No. 123989

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-15-0293.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Eleventh Judicial
-vs-	)	Circuit, McLean County, Illinois, No. 14-CF-1271.
MARSHALL ASHLEY	)	Honorable Scott D. Drazewski,
Defendant-Appellant	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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POINTS AND AUTHORITIES Page

NATURE OF THE CASE

Following a bench trial, Marshall Ashley was convicted of stalking under 720 ILCS 5/12-7.3(a) (West 2014). He was sentenced to 18 months' imprisonment He has completed his term of incarceration and mandatory supervised release.

This is a direct appeal from the judgment of the court below. Issues are raised challenging the validity of the statute of conviction.

JURISDICTION

The Appellate Court issued a decision affirming Ashley's conviction, *People v. Ashley*, 2018 IL App (4th) 150293-U, and Ashley's petition for rehearing from that decision was denied on August 6, 2018. This Court granted leave to appeal from that decision on November 28, 2018.

ISSUES PRESENTED FOR REVIEW

I. **Whether subsections (a) and (c) of the "stalking" statute, which render it a felony to engage in conduct including "threaten[ing]" a person in a manner that knowingly or negligently would cause emotional distress, violates the right ot free speech on its face, where the provision allows prosecution for threats to undertake lawful acts and lacks any requirement that the speaker intend the recipient to understand his communication as a threat.**

II. **Whether subsection (a) of the "stalking" statute violates due process where the legislature drafted it so broadly as to make a felony out of any conduct which knowingly or negligently would cause a reasonable person emotional distress.**

III. **Whether the stalking statute can be narrowly construed to avoid the constitutional doubts raised in Issues I and II.**

STATUTE INVOLVED

720 ILCS 5/12-7.3 (2014). Stalking.

(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.

. . .

(b) Sentence. Stalking is a Class 4 felony; a second or subsequent conviction is a Class 3 felony.

(c) Definitions. For purposes of this Section:

(1) "Course of conduct" means 2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications.

. . .

(3) "Emotional distress" means significant mental suffering, anxiety or alarm.

. . .

(8) "Reasonable person" means a person in the victim's situation.

STATEMENT OF FACTS

Summary. Marshall Ashley was convicted of stalking under subsections (a) and (c) of the amended stalking statute, following allegations that he threatened his girlfriend in text messages and telephone communications. 720 ILCS 5/12-7.3(a),(c) (2014). The appellate court affirmed Ashley's conviction over claims that the statute of conviction violated the rights to free speech and due process on its face.

The statute. Illinois' first stalking statute was enacted in 1992. 720 ILCS 5/12-7.3 (West 1992). That original statute defined the offense as requiring an intentional threat of a violent crime plus multiple acts of following or surveillance in furtherance of that threat. 720 ILCS 5/12-7.3 (a) (West 1992).

In 2009, the legislature added a new provision to the stalking statute. P.A. 96-686. The new subsection (a) states:

> (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(a) (West 2014).

Section (c)(1) defines "course of conduct":

> 'Course of conduct' means 2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications.

720 ILCS 5/12-7.3(c)(1).

The statute further defines "emotional distress" as "significant mental

suffering, anxiety or alarm" 720 ILCS 5/12-7.3(c)(3), and "reasonable person" as "a person in the victim's situation." 720 ILCS 5/12-7.3(c)(8).

The legislature retained the predecessor statutes' prior definition of stalking as an alternate version of the offense in a new subsection (a-3). The legislature newly defined "transmits a threat" under subsection (a)(3) as "a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct." 720 ILCS 5/12-7.3(c)(9).

The brief legislative history shows the sponsoring senator commenting that the revision "redefine[d] stalking" and "broaden[ed] the definition of stalking" out of concern that stalking escalates to homicide of women. Illinois Senate Transcript, 2009 Reg. Sess. No. 54 (statement of Hutchinson, Sen.) (May 21, 2009).

Charging. Marshall Ashley with charged by indictment of two counts of stalking under 720 ILCS 5/12-7.3(a),(c) (West 2014).

Each of the two counts alleged that Ashley knowingly engaged in a course of conduct directed at his girlfriend, Keshia Tinch, in that he "sent . . . threatening text messages," " made threatening phone calls," and drove to their shared residence. (C. 12-13) Count 1 alleged Ashley "knew or should have known" that the conduct "would cause a reasonable person to fear for his or her safety." (C. 12) Count 2 alleged he "knew or should have known" the conduct "would cause a reasonable person to suffer emotional distress." (C. 13) Following a bench trial, the court found Ashley guilty, but only entered judgment under Count 2, alleging a course of conduct knowingly or negligently causing other emotional distress.

Bench trial. In October 2014, Ashley and Tinch had been dating for about two years, had a child together, and lived together in an apartment in Normal,

Illinois. (Vol. 7, R. 56-57, 60, 99) On October 21, Tinch and her mother Karen Miller were at the apartment when Tinch received a phone call from Ashley. (Vol. 7, R. 27, 60-61) Tinch and Miller testified that during the phone call, which Miller overheard in part on the speakerphone, Ashley told Tinch that if she had a man over there, he was going to come over there and kill her with a "banger." (Vol. 7, R.31, 63) Tinch phoned the police and an officer responded. (Vol. 7, R. 33, 37, 63-65) While the officer was present, Tinch received additional phone calls and text messages, which the officer documented. (Vol. 7, R. 39-40; St. Ex. 1a-b)

Shortly after, another police officer stopped a vehicle in which Ashley was a passenger, took Ashley into custody, and interrogated him. (Vol. 7, R. 44-45, 48-49) The officer documented text messages to Tinch found on Ashley's phone. (Vol. 7, R. 54-55, 68-69, R. 68-69, St. Ex. 3a-p, St. Ex. 3a-t) Text messages from Ashley to Tinch, introduced at trial, included the following:

> 11:44 am: "I love you... betta not hear anything that will make me mad." (St. Ex. 3b, R. 79)
>
> 2:21 pm:"You finna make me come look for your ass." (St. Ex. 3d, R. 79)
>
> 2:54 pm: "I love you too much to see u dead dummy. But I guarantee you this. I can make u suffer if I want to." (St. Ex. 3i, R. 80)
>
> 7:12 pm: "Where the fuck are u?" "Cause I rode past an seen lights on there." (St. Ex. 3n, R. 81)
>
> 7:20 pm: "You got my blood boiling." (St. Ex. 30, 1b, R. 82)
>
> 8:23 pm: "I swear bitch, if a nigga there is going to be one." (St. Ex. 3p, 1b, R. 83)
>
> 8:31 pm: "I hope whoever you got it when I got guns." (St. Ex. 1b)

Under custodial questioning, Ashley acknowledged that he was angry with Tinch but denied that any of the text messages were threatening, and denied that

he threatened to shoot her. (St. Ex. 2, 21:30; 21:35-37) During the interview, Ashley allowed the officer to review and document the messages on his phone. (St. Ex. 2, 22:08; 22:18) The messages documented from the phone largely matched those from Tinch's phone, except that Ashley's phone did not contain one message referencing guns that was found on Tinch's phone. (R. 68-69, St. Ex. 1a-b, St. Ex. 1b, St. Ex. 3a-p)

Over defense objection, Tinch was further permitted to testify as to a prior, uncharged incident in which Ashley held Tinch at gunpoint. (Vol. 7, R. 19-21, 57-59)

Ashley testified in his defense that he and Tinch had argued often in October 2014. (Vol. 7, R. 99) On October 21, he was out and Tinch phoned him to ask if he was going to help her move as she was being evicted from the apartment and asked if he had retrieved his belongings. (Vol. 7, R. 101) Ashley was upset with her because he had given her money for rent which he learned that she had spent elsewhere. (Vol. 7, R. 102) Ashley admitted that he engaged in heated exchanges with Tinch, but denied that he ever threatened her and specifically denied threatening her with a gun. (Vol. 7, R. 104) Two prior convictions, a 2013 criminal trespass to residence and a 2014 domestic battery were admitted to impeach Ashley's testimony. (Vol. 7, R. 110)

The court found Ashley guilty of stalking under Count 2. It specifically found the State's allegation of a physical act as part of the course of conduct – that Ashley went to "the residence" – not to have been proven. (Vol. 8, R. 21) Instead, the court focused on the telephone and text message communications. (Vol. 8, R. 21-23) It read out the list of predicate acts under subsection (c) of the statute, including "threatens," "communicates," and "other nonconsensual contact." (Vol.

8, R. 22) It noted that under the statute, a "course of conduct may include contact via electronic communications," commenting "that is what we have here." (Vol. 8, R. 22)

The court did not make an express finding of guilt on Count 1, commenting that "[s]ince the Court is finding that the State has proven the defendant guilty beyond a reasonable doubt on Count 2 under the merger doctrine, there's no sense to address Count 1 . . . since it is basically the same act, just different mental state." (Vol. 8, R. 28) It later commented, though, that "no judgment was rendered under Count 1 under the doctrine of merger." (Vol. 9 R. 17) Following a sentencing hearing, the court imposed a sentence of 18 months' imprisonment. (Vol. 9, R. 21)

Appeal. On appeal, Ashley argued that the amended stalking statute was facially invalid under the Free Speech and Due Process Clauses of the United States and Illinois constitutions. After this Court issued *People v. Relerford,* 2017 IL 121094, in November 2017, the Appellate Court ordered supplemental briefing in light of *Relerford.*

The court affirmed Ashley's conviction. *People v. Ashley*, 2018 IL App (4th) 150293-U. As to free speech, the court concluded that where Ashley was charged with "threatening," not "communicating to" the complainant, *Relerford* did not control. The court did not resolve Ashley's facial challenge to the "threaten[ing]" provision of the stalking statute, instead finding that Ashley's own "conduct me[t] the definition of a true threat." *Id.*, ¶41. As to due process, the court found that *Relerford* foreclosed any substantive due process challenge to the statute. *Id.*, ¶36.

Ashley filed a petition for rehearing on August 3, 2018, arguing that the

court erred in failing to adjudicate the facial invalidity of the "threaten" provision of the statute under the overbreadth doctrine, and that it misread *Relerford* to resolve a due process question that *Relerford* did not decide. The appellate court denied rehearing on August 6, 2018.

ARGUMENT

This case presents two issues concerning the validity of subsections (a) and (c) of the stalking statute left open by this Court in *People v. Relerford,* 2017 IL 121094. 720 ILCS 5/12-7.3(a),(c) (West 2014).

First, under Issue I, where the "threaten[]" provision of the statute authorizes the State to prosecute a speaker who, for example, threatens a boycott, as easily as it may prosecute someone who threatens to kill, and where the statute permits speakers to be convicted for words that were not intended to threaten but were reasonably misunderstood that way, the statute's sweep is overbroad, far exceeding the narrow "true threats" exception to the First Amendment. This Court should hold the "threaten[]" provision of subsection(c) unconstitutional, just as it held the "communicat[ions]" provision of subsection (c) unconstitutional in *Relerford.*

Second, under Issue II, subsections (a) and (c) combine to form a general prohibition on knowingly or negligently distressing conduct, most of which is far removed from "stalking" in the ordinary sense of the word. The statute sweeps in innocent conduct and portends arbitrary enforcement, and therefore should be held unconstitutional on its face under due process.

Under Issue III, in light of the statute's plain language and legislative history, no narrowing construction is available that could save the statute from unconstitutionality without doing violence to the legislature's intent.

I. The "threaten[s]" provision of subsection (a) and (c) of the amended stalking statute is an overbroad restriction on speech, and thus facially unconstitutional under the First Amendment.

In *People v. Relerford,* this Court unanimously held that the amended stalking statute's prohibition on distressing communications unconstitutionally restricted Illinoisan's freedom of speech. 2017 IL 121094, ¶63. Accordingly, it struck down the portion of the statute prohibiting such "communicat[ions]" as violating the First Amendment on its face. *Id., invalidating in part* 720 ILCS 5/12-7.3 (a), (c)(1).

While *Relerford* found a general ban on distressing communications to be unconstitutional, this Court did not resolve the validity of the statute's parallel prohibition on one particular type of distressing communications, those communications that "threaten." *Relerford,* ¶¶37-39; 720 ILCS 5/12-7.3 (c)(1).

The appellate court's ruling in Marshall Ashley's case presents that question. Precedent directs the same answer as in *Relerford*: Just as the First Amendment forbids a statute criminalizing "communicat[ions]" that knowingly or negligently causes emotional distress, the First Amendment forbids criminalizing "threaten[ing]" that knowingly or negligently causes emotional distress.

Under the amended stalking statute's plain language, the legislature made felons out of those who threaten to boycott a corrupt corporation, who threaten to fire an underperforming employee, or who threaten to file for divorce as equally as it criminalized those who threaten to commit a violent crime. And, where the statute allows conviction under a mental state of mere negligence, speakers risk conviction not only where a threat was intended, but wherever a listener reasonably misinterprets what the speaker said to be a threat. Such overbroad restrictions on what we say cannot be shoe-horned into the narrow exception for "true threats"

See, generally, Virginia v. Black, 538 U.S. 343, 359 (2003). Therefore, just as this Court in *Relerford* struck the prohibition on distressing "communica[tions]," it should now strike the prohibition on "threaten[ing]" and vacate Ashley's conviction.

a) *The question of whether the "threaten" provision of subsection (c) is unconstitutional on its face is properly before this Court and is to be reviewed de novo.*

A statute's constitutionality is properly challenged at any time, including on appeal from a criminal conviction. *People v. Clark*, 2014 IL 115776, ¶¶12-13. Where a defendant has been convicted under a statute that is unconstitutional on its face, this Court bears a duty to vacate the conviction, regardless of the procedural posture of the case. *In re N.G.*, 2018 IL 121939, ¶¶36-43.

In general, the challenging party bears the burden of establishing the statute's unconstitutionality. *Relerford,* ¶30; *People v. Melongo*, 2014 IL 114852, ¶20; However, "[w]hen the [g]overnment restricts speech, the [g]overnment bears the burden of proving the constitutionality of its actions." *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816 (2000). Here, "the usual presumption of constitutionality afforded [legislation] is reversed." *Id., citing R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *see also Relerford,* ¶32.

In this case, although the trial court only imposed sentence on one of the two counts under which Ashley was charged, the validity of both counts is properly before this Court. Specifically, the court found Ashley guilty and entered judgment under Count 2, which alleged conduct causing "emotional distress" other than fear for safety, under 720 ILCS 5/12-7.3(a)(2). (Vol. 8, R. 28) Using language echoing the one-act, one-crime rule, the court did not enter judgment on Count 1, which alleged the same course of conduct, but the different emotional harm of "fear for

safety," under 720 ILCS 5/12-7.3(a)(2). (Vol. 8, R. 28; Vol. 9 R. 17) In *People v. Aguilar*, where the firearms statute under which the defendant had been convicted was found facially unconstitutional, it continued on, to address the constitutionality of a statute of conviction for which the circuit court had imposed no sentence, under the merger doctrine. 2013 IL 112116, ¶¶7, 28-30. In *Relerford*, where the circuit court was silent as to the reason it declined to impose judgment on three of four counts, this Court, after vacating the conviction on which sentence was entered, exercised its supervisory authority to address the constitutionality of the statutes underlying the three other counts of conviction. 2017 IL 121094, ¶¶74-76. Under either approach, if this Court concludes that the conviction under Count 2 needs to be vacated, then it is left to decide the constitutionality of the statute of conviction under Count 1.

This Court reviews the constitutionality of a statute *de novo. Relerford*, ¶30.

> b) *Because anyone convicted under a statute that is an overbroad restriction on speech has standing to challenge the law's validity, the court below erred in not resolving Ashley's claim that the statute is unconstitutional on its face.*

"The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). *quoted in Relerford*, ¶31.

In general, where a defendant claims that the statute of conviction is unconstitutional on its face, a court cannot affirm on the theory that the defendant's particular conduct could be constitutionally prosecuted. *See, e.g., People v. Aguilar*, 2013 IL 112116, ¶¶11-12 (vacating conviction under statute held unconstitutional on its face, while conduct could be prosecuted under separate statute).

These rules have particular force where a statute jeopardizes free speech. Where an appellant claims to have been convicted under a statute that is facially invalid under the First Amendment, courts may not look back to the defendant's underlying acts and affirm under a theory that the defendant's conduct could have been charged under a narrower, constitutionally acceptable statute. *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949).

Overbroad laws chill the speech of those who are not before the court, as speakers silence themselves, lest they risk prosecution. Thus, an individual charged under a statute that chills free speech may stand in the place of those who are censoring themselves for fear of prosecution "even when that person's own activities are not protected by the first amendment" and could have been prosecuted under a narrower statute. *Melongo*, 2014 IL 114852, ¶24. Overbroad laws, even though they may have permissible applications, must fall, as "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Id.* A showing that a statute sweeps in too much protected speech "suffices to invalidate *all* enforcement of that law." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (emph. in orig.).

On this point, the appellate court failed to follow black-letter constitutional law. *People v. Ashley,* 2018 IL App (4th) 150293-U, ¶41.The court below found that because Ashley's "own activities are not protected by the first amendment" – in its view, what he said amounted to "true threats" – it did not need to resolve the question of the facial constitutionality of the threat provision. *Ashley*, ¶41-43. Asking whether Ashley's actual "conduct meets the definition of a true threat," as the appellate court did, though, posed the wrong question. *Ashley*, ¶41; *contra*

Melongo, ¶24. Under First Amendment overbreadth doctrine, a court must place aside the defendant's actual conduct, look to the statute itself, and determine whether "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) (internal quotation omitted); *see also Melongo*, ¶24.

Here, Ashley was charged with having "sent . . . threatening text messages," and having "made threatening phone calls." (C. 12-13) This language most invokes subsection (c)'s inclusion of "threatens" as a predicate of stalking's course of conduct, and it was the only basis in the indictment of the court's finding of guilt. Ashley therefore has standing to raise the constitutional validity of the "threatens" provision of subsection (c). 720 ILCS 5/12-7.3 (a), (c)(1).

> c) *Where the "threaten[ing]" criminalized by the amended stalking statute far exceeds the scope of the "true threats" exception to sweep in threats of lawful acts and negligently distressing threats, it is overbroad, and therefore unconstitutional on its face.*

A bare prohibition on "threaten[ing]" that knowingly or negligently causes distress is an overbroad prohibition on speech that far exceeds the bounds of the "true threats" exception. Specifically, where the legislature, in amending the stalking statute, 1) abandoned the requirement that the threat be a threat of a criminal act and 2) allowed conviction for conduct that negligently conveys a threat, the legislature criminalized far more speech than the exception allows.

The first step in overbreadth analysis is to ascertain the statute's reach. *Clark,* 2014 IL 115776,¶14*; see also Stevens*, 559 U.S. at 474. This Court applies "ordinary rules of construction and then decide[s] whether, as construed, the statute comports with constitutional requirements." *People v. Alexander*, 204 Ill. 2d 472, 485 (2003) (internal quotation omitted). This Court "cannot ignore the plain

meaning" of statutory terms that abut free speech interests. *People v. Sanders*, 182 Ill. 2d 524, 533 (1998). It asks whether the statute "may reasonably be interpreted to reach constitutionally protected conduct." *People v. Klick*, 66 Ill. 2d 269, 274 (1977).

Many of the same findings that this Court made regarding subsections (a) and (c) regarding the "communicat[ions]" provision, are equally true of the "threaten[ing]" provision of subsection (c). *See Relerford*, ¶¶26-29. *Relerford* found that the legislature "greatly expanded" the stalking statute's sweep. *Id.*, ¶27. Indeed, the sponsoring senator was clear that the function of the new amendment was to "broaden" the definition of stalking. Illinois Senate Transcript, 2009 Reg. Sess. No. 54 (statement of Hutchinson, Sen.) (May 21, 2009). And, just as this Court found that the statute's broadened language meant that "nonconsensual communications to or about a person that the defendant knows or should know would cause a reasonable person to suffer emotional distress constitute a course of conduct sufficient to establish the offense of stalking," a speaker is also subject to felony prosecution for making two or more "threat[s]" to a person that the speaker knows or should know would cause a reasonable person to suffer emotional distress. *Relerford*, ¶29. Moreover, *Relerford* recognized that the statute permits conviction based on a mental state of mere negligence as to the conduct's effect, finding that it "criminalize[d] communications to or about a person that negligently would cause a reasonable person to suffer emotional distress." *Relerford*, ¶¶34, 52.

Features like these result in a criminal prohibition far broader than the First Amendment allows. "From 1791 to the present," the First Amendment has only "permitted restrictions upon the content of speech in a few limited areas,"

and has never empowered legislators "to disregard these traditional limitations." *United States v. Stevens,* 559 U.S. 460, 468 (2010) (internal quotation omitted). "These historic and traditional categories long familiar to the bar," *id.,* include "advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words'; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent[.]" *United States v. Alvarez,* 567 U.S. 709, 717 (2012) (plurality op.) (internal citations omitted). Outside of these categories, speech is presumptively protected and generally cannot be curtailed. *Stevens,* 559 U.S. at 468-69.

Under the one exception relevant here, a state may proscribe "true threats."[1] *Virginia v. Black,* 538 U.S. 343, 359 (2003).*Black* addressed a Virginia statute that criminalized the act burning a cross with intent to intimidate, and that included a provision that the fact of cross-burning itself constituted *"prima facie* evidence" of intent to intimidate. As *Relerford* found, *Black* held that "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 or group of individuals." 538 U.S. at 359; *cited at Relerford,* ¶37. Because the First Amendment's protection of speech extends to "vehement, caustic, and sometimes unpleasantly sharp attacks" that are inherent in social and political debate, the exception is to be narrowly applied and defined. *Watts v. United States,* 394 U.S. 705, 708 (1969) (*per curiam*).

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[1]In *Relerford,* this Court rejected the claim that the stalking statute escaped First Amendment scrutiny under theories that it only regulated conduct, or that it applied to speech "integral to criminal conduct." *Relerford,* ¶¶40-48.

The governing plurality in *Black* ultimately concluded that the "First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Black*, 538 U.S. at 363 (2003) (plurality op.). However, where the "*prima facie* evidence" provision had the effect of relieving prosecutors of the burden to prove intent to intimidate as an element of the offense, the statute was unconstitutional. *Id.*,at 365; *see also Black*, 538 U.S. at 385 (Souter, J., concurring).

This Court has not addressed the "true threat'" exception in detail since *Black*. In *Relerford*, this Court found that a "true threat" "constitutes a 'serious expression of an intent to commit an act of unlawful violence.'" 2017 IL 121094, ¶38, *quoting Black*, 538 U.S. at 359. Where only the communications provision of subsection (c) was at issue there, though, this Court went no further in discussing the exception, as the statute separately detailed "threaten[ing]" as a predicate act of stalking. *Relerford,* ¶38.

> 1) The "true threats" exception only encompasses threats to commit an unlawful act. Where the stalking statute allows speakers to be convicted for expressing their intent to engage in lawful behavior, the statute is overbroad.

Not all threats are threats that the speaker will act unlawfully in the future, let alone commit a violent crime. Precedent is clear that the "true threats" exception only encompasses threats, that are threats to act *unlawfully*. *Black,* for example, characterized true threats as "serious expression[s] of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. It further emphasized that "constitutionally proscribable" intimidation only occurred "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360.

This limitation is inherent in the underlying justification for the "true threats" exception: "protect[ing] individuals from the fear of violence . . .and disruption that fear engenders," and to prevent threats from escalating to actual violence. *Black*, 538 U.S. at 360, *quoting R.A.V. v. City of St. Paul*, 505 U.S. at 383-84.

The amended stalking statute, however, contains no such limitation on the kind of threats that can be prosecuted. Its plain language draws no distinction between, say, threatening to sue a person, or threatening to kill them. So long as the threat knowingly or negligently causes distress, it can support a stalking prosecution.

The legislature did not define "threaten" as used in subsection (c) of the stalking statute. 720 ILCS 5/12-7.3 (a),(c)(1); *compare* 720 ILCS 5/12-7.3 (c)(9)(defining "transmits a threat" for purposes of 720 ILCS 5/12-7.3 (a-3)). And, unlike subsection (a-3), which expressly limits prosecutable threats to threats of violent felonies, the legislature included no such restriction for threats prosecutable under subsection (a).

Instead, the legislature allowed *any* act of "threaten[ing]" to suffice as a predicate of stalking so long as it might reasonably distress the recipient. 720 ILCS 5/12-7.3 (a),(c). But, the common use of the term "threaten" is merely to express one's intention to do something undesirable, "to utter threats against" or "to announce as intended or possible"[2]; or to "state one's intention to do (something

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[2]"Threaten," MERRIAM-WEBSTER, (online edition), *available at* : https://www.merriam-webster.com/dictionary/threaten (last accessed Feb. 3, 2019).

undesirable) in retribution. . . [*e.g.*] 'the trade unions threatened a strike'."[3] As one court recently found,

> the definition of 'threat' is broader than true threats: any 'statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done.'

Seals v. McBee, 898 F.3d 587, 595 (5th Cir. 2018), *quoting* "Threat," OXFORD DICTIONARIES (Online ed.); *see also, for example, Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶32 (reviewing dictionaries to ascertain the meaning of a statutory term not specifically defined by legislature).

Many, if not most, threats are constitutionally protected speech. Our daily lives provide countless examples where a speaker threatens to do *something*, yet the threat is speech at the core of the First Amendment. The boss who threatens to fire an underperforming employee, the parent who threatens to ground an unruly teenager, or the spouse who threatens to file for divorce each express an intent to do something undesirable. And each know, or at least should reasonably expect, that their threat would cause significant emotional distress. None is a "true threat," yet each qualifies as a predicate act of stalking.

The statute's sweep into our public discourse is perhaps more troubling. Social and political debate often involves warnings as to what a speaker may do. *Relerford* itself offers perhaps the clearest case. *Relerford*, ¶53. This Court described how the overbroad stalking statute reached a "quintessential example" of speech at the heart of the First Amendment. It struck down the "communicat[ions]" provision of subsection (c) in part because the provision could chill the speech of a citizen-activist who, at town meetings, "repeatedly complains about pollution caused by

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[3]"Threaten," OXFORD DICTIONARIES (online edition), *available at* : https://en.oxforddictionaries.com/definition/threaten (last accessed Feb. 3, 2019).

a local business owner and advocates for a boycott of the business." *Relerford*, ¶53. Because "the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott," the person may be subject to a felony stalking charge for this protected speech. *Id.*

This Court's boycott hypothetical applies just as forcefully to the "threatens" provision as to the "communicat[ions]" provision. Because there is no meaningful difference between *"advocating for"* a boycott and *"threatening"* a boycott, the citizen-activist could still be prosecuted under a legal regime where threatening remains a predicate of stalking.

Another example is the defendant's shouted warning to his attorney in *People v. Dye*, 2015 IL App (4th) 130799, ¶¶11-12. In *Dye*, a defendant, charged with violating a drug statute, became irate when his attorney refused to have certain evidence tested. When he was told to leave, he repeatedly yelled "I'm gonna get you," in an aggressive tone. The *Dye* court found the First Amendment barred prosecuting his statement, because "I'm gonna get you" was ambiguous as to whether the threat was one of unlawful violence, or of a lawful action, like filing an ethics complaint. *Id. Dye* reversed the conviction for threatening a public official even though that shouted threat, though ambiguous, was likely to cause fear or other distress. With no requirement that the threatening shout amounted to a serious expression of intent to commit an *unlawful* act, the shouts, though protected, would fall within the reach of the stalking statute's language.

U.S. Supreme Court precedent offers another example, establishing that it is not enough that a threat causes fear of safety. In *NAACP v. Claiborne Hardware*, activist Charles Evers sought to enforce a boycott of discriminatory Mississippi

businesses, and gave a speech that included "'threats' of vilification or social ostracism" of African Americans who continued to frequent the businesses — speech which the Supreme Court found, at points, seemed "intend[ed] to create a fear of violence" in his audience. 458 U.S. 886, 927 (1982). Yet, the Court held the speech "must be regarded as protected," to reflect the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *Id.*, at 928 (internal quotation omitted); *see also Watts*, 394 U.S. at 708 (First Amendment was violated for prosecuting speaker for statement and anti-war rally, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.").

Similarly, if the victim of a beating threatens to strike back in self-defense, he might place the assailant in reasonable fear for safety, even though the threat is of a lawful act. Or, for example, a local official who threatens in a community meeting to cut the number of police officers in a neighborhood as an act of political retaliation might reasonably expect the threat to frighten residents. Yet, the threat is ordinary political speech.

Where a threat to boycott, a threat to file an ethics complaint, or a threat to socially ostracize each come within the reach of the amended stalking statute's plain language just as easily as do threats to commit unlawful violence, the number of unconstitutional applications exceed the statute's legitimate sweep, and the "threaten[ing]" provision, like the "communicat[ions]" provision in subsection (c), is unconstitutional on its face. *See Stevens,* 559 U.S. at 473.

This Court would not be treading new ground in holding the "threatens" provision unconstitutional. A federal Court of Appeals recently struck down as facially invalid a state "threats" statute similar to, if not narrower than, subsection (a) because it failed the requirement that a threat must be of an unlawful act.

Seals v. McBee, 898 F.3d 587, 598 (5th Cir. 2018).

Seals illustrates how decoupling threatening from the prospect of a violent act renders the stalking statute overbroad. Louisiana had criminalized threats to any public officer with the intent to influence the officer's conduct in relation to his position. *Id.*, at 590. The statute, though, did not require as an element that the "threat" be a threat to do an unlawful act. Describing the speech that the statute criminalized where it lacked this requirement, *Seals* identified examples like "threats to call your lawyer if the police unlawfully search your house," "to complain to a DMV manager if your paperwork is processed wrongly," or "even to run against an incumbent unless he votes for a favorable bill." *Id.*, at 594, 598.

Seals recognized that threats to act lawfully are protected speech. *Id.*, at 597. Where the statute drew no line between "true threats—such as 'don't arrest me or I'll hit you'—and threats to take wholly lawful actions—such as 'don't arrest me or I'll sue you,'" it swept far beyond the exception's boundaries and was therefore unconstitutional as overbroad. *Id.* at 595.

At least the Louisiana statute was limited to intentional threats against officials. Illinois' use of threatening as a predicate act of stalking criminalizes threats to *anyone*, with no narrowing requirement beyond that that speaker should have known that what he said might reasonably cause distress. 720 ILCS 5/12-7.3(a), (c). And, unlike the statute in *Seals*, Illinois' stalking statute has no intent requirement at all. Thus if a prosecutor can show that threats to call a DMV agent's manager or to run against an incumbent would reasonably cause its target a harm so minor as professional anxiety, the defendant has committed stalking, even if he did not mean the threat to cause emotional harm.

Therefore, the legislature's choice to remove the statutory condition that

a threat be a threat to commit a violent crime inflated the statute's reach to sweep in a substantial number of unconstitutional applications. It is therefore overbroad and unconstitutional on its face. *See Stevens,* 559 U.S. at 473.

2) *The true threats exception requires that the State prove intent for the recipient to feel threatened. Where the stalking statute now criminalizes negligently conveying a threat, it is overbroad.*

To protect the right to free speech, the true threats exception is best understood as limited to circumstances where the speaker intended the recipient of the threat to feel threatened. *See, e.g. United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014). The stalking statute, though, allows conviction of a speaker who, with no unlawful intent, negligently conveys a message that a reasonable person would understand as threatening. Where speakers are at risk of prosecution because of unintended interpretations of what they say, the statute sweeps too broadly.

In *Relerford*, this Court acknowledged, but declined to resolve, a split of authority as to whether the First Amendment allows punishing speakers for negligently conveyed threats. 2017 IL 121094, ¶38 ("[I]t is unclear whether the true threat exemption . . . would apply to a statement made with innocent intent but which negligently conveys a message that a reasonable person would perceive to be threatening.") This Court should hold that the only constitutionally proscribable threats are those made with the intent to convey a threat to the recipient – in other words an intent to make the recipient feel threatened.[4] And,

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[4]This issue was briefed by the parties and *amici* in *Relerford*, and this Court may wish to take notice of those briefs. *See, especially People v. Relerford*, No. 121094, Brief of Cato Institute, *et al., as amici curiae,* 5-14.The briefs in *Relerford* are readily available on the Illinois Courts' website in this Court's September 2017 Illinois Supreme Court docket, at:

where the legislature abandoned this requirement when it broadened the stalking statute, this Court should hold the "threatens" provision unconstitutional.

A common feature of exceptions to the First Amendment is that, to punish a speaker for what he says, it must be proven that the speaker said it with a particular mental state. Else, speakers risk censoring themselves for fear that their words could be misconstrued so as to render their speech unlawful. In many contexts, precedent has held "negligence [to be a] constitutionally insufficient" standard for punishing speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). For example, defamation of a public figure requires proving the speaker's "actual malice" as to what was said, *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), "incitement" requires the speaker "intend[] to produce" imminent disorder, *Hess v. Indiana*, 414 U.S. 105, 108 (1973), and "obscenity" requires "knowledge" of the obscene nature of the material sold. *Smith v. California*, 361 U.S. 147, 150 (1959).

The true threats exception should be treated no differently. A mere negligence standard as to the content of the threat – one which allows conviction if the defendant did not subjectively intend to threaten, but "should know" that a "reasonable person" would interpret the communication in that distressing way – risks criminalizing protected expression simply because it is crudely, zealously, or inartfully expressed. When speakers are held responsible not only for the messages they intend to convey, but for others' reasonable misinterpretations of their lawful intent, what was meant as a mere joke or as hyperbole becomes transformed into grounds for felony prosecution. *See Relerford*, ¶¶50-58. Speech is chilled, as speakers must carefully calibrate their discourse, lest they run afoul

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http://www.illinoiscourts.gov/SupremeCourt/Docket/2017/Sept/09-17_Docket.asp (last accessed Mar. 6, 2019).

of the law. A regime that encourages such self-censorship by threat of imprisonment is incompatible with a tradition that recognizes that discourse is "often vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708.

The Supreme Court has placed proof of the subjective intent to threaten at the center of its precedent on threats. *Black* characterized true threats as those where a "*speaker means* to communicate a serious expression of an intent to commit an act of unlawful violence[.]" *Black*, 538 U.S. at 359 (emph. added). In finding cross-burning with intent to intimidate to be a prohibitable true threat, the court defined "intimidation" as occurring "where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360 (emph. added). The court emphasized cross-burning's history as a strategy often "*intended* to create . . . fear." *Id.* (emph added)

The plurality found that where the *prime facie* evidence provision permitted authorities "to arrest, prosecute, and convict a person based solely on the fact of cross burning itself," without proof of the message that it was intended to send, it "strip[ped] away the very reason why [governments] may ban cross burning with the intent to intimidate" and "create[d] an unacceptable risk of the suppression of ideas." *Id.*, at 365. It ultimately struck down the statute as overbroad *because* of the statute's failure to require that intent to intimidate be proven. *Id.* Where no evidence of intent to intimidate was required, the statute risked chilling protected speech – even when that speech took the despised form of burning a cross. And, while *Black* fractured over whether Virginia's cross-burning ban was unconstitutional in all cases, or only in those where intent was erroneously presumed, eight justices emphasized the importance of the speaker's intent. *See Black*, 538 U.S. at 385 (Souter, J., concurring); *Black*, 538 U.S. at 378 (Scalia,

J., concurring in part and dissenting in part).

Many courts have found *Black*'s statement that the speaker must "mean[] to communicate a serious expression of intent" to require more than just knowingly communicating the threatening words. *See, e.g., Heineman,* 767 F.3d at 978 ("a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened.") Rather, the First Amendment requires that the speaker want the recipient to believe that he intends to act violently. *Id.* The Ninth Circuit, for example, recognized that *Black*'s "insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear" in light of *Black's* finding that presuming intent to threaten from the fact of a cross-burning alone was unconstitutional. *United States v. Cassel,* 408 F.3d 622, 631 (9th Cir. 2005); *see also, e.g. United States v. Parr,* 545 F.3d 491, 500 (7th Cir. 2008) (commenting that it is"likely . .. that an entirely objective definition is no longer tenable" after *Black*), *United States v. Magleby,* 420 F.3d 1136, 1139 (10th Cir. 2005) (after *Black*, the First Amendment requires "intent to threaten"),

Sister states have adopted a similar standard after *Black*. Indiana's high court, for example, held that true threats

> depend on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.

Brewington v. State, 7 N.E.3d 946, 964 (Ind. 2014).

Courts in Illinois and nationwide have divided on the question. *Compare, e.g., People v. Wood,* 2017 IL App (1st) 143135 , ¶13 *and Cassel,* 408 F.3d at 631 (each holding that intent to convey a threat is required) *with People v. Diomedes,*

2014 IL App (2d) 121080, ¶¶29-36, *and State v. Johnston*, 127 P.3d 707, 710 (Wash. 2006).

The U.S. Supreme Court granted *certiorari* to resolve these questions in *Elonis v. United States,* 135 S.Ct. 2001 (2015). After *Elonis,* the trend has increasingly been to find that true threats require intent to threaten. The Fourth District, in another case, has directly held that "a 'true threat' requires intentionality." *People v. Dye,* 2015 IL App (4th) 130799, ¶10. The First District has held likewise, after examining *Black*. *People v. Goodwin,* 2018 IL App (1st) 152045, ¶¶35-54, *People v. Wood,* 2017 IL App (1st) 143135, ¶13; *see also People v. Bona,* 2018 IL App (2d) 160581, ¶36 (interpreting *Black* and *Elonis* to require speaker had "intent to issue threat" or actual "knowledge that [the communication] will be viewed as a threat").

The *Elonis* defendant was charged under the federal ban on making threatening communications, 18 U.S.C § 875(c), for a series of statements on his Facebook page. Where that statute was silent as to the required mental states, the district court read two mental states into the statute. It instructed the jury that the defendant had to "intentionally make the statement." *Elonis,* 135 S. Ct. at 2004-07. However, it also instructed the jury that the defendant did not have to intend or know that the communications would be understood by the recipient as threats. *Id.* Instead, the jury was instructed it should convict under a mere negligence standard; if it found the statements were such that "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual." *Id.* at 2007.

Elonis ultimately avoided directly resolving the First Amendment question.

Instead, it found that the trial court had read a too-weak *mens rea* into the statute. 135 S. Ct. at 2008-12. The speaker's knowledge that he made the communication which contained a threat was not enough. *Id.* at 2011. Where the instruction relied on what a "reasonable person" would foresee, it set out a mental state of negligence: "Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence." *Id.* at 2011 (internal quotation omitted). The court then found that a negligence mental state was an unacceptable option, insufficient "to separate wrongful conduct from otherwise innocent conduct." *Id.* at 2010-11.

To be sure, *Elonis* did not make an express constitutional holding; because the statute at issue was silent as to the required mental state, the court could avoid the First Amendment question by reading an additional "knowingly" mental state into the statute. But *Elonis* provides useful guidance as to the kind of mental state element that threat statutes require. Courts do not construe statutes to avoid constitutional doubts when there are no doubts about a statute's constitutionality. If the court had been comfortable with a purely objective approach, it would not have read in the high mental state it did.

After *Elonis*, the statutes' a "reasonable person" standard, in addition to the phrase "should know," establishes that they allow conviction under a mere negligence standard as to how the communications' content will be received. Illinois' amended stalking statute's mental state elements parallel the mental states used in the *Elonis* district court. *See id.* The stalking statute only contains two mental state elements: 1) knowingly engaging in the course of conduct that would 2) knowingly or negligently cause emotional distress. Subsection (a) and (c)'s knowingly engaging in "acts . . .including . . . threatening," is no different than the knowingly

sending a communication containing a threat that *Elonis* found insufficient. The definition of course of conduct contains no element on the speaker's beliefs toward how the message will be understood, save how a "reasonable person" might interpret the speaker's conduct and be distressed. Without a requirement that the speaker intend the recipient to understand the message as a threat, the statute thus fails the intent requirement of the true threats exception.

By criminalizing careless speech that could be reasonably construed as a distressing threat, the stalking statute sweeps in too many innocent actors to be constitutional. *Elonis* expressly found that a statute that allows convicting someone who intentionally makes communications, but is negligent as to whether their recipient would interpret them to include a threat, unjustly "sweeps in innocent conduct." 135 S. Ct. at 2008-12. This Court has used the same language as *Elonis* to describe when a statute's overbreadth renders it unconstitutional under the First Amendment, most recently, by striking down provisions of the eavesdropping act as overbroad as they "criminalize[d] a wide range of innocent conduct." *People v. Melongo*, 2014 IL 114852, ¶29.

Often, words that literally express a threat are merely emotional outbursts, not intended to be taken literally. For example, a student, frustrated with bureaucratic delays in having her schedule changed, may blurt out to a guidance counselor "I'm so angry. I could shoot someone." *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 358 (2001), *discussing Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 369 (9th Cir. 1996). The counselor, unaware of the student's day, could reasonably understand the unintended outburst as a threat and be distressed.

Sometimes, idiomatic phrases not intended to threaten may be reasonably

interpreted that way, distressing their recipient. *See, e.g., United States v. Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997) (defendant sent message to FBI agent investigating closed case that "the silver bullets are coming." Agent construed this as threat of violence, but defendant offered evidence that he was using idiomatic phrase describing new evidence in the case).

Other times, words that could be construed as threatening by a literal reader are not meant that way at all. *Elonis* offered the example of a

> letter that says "I'm going to kill you" [which] is "an expression of an intention to inflict loss or harm" regardless of the author's intent. A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke.

135 S. Ct. at 2008.

These dangers are heightened when speech is in the form of electronic communications. Internet and text message communications are sent from afar, frequently brief and laden with typographical errors, and often couched in encoded hyperbole. Increasingly, speakers communicate in fragmented and exaggerated discourse, where for example, receiving a text, "you're about to be dead" is more likely to be followed by a photograph of a kitten as it is a violent act. *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, "*'#i<<unknown Symbol>>u:' Considering the Context of Online Threats*," 106 Calif. L. Rev. 1885, 1912 (2018).

Recent Illinois case law offers examples of how the lack of an intent requirement can sweep in protected speech. *People v. Dye*, 2015 IL App (4th) 130799, ¶¶11-12. With no requirement that the speaker threaten an unlawful act, the *Dye* defendant's repeatedly shouted warnings to his attorney, "I'm gonna get you," amounted to a completed offense of stalking even if all participants understood it to be a threat to complain to the judge, alleging her ineffectiveness. And, where

the statute requires no intent to threaten, the defendant could be convicted of stalking for the shouted warnings, even if a trier of fact concluded he meant nothing by his words beyond a mere emotional outburst, so long as his attorney reasonably thought otherwise.

Returning to *Relerford*'s example, not only would the activist who expressly threatened a boycott be in danger of prosecution, the activist who tells the business owner "We shouldn't do business with you" as simply an expression of her frustration would be as well, so long as the business owner reasonably though a boycott might come. *Relerford,* ¶54.

The "threatens" provision "thus chills constitutionally protected speech because of the possibility that the [State] will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365 (plurality op.) This Court should therefore find it unconstitutional on its face.

d) *In the alternative, where the statute is not adequately tailored to legislature's interest in prohibiting campaigns of stalking that escalate to homicide, it fails under any standard of scrutiny.*

"Content-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382 (ordinance restricting racially biased "fighting words" invalid). The State may rebut the presumption only by proving that the provisions meet strict scrutiny —*i.e.*, that the legislature narrowly tailored the provisions to satisfy a compelling interest. *Id.*

This Court has already held that because the stalking statute criminalizes speech based on other's reactions to what was said, it is a content-based restriction on speech and therefore subject to strict scrutiny. *Relerford*, ¶34, 52. Just as with the communications predicate, to determine if the "threaten[ing]" amounts to a

criminal act, the trier of fact must evaluate whether the communication is objectively frightening, alarming or otherwise distressing. But, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). To be upheld, the State must prove the provision narrowly tailored to a compelling state interest. *Relerford,* ¶¶32-34, *citing, among others, Reed v. Town of Gilbert*, 576 U.S.___,135 S. Ct. 2218, 2227 (2015). At a minimum, that means the legislature must use "means that are neither seriously underinclusive nor seriously overinclusive." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 805 (2011).

The legislature's stated interest was to prevent campaigns of stalking from escalating into violent crime. Illinois Senate Transcript, 2009 Reg. Sess. No. 54 (statement of Hutchinson, Sen.) Even assuming a government interest in preventing violent crime and protecting potential victims is compelling, "[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Free Speech Coalition*, 535 U.S. at 245. Moreover, the additional kinds of "threatening" that the amended statute newly criminalized– threats of lawful acts, or inadvertent but negligent threats, presage no violent crime. One follows through on a threat to do something lawful by acting lawfully, not by committing a violent crime. And threatening words spoken with no intent to threaten presage no further act at all. Where the stalking statute sweeps in routine discourse that holds no real prospect of escalating to homicide beyond what must be accepted in social debate, the provision is vastly overinclusive.

This holds, even if the statute's reach is thought to be limited to true threats. To be permissible, a prohibition on threats must be justified "based on the very reasons why the particular class of speech at issue ... is proscribable" – the fear

that threats of violence engender and their prospect for escalating into violence. *Black*, 538 U.S. at 362, *quoting R.A.V.*, 505 U.S. at 383-84. But much of the speech that the statute now criminalizes holds no such prospects. Indeed, one of the two subsections, affirmatively excludes "fear for safety" as an actionable harms, instead reaching only "other" emotional distress. 720 ILCS 5/12-7.3 (a)(2),(c); In so doing, it affirmatively rejects the very reason that true threats can be banned in the first instance. *See R.A.V.*, 505 U.S. at 383-84.

The legislative history suggests that the reason that the legislature removed content and mental state elements was simply to relieve the State of its burden to prove those elements at trial, to make it easier to pursue cases where it suspected a true threat of violent crime occurred, which one supposes "felt like" stalking in some colloquial sense, but were difficult to prove. Obviously, the State would find it easier to prosecute actual, intended campaigns of stalking if the State did not have to prove the accused's intent or the unlawful nature of what was threatened. But, the State "may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255 (government could not justify ban on virtual child pornography on theory that it made prosecuting actual child pornography less difficult). As it did with the "communications" provision, with the "threatens" provision, the legislature has "burn[ed] the house to roast the pig." *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (internal quotation omitted).

Moreover, a restriction on speech "cannot be justified if it could be avoided by a more carefully drafted statute." *Id.*, at 874. Rather, if "a less restrictive alternative would serve the [state's] purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. But, nothing in the legislative history explains why the legislature could not have enacted more finely tailored provisions to reach

its interest in limiting behaviors that might escalate to homicide. In the context of threats, in particular, the State could simply pass a straightforward ban on intentional threats to commit violent crime. For example, a statute that prohibits knowingly communicating a threat to commit a criminal act against a person, intending that a person understand it as a threat to commit a crime would likely pass constitutional muster.

The legislature chose to ban threats, regardless of what was threatened, and regardless of the speaker's intent, as part of a wider effort to criminalize almost all emotionally distressing discourse. Because doing so swept far beyond the legislature's legitimate interest, this Court should hold the threatens provision of subsection (c) unconstitutional.

II. Subsection (a) of the amended stalking statute violates substantive due process on its face, where it sweeps in vast amounts of conduct unrelated to its narrow purpose, and will result in arbitrary enforcement.

With subsection (a) of the amended stalking statute, the legislature created a sweeping new felony of knowing or negligent infliction of emotional distress. 720 ILCS 5/12-7.3(a),(c) (2014). In so doing, it transformed millions of Illinois' citizens, few of whom would suspect that the law would label them as "stalkers," into criminals subject to felony prosecution.

This Court has a long-standing tradition of invalidating exceedingly broad criminal laws as violating due process. Sometimes, it has done so because the legislature's failure to set a properly culpable mental state leads a statute to "potentially criminalize[] innocent conduct," a result a reasonable legislature could not intend. *See, e.g., People v. Carpenter*, 228 Ill.2d 250, 269 (2008). Elsewhere, it has done so because a prohibition's language sweeps in so much ordinary behavior that authorities will inevitably enforce the law in a piecemeal and arbitrary manner. *See, e.g., City of Chicago v. Morales*, 177 Ill. 2d 440, 461 (1997), *aff'd*, 527 U.S. 41 (1999).

Subsection (a) of the amended stalking statute exemplifies each of these failings. In *Relerford*, this Court recognized that the offense that the legislature labeled "stalking" was instead, by its plain language, a general prohibition on conduct that knowingly or negligently would cause emotional distress. Because allowing a conviction for almost any emotionally distressing conduct does not "represent a reasonable method of preventing the targeted conduct" of stalking escalating to violence that concerned the legislature, subsection (a) violates due process on its face. *People v. Madrigal*, 241 Ill. 2d 463, 468 (2011).

This issue was previously before this Court in *Relerford*. Contrary to the

appellate court's assumption, *Relerford* did not resolve the kind of facial due process challenge that Ashley has raised. 2017 IL 121094, ¶¶19-22. Indeed, experience since *Relerford* illustrates how exceedingly broadly the statute has been applied, magnifying the uncertainty as to how the law will be enforced.

The time has therefore come for this Court to strike subsection (a) in its entirety.

a) *The question of the facial constitutionality of subsection (a) is properly before this Court and is to be reviewed de novo.*

The court below found *Relerford* closed the question of whether the amended stalking statute violates substantive due process. *Ashley,* ¶36. This seriously misreads *Relerford.* "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). The appellate court projected a sweeping constitutional holding into this Court's opinion, where this Court, in an act of judicial reserve, only decided the case on narrower First Amendment grounds, leaving the due process challenge for another day.

As to due process, this Court made no holding except to disagree with the First District's prior *reasoning* in *People v. Relerford,* 2016 IL App (1st)132531. *Relerford,* 2017 IL 121094, ¶¶19-22 ("We agree... the appellate court's reasoning is flawed.") A *different* due process claim was raised in this Court and passed unadjudicated, where this Court resolved the case on a narrower ground. 2017 IL 121094, ¶¶24, 78. This Court recognized as much, summarizing the issues before it by stating:

> Defendant *does not* seek affirmance under *Elonis* but argues that the appellate court's judgment should be *sustained for other reasons* . . . [including] . . . that the relevant provisions violate substantive due process guarantees because they improperly criminalize innocent conduct.

Relerford, 2017 IL 121094, ¶24 (emph. added).

To be sure, this Court found the lower court decision in *Relerford* overshot the mark, in particular, that it erred "in vacating defendant's conviction *based on Elonis*." *Id.*, ¶19 (emph. added). It read the First District's *Relerford* opinion to hold that *Elonis* created a broad categorical rule that a statute imposing criminal liability based on a mental state of negligence was necessarily unconstitutional. *Relerford*, ¶¶19-22, *discussing People v. Relerford*, 2016 IL App (1st) 132531, *and Elonis*, 135 S. Ct. 2001 (2015). It found this to over-read *Elonis*, noting, unremarkably, that 1) a negligence mental state can sometimes be a permitted *mens rea* for a criminal statute, and 2) that *Elonis* did not contain a due process holding. *Relerford*, 2017 IL 121094, ¶¶21-22. This Court needed to address this finding, where it was affirming the judgment on an alternative ground, else the appellate court's *Relerford* opinion would stand.

Ashley's briefs, like the *Relerford* defendant before this Court, offered "other reasons" that the "relevant provisions violate substantive due process." *Relerford*, 2017 IL 121094, ¶24.

Although *Relerford* rejected the appellate court's reasoning that *Elonis* mandated finding that subsection (a) violates due process, it left open the core due process question Ashley raised below: whether subsection (a) violated due process under long-standing precedent holding that a criminal statute which sweeps in innocent conduct cannot stand where it combines a nearly exhaustive list of possible predicate conduct with the ill-defined harm of mere emotional distress and a diluted mental state of negligence. *See, e.g., People v. Madrigal*, 241 Ill.2d 463 (2011).

A facial challenge to a statute's constitutionality may be raised at any time,

Carpenter, 228 Ill. 2d at 263, and is reviewed *de novo*. *Madrigal*, 241 Ill. 2d at 466.

b) *Criminal laws so broad as to sweep in innocent conduct violate due process on their face.*

This Court has "repeatedly held that a statute violates the due process clauses of both the Illinois and United States Constitutions if it potentially subjects wholly innocent conduct to criminal penalty." *Madrigal*, 241 Ill. 2d at 466; U.S. Const., amend XIV; Ill. Const. 1970, art 1 §2. This precedent recognizes that a rational legislature does not intend to sweep in innocent conduct unnecessary to a statute's purpose. If a statute "can be read to apply to wholly innocent conduct, it does not bear a rational relationship to a legitimate State purpose," and is therefore unconstitutional on its face. *People v. Zaremba*, 158 Ill. 2d 36, 39 (1994). This is so even though the statute may encompass much legitimately proscribable activity. *See, e.g., Madrigal*, 241 Ill. 2d at 473. Conversely, if a statute "capture[s] the precise activities that it was meant to punish," it should be upheld. *Madrigal*, 241 Ill. 2d at 476, *quoting People v. Williams*, 235 Ill. 2d 178 (2009). Under this line of authority, this Court has struck down statute under both the federal Due Process Clause, *see, e.g., Madrigal*, 241 Ill. 2d at 466, and the Due Process Clause of the Illinois Constitution. *See, e.g., People v. Hamm*, 149 Ill. 2d 201, 218 (1992) (emphasizing that felony penalty for ordinary conduct rendered statute in violation of Illinois constitution).

In particular, a statute may violate due process where it fails to "requir[e] a culpable mental state beyond mere knowledge." *Madrigal*, 241 Ill. 2d at 467; *see also Carpenter*, 228 Ill. 2d at 267. In *Madrigal*, this Court struck down an identity theft statute that criminalized "knowingly us[ing] any personal identification

information . . . of another for the purpose of gaining access to any record of the actions taken, communication made or received, or other activities or transactions of that person, without the prior express permission of that person." 241 Ill. 2d at 464. The statute's purpose was "to protect the economy and people of Illinois from the ill-effects of identity theft." *Id.* at 467. The statute, though, allowed conviction based on a mental state of mere knowing "use" of the information, and defined "personal identifying information" so broadly as to include a person's name or telephone number. The statute thus reached innocent conduct unrelated to its purpose, such as "doing a computer search through Google . . or through a social media site like Facebook . . . by entering someone's name." *Id.* at 470-72. Where the statute subjected routine acts like these to potential felony prosecution, this Court struck it down as an unreasonable means of addressing actual identity theft. *Id.* at 473.

Similarly, in *Carpenter,* this Court invalidated a statute that prohibited owning a motor vehicle that the owner "knows to contain a false or secret compartment." 228 Ill. 2d at 268. The statute's purpose was to "protect[] police and punish[] those who hide guns and illegal contraband from officers." *Id.* at 268-69. But, the statute did not require the container's contents to be contraband. *Id.* at 269. Because of the missing connection between the statute's purpose and its broad sweep, this Court held that the statute unconstitutionally "criminalize[d] innocent conduct" and "violate[d] due process." *Id.* at 269; *see also People v. Wright,* 194 Ill. 2d 1, 28 (2000) (invalidating statute that criminalized knowing failure to comply with vehicle title record-keeping laws); *Zaremba,* 158 Ill. 2d at 38-42 (invalidating statute that criminalized knowingly exerting control over stolen property in law enforcement custody).

Due process is also violated where a law is so broad that the public is left to guess as to how and when it will be enforced. This Court's practice of striking down statutes that sweep in innocent conduct anticipated the emerging trend of finding such laws unconstitutional. *See, e.g.*, Brennan-Marquez, Kiel, *Very Broad Laws* (June 29, 2018).[5] Just as a statute may violate due process by relying on vague, uncertain language that requires citizens to guess at what the statute's language means, a statute may violate due process when its language, though clear, is so broad that enforcement is inevitably piecemeal, left in the unpredictable hands of line prosecutors or officers on the beat. *See City of Chicago v. Morales*, 177 Ill. 2d 440, 457 (1997), *aff'd*, 527 U.S. 41 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). When such laws remain on the books, the citizenry is as much left in the position of having to guess whether and when their conduct will be the basis for arrest and prosecution as they are when the statute's language is uncertain. *See, e.g., Morales,* 527 U.S. at 57 (finding gang loitering ordinance's unconstitutionality "not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not.") In either circumstance, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (internal quotation omitted).

c) *The amended stalking statute is so broad as to treat almost any knowing or negligently distressing conduct as a felony.*

Few, if any, criminal laws in our state's history sweep as broadly as subsections (a) and (c) of the stalking statute do in combination, where almost

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[5] *Available online at*: https://ssrn.com/abstract=3205783 (last accessed Feb 13, 2019).

any knowingly undertaken conduct can trigger a felony prosecution if authorities are convinced it could reasonably distress someone. The statute's definition of the kind of negligently distressing behaviors that can result in conviction is expressly unlimited, criminalizing conduct "including but not limited to" that enumerated in the statutes. 720 ILCS 5/12-7.3 (c)(1). The methods by which the behaviors render one a felon are likewise endless: "in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means . . ." *Id.* And, the definition, though already open-ended, includes a catch-all provision criminalizing "engag[ing] in other non-consensual contact." *Id.*

Where subsection (a) criminalizes harms that this Court would consider borderline frivolous if alleged in a tort case, subsection (c)'s definitions of emotional distress aggravate the statutes' overbreadth. Subsection (a)(2) renders conduct a felony where it would cause a reasonable person to "suffer . . .emotional distress."720 ILCS 5/12-7.3(a)(2). "Emotional distress" is defined as "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.3(c)(3). Subsection (a)(1) delineates a specific kind of emotional distress: "fear for his or her safety or the safety of a third person." 720 ILCS 5/12-7.3(a)(1).

The statute's only qualifier on the degree of emotional distress is that it be "significant." 720 ILCS 5/12-7.3(c)(3). "Significant," though, merely means of a "noticeably or measurably large amount."[6] And, for each of the emotional harms, one limiting feature is notably missing: the conduct need not actually have caused emotional harm to the complainant. Instead, the conduct is a felony if it "would

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[6] "Significant," *Merriam-Webster.com*. Available online at: http://www.merriam-webster.com/dictionary/significant (last accessed Mar. 11, 2019).

cause a reasonable person" the alleged emotional fear or emotional distress, regardless of whether it actually does. 720 ILCS 5/12-7.3(a)(1).

When compared to more familiar circumstances under which emotional distress is an actionable harm, these provisions are strikingly broad. "Emotional distress" might be most often litigated in the tort of intentional infliction of emotional distress. The tort, however, requires "truly extreme and outrageous" conduct that "the actor must either intend or . . . know" will "in fact cause *severe* emotional distress [such that] that no reasonable man could be expected to endure it." *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988) (emph. in original). Although "[f]right, horror, grief, shame, humiliation, worry, and other such mental conditions alone are not actionable" as torts, they fall within the plain language of the harms criminalized under subsection (a). *Taliani v. Resurreccion*, 2018 IL App (3d) 160327, ¶27.

The statute's diluted mental states make this all the worse. By abandoning the requirement that the acts alleged as a "course of conduct" share any common purpose, the legislature further broadened its reach. The new provisions define a "course of conduct" merely as any two acts. 720 ILCS 12-7.3(c)(1). This list of potentially chargeable predicate acts is avowedly open-ended — " . . .including but not limited to . . ." *Id.* While subsection (a) of each statute does require that the course of conduct be "directed" at a complainant, the definition of "course of conduct" takes away even that restriction's nominal limiting effect by including "acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means" engages in communications or other conduct within the statutes' reach. *Id.*

This redefinition of "course of conduct" broke from both the predecessor statutes' and other jurisdictions' requirement of some commonality of purpose

between the predicate acts alleged. Unlike other stalking statutes, which require that each predicate act be part of a campaign undertaken with a continuity of purpose, the amended definition creates a felony conviction from any two unrelated acts in the new, non-exhaustive list. *See, e.g., Long v. State*, 931 S.W.2d 285, 292 (Tex. Crim. App. 1996) (striking down Texas' stalking statute in part because it lacked an "in furtherance" provision).

Our initial stalking statute, for example, required a "threat" to a person, plus two separate incidents of following or surveillance, "knowingly" done "*in furtherance of*" the threat. 720 ILCS 5/12-7.3 (a) (West 1992) (emph. added).

In *People v. Bailey*, this Court addressed that narrower statute and found that it still needed an additional narrowing construction to avoid sweeping in innocent conduct. 167 Ill. 2d 210, 225-26 (1995). This Court recognized that the statute included "the requisite intent" where the statute required the defendant to intend to place the target in fear of an enumerated violent crime. *Bailey*, 167 Ill. 2d at 225. The statutory phrase "in furtherance of the threat" mandated a second *mens rea* of specific intent as to the harm; the predicate acts of following or surveilling each need to share the same intent to cause fear of death or other harm as the initial threat. *Id.* Further, because a threat intended to cause fear of death could alone be criminalized, the legislature was free to add extra requirements to the already criminally-intended threat to create the offense of stalking. *See id.* at 227. Yet, this Court found that these mental states alone were not enough to avoid sweeping in innocent conduct. A third articulation of criminal purpose was needed. By the time the 1992 statute's constitutionality reached this Court, the legislature had narrowed its reach, adding an additional element to the statute, requiring that the threat, following or surveillance each be performed

"without lawful justification." *Id.* at 225. This Court thus construed the statute to add this extra element, to proscribe "only conduct performed 'without lawful authority.'" *Id.* at 224.

In the two decades since *Bailey*, the legislature has amended away every constraint that allowed this Court to find the predecessor stalking statute constitutional. There is no longer any requirement that the accused threaten a violent crime, or that the accused intend to place the victim in fear of violent crime. No longer must the predicate acts be in furtherance of any criminal intent, but a crime may be composed of predicate acts alone. Those acts need not be following or surveillance; any conduct suffices. All the State has to do is show that the accused's conduct knowingly or negligently would cause emotional distress.

Without a requirement that the conduct be "in furtherance" of some criminal intent, the new provisions allow prosecutors to craft a charge for any two qualifying acts or communications, no matter how disconnected, so long as they can be shown to be directed at the same person. Thus, for example, a battery and an assault of the same individual, occurring eleven months apart, has been found sufficient to amount to stalking. *See People v. Douglas,* 2014 IL App (5th) 120155, ¶¶22-23.

Beyond this, the legislature enacted a mental state of mere negligence as to the emotional harm. The use of a negligence mental state, although "a familiar feature of civil liability in tort law," is a rarity in criminal law, as it "is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Elonis*, 135 S. Ct. at 2011 (internal quotation omitted; emph. in original). Of course, the fact that an offense contains a mental state of negligence does not categorically mean the statute is invalid. *Relerford,* ¶22. In this particular statute, though, where the conduct that can be prosecuted is limitless, and the

harm so common as emotional distress, the use of a mental state of negligence allows arrest, prosecution, and conviction for conduct undertaken while merely thoughtless as to another's feelings, resulting in an exceedingly broad statute.

Daily life is replete with conduct that one would expect to distress, but lacks any criminal purpose and for which no one would expect to be subject of prosecution, whether a bank seeking to foreclose on a home, the break-up of romantic relationship, or a parent filing for sole custody of a child. Further examples are easy to come by:

• A parent views their teenage child's otherwise-private Facebook page, suspecting the teenager has become involved in a sexual relationship. Because the parent has every reason to believe their actions, when discovered, would distress the teenager, even though that is not their intent, their actions constitute stalking.

• A journalist, tipped off that a public official is about to be arrested, stations herself outside the official's home to photograph the arrest. The journalist is just doing her job by monitoring the official and his residence to get a story. But she knows that pictures of the arrest are likely to humiliate the official.

• A manager, tasked with choosing which of two long-time employees will receive a coveted promotion expects the unsuccessful candidate will be distraught. Under the statute's plain language, no matter what choice she makes, she will have committed a predicate act of stalking.

• Out of a negligently mistaken belief that a home under foreclosure is abandoned, a bank's agent breaks in to conduct repairs, surprising the resident inside, causing her anxiety and fear that she may be attacked. *See Schweihs v. Chase Home Finance,* 2016 IL 120041, ¶¶26-61 (discussing scope of emotional distress torts under similar facts).

By broadly criminalizing non-violent conduct merely because of its likelihood of distressing someone, and without even requiring a knowing or intentional mental state as to whether the conduct would distress, subsection (a) has made criminals out of millions of Illinoisans, the vast majority of whom would have no expectation that their action could be considered a felony.

d) *The statute's reach so grossly exceeds its purpose as to be unreasonable and portend arbitrary enforcement.*

The legislature's purpose was far narrower than the sweep of the statute it enacted. The purpose behind the amended statute was to reach conduct that the legislature thought especially likely to escalate to homicide by "broaden[ing]" the statute's reach. *See* Ill. Senate Transcript, 2009 Reg. Sess. No. 54, at 125. But the examples above show that is only a fraction of what the statute does. Much, if not most, of the conduct criminalized is entirely unrelated to the statutes' purpose of preventing actual forcible felonies.

Indeed, the legislature could never have reasonably concluded that every, or even most, instances where Illinoisans knowingly or negligently cause each other emotional distress should or would be prosecuted. Life under a regime where even a substantial plurality of such acts were prosecuted would be far different and self-censorial experience than it is today.

And, even once charged, the unpredictability of the statute's operation through trial and appeal creates further uncertainty, as those accused of stalking have repeatedly had to contend with shifting theories of guilt. In the brief time since this Court decided *Relerford,* and even with the term "communicates" excised from the statute, subsection (c)'s limitless definition of the types of conduct that the statute makes a felony has led defendants charged under one predicate, to be found

guilty or seen their convictions upheld on appeal under a different predicate. Indeed, in this case, Ashley was charged with making threats and traveling to the complainant's residence, found guilty only under the theory that his "communications" to the complainant were distressing, then saw his conviction affirmed on the theory that he "threatened" her. (C. 12-13; Vol. 8, R. 21-23); *People v. Ashley*, 2018 IL App (4th) 150293-U; *see also People v. Gauger*, 2018 IL App (2d) 150488 (upholding conviction apparently brought under "communicat[ions]" predicate on theory that conduct also amounted to "monitor[ing]"), ¶¶18-20; *contra. Street v. New York*, 394 U.S. 576, 588 (1969) (conviction having possible basis in theory disallowed by First Amendment must be reversed).

Maybe, one should expect stalking cases to be prosecuted only on facts that feel like "stalking" in some colloquial sense of the term. But where the statute's language offers nothing to provide that guidance, all are at risk. Taking the Facebook "monitoring" example above, nowhere does the statute differentiate the situation of a parent monitoring their child, from a person monitoring their ex-spouse, an investigator while looking for impeachment material in preparing for litigation, or a muckraking journalist reviewing a political official's social media looking for embarrassing information. Where the statute draws no lines among which distressing conduct is to be prosecuted and which is not, it fails to provide the public fair notice of whether what they are doing is to be treated as a crime.

The inevitable result is arbitrary enforcement that offends due process. *See Morales*, 527 U.S. at 57 (finding gang loitering ordinance's unconstitutionality "not the product of uncertainty about the normal meaning of loitering,' but rather about what loitering is covered by the ordinance and what is not.") Where prosecuting every instance of emotionally distressing conduct within the statute's

grasp is neither possible nor was intended by the legislature, and where the statute offers no guidance to police and prosecutors as to which incidents are worthy of arrest and prosecution, the stalking statute results in "a standardless sweep" where enforcement rests on authorities' "personal predilections" as to who to pursue. *Kolender*, 461 U.S. at 358.

Where there is no way for the millions of Illinoisans who have run afoul of the statute's plain language to confidently predict how and whether those acts will lead them to be labeled as a stalker and charged with a felony, subsection (a) violates due process on its face.

III. No narrowing construction is available to evade the constitutional flaws identified in Issues I and II.

Where the stalking statute is not "readily susceptible" to a narrowing construction without doing violence to the legislature's intent, the challenged portions of the statute should be found unconstitutional on their face. *People v. Relerford,* 2017 IL 121094, ¶60, *quoting United States v. Stevens*, 559 U.S. 460, 481 (2010)*; see also People v. Melongo,* 2014 IL 114852, ¶20. Although narrowing constructions are preferable where possible, where they would amount to "rewrit[ing] a ... law to conform it to constitutional requirements .... [they] constitute a serious invasion of the legislative domain[.]" *Stevens*, 559 U.S. at 481 (internal quotations omitted).

Here, any construction of the statute that could squeeze it into constitutionally acceptable confines would require rewriting and adding multiple elements. If it did so, this Court would not be effectuating the legislature's intent, but acting as a super-legislature. As the Supreme Court once phrased it:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

Reno v. ACLU, 521 U.S. 844, 885 n.49 (1997) (internal quotation omitted).

First, this Court has already once declined to adopt a narrowing construction to save another portion of the statute. *Relerford,* 2017 IL 121094, ¶60, *quoting Stevens*, 559 U.S. at 481. There, the State advanced for the first time at oral argument the idea that the phrase "directed at" in subsection (c) could be construed to avoid the unconstitutional consequences criminalizing distressing "communicat[ions] to or about" someone. *Relerford,* ¶60. This Court rejected the

proposed construction, finding the statute not susceptible to such rewriting, and that it was unclear the construction would solve the statute's patent overbreadth. *Id.*

Second, where the legislature's express purpose was to "broaden" the statute's sweep, any construction that would confine it to a permissibly narrow range would thwart that purpose. Illinois Senate Transcript, 2009 Reg. Sess. No. 54. As the State previously reported to this Court, the legislature "eschewed an intentional threat-based definition of stalking" and "discarded intentional threats" as the gravamen of the offense of stalking. (State's Brief, *People v. Relerford,* 2017 IL 121094, at 11) Where the statute's overbreadth is so closely bound up with the legislature's purpose, to limit the statute's reach into what we say to only *intentional* threats of only *unlawful* acts would not "ascertain and give effect to the legislature's intent," but to rewrite the statute to avoid "giv[ing] effect" to what the legislature sought to do. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶24; *see also City of Chicago v. Morales*, 177 Ill. 2d 440, 459 (1997) (refusing to narrow statute's range where city's purpose was to draft broad ordinance), *aff'd*, 527 U.S. 41 (1999).

Third, the statute's history and structure foreclose a narrowing construction. This Court will not construe a statute so as to read "into it exceptions, limitations, or conditions not expressed by the legislature." *People v. Wright*, 194 Ill. 2d 1, 29 (2000). Nor will it construe a statute "to render any part of it superfluous or redundant." *People v. Baskerville*, 2012 IL 111056, ¶25. Any narrowing construction of the stalking statute, though, would add "limitations [and] conditions" that the legislature chose to remove in broadening the statute, and would render the statute's function redundant with offenses already on the books. *Wright*, 194 Ill. 2d at 29.

The predecessor statute, now recodified as subsection (a-3), required a

"threat" specifically threaten an unlawful act: "immediate or future bodily harm, sexual assault, confinement or restraint." 720 ILCS 5/12-7.3(a-3). It further required the threat "place [its recipient] in reasonable apprehension of immediate or future" violent crime *Id.* When it broadened the statute by adding subsections (a) and (c), though, the legislature chose to abandon these constraints. These kinds of legislative decisions have consequences: when the legislature adds to a statute, "we must presume that the legislature intended to change the existing law," not to "add a provision essentially identical to existing law." *People v. Stoecker,* 2014 IL 115756, ¶25. And, when the legislature "delet[es] . . . language, it is presumed that the legislature intended to change the law in that respect." *Illinois Landowners All., NFP v. Illinois Commerce Comm'n,* 2017 IL 121302, ¶42.

Where the legislature retained the criminalization of threats of unlawful acts in subsection (a-3), but excised the requirement in prosecutions under subsection (a), a narrowing construction "would require not only that [this Court] read into the statute language that is not there but . . . rewrite the statute to reinsert language the General Assembly affirmatively removed." *Illinois Landowners,* ¶42.

Fourth, this Court's strong rules against rewriting a statute's mental state elements prevent any construction that could rescue the statute. Where legislation contains an express mental state, courts cannot read a different or additional mental state into the statute, even where doing so would be necessary to render the statute constitutional. *People v. Carpenter,* 228 Ill. 2d 250, 269 (2008). In *Carpenter,* for example, when this Court considered the prohibition on secret compartments in automobiles, it noted the statute already contained two mental states: the defendant had to "know" of the secret compartment in the possessed automobile, and that the compartment had to be "intended" or "designed" to conceal its contents. *Id.,*

at 269-70. Where the State suggested an additional "criminal purpose" be read into the statute, this Court refused, as the statute already contained elements of knowledge and intent. *Id.*, at 270, *citing Wright*, 194 Ill.2d at 29-30, *Zaremba*, 158 Ill.2d 36, *People v. Hamm*, 149 Ill.2d 201 (1992), *and People v. Wick*, 107 Ill.2d 62 (1985). Here, subsection (a) already includes two mental state requirements: that the accused "knowingly" engage in conduct that he or she "knows or should know" would cause a reasonable person emotional harm. Because any saving construction would require rewriting these mental states, it is foreclosed by this Court's precedent.

Finally, where the statute's brief history has already seen widespread confusion about how stalking is to be charged and proven, this Court should avoid further complicating matters by adding yet another interpretation. Whenever a Court modifies or adds to the elements of an offense, it disrupts the administration of justice: Indictments that include an incorrect element may be invalid. Pattern instructions need to be rewritten. With this statute, the problem is especially acute, where courts have seen already one limiting construction placed on the statute in *People v. Douglas,* 2014 IL App (5th) 120155, ¶¶22-23, the statute struck down in its entirety in *People v. Relerford,* 2016 IL App (1st) 132531, then this Court excising the "communicates" portion of the statute on review of *Relerford.* Because adding another limiting construction would only compound the administrative difficulties that the legislature's indifference to constitutional norms has caused, it should be avoided.

Facial invalidation of a statute is especially warranted when necessary to remind legislatures to heed constitutional limits. *United States v. Stevens*, 559 U.S. 460, 481 (2010). While the judiciary has been left to wrestle with the stalking

statute, the General Assembly has enacted nothing that would resolve doubts about its constitutionality. When the legislature learns to expect this Court to clean up the unconstitutional consequences of ham-handed legislating by creating narrowing constructions, it "sharply diminish[es] [the legislature's] incentive to draft a narrowly tailored law in the first place." *Id.* (internal quotation omitted).

This Court should therefore not adopt a limiting construction, but hold the challenged provisions to be facially unconstitutional.

CONCLUSION

For the foregoing reasons, Marshall Ashley, Defendant-Appellant, respectfully requests that this Court reverse the appellate court's decision, hold the challenged provisions of subsections (a) and (c) of the stalking statute unconstitutional on their face, vacate his conviction under Count 2, and enter no new conviction under Count 1.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jonathan Yeasting, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 14962 words.

/s/Jonathan Yeasting
JONATHAN YEASTING
Assistant Appellate Defender

APPENDIX TO THE BRIEF

E-FILED
3/21/2019 10:53 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

INDEX TO THE RECORD

Common Law Record ("C") **Page**
Vol. I

Vol. II

Report of Proceedings ("R")

IN THE CIRCUIT COURT OF McLEAN COUNTY, IL
ELEVENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.)
)
Marshall Ashley)
Defendant)

Date of Sentence 4.3.15
Case Number 14 CF 1271
Date of Birth 3.16.85
(Defendant)

FILED
APR 03 2015
CIRCUIT CLERK
McLEAN COUNTY

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
2	Stalking	10.21.14	720 ILCS 5/12-7.3(a)(1)	4	1 Yrs. 6 Mos.	4 Yrs.

To run (concurrent with) (consecutively to) count(s)_____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

_____ _____ _____ _____ _____ Yrs. _____ Mos. _____ Yrs.
To run (concurrent with) (consecutively to) count(s)_____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

_____ _____ _____ _____ _____ Yrs. _____ Mos. _____ Yrs.
To run (concurrent with) (consecutively to) count(s)_____ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3

This Court finds that the defendant is:

_____ Convicted of a Class _____ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

X The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 164 days as of the date of this order) from (specify dates) 10.21.14 to 4.2.15. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

_____ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts _____ resulted in great bodily harm to the victim. [730 ILCS 5/3-6-3(a)(2)(iii)]

_____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. [730 ILCS 5/5-4-1(a)]

_____ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. [730 ILCS 5/5-4-1(a)]

_____ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ____ Educational/Vocational ___ Substance Abuse ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s)_____ x .50 = _____ days, if not previously awarded.

_____ The defendant passed the high school level test for General Education and Development (GED) on _____ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

_____ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) _____ be (concurrent with) (consecutive to) the sentence imposed in case number _____ in the Circuit Court of _____ County.

_____ IT IS FURTHER ORDERED that _____

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (X effective immediately) (_____ stayed until _____).

DATE: 4.3.15 ENTER: _____

DRAZEWSKI
(PLEASE PRINT JUDGE'S NAME HERE)

White original – Court Green – Defendant Canary – IDOC Pink – State's Attorney Goldenrod – Defendant's Attorney
Approved by Conference of Chief Judges 6/20/14 (rev. 12/04/2014)

C80

No. 4-15-0293

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MARSHALL ASHLEY, Defendant-Appellant.	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois. No. 14-CF-1271 Honorable Scott D. Drazewski, Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Marshall Ashley
Appellant's Address:	Register No. R-26044 Danville Correctional Center 3820 East Main Street Danville, IL 61834
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	Fourth Judicial District 400 West Monroe Street, Suite 303 Springfield, IL 62705-5240 (217) 782-3654
Offense of which convicted:	Stalking
Date of Judgment or Order:	April 3, 2015
Sentence:	18 months in the Illinois Department of Corrections
Nature of Order Appealed:	Conviction and Sentence

JACQUELINE L. BULLARD
Deputy Defender
ARDC No. 6242609

COUNSEL FOR DEFENDANT-APPELLANT

C99

2018 IL App (4th) 150293-U

NO. 4-15-0293

FILED
July 11, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
MARSHALL ASHLEY,	)	No. 14CF1271
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the stalking statute (720 ILCS 5/12-7.3(a) (West 2012)) (1) did not violate the constitutional guarantee of due process, and (2) defendant's stalking conviction could be sustained based on conduct other than "communicating to or about a person," which was otherwise prohibited by the stalking statute.

¶ 2 In October 2014, the State charged defendant, Marshall Ashley, with two felony counts of stalking, alleging he knowingly engaged in a course of conduct directed at Keisha Tinch, which defendant knew or should have known would cause a reasonable person (1) to fear for his or her safety (count I) (720 ILCS 5/12-7.3(a)(1) (West 2012)), and (2) to suffer emotional distress (count II) (720 ILCS 5/12-7.3(a)(2) (West 2012)). Following a February 2015 bench trial, the trial court found defendant guilty on count II. In April 2015, the court sentenced defendant to a term of one year and six months' imprisonment, followed by a four-year term of mandatory supervised release.

¶ 3 Defendant appeals, arguing subsection (a) of the stalking statute violates state and federal constitutional guarantees of (1) due process, because it lacks a *mens rea* requirement and is unduly vague; and (2) free speech, because it overbroadly criminalizes a substantial amount of protected speech. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In October 2014, the State charged defendant with two felony counts of stalking, alleging he knowingly engaged in a course of conduct directed at Tinch, which defendant knew or should have known would cause a reasonable person (1) to fear for his or her safety (count I) (720 ILCS 5/12-7.3(a)(1) (West 2012)), and (2) to suffer emotional distress (count II) (720 ILCS 5/12-7.3(a)(2) (West 2012)), in that he drove by her residence, sent her threatening text messages, made threatening phone calls, and went to her residence.

¶ 6 In October 2014, defendant and Tinch had been dating for approximately two years and had a daughter together. Tinch and defendant lived together in an apartment on Dustin Avenue in Normal, Illinois. Karen Miller, Tinch's mother, testified she and several relatives and children were having dinner at Tinch's apartment on October 21, 2014. At some point that evening, Tinch received a phone call from defendant. Miller testified she heard Tinch arguing on the phone and went into the kitchen. Tinch put the telephone on speaker, and Miller heard defendant threaten to come over and kill Tinch with a "banger," and he did not care who was at Tinch's apartment. Tinch testified defendant told her that if she had a man at her apartment, he was going to come and kill her with a "banger," meaning a gun. After receiving this phone call, Tinch, Miller, and the other relatives all went to Miller's house.

¶ 7 On the way to Miller's house, Tinch called the police and gave them both her address and Miller's address. Nicholas Mishevich, an officer with the Normal Police

Department, testified he responded to Miller's address and spoke with Tinch. While Mishevich was present, Tinch received multiple telephone calls and text messages from the same telephone number. Mishevich testified he took photographs of the text messages and identified People's Exhibit Nos. 1-A and 1-B as accurately depicting the text messages he saw on Tinch's telephone that night.

¶ 8 Officer Jonathan McCauley testified he was on patrol on October 21, 2014, and was dispatched to the area near Tinch's apartment to look for defendant. McCauley pulled over a vehicle with defendant in the passenger seat and took defendant into custody. McCauley interviewed defendant at the police station and took photographs of the text messages exchanged with Tinch on defendant's phone.

¶ 9 Tinch identified the photographs of the text messages the police took from both her telephone and defendant's telephone. Defendant sent Tinch the following relevant text messages:

> 2:24 p.m.: "you finna make me come look for you're a**"
>
> 3:04 p.m.: "I love you too much to see u dead dummy. But [I] guarantee u this. I can make u suffer. If [I] want to."
>
> 3:29 p.m.: "You rite start to think more before u talk that s**t will get u hurt or killed talking dumb put your mouth bay"
>
> 3:30 p.m.: "Out"
>
> 7:05 p.m.: "So y haven't you text or call me but it[']s cool [K]eshia [I] guess we don[']t have to talk like that every time"
>
> 7:12 p.m.: "Just saying b***h u don[']t check up on me you don't know how [I']m living"

7:12 p.m.: "Where the f**k are u"

7:12 p.m.: "Cause [I] rode past in seen lights on there"

7:23 p.m.: "Answer my f**king question why is there lights on at the house"

7:26 p.m.: "You got my blood boiling"

7:45 p.m.: "Y u aint answering the phone scary a** b***h"

7:54 p.m.: "So u ain't gon pick up huh"

7:57 p.m.: "Rite you not picking up cause uk im f**king rite b***h [I] swear [I] tried to trust your thot a** w[h]en [I] go over there any tim[e] said u had a n***a over there imma go in on you're a**"

8:23 p.m.: "I swear b***h if a n***a there its g[o]ing to be one"

8:24 p.m.: "U them f**ked up"

8:31 p.m.: "I hope whoever you got it when I got guns"

8:57 p.m.: "So u called the law"

Defendant also sent Tinch a photograph of a handgun. The photographs taken of the messages on defendant's telephone were consistent with those taken from Tinch's telephone. However, defendant's phone did not include the message sent at 8:31 p.m. referencing guns. Tinch testified the text messages "scared" her and the message sent shortly after 7 p.m. "terrified" Tinch because she "knew right then and there that [defendant] was going to come after [her] even more."

¶ 10 Defendant testified he and Tinch lived together in October 2014 and had been arguing a lot. At some point, Tinch told defendant she was getting evicted from her apartment.

On October 21, 2014, defendant was out and Tinch called him and asked him to help her move because someone was coming to change the locks at 3 p.m. Defendant testified he was "heated" because he had given Tinch money for rent and she used the money for something else. Defendant admitted he and Tinch had some heated discussions, but he denied threatening her and specifically denied threatening her with a gun.

¶ 11 Following closing arguments, the trial court found defendant guilty of count II, finding that defendant's text messages and phone calls would cause a reasonable person to suffer emotional distress. In April 2015, the court sentenced defendant to a term of one year and six months' imprisonment, followed by a four-year term of mandatory supervised release.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues subsection (a) of the stalking statute violates state and federal constitutional guarantees of (1) due process, because it lacks a *mens rea* requirement and is unduly vague; and (2) free speech, because it overbroadly criminalizes a substantial amount of protected speech. On November 30, 2017, the supreme court filed an opinion addressing the constitutionality of the stalking statute in *People v. Relerford*, 2017 IL 121094. That same date, this court ordered the parties to file supplemental briefs in light of *Relerford*. We first discuss the relevant statutory provision before turning to defendant's claims.

¶ 15 A. Pre-*Relerford* Stalking Statute

¶ 16 Prior to the supreme court's decision in *Relerford*, the stalking statute provided, in pertinent part, as follows:

> "(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(a)(1), (2) (West 2012).

The statute further defines "course of conduct" as follows:

> " 'Course of conduct' means 2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 720 ILCS 5/12-7.3(c)(1) (West 2012).

¶ 17 Although not at issue in the present case, the Illinois Supreme Court's decision in *Relerford* addresses the cyberstalking statute. Therefore, we point out the cyberstalking provisions are substantially similar to the stalking statute provisions, with the additional requirement that the defendant used electronic communication in committing the offense. See 720 ILCS 5/12-7.5(a), (c) (West 2012)).

¶ 18 B. The Present Case

¶ 19 As noted above, defendant challenges the constitutionality of the stalking statute, arguing it violates (1) due process because it lacks a *mens rea* requirement and is unduly vague,

and (2) the first amendment because it overbroadly criminalizes a substantial amount of protected speech. In his supplemental brief, defendant argues the stalking statute expressly writes out the requirement of intent from the true threats exception to first amendment protection and, thus, is unconstitutional. We address these claims in turn.

¶ 20 1. *Standard of Review*

¶ 21 Statutes are presumed constitutional, and the party raising a challenge to the constitutionality of a statute bears the burden of proving the statute's unconstitutionality. *People v. Hollins*, 2012 IL 112754, ¶ 13, 971 N.E.2d 504. It is our duty to construe the statute in a manner that upholds the statute's validity and constitutionality if reasonably possible. *Id.* A challenge to the constitutionality of a statute presents a question of law, which we review *de novo*. *Relerford*, 2017 IL 121094, ¶ 30.

¶ 22 2. Relerford *Overview*

¶ 23 In *Relerford*, the defendant was charged with two counts of stalking (720 ILCS 5/12-7.3(a)(1), (a)(2) (West 2012)), and two counts of cyberstalking (720 ILCS 5/12-7.5(a)(1), (a)(2) (West 2012)). *Relerford*, 2017 IL 121094, ¶ 3. The stalking charges were based on allegations that the defendant "(1) called Sonya Blakey, (2) sent her e-mails, (3) stood outside of her place of employment, and (4) entered her place of employment and that he knew or should have known that this course of conduct would cause a reasonable person to suffer emotional distress," or to fear for her safety. *Id.* The cyberstalking charges were based on allegations that the defendant "used electronic communication to make Facebook postings in which he expressed his desire to have sexual relations with Sonya Blakey and threatened her coworkers, workplace, and employer and that he knew or should have known that his conduct would cause a reasonable person to fear for her safety," or to suffer emotional distress. *Id.* The trial court found the

defendant guilty and subsequently sentenced him to a six-year term of imprisonment for the stalking charge that alleged the defendant (1) called the victim, (2) sent her e-mails, (3) stood outside of her place of employment, and (4) entered her place of employment and that he knew or should have known that this course of conduct would cause a reasonable person to suffer emotional distress. *Id.* ¶ 14.

¶ 24 The defendant appealed, and the appellate court vacated all of his convictions, finding the terms of subsection (a) of the stalking and cyberstalking statutes violated due process. *Id.* ¶ 15. "In the appellate court's view, the United States Supreme Court's decision in *Elonis v. United States*, 575 U.S. __, 135 S. Ct. 2001 (2015), compelled invalidation of both statutes on due process grounds because the relevant provisions lack a mental state requirement." *Id.* The supreme court granted the defendant's petition for leave to appeal and we discuss its decision where relevant below.

3. *Due Process*

¶ 25 Defendant first argues subsection (a) of the stalking statute violates state and federal constitutional guarantees of due process because it lacks a *mens rea* requirement and is unduly vague. Defendant relies heavily on the First District Appellate Court's decision in *Relerford, People v. Relerford*, 2016 IL App (1st) 132531, 56 N.E.3d 489, and the primary case relied on by the First District Appellate Court, *Elonis*, 575 U.S. __, 135 S. Ct. 2001.

¶ 26 We conclude the Illinois Supreme Court decision in *Relerford* precludes defendant's due-process argument. See *Relerford*, 2017 IL 121094, ¶ 22. The Illinois Supreme Court rejected the appellate court's holding that the stalking statute violated due process, concluding (1) *Elonis* decided a question of statutory interpretation and did not engage in any due process analysis; and (2) "substantive due process does not categorically rule out negligence

as a permissible mental state for imposition of criminal liability, and *Elonis* does not suggest such a categorical rule." *Id.* ¶¶ 21-22. The supreme court observed the *Elonis* Court acknowledged the recognition of criminal negligence as a valid basis to impose criminal liability. *Id.* ¶ 22. The supreme court also pointed to the Criminal Code of 2012, which includes both recklessness and negligence as permissible mental states and permits absolute liability in limited circumstances. *Id.* (citing 720 ILCS 5/4-6, 4-7, 4-9 (West 2012)). Finally, *Relerford* further mentioned that the stalking and cyberstalking statutory provisions were not silent as to mental state. *Id.* ¶ 21. Accordingly, the supreme court rejected "the appellate court's reasoning and its determination that *Elonis* mandates invalidation of the statutory provisions at issue here." *Id.* ¶ 22. As the arguments defendant makes before this court were rejected by the supreme court in *Relerford*, we conclude defendant's due-process claim must fail.

¶ 27 4. *First Amendment*

¶ 28 Defendant next contends subsection (a) of the stalking statute violates the first amendment guarantee of free speech because it criminalizes a substantial amount of protected speech. Defendant maintains this position in his supplemental brief, arguing he was convicted for "communications" that he knew or should have known would cause a reasonable person to suffer emotional distress. Defendant further argues the stalking statute expressly writes out the requirement of intent from the true threats exception to first amendment protection and, thus, is unconstitutional. The State asserts *Relerford* held the phrase "communicates to or about" was facially unconstitutional and must be stricken from the statute. However, in *Relerford* the supreme court went on to determine whether the defendant's convictions could be upheld based on other conduct prohibited by the statute. Accordingly, the State asserts defendant's conviction

in the present case can be sustained based on other conduct prohibited by the stalking statute, including his conduct threatening and monitoring the victim.

¶ 29 The first amendment, applicable to the states through the fourteenth amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., amends. I, XIV. The first amendment means the government does not have the power to prohibit expression based on its subject matter, message, ideas, or content. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002). Laws targeting speech based on its communicative content are presumed to be invalid. *Relerford*, 2017 IL 121094, ¶ 32. However, there are categories of expression the first amendment does not protect, including "true threats." *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

> " '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 or group of individuals. [Citations.] The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects 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." (Internal quotation marks omitted.) *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

¶ 30 Turning back to *Relerford*, we now examine the supreme court's discussion of the defendant's first amendment challenge to the stalking statute. *Relerford*, 2017 IL 121094, ¶¶ 23-63. The supreme court found the proscription against communications to or about a person that

would cause a reasonable person to suffer emotional distress was a content-based restriction. *Id.* ¶ 34. "Under the relevant statutory language, communications that are pleasing to the recipient due to their nature or substance are not prohibited, but communications that the speaker 'knows or should know' are distressing due to their nature or substance are prohibited." *Id. Relerford* rejected the State's argument that the prohibited communications do not unconstitutionally encroach on the right to free speech because they are categorically unprotected by the first amendment. *Id.* ¶¶ 35, 45. Specifically, the State argued the prohibited communications fell within the exceptions for (1) true threats, and (2) speech integral to criminal conduct. *Id.* ¶ 35.

¶ 31 The supreme court recognized the United States Supreme Court has held that speech "qualifies as a true threat if it contains a 'serious expression of an intent to commit an act of unlawful violence.' " *Id.* ¶ 37 (quoting *Black*, 538 U.S. at 359. The *Relerford* court went on to say the following:

> "The State offers no cogent argument as to how a communication to or about a person that negligently would cause a reasonable person to suffer emotional distress fits into the established jurisprudence on true threats. The State does not explain how such a communication, without more, constitutes a 'serious expression of an intent to commit an act of unlawful violence.' *Black*, 538 U.S. at 359. Moreover, it is unclear whether the true threat exemption from the first amendment would apply to a statement made with innocent intent but which negligently conveys a message that a reasonable person would perceive to be threatening. Compare *United States v. Cassel*, 408 F.3d 622, 632-

> 33 (9th Cir. 2009) (interpreting the Supreme Court's decision in *Black* as indicating that speech is unprotected under the first amendment only if the speaker subjectively intended the speech as a threat), with *State v. Johnston*, 156 Wash. 2d 355, 127 P.3d 707, 710 (2006) (adopting an objective standard for statements that may be understood to convey a threat, even if the speaker did not so intend). The State does not attempt to reconcile this conflicting precedent." *Relerford*, 2017 IL 121094, ¶ 38.

The supreme court declined to resolve that question, because the prohibited communications stood separate and apart from the statutory prohibition on threats. *Id.* ¶ 39. "Therefore, even assuming that statements which negligently convey a threat are not protected, a course of conduct based on such statements could be prosecuted under the threat portion of subsection (a). If distressing communications to or about a person are construed to refer to 'true threats,' as the State's argument suggests, then the language proscribing threats would be superfluous." *Id.* The supreme court rejected such a construction because it would render part of the statute superfluous. *Id.*

¶ 32 *Relerford* also rejected the State's argument that communications to or about a person were exempt from first amendment protection as speech integral to criminal conduct. *Id.* ¶ 45. The supreme court then determined the prohibition on communications to or about a person was overbroad on its face as it "embrace[d] a vast array of circumstances that limit speech far beyond the generally understood meaning of stalking." *Id.* ¶ 52. The supreme court offered the following hypothetical as an example of the type of protected speech the stalking statute encroached upon:

> "[S]ubsection (a) prohibits a person from attending town meetings at which he or she repeatedly complains about pollution caused by a local business owner and advocates for a boycott of the business. Such a person could be prosecuted under subsection (a) if he or she persists in complaining after being told to stop by the owner of the business and the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott." *Id.* ¶ 53

The supreme court found the degree of overbreadth was substantial, given the wide range of constitutionally protected speech covered by the prohibition on communications to or about a person. *Id.* ¶ 63. *Relerford* held "that the portion of subsection (a) of the stalking statute that makes it criminal to negligently 'communicate[] to or about' a person, where the speaker knows or should know the communication would cause a reasonable person to suffer emotional distress, is facially unconstitutional." *Id.*

¶ 33 Because the supreme court found the prohibition on communications to or about a person overbroad, it determined the phrase "communicates to or about" must be stricken from subsection (a) of the stalking statute. *Id.* ¶ 65. Because that provision was severable, the court then addressed whether the defendant's convictions could be sustained based on other conduct prohibited by the statutes.

¶ 34 As set forth above, the *Relerford* defendant's stalking charges were based on allegations that the defendant called and e-mailed the victim, stood outside her place of employment, and entered her place of employment. The supreme court determined the calls and e-mails could not be considered as part of a course of conduct because there was no evidence

they were threatening. *Id.* ¶ 66. The record did not establish that one of the incidents at the victim's place of employment was nonconsensual, so the court did not consider it as part of a course of conduct. That left a single instance of nonconsensual contact, which was "insufficient to establish a course of conduct requiring two or more acts." *Id.* ¶ 68. The defendant's cyberstalking charges were based on allegations that the defendant "used electronic communication to make Facebook postings in which he expressed his desire to have sexual relations with Sonya Blakey and threatened her coworkers, workplace, and employer." *Id.* ¶ 3. The supreme court determined the Facebook posts did not include language that could be construed as specifically threatening the victim. *Id.* ¶ 69. Even if one of the Facebook posts could be construed as a threat to all employees of the victim's employer, thus including a threat to the victim, it amounted to a single incident and could not establish a "course of conduct" under the statutory language. *Id.* Accordingly, the supreme court vacated all four of the defendants convictions. *Id.*

¶ 35 Defendant asserts his convictions were based on his communications to or about Tinch and must be reversed in light of the supreme court's holding in *Relerford.* While we follow the supreme court's decision that the "communicates to or about" portion of the statute is overbroad, it is clear from *Relerford* this does not end our inquiry. As the State argues, we must determine whether defendant's conviction can be sustained based on other prohibited conduct.

¶ 36 Based on *Relerford,* the stalking statute defines "course of conduct" as "2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, *monitors,* surveils, [or] *threatens* *** a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications."

(Emphases added.) 720 ILCS 5/12-7.3(c)(1) (West 2012). The State argues defendant's conduct in driving by Tinch's house and observing lights on falls within the statute's prohibition on monitoring a person. The State further argues defendant's phone calls and text messages were threatening and fall within the statute's prohibition on threatening a person.

¶ 37 The text messages sent by defendant on October 21, 2014, show he "monitored" Tinch by driving by her house and observing lights on inside. For example, one text read, "you finna make me come look for you're a**," and another series of texts read, "Where the f**k are u[?] Cause [I] rode past in seen lights on there[.] Answer my f**king question why is there lights on at the house[?]" Moreover, defendant was stopped and taken into custody near Tinch's home. Defendant argues his text messages were mere "communications," pointing to messages such as "I love you *** betta not hear anything that will make me mad," and "You got my blood boiling" as examples. However, the text about defendant's blood boiling was sent shortly after he sent the text messages indicating he drove by Tinch's house and saw lights on. Defendant also ignores other text messages, such as "But [I] guarantee u this. I can make u suffer," "I swear b***h if a n***a there its g[o]ing to be one," and "I hope whoever you got it when I got guns." Tinch testified defendant called her and told her he was going to come and kill her with a "banger," meaning a gun. Additionally, Miller testified she heard defendant threaten to come over and kill Tinch with a "banger," and he did not care who was at her apartment.

¶ 38 Defendant argues that, where the statute "contain[s] no requirement that the predicate communications express any intent to act in the future, or even refer to an 'unlawful act of violence' for a felony conviction, the statute lacks any elements of a required true threat." Defendant asserts the State cannot avoid the impact of *Relerford* by relabeling "communications" as "threats" when it prosecutes a defendant under a statute that lacks the

constitutional protections required by "true threats" jurisprudence. Finally, defendant argues *Relerford* rejected the same "true threats" argument the State raises before this court.

¶ 39 Initially, we find the State has not relabeled "communications" as "threats" in order to avoid the consequences of *Relerford*. Defendant was charged with stalking in that he drove by Tinch's residence, sent her threatening text messages, made threatening phone calls, and went to her residence. The State has consistently argued that defendant's threatening texts and phone calls were "true threats" exempt from first amendment protection. Relatedly, we disagree that *Relerford* rejected the same "true threats" argument the State raises before this court. In *Relerford*, none of the phone calls or emails were threatening and, therefore, could not be considered as part of a course of conduct. Here, there is evidence defendant's text messages and phone calls specifically threatened Tinch, including an expression of defendant's intent to get a gun, come to Tinch's home, and kill her.

¶ 40 Here, the defendant fails to cite any authority for his argument that the statute must contain a requirement that conduct which "threatens" a person must express an intent to act in the future to commit an unlawful act of violence. Defendant also contends the statute imposed criminal liability based on a mental state of negligence thereby criminalizing statements made with an innocent intent. Defendant draws this argument from the supreme court's statement that, "it is unclear whether the true threat exemption from the first amendment would apply to a statement made with innocent intent but which negligently conveys a message that a reasonable person would perceive to be threatening." *Relerford*, 2017 IL 121094, ¶ 38. How does one negligently threaten someone? We fail to see how a *threat* that meets the definition of a "true threat" could be negligently made.

¶ 41 Unlike in *Releford*, in this case, defendant's conviction is sustained by considering whether his conduct meets the definition of a true threat. Inherent to a true threat is a "serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. A statement containing a "serious expression of an intent to commit an act of unlawful violence" is not a statement made with "innocent intent," and therefore meets the definition of a true threat.

¶ 42 We acknowledge the "conflicting precedent" with regard to whether a "true threat" requires a showing of the speaker's subjective intent to threaten or an objective standard for statements that are reasonably understood to convey a threat, even if the speaker did not so intend. However, in this case we need not determine which standard must be met, because under either standard defendant's statements to Tinch were "true threats." Defendant's rapid, angry text messages provide some context for his mental state, and the other evidence in the record supports the inference that he subjectively intended to express an intent to commit an act of unlawful violence when he threatened to get a gun and go to Tinch's house to kill her. Those statements also objectively convey a threat, which both a reasonable speaker and a reasonable listener would understand.

¶ 43 To summarize, we adhere to the supreme court's decision in *Relerford* that the "communicates to or about" portion of the stalking statute is overbroad. As that does not end the inquiry, we determined defendant's conviction could be sustained based on his conduct that was otherwise prohibited by the statute. Accordingly, we affirm the judgment of the trial court.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016)).

¶ 46 Affirmed.

No. 123989

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MARSHALL ASHLEY Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0293. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 14-CF-1271. Honorable Scott D. Drazewski, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

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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. On March 15, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
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