No. 121094

IN THE

SUPREME COURT OF ILLINOIS

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

CROSS-REPLY BRIEF FOR DEFENDANT-APPELLEE CROSS-RELIEF REQUESTED

MICHAEL J. PELLETIER
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

JONATHAN YEASTING
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

E-FILED
7/12/2017 3:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

No. 121094

IN THE

SUPREME COURT OF ILLINOIS

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

CROSS-REPLY BRIEF
FOR DEFENDANT-APPELLEE

I. The new provisions of the stalking and cyberstalking statutes, by criminalizing communications to a person or about a person that negligently would cause a reasonable person emotional distress, are unconstitutional on their face. (Cross-relief requested)

It is a basic part of the human experience that we sometimes need to say, and often need to weather, hurtful words. Communications that we expect to cause another anguish or anxiety are part of the fabric of our personal lives: most of us have borne the responsibility of telling an employee that she will be laid off or telling a loved one that a family member has died. Communications that the speaker ought to know will distress are equally a deep tradition in our public culture: the most compelling political speech is often that which brings its audience to anger or to tears.

The State does not seriously dispute that the amended stalking statutes' plain language rendered these and the many other examples of distressing communications – many taken straight from First Amendment canon – felonies.

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

Mislabeling these communications as "stalking conduct" as the statutes do, does not diminish the affront to free speech rights posed by banning merely distressing communications. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("[M]ere labels of state law" do not grant laws punishing speech "immunity from constitutional limitations.") Indeed, the State demeans our discourse when it equates such personal and political moments – or frankly, a few crass Facebook posts and an apologetic email – with acts so outrageous as disseminating child pornography or burning a cross with intent to intimidate. (St. Resp. 10-11, 13)

a) This Court should adjudicate Relerford's claims that the new provisions violate the First Amendment on their face. (Def. Br. 15-17)

The State does not dispute that Relerford's First Amendment claim is properly before this Court and determinative of the outcome of the case. *See People v. Wright*, 194 Ill. 2d 1, 15 (2000) (addressing constitutionality of statute for first time on rehearing). (Def. Br. 15; St. Resp. 19)

In a footnote, the State, citing nothing, asserts there is no "cross-appeal" because Relerford is seeking vacatur of his convictions under either the due process or free speech issues. (St. Resp. 1, n.1) However, in criminal cases where the Appellate Court has ruled in favor of an appellant on one of two constitutional grounds, this Court has traditionally considered an alternative ground through a request for cross-relief under Illinois Supreme Court Rule 315. *See, e.g., People v. Patterson*, 2014 IL 115102, at ¶ 80 ("As an alternative basis to uphold the appellate court's finding . . . defendant argues in his cross-appeal that his trial counsel failed to provide him with effective legal assistance"); *People v. Davis,* 2014 IL 115595, ¶ 22, (addressing validity of sentencing provision under State Constitution through request for cross-relief where Appellate Court had ordered resentencing under federal constitution). Moreover, because Relerford's free speech

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

issue has the potential for a different judgment in this Court than the Appellate Court employed, and thus might require modification of the scope of judgment below, a request for cross-relief is a proper and perhaps necessary vehicle to raise the claim. Part of the judgment below was holding subsection (a) of the statutes unconstitutional in their entirety. Unlike for the due process issue, Relerford's free speech issue may require this Court to modify the judgment of the Appellate Court to sever a portion of the statute. (Def. Br. 60)

The State notes the maxim that, when reasonably possible, statutes should be construed to avoid unconstitutionality. But, the State has offered no saving construction of the statutes, let alone a saving construction that is reasonably available in light of the statutes' clear, sweeping language. It is "well-settled . . . that our state courts may not rewrite legislation to avoid constitutional issues." *People v. One 1998 GMC*, 2011 IL 110236,¶ 13. While "useful in close cases," the maxim that courts should construe statutes to be constitutional is "not a license for the judiciary to rewrite language enacted by the legislature." *In re Branning*, 285 Ill. App. 3d 405, 410 (4th Dist. 1996)*, quoting Chapman v. United States,* 500 U.S. 453, 464 (1991).

The State does respond to the statutory construction arguments in Relerford's opening brief, and points to no ambiguity in the statutes on which tools of statutory construction might operate. (Def. Br. 28-45) Indeed, the State ultimately acknowledges that the question before this Court is whether "criminalizing communications to or about" someone that one knows or should know would cause emotional distress violates the First Amendment. (St. Resp. 19) It is because they criminalize such speech that the amended statutes are unconstitutional.

At one point, the State asks this Court to "excise borderline cases from the scope of the statute." (St. Resp. 12) But what element would the State have this

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

Court rewrite to draw that line? It does not say. Precedent, undisputed by the State, holds that where a statute contains an express mental state, as the amended statutes do, this Court will not substitute another one. *People v. Carpenter*, 228 Ill. 2d 250, 270 (2008), *Wright*, 194 Ill. 2d at 30. (Def. Br. 72) And the State expressly argues that no alteration to the lists of potential predicate acts in subsection (c)(1) could be permitted consistent with the legislature's intent, refusing Relerford's concession in his opening brief that a portion of that definition may be severed. (St. Resp. 19)

b) Where the new stalking provisions directly criminalize "communicat[ions] to or about" a person, the State is incorrect to argue they only warrant the diminished scrutiny appropriate for provisions targeting mere noncommunicative conduct. (Def. Br. 17-24)

The legislature cannot successfully hide a prohibition on communication from First Amendment scrutiny simply by embedding the provision in a definition of course of conduct. *See, generally, Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

The State has shifted its "conduct" argument from its opening brief, to newly argue that a ban on distressing communications is excepted from the First Amendment as "speech integral to criminal conduct." *See, generally, Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); Eugene Volokh, The "Speech Integral to Criminal Conduct" Exception, 101 Cornell L. Rev. 981, 983 (2016). (St. Resp. 8-10) Sister state high courts have rejected the argument for statutes similar to Illinois'. *See State v. Bishop*, 787 S.E.2d 814, 817-18 (N.C. 2016)("*Giboney*" exception did not apply to "cyberbullying" statute prohibiting the posting of material online with "intent to intimidate or torment a minor"); *People v. Marquan M.*,

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

19 N.E.3d 480 (N.Y. 2014); *State v. Machholz*, 574 N.W.2d 415 (Minn. 1998). (Def. Br. 22-23) The State offers this Court no reason not to follow these unanswered cases.

Much of the State's argument on this exception repeats the "conduct" argument from its opening brief, often verbatim. (St. Resp. 8)[1] The State does not distinguish the U.S. Supreme Court's or this Court's precedent rejecting like arguments. *See Humanitarian Law Project*, 561 U.S. at 28; *People v. Sanders*, 182 Ill. 2d 524, 532-33 (1998), *People v. Klick*, 66 Ill. 2d 269, 272-75 (1977). (Def. Br. 20-22)

The "integral part of criminal conduct exception" does not apply where "the conduct triggering coverage under the statute consists of communicating a message." *Humanitarian Law Project*, 561 U.S. at 28. To the contrary, the exception only applies where speech is the instrumentality of the commission of a separate unlawful act that is not itself a ban on speech, such as where there is an "element requiring the speech to be related to criminal conduct." *United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012) (ban on false claims to have received military medal facially unconstitutional).

In the seminal case, the other criminal conduct was clear: the defendants were charged under an antitrust statute barring restraints of trade, and the "avowed immediate purpose" and "sole immediate object" of their picketing was to force a company to enter an unlawful agreement in violation of the criminal statute.

---

[1] Relerford's response brief noted that one of the State's cited authorities, *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014), had been overturned, 806 F.3d 411 (7th Cir. 2015). (St. Br. 15; Def. Resp. 18) The State repeats its citation to the overturned *Norton* decision. (St. Resp. 8)

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

Giboney, 336 U.S. at 492, 498. The use of speech to commit an inchoate offense also qualifies; speech used to solicit prostitution, for example, satisfies the exception because it is intended to facilitate the crime of prostitution. *See People v. Johnson*, 60 Ill. App. 3d 183, 188 (1st Dist. 1978). Or, for example, when "a law against treason . . . is violated by telling the enemy the Nation's defense secrets." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).

Here, the State's reply brief leaves the decisive question unanswered: In what other criminal conduct could every instance of making distressing communications possibly inhere? The State does not say. Indeed, the unanswered hypotheticals from Relerford's opening brief show that the obvious answer is there is none. (Def. Br. 39-41) What is inherently criminal about making assertive political tweets, forwarding on a tornado warning, or for that matter, writing a few vulgar Facebook posts?

When the legislature abandoned the requirement that distressing communications be in furtherance of any other unlawful purpose to amount to stalking, but newly defined stalking to be completed by merely uttering knowingly or negligently distressing words, the exception cannot apply. Relerford's description of how the federal cyberstalking statute is distinguishable because it does not require specific intent to harm and does not criminalize communications to or about someone is unanswered. (St. Br. 15-16; Def. Br. 18-19, 23-24*, discussing United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) and *United States v. Petrovic,* 701 F.3d 849 (8th Cir. 2012)) In addition to the two cases under the federal statute cited in its opening brief, the State cites one additional federal case, *United States v. Sayer*, 748 F. 3d 425 (1st Cir. 2014) (St. Resp. 9-10) But that case only proves

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

the point. In *Sayer*, the First Circuit could find the exception to apply because of the federal statute's requirement of "criminal purpose." *Id*. at 433-34. When our legislature abandoned this requirement of an additional criminal purpose, it abandoned any claim that its new ban on communications fell outside First Amendment scrutiny.

Importantly, the State does not address *Humanitarian Law Project*. (Def. Br. 18-19) There, the Supreme Court rejected the government's argument that all "material support" to designated terror groups fell into the *Giboney* exception because it only regulated the conduct of "the fact of plaintiffs' interaction" with the groups at issue. 561 U.S. at 7, 26. The Court found this argument went "too far" because the ban's force still turned on what the plaintiffs wanted to say. *Id.* at 26-27. The ban would only apply if the plaintiffs imparted a specific skill or specialized knowledge, versus general knowledge. *Id*. While the ban could "be described as directed at conduct," it actually was a limitation on speech since "the conduct triggering coverage" under the ban "consist[ed] of communicating a message." *Id*. at 28.

Very recently, the Supreme Court extended *Humanitarian Law Project*'s reasoning to find that "First Amendment protections always apply when 'the conduct triggering coverage under [a law] consists of communicating a message," even in the area of diminished First Amendment rights of commercial speech. *Expressions Hair Design v. Schneiderman,* 581 U.S. ___, 137 S. Ct. 1144, 1151 (2017), *quoting Humanitarian Law Project*, 561 U.S. at 28. *Expressions Hair Design,* in holding that a restriction on how merchants communicate credit card surcharges to customers was a restriction on speech, clarified that the *Giboney* exception applies

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

only where a statute's burden on speech is "incidental to its primary effect on conduct." 137 S. Ct. at 1150. Because the provision "regulat[ed] the communication of prices rather than prices themselves, [it] regulate[d] speech," and thus could not be fit within the *Giboney* exception. *Id*. at 1151.

The plain language of the new stalking provisions makes the question whether the statute may be violated by communicating a message easy — distressing "communicat[ions] to or about" are expressly criminalized. 720 ILCS 12-7.3(c)(1), 720 ILCS 12-7.5(c)(1). And where the definition of "course of conduct" is met by "communicat[ing] to or about" someone, without anything more, the statutes' restriction on communication is not just "incidental to" a ban on non-communicative conduct, but the very *actus reus* of the offense. *Expressions Hair Design,* 137 S. Ct. at 1150.

The State, by contrast, has offered no reason why the new stalking provisions satisfy the exception beyond the mere statutory relabeling of communications as "course of conduct," and implies that the label alone is sufficient. But statutory labeling cannot be used to circumvent the First Amendment. *Sullivan*, 376 U.S. at 269. Under the State's reasoning, it seems, the legislature could fit the following crime perfectly within the exception:

> A person commits stalking by engaging in a "course of conduct" directed at another person. "Course of conduct" means 2 or more acts, including but not limited to acts in which a defendant exercises religion, speaks, writes, assembles with others or petitions the government for grievances.

This Court would certainly not find such a statute to escape First Amendment scrutiny. It should not find the amended stalking provisions to evade First Amendment scrutiny either.

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

c) Where the new provisions' ban on communications discarded the requirement that the State prove a "true threat," they do not qualify under any traditional First Amendment exception. (Def. Br. 25-28)

The only constitutionally actionable "threat" is a "true threat"— one that meets the definition set out in precedent like *Virginia v. Black*, 538 U.S. 343, 359-60 (2003), and *Watts v. United States*, 394 U.S. 705, 707 (1969). Most communications to or about someone, even distressing ones, are not threats at all, let alone "true threats." Indeed, the statutes categorize "threatening" someone separately, and in addition to, "communicat[ing] to or about" someone. 720 ILCS 12-7.3(c)(1); 720 ILCS 12-7.5(c)(1). This Court should therefore reject the State's effort to force-fit its sweeping prohibition on communications into the narrow "true threats" exception. (St. Resp. 11)

The State does not contest Relerford's many, many examples of communications swept in by the statutes that do not amount to threats in any sense, including the facts of several U.S. Supreme Court cases. (Def. Br. 39-41)

Relerford's opening brief noted that the "true threats" exception has required elements both as to the content of the message that is communicated and the mental state of the speaker. (Def. Br. 26; *see also* Brief of Cato Institute, *et al., as amici curiae,* 5-14) A ban on distressing communications falls so far afield of the first of these two requirements that this Court need not resolve the second.

As the State acknowledges, as to content, a communication must contain a "serious expression of an intent to commit an act of unlawful violence" to qualify for the exception. *Black*, 538 U.S. at 359. (St. Resp. 11) At a bare minimum, this means a threat must say the speaker is going to act some way in the future — an "intent to commit an act." *Black*, 538 U.S. at 359. But most distressing

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

communications are not even this. Bringing someone sad news, hurling a personal insult in retaliation for a perceived grievance, or warning others about the danger they may face, all may be distressing communications, yet none describes how the speaker will act in the future. Moreover, the act threatened must be of "unlawful violence." *Id.* A threat to file an ethics complaint is likely to unnerve its recipient, but is far from the kind of true threat the Constitution allows Illinois to criminalize. *People v. Dye*, 2015 IL App (4th) 130799 at ¶¶ 10-12. And, the "expression" must be a "serious" one, and not just one of implication, lest whether a crime has been committed depend on others' interpretations of ambiguous words or gestures. *Black*, 538 U.S. at 359.

Thus, even if this Court adopts the broadest interpretation of the exception colorable under current "true threats" jurisprudence, the State's claim must be rejected because most distressing communications are not threats at all.

The legislature's choice to ban "communicat[ions] to or about" someone in addition to its prohibition on "threaten[ing]" underscores the distinction. 720 ILCS 12-7.3(c)(1); 720 ILCS 12-7.5(c)(1). Not only has the legislature "eschewed an intentional threat-based definition of stalking," as the State acknowledges, (St. Br. 1), the legislature forswore any claim to limit the criminalized speech to threats at all, when it criminalized "communica[tions] to or about" someone independent of communications that "threaten." This Court "presume[s] that each part of the statute has meaning," and will not construe a statute to render any "part . . . superfluous or redundant." *People v. Baskerville*, 2012 IL 111056, ¶25. If communicating to or about someone meant nothing more or less than threatening someone, the provision would be wholly superfluous. Instead, because

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

the statute separately bars threatening, the only time the State would ever need accuse a speaker of stalking for communicating to or about someone, is where that communication is not a threat at all.

Therefore, even if this Court concludes that *Elonis* had nothing informative to say about the scope of the "true threat" exception, and even if the First Amendment allows for the criminalization of communications as threats, so long as a reasonable person might understand them to be threatening, a ban on distressing communications still far exceeds the exception.

If this Court does reach the question of what mental state the exception requires, it should hold that a speaker must know or intend that a recipient will understand his words to be a threat. This question as to the mental state is where the current controversy in "true threats" jurisprudence lies. *See Perez v. Florida*, 580 U.S. ___, 137 S.Ct. 853 (Mar. 6, 2017) (Sotomayor, J., concurring in denial of *certiorari*) (commenting that Supreme Court should clarify that a "threat" element requires intent for recipient to understand communication as a threat). As Relerford's brief and *amici* point out, *Black*, *Watts*, and *Elonis* all strongly support a finding that to criminalize a threat, the speaker must intend or at least know that the recipient understand what he says to be a threat, lest the merely zealously expressed or misspoken become grounds for a felony conviction. (Def. Br. 25-28; Brief *Amici Curiae* of Cato Institute *et al.*, 5-14)

Finally, the State's effort to distinguish *Black* exposes just how extraordinary its position is. *Black* found that, because of "cross burning's long and pernicious history as a signal of impending violence," a ban on cross-burning could fit within the true threats exception, but only if the state was additionally required to prove

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

that the cross-burning was done with "intent to intimidate." 538 U.S. at 363. Even for a criminal law banning cross-burning, to avoid "chill[ing] constitutionally protected" speech, the Supreme Court held the statute must distinguish between those who do so with the intent to threaten and those, for example, who do so only for the "purpose of creating anger or resentment." *Id.* at 365-66.

To deal with the fact that the legislature eschewed any equivalent mental state requirement in favor of mere negligence, the State argues that unlike cross-burning which it says may sometimes be a "legitimate exercise of speech," even unintendedly distressing communications never serve any "other purpose than to cause fear and suffering." (St. Resp. 11-12) The State's notion that all merely distressing communications, including all of the examples offered by Relerford and *amici*, are not just equivalent to, but worse than *cross-burning*, borders on self-refuting. Decades of U.S. Supreme Court refute it even more powerfully. *See, e.g., Snyder v. Phelps,* 562 U.S. 443, 450 (2011), *Hustler v. Falwell*, 485 U.S. 46, 50 (1988).

d) By criminalizing communications to or about a person that the speaker knows or should know would cause a reasonable person emotional distress, the new provisions of the stalking and cyberstalking statutes unconstitutionally sweep in much of our public and private discourse. (Def. Br. 28-47)

Where the State does not dispute that much of our discourse is criminalized under the amended stalking statutes, their unconstitutional sweep far exceeds the few anecdotal examples of stalking that the State offers.(St. Resp. 12-15) The State makes no effort to describe how Relerford's examples, including the facts of several Supreme Court cases, are not "substantial" in either number or importance. *United States v. Stevens,* 559 U.S. 460, 473 (2010). In *Stevens*, the

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

ban on depictions of animal abuse was found overbroad merely because it swept in examples like hunting videos or slaughterhouse exposés. *Id.*, at 475. The uncontested examples of ordinary communications swept in by the new stalking provisions far exceed those at issue in *Stevens*. (Def. Br. 39-47)

By comparison, the examples of "legitimate[ly]" prosecutable speech that the new statutes criminalize are few in number, and easily reached by more narrowly drawn statutes, including some already on the books. *See Stevens,* 559 U.S. at 473. The strong medicine of facial invalidation is therefore warranted. *See People v. Clark,* 2014 IL 115776, ¶ 19.

The State does not distinguish overbreadth precedent like *Stevens* or *Clark*. (Def. Br. 28-30) Nor does the State address recent decisions finding similar bans on emotionally distressing communications to be overbroad, such as the Albany cyberbullying ordinance, or the Virginia university speech code. (Def. Br. 23, 42)

The State offers a few examples of "stalking" conduct that it wishes to punish under the new statutes, such as false impersonation or non-consensual pornography. (St. Resp. 13-14) But, the vast majority of communications that distress someone do not resemble these examples at all. (Def. Br. 39-47)

The State's piecemeal examples of the new behaviors the statute sweeps in only highlight one of the greatest dangers of overbroad statutes: piecemeal enforcement. Communications that a prosecutor could easily prove ought have been known to distress someone are such a pervasive feature of our on- and offline discourse that the State cannot seriously consider prosecuting every instance. Nothing in the statutes differentiates how they criminalize crass Facebook comments like those at issue in this case from the ordinary puerile teasing of teenagers, the

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

earnest warning to a friend, or the confrontational inflammatory social media posts that have emerged as a daily feature of our political discourse. But when the choice of which distressing communications are really worth punishing is left to arresting officers and line prosecutors, minority voices are the most at risk of being chilled.

One oft-repeated subtheme of the State's argument posits that new technologies of electronic communication pose such dangers of distress that the First Amendment's old demands of legislative precision must be relaxed lest they be unable to keep up with technological progress. (St. Resp. 16-17) Thus, the State suggests, a sweeping ban on knowingly or negligently distressing communications is justified, whether online or off.

Days before the State filed its response brief, the Supreme Court found the opposite. *Packingham v. North Carolina*, 582 U.S. ___,137 S. Ct. 1730, 1736 (2017). In striking down North Carolina's prohibition on sex offenders using social media websites, the Court was adamant that courts "must exercise extreme caution before suggesting that the First Amendment provides scant protection" online. *Id.* This is especially so where new communication technologies like social media have rapidly become "integral to the fabric of our modern society and culture." *Id.,* at 1738. Constitutional history teaches the same: whenever a new form of communication technology has emerged – radio dramas, comic books, movies, video games – legislators somewhere enact restrictions, claiming that new media pose new dangers. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 797 (2011). Almost invariably those efforts fail in light of longstanding First Amendment principles. *See Id.*

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

The only limitation the State points to in the stalking statute is an exemption creating an affirmative defense for an "otherwise lawful" act of "free speech." (St. Resp. 12) Courts have "sound[ed] the alarm" against such arguments. *United States v. Stevens*, 533 F.3d 218, 231 (3d Cir. 2008), *aff'd*, 559 U.S. 460 (2010). The Supreme Court has repeatedly found statutes including similar exemptions not to be saved from First Amendment invalidity. *See Stevens*, 559 U.S. at 479, *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

First, as *amici* describe, the exemption adds a vagueness problem to the statute's overbreadth. (See Brief *amici curiae* of Cato Institute, *et al.*, 24-25) The exemption requires speakers making communications and police officers enforcing the law to make precise predictions about what "otherwise lawful" "free speech" is. But, "relegat[ing] the First Amendment issue to a 'case-by-case adjudication,' creates another vagueness problem. . .[as it] would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars." *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996).

Additionally, the affirmative defense cannot save the statute from facial overbreadth because speakers must wait until trial to hope their free speech rights are vindicated, and thus remain chilled. Assuming the exemption operates the same for the new statute as it did for the predecessor statute, it is no more than an affirmative defense which a defendant must raise and prove at trial, *See* Illinois Pattern Jury Instructions, Criminal, No. 11.87X, Committee Comment ("The defendant bears the burden of proving [the lawful free speech] exception[] by a preponderance of the evidence.") A speaker considering whether his speech might

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

risk imprisonment needs more guidance than that offered by an assurance that he might be allowed to raise an affirmative defense at trial, months or years after his arrest. When speakers are faced with the prospect of prosecution for what they might say, "yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial." *ACLU*, 542 U.S. at 670-71. Even at trial, to "impose on the defendant the burden of proving his speech is not unlawful," *Free Speech Coalition*, 535 U.S. at 255, unfairly "permits a jury to convict in every . . . case in which defendants exercise their constitutional right not to put on a defense." *Black*, 538 U.S. at 365 (plurality op.). Thus, the "statutory engineering" of a First Amendment exemption cannot save the stalking statute from overbreadth. *Stevens*, 533 F.3d at 232.

e) In the alternative, where they criminalize communications based on the recipient's response and by the communications' subject, the new provisions are content-based restrictions requiring strict scrutiny. (Def. Br. 47-50)

Relerford's opening brief described the three ways the amended statutes make inappropriate content-based distinctions: by criminalizing communications based on their effects on the recipient, by who they are about, and by including an exemption for labor speech alone. (Def. Br. 47-50)

The State does not contest any of these three bases. Strict scrutiny is therefore *due. See, e.g., Boos v. Barry*, 485 U.S. 312, 321 (1988).

f) Because prohibiting knowingly or negligently distressing communications to or about others is not remotely tailored to an interest in preventing violent crime, the new provisions are unconstitutional under any degree of scrutiny. (Def. Br. 51-58)

The State offers no example of a case that has found a similar ban on distressing communications to pass either strict or intermediate scrutiny.

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

Conversely, the State does not dispute the applicability of Supreme Court precedent striking down more carefully drafted statutes motivated by a desire to shield recipients from the harmful effects of communications, such as *Entm't Merchants Ass'n*, 564 U.S., at 799-800 (violent video games), *Free Speech Coalition*, 535 U.S. at 245 (virtual child pornography), *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 824 (2000) (adult television programming), or *Reno v. ACLU*, 521 U.S. 844, 877 (1997) ("patently offensive" speech to minors online). (Def. Br. 50-58)

The State's claimed interest appears to have shifted from its opening brief's rationale – that distressing communications escalate into violent crime – to be a broader interest in the "health and safety" of the public by preventing the "psychological" effects of distressing communications. (St. Resp. 12-13) It cites no case finding that shielding the public from the psychological effects of distressing communications to be a compelling interest.

While preventing violent crime might be a compelling interest, sheltering the public from the mere distressing effects of speech is not. The Supreme Court has noted its "longstanding refusal" to punish speech merely because it "may have an adverse emotional impact on the audience." *Hustler v. Falwell*, 485 U.S. 46, 55 (1988). Cases in which the Supreme Court has rejected the legitimacy of an emotional harm rationale are legion, and none are distinguished by the State. *See e.g.*, *Snyder v. Phelps,* 562 U.S. 443, 450 (2011), *Madsen v. Women's Health Center*, 512 U.S. 753, 758 (1994), *Boos v. Barry*, 485 U.S. 312, 322 (1988), *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927 (1982) (each finding a distressing communication protected by the First Amendment). (Def. Br. 41-42, 48-49)

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

The Supreme Court stood by that refusal just days before the State filed its response brief in this Court. *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744, 1764 (2017) (plurality op.) (assuming intermediate scrutiny). In *Matal,* all eight justices of the Supreme Court found the clause of the Lanham Act barring the registration of "disparaging" trademarks to violate the First Amendment on its face. Relevant here, every opinion in the case was emphatic that a statute motivated by a desire to shield an audience from offensive speech not only failed heightened scrutiny, but was not even a legitimate or compelling government interest. A four-justice plurality, finding the statute would fail even intermediate scrutiny, wrote that a claimed government interest in protecting public from being "bombarded with demeaning messages" was invalid as it "strikes at the heart of the First Amendment." *Matal*, 137 S. Ct. at 1764. An overlapping group of four justices, finding the provision to fail strict scrutiny, commented as strongly that "a speech burden based on audience reactions is simply government hostility and intervention in a different guise." 137 S. Ct. at 1767 (Kennedy, J., concurring).

The State argues that a diluted mental state is justified because the emotional harm to the recipient is the same, regardless of whether the speaker has intent to distress. (St. Resp. 15) The threat to free speech, however, is not the same. A mental state of negligence chills speech far more than a mental state of intentionality, as even the well-meaning speaker is forced to censor himself when he is newly made criminally responsible for others' reasonable interpretations of his words, lest he utter an inadvertently distressing slight. Regardless, if the prevention of the emotional harm were the statutes' actual purpose, the statute would at least require proof that emotional harm actually occurred. The State

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

does not dispute that the statutes, remarkably, do not even require that. (Def. Br. 38)

To argue its psychological harm rationale, the State does not defend the study that was actually before the legislature. (Def. Br. 53-54) It offers a new study for its new rationale, that "[w]omen who are stalked are at significantly greater risk of suffering psychological distress than their peers." (St. Resp. 13, citing Diette, *et. al.,* Stalking: Does it Leave a Psychological Footprint?, Social Science Quarterly 95: 563–580 (June 2014).) However, the cited metastudy did not define "stalking" to encompass communications at all, let alone all knowingly or negligently distressing communications as Illinois' amended statutes do. Instead, the study defined stalking far more like Illinois' predecessor statute, as "the willful, malicious, and repeated pursuit of another person threatening his or her safety." Diette, *et al.,* 563, 567. The study thus offers no support for the idea that a ban on distressing communications, such as the crass Facebook posts at issue in this case, is narrowly tailored.[2]

The vast over-inclusiveness of the statutes is further shown by the State's strained efforts to analogize all distressing communications to child pornography. (St. Resp. 13, citing *New York v. Ferber,* 458 U.S. 747 (1982)). Prohibitions on

---

[2] The State cites a second study on the prevalence of "stalking" online, for the proposition that one-third of surveyed women who had been "stalked" had received unwanted emails or other online communications, Balm, *et al.,* Bureau of Justice Statistics, "Stalking Victimization in the United States." (Jan.2009). (St. Resp. 16-17) The State's cited study was later withdrawn because it included a definition of "stalking" so broad as to include routine spam email as "unwanted communication." Catalano, Bureau of Justice Statistics, "Stalking victims in the United States – Revised" (Sept. 2012).

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

distributing child pornography are categorically excepted because the sexual abuse of children is an "intrinsic[]" feature of how child pornography is produced. *Ferber*, 458 U.S. at 759. As the Supreme Court later clarified in *Free Speech Coalition*, because "*Ferber's* judgment about child pornography was based upon how it was made, not on what it communicated," it is error to use *Ferber to* justify a law "that prohibits speech that records no crime and creates no victims by its production." 535 U.S. at 249-51. Thus, the Supreme Court has cabined *Ferber*'s rationale to the child pornography exception alone, holding it not to apply to all statements of *"de minimis"* value, *Stevens*, 559 U.S. at 471-72, and has held that only actual, but not virtual, child pornography may be categorically prohibited, because actual children are not abused in the process of producing virtual pornography. *Free Speech Coalition,* 535 U.S. at 250; *see also People v. Alexander*, 204 Ill. 2d 472, 479 (2003) (discussing limitation on *Ferber's* rationale).

Ferber's rationale, even if it could be extended beyond child pornography, offers the State no support in this case, because merely distressing statements generally "record[] no crime and create[] no victims by [their] production." There is simply no other criminal act inherent in the act of posting a communication on Facebook, let alone a crime as condemnable as the sexual abuse of a child.

To equate distressing communications with child pornography, the State, citing nothing, makes the remarkable pronouncement that "the value of speech that one knows — or should know — will cause [one] to feel fear or significant mental suffering is *de minimis*." *Compare Alexander*, 204 Ill. 2d at 479 (noting the U.S. Supreme Court rejected a reading of *Ferber* that would find speech less protected because it was of *de minimis* value). The U.S. Supreme Court has rejected

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

such efforts to balance away the value of speech as "startling and dangerous." *Stevens*, 559 U.S. at 470.

g) The legislature — and the public — have ample alternative ways to respond to the behavior the new provisions criminalize. (Def. Br. 58-60)

The hypothetical examples the State offers only show how narrower statutes can reach the conduct the State wishes to criminalize.

The State discusses, for example, the conduct of the defendants in *United States v. Sayer*, 748 F. 3d 425 (1st Cir. 2014), and *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014). (St. Resp. 9-10) However, where those defendants were convicted under the federal statute, which requires a criminal purpose, and is narrower as to almost every other element, they fail to show why a sweepingly broad statute is necessary. (Def. Br. 59)

The State offers one new anecdotal example of conduct it suggests the amended statutes were needed to reach, by way of an incident in Pennsylvania, where fraternity members disseminated surreptitiously-taken nude photos on a private Facebook group. (St. Resp. 13-14) *Cf. Playboy*, 529 U.S. at 819 (anecdotal accounts cannot provide compelling justification). While the conduct in the Pennsylvania case was an abhorrent violation of privacy, it is not "stalking" in any colloquial sense, but a different offense, the non-consensual dissemination of private sexual images. And that is an offense that Illinois has made a felony. 720 ILCS 5/11-23.5(b) (West 2015) (creating felony offense of non-consensual dissemination of private sexual images). Indeed, statutory history shows that the legislature itself did not consider that the amended stalking statutes were meant to reach non-consensual pornography. When the legislature debated section

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

11-23.5, its sponsor was adamant that "revenge pornography" was not thought to have been covered by even the amended stalking statutes, saying that "Right now, there's absolutely no law that deals with this horrible. . . crime[.]" Illinois House Transcript, 2014 Reg. Sess. No. 54 (statement of Drury, Rep.) (Mar. 27, 2014).

"If a less restrictive alternative would serve the . . . purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. The way to criminalize non-consensual pornography is to criminalize non-consensual pornography, as our legislature later did, not by sweepingly banning all negligently distressing communication about someone.

The State offers a hypothetical variation of the false impersonation case from California discussed in its opening brief, imagining that the defendant was not motivated by an intent to distress, but had other purposes. (St. Br. 11; St. Resp. 14-15) But, of course, the State is aware of the difference between criminal intent and motive; it regularly insists on that distinction to this Court, and proves a defendant's intent despite his protestations. *See People v. Smith,* 141 Ill. 2d 40, 56 (1990).(Def. Br. 55-56)[3] Regardless, there is wide gap between the mental states of intent and mere negligence. Nothing in the State's examples explains why mental states of knowledge or recklessness would not serve the State's purpose.

---

[3]In the case that appears to be the basis for the State's example, the perpetrator was in fact convicted of the specific intent crime of solicitation of rape. Greg Miller, *Man Pleads Guilty to Using Net to Solicit Rape*, L.A. Times, Apr. 19, 1999, available online at:http://articles.latimes.com/1999/apr/29/business/fi-32219 (Last accessed July 5, 2017).

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

Moreover, the State offers no reason why, to stop such false impersonation campaigns, it was necessary to enact a sweeping ban on all distressing communication to or about others. To the contrary, the natural way to ban such distressing false impersonation online is to enact a statute that bans false impersonation online. Several states have done just that. *See, e.g.,* Tex. Penal Code Ann. § 33.07 ("Online impersonation"), Cal. Penal Code Ann. § 528.5.

The State does not answer Relerford's argument that civil remedies, such as requiring a restraining order before convicting someone of merely negligently distressing speech, offer a less restrictive alternative. (Def. Br. 59)

Finally, the State leaves unanswered Supreme Court precedent holding that where communications are restricted because of their purported harms to recipients, "the right of expression prevails, even where no less restrictive alternative exists." *Playboy*, 529 U.S. at 813 (internal quotation omitted) (Def. Br. 58-59)

h) This Court should sever the unconstitutional provisions from the statutes. (Def. Br. 60)

The State has declined Relerford's concession that portions of the definition of course of conduct may be severed. (St. Resp. 18-19)

What Justice Kennedy just wrote about offensive communications is just as true of the knowingly or negligently distressing speech that is now a felony:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence.

Matal, 137 S. Ct. at 1769 (Kennedy, J., concurring).

In this case, not only would invalidation under the First Amendment potentially provide the narrower basis of decision, (Def. Br. 16), deciding this case

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

on First Amendment grounds would send a needed signal to the legislature. So long as the new stalking provisions remain on the books, all Illinoisans must censor themselves before engaging in vigorous debate or saying harsh words about others, lest they risk a felony charge and the State labeling them a "stalker." The legislature granted the State such power over our speech with scant debate and no consideration to how far the statutes swept into our public and private discourse. To lift the chill to free speech, and to remind legislators to act with care before criminalizing what we say, this Court should find the new stalking provisions unconstitutional on their face under the First Amendment. *See Stevens*, 559 U.S. at 481 (facial invalidation is warranted to ensure legislators have an "incentive to draft a narrowly tailored law in the first place.")

This Court should therefore hold subsection (a) of the amended stalking and cyberstalking statutes unconstitutional.

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

CONCLUSION

For the foregoing reasons, Walter Relerford, Defendant-Appellee, respectfully requests that this Court hold subsection (a) of the amended stalking and cyberstalking statutes unconstitutional.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

JONATHAN YEASTING
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

CERTIFICATE OF COMPLIANCE

I, Jonathan Yeasting, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 6984 words

/s/Jonathan Yeasting
JONATHAN YEASTING
Assistant Appellate Defender

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM

No. 121094

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us, cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us;
Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;
Mr. Steven W. Becker, Law Office of Steven W. Becker LLC, 500 N. Michigan Ave., Suite 600, Chicago, IL 60601, swbeckerlaw@gmail.com;
Ms. Rebecca K. Glenberg, Roger Baldwin Foundation of the ACLU of Illinois,,180 North Michigan Ave., Ste 2300, Chicago, IL 60601, rglenberg@aclu-il.org;
Mr. Robert R. Stauffer, Jenner &Block LLP, 353 North Clark St., Chicago, IL 60654, rstauffer@jenner.com;
Mr. Walter Relerford, 1510 S. Central Park Ave, Floor 1, Chicago, IL 60623

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 July 12, 2017, the Cross-Reply Brief 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-appellee in an envelope deposited in a U.S. mail box in Chicago, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Cross-Reply Brief to the Clerk of the above Court.

/s/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

E-FILED
7/12/2017 3:10 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

SUBMITTED - 44003 - Alicia Corona - 7/12/2017 3:10 PM