No. 121094

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

ARGUMENT

The People's opening brief established that Illinois's stalking and cyberstalking statutes do not violate the Due Process Clause because they do not criminalize a significant amount of conduct wholly unrelated to the legislature's purpose in enacting them. Nothing in defendant's brief leads to a contrary conclusion. As the opening brief also explained, the First District's reliance on *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), was misplaced because the question of whether the federal threats statute at issue there survived scrutiny under the Due Process Clause was neither decided by, nor presented to, the *Elonis* Court. Not only does defendant's brief fail to counter this point; defendant concedes that *Elonis* does not dictate, or even guide, this Court's analysis of the due process issue.

Defendant also fails to demonstrate that the stalking and cyberstalking statutes violate the First Amendment.[1] As explained in the People's opening brief, although the appellate court did not address defendant's First Amendment argument — because it held that the statutes violated the Fourteenth Amendment — both statutes survive scrutiny under the First Amendment. First, the stalking and cyberstalking statutes do not prohibit protected speech because they only prohibit speech integral to a criminal "course of conduct." Second, the speech governed by the statute is unprotected because it constitutes a true threat to the victim and, by its very utterance, inflicts injury. And finally, even applying strict scrutiny, the statute is constitutional because it is narrowly tailored to serve a compelling government interest.

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[1] Although defendant has characterized his First Amendment argument as a request for cross relief, he is actually asking this Court to affirm the First District's judgment on an alternative basis. The First District did not rule against defendant, but instead declined to address the First Amendment argument because it had invalidated the statute on due process grounds. There is no cross-appeal in this case.

I. The Stalking and Cyberstalking Statutes Do Not Violate the Due Process Clause of the Fourteenth Amendment Because They Do Not Criminalize a Significant Amount of Conduct Wholly Unrelated to the Legislature's Purpose in Enacting Those Laws.

Defendant contends that the appellate court correctly held that portions of two statutes — 720 ILCS 5/12-7.3 ("the stalking statute") and 720 ILCS 5/12-7.5 ("the cyberstalking statute") — are facially unconstitutional because the statutes lack "a properly culpable mental state" element, and "potentially criminalize innocent conduct." Def. Br. 61,[2] citing *People v. Carpenter*, 228 Ill. 2d 250, 269 (2008). But since *Carpenter* and *People v. Madrigal*, 241 Ill. 2d 463 (2011), on which defendant also relies extensively, this Court has explained that "innocent conduct" is conduct that is "wholly unrelated to the legislature's purpose in enacting the law." *People v. Hollins*, 2012 IL 112754, ¶¶ 27 & 28. Defendant neither cites nor discusses *Hollins*.

Madrigal held that due process requires a criminal statute to contain a criminal purpose element only where, without that element, the statute would "punish[ ] a significant amount of wholly innocent conduct not related to the statute's purpose." 241 Ill.2d at 472-73. *Hollins* clarified that "the term 'innocent conduct'" in this context "mean[s] conduct not germane to the harm identified by the legislature, in that the conduct was wholly unrelated to the legislature's purpose in enacting the law." 2012 IL 112754, ¶ 28 (citing *Madrigal*, 241 Ill.2d at 473).

Thus, in *Madrigal*, a statute intended to "protect the economy and people of Illinois from the ill-effects of identity theft" violated due process by "criminaliz[ing] the mere use

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[2] "App. Br." denotes the People's opening brief before this Court; and "Def. Br." denotes defendant's appellee's brief.

of names, or other commonly and publicly available information such as addresses and phone numbers, for the purpose of gaining access to innocent information about people" because "without any [requirement of] criminal intent, purpose or knowledge," the statute punished a significant amount of conduct that "[wa]s not reasonably related to the purpose of the statute." *Madrigal*, 241 Ill.2d at 474. *Madrigal* offered several hypothetical violations of the identity theft statute that were both everyday occurrences and wholly unrelated to the law's purpose to deter and punish identity theft. *Id.* at 471-72. That is not the case with the statutes at issue here.

In relevant part, the stalking statute provides:

> (a) A 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:
>
> (1) fear for his or her safety or the safety of a third person; or
>
> (2) suffer other emotional distress.

720 ILCS 5/12-7.3. The cyberstalking statute is almost identical. It says:

> (a) A person commits cyberstalking when he or she engages in a course of conduct using electronic communication directed at a specific person, and he or she knows or should know that would cause a reasonable person to:
>
> (1) fear for his or her safety or the safety of a third person; or
>
> (2) suffer other emotional distress.

720 ILCS 5/12-7.5. Each statute defines "emotional distress" as "significant mental suffering, anxiety or alarm," and "reasonable person" as "a person in the victim's situation." 720 ILCS 5/12-7.3(c)(3) & (8); 720 ILCS 5/12-7.5(c)(3) & (6).

Defendant argues that innocent conduct is captured by these statutes. The first example defendant provides to illustrate this argument — a prosecutorial investigator who twice tries to interview a sexual assault complainant who has communicated a desire not to press charges, Def. Br. 67 — is inapposite. Although a person in the complainant's position might suffer what a layperson would call "emotional distress" under these circumstances, a reasonable person so situated would not suffer "emotional distress" as defined by the statute — that is, "significant mental suffering, anxiety or alarm." Accordingly, the investigator in this example would not be guilty of stalking or cyberstalking. Even more obviously excluded from prosecution under the stalking statute is the parent in defendant's next example, who follows her teenage daughter to determine if she is using drugs. *See* Def. Br. 67. The daughter in this example might be upset about her parents' lack of trust in her, but she would not reasonably experience "significant mental suffering, anxiety or alarm." Nor would a reporter or photographer be guilty of stalking for following an elected official to capture evidence of a bribery scheme or extramarital affair. *See* Def. Br. at 67-68. While the elected official's anxiety or alarm might be severe, it would be due to the fact that he had been caught in an illegal or immoral act, not due to the reporter's or photographer's conduct in attempting to obtain a statement or photo. In any case, the statute exempts "an exercise of the right to free speech," 720 ILCS 5/12-7.3(d)(2), thus excluding conduct seeking to expose wrongdoing by a public official, which, unlike the speech that occasionally serves to satisfy stalking's course of conduct element, has more than *de minimis* value as speech.

Should the conduct of the investigator, parent, or reporter discussed above rise to the level where he should have known that it would cause a reasonable person to suffer

"significant mental suffering, anxiety or alarm," then, indeed that person would be guilty of stalking, and there is no constitutional reason the General Assembly would be barred from criminalizing such conduct. The government has a compelling interest in deterring and punishing conduct that causes such distress. *See People v. Bailey*, 167 Ill. 2d 210, 233 (1995) (holding prior version of stalking statute served legitimate government interest in preventing "terror, intimidation, and justifiable apprehension caused by the stalker's conduct"). Because the statutes at issue do not criminalize "a significant amount of . . . conduct . . . wholly unrelated to the legislature's purpose in enacting the law," they do not violate due process. *See Hollins*, 2012 IL 112754, ¶¶ 27 & 28.

II. *Elonis* is Inapposite.

The First District held that the United States Supreme Court's decision in *Elonis* compelled a different outcome. But *Elonis*, which construed a federal statute, did no such thing. Indeed, the question of whether the federal threats statute construed in *Elonis* was constitutional under the Due Process Clause was neither decided by, nor even presented to, the Court in that case. Defendant concedes that *Elonis* is not controlling here, and argues only that some of the language in *Elonis* supports a finding that the stalking and cyberstalking statutes are invalid. Def. Br. 73. Defendant's reading of *Elonis* stretches the Supreme Court's decision too far.

For example, defendant notes that the Court said that "a reasonable person standard . . . is inconsistent with the conventional requirement for criminal conduct — *awareness* of some wrongdoing." Def. Br. 74, citing *Elonis*, 135 S. Ct. 2010-11 (emphasis in original). But the Court did so in the course of determining the appropriate mens rea where the

legislature has not articulated a specific mental state requirement. *Id.* at 2010. Indeed, the Court explicitly stated that "Congress *could* have intended to cover such a broad range of conduct, but [it] declined to adopt such a sweeping interpretation in the absence of a clear indication that Congress intended that result." *Id.* (emphasis in original). Here, in contrast, the General Assembly has given a clear indication that it intended the statute to cover a broader range of conduct than an intentional mens rea requirement would encompass, and defendant does not dispute that his conduct falls within the statute's prohibitions. Thus, *Elonis* is inapposite.

III. The Stalking and Cyberstalking Statutes Do Not Violate the First Amendment.

The main thrust of defendant's brief is his First Amendment argument, which the First District did not address because it held that the statutes violated the Fourteenth Amendment. *See* Def. Br. 15-61. Both statutes survive scrutiny under the First Amendment as well.

Defendant contends that Illinois's stalking and cyberstalking statutes violate the First Amendment because they are overbroad. The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Striking down a statute that also has legitimate applications because of its potential to punish or chill protected expression is a drastic remedy. The Supreme Court has therefore instructed that courts should employ this remedy "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *People v. Williams*, 235 Ill. 2d 178, 200 (2009)

("Invalidation for overbreadth is strong medicine that is not to be casually employed." (internal quotations omitted)). A statute should be invalidated as unconstitutionally overbroad only if "a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010); *People v. Minnis*, 2016 IL 119563, ¶ 44, and if no reasonable limiting construction is available that would render the statute constitutional. *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Minnis*, 2016 IL 119563, ¶ 21. The burden to establish the overbreadth of a statute rests on the party challenging it. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *Minnis*, 2016 IL 119563, ¶ 21.

Courts have "insisted that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face." *Ferber*, 458 U.S. at 769; *Minnis*, 2016 IL 119563, ¶ 24. "Substantial overbreadth" requires a showing of actual or serious potential encroachments on fundamental rights:

> [T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.
>
> * * *
>
> [T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800–801 (1984) (internal citations and footnote omitted).

Defendant's First Amendment challenge fails for three reasons. First, the stalking and cyberstalking statutes do not prohibit speech; they prohibit a "course of conduct." Second, the speech governed by the statute is unprotected because it constitutes a true threat

to the victim and, by its very utterance, inflicts injury. And finally, even applying strict scrutiny, the statute is constitutional because it is narrowly tailored to serve a compelling government interest.

A. The Statutes Criminalize Conduct Rather Than Speech.

The stalking and cyberstalking statutes do not prohibit speech by their plain terms; they prohibit a "course of conduct." 720 ILCS 5/12-7.3(a)(1) & (2); 720 ILCS 5/12-7.5(a)(1) & (2). "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Norton v. City of Springfield, Ill.*, 768 F.3d 713, 716 (7th Cir. 2014) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). Thus, while the course of conduct prohibited by the statutes may include speech, that potentially communicative aspect does not render the statute overbroad or subject it to heightened scrutiny under the First Amendment. *See United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (rejecting overbreadth challenge to federal stalking statute criminalizing "a course of *conduct* that . . . causes . . . substantial emotional distress" because "the proscribed acts are tethered to the underlying criminal conduct and not to speech") (quoting 18 U.S.C. § 2261A(2)(A)) (emphasis in original); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (holding that interstate stalking statute's prohibition against criminal contact "is directed toward 'course[s] of conduct,' not speech, and the conduct it proscribes is not 'necessarily associated with speech'") (quoting 18 U.S.C. § 2261A(2)(A)).

Some narrowly defined categories of speech are traditionally excluded from the First Amendment's protection. Among these categories is "speech integral to criminal conduct."

Stevens, 559 U.S. at 460 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). This exception traces to the Supreme Court's decision upholding criminal antitrust laws in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). *See Stevens*, 559 U.S. at 468. Courts have relied on the *Giboney* exception to uphold the federal stalking statute.

For example, in *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014), the defendant posted an online ad on Craigslist, created fake Facebook and MySpace accounts, and posted explicit photographs of his former partner on pornography websites. *Id.* at 429–30. In these postings, he impersonated her and invited men to her house for sexual encounters, leading a number of men to appear at her door. *Id.* The defendant was charged with cyberstalking and identity theft. *Id.* The First Circuit relied on *Giboney* to reject the defendant's First Amendment challenge: "To the extent his course of conduct targeting [his ex-partner] involved speech at all, his speech is not protected. Here, as in *Giboney*, it served only to implement [defendant's] criminal purpose." *Id.* at 433–34. In effect, the court concluded that whatever speech was involved could not possibly have any valid, protected purpose.

Osinger involved similar facts. There, the defendant repeatedly contacted his ex-partner asking her to resume their relationship. *Id.* at 941–43. After she refused, he created a fake Facebook page in his ex-partner's name which included sexually explicit photographs of her. *Id.* He also sent explicit pictures of his ex-partner to her current and former co-workers. *Id.* The defendant was convicted of cyberstalking. Like the First Circuit, the Ninth Circuit rejected a First Amendment challenge to the prosecution, concluding that the defendant's speech was not protected expression: "Any expressive aspects of [defendant's] speech were not protected under the First Amendment because they were 'integral to criminal

conduct' in intentionally harassing, intimidating or causing substantial emotional distress to [the victim.]" *Id.* at 947.

Nor does it substantially change the analysis that Illinois's statute criminalizes a course of conduct that the defendant knew or should have known would cause significant mental suffering to a reasonable person in the victim's situation. In arguing to the contrary, defendant relies heavily on *Elonis*. Def. Br. 30-34. However, as previously discussed, *Elonis* is a case of federal statutory construction that did not decide the constitutionality of the federal threats statute. Therefore, *Elonis* is inapposite. Certainly, Illinois's stalking statute is somewhat broader than one criminalizing only conduct intended to cause significant mental suffering. A defendant can no longer defend his conduct by saying that, however outrageous it may have been, it was not his actual intent to cause "significant mental suffering, anxiety or alarm" to his victim. But this important added protection for victims only incrementally increases the reach of the statute, as opposed to causing the statute to reach "a substantial amount of constitutionally protected conduct." *See Houston v. Hill*, 482 U.S. 451, 458 (1987); *see also, e.g.*, *State v. Cardell*, 723 A.2d 111, 115 (N.J. Super. Ct. App. Div. 1999) (rejecting argument that New Jersey stalking statute became overbroad when it "substituted for specific intent . . . the concept of purposely engaging in conduct . . . that would cause a reasonable person to fear bodily injury or death").

B. Stalking Is Not Protected Speech Under the First Amendment Because It Constitutes a True Threat to the Victim.

The speech covered by the stalking and cyberstalking statutes falls under a second category unprotected by the First Amendment: true threats. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (the First Amendment allows a state to ban a true threat); *Watts v. United*

States, 394 U.S. 705, 708 (1969) (*per curiam*). "True threats" encompass 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. *Watts*, 394 U.S. at 708. The speaker does not have to actually intend to carry out the threat. *Black*, 538 U.S. at 360. Rather, the "true threats" doctrine allows states to "protect individuals from the fear of violence" and "from the disruption that fear engenders," not just the possibility that the violence will actually occur. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 388 (1992).

Virginia v. Black is instructive. To be sure, a plurality of justices in *Black* concluded that the cross-burning statute at issue was unconstitutional because of its presumption that burning a cross was prima facie evidence of an intent to intimidate, *Black*, 538 U.S. at 366; *see also*, *id.* at 368 (Stevens, J., concurring), *id.* (Scalia, J., concurring) (each opining cross-burning with an intent to intimidate was not protected by the First Amendment). Crucial to the Court's analysis was the fact that cross-burning can be used to generate fear in a victim when a cross is burned on someone's lawn, but can also be used to communicate a shared ideology when a cross is burned at a Ku Klux Klan rally. *Id.* at 354. The plurality found that the Virginia statute violated the overbreadth doctrine only because it failed to differentiate between the two. *Id.* at 366.

But no legitimate exercise of speech is associated with stalking that would necessitate a similar distinction in the statutes at issue here. The statutes criminalize only knowingly engaging in a course of conduct that the defendant knows or should know will cause the victim to fear for her safety or suffer significant mental suffering, anxiety, or alarm. 720 ILCS 5/12-7.3; 720 ILCS 5/12-75. When stalking is accomplished wholly or partly through

speech, such speech explicitly serves no other purpose than to cause fear and suffering in its victims, and therefore, as when a cross is burned with the intent to intimidate, stalking is not protected by the First Amendment.

In any event, the stalking statute excludes conduct that constitutes "an exercise of the right to free speech." 720 ILCS 5/12-7.3(d)(2). This exemption ensures that the statute will not prohibit constitutionally protected speech in a substantial number of its applications as compared to its plainly legitimate sweep. *See Minnis*, 2016 IL 119563, ¶ 24. In the rare case where a course of conduct that would otherwise constitute stalking served a First Amendment purpose other than causing fear or significant mental suffering — such as reporting on misconduct by a public official — that conduct would be exempt from the statute's reach. In other words, this Court can excise borderline cases from the scope of the statute as a matter of statutory construction. *See id.* at ¶ 21 ("A court must construe a statute so as to uphold its constitutionality, if reasonably possible."). Therefore, because the statute criminalizes only unprotected speech, it does not violate the First Amendment.

C. Even Under Strict Scrutiny, the Statutes Survive Because They Are Narrowly Tailored to a Compelling Government Interest.

Generally, the First Amendment prohibits content-based restrictions on speech unless they survive strict scrutiny. *People v. Alexander*, 204 Ill. 2d 472, 476 (2003). Strict scrutiny requires that the restriction is justified by a compelling government interest and is narrowly tailored to achieve that interest. *People v. Sanders*, 182 Ill. 2d 524, 530 (1998). Even if they were viewed as content-based speech restrictions, the stalking and cyberstalking statutes survive strict scrutiny because they are justified by the compelling government interest in

protecting the health and safety of the victims of stalking, and because the statutes are narrowly tailored to achieve that interest.

In *Ferber,* the Court held that content-based restrictions on child pornography satisfy strict scrutiny because child pornography is "intrinsically related" to child sexual abuse and states have a compelling interest in safeguarding the physical and psychological health of children. *See Alexander*, 204 Ill. 2d at 477 (discussing *Ferber*). And the value of child pornography is "exceedingly modest, if not *de minimis.*" *Ferber,* 458 U.S. at 762. As with child pornography, the value of speech that one knows — or should know — will cause one's victim to feel fear or significant mental suffering is *de minimis*. And as discussed in the People's opening brief, *see* App. Br. 10, the State has a compelling interest in safeguarding the physical and psychological health of the victims of such conduct. *See Bailey*, 167 Ill. 2d at 233. Approximately one in ten women reports being stalked by the age of forty-five. Diette, T. M., Goldsmith, A. H., Hamilton, D., Darity, W. and McFarland, K. (2014), *Stalking: Does it Leave a Psychological Footprint?*, Social Science Quarterly 95: 563–580. Women who are stalked are at significantly greater risk of suffering psychological distress than their peers. *Id.* The government has a compelling interest in deterring and punishing conduct that causes such distress.

Nor could the statute be more narrowly tailored and still achieve that governmental interest. For example, a requirement that the State prove the defendant *intended* to cause distress to his victim would leave unprotected all victims harmed by perpetrators motivated by a desire to entertain, to make money, or to gain notoriety. For example, when it was discovered that members of the Penn State chapter of the Kappa Delta Rho fraternity had

uploaded photos of unconscious, naked women to a members-only Facebook page, a fraternity brother explained that the conduct "wasn't intended to hurt" the victims — indeed, the perpetrators undoubtedly would have preferred that the victims never learned of their conduct at all — but rather was intended to be "funny to some extent" to the members. Holly Otterbein, *Member of Penn State's Kappa Delta Rho Defends Fraternity*, Philadelphia Magazine (Mar. 18, 2015) available at http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/ (last visited June 26, 2017). But the perpetrators' intent in no way diminishes the harm done to the victims, or the State's interest in protecting them from it.

Furthermore, the General Assembly found the old, intentional-threat definition of stalking inadequate. As Senator Toi Hutchinson pointed out, the changes to the law were necessary to address the ways in which modern technology empowers stalkers to harass their victims. 96th Ill. Gen. Assem., Senate Proceedings, May 21, 2009, at 125 (statements of Senator Hutchinson). Modern technology allows stalkers to remain physically removed from their victims, maintain near-anonymity, impersonate their victims, and even incite "innocent" third parties to doing their stalking for them. *See* Naomi Harlan Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 Mo. L. Rev. 125, 128-32 (2007). In one example similar to *Sayer*, *supra.* p. 9, a California man impersonated a woman in various Internet chat rooms and posted her telephone number and address along with messages indicating that she fantasized about being raped. *Id.* at 132. On at least six separate occasions, men then knocked on the woman's door and told her that they wanted to rape her. *Id.* The intentional threat model of stalking might not capture this

conduct because there was no overt threat and defendant did not communicate a threat directly to the victim. The defendant could argue that his intent was to spread a rumor about his victim, but not cause her fear or severe mental suffering. Or he could argue that he never intended that she learn of his actions. Needless to say, the harm to the victim is every bit as severe regardless of the man's intent. The amended version of the statute addresses this harm by capturing conduct that the perpetrator knew or should have known would cause the victim to fear for her safety or suffer other emotional distress.

As the People discussed, App. Br. 11-12, this case provides another example of conduct better captured by the amended statute than by the discarded intentional-threats model. Defendant posted messages on a website that caused his victim to feel fear, but did not communicate those messages directly to her. It would be difficult to prove that a defendant intended "to place [his victim] in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint," 720 ILCS 5/12-7.3(a)(1992), when he posted a message on his Facebook page and his victim was not one of his Facebook "friends." But defendant knew, or should have known, that these disturbing messages, disseminated on the Internet — including to Blakey's co-workers who *were* defendant's Facebook "friends" — would cause Blakey to fear for her safety or suffer other emotional distress. It is true, as defendant contends, that defendant could have caused Blakey to feel fear and emotional distress by threatening her directly, but the fact that defendant chose a less direct course of conduct to inflict harm on his victim should not exempt him from criminal prosecution. Indeed, this is exactly the conduct the amended statute was meant to cover. Stalking statutes exist "to eliminate behaviors which disrupt normal life for the victim and to prevent such

behaviors from escalating into violence." James Thomas Tucker, *Stalking the Problems With Stalking Laws: The Effectiveness of Florida Statutes Section 784.048*, 45 Fla. L. Rev. 609, 617 (1993). Here, defendant's behavior disrupted normal life for Blakey. She experienced fear and had to remain home from work for several days. And, as discussed, this kind of online behavior can, and often regrettably does, escalate into violence.

Defendant argues that the General Assembly rendered the statutes overbroad by amending them to include (1) conduct the defendant knew or should have known, as opposed to intended, would cause the victim to experience fear or suffer other emotional distress; (2) communication to or about the victim in the definition of course of conduct; and (3) "other emotional distress" in addition to fear. Def. Br. 45-47. But each change was narrowly tailored to achieve the government's compelling interest in safeguarding the physical and mental health of victims of stalking and cyberstalking. After the *mens rea* amendment, a defendant can no longer defend his conduct by saying that, however outrageous it may have been, it was not his actual intent to cause "significant mental suffering, anxiety or alarm"—a defense which in no way reduces the harm experienced by his victim. Including communication to or about a victim was necessary to reflect the ways in which stalkers pursue their victims in the Internet era. For example, a Department of Justice study of stalking victims found that even ten years ago, nearly one-quarter of all victims reported that some of the stalking occurred online, approximately one-third reported receiving unwanted emails, and a similar number reported that their stalkers spread rumors about them. Katrina Baum, Shannan Catalano, Michael Rand, and Kristina Rose, *Stalking Victimization in the United States*, Bureau of Justice Statistics (Jan. 2009), available at

https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf (last visited June 27, 2017). Likewise, expanding the law's scope to include not only fear but also "significant mental suffering, anxiety or alarm" is necessary to protect victims as stalkers migrate from the physical to the online world. As discussed, cyberstalkers use a variety of techniques to harass their victims, including sending hostile e-mails, publishing falsehoods about them in chat rooms and on social media platforms, and even posing as the victims in provocative Internet communications and e-mail messages to others — all of which can cause significant mental suffering even if they do not engender fear, especially when they are done remotely. Therefore, while the amended statute is certainly broader than what came before, it is still narrowly tailored to the compelling government interest in protecting stalking victims from physical and mental harms, because the Internet has dramatically broadened the ways in which stalkers can threaten and inflict those harms.

Even if one could hypothesize a scenario in which the statute penalizes speech that does not advance the State's compelling interest — and which is not exempted under sub-section (d)(2) — that hypothetical scenario alone would not demonstrate that the statute is overly broad. While any statute that regulates speech must avoid constitutional overbreadth, such concerns "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. Because the stalking and cyberstalking statutes serve a compelling government interest, and are narrowly tailored to that interest, they survive strict scrutiny under the First Amendment.

IV. The Court Should Not Sever the Phrase "or communicates to or about" from the Statute.

Defendant argues that should this Court agree that capturing communications to or about a person violates the First Amendment, this Court should sever the phrase "or communicates to or about" from the definition of "course of conduct" in the statutes. Def. Br. 60. When considering whether an invalid provision is severable from the remainder of a statute, the question is whether it is essentially and inseparably connected in substance to the remaining provisions, such that the legislature would not have enacted the remaining provisions absent the invalid one. *See Jordan G.*, 2015 IL 116834, ¶ 18. Here, there is little question that the General Assembly would not have passed the amended stalking and cyberstalking statutes without capturing communications to or about a person that the perpetrator knew, or should have known, would cause the victim to fear for her safety or otherwise suffer significant mental suffering, anxiety or alarm. As discussed *supra*, the General Assembly passed the amended statutes to capture the ways in which modern technology, principally the Internet, empowered stalkers to harass and torment their victims. Many of the cases discussed — for example, sending frequent harassing and threatening messages remotely and anonymously or using information shared online to induce third parties to participate in the criminal course of conduct against the victim — involve communicating to or about a person as an integral part of the criminal act. It is clear that capturing communications to or about the victim that the defendant knew or should have known would cause the victim to fear for her safety or otherwise suffer significant mental suffering, anxiety or alarm is so essential and inseparably connected in substance to the

General Assembly's purpose in passing the amendments that the General Assembly would not have passed them without those added protections.

Therefore, if this Court finds that criminalizing communications to or about a victim that cause the victim to fear for her safety or experience significant mental suffering, anxiety or alarm violates the First Amendment, it should find the amended stalking and cyberstalking statutes unconstitutional in their entirety.

CONCLUSION

For these reasons, and those stated in their opening brief, the People respectfully request that this Court reverse the judgment of the appellate court.

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People of the State of Illinois

CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, 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 nineteen pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned certifies that on June 28, 2017, the foregoing **Reply Brief of Plaintiff-Appellant** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following by email and by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

Jonathan Yeasting
Patricia Mysza
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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail a copy of the brief to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol, Springfield, Illinois 62701.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General