counsel of Record*

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INTEREST OF AMICI

Amici are law school professors and legal scholars with deep expertise in First Amendment doctrine and practice.[1] They have taught courses, published articles and books, and devoted scholarly attention to constitutional law and the First Amendment free speech clause. Based on their expertise and experience, they seek to draw the Court's attention to the well-established, historical support for an objective standard in determining true threats and to highlight the costs a subjective standard would impose on free speech generally, and to individuals and communities targeted by stalking in particular.

Amici join on their own behalf and not as representatives of their universities. *Amici* are*:*

Dean Erwin Chemerinsky
Jesse H. Choper Distinguished Professor of Law
Berkeley Law School

Professor Danielle Citron
Jefferson Scholars Foundation Schenck
Distinguished Professor in Law
Caddell and Chapman Professor of Law

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[1] Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Amici—contributed money that was intended to fund preparing or submitting the brief.

University of Virginia School of Law

Professor Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell Law School

Professor Mary Anne Franks
Michael R. Klein Distinguished Scholar Chair
University of Miami School of Law

Professor Eric J. Segall
Ashe Family Chair Professor of Law
Georgia State University College of Law

Professor Cristina Tilley
Professor of Law
Iowa College of Law

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no inviolable First Amendment right to engage in a prolonged, objectively terrorizing campaign of stalking against another person. Stalking is a uniquely dangerous form of conduct that provides the clearest possible case for a constitutional rule that general intent—as opposed to a specific intent—is all that is required for the regulation and prosecution of the historically unprotected category of true threats. While stalkers frequently fail to grasp the objective reality of their actions, this capacity for delusion makes them more, not less, dangerous. Stalkers often

believe that their victims should welcome rather than fear their attention, but the First Amendment does not require objectively terrifying conduct to receive heightened constitutional protection simply because it is based on an unreasonable belief or expectation. A specific-intent requirement for stalking and other threats undermines, rather than protects, First Amendment values, including by depleting the marketplace of ideas, inhibiting counter-speech, and interfering with individual autonomy and association. Such a requirement also jeopardizes other important legal protections that rely on objective, context-specific standards.

ARGUMENT

I. The First Amendment Does Not Require A Specific-Intent Element For Laws That Criminalize Stalking And Other Threats

The thrust of Petitioner's argument is that there is an inviolable constitutional right to engage in a prolonged, objectively terrorizing campaign of stalking against another person, so long as the government cannot prove beyond a reasonable doubt that the stalker has a specific desire to threaten the victim. If, as here, the stalker is motivated by the desire to enter a relationship with an entirely unwilling victim, Petitioner's position would leave the state powerless to punish or deter the stalking, no matter how objectively terrorizing it is or how pervasive or how lengthy it becomes. Such a startling

claim has no grounding in "well-accepted First Amendment doctrine," which recognizes both that "a speaker's motivation is entirely irrelevant to the question of constitutional protection," *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (plurality op. of Roberts, C.J.) (quoting Martin Redish, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)), and that "there is no historical practice requiring more than general intent when a statute regulates speech," *Elonis v. United States*, 575 U.S. 723, 755 (2015) (Thomas, J., dissenting).

A prime example of these principles can be found in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There, this Court faced a First Amendment challenge to the federal law making it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1). The challengers in *Holder*—a collection of individuals and nonprofits—argued that the material-support statute could only be constitutionally applied to those who had the "specific intent to further [an] organization's terrorist activities," and did not apply to well-intentioned speech, such as teaching designated terrorist organizations "how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." 561 U.S. at 17, 21–22. The Court rejected challengers' First Amendment claims, interpreting the material-support statute to require only a showing of "knowledge about the

organization's connection to terrorism" and finding the statute constitutional even without requiring a specific intent to further the illegal ends of a foreign terrorist organization. *Id.* at 16–17, 25.

The principle that the First Amendment generally does not require a malicious motive in order to regulate speech is eminently sound. After all, a test focused on the speaker's subjective intent could lead to the "bizarre result" where two speakers communicate the same message at the same time to the same audience, yet those identical communications "could be protected speech for one speaker, while leading to criminal penalties for another." *Wis. Right to Life, Inc.*, 551 U.S. at 468 (plurality op. of Roberts, C.J.); *see also id.* at 469 (explaining that objective standards, "focusing on the substance of the communication rather than amorphous considerations of intent," are needed to "safeguard liberty").

A. Historically unprotected categories of speech can generally be regulated irrespective of the speaker' motive

At the heart of this general rule is the notion that a "speaker's purpose doesn't affect the value of the speech to listeners or to public debate," nor does it "affect the harm caused (or not caused) by the speech." Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1370 (2016). This reasoning extends with special force to those "historic

and traditional categories" of speech "the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (cleaned up). If a category of speech is determined to be "so harmful, valueless, or traditionally unprotected that it ought to lose First Amendment protection, that should generally happen even when the speaker has a mental state below purpose…." Volokh, *supra*, at 1371; *see also Elonis*, 575 U.S. at 766 (Thomas, J., dissenting) (explaining that this Court "generally ha[s] not required a heightened mental state under the First Amendment for historically unprotected categories of speech").

It is well settled, for example, that a legislature may constitutionally prohibit "fighting words" without proof of a specific intent to provoke a violent reaction. The definition of unprotected "fighting words" turns on how the "ordinary citizen" would react to these "personally abusive epithets"—not how the speaker intended them to be received. *Cohen v. California*, 403 U.S. 15, 20 (1971). As a result, a person may commit a breach of the peace if they "make[] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and the punishment of such statements "as a criminal act would raise no question under [the Constitution][.]" *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–573 (1942) (rejecting a First Amendment challenge to a general-

intent construction of a state "fighting words" statute that allowed for conviction based on what "men of common intelligence would understand would be words likely to cause an average addressee to fight").

The same is true of laws addressing the historically unprotected category of obscenity. There, again, this Court has focused on what defendants knew or should have known about the speech's properties and not on their intention for speaking. In *Hamling v. United States*, 418 US 87, 123 (1974), this Court held that the First Amendment permits a defendant to be convicted of mailing obscenity based only on proof they had knowledge of the contents of the materials they distributed, and that they knew the character and nature of the materials. An obscenity defendant therefore need not act with a specific motive, such as an intent to appeal to the recipient's prurient interest. *See id.* at 120–24.

Liability for the unprotected category of defamation fits the same mold. For false statements about a private person on matters of private concern, this Court's First Amendment precedent allows for liability based solely on a speaker's negligence concerning the statements' falsity. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770, 773–75 (1986). And even for false statements that involve public figures or matters of public concern, this Court's "actual malice" standard only requires "knowledge" of a statement's falsity or a "reckless disregard" for the truth. *New York Times Co. v.*

Sullivan, 376 U.S. 254, 279–280 (1964). In neither situation does the First Amendment require that the speaker have a specific intent to harm a person's reputation. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.").

This Court should recognize definitively that no specific-intent element is necessary for laws that criminalize stalking and other threats. A contrary rule—one that constitutionally enshrines a motive-to-threaten element in every threat law—would "make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine." *Elonis,* 575 U.S. at 766 (Thomas, J., dissenting). After all, it would make little sense to allow the prosecution of a person for sending obscene material to an unsuspecting recipient irrespective of whether they intended to offend that recipient, but forbid the prosecution of the same person for sending a threatening message absent evidence that they intended to terrorize the recipient. There is "no reason why [this Court] should give threats [such] pride of place among unprotected speech." *Id*. This Court should therefore "stay away from focusing on the speaker's purpose" when considering stalking and other forms of unprotected threats. Volokh, *supra*, at 1420. "The content of speech should matter; the speaker's purpose should not." *Id*.

B. There is no clear historical predicate for a motive requirement

States have maintained general-intent criminal statutes prohibiting threats since "the late 18th and early 19th centuries," including after those states "amended their constitutions to include speech protections similar to those in the First Amendment." *Elonis*, 575 U.S. at 760–61 (Thomas, J., dissenting) (citing examples from Florida, Illinois, Michigan, and New Jersey). These early threat laws made it a crime to "knowingly send or deliver any letter or writing . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing shall be demanded." *Id*. at 761 (citations and quotation marks omitted). These laws were, in turn, "copies of a 1754 English threat statute subject to only a general-intent requirement." *Id*. (citations omitted). The early English cases interpreting this statute—which would have been "well known in the legal world of the 19th century United States"— "consider[ed] only the import of the letter's language, not the intent of its sender." *Id*. at 762–63 (citations omitted). Thus, "there is good reason to believe that States bound by their own Constitutions to protect freedom of speech long ago enacted general-intent threat statutes," and thus that there is a history and tradition of criminalizing threats without attention to the speaker's motivation. *Id*. at 763.

These Founding Era examples of general-intent *criminal* threat statutes complement the long and established history of *civil* protections available against threats that did not depend on the speaker's intent. For example, Blackstone explained that the remedy of "surety of the peace" was available "wherever any private man hath *just cause* to fear that another will . . . do him a corporal injury." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 253 (1769) (emphasis added); *see also New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2149–50 (2022) (recognizing the early Founding Era presence of surety laws). This long history and tradition provides a clear basis for requiring only general intent for laws regulating stalking and other threats.

Petitioner asks this Court to analogize threats to incitement, which Petitioner says requires an element of specific intent. Pet. Br. 21–22, 45. This analogy has many problems. First, it is a poor fit: unlike incitement, which only involves potential harm when third party listeners are stirred to action, threats themselves cause harms (like those caused by fighting words and defamation) that affect the immediate listener. Second, the strained analogy is far less probative than both the identifiable history and tradition of criminalizing threats without a specific-intent requirement and the broader principle that government may regulate speech using general-intent requirements. Finally, it remains debatable whether *Brandenburg v. Ohio*, 395 U.S. 444 (1969),

and its progeny truly require specific intent to cause lawlessness as an element of incitement. *See United States v. White*, 670 F.3d 498, 511–12 (4th Cir. 2012) ("The *Brandenburg* test only requires that the speaker use specific words advocating unlawful conduct" and "does not require that the speaker have a specific intent to incite unlawful conduct."), *abrogated on other grounds by United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016) (recognizing that the abrogation of the earlier decision "does not affect our constitutional rule that a 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm").

C. Threats and stalking are uniquely harmful even among unprotected categories of speech

Threats—and especially stalking—provide the clearest case for the general rule that the "content of speech should matter; the speaker's purpose should not." Volokh, *supra*, at 1420. Motive is entirely irrelevant to the First Amendment value of threats, which is minimal, as well as to the harm caused by threats, which is substantial.

Stalking, in particular, is often a matter of life and death. Indeed, stalking is so "significantly associated with murder and attempted murder" that it has been referred to as "slow motion homicide." Judith M. McFarlane et al., *Stalking and Intimate*

Partner Femicide, 3 HOMICIDE STUDIES 300, 311–16 (1999); Brieanna Charlebois, *'Homicide in slow motion': Police urged to tackle stalking in wake of Coquitlam woman's murder*, VANCOUVER SUN, (Jan. 22, 2023).[2]

More than half of female homicide victims reported being stalked before they were murdered by their stalker, and more than two-thirds of female homicide victims were stalked by their intimate partner before being killed by them. McFarlane, *supra*. "In a study of cases of actual or attempted domestic violence homicide involving a female victim who was physically assaulted by her violent partner in the preceding year, nearly all (90%) of the victims were also stalked by their assailant." U.S. Dep't of Justice, *2014 Report to Congress Grant Funds Used to Address Stalking* at 3 (Jan. 2017).[3]

Violence against stalking victims short of homicide is similarly pervasive. Between one-third and one-half of stalkers commit physical violence against victims. *See* Katrina Baum et al., Bureau of Justice Statistics, *Department of Justice, Stalking Victimization in the United States* (2009); Barry Rosenfeld, *Violence Risk Factors in Stalking and Obsessional Harassment*, 31 CRIM. JUST. & BEHAV. 9, 31 (2004); Frances P. Churcher et al., *Risk Factors for Violence in Stalking Perpetration: A Meta-Analysis*, 7

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[2] https://vancouversun.com/news/crime/bc-police-urged-tackle-stalking-tracking-tech

[3] https://www.justice.gov/ovw/page/file/932736/download

FWU J. OF SOC. SCI. 100, 107 (2013). Research on stalking demonstrates a strong correlation between intimate partner stalking and physical violence, as 81% of women who were stalked by a current or former intimate partner were also physically assaulted by that partner. Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. MIAMI L. REV. 711, 735 (2020). In addition to physically harming their victims, research indicates that approximately 29% of stalkers vandalize the victim's property, and 9% of stalkers kill or threaten to kill the victim's family pets. U.S. Dep't of Justice, *Stalking in America: Findings from the National Violence Against Women Survey,* at 7 (April 1998).[4]

Even victims who are not killed or physically assaulted face a lifetime of fear and uncertainty if their stalkers are not apprehended. Stalking has no natural endpoint; victims have no way of knowing when or whether it will end, or if it will end violently. Not only is stalking "all too often a lengthy and intense harassment continuing for months or years," Paul E. Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 277 (2002), but "stalking behavior often escalates into violence as time passes and the stalker's obsession with the victim grows," U.S. Dep't of Justice, *Project to Develop a Model Anti-Stalking Code for States* 49–50 (1993).[5] Nearly a quarter of stalking

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[4] https://www.ojp.gov/pdffiles/169592.pdf

[5] https://www.ojp.gov/pdffiles1/Digitization/144477NCJRS.pdf

victims said the stalking behaviors lasted two years or more. Rachel E. Morgan & Jennifer Truman, Bureau of Justice Statistics, *Stalking Victimization, 2016,* at 1 (2021).[6] Even if stalkers often "move on" to another victim after some period of time, victims never know when and if they will return. Indeed, stalkers exhibit high rates of recidivism. *See* Barry Rosenfeld, *Recidivism in Stalking and Obsessional Harassment*, 27 LAW & HUM. BEHAV. 251, 257 (2003) (finding a recidivism rate approaching 50%); Angela W. Eke et al., *Predictors of Recidivism by Stalkers: A Nine-Year Follow-Up of Police Contacts*, 29 BEHAV. SCI. & LAW 271, 276 (2011) (finding a 56% recidivism rate).

Stalking tends to have a devastating and irreversible impact on victims' mental and physical health. "Most stalking involves multiple forms of harassment, engendering fear and apprehension, hypervigilance, and mistrust in its victims." Mullen & Pathé, *supra*, at 296. As such, it can alienate victims from their customary support systems, erode relationships and careers, and exacerbate social isolation and despair. *Id.* Stalking causes "deleterious effects on the victim's psychological and social functioning in virtually all cases," including increased anxiety, sleep disturbance, significant depression, and suicidal ruminations. *Id.* at 278. This "distress and disturbance leave lasting emotional and psychological damage" that persists even after the stalking has ended. *Id.* "In practice most stalking that attracts the

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[6] https://bjs.ojp.gov/content/pub/pdf/sv16.pdf

attention of the criminal justice system is of a nature that would frighten and distress all but the most stoic of individuals." *Id.* at 277.

Members of the judiciary are uniquely positioned to appreciate the profound impact that campaigns of fear and intimidation have not only on their targets, but also their loved ones. There has been an unprecedented rise in threats to the judiciary in recent years. *See* Sarah N. Lynch, *U.S. judges faced over 4,500 threats in 2021 amid rising extremism*, REUTERS (Feb. 5, 2022).[7] Chief Justice Roberts, in his 2022 Year-End Report on the Federal Judiciary, praised Judge Esther Salas for her successful advocacy of the 2022 Daniel Anderl Judicial Security and Privacy Act, which protects the privacy of personal information about judges and their families. Chief Justice John G. Roberts, Jr., *2022 Year-End Report on the Federal Judiciary*, 3-4 (Dec. 31, 2022).[8] The impetus for the law was the tragic murder of Judge Salas' son in 2020 by a disgruntled lawyer. *Id.* In 2022, Justice Kavanaugh also became the target of a violent individual: a man angered by anticipated Supreme Court decisions regarding abortion and guns was found outside Justice Kavanaugh's home carrying zip ties, a knife, a gun, and a hammer. Maria Cramer and Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y.

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[7] https://www.reuters.com/world/us/us-judges-faced-over-4500-threats-2021-amid-rising-extremism-official-2022-02-14/.

[8] https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf

TIMES (June 9, 2022).[9] In his report, the Chief Justice wrote "… we must support judges by ensuring their safety. A judicial system cannot and should not live in fear." 2022 Year-End Report, *supra*, at 4.

Given the uptick in threatening behavior against the judiciary, it is little surprise that the Supreme Court's 2024 budget request reflects heightened concern for judicial security, seeking nearly $6 million in new security funding because "[o]n-going threat assessments show evolving risks that require continuous protection." Tierney Sneed and Devan Cole, *Supreme Court asks Congress for more security money due to threats,* CNN (Mar. 9, 2023).[10] Measures of this kind will hopefully go some way to countering the effects of threatening communications on the judiciary. But thousands of individuals targeted by stalkers every year are average citizens who, absent the legal protections of criminal statutes, are forced to contend on their own with the effects of stalking.

D. Stalkers' motives do not determine their dangerousness

The fact that stalkers may not subjectively intend to terrorize their victims does not mean they pose no danger to them. That is why, in the view of

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[9] https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html

[10]https://www.cnn.com/2023/03/09/politics/supreme-court-security-budget-request/index.html.

experts who study stalkers and stalking behavior, "the stalker's intent must be regarded as irrelevant to the legal constructions of the crime of stalking if the law is to effectively protect victims." Mullen & Pathé, *supra*, at 277. These experts recognize that the mindset of stalking, which by definition is a course of conduct that takes place over time and frequently involves a failure or refusal to accept objective reality, is too complex to be reduced to simplistic notions of a single, stable, subjective intent to threaten. "Stalking …. is part of a spectrum of activities that merge into normal behaviors, often around such aspirations as initiating or reestablishing a relationship." Paul E. Mullen et al, *A Study of Stalkers*, 156 AM. J. OF PSYCH. 1244, 1244–45 (1999).

A stalker's belief that his behavior is benevolent actually increases the terrifying impact on victims, as it signals that the stalker feels justified in his actions. When this attitude is reinforced by law enforcement and courts, victims are at the mercy of a stalker's delusion. "Most stalkers deceive themselves into believing their activities will further the aims of either attracting or reconciling with the object of their unwanted attentions, and even those pursuing agendas of revenge or vindication rarely admit to themselves the extent to which they are damaging their victims." Mullen & Pathé, *supra*, at 308. What is more, stalkers' motives change over time. A stalker who begins with seemingly innocuous or benevolent gestures, such as sending gifts, may at some point

"react with extreme violence to their victim's repeated rebuffs." *Id*. at 294.

II. A Motive Requirement For True Threats Undermines, Rather Than Protects, Important First Amendment Values

Like other forms of categorically unprotected speech, stalking and threats are "particularly valueless." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). Restricting such speech therefore poses an "inconsequential" risk to free expression." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007). In fact, mandating a specific-intent requirement for all stalking and threat laws would undermine the broader "values the First Amendment is meant to protect." *Wis. Right To Life*, 551 U.S. at 468 (plurality op. of Roberts, C.J.).

A. The marketplace of ideas

Not only do stalking and other threats not contribute to the marketplace of ideas, but they deplete the marketplace of ideas by placing victims in reasonable fear for their lives, thereby chilling their speech. Threats and stalking cause victims to curtail their activities and withdraw from public life, resulting in a "net decrease in the amount of available speech." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 647 (1994). The chilling effects of targeted threats, harassment, and other abuse, especially when they take place online, have been well-documented.

"[T]argeting an individual persistently with threats . . . can cause severe distress and fear of physical harm. This online abuse can have a totalizing and devastating impact upon victims, causing chilling of their own speech, sharing, and engagement online." Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1478 (2022) (quotation marks and footnotes omitted); *see also id.* at 1511–12 (explaining that "threats of violence and physical harm are a powerful force for self-censorship, which trigger deeper psychological states of fear, anxiety, and severe emotional distress that then in turn amplify social conformity").

Stalking can take over every aspect of a victim's life. In a significant number of cases, victims are forced to relocate, sometimes more than once. Mullen & Pathé, *supra*, at 296–97. More than half of stalking victims report changing or withdrawing from their employment, often in response to the stalker's appearance at or around their workplace or threats the stalker makes to co-workers. *Id*. Victims also miss work because of medical appointments or court appearances related to the stalking. *Id*.

The chilling effect of stalking and harassment is not confined to the individual targeted. Stalkers pull family members, friends, co-workers, and colleagues of the victim into their orbit as well. Merely witnessing online harassment leads nearly a third of bystanders to self-censor. Maeve Duggan, *Online Harassment 2017,* PEW RESEARCH CENTER, (July 11,

2017). The disciplinary chilling effect of threats affects women and girls disproportionately, pushing them away from careers such as journalism. *See* Lili Levi, *Racialized, Judaized, Feminized: Identity-Based Attacks on the Press*, 20 FIRST AMEND. L. REV. 147, 165–66 (2022). "Instead of fully participating in society . . . , women are sacrificing their freedom of expression for safety and self-preservation." Jessica K. Formichella, *A Reckless Guessing Game: Online Threats Against Women in the Aftermath of Elonis v. United States*, 41 SETON HALL LEGIS. J. 117, 135 (2016) (quotation marks and footnotes omitted).

The present case provides an illustrative example. Petitioner targeted C.W., a local musician with whom he had become obsessed, by sending hundreds, if not thousands, of messages, including messages saying he wanted her to die and insinuating that he was physically surveilling her. *People v. Counterman*, 497 P.3d 1039, 1048 (Colo. App. 2021); J.A. 128, 429, 432. According to a bandmate:

> [C.W.] was too frightened to book shows because it meant we had to post online where we would be and at what time . . . . We did not know what Bill Counterman looked like—he could be anyone at any show. [C.W.] became afraid to talk to people; she was anxious, unhappy, and constantly checking in with security. Playing a show was clearly more stressful than joyful.

J.A. 431.

C.W. tried to ignore the terrifying messages, but when she discovered that Petitioner had twice been arrested for threatening women with bodily harm (including threats to "put your head on a fuckin sidewalk and bash it in," and to "rip your throat out on sight"), she felt she had to contact police. J.A. 433. C.W. worried, however, about how the process would allow Petitioner to take over even more of her life:

> [O]nce you get an authority involved, there's a chance that something like this could happen where you have to spend many months of your life being vulnerable to questioning, sitting in a courtroom just a few feet away from somebody who's been antagonizing you for years. And I was—hesitant doesn't even describe how I was feeling about telling somebody about this. The fact that it would then become undeniably real, and it just makes all of the terror a little bit more tangible.

J.A. 182.

At sentencing, C.W. explained: "This entire experience has been a nightmare for me. I did not ask to be on trial. I did not ask to have to prove that I have suffered emotional distress. I didn't even ask for these

charges to be filed. But I am asking for the Court to please provide me with some safety." J.A. 432. She ended her plea at sentencing with: "I'm just asking the Court to protect me." J.A. 435.

B. The remedy of counter-speech

This Court's cases extol the importance of addressing harmful speech with counter-speech. *See, e.g., United States v. Alvarez*, 567 U.S. 709, 727 (2012) ("The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."). But where threats—and particularly stalking—are concerned, this kind of engagement through counter-speech offers no remedy. On the contrary, stalkers are often motivated by the desire to receive attention from victims who otherwise have no interest in interacting with them. As a result, a victim's attempts to reason with or dissuade a stalker often only invite more unwanted attention and increase the victim's risk of harm. *See* Mullen & Pathé, *supra*, at 294 (explaining that some "stalkers will react with extreme violence to their victim's repeated rebuff" and that engagement with a stalker may "gratify the stalker's wishes to have, and to hold onto, a relationship and reinforce[] the pursuit"); *id.* at 310 ("…. any contact with the perpetrator, however intermittent, will reinforce the unwanted behavior.").

Counter-speech cannot provide a remedy for stalking for another reason. Contrary to the claims of Petitioner, stalking statutes, including the Colorado

statute under which Petitioner was convicted, do not regulate "pure speech" but rather a course of conduct. This conduct can and almost always does include non-speech acts, including "repeatedly follow[ing], approach[ing] . . . or plac[ing] under surveillance" another person. Colo. Rev. Stat. § 18-3-602. There is no rejoinder to being followed home by a stranger at night; no reply to having one's every movement surreptitiously tracked and recorded by a possessive ex-partner; and no riposte to the stalker's unshakable sense of entitlement to the attention of his victim.

C. The right to associate, or not

In the similar context of regulating offensive or indecent material in broadcast media, this Court observed that an "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). The same must be true for the victim of objectively threatening stalking. What Petitioner and amici euphemistically refer to as "vulgar," "offensive," "disturbing," "distasteful," "discomforting," and "abrasive" speech was in fact a six-year campaign by a man to relentlessly insert himself into a woman's life without her consent—a campaign that might never have ended were it not for his conviction and imprisonment under Colorado's stalking statute. The First Amendment should not exalt or protect the stalker's intrusion into the victim's life, disturbance of their solitude, interference with their autonomy, and

derogation of their right *not* to associate or speak, regardless of the stalker's motive.

D. Avoiding chilling valuable speech

Petitioner misguidedly claims that allowing criminal threat laws to rest on general-intent requirements will chill otherwise-protected speech. Not only is the empirical evidence of the chilling effect of legal regulations extremely thin, but the objective, context-focused standard for defining true threats fully addresses his litany of hypotheticals in which out-of-context statements are mistakenly and unreasonably construed as threats.

Studies of subjective intent "are unable to demonstrate a connection between a chosen legal standard and a reduction of chilling at the level of nuance required to justify the selection of one intent requirement over another." Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1675 (2013). "[R]esearchers from a range of social science fields have systematically tested the [chilling effect] theory's assumptions and effectiveness, and they are not empirically supported." Penney, *supra*, at 1470. Most people do not make decisions based on rational considerations or cost-benefit analyses, and most "are often not sufficiently aware of the law or state activities such that any possible legal harm or sanction could impact their decision about speaking or acting." *Id*.

In any event, the objective true-threat standard assesses the statements and conduct at issue, not "in isolation," but rather "in the context in which they" occurred. *Counterman*, 497 P.3d at 1046. As the lower court explained, this context-focused analysis ensures that "protected speech remains protected, and that unprotected speech may be criminalized." *Id.* at 1049. For example, accounting for context can confirm that an ambiguously threatening statement is in fact "protected political opinion rather than a true threat." *Id.* (discussing *Watts v. United States*, 394 U.S. 705 (1969)). And by the same token, context can inform when statements that are not explicitly threatening nevertheless "are just as undeserving of protection" as explicit threats. *Id.*

The objective standard also avoids chilling protected speech by relying, not on the varied and unpredictable subjective sensibilities of particular speakers or listeners, but rather on whether the conduct would cause "a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship." Colo. Rev. Stat. § 18-3-602(2)(b). This objective standard ensures that various forms of non-threatening expression—including "political speech, minority religious beliefs, and artistic expression," Pet. Br. 4—will enjoy the needed "breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Petitioner's concerns about chilling protected speech are further dispelled by another aspect of the stalking statute at issue, which requires a course of conduct that is made "in connection with" the threat and that "further[s], advance[s], promote[s], or ha[s] a continuity of purpose" with the threat. Colo. Rev. Stat. § 18-3-602(2)(a). Similar course-of-conduct requirements are found in most stalking statutes, *see*, *e.g.*, 18 U.S.C.§ 2261A(2), and ensure that convictions cannot rest on an isolated misunderstanding.

In contrast, accepting Petitioner's argument would mean that victims of stalking have no recourse through the law to address objective threats to their safety—no matter how terrorizing, pervasive, or never-ending—from perpetrators that for whatever reason do not subjectively perceive their own actions to be threatening. *See* Pet. Br. at 42 (describing objectively threating stalking as merely "offensive speech" that must be "expected in social interaction and tolerated without legal recourse") (citations and quotation marks omitted). Such a state of affairs cannot be justified by the hypothetical need to accommodate the plight of misunderstood stalkers who simply lack social grace.

E. The First Amendment as a "safety valve"

The First Amendment is often regarded as a "safety valve" that tends to decrease the resort to violence by frustrated citizens. *See Whitney v.*

California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Thomas Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11–15 (1967). But under-protecting victims of threats and harassment has the opposite effect.

It is well established that stalking frequently leads to violence against victims. *See infra* at 12-14. But the lack of protection for victims may also encourage them to take matters into their own hands. Under well-established principles of self-defense, a person is entitled to use deadly force if they reasonably fear imminent and unlawful bodily harm. *See* Wayne R. LaFave, SUBSTANTIVE CRIMINAL LAW § 10.4 (3d ed. 2022) (explaining that self-defense is justified where one "reasonably believes" that bodily harm is imminent). Stalking often creates exactly this fear. It would be truly absurd for this Court to adopt a constitutional rule that would require a higher legal standard for convicting a stalker than justifiably killing one, or to leave victims with the choice of either resigning themselves to lifelong terrorization or resorting to lethal self-help. By contrast, "there is nothing absurd"—and certainly nothing unconstitutional—"about punishing an individual who, with knowledge of the words he uses and their ordinary meaning in context, makes a threat." *Elonis*, 575 U.S. at 759 (Thomas, J., dissenting).

III. Accepting Petitioner's Argument Would Have Dire Consequences For Victims Of Stalking, Discrimination, And Other Forms Of Abuse

A. A motive requirement will give stalkers a roadmap for avoiding prosecution

Perpetrators of stalking and other abuses that disproportionately target women have increasingly argued that their actions are not only not criminal, but constitute First Amendment-protected speech. *See* Miles, *supra*, at 743–44 ("A review of reported state court civil and criminal cases involving true threats and domestic violence indicates a surge in the number of litigants raising First Amendment arguments in these types of cases in the last twenty years."). The petitioner in *Elonis v. United States* was one such litigant, and, though the Court declined to take up his argument that his postings on social media were therapeutic rap lyrics protected by the First Amendment, Justice Alito warned that such a view would "grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar." *Elonis*, 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part).

As Justice Alito observed in the same opinion, "[t]hreats 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." *Id.* Social media has also made it easier for abusers to invoke the First Amendment as a defense for their actions, allowing communities of abusers to come together to share litigation strategies. Miles, *supra*, at 745. The petitioner in *Elonis* gained considerable notoriety and credibility as a self-proclaimed free-speech hero following the Supreme Court ruling in his interstate threats case, and he frequently took to social media to espouse his theories of how he could use the First Amendment to get away with stalking and "revenge porn." National Public Radio, *Unprecedented: A Thousand Ways to Kill You* (Dec. 18, 2019).[11] Indeed, Elonis was eventually charged with three counts of federal cyberstalking in 2022 regarding threatening messages and sexually graphic images he sent to his ex-wife, an ex-girlfriend, and the prosecuting attorney from his interstate threats case, and argued the statements were protected free speech. Press Release, United States Attorney's Office, Middle District of Pennsylvania, Northampton County Man Convicted of Cyberstalking (Aug. 8, 2022);[12] Def.'s Mtn. to Dismiss, *United States v. Elonis*, No. 5:21-cr-00281, Dkt. # 23 at 8-10 (E.D. Pa. filed Jan 12, 2022). While the judge and jury disagreed, the verdict was likely cold comfort to the women he terrorized for years.

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[11] https://one.npr.org/?sharedMediaId=789202495:789202497.

[12] https://www.justice.gov/usao-mdpa/pr/northampton-county-man-convicted-cyberstalking

In stark contrast to the picture that Petitioner paints of overzealous stalking prosecutions, the reality is that stalking remains an under-reported and under-prosecuted crime. Even as awareness of the prevalence and impact of stalking is increasing, reporting, arrest, and conviction rates for stalking remain low. For example, less than 29% of all stalking victims reported the victimization to police in 2019. *See* Rachel E. Morgan & Jennifer Truman, Bureau of Justice Statistics, *Stalking Victimization, 2019*, at 3, 11, 17 (2022).[13] One in five victims who have reported stalking to law enforcement say that police took no action. U.S. Dep't of Justice, Office of Violence Against Women, *2014 Report to Congress, Grant Funds Used to Address Stalking* (2017).[14] Investigating and prosecuting stalking requires voluminous documentation of repeated incidents and evidence of their impact on victims. Leana A. Bouffard et al, *Still in the Shadows: The Unresponsiveness of Stalking Prosecution Rates to Increased Legislative Attention*, 73 J. OF CRIM. JUST. 2–3 (Mar.–Apr. 2021) These complexities "result in low prosecution and convictions rates, with offenders offered the opportunity to plead to lesser charges (that often involve one-time behaviors) or prosecutors dropping charges entirely." *Id.* "Studies show a significantly lower arrest rates for stalking compared to projected stalking rates, even when accounting for

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[13] https://bjs.ojp.gov/content/pub/pdf/sv19.pdf

[14] https://www.justice.gov/ovw/page/file/932736/download

underreporting." *Id.* This is precisely the phenomenon C.W. spoke of at Petitioner's sentencing hearing.

B. A motive requirement will undermine the victim's ability to obtain civil protection orders

Petitioner suggests that victims of stalking can seek restraining orders as an alternative to criminal prosecution. But if this Court decides in his favor and adopts the subjective test for true threats in criminal cases, this would likely also impair victims' ability to obtain civil protection orders. *Sullivan*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law. . . .").

This is because many states' civil protection order laws currently focus on "the objectively threatening nature of the statement to a reasonable person, rather than a speaker's subjective intent to threaten." Miles, *supra*, at 743–44. If this Court decides that either purpose or knowledge is required to provide a true threat for a criminal conviction, this would "potentially [ ] undo[ ] years of legislative progress . . . to increase protections for victims of domestic violence via civil protection orders." *Id.* Additionally, many states require victims seeking a civil protection order based on threats or stalking to prove the crime of threats or stalking. *Id.* A ruling in Petitioner's favor will inevitably serve to encourage

and buttress defendants' free speech arguments in civil protection order proceedings. *Id.*

C. A motive requirement will have broader repercussions for victims of discrimination and other forms of abuse

Petitioner's argument both endorses a subjective intent standard and attacks the objective standard as unworkable, vague, and chilling. To find for him on either point risks undermining multiple areas of the law where the objective characteristics of the conduct or speech are central.

1. Harassment and discrimination under Title VII

The complexity of determining what constitutes criminal stalking in many ways resembles what constitutes legally actionable sexual harassment or discrimination. To determine the existence of a hostile or abusive work environment for Title VII purposes, the Court takes a totality of the circumstances approach, focusing on the objective character of working conditions and the victim's subjective perception. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993). The test is "not, and by its nature cannot be, a mathematically precise test," but instead looks at a multitude of factors, including frequency of the abusive conduct, its severity, and its impact on the employees. *Id.* at 22–23. Multiple Title

VII decisions emphasize that discriminatory intent is not among the essential factors. *See, e.g., Newton v. Dep't of Air Force,* 85 F.3d 595, 598 (Fed.Cir.1996); *Ellison v. Brady,* 924 F.2d 872, 880 (9th Cir.1991). As one court has explained, "[w]ell-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment." *Vaughn v. Pool Offshore Co.,* 683 F.2d 922, 925 n.3 (5th Cir.1982). Whatever difficulties attend the determination of what constitutes an objectively hostile, rather than merely offensive, environment, they are not resolved by recourse to evaluating an alleged harasser's intent.

The Court's response to the concern that Title VII would become a "general civility code" is instructive here. "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so *objectively offensive* as to alter the "conditions" of the victim's employment." *Harris,* 510 U.S. at 21 (emphasis added). The objective totality of the circumstances test is the appropriate standard for evaluating the "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82

(1998). "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . , and conduct which a reasonable person . . . would find severely hostile or abusive." *Id*.

2. Nonconsensual pornography laws

The unauthorized distribution of private, sexually explicit imagery, also known as "nonconsensual pornography" or "revenge porn," is now recognized as a crime in in 48 states. Many of these laws are of fairly recent vintage, and the elements of the crime vary by jurisdiction. While the majority of state laws require that the perpetrator act with the intent to cause harm, *see*, *e.g.*, Fla. Stat. § 784.049, others do not include this element, *see*, *e.g.*, 720 Ill. Comp. Stat., ch. 5, § 11-23.5. The view of many experts and advocacy organizations familiar with the nature, scope, and impact of this abuse is that the perpetrator's motive for disclosing the private information is irrelevant. Mary Anne Franks, "*Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251, 1290 (2017). While some perpetrators, especially those who are former intimate partners, do act out of a desire to harm the victim, many others do not. *See* Asia A. Eaton et al., *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report* at 19 (June 12, 2017) (finding that 79% had

some other motive than to hurt the victim).[15] They are motivated instead by greed, voyeurism, a desire for social standing, or other impulses. *See, e.g.*, Franks, *supra*, at 1335.

Regardless of the perpetrator's motive, the disclosure of such personally sensitive information can causes life-shattering harm, including severe psychological trauma, loss of employment, stalking, and suicide. "[B]anning the distribution of nonconsensual pornography only when the distributor has the purpose to distress the subject will leave untouched a lot of equally harmful nonconsensual pornography. If the content of speech is indeed harmful and valueless enough to be banned, it should be banned without regard to the speaker's purpose." Volokh, *supra*, at 1421.

All of the laws that have been challenged on First Amendment grounds to date have been upheld, including those that do not require a subjective intent to harm the victim. Victoria Killion, Cong. Rsch. Serv., LSB10723, *Federal Civil Action for Disclosure of Intimate Images: Free Speech Considerations* 2 (2022). The Illinois Supreme Court, in addressing the criticism of that state's law for not including intent to cause harm as an element of the offense, correctly noted that:

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[15] https://www.cybercivilrights.org/wp-content/uploads/2017/06/CCRI-2017-Research-Report.pdf

> the motive underlying an intentional and unauthorized dissemination of a private sexual image has no bearing on the resulting harm suffered by the victim. A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective. Therefore, the question of the disseminator's motive or purpose is divorced from the legislative goal of protecting the privacy of Illinois citizens. The explicit inclusion of an illicit motive or malicious purpose would not advance the substantial governmental interest of protecting individual privacy rights, nor would it significantly restrict its reach.

People v. Austin, 155 N.E.3d 439, 470 (Ill. 2019), *cert denied*, 141 S.Ct. 233 (2020).

A ruling in Petitioner's favor would jeopardize the progress that has recently been made to deter and punish emerging and evolving abuses facilitated by technology such as nonconsensual pornography.

CONCLUSION

For the above reasons, the judgment below should be affirmed.

Respectfully submitted,

Jeffrey A. Mandell*
Erin K. Deeley
Carly Gerads
STAFFORD ROSENBAUM LLP
222 West Washington Ave.
#900
P.O. Box 1784
Madison, WI 53701
608.256.0226
jmandell@staffordlaw.com
**Counsel of Record*

Mary Anne FrankS
1311 Miller Drive
Coral Gables, FL
33146
786.860.2317

Counsel for Amici Curiae

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