No. 121094

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. WALTER RELERFORD, Defendant-Appellee	Appeal from the Appellate Court of Illinois, First District No. 1-13-2531 There on Appeal from the Circuit Court of Cook County, Illinois, No. 12 CR 8636 The Honorable William G. Lacy, Judge Presiding

BRIEF OF *AMICI CURIAE*
CATO INSTITUTE AND
MARION B. BRECHNER FIRST AMENDMENT PROJECT
IN SUPPORT OF DEFENDANT-APPELLEE'S CROSS-APPEAL

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POINTS AND AUTHORITIES

Interest of *Amici Curiae*

The Cato Institute, founded in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Cato is deeply interested in the First Amendment as an aspect of liberty and as a protection for such liberty, and it has published a vast range of commentary strongly supporting First Amendment rights.

The Marion B. Brechner First Amendment Project in the College of Journalism and Communications at the University of Florida is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a range of scholarly and educational activities benefiting scholars, students and the public. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida Board of Trustees. The Project's scholarly and educational interest in filing this *amici* brief is to bring to the Court's attention important First Amendment scholarship on issues and

public policies that are implicated by the Illinois statutes at issue in this case.

Summary of Argument

The Illinois Stalking and Cyberstalking statutes are unconstitutionally overbroad.

1. Subsections (a) of both statutes criminalize substantially more speech than is permissible under the narrow "true threats" exception to First Amendment protection. The statutes punish speech whenever the speaker is merely negligent about the risk that it will be interpreted as threatening. Yet the U.S. Supreme Court defines true threats as "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." *Virginia v. Black*, 538 U.S. 343, 344 (2003) (emphasis added). Courts have since held that the true threats exception is limited to statements made with the purpose to threaten or, at the very least, with knowledge or recklessness that they will be threatening. *See, e.g., United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). A negligence standard is inconsistent with these precedents.

2. Subsection (a)(2) of the cyberstalking statute unconstitutionally criminalizes speaking more than once about a person when such speech negligently causes "emotional distress," defined as "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.3(a), (c)(1), (c)(3), 720 ILCS 5/12-7.5(a), (c)(1),

(c)(3). Yet there is no First Amendment exception from speech protection for emotionally distressing messages. The U.S. Supreme Court has made it clear that speakers cannot be *civilly* liable for speech on matters of public concern, even when it *intentionally* causes *severe* emotional distress. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011). Here, Subsection (a)(2) *criminally* punishes speech on matters of public concern when it *negligently* causes *significant* emotional distress—an even graver restriction than that held unconstitutional in *Snyder*.

Argument

I. Subsections (a) of the Statutes Are Content-Based Speech Restrictions, and Are Thus Presumptively Unconstitutional

"Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). A law is "content[-]based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley,* 134 S. Ct. 2518, 2531 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

Here, Subsections (a)(1) and (a)(2) prohibit speech that causes a person to fear for his or her safety or suffer emotional distress. To enforce this restriction, authorities must examine the content of the speech to determine its effect on the listener. "Listeners' reaction to speech"—here, fear or emotional

distress—"is not a content-neutral basis for regulation." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

The state argues that the statutes do not regulate speech at all, but rather a "course of conduct." Br. Pl.-Appellant 15-16; 720 ILCS 5/12-7.3(a). The statutes themselves, however, plainly define "course[s] of conduct" as "including but not limited to acts in which a defendant . . . communicates to or about, a person," and this "include[s] contact via electronic communications." 720 ILCS 5/12-7.3(c)(1), 720 ILCS 5/12-7.5(c)(1). These definitions clearly encompass speech.

Even when "most" of the conduct that triggers a criminal statute "does not take the form of speech" and the statute "generally functions as a regulation of conduct," the statute nonetheless is still treated as a speech restriction when "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *see also Cohen v. California*, 403 U.S. 15 (1971) (treating a breach of the peace statute, which generally regulated conduct, as a content-based speech restriction because the defendant was prosecuted under the statute based on the communicative impact of a message on his jacket). Here, as in *Holder*, "[t]he Government is wrong that the only thing actually at issue in this litigation is conduct." *Holder*, 561 U.S. at 27.

Indeed, in a case involving threats, the U.S. Court of Appeals for the Ninth Circuit likewise held that "when the definition of a crime or tort em-

braces any conduct that causes or might cause a certain harm, and the law is applied to speech whose communicative impact causes the relevant harm, we treat the law as content-based." *United States v. Cassel*, 408 F.3d 622, 626 (9th Cir. 2005). That principle remains true even when the statute's "language is not addressed specifically to speech," but criminalizes the creation of various harms "whether through speech or conduct." *Id.*

Thus, because criminal liability under the statutes is triggered by the communicative impact of speech on the listener, the statute is a content-based speech restriction. It is therefore unconstitutional unless (1) it is limited to speech that fits within a First Amendment exception (which it is not, as the sections below will show), or (2) it is narrowly tailored to a compelling government interest (which the government does not even argue). *See, e.g.*, *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 799 (2011).

II. Subsection (a)(1) Unconstitutionally Criminalizes Speech That Does Not Fit Within the True Threats Exception to First Amendment Protection

A. The True Threats Exception Requires More Than Negligence

The government may punish true threats of violence—but the true threats exception requires a higher *mens rea* than mere negligence. In *Virginia v. Black*, the Supreme Court defined true threats as "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." 538 U.S. 343, 344 (2003) (emphasis added). Speech constitutes "constitutionally proscribable" true threats only "where a speaker directs a threat to a

person . . . *with the intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

This is why the Ninth and Tenth Circuits have both recognized that true threats require a mental state above negligence under *Black*. "[S]peech may be deemed unprotected by the First Amendment as a true threat only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633; *see also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech."); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (finding that an intent to threaten is necessary, even though the intent to carry out the threat is not).

The Seventh Circuit likewise held that "an entirely objective standard is [likely] no longer tenable" after *Black*. *United States v. Parr*, 545 F.3d 491, 499-500 (7th Cir. 2008). Instead, the *Black* Court either "meant to retire the objective 'reasonable person' approach or to add a subjective intent requirement." *Id.*

Thus, at the very least, the *mens rea* for true threats *must* include a subjective element, regardless of whether an objective element is also necessary. *See also Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014) (relying on *Black* in reading "true threats" as having a subjective, purpose-to-put-in-fear component); *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012) (same), *abro-*

gated as to a different question, Seney v. Morhy, 3 N.E.3d 577, 581 (2014); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004) (same). Here, however, the statutes penalize protected speech simply based on a showing that the defendant "should know" that the speech would cause the listener fear, with no subjective purpose, knowledge, or recklessness requirement. 720 ILCS 5/12-7.3(a), (c)(1), (c)(3), 720 ILCS 5/12-7.5(a), (c)(1), (c)(3).

To be sure, some cases have read the true threats exception as requiring merely a showing of negligence. *See, e.g., United States v. White*, 810 F.3d 212, 220 (7th Cir. 2016); *State v. Trey M.*, 383 P.3d 474, 478 (Wash. 2016), *cert. petn. pending*, No. (docketed Jan. 26, 2017). But these statements are inconsistent with the implications of the U.S. Supreme Court's position in *Elonis v. United States*, 135 S. Ct. 2001 (2015).

In *Elonis*, the Court concluded that the federal threats statute in that case should be interpreted to require a *mens rea* higher than negligence; the Court thus set aside the conviction without having to address the First Amendment question. *Id.* at 2012; *see* Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 Wm. & Mary Bill Rts. J. 943, 959 (2016) (discussing the *Elonis* decision as an instance of avoiding constitutional questions on statutory grounds). Yet, as explained below, the *Elonis* Court's statutory reasoning strongly suggests that the constitutionally required *mens rea* must be higher than negligence.

The First Amendment exceptions, including the true threats exception, are recognized because they are "historic and traditional" limitations. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted) (speaking about the exceptions generally); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 791 (2011); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality op.) (expressly including "true threats" as one of those categories). In examining the federal threats statute in *Elonis*, the Court made it clear that the principle that "'wrongdoing must be conscious to be criminal,'" an understanding that "'took deep and early root in American soil,'" applied to federal threats law. *Elonis*, 135 S. Ct at 2012 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). This principle, the Court stressed, was a "general rule" that was "universal and persistent," *id.* at 2009 (internal quotation marks omitted). The Court emphasized in *Elonis* that "a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." *Id.* It thus follows that the "historic and traditional" scope of the First Amendment true threats exception should be understood in light of this "general rule" that a "defendant must be blameworthy in mind before he can be found guilty." *Id.*

Black and *Elonis* are also consistent with the Court's long-standing practice of minimizing broad speech restrictions by requiring speakers to have a subjective intent greater than negligence. The Court has defined other First

Amendment exceptions as requiring speakers to have a mental state above negligence before imposing criminal punishment for speech—indeed, even before imposing *civil* punitive damages liability.

For example, false and defamatory statements about a public official on matters of public concern are unprotected only when made with "actual malice," meaning "knowledge" that the statement is false or "reckless disregard" of the possibility of falsehood. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (extending the recklessness requirement to the criminal libel context). False and defamatory statements about private figures on matters of public concern similarly require actual malice for a jury to award punitive damages. In *Gertz v. Robert Welch, Inc.*, the Court held that a jury in a civil case could not punish even libels on matters of public concern unless the speaker acted with knowledge of falsity or reckless disregard for the truth. 418 U.S. 323, 350 (1974). If merely negligent speech cannot lead to punishment via punitive damages using civil liability, it certainly should not lead to criminal punishment.

Likewise, the Court limits the unprotected category of incitement to speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Court has since made clear that *Brandenburg*'s "directed to inciting" language requires specific intent: when there is no evidence that a speaker's "words were *intended to produce*, and likely to produce, imminent

disorder, those words [can]not be punished by the State." *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (emphasis added).

The Court similarly has held that the First Amendment precludes obscenity prosecutions when the defendant lacked "scienter," defined as "knowledge by [defendant] of the contents of the book" that he was selling. *Smith v. California*, 361 U.S. 147, 149, 150 (1959); *id.* at 153 ("By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."); *Martin v. Commonwealth*, 96 S.W.3d 38, 61 (Ky. 2003) ("*Smith* struck down the obscenity ordinance at issue in that case precisely because it did *not* require the *mens rea* element of scienter, *i.e.*, knowledge by the defendant bookseller of the content of the allegedly obscene book."). Furthermore, in interpreting a federal statute targeting child pornography—another category of speech not protected by the First Amendment—the Court has held that a "knowingly" scienter requirement "extends both to the sexually explicit nature of the material and to the age of the performers." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

The speaker's subjective intent must likewise matter for cases involving true threats. Consider, for example, *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997), where Kevan Fulmer had asked the FBI to investigate a matter, but the FBI agent decided that the record did not support a prosecution. Three months later, Fulmer left a voicemail for the agent stating, "the silver

bullets are coming," and was then indicted for threatening a federal officer. *Id.* at 1490. Fulmer argued that "silver bullet" meant "a solution to a problem," *see* Brief of Appellant, *Fulmer*, 1996 WL 33659048, at *8; *Silver Bullet*, American Heritage Dictionary, http://ahdictionary.com ("1. An infallible means of attack or defense. 2. A simple remedy for a difficult or intractable problem."), but the government concluded that a reasonable person could understand it as a threat of gunfire.

In this situation, an honest mistake by the speaker in such a case should not lead to criminal punishment, even if a jury finds that the speaker should have realized that his statement could have been misunderstood. Indeed, in *Fulmer*, Fulmer was convicted only based on the government's proving (as required by the statute in that case) that Fulmer had intended to put the agent in fear. 108 F.3d at 1493-94. Yet under the Illinois statute, even a speaker who only intended the metaphorical use of "silver bullet" (or was perhaps referring to the silver bullets as a calling card for the Lone Ranger), and had no thought of a possible threatening meaning, could be criminally punished.

And criminally punishing speakers based on mere negligence can chill even constitutionally protected speech. Consider, for instance, an aspiring rap artist who posts a song to YouTube filled with violent imagery and lyrics. The artist intends only to convey an artistic message and social commentary about the harsh reality of life on the streets and has no desire to threaten an-

yone. *See* Clay Calvert, Emma Morehart & Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 Columbia J.L. & Arts 1, 17-18 (2014) (discussing "the multifaceted and intricate nature of the meaning of rap music"). A listener, however, who has had conflicts with the artist in the past perceives the song to be about him and to carry veiled threats against him. Under Subsection (a)(1), the rap artist could be prosecuted and convicted because he supposedly should have known the listener would feel threatened.

And then others hearing of the artist's prosecution and conviction may, in turn, easily conclude that writing such songs is too dangerous; who knows whether they might be prosecuted next? A negligence standard would thus chill a great deal of artistic expression if artists fear their expression will be misunderstood.

The same holds true of political speech: People who hear that speakers are being criminally prosecuted because they had "reason to know" that listeners could misunderstand their rhetoric might become reluctant to speak out on controversial topics. As a result, the threat of prosecution under a negligence standard will deter even speech that ultimately is not threatening at all—just as the threat of liability in defamation cases can "deter[speakers] from voicing their criticism, . . . even though it is in fact true." *New York Times*, 376 U.S. at 279.

B. Courts Have Repeatedly Held That True Threats Require Speakers to Purposely Threaten Violence

Beyond holding that the true threats exception requires a *mens rea* beyond mere negligence, many courts and commentators read *Black* further to specifically require purpose. *Cassel*, 408 F.3d at 633; *Bagdasarian*, 652 F.3d at 1117; *Magleby*, 420 F.3d at 1139; Frederick Schauer, *Intentions, Conventions, and the First Amendment*, 55 Sup. Ct. Rev. 197, 217 (2003) ("[I]t is plain that . . . the *Black* majority . . . believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate."); Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U. L. Rev. 1, 33 (2004) ("*Black* now confirms that proof of specific intent (aim) must be proved also in threat cases."). Very recently, Justice Sotomayor expressed the same view: "[*Watts v. United States* and *Virginia v. Black*] strongly suggest that," for the true threats exception to apply, "a jury must find that the speaker actually intended to convey a threat." *Perez v. Florida*, No. 16-6250, 2017 WL 865419 (U.S. Mar. 6, 2017) (Sotomayor, J., concurring in the denial of certiorari).

The language in *Black* undeniably points in this direction. The Court's definition of true threats—"encompass[ing] 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"—indicates in unequivocal terms that only *intentional* threats qualify as true threats. *Black*, 538 U.S. at 359 (emphasis added). "When the Court says that

the speaker must 'mean[] to communicate a serious expression of an intent,' it is requiring more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently." *United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014) (citations omitted).

Black's ultimate conclusion also strongly supports the requirement of a subjective intent to threaten. In *Black*, the Court struck down a provision in an anti-cross-burning statute that allowed cross-burning itself to serve as prima facie evidence of intent to intimidate. Justice O'Connor's plurality opinion reasoned that the provision created an "unacceptable risk of the suppression of ideas" because it blurred the distinction between permissible and impermissible cross-burnings, which hinged on whether the speaker "intended to intimidate." 538 U.S. at 366 (plurality op.). Three more justices agreed that the prima facie intent provision was unconstitutional because "it encouraged a factfinder to err on the side of a finding of intent to intimidate" when the speech has both permissible and impermissible motivations. *Id.* at 386 (Souter, J., concurring in the judgment in part and dissenting in part).

As the Ninth Circuit recognizes, "[t]he Court laid great weight on the intent requirement." *Cassel*, 408 F.3d at 631:

> The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another "prima facie evidence of an intent to intimidate."

Id. Ultimately, the Ninth Circuit concluded, "the clear import" of *Black*'s definition of true threats "is that only *intentional* threats are criminally punishable consistently with the First Amendment." *Id.*; *see also Heineman*, 767 F.3d at 976-79 (providing a lengthy discussion of the *Black* plurality's insistence on the specific intent requirement). Nor does *Elonis* contradict this reading of *Black*: Because the parties in that case agreed that a *mens rea* of recklessness or knowledge was sufficient for liability, 135 S. Ct. at 2012, and because Elonis's conviction had to be reversed once the Court concluded that the jury instructions were invalid because they called for a *mens rea* of mere negligence, *id.* at 2013, the Court had no occasion to decide whether purpose was constitutionally required.

Requiring intent to threaten also parallels the incitement exception, where a specific purpose to bring about a certain result is necessary. *See supra* p. 9. The *mens rea* question as to both true threats and incitement has to do with future results (future violence by listeners, or future fear on the listeners' part). It makes sense to treat both as punishable only when they are purposeful attempts to bring about the future conditions. By contrast, libel suits are concerned with past facts—what a person knows about things that have already happened. Such facts are what the Model Penal Code calls "attendant circumstances," as to which a person cannot have "purpose," but merely knowledge or recklessness. Model Penal Code § 2.02(2)(a) (2015).

Given the express language in *Black*, the Seventh, Ninth, and Tenth Circuits' interpretations of that language, as well as the similarities between the true threats and incitement doctrines, the "true threats" exception should be limited to statements made with the purpose to threaten.

III. Subsection (a)(2) of the Cyberstalking Statute Is Unconstitutionally Overbroad—and Thus Facially Invalid—Because Much Speech That Inflicts Emotional Distress Is Constitutionally Protected

The cyberstalking statute criminalizes speech that a speaker "knows or should know . . . would cause a reasonable person to . . . suffer emotional distress," defined as "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.5(a)(2), (c)(3). Like Subsection (a)(1), Subsection (a)(2) is thus a content-based speech restriction because it applies to speech based on "the effect of [the speaker's] communication upon his hearers." *Cantwell v. Connecticut*, 310 U.S. 296, 308-09 (1940).

And Subsection (a)(2) is an unconstitutionally overbroad speech restriction, which is therefore facially invalid (even if a narrower restriction might be constitutional as applied to this case). It criminalizes protected speech on matters of public concern. It criminalizes protected speech on matters of private concern. It invites viewpoint discrimination. And though some restrictions on unwanted speech *to* a person (such as traditional telephone harassment bans) may be constitutional, Subsection (a)(2) unconstitutionally criminalizes protected speech *about* a person.

A. Subsection (a)(2) Criminalizes Protected Speech on Matters of Public Concern

Speech is presumptively protected by the First Amendment, even when the speech is offensive and distressing, so long as it does not fit within one of the "narrow exceptions" to First Amendment coverage (such as the true threats exception). That is especially true for speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 459 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

In *Snyder*, the Court found that picketers could not be held liable for intentional infliction of emotional distress after they protested the funeral of a Marine killed in the line of duty. *Snyder*, 562 U.S. at 459. Though the protest included signs with reprehensible messages such as "Thank God for Dead Soldiers" and "Thank God for IEDs"—language that "inflict[ed] great pain" and "added to [the plaintiff's] already incalculable grief"—the speech was nonetheless protected by the First Amendment. *Id.* at 454, 461.

Similarly, in *Hustler*, the Court held that an ad parody published in Hustler Magazine depicting televangelist Jerry Falwell as an incestuous drunk was protected speech. *Hustler*, 485 U.S. at 53-55. Though "a bad motive may be deemed controlling for the purposes of tort liability in other areas of the law," the Court held, "the First Amendment prohibits such a result in the area of public debate about public figures." *Id.* at 53.

Snyder and *Hustler* thus held that harassing speech could not lead to *civil* liability even when the speech was "*outrageous*" and *purposefully or recklessly*

caused *severe* emotional distress. *Snyder*, 562 U.S. at 458 (emphasis added); *Hustler*, 485 U.S. at 50-52 (emphasis added). Surely then *criminal* liability may not attach to speech that *negligently* causes merely *significant* emotional distress (and without an "outrageousness" requirement). Yet that is exactly what Subsection (a)(2) purports to do. Indeed, the very speakers in *Snyder* and *Hustler* would have been subject to criminal punishment under this provision, had they repeated their statements in Illinois at least twice today—after all, they should have known that their "course of conduct" (consisting of "communicat[ing] to or about[] a person") would have caused some reasonable people "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.5(c)(3).

Indeed, a vast range of public debate could be punished by these subsections. Consider, for example, a citizen who writes several Facebook posts that sharply criticize a local businessperson's practices (whether related to labor, the environment, consumer service, political contributions, or whatever else) and urge people to boycott the business. The businessperson sees the posts and reasonably feels "significant mental suffering" or "anxiety" at the prospect of losing customers or perhaps even going bankrupt. The citizen critic would then be guilty of a crime, for negligently causing "emotional distress."

Or say that another person then responds by repeatedly noting that the critic has a serious criminal history, and should therefore not be trusted. The critic sees the posts and reasonably feels "significant mental suffering" for be-

ing exposed as a felon. Now the person who posted this public-record information would be a criminal simply because he negligently "emotional[ly] distress[ed]" the initial critic. *But see Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004) (holding that accurate reports about a person's criminal past, drawn from public records, are constitutionally protected even against civil liability).

And now say that a newspaper reporter writes two online articles about all this behavior, which deeply embarrasses the feuding parties. The reporter might likewise be criminally liable.

To be sure, the stalking statute purports to exempt the "exercise of the right to free speech or assembly that is otherwise lawful." 720 ILCS 5/12-7.3(d)(2). Yet the cyberstalking statute conspicuously omits any such exemption. Subsection (d) of -7.5 repeats subsection (d)(3) of -7.3, which immunizes various telecommunications providers, but does not repeat subsections (d)(1)-(2) of -7.3, which immunize labor picketers and other lawful speakers. When it comes to online speech, the cyberstalking statute thus deliberately covers "otherwise lawful" "exercise of the right to free speech," and not just constitutionally unprotected conduct.

B. Subsection (a)(2) Also Criminalizes Constitutionally Protected Speech on Matters of Private Concern

The First Amendment also protects even speech on matters of purely private concern. *Stevens*, 559 U.S. at 460. In *Stevens*, the Court struck down a ban on certain depictions of violence towards animals, even though the stat-

ute exempted depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." *Id.* at 479. The Court concluded that the exception did not save the statute: "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value) but it is still sheltered from government regulation." *Id.* (emphasis in original).

Thus, even much of the speech on matters of purely private concern that is targeted by Subsection (a)(2) is likely protected by the First Amendment. People must be free to talk about their lives even when they should know that their speech might cause someone emotional distress—yet subsection (a)(2) would outlaw such speech (at least if it takes place two or more times).

Consider a woman whose ex-boyfriend cheated on her, and who publicly excoriates him several times to her Facebook friends. She should be free to engage in such speech, whether to explain to her friends why she feels sad or to alert her friends that they should stay away from the ex-boyfriend.

But if her ex-boyfriend sees the posts and feels "significant mental suffering" because their mutual friends now know about the cheating and shun him for it, the woman could be subject to criminal punishment under Subsection (a)(2). That perverse result cannot be constitutionally permissible. "As a general matter, Americans are free to say and to write bad things about each other." *People v. Bethea*, No. 2003BX036814, 2004 WL 190054, at *1 (N.Y. Crim. Ct. Jan. 13, 2004) (rejecting harassment prosecution for woman's pub-

licly excoriating her ex-boyfriend); *see also State v. Machholz*, 574 N.W.2d 415, 418, 420-21 (Minn. 1998) (striking down a ban on harassing conduct, partly because the law "criminalizes any number of day-to-day interactions between people"); Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. U. L. Rev. 731, 783-88 (2013).

C. Courts in Other States Have Struck Down Such Bans on Distressing Speech

Courts have repeatedly struck down or limited the application of harassment statutes like Subsection (a)(2). In *People v. Dietze*, for instance, New York's high court struck down, as substantially overbroad, a criminal harassment statute that criminalized "abusive" speech said with the intent to "harass" or "annoy." 75 N.Y.2d 47 (1989). More recently, that court in *People v. Marquan M.* struck down as substantially overbroad a cyberstalking statute similar to the one at issue here because it criminalized electronic communications meant to "harass, annoy . . . . taunt, . . . [or] humiliate." 24 N.Y.3d 1 (2014).

Florida appellate courts have likewise struck down, on First Amendment grounds, injunctions against potentially harassing speech. In *Neptune v. Lanoue*, a Florida court overturned an injunction that restricted the appellant's speech on matters of public concern about a police officer, even though the trial court had characterized the repeated criticism of the officer as "stalking." 178 So. 3d 520, 522 (Fla. Ct. App. 2015). Similarly, *O'Neill v.*

Goodwin held that the state stalking and cyberstalking laws could not constitutionally be applied to ban an aspiring filmmaker from using the plaintiff's image, even though the plaintiff was apparently distressed by the speech. 195 So. 3d 411, 414 (Fla. Dist. Ct. App. 2016).

Most analogously, the North Carolina Supreme Court in *State v. Bishop* struck down a cyberbullying statute that prohibited "post[ing] on the Internet private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." 787 S.E.2d 814, 820 (N.C. 2016). The court concluded that, though the statute focused only on offensive speech about minors, it still unconstitutionally outlawed "behavior that a robust contemporary society must tolerate because of the First Amendment, even if we do not approve of the behavior." *Id.* at 821.

Like the statute at issue in *Bishop*, Subsection (a)(2) criminalizes a wide range of protected speech, potentially leading speakers to refrain from speaking at all for fear of criminal liability. "Civility, whose definition is constantly changing, is a laudable goal but one not readily attained or enforced through criminal laws." *Id.*; *see also United States v. Cassidy*, 814 F. Supp. 2d 574, 584-85 (D. Md. 2011) (rejecting the claim that a ban on public speech that causes substantial emotional distress is justified by a "compelling interest in protecting victims from emotional distress sustained through an interactive computer service").

D. Unlike Lawful Harassment Statutes, Subsection (a)(2) Criminalizes Constitutionally Protected Speech *About* a Person, Not Merely *to* a Person

Subsection (a) is far broader than traditional stalking statutes or telephone harassment laws. Though certain traditional stalking statutes and telephone harassment laws have been found constitutional, these statutes specifically restrict what a speaker can say *to* a person. *See Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (upholding a statute that allowed individual recipients to block future unwanted mail from particular senders).

But the law cannot similarly restrict speech *about* a person that is said to the public. Thus, for instance, the Court in *Organization for a Better Austin v. Keefe* invalidated an injunction that prevented an organization from distributing leaflets that were critical of a real estate agent (even though the leaflets were distributed in the neighborhood where the agent lived, and urged people to call the agent at his home phone number). 402 U.S. 415, 420 (1971). *Rowan*, the Court said, was not analogous, because Keefe "[was] not attempting to stop the flow of information into his own household, but to the public." *Id.* Likewise, when the Court in *Frisby v. Schultz* upheld a law against targeted residential picketing, it did so precisely because "the picketing [was] narrowly directed at the household, not the public," and because the picketers "[did] not seek to disseminate a message to the general public, but to intrude upon the targeted resident." 487 U.S. 474, 486 (1988). *See generally* Volokh, *supra*, at 740-51.

Here, Subsection (a) defines "course of conduct" as including communications "to or about, a person," and so differs fundamentally from constitutional restrictions such as those in *Rowan* or *Frisby*. 720 ILCS 5/12-7.3(c)(1), 720 ILCS 5/12-7.5(c)(1) . As the Florida Court of Appeal noted in striking down an injunction barring speech about a person, "communications *about*" an offended party are constitutionally protected even when "communications *to*" the person are not. *David v. Textor*, 189 So. 3d 871, 876 (Fla. Ct. App. 2016).

Speech that causes emotional distress is protected when made to the public even if it is critical of a person (as in *Keefe*), and even if it is outrageous and offensive (as in *Snyder* and *Hustler*). Subsection (a)(2), therefore, unconstitutionally restricts a substantial amount of protected speech.

IV. Subsection (a)(2) of the Stalking Statute Is Likewise Unconstitutional Because the Savings Clause in (d)(2) is Unconstitutionally Vague

As noted at p. 19, the stalking statute (but not the cyberstalking statute) purports to exempt the "exercise of the right to free speech or assembly that is otherwise lawful." 720 ILCS 5/12-7.3(d)(2). But this vague savings clause cannot save the stalking statute from overbreadth, because it is unconstitutionally vague: It requires citizens to become First Amendment experts, deeply knowledgeable about what constitutes "exercise of the right to free speech or assembly" and what might fit within the complicated array of First Amendment exceptions.

"[A] savings clause that provides that conduct protected by the state or federal constitutions is not a crime under this section" "cannot substantively

operate to save an otherwise invalid statute." *State v. Machholz*, 574 N.W.2d 415, 421 n.4 (Minn. 1998) (striking down overbroad criminal harassment statute, and citing *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996)); *State v. Moyle*, 705 P.2d 740, 748 n.12 (Or. 1985) (applying the same reasoning as to threats statute). Such a provision "would relegate the First Amendment issue to a 'case-by-case adjudication,' creating [a] vagueness problem." *Long*, 931 S.W.2d at 295 (striking down overbroad criminal harassment statute) (internal quotation marks omitted).

> Application of [such an] affirmative defense . . . on a case-by-case basis would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars. . . . Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence, and a First Amendment defense cannot by itself provide adequate guidelines for law enforcement. Moreover, an attempt to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression.

Id.

Given that Subsection (a)(2) of the stalking statute thus criminalizes a broad range of constitutionally protected speech, Subsection (d)(3) cannot save the stalking statute from invalidity.

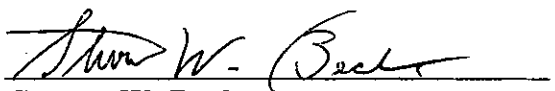
Conclusion

Subsections (a)(1) of the stalking and cyberstalking statutes are unconstitutionally overbroad because they punish speakers who are merely negligent about the risk that their speech may be interpreted as threatening. The true

threats exception requires the much higher *mens rea* of either purpose or, at the very least, recklessness or knowledge.

Subsections (a)(2) of those statutes are also unconstitutionally overbroad because speech is generally protected by the First Amendment even when it causes emotional distress. This Court should therefore affirm the judgment of the decision below (even if not its precise reasoning) and reverse Relerford's conviction.

Respectfully submitted,



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Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages ~~or words~~ contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages ~~or words~~.

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