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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who specialize in the First Amendment. They have no personal interest in the outcome of this case, but are concerned that this Court may apply the "true threats" doctrine to stalking statutes, which raise distinct First Amendment concerns.

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[1] University affiliations of *amici curiae* are provided for identification purposes only. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This is not a threats case. To convict Petitioner Billy Ray Counterman, Colorado prosecutors were not required to prove that he made a threat—"true" or not. Rather, he was tried and convicted under a statute that is violated when an individual "[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person … in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person … to suffer serious emotional distress." Colo. Rev. Stat. § 18-3-602(1)(c). In other words, he was convicted of stalking.

This difference matters to the First Amendment analysis. Laws that simply prohibit threats—like the law at issue before this Court in *Elonis v. United States*—forbid speech because of its communicative content alone. But laws that prohibit stalking do no such thing. They prohibit a pattern of conduct, sometimes involving speech, that is directed at another person and that, because of the manner in which it occurs, reasonably causes its target serious emotional harm. This conduct *can* include the making of threats, but it does not have to. Even in cases where stalkers make no explicit threats, victims of stalking often experience profound emotional—and sometimes physical—harm.

The First Amendment constrains the government when it regulates stalking, just as it constrains the government when it regulates threats. But the constraints the First Amendment imposes on the government in stalking cases are meaningfully

different than those imposed on the government when it regulates threats, and this Court should be careful to distinguish the two.

Stalking laws like Colorado's prohibit a course of repeated conduct that is *by definition* directed at a specific person. So, while the repeated conduct may include communications, it is typically not addressed to a broad public audience. That means stalking laws pose much less risk to the "uninhibited, robust, and wide-open" public discussion that the First Amendment protects than laws that punish one-off, untargeted communications. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A stalker's communications are also always directed at an unwilling listener. As this Court's cases recognize, "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 737 (1970). Finally, because stalking convictions require proof of multiple instances of the offending behavior, it is less likely that stalking laws will be used to "criminaliz[e] inevitable misunderstandings" than threat statutes. *Cf.* Pet'r Br. 12. For all of these reasons, it is not necessary to read a heightened *mens rea* requirement into stalking laws in order to ensure adequate "breathing room" for expressive freedom. *See United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer J., concurring in the judgment) (noting that "mens rea requirements … provide 'breathing room' [for speech] … by reducing a[] … speaker's fear that he may accidentally incur liability for speaking").

The way this case has been presented to this Court risks obscuring the important difference between threats and stalking. Throughout the appellate

process, Mr. Counterman painted this as a "true threats" case, and the Colorado Court of Appeals accepted this framing. But the record demonstrates that Mr. Counterman was not convicted of making an isolated threatening statement. Rather, the jury convicted him on the basis of evidence showing that over a two-year period, Mr. Counterman sent hundreds, possibly thousands, of messages to a musician, C.W., whom he did not know. Some of these messages were threatening. Many were simply confusing or mundane. But collectively they caused C.W. great emotional distress, not because of what they threatened to do but because of the intimacy they falsely presumed to exist, and the fact that, despite her efforts to block them, the messages *did not stop*. This is a paradigmatic stalking case.

If this Court reverses on the ground advanced by Mr. Counterman—that the government must prove he had a subjective intent to threaten C.W. before it can impose criminal liability—it would significantly hamper the government's ability to protect individuals from the serious harm caused by stalking, without any corresponding benefit to public discourse. Under this rule, a defendant could send thousands of messages to his target but only face repercussions if the messages happen to include one or two "true threats."

This Court should therefore affirm the judgment of the Colorado Court of Appeals, albeit for different reasons than that court provided. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (Court has the "discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below") (citing *Thigpen v.*

Roberts, 468 U.S. 27, 30 (1984)). It should hold that Mr. Counterman's conviction does not run afoul of the First Amendment because the Colorado emotional-distress stalking statute as applied to him does not criminalize protected expression. Colorado proved that he made repeated and unwanted communications to a particular individual that reasonably caused her serious emotional distress. Prosecutions of this kind do not pose a serious risk to free and open public discourse.

ARGUMENT

I. Stalking laws and laws targeting standalone threats raise distinct First Amendment questions.

Laws that make it a crime to stalk another, like laws that make it a crime to threaten, protect people from violence and from "the fear of violence and the disruption that fear engenders." *Virginia v. Black*, 538 U.S. 343, 344 (2003). Nevertheless, laws that prohibit stalking operate differently from laws that prohibit threats alone. Stalking statutes target a pattern of conduct of which threatening communications can be—but are not necessarily—a part; and they typically target conduct and communications aimed *at a specific individual* rather than the public at large. Accordingly, they trigger different First Amendment questions from prohibitions on threats.

A. Stalking laws emerged to combat persistent unwelcome targeting of individuals that frequently leads to violence.

Since at least the early twentieth century, state and federal law have prohibited individuals from using

words or expressive actions to threaten, harass or intimidate particular targets.

In the early twentieth century, numerous states, as well as the federal government, enacted laws to prevent the marvelous new technological device of the telephone from being turned into an instrument of harassment and abuse. *E.g.*, 47 U.S.C. § 223(a)(1)(C) (making it a crime to "make[] a telephone call or utilize[] a telecommunication device … without disclosing [one's] identity and with intent to abuse, threaten, or harass any specific person"); *id.* § 223(a)(1)(E) (making it a crime to "make[] repeated telephone calls … during which conversation or communication ensues, solely to harass any specific person"); La. Rev. Stat. Ann. § 14:285(A)(2) (making it a crime to "[m]ake repeated telephone communications or send repeated text messages or other messages using any telecommunications device directly to a person anonymously or otherwise in a manner reasonably expected to abuse, torment, harass, embarrass, or offend another, whether or not conversation ensues").

More recently, all fifty states as well as the federal government have enacted laws to prohibit stalking, commonly defined to mean the repeated use of either physical actions or speech to follow, harass, or surveil another in a manner that causes them serious emotional distress. *E.g.*, Alaska Stat. § 11.41.270(a) ("A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member."); Mich. Comp. Laws § 750.411h(1)(d) ("'Stalking' means a willful

course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."); *see also generally* Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991 (1993). According to the U.S. Department of Justice, approximately 3.4 million adults are stalked every year in the United States, with women being at greater risk of stalking than men. *See* Katrina Baum et al., *Stalking Victimization in the United States*, U.S. Dep't of Just. (Jan. 2009), https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf.

California enacted the first stalking law in 1990, after actress Rebecca Schaeffer was shot and killed by an obsessive fan who had stalked her for three years. Soon afterwards, in unrelated incidents, five other California residents (all women) were killed by their intimate partners. The killings shared two common attributes: "the killers had stalked their victims incessantly, and the justice system had been unable to intervene." Guy, *supra*, at 991–92. Similarly, Colorado's stalking law, under which Petitioner was convicted, was amended after Vonnie Flores was shot and killed by her stalker of five years.

As the history of the California and the Colorado stalking laws illustrates, the conduct of stalking is criminalized in part to head off the serious, even deadly, violence that stalking can lead to. In this respect, then, there is overlap between the concerns underpinning stalking laws and those underpinning

prohibitions on threats. There is also overlap between the behavior targeted by threat laws and that targeted by stalking laws. But the two types of laws are also meaningfully distinct.

B. Threats laws and stalking laws target different behavior.

Issuing an isolated threat is neither necessary nor sufficient to constitute stalking. Rather, stalking laws prohibit *courses of conduct* of which speech, including threatening speech, can be a part. *See, e.g.*, Kan. Stat. Ann. § 21-5427 (requiring a "course of conduct targeted at a specific person" that would cause a "reasonable person in the circumstances" to "fear for such person's safety"); N.J. Stat. Ann. § 2C:12-10 (same).

Many stalking statutes specifically address stalking behavior that includes threatening communications. The Colorado statute at issue in this case is a good example. In a separate provision from the one at issue here, it makes it a crime to "directly, or indirectly through another person … [m]ake[] a credible threat to another person and, in connection with the threat, repeatedly follow[], approach[], contact[], or place[] under surveillance that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship." Colo. Rev. Stat. § 18-3-602(1)(a); *see also id.* § 18-3-602(1)(b) (defining stalking to include making a "credible threat to another person" and, "in connection with the threat, repeatedly mak[ing] any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has

had a continuing relationship, regardless of whether a conversation ensues").

But stalking statutes also prohibit patterns of conduct, including communications, that do not include threats at all. For example, the Colorado statute separately makes it a crime to "[r]epeatedly follow[], approach[], contact[], place[] under surveillance, or make[] any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person … to suffer serious emotional distress." *Id.* § 18-3-602(1)(c). This is the provision of the Colorado statute under which Mr. Counterman was convicted.

Colorado is one of many states that prohibits stalking that does not include the making of threats. *See* Mich. Comp. Laws § 750.411h (stalking is a willful course of conduct that causes a reasonable person to suffer emotional distress); Mo. Rev. Stat. §§ 565.225, 565.227 (making it a second-degree stalking offense to cause a specific person emotional distress if committed with "the intent to disturb another person"); N.J. Stat. Ann. § 2C:12-10 (a person is guilty of stalking if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to suffer significant emotional distress). Federal law also prohibits this behavior. *See, e.g.*, 18 U.S.C. § 2261A (making it a crime to "with the intent to kill, injure, harass, intimidate, or place under surveillance … use[] the mail, any interactive computer service or electronic communication service or electronic communication

system of interstate commerce … to engage in a course of conduct that … causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress").

These laws reflect the fact that while *one* way stalkers intimidate or attempt to control their victims is by threatening them or someone they love, *see* T.K. Logan & Robert Walker, *Stalking: A Multidimensional Framework for Assessment and Safety Planning*, 18 TRAUMA, VIOLENCE & ABUSE 200, 201 (2017), that is not the *only* way. A National Institute of Justice survey of stalking victims found that "[l]ess than half of all stalking victims are directly threatened by their stalkers." Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings From the National Violence Against Women Survey*, U.S. Dep't of Just., at 2 (Nov. 1998), https://www.ojp.gov/pdffiles/172837.pdf.

Because of the pervasiveness and intrusiveness of the contact, victims of stalking reasonably feel great fear and anxiety even when their stalkers do not explicitly threaten them. Researchers have found that "[b]eing followed, tracked, and watched … can create fear of future harm and significant emotional distress," even when stalkers do not say anything explicitly threatening. Logan & Walker, *supra*, at 206; *see also* Baum et al., *supra* (finding that 56.8% of stalking victims did not experience explicit threats but were fearful or concerned for safety due to the threat implicit in stalking behavior). Indeed, many stalkers cause serious emotional distress to their victims through "[l]ife invasion"—*i.e.*, the persistent intrusion of the stalker into the private sphere of the victim's life—as is amply demonstrated by this case.

Logan & Walker, *supra*, at 204; *see also infra* Part II. And in some cases—such as the murder of Vonnie Flores—a stalker who has not previously made any threatening statements can suddenly turn violent. *See* Jennifer Kocher, *Casper Woman Seeking Justice for Murdered System by Strengthening Wyoming Stalking Laws*, Cowboy State Daily (Mar. 23, 2022), https://cowboystatedaily.com/2022/03/23/casper-woman-seeking-justice-for-murdered-sister-by-strengthening-wyoming-stalking-laws/ (target of previously non-threatening messages murdered by stalker in her driveway).

C. Stalking laws raise their own distinct set of First Amendment issues.

The differences between laws targeting standalone threats and laws targeting stalking have constitutional significance. Laws that criminalize standalone threats restrict speech solely because of the message it communicates. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (noting that because the federal law making it a crime to threaten the life of the president regulates "pure speech" it must be interpreted "with the commands of the First Amendment clearly in mind"); *Elonis v. United States*, 575 U.S. 723, 737 (2015) (noting that, in the case of a prosecution under a law prohibiting the making of threat in interstate commerce "'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication") (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). They do not require that the message be directed at any particular person or persons. *See Black*, 538 U.S. at 359 (true threats encompass statements made to "a particular

individual or group of individuals"); 18 U.S.C. § 875(c) (making it a crime to "transmit[] in interstate or foreign commerce *any* communication" containing "*any* threat to injure the person of another" (emphases added)). They also generally do not require that the threat be issued on more than one occasion. *See, e.g.*, *United States v. Williams*, 690 F.3d 1056 (8th Cir. 2012) (affirming conviction for a single threat). This means that threats statutes can be used to criminalize thoughtless comments, jokes, or disfavored speakers. *See Perez v. Florida*, 137 S. Ct. 853, 853 (2017) (Sotomayor, J., concurring in the denial of certiorari) (noting that the prosecution in that case was for a statement that "may have been nothing more than a drunken joke"); *Watts*, 394 U.S. at 709–12 (Douglas, J., concurring) (agreeing that the petitioner's words did not amount to a true threat against the president and noting that "[s]uppression of speech as an effective police measure is an old, old device, outlawed by our Constitution"). In this context, a heightened *mens rea* requirement may be appropriate. *See Black*, 538 U.S. at 367 (finding true threats statute unconstitutional where a "prima facie" evidence provision "ignore[d] all of the contextual factors that [were] necessary to decide whether a particular cross burning [was] intended to intimidate").

Stalking laws, in contrast, criminalize "course[s] of conduct" that only *sometimes* include speech. *See, e.g.*, *United States v. Ackell*, 907 F.3d 67, 73 (1st Cir. 2018) (recognizing this) (quoting 18 U.S.C. § 2261A(2)(B)); *United States v. Gonzalez*, 905 F.3d 165, 193 (3d Cir. 2018) (same); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (same); *State v. Hemmingway*, 825 N.W.2d 303, 308–09 (Wis. Ct. App. 2012) (holding that

stalking statute regulated a course of conduct, not speech); *State v. Lindell*, 828 N.W.2d 1, 2–3 (Iowa 2013) (stalking based on repeated contact, including "handwritten note[s] and flowers," "hang-up calls," personal contact, and damage to personal property). In other words, they require that the unwanted communication occur as part of a larger pattern of threatening or harassing conduct before liability is imposed; they do not criminalize isolated speech acts. *See, e.g.*, Colo. Rev. Stat. § 18-3-602(1)(c) (requiring the communication be made "[r]epeatedly"); Wash. Rev. Code § 9A.46.110(1)(a) (same); Del. Code Ann. tit. 11, § 1312(e)(1) (requiring the unwanted communication to occur "3 or more separate" times).

Even when applied to speech, stalking laws typically require that the speaker communicate their speech to a particular person or persons, rather than to the public at large. *See, e.g.*, Colo. Rev. Stat. § 18-3-602(1)(c) (requiring that the communication be "with another person"); Kan. Stat. Ann. § 21-5427(a)(2) (communication must be "targeted at a specific person"); Or. Rev. Stat. § 163.732(1)(a) (requiring that the stalker "alarm[] or coerce[]" another person through "repeated and unwanted contact with the other person"). And "emotional distress" stalking statutes, like the one under which Mr. Counterman was convicted, typically require that the pattern of conduct is intended to, or is reasonably likely to cause the target serious emotional distress. *See, e.g.*, 720 Ill. Comp. Stat. 5/12-7.3(a)(2) (person commits stalking when he or she "knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to … suffer other

[significant] emotional distress"); Wyo. Stat. Ann. § 6-2-506(a), (b) (requiring stalker to "inten[d]" to cause a "reasonable person to suffer substantial emotional distress"). Many also require that the target actually experience serious emotional distress. *See, e.g.*, Colo. Rev. Stat. § 18-3-602(1)(c) (person commits stalking if they knowingly communicate with target in a way that would cause a reasonable person to suffer serious emotional distress and the victim experiences emotional distress); Mich. Comp. Laws § 750.411h(1)(c), (d) (willful course of conduct involving repeated or continuing acts that would cause another to suffer emotional distress and actually cause the victim to suffer significant emotional distress).

These attributes mean that stalking laws—although by no means immune from First Amendment scrutiny—do not raise the same First Amendment concerns as laws prohibiting standalone threats. Stalking laws prohibit only *repeated* conduct and communications targeted at a particular *unwilling* listener—in the paradigmatic case, a listener who is likely to experience or who in fact experiences extreme emotional distress. These additional elements are why stalking statutes are far less likely than threat statutes to be applied to "drunken joke[s]," isolated offensive communications, or speech that has simply been misunderstood. They are also why stalking statutes pose a much less significant threat to the "uninhibited, robust, and wide-open" public discussion that is the core of what the First Amendment protects, *N.Y. Times Co.*, 376 U.S. at 270, than do laws that punish the making of threats and other acts of "pure speech," *Watts*, 394

U.S. at 707. This Court has recognized that "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan*, 397 U.S. at 738; *see also Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan J., concurring) (recognizing the need to safeguard the "sensibilities of the unwilling recipient" who requests to no longer receive certain communications); Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 742–43 (2013) ("When the laws apply to one-to-one unwanted speech, they interfere only slightly with debate and the spread of information[.] … A one-to-one unwanted statement is highly unlikely to persuade or inform anyone, precisely because the listener does not want to hear it. Its only effect is likely to be to offend or annoy. And restricting such statements thus leaves speakers free to communicate to other, potentially willing listeners.").

The differences are illustrated by comparing this case with the facts in *Elonis*, 575 U.S. 723, where the defendant was charged under 18 U.S.C. § 875(c), a federal threats law, with making threatening public posts to his Facebook feed. The speech for which Mr. Elonis was prosecuted—public posts that contained graphic and violent language and imagery that threatened harm to his ex-wife, co-workers, a kindergarten class, and a law enforcement officer—was visible to many. Here, in contrast, Mr. Counterman's communications were direct messages to C.W. alone.

Further, to convict Elonis, the prosecution did not have to prove that Elonis engaged in a repeated course of threatening conduct—indeed, Elonis was charged

with five separate violations of § 875(c) for making five distinct threats, each based on a different Facebook post. *Elonis*, 575 U.S. at 726–31 (each post formed the basis for a criminal count). In contrast, here, the prosecution had to prove that Mr. Counterman made his communications to C.W. "[r]epeatedly," and in fact he sent C.W. *many hundreds* of messages—all targeted specifically at her. Colo. Rev. Stat. § 18-3-602(1)(c); JA 448–92.

Finally, 18 U.S.C. § 875(c) prohibits speech even when it only reaches sympathetic listeners. The threat, in other words, does not have to be received by the ostensible target. The Colorado statute under which Mr. Counterman was convicted, on the other hand, applies when the recipient reasonably suffers "serious emotional distress," as C.W. did. Colo. Rev. Stat. § 18-3-602(1)(c); JA 108–09, 127, 149. Thus, where Mr. Elonis was convicted for a few instances of public expression that could conceivably contribute to public discourse, Mr. Counterman's prosecution was based on private messages sent to a single unwilling recipient over and over again. Mr. Counterman's communications contributed—and could have contributed—nothing to public debate.

D. Lower courts are developing a First Amendment jurisprudence of stalking.

The fact that stalking laws in general pose less of a threat to free speech values does not, of course, mean that they are immunized from First Amendment scrutiny. Any time the government criminally sanctions speech, care needs to be taken to ensure that the sanctions do not end up chilling valuable protected expression. *See* Volokh, *supra*, at 737–38.

There is no categorical "stalking exception" to the First Amendment, just as there is no categorical exception for harassment laws. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.).

Rather, there is a developing First Amendment jurisprudence establishing the boundaries of governments' ability to prosecute stalking. On the one hand, federal and state courts have held stalking laws unconstitutional when applied in a manner that risks impinging upon core First Amendment values. For example, in *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011), a Maryland district court held invalid the application of the federal stalking statute to a defendant who posted critical speech about a local religious leader on Twitter and his blog. The court emphasized that his speech was not "targeted towards a particular victim and … received outside a public forum" but instead constituted commentary and criticism about "an easily identifiable public figure that leads a religious sect." *Id.* at 585–86. This kind of "anonymous, uncomfortable Internet speech addressing religious matters," the Court held, was protected by the First Amendment, and therefore could not be subject to criminal punishment as stalking, even if less public, more targeted speech could. *Id.* at 583.

Courts have also found certain stalking laws to be facially invalid when they are drafted so broadly that they can be used to restrict not only repeated and privately targeted, and threatening or distressing forms of communication, but other—more valuable—kinds of speech as well. For example, in *In re Welfare of A. J. B.*, 929 N.W.2d 840, 849–56 (Minn. 2019), the

Minnesota Supreme Court held that the state's stalking-by-mail statute facially violated the First Amendment because it imposed criminal liability for repeated communications that negligently frighten, threaten, oppress, persecute, or intimidate the recipient, without any requirement that the emotional harm to the target be "substantial." And in *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017), the Illinois Supreme Court held that state's stalking law to be impermissibly overbroad because it penalized communications "to *or about* a person," so it could have been used to "prohibit[] a person from attending town meetings" and complaining "about pollution caused by a local business owner and advocat[ing] for a boycott of the business." *Id.* at 354 (emphasis added); *see also State v. Shackelford*, 825 S.E.2d 689, 698 (N.C. Ct. App. 2019) (similar).

On the other hand, courts have sustained stalking statutes against facial First Amendment challenges when they more narrowly criminalize repeated communications directed at a specific individual and threaten her or cause her severe emotional harm. *See, e.g.*, *State v. Whitesell*, 13 P.3d 887, 900–01 (Kan. 2000) ("As speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the State has greater latitude to regulate expression. … Concerning stalking laws, there must be a balance that is struck between our constitutional right to free speech and our personal right to be left alone.") (quotation marks omitted); *Dugan v. State*, 451 P.3d 731, 737–39 (Wyo. 2019) ("Properly crafted harassment or stalking statutes do not punish the simple act of communicating statements; they punish

repeated communications done with an unlawful intent to harm another person."); *Hemmingway*, 825 N.W.2d at 304, 308–10 ("The First Amendment does not protect intentional conduct designed to cause serious emotional distress … in a targeted victim."). In *no* case of which *amici* are aware has a state or federal court held what Mr. Counterman's proposed rule would require: that the prosecution of a defendant under a stalking law for repeated communications is only constitutionally permissible if that defendant made at least one "true threat," as First Amendment doctrine defines it. *Contra* Pet'r Br. 12–13.[2]

Of course, in many cases, a pattern of stalking behavior *does* entail threatening communications. Courts sometimes dispose of First Amendment challenges to such prosecutions by holding that the speech in question constituted "true threats" under the First Amendment, so that it was unprotected. *See, e.g.*, *United States v. Fleury*, 20 F.4th 1353, 1366 (11th Cir. 2021) (rejecting as-applied challenge to federal

[2] Every circuit that has evaluated the constitutionality of the federal stalking law has upheld it. *See United States v. Yung*, 37 F.4th 70, 81 (3d Cir. 2022) (facial challenge); *Ackell*, 907 F.3d at 77 (same); *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005) (same); *United States v. Fleury*, 20 F.4th 1353, 1362–63 (11th Cir. 2021) (facial and as-applied challenge); *United States v. Sayer*, 748 F.3d 425, 436 (1st Cir. 2014) (same); *Petrovic*, 701 F.3d at 856 (same); *United States v. Osinger*, 753 F.3d 939, 944–45 (9th Cir. 2014) (same). In some of these cases, courts construed the statute narrowly, to avoid finding a constitutional violation. *E.g.*, *Yung*, 37 F.4th at 81; *United States v. Sryniawski*, 48 F.4th 583, 587 (8th Cir. 2022). But in no cases did they find the law to be overbroad.

antistalking statute because the "messages Fleury sent amount to true threats, [and] are not afforded protection under the First Amendment"); *People v. Ashley*, 162 N.E.3d 200, 210–18 (Ill. 2020) (interpreting the term "threaten" in stalking statute to reach only "true threats"); *State v. Noll*, 199 A.3d 1054, 1062 (Vt. 2018) (holding stalking statute facially constitutional where it only reached "true threats"). But these cases do not stand for the inverse proposition that a stalking prosecution is *only* permissible under the First Amendment if the perpetrator has made "true threats." Rather, a stalking conviction may validly be predicated on a pattern of repeated communications that are not threatening, as long as there are other factors present—such as direct, private communications to the target that reasonably cause her serious emotional distress—that ensure that core First Amendment concerns are not implicated. *See supra* Part I.C.[3]

[3] Under the principles discussed here, *see supra* Part I.C, the First Amendment constraints that apply to laws penalizing standalone threats would not necessarily also apply to laws penalizing stalking that involves explicit threats. In the latter category of cases, a context-sensitive reasonable listener standard may adequately protect the relevant First Amendment interests, because threats-based stalking statutes generally require the communications to be part of a pattern of repeated conduct and directed to a particular person. But the question of the requisite *mens rea* for a threats-based stalking conviction question is beyond the scope of this case, because Colorado dropped the charge it initially brought against Mr. Counterman under its statute that prohibits stalking involving threats. *People v. Counterman*, 497 P.3d 1039, 1043 (Colo. App. 2021).

II. Mr. Counterman was convicted for the crime of stalking, not threats.

Stalking laws and threats laws, then, target separate crimes and raise distinct First Amendment concerns. This is a stalking case.

On April 27, 2017, Mr. Counterman was convicted by a jury of his peers of the crime of stalking because he caused C.W., a local musician that Mr. Counterman did not know, serious emotional distress after he sent her several hundred direct, unwanted messages on Facebook. JA 445. The state of Colorado initially also charged Mr. Counterman under the "credible threat[s]" prong of its stalking law, Colo. Rev. Stat. § 18-3-602(1)(b), as well as with the crime of harassment. But the prosecution dropped both of those additional charges prior to trial.

The jury was therefore not required to find that Mr. Counterman made a true threat or a credible one. Indeed, the jury instructions at Mr. Counterman's trial made no mention of threats. JA 405–14. Instead, they instructed the jury to find Mr. Counterman guilty of stalking if it found the prosecution had proven beyond a reasonable doubt that Mr. Counterman "knowingly repeatedly followed, approached, contacted, placed under surveillance, or many any form of communication with another person … in a manner that would cause a reasonable person to suffer serious emotional distress, and … which did cause [her] to suffer serious emotional distress." JA 411–12. The jury instructions required the jury to determine, in other words, whether Mr. Counterman had committed the crime of serious-

emotional-distress stalking, as defined by Colorado law, § 18-3-602(1)(c).

To prove its case, the prosecution introduced evidence that Mr. Counterman sent several threatening direct messages on Facebook to C.W. On one occasion, for example, Mr. Counterman told C.W. to "[f]uck off permanently." JA 472. On another occasion he told her to "Die, don't need you." JA 473. But the prosecution's case did not rest on these messages alone. Mr. Counterman's offense was that he sent these messages *as well as many hundreds of* other messages directly to C.W. over the course of two years. *See, e.g.*, JA 464 ("Truly, there is so much i'd like to share with you, [s]uppose now isnt timely … [frog emoji]."); JA 465 ("I am going to the store would you like anything?"); JA 468 ("What is normal? Third party talking for someone, not in my world[.] That part of me probably will never change. So, what about the coffee[.] Also know, I do not want to talk to others about my inititives.").

The prosecution's case also rested on the severely damaging emotional effect these messages had on C.W. At trial, C.W. testified that it was the volume of these messages, their persistence, and the strange intimacy that they presumed, that left her feeling paranoid, terrorized, and afraid. JA 197–98 The threatening messages made everything scarier, but it was not because of the credibility of their threat. It was instead what they reflected about Mr. Counterman's mental state. As C.W. testified at the trial: "[T]hese messages … ma[d]e me think that he's living in some kind of alternate reality, and it's unpredictable what somebody in that kind of

alternate reality might do. … There's not a way to say, 'You can't do that.'" JA 205.

To focus on the precise semantic content of a handful of messages amongst the flood Mr. Counterman sent is to misunderstand the nature of the criminal conduct being prosecuted. As CW's testimony makes clear, it wasn't so much what individual messages *said* that led her to live "in constant fear." JA 127. Many of the messages were quite banal. And in fact, there is no record of the content of all of the messages Mr. Counterman sent to C.W.—she deleted many of his messages as soon as she got them because she was so distressed by their mere presence in her inbox. Indeed, C.W. testified at trial that she feared that if she read all the messages Mr. Counterman sent her, she "would not have been able to function." *Id.* So she "just ended up deleting them without reading them at some point along those years." *Id.* It's possible that the deleted messages contained more explicit threats—there is no way of knowing—but it does not matter. The fact that Mr. Counterman persisted in sending hundreds of messages to a total stranger even after she blocked him made his communication with C.W. deeply distressing, even when the messages' content was superficially banal.

This is why Mr. Counterman was prosecuted for stalking—and why, in her closing arguments, the prosecutor did not categorically distinguish Mr. Counterman's overtly threatening messages from the others. Instead, she asked the jury to evaluate whether, in sending these hundreds, if not thousands, of intimate messages to a woman he had never met, Mr. Counterman knowingly communicated in a

manner that would cause a reasonable person to feel emotional distress and did in fact cause C.W. distress. The prosecutor asked the jury to evaluate whether Mr. Counterman stalked C.W., not whether he threatened her.

Mr. Counterman's defense attorney did argue at trial that he should be acquitted because his messages to C.W. did not rise to the level of true threat. JA 81, 345–47. The trial judge rejected this argument because he concluded that Mr. Counterman's speech "would not be considered protected speech" and that, when considered in light of "the totality of the circumstances, a reasonable jury could find that defendant's statements rise to the level of a violation of law *and* that of a true threat." JA 346 (emphasis added). Therefore, the judge concluded, "submitting the charges to the jury [would] not impermissibly intrude on or violate [the] defendant's First Amendment rights." *Id.*

The judge was correct that a jury conviction in this case would not "impermissibly intrude on or violate [the] defendant's First Amendment rights." *Id.* But this was not because Mr. Counterman's speech necessarily constituted a true threat. It was because he persistently directed unwanted communications to an unwilling recipient, and thereby caused her serious emotional distress.

The fact that Mr. Counterman was convicted for stalking, not threats, got elided on appeal. Mr. Counterman argued that his conviction was unconstitutional because he did not make any true threats, as the First Amendment defines them, and that the jury instructions were deficient because they

did not include a true threats instruction. *People v. Counterman*, 497 P.3d 1039, 1050 (Colo. App. 2021). The Court of Appeals rejected both arguments. It found, first, that Mr. Counterman's messages included true threats. It also found that, because the instructions tracked the model jury instruction for stalking, they did not need to include a threats instruction. *Id.* at 1051. The Court of Appeals therefore appeared to assume, like the trial court, that Mr. Counterman's conviction was constitutional because it involved true threats—but also that the jury did not need to find that Mr. Counterman truly threatened C.W. because he was prosecuted under a stalking law. The opinion thus reflected significant confusion about the relationship between stalking and threats under the First Amendment.

III. This Court should affirm rather than announcing a rule that would require all communication-based stalking prosecutions to prove a "true threat."

The mismatch between the question presented to this Court and the underlying facts of the case creates a risk that this Court's ruling will be interpreted by lower courts as a pronouncement on the constitutional *mens rea* standard for *stalking* laws, rather than simply laws criminalizing threats. Many state stalking laws would be eviscerated if this Court adopts Mr. Counterman's proposed constitutional rule and reverses the judgment. Instead, this Court should affirm.

Mr. Counterman asks this Court to hold that his conviction cannot stand because the prosecution did not prove he made at least one intentionally

threatening statement. But as explained above, the First Amendment does not require the government to prove an intent to threaten in stalking cases. To so hold would, in fact, be inconsistent with basic First Amendment principles and the First Amendment jurisprudence on stalking that is developing in the lower courts. *See supra* Part I.

Reversal on the basis advanced by Mr. Counterman would seriously hamper governments' ability to protect targets of stalking. *See* Baum et al., *supra*. The federal government, all fifty states, the District of Columbia, and U.S. territories all have enacted laws making stalking a criminal act. Many of these laws, like Colorado's, do not require an intent to threaten or harass the target. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2923 (requiring the stalker to intentionally or knowingly engage in a course of conduct that causes the victim emotional distress); Me. Stat. tit. 17-A, § 210-A (same); Conn. Gen. Stat. § 53a-181d (requiring the stalker to knowingly engage in a course of conduct that causes the victim emotional distress). But as discussed above, these laws require proof of *other* elements that protect core First Amendment values. *See supra* Part I.C, D. And where they do not, lower courts have generally invalidated them. *See id.* Part I.D.

Where the messages do not include threatening language, perpetrators may not subjectively understand that their repeated, unwanted communications are distressing. But that does not lessen the harms and risks to the target. Moreover, adding an intent to threaten requirement would hamper targets' ability to obtain orders of protection, which generally require that the elements of statutory

stalking be satisfied. *See, e.g.*, Colo. Rev. Stat. § 13-14-106(1)(a), (b) (to issue a civil protection order, the judge must determine by a preponderance of the evidence that the respondent has committed the acts alleged and that without the order they will continue to commit the acts or will retaliate against the victim); 740 Ill. Comp. Stat. 21/80, 21/95 (protection order requires showing that petitioner has been a victim of stalking); Wyo. Stat. Ann. § 7-3-508 (temporary order of protection requires "specific facts" that show that "there exists a clear and present danger of further stalking"). And, as set forth above, adding a subjective intent requirement for stalking convictions would not serve First Amendment values. *See supra* Part I.C.

This Court should therefore affirm Mr. Counterman's conviction, but on a different basis than that relied upon by the Colorado Court of Appeals. *See Upper Skagit Indian Tribe*, 138 S. Ct. at 1654. Specifically, it should affirm Mr. Counterman's conviction under Colorado's stalking law *not* because one or more of his messages amounted to a "true threat"; but rather because the First Amendment is not violated by a defendant's conviction for a course of conduct involving hundreds of direct communications to a single individual that reasonably caused the target serious emotional distress. The required elements of such a conviction—all of which were proved to the jury here—provide adequate protection against abuse of stalking statutes to suppress valuable speech.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Colorado Court of Appeals.

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Respectfully submitted,

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