

No. 22-138

IN THE
Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

COLORADO,

Respondent.

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

**BRIEF OF LEGAL MOMENTUM,
THE NATIONAL CRIME VICTIM LAW
INSTITUTE, AEQUITAS, AND COMPANION
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. This Court’s “True Threat” Decisions Acknowledge the Societal Value of Preventing Violence and Fear of Violence. This Is Precisely the Type of Harm Stalking Laws Seek to Prevent.....	6
II. Imposing a Specific Intent Requirement Would Undermine the Protection Provided by Stalking Laws and Reduce the Availability of Civil Protection Orders.....	11
III. If This Court Still Adopts an Intent Requirement, It Should Set the Constitutional Floor at Recklessness.....	13
IV. Alternatively, This Court Should Dismiss the Case as Improvidently Granted.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bullock v. BankChampaign, N.A.</i> , 569 U.S. 267 (2013).....	14
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	6
<i>Elonis v. United States</i> , 575 U.S. 725 (2015).....	13
<i>Gilbert v. State</i> , 765 P.2d 1208 (Okla. Crim. App. 1988)	10
<i>Hernandez v. Ashcroft</i> , 345 F.3d 824 (9th Cir. 2003).....	10
<i>In re Grand Jury</i> , 143 S. Ct. 543 (2023).....	15, 16
<i>People v. Borrelli</i> , 91 Cal. Rptr. 2d 851 (Ct. App. 2000)	10
<i>Pugliese v. Superior Ct.</i> , 53 Cal. Rptr. 3d 681 (Ct. App. 2007)	10
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	6
<i>United States v. Haischer</i> , 780 F.3d 1277 (9th Cir. 2015).....	10
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	6
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).....	6
<i>Watts v. United States</i> , 394 U.S. 705 (1969).....	6
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I	1, 4, 10, 13

TABLE OF AUTHORITIES
(continued)

	Page
OTHER AUTHORITIES	
AEquitas et al., <i>Stalking Statutes in Review</i> (2022), https://sparc.broncotime.info/wp-content/uploads/2022/06/Stalking-Statutes-in-Review.pdf	9
Am. Bar Ass’n & Nat’l Inst. of Just., <i>Legal Interventions in Family Violence: Research Findings and Policy Implications</i> (1998)	12
Marley N. Brison, <i>Elonis v. United States: The Need for a Recklessness Standard in True Threats Jurisprudence</i> , 78 U. Pitt. L. Rev. 493 (2017)	13
Kenneth S. Cannaday, <i>Constitutional Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test</i> , 50 N.C. L. Rev. 390 (1972), http://scholarship.law.unc.edu/nclr/vol50/iss2/9	14
<i>Dox</i> , Merriam-Webster, https://www.merriam-webster.com/dictionary/doxing (last visited Mar. 30, 2023).....	7
Lynn Greenky, <i>His Words Were So Terrifying the Supreme Court Got Involved</i> , Daily Beast (Mar. 18, 2023), https://www.thedailybeast.com/billy-raymond-countermeasures-words-were-so-terrifying-the-supreme-court-got-involved	11

TABLE OF AUTHORITIES
(continued)

	Page
Adele Harrell & Barbara E. Smith, <i>Effects of Restraining Orders on Domestic Violence Victims,</i> in <i>Do Arrests and Restraining Orders Work?</i> (Eve S. Buzawa & Carl G. Buzawa eds., 1996)	12
David V. James et al., <i>Stalking and Serious Violence</i> , 31 J. Am. Acad. Psychiatry L. 432 (2003).....	8
Mindy B. Mechanic et al., <i>Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse</i> , Nat'l Inst. of Health (2008) http://www.ncbi.nlm.nih.gov/pmc/ articles/PMC2967430/pdf/ nihms245802.pdf	9
J. Reid Meloy, <i>Stalking and Violence</i> , in <i>Stalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing and Treatment</i> (Julian Boon & Lorraine Sheridan eds., 2002).....	8
Model Penal Code § 2.02	13, 14
Model Penal Code § 211.3	14
Nat'l Inst. of Just., U.S. Dep't of Just., <i>Civil Protection Orders: Victims' Views on Effectiveness</i> (Jan. 1998), https://www.ncjrs.gov/pdffiles/ fs000191.pdf	12

TABLE OF AUTHORITIES
(continued)

	Page
Nat'l Network to End Domestic Violence Safety Net Project, <i>A Glimpse from the Field: How Abusers Are Misusing Technology</i> , https://www.techsafety.org/blog/2015/2/17/a-glimpse-from-the-field-how-abusers-are-misusing-technology (Feb. 17, 2015).....	8
Phillip J. Resnick, <i>Stalking Risk Assessment</i> , in <i>Stalking: Psychiatric Perspectives and Practical Approaches</i> (Debra A. Pinals ed., 2007).....	8
<i>Sextortion</i> , Merriam-Webster, https://www.merriam-webster.com/dictionary/sextortion (last visited Mar. 30, 2023).....	7
Stalking Prevention, Awareness, & Res. Ctr., <i>Prosecutor's Guide to Stalking</i> , https://www.stalkingawareness.org/wp-content/uploads/2020/01/SPA-19.005-Prosecutors-Guide-to-Stalking-00000002-revised.pdf (last visited Mar. 30, 2023).....	9, 11, 15
Evan Stark, <i>Coercive Control</i> , in <i>Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation</i> (Nancy Lombard & Lesley McMillan eds., 2013).....	6, 7
Evan Stark, <i>Looking Beyond Domestic Violence: Policing Coercive Control</i> , 12 J. Police Crisis Negots. 199 (2012).....	10

TABLE OF AUTHORITIES
(continued)

	Page
Evan Stark, <i>Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control</i> , 58 Alb. L. Rev. 973 (1995)	10
Mary-Christine Sungaila, <i>And After All That Work!: The Dreaded U.S. Supreme Court “DIG,”</i> WLF Legal Pulse (Jan. 31, 2013), https://www.wlf.org/2013/01/31/wlf-legal-pulse/and-after-all-that-work-the-dreaded-u-s-supreme-court-dig/	16
Swat, Merriam-Webster, https://www.merriam-webster.com/dictionary/swatting (last visited Mar. 30, 2023).....	7
Amanda R. Witwer et al., Priority Crim. Just. Needs Initiative, RAND Corp., <i>Countering Technology-Facilitated Abuse: Criminal Justice Strategies for Combating Nonconsensual Pornography, Sextortion, Doxing, and Swatting</i> (2020)	7, 8, 9, 11

**BRIEF OF LEGAL MOMENTUM,
THE NATIONAL CRIME VICTIM LAW
INSTITUTE, AEQUITAS, AND COMPANION
AMICI CURIAE IN SUPPORT OF
RESPONDENT**

The undersigned respectfully submit this *amici curiae* brief in support of respondent.¹

INTEREST OF *AMICI CURIAE*

Legal Momentum, the National Crime Victim Law Institute (NCVLI), AEQUITAS, and companion *amici*² are advocacy groups dedicated to, among other things, the rights of women, crime victims, and survivors of gender-based violence. The Court’s ruling as to what mental state the government must show to establish that a statement is a “true threat” without First Amendment protection will have serious implications for crime victims, particularly survivors of intimate partner and gender-based violence, including on their ability to seek protection and accountability.

¹ No counsel for any party authored this brief in whole or in part, no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

² Companion *amici*, legal advocacy and service organizations supporting the rights of crime victims, women, and survivors of gender-based violence, are: National Coalition Against Domestic Violence, Sanctuary for Families, Ohio Crime Victim Justice Center, Feminist Majority Foundation, Women’s Law Project, National Center for Victims of Crime, Futures Without Violence, Rocky Mountain Victim Law Center, Colorado Organization for Victim Assistance, and National Domestic Violence Hotline.

Legal Momentum is the nation's longest serving civil rights organization dedicated to advancing women's rights and has worked to achieve gender equality through impact litigation, policy advocacy, and education. NCVLI is a legal education and advocacy organization focused on promoting victims' voices and rights in the justice system through legal advocacy, education, and resource sharing. NCVLI is dedicated to ensuring that everyone in the justice system respects and enforces the legal rights of crime victims. AEquitas is focused on developing, evaluating, and refining prosecution practices related to sexual violence, intimate partner violence, and human trafficking and works globally to hold offenders accountable and promote victim safety. Companion *amici* are national and regional groups dedicated to advancing the rights of women, crime victims, and survivors of gender-based violence.

Legal Momentum, NCVLI, AEquitas, and the companion *amici* have a collective interest in ensuring that crime victims and survivors of intimate partner and gender-based violence can seek protection and accountability through the civil and criminal justice systems for all forms of abuse.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over a two-year period, petitioner messaged singer-songwriter C.W. “many multiples of” hundreds of times over the internet, using Facebook and C.W.’s professional website. J.A. 115, 118, 126-28, 150-56. He continued to send her messages even though she never responded to him. J.A. 128-29. She blocked his known accounts at least six times. Each time, petitioner opened new accounts and continued messaging her. J.A. 137-39, 165, 182; *see also* J.A. 425 (according to C.W.’s mother, C.W. still received “thousands of emails from a pseudonym” account of petitioner after C.W. “blocked him from her public website”).

Sometimes petitioner sent dozens of messages a day, ranging from “I’m going to the store. Would you like anything?” and leaving a phone number for her to call with the note “I’m available to talk to you. I’m home from work” to “Janice has nothing on you on stage,” “Die. Don’t need you,” and referencing physical sightings of her, including in a white Jeep (a car she had in fact owned a few years before). J.A. 126, 135, 140, 143-44, 173, 448-83.

The messages “terrif[ied]” C.W. because they were “intimate,” suggested that the two were in a relationship when they had never met, often made little sense, became more demanding, and revealed that petitioner was “possibly showing up in places where” C.W. was. J.A. 142; *see also* J.A. 181 (“I was very fearful that he was following me in person.”). Because C.W. was concerned that petitioner was coming to her shows, she bought pepper spray, took professional sit-

uational awareness training, hired security, and obtained a restraining order; she also feared for the safety of her friends and family, took a concealed carry class, turned down gigs, and for years “really didn’t go anywhere alone. It just didn’t feel like a safe decision.” J.A. 182-83, 185, 193-95, 198-99, 201-04, 206. C.W. worried that petitioner would get “[n]ear enough to me to do something,” to hurt her or “[h]urt somebody [she] was with.” J.A. 205. To C.W., his messages showed that he was “living in some kind of alternate reality, and it’s unpredictable what somebody in that kind of alternate reality might do. Might think they can do.”³ *Id.*

At petitioner’s criminal trial, C.W. testified that “[a]ll I wanted and all I’ve ever wanted was for it to stop.” J.A. 143.

The jury convicted petitioner of stalking. J.A. 397. The Colorado Court of Appeals affirmed. Pet. App. 1a-39a.

The court of appeals rejected petitioner’s First Amendment challenge to the conviction and his argument that “his statements — although threatening — didn’t rise to the level of a ‘true threat’ because they weren’t explicit ‘statements of purpose or intent to

³ As it turns out, when petitioner was stalking C.W., he was on supervised release from a second felony conviction for stalking and threatening other women. J.A. 428. In 2003, he reportedly told his first victim that people in his position “have been known to have gone and killed people . . . blow[n] their heads off and shit.” J.A. 433 (C.W.’s victim impact statement at petitioner’s sentencing in her case). In 2011, after he began contacting C.W., he reportedly telephoned his second victim and threatened that he was coming to New York and would “rip [her] throat out on sight” and “bash” her head on the sidewalk. *Id.*

cause injury or harm to the person, property, or rights of another, by an unlawful act.’” Pet. App. 19a. The appellate court determined that “this limited characterization of a true threat misses the mark by ignoring the importance of the context in which a statement is made. This approach thereby risks excluding true threats that may not be explicit but, when considered in context, are just as undeserving of protection.” *Id.*

The appellate court expressed particular concern about the “‘stakes of leaving true threats unregulated’” in the context of stalking, where “online communication can enable ‘unusually disinhibited communication’ from a perpetrator to a victim — ‘magnifying the danger and potentially destructive impact of threatening language on victims.’” Pet. App. 21a (citation omitted). The court acknowledged the importance of this context of the threats in pointing to “[r]ecent widely reported cases of online harassment and stalking of public figures — particularly of women — involv[ing] internet users who are ‘strangers to the victims’ granted previously unavailable access to their targets through social media,” “a context [that] mirrors the one in which Counterman sent his myriad Facebook messages to C.W[.] over two years . . . [a]nd buttresses our conclusion that Counterman’s statements were true threats that aren’t protected under the First Amendment.” *Id.* (citation omitted).

If the Court does not dismiss this case as improvidently granted, it should reach the question presented and confirm that petitioner’s conduct was a

constitutionally unprotected “true threat.” To do otherwise would jeopardize future stalking prosecutions, as well as civil protective orders.

ARGUMENT

I. This Court’s “True Threat” Decisions Acknowledge the Societal Value of Preventing Violence and Fear of Violence. This Is Precisely the Type of Harm Stalking Laws Seek to Prevent.

This Court has recognized that there are certain “classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); accord *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). True threats are among them. *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam). A “prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’” *Virginia v. Black*, 538 U.S. 343, 359-60 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (brackets in original).

Stalking and domestic violence laws are among those that seek to protect victims from actual physical violence as well as from the fear and harm of threatened violence. Perpetrators often use threats as a method of control and intimidation, traumatizing and “deflat[ing] the victim’s will to resist.” Evan Stark, *Coercive Control*, in *Violence Against Women: Current*

Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation 17, 23 (Nancy Lombard & Lesley McMillan eds., 2013). Today, those threats are likely to be made online.

“The proliferation of digital technologies that enable virtual interactions and allow the storage and sharing of content has given rise to new modes and methods of perpetrating harassment, abuse, and other criminal behavior,” including cyberstalking, sextortion, doxing, swatting, nonconsensual pornography obtained via secret cameras, and hacking, often in the context of a prior intimate relationship. Amanda R. Witwer et al., Priority Crim. Just. Needs Initiative, RAND Corp., *Countering Technology-Facilitated Abuse: Criminal Justice Strategies for Combating Nonconsensual Pornography, Sextortion, Doxing, and Swatting* 13 (2020).⁴

⁴ Demonstrating the ubiquitous rise in these technology-facilitated abuses, Merriam-Webster Dictionary now includes definitions of sextortion (“extortion in which a perpetrator threatens to expose sexually compromising information (such as sexually explicit private images or videos of the victim) unless the victim meets certain demands”); doxing (“to publicly identify or publish private information about (someone) especially as a form of punishment or revenge”); and swatting (“to make a false report of an ongoing serious crime in order to elicit a response from law enforcement”). See *Sextortion*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/sextortion> (last visited Mar. 30, 2023); *Dox*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/doxing> (last visited Mar. 30, 2023); *Swat*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/swatting> (last visited Mar. 30, 2023) (third definition); see also Witwer et al., *supra*, at 3 (defining these terms).

Technology-facilitated threats like those to which C.W. was subjected are a common “tactic[] in the perpetration of stalking” and can be perpetrated in tandem with, or as a precursor to, in-person victimization. Witwer et al., *supra*, at 4. In general, 30 percent or more of stalking cases lead to physical violence. See J. Reid Meloy, *Stalking and Violence*, in *Stalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing and Treatment* 105, 106-07 (Julian Boon & Lorraine Sheridan eds., 2002) (discussing ten studies, with 21 to 76 percent physical violence rates); David V. James et al., *Stalking and Serious Violence*, 31 *J. Am. Acad. Psychiatry L.* 432, 435 (2003) (in stalking cases studied, 32 percent led to serious physical violence).⁵ Likewise, in the domestic violence context, 97 percent of victim services providers surveyed reported working with survivors who experienced harassment, monitoring, and threats by their abusers through social media, computer activities, and cell phone usage. Nat’l Network to End Domestic Violence Safety Net Project, *A Glimpse from the Field: How Abusers Are Misusing Technology*, <https://www.techsafety.org/blog/2015/2/17/a-glimpse-from-the-field-how-abusers-are-misusing-technology> (Feb. 17, 2015).

Technology-facilitated threats can have “severe and long-lasting impacts on victims that extend far beyond the digital realm,” including “serious psychological distress,” the loss of a job or having trouble

⁵ In some cases, stalkers are physically violent without making any prior threats. See Phillip J. Resnick, *Stalking Risk Assessment*, in *Stalking: Psychiatric Perspectives and Practical Approaches* 61, 63 (Debra A. Pinals ed., 2007).

finding a job, or loss of educational opportunities because of something posted about them online. Witwer et al., *supra*, at 4-5.

Regardless of the method of delivery, threats, harassing behaviors, and emotional and verbal abuse are significant contributors to post-traumatic stress symptoms; indeed, women⁶ who have been subjected to abuse “identify psychological abuse as inflicting greater distress compared to physical acts of violence.” Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, Nat’l Inst. of Health, at 2, 8 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2967430/pdf/nihms245802.pdf>.

To properly evaluate a reported threat, context is key. The entire ongoing, persistent pattern of acts of control and intimidation must be analyzed collectively and in the context of all that has come before, rather than as isolated events.⁷ A court must engage in an “examination of the dynamic of coercive control

⁶ *Amici* recognize that women are not the only people subjected to stalking and related abuses. Throughout this brief we nonetheless focus on the impact on women victims like C.W., in accordance with the cited research.

⁷ Stalking laws, including the Colorado law here, generally require a showing of a course of conduct of two or more proscribed acts. See AEquitas et al., *Stalking Statutes in Review* 5-6 (2022), <https://sparc.broncotime.info/wp-content/uploads/2022/06/Stalking-Statutes-in-Review.pdf>; Stalking Prevention, Awareness, & Res. Ctr., *Prosecutor’s Guide to Stalking* 10, <https://www.stalkingawareness.org/wp-content/uploads/2020/01/SPA-19.005-Prosecutors-Guide-to-Stalking-00000002-revised.pdf> (last visited Mar. 30, 2023).

over time,” including a pattern of control over “minute facets of everyday life”; “[t]his history helps the court understand how events that might seem relatively trivial to an outsider . . . take on momentous importance.” Evan Stark, *Re-Presenting Women Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 1024 (1995).⁸

Threats of physical harm may be subtle, and present in ways that may not be immediately understood as threats by others but which the abuser or stalker knows the victim will perceive as a threat based on a continuum of past behavior. See Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. Police Crisis Negots. 199, 208 (2012).

The domestic violence context in which some perpetrators make these threats has caused some courts to conclude that the threats are not protected speech under the First Amendment. See, e.g., *Gilbert v. State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988); cf. *People v. Borrelli*, 91 Cal. Rptr. 2d 851, 860 (Ct. App. 2000) (“[T]he right to free speech guarantees a powerful right to express oneself,” but “does not include the right to repeatedly invade another person’s constitutional rights of privacy and the pursuit of happiness through the use of acts and threats that evidence a pattern of harassment designed to inflict substantial emotional distress.”).

⁸ Many courts have applied the coercive control model to assess non-physical domestic abuse. See, e.g., *United States v. Haischer*, 780 F.3d 1277, 1282-83 (9th Cir. 2015); *Hernandez v. Ashcroft*, 345 F.3d 824, 836-37 (9th Cir. 2003); *Pugliese v. Superior Ct.*, 53 Cal. Rptr. 3d 681, 686 (Ct. App. 2007).

This Court should conclude that stalking and threats associated with it likewise constitute true threats that may be constitutionally proscribed. “[W]hen expression is so menacing that its targets, like C.W., cannot enjoy the liberties that democracy provides,” the government should be allowed to step in to police it. Lynn Greenky, *His Words Were So Terrifying the Supreme Court Got Involved*, Daily Beast (Mar. 18, 2023), <https://www.thedailybeast.com/billy-raymond-countermands-words-were-so-terrifying-the-supreme-court-got-involved>.

II. Imposing a Specific Intent Requirement Would Undermine the Protection Provided by Stalking Laws and Reduce the Availability of Civil Protection Orders.

Petitioner asserts that if criminal prosecutions for stalking are limited by the specific intent standards he urges, the person being threatened can seek a civil protection order instead. Pet. Br. 41 n.4. But if true threat protection is conditioned on a specific intent requirement, both criminal stalking laws and civil protection orders will be unnecessarily compromised.

As *amici* know firsthand from their extensive work with survivors of such abuses, technology-facilitated stalking and abuse are already under addressed.⁹ Making these crimes harder to prove by imposing a

⁹ See generally Witwer et al., *supra*, at 6; *Prosecutor’s Guide to Stalking*, *supra*, at 3, 3-39 (“Stalking is often misunderstood and only rarely, considering its prevalence, criminally charged by police or prosecutors.”).

specific intent requirement as a constitutional floor will create another hurdle to prosecution.

Additionally, as respondent notes (at 48), a specific intent requirement would directly threaten the availability of civil protection orders. Threats often give rise to civil protective orders. *See* Nat'l Inst. of Just., U.S. Dep't of Just., *Civil Protection Orders: Victims' Views on Effectiveness* 1-2 (Jan. 1998), <https://www.ncjrs.gov/pdffiles/fs000191.pdf> (in a study of three U.S. jurisdictions: 99 percent of women who received protective orders "had been intimidated through threats, stalking, and harassment"); Am. Bar Ass'n & Nat'l Inst. of Just., *Legal Interventions in Family Violence: Research Findings and Policy Implications* 50 (1998) (victims rarely seek restraining orders as a form of early intervention but rather as an act of desperation after experiencing repeated threats, stalking, harassment, or violence); Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *Do Arrests and Restraining Orders Work?* 214, 237 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (89 percent of women seeking restraining orders reported threats or property damage).

At least 18 states require litigants to prove a threat crime in order to receive a civil protective order based on those threats. *See* Domestic Violence Legal Empowerment and Appeals Project & Professor Margaret Drew *Amicus Br.* at 27, *Elonis v. United States*, 575 U.S. 725 (2015) (No. 13-983).

The constitutional floor established in criminal threat cases therefore will limit the availability of civil protective orders as well.

III. If This Court Still Adopts an Intent Requirement, It Should Set the Constitutional Floor at Recklessness.

If this Court still concludes that stalking threats are entitled to some kind of First Amendment protection, it should set the standard at recklessness, and not require proof of a subjective intent to convey a threat.

After all, “[s]omeone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.” *Elonis v. United States*, 575 U.S. 725, 745-46 (2015) (Alito, J., concurring in part and dissenting in part); see also Marley N. Brison, *Elonis v. United States: The Need for a Recklessness Standard in True Threats Jurisprudence*, 78 U. Pitt. L. Rev. 493, 509-14 (2017) (arguing for a recklessness standard under which defendants who “consciously disregard[] the substantial and unjustifiable risk that their communications were threatening in nature” could be held criminally responsible for those threats, even if they had no “conscious object to threaten”).

The Model Penal Code provides a framework. The Code lays out an objective standard for recklessness under which “[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.” Model Penal Code § 2.02(2)(c). “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s

conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.*; see also *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273-74 (2013); cf. generally Kenneth S. Cannaday, *Constitutional Law—Torts—Defamation and the First Amendment: The Elements and Application of the Reckless-Disregard Test*, 50 N.C. L. Rev. 390, 396-97 (1972), <http://scholarship.law.unc.edu/nclr/vol50/iss2/9> (proposing various factors relevant to a potential reckless disregard standard). The Code applies the reckless disregard standard to terroristic threats. Model Penal Code § 211.3.

In this case, petitioner continued to message and threaten C.W. for two years, in reckless disregard of the fact that she never responded to any of his messages and blocked the accounts from which he communicated with her at least six times. Petitioner's relentless pursuit of C.W. and efforts to communicate with her (not to mention the contents of those communications) were certainly a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

IV. Alternatively, This Court Should Dismiss the Case as Improvidently Granted.

In opposition to the certiorari petition, respondent observed that this case was not a good vehicle for laying out the contours for identifying a true threat because the conviction could be upheld based on petitioner's conduct, making the true threat analysis un-

necessary. Respondent pointed to the petitioner's admissions to physically tracking and stalking C.W. in his online comments to her. Br. in Opp. 9-11.

But this case has other complications, too, which now warrant dismissal. The question presented need not be reached, because this is not a pure speech case. There is threatening online conduct too, separate and apart from speech. To continue to threaten C.W., petitioner had to ignore her online blocking attempts, which were implicit requests to stop messaging her. J.A. 137-39, 165, 182. As C.W. explained at trial: "I blocked him multiple times. I believe that is an even stronger way than saying 'Please stop contacting me.' It's intended to make it impossible for somebody to continue to contact you [online]." J.A. 182. On at least six occasions he created new accounts to remain in contact with her, and referred to her efforts to block him in some of his communications. J.A. 137-39.

Thus, this is not solely a verbal threat case.¹⁰ Petitioner stalked C.W. online. He repeatedly ignored her efforts to block him, and created new accounts to continue to message her. This is conduct, not speech. This is the online equivalent of continuing to prowl around her house after she closed the door on him.

This Court has dismissed many cases because certiorari was improvidently granted, sometimes even after oral argument. *See, e.g., In re Grand Jury,*

¹⁰ As the ACLU carefully notes in its *amicus* brief, stalking prosecutions can involve unprotected conduct, and as a result the ACLU and their companion *amici* expressly disclaim "any view as to the appropriate First Amendment standard for evaluating speech integral to criminal conduct." ACLU *Amicus* Br. 10 n.5; *see also Prosecutor's Guide to Stalking, supra*, at 8-13.

143 S. Ct. 543 (2023); *see also* Mary-Christine Sungaila, *And After All That Work!: The Dreaded U.S. Supreme Court “DIG,”* WLF Legal Pulse (Jan. 31, 2013), <https://www.wlf.org/2013/01/31/wlf-legal-pulse/and-after-all-that-work-the-dreaded-u-s-supreme-court-dig/>. It should consider doing so here. The judgment can be affirmed based on petitioner’s threatening conduct, without regard to whether his speech is a constitutionally unprotected true threat.

CONCLUSION

For these reasons, and for the reasons stated in the respondent’s brief, *amici* ask this Court to affirm the judgment.

Respectfully submitted,

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