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.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE CROSS-RELIEF REQUESTED

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES Page

CROSS-APPEAL ISSUE

I. **Whether the new provisions of the "stalking" and "cyberstalking" statutes, which render it a felony to communicate to a person or about a person in a manner that knowingly or negligently would cause a reasonable person emotional distress, are unconstitutional on their face as violating the right to free speech.**

ISSUE PRESENTED FOR REVIEW

II. **Whether the Appellate Court correctly concluded that the new provisions of the "stalking" and "cyberstalking" statutes violate due process where they sweep in innocent conduct.**

STATUTES INVOLVED

720 ILCS 5/12-7.3 (2012). 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.

. . .
(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.

720 ILCS 5/12-7.5 (2012). Cyberstalking.

(a) A person commits cyberstalking when he or she engages in a course of conduct using electronic communication directed at a specific person, and he or she knows or should know that would cause a reasonable person to:

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

. . .
(c) 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. The incarceration in a penal institution of a person who commits the course of conduct is not a bar to prosecution under this Section.

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

. . .
(8) "Reasonable person" means a person in the victim's circumstances, with the victim's knowledge of the defendant and the defendant's prior acts.

STATEMENT OF FACTS

Summary.

In 2009, the legislature expanded Illinois' stalking and cyberstalking statutes, adding new provisions that criminalize a "course of conduct," including "communicat[ions] to or about a person" that the speaker "knows or should know" would cause a reasonable person "emotional distress," including "fear for . . . safety." 720 ILCS 5/12-7.3(a),(c) (West 2012); 720 ILCS 5/12-7.5 (a),(c) (West 2012).

Walter Relerford was charged under the new provisions with two counts of stalking and two counts of cyberstalking, primarily for making various Internet communications about a popular radio host at a station where he was an intern. (C. 18-22) He was convicted following a bench trial and sentenced to 6 years' imprisonment. (C. 114; R. N66-67, Q15, 17)

The statutes.

Illinois' first stalking statute was enacted in 1992. 720 ILCS 5/12-7.3 (West 1992); P.A. 87-870. 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).[1]

The legislature narrowed the statute's reach over the next few years. Specifically, the legislature, in 1993, first required that the defendant's actions be undertaken "knowingly and without lawful justification." 720 ILCS 5/12-7.3 (a) (West 1993). In 1994, concerned that the statute as written would criminalize

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[1]Copies of the key statutory provisions discussed are included in the appendix to this brief.

much labor picketing, the legislature clarified language exempting "bona fide labor dispute[s]." 720 ILCS 5/12-7.3 (a) (West 1993); P.A. 88–677.

The original cyberstalking statute, enacted in 2001, required knowing harassment through electronic communications combined with multiple threats of criminal violence. 720 ILCS 5/12–7.5 (West 2001); P.A. 92-199.

In 2009, the legislature added new provisions to each statute. P.A. 96-686. As the Appellate Court described,

> [t]he 2009 amendments: (1) removed the threat requirement from the definition of the general stalking offense; (2) created subsection (a–3), which retained the threat-centric definition of stalking that was present in the statute since 1992; and (3) redefined the general offense of stalking in section (a).

People v. Relerford, 2016 IL App (1st) 132531, ¶ 18, *discussing* 720 ILCS 5/12-7.3 *and* 720 ILCS 5/12-7.5 (West 2012).

Subsection (a) contains nearly identical language in each of the two new statutes. Subsection (a) of the new stalking statute 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 2012). Subsection (a) of the cyberstalking statute is identical except that it additionally requires that the course of conduct occur "using electronic communication." 720 ILCS 5/12-7.3(a); 720 ILCS 5/12-7.5(a) (West 2012).

Section (c)(1) of both statutes 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.

720 ILCS 5/12-7.3(c)(1); 720 ILCS 5/12-7.5(c)(1) .

To qualify under the cyberstalking statute the communication must be made electronically. 720 ILCS 5/12-7.5(c)(2). Under the stalking statute, the illegal communications may be transmitted in the same electronic manner proscribed by the cyberstalking statute, 720 ILCS 5/2-7.3 (c)(1),(2), but they need not be.

The statutes further define "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 and cyberstalking as an alternate version of the offense in a new subsection (a-3).

> (a-3) A person commits stalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and:
>
> (1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint and the threat is directed towards that person or a family member of that person; or
>
> (2) places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint to or of that person or a family member of that person.

720 ILCS 5/12-7.3(a-3).

The legislature also retained the prior exemptions for picketing arising out of a "bona fide labor dispute" and for "any exercise of the right of free speech or assembly that is otherwise lawful." 720 ILCS 5/12-7.3(d)(1),(2).

The charges against Relerford.

A grand jury indicted Walter Relerford under the new statutory provisions on two counts of cyberstalking and two counts of stalking for communications and acts regarding Sonya Blakey, a popular radio host and his former boss from an unpaid internship at the radio station. (C.18-22) Each count of the indictment alleged internet communications by Relerford as a predicate act. (C. 19-22)

The cyberstalking charges each alleged that Relerford engaged in a course of conduct using electronic communication, specifically by "Facebook postings, in which he expressed his desire to have sexual relations with [the complainant]" and "threatened her co-worker, workplace and employer."(C. 21, 22) These charges alleged, respectively, that Relerford knew or should have known that his course of conduct would cause a reasonable person to either "suffer . . . emotional distress" (Count 4) or "fear for . . . safety." (Count 3) (C. 21, 22)

The two stalking charges alleged a nearly identical course of conduct that Relerford directed at Blakey. (C. 19-20) Count 1 alleged that Relerford "called and communicated with [her] via email, stood outside of [her] job and attempted to communicate with her, and entered [her] place of employment." (C. 19) Count 2 additionally alleged that the entry was "under ruse." (C. 20) These two charges further alleged that Relerford "knew or should have known" that the alleged course of conduct would cause a reasonable person to either "suffer emotional distress," (Count 4), or "fear for . . . safety." (Count 3) (C. 21-22)

Trial.

Relerford waived a jury and was tried by the court. (C. 54; R. M5-6)

Radio host Sonia Blakey testified that she was employed by Clear Channel Media and Entertainment, located at 233 North Michigan Avenue in Chicago. (R. M9) She worked on-air for Inspiration 1390, Clear Channel's gospel station, which she also managed, and for V-103, its sister station. (R. M9-10) Blakey met Relerford when he was an intern at Clear Channel from May through August of 2011. (R. M10-12)

In September or October 2011, Relerford applied for employment as a board operator on Inspiration 1390. (R. M10-12) Blakey and Derrick Brown, the program director for V-103, interviewed Relerford, but did not offer him the job. (R. M12-13) After the interview, Relerford emailed, inquiring if the position was filled. (R. M13) After he was told he did not get the position, Relerford emailed about five times and called Blakey a couple of times asking to be considered for another internship. (R. M13-14)

After January 2012, Blakey learned that Relerford, seeking a position, had been emailing other Clear Channel employees in addition to her, and she was instructed to forward any further emails from Relerford to the human resources department. (R. M15-16) Brown testified that he received more than five calls and emails each from Relerford after he was turned down for the job. (R. M67) Lavonne Battle testified that she had worked with Relerford during his internship, and she too received a few calls, emails and letters from him after his internship ended. (R. M42-45) To her, Relerford's contact "started to become unusual" because it was "very persistent" and "a little overzealous" in his job-seeking. (R. M45-46)

Relerford himself testified that he made several calls and sent several emails to Clear Channel after his internship ended because he believed that companies reward persistence, saying "[t]hat's how people get the job." (R. N28, N47) He testified he never intended any harm, but acknowledged he may have been too persistent, but only because he had wanted to work for Clear Channel his entire life. (R. N33)

Many businesses besides Clear Channel are located at the Illinois Center complex at 233 North Michigan Avenue in Chicago, including restaurants like McDonald's and Dunkin Donuts. (R. M35) In March 2012, when Blakey was leaving work one day, she saw Relerford standing with friends outside of the building. (R. M16) When Blakey made eye contact with Relerford, he waved to her. (R. M17) Blakey did not wave back as she continued on toward her destination. (R. M17) Although she later acknowledged the many businesses in the complex, she testified she was "startled and amazed, and kind of shocked" to see Relerford standing with his friends outside. (R. M17, M35) She was also "a little scared[,] [a] little nervous, because [she] just wasn't expecting to see him[.]" (R. M17) By then, Relerford had been informed that there was no position available for him, and the company had decided not to respond to his inquiries. (R. M17-18) Blakey testified that, at that time, Relerford was "not welcome" at the radio station. (R. M17) Relerford did not say anything to her and did not follow her after she walked away. (R. M34-36)

Relerford testified he had been at the Illinois Center to shop at the CVS pharmacy located at the front of the complex. (R. N30) He often shopped there

after he left class at Harold Washington College, located approximately a block away, where he had been a student since January 2012. (R. N24, 29-30) When he was talking to his friends outside, in March 2012, he saw Blakey and waved to her. (R. N30) When Blakey kept walking, he did not follow her or call out her name. (R. N31)

On April 4, 2012, while Blakey was live on the air for a show, Relerford walked into the studio. (R. M18, 20) Blakey was not expecting him. (R. M20) When he entered, she was "startled, nervous, [and] felt violated." (R. M21) In order to get to the studio on the 27th floor, a visitor must first get clearance to pass through security in the building's lobby, and then get buzzed in through Clear Channel's door. (R. M19-20) Blakey switched her show to run on automation. (R. M21) She testified that she was "scared" because "he was not supposed to be in the building" and "was not invited." (R. M21) Blakey added that she was scared because of what had previously transpired "with the numerous e-mails and the continuous almost harassment . . . and not accepting no." (R. M22)

Blakey's board operator, Amelia Lane, was the only other person present when Relerford walked into the studio. (R. M19) Lane was "startled" and "shocked" to see him because his internship was over and he had not been offered a job. (R. M100)

Soon after Relerford walked into the studio, Blakey and Battle escorted him out of the building. (R. M22-23, 47-48) Relerford did not say anything threatening during this incident, and did not protest or refuse when Blakey and Battle escorted him out. (R. M38)

Relerford testified that he went to Clear Channel after class to inquire about a new internship, and thought it was appropriate to go in person because he had already interned there. (R. N25, 29, 41) After building security gave him a visitor's pass to go to the Clear Channel offices on the 27th Floor, an intern who Relerford used to work with let him inside. (R. N25-27, 40-41) He walked to the Inspiration 1390 studio, where he had previously worked with Blakey, and told her he was there to apply for an internship. (R. N27, 29) Blakey walked him over to Battle's office and Relerford said the same. (R. N29) He explained that he came in person since he attended school on the next block and had not received a reply to his application. (R. N29)

On April 9, 2012, Blakey received an email from Relerford in which he apologized for startling her by coming to the studio unannounced, and explained that his intention was only to try and get another internship. (R. M23-27) The email contained nothing threatening toward her or others at Clear Channel. (R. M39) Relerford testified that he wrote Blakey that apology because she had looked surprised when he arrived at the studio, and he wanted to clear up any confusion about why he was there. (R. N31-32, N44)

After that, Lane discovered the posts on Relerford's Facebook page, because they were visible to his Facebook friends, and Lane had become Facebook friends with him when both were interns. (R. M86-89, M101) Lane emailed copies of the posts to Blakey since they referenced her. (R. M29, M96)

Relerford's Facebook posts were admitted into evidence and the following five posts were published:

> [1] This is a motherfucking order: If my shit gets shut down by any and everyone who does, dies. You got till Friday at 5:00 p.m. to find some type of job for me with Clear Channel Chicago, maybe a board op or something. If you don't, Saturday is going to be the worst day of your life. That's a motherfucking order, bitch, ass, punk. Send it through 100 shundulah jobo ho 1.
>
> [2] The order: If Sonya's vagina is not in my mouth by next Friday, bury the entire Michigan State football team from 1993. That's the order. Send it through. One hundred.
>
> [3] Just like the folks at Clear Channel think I want to come back to get close to Sonya, I mean, don't get me wrong, who wouldn't want to be close to her? She's wonderful and addictive to be around. The truth of the matter is, since I was 10, I've always wanted to work for WGCI, and that was before it was called Clear Channel. That was back in the 332 South Michigan Avenue days, suite 600. But now, since they are a. [Lane and Brown testified that this post abruptly caught off in that spot].
>
> [4] How am I gay? I want to fuck Sonya. There's nothing gay about that.
>
> [5] I still love you, Sonya. Who gives a shit about that other shit? I'm a man before anything. I'm not afraid of anyone. Life is bullshit anyway. I wonder what will happen when I'm dead and gone. I wonder will they just move on to the next person and treat them the same way they are treating me. I know everything and I'm still not mad. I'm still worried about you, though; especially since these Chinese people talking about killing everyone on the 27th and 28th floor of Clear Channel. That's fucked up. I'll ride for you, Sonya. But these Chinese people don't fuck around. I think I'm going to need to ask Randall for some army weapons to fuck with them. I got your back. But if this shit gets rough, you better scratch, bite, kick or do something.

(R. M73-78, 91-96)

Blakey perceived the posts to reference her husband, Randall, and to include a threat against Clear Channel. (R. M28) She acknowledged that the posts were not sent to her directly by Relerford, and that she had no way of knowing whether it was actually Relerford who had written them on his Facebook page. (R. M39-40)

Once the Facebook posts were reported to Clear Channel, Blakey and Brown were encouraged to stay home from work. (R. M79) Blakey said Clear Channel

offered that option "because I was feeling uncomfortable. I did not know what his next move would be, and so, just a little bit uneasy, a little scared, a little fearful." (R. M29) She continued, to say she was upset by "hav[ing] my name splattered all over Facebook and those — the things that were said, I thought they were very obnoxious, very harassing and almost to the point of feeling like a little stalked, if I could use that word." (R. M29) According to Brown, Clear Channel's suggestion to stay home from work pertained to the fact that the police were looking for Relerford. (R. M79-80)

On April 12, 2012, Relerford, after learning the police were looking for him, went to the police station to turn himself in. (R. N3-6, N50) When questioned, Relerford denied making the Facebook posts about Clear Channel and its employees. (R. N13-14) Relerford testified that he did not post the Facebook messages published during the State's case. (R. N36-37)

In ruling, the court found that Blakey feared for her safety and experienced emotional distress as a result of Relerford's sending numerous emails, the information she received about what he had posted on Facebook, and his coming to the office. (R. N64) The court also found Relerford's electronic messages and conduct were "both overtly and subtly menacing." (R. N66-67) It found Relerford guilty on each count. (R. N67)

The court imposed sentence only on Count 1 and ordered an extended-term sentence of six years' imprisonment. (C. 114; R. Q15, 17)

Appeal.

In the Appellate Court, Relerford raised, among other claims, facial and as-applied challenges to the statutes of conviction, arguing that they violated the Free Speech and Due Process Clauses of the U.S. and Illinois Constitutions.

The Appellate Court, First District issued a unanimous decision on June 24, 2016, holding that the new provisions of the stalking and cyberstalking statutes violated due process on their face. Specifically, it found that by expanding the statutes' reach to encompass communications or conduct that a speaker "knows or should know" would cause a "reasonable person" fear or other emotional distress, subsection (a) of each statute allowed conviction on a mental state of mere negligence and thus swept in innocent conduct. The Appellate Court therefore vacated each of Relerford's convictions. *Relerford,* 2016 IL App (1st) 132531, ¶¶ 26-36.

ARGUMENT

With scant debate on the provisions' consequences, the 2009 legislature created what are, in effect, new crimes of felony negligent infliction of emotional distress, mislabeled as anti-stalking and cyberstalking statutes. The new provisions make it a felony to engage in conduct defined to include "communicat[ing] to or about" a person, which knowingly or negligently would cause a reasonable person "emotional distress," such as alarm, anxiety, or fear for one's safety. 720 ILCS 5/12-7.3 (a)(1),(2),(c)(1),(3) (West 2012); 720 ILCS 5/12-7.5 (a)(1),(2),(c)(1),(3) (West 2012).[2]

Under the cross-appeal Issue I, this Court should find that these new provisions violate the free speech guarantees of the United States and Illinois Constitutions because they are overbroad and because they make content-based restrictions on speech ill-tailored to their purpose of preventing violent crime. Specifically, this Court should strike the phrase "communicates to or about" from each statute's definition of "course of conduct."

For similar reasons, this Court, under Issue II, should affirm the Appellate Court's finding that the new provisions criminalize innocent conduct and therefore violate due process.

This Court should therefore affirm the Appellate Court's vacatur of each of Relerford's convictions.

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[2]This brief refers to the new subsections(a) and (c) of both the amended stalking and cyberstalking statutes as the "new stalking provisions." 720 ILCS 5/12-7.3 (a),(c); 720 ILCS 5/12-7.5 (a),(c).

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)

"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 69 Ill. 2d 605, 618–19 (1978). Sometimes, we "must tolerate insulting, and even outrageous, speech in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988), *quoting Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Nevertheless, in 2009 our legislature added provisions to the stalking and cyberstalking statutes that criminalize much of our personal and political discourse, making it a felony to communicate to, or even about, someone in a way that knowingly or negligently would cause emotional distress. These new provisions "criminalize[] a wide range" of constitutionally protected communications, *People v. Melongo*, 2014 IL 114852, ¶ 29, and thus violate the free speech guarantees of the United States and Illinois Constitutions. U.S. Const. amends. I, XIV; Ill. Const.1970, art. I, § 4.

a) This Court should adjudicate Relerford's claims that the new provisions violate the First Amendment on their face.

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.

In general, the challenging party bears the burden of clearly establishing the statute's unconstitutionality. *People v. Melongo*, 2014 IL 114852, ¶ 20. However, "[w]hen the Government restricts speech, the Government 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).

This Court reviews the constitutionality of a statute *de novo*. *People v. Burns*, 2015 IL 117387, ¶ 19.

Relerford's First Amendment claim on cross-appeal is properly adjudicated before his due process claim. *See Melongo*, ¶ 24 (where interrelated free speech and due process claims are before it, this Court prefers to resolve free speech claims first). Although the Appellate Court invalidated the new provisions on due process grounds, the case was argued primarily under free speech theories in the court below and the State's brief anticipatorily addresses Relerford's free speech claim. (St. Br. 15-16) Further, First Amendment invalidity provides the narrower basis of decision: The free speech issue may be resolved by striking only the phrase "communicates to or about a person" from the statutes, whereas the Appellate Court found the due process concerns raised in Issue II required striking the new provisions in their entirety. (See section (h), below, at p. 60, discussing severability).

Therefore, this Court should affirm the Appellate Court's judgment vacating Relerford's convictions.

As the court below found, and the State acknowledges, although the trial court only imposed sentence on one of four counts of conviction in Relerford's case, all are properly before this Court under *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982); *People v. Relerford,* 2016 IL App (1st) 132531, ¶¶ 29-30; Ill. Sup. Ct. R. 615(b). (St. Br. 8)

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.

This is a speech case. The legislature expressly barred "communicat[ions] to or about" a person by their emotional effect on their subject or recipient. Communicating to or about a person is at the core of what the First Amendment protects. It is fundamentally implausible to characterize an express criminalization of "communicat[ions]" as the kind of mere "regulation of noncommunicative conduct," that is subject to lesser scrutiny under *United States v. O'Brien*, 391 U.S. 367, 382 (1968). This Court should therefore find the new provisions subject to strict scrutiny and reject the State's pre-emptive effort to diminish the level of this Court's scrutiny. (St. Br. 15-16)

In general, the intensity with which this Court scrutinizes a statute's threat to free speech hinges on whether the statute targets communication or merely noncommunicative conduct. Only where a provision is a mere "regulation of

noncommunicative conduct," *O'Brien*, 391 U.S. at 382, that is justified by reasons "not related to expression," *Texas v. Johnson*, 491 U.S. 397, 403 (1989), is the less-exacting framework of intermediate scrutiny appropriate.[3] The reduced intermediate scrutiny is categorically inapplicable to statutes, like the new provisions that penalize pure communications or discriminate based on content.

The Supreme Court has been clear that where a prohibition on what citizens "may do . . . depends on what they say," the prohibition targets speech at the core of the First Amendment, not mere conduct, and thus receives strict scrutiny. *Holder v. Humanitarian Law Project*, 561 U.S.1, 27 (2010). This is so even if when the statutory language declares that it is merely targeting "conduct." *See id.* Strict, not intermediate, scrutiny is due where "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28.

Under the new provisions, reference to the "content of [the] particular message" is required to determine their applicability. *Humanitarian Law Project*, 561 U.S. at 28. To determine if a communication would likely cause a reasonable person emotional distress, a trier of fact needs to know what the content of that communication is. Indeed, to determine whether the new provision reaches what one expresses, this Court need look no further than the indictment in this very

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[3]For the general proposition that regulation of noncommunicative conduct does not trigger strict scrutiny, the State quotes *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014). (St. Br. 15) *Norton* was reversed on rehearing in 2015. *Norton*, 806 F.3d 411, 412 (7th Cir. 2015) (holding Springfield's panhandling ordinance unconstitutional).

case. Relerford was indicted for having "*expressed* his desire to have sexual relations" with the complainant. (C. 21, emphasis added)

Further, the new provisions criminalize hurtful communications not just made to a person, but also when they are "about" the person. 720 ILCS 5/12-7.3(c)(1); 720 ILCS 5/12-7.5(c)(1). Under the new provisions, to determine if a speaker's communication renders him a felon, the trier of fact must decide if the communication was "with regard to" a complainant. "About." *Merriam-Webster.com.*[4]

Writing, speaking, expressing one's self — in other words, core First Amendment activities — are "about" something. To describe noncommunicative conduct as "about" a person is nonsensical.

The resulting exposure to a potential felony conviction because of what one says online or elsewhere is far afield from, say, a regulation against the physical destruction of a draft card, justified by the need to keep records, *see O'Brien*, 391 U.S. 367, but is governed by the many cases where the Supreme Court has treated the making or receiving of online communications as at the core of free speech interests. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding no "basis for qualifying the level of First Amendment scrutiny that should be applied" to online communications); *see also United States v. Am. Library Ass'n,*. 539 U.S. 194, 202 (2003); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002); *People v. Minnis,* 2016 IL 119563, ¶ 23 (cataloguing cases recognizing right to free speech online).

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[4]Available online at: http://www.merriam-webster.com/dictionary/about (Last accessed Feb. 26, 2017).

Similarly, in those cases where the boundaries of what is or is not a constitutionally actionable threat is at issue, the court has not doubted that words, no matter how menacing, are speech. *See Watts v. United States*, 394 U.S. 705, 707 (1969) (*per curiam*) (statute barring threatening the president made "criminal a form of pure speech").

The State suggests lesser scrutiny is due because the legislature used the phrase "course of conduct." (St. Br. 15-16) But the legislature then immediately defined that conduct to include "communicat[ions] to or about . . . a person." 720 ILCS 5/12-7.3(c)(1); 720 ILCS 5/12-7.5(c)(1). Because the legislature expressly chose to define the phrase "course of conduct" as something other than "conduct" in the ordinary sense, the bare statutory label offers the State no support. *See People v. McCarty*, 86 Ill. 2d 247, 254 (1981) (where a term is expressly defined, legislature's "power to define terms" controls over term's popular meaning).

Relabeling speech as "conduct" by statute does not remove it from the purview of the First Amendment. To find otherwise would reduce the strongest First Amendment protections to mere hortatory advice, easily circumvented through cynical drafting by legislators who redefine "conduct" to include all "communicat[ions]," then criminalize the newly-defined speech-infused "conduct."

While other behaviors the legislature defined as conduct in these statutes — "follow[ing]," for example — might not be inherently communicative, by definition "communicat[ing]" to or about someone is. It is this prohibition on distressing communications that underlay the charges against Relerford and that he argues

should be struck from the statute.

This Court refused a similar effort to bar speech in the guise of "conduct" when it struck down a provision of the disorderly conduct statute in *People v. Klick*, 66 Ill. 2d 269, 272-75 (1977). The provision at issue created an offense where one "knowingly . . . with intent to annoy another, makes a telephone call, whether or not conversation thereby ensues." *Id.* at 272. This Court rejected the claim that the provision "merely regulate[d] conduct," finding that, despite the legislature's attempt to avoid triggering First Amendment scrutiny by including the phrase "whether or not conversation . . . ensues," the statute reached a wealth of communications, where it was often the content of the conversations that fulfilled the intent to annoy, such as assertive consumer complaints or individuals bickering over family affairs. *Id.* at 272-74.

More recently, this Court found a similarly-structured statute to target speech, not just noncommunicative conduct, when it struck down a provision of the Hunter Interference Prohibition Act in *People v. Sanders*, 182 Ill. 2d 524, 532-33 (1998). The Act made it a misdemeanor to "disturb[] another person who is engaged in the lawful taking of a wild animal . . .with intent to dissuade or otherwise prevent the taking." *Id.* at 526, *quoting* 720 ILCS 125/2 (West 1996). While *Sanders* recognized that "disturb[ing]" hunting could be accomplished by various noncommunicative means like noise-making, it found the specific inclusion of the phrase "intent to dissuade" targeted an inherently communicative activity because "dissuade" had a "specific meaning associated with argument." 182 Ill.2d

at 532. This Court then subjected the content-based provision to strict scrutiny and excised the phrase "intent to dissuade" from the Act. *Id.* at 533.

Here, as in *Klick,* where the most natural and common way a communication to or about someone might distress is because of what the communication says, the new provisions sweep far beyond mere noncommunicative conduct. And, as in *Sanders,* where the new provision included an inherently communicative act among a list of behaviors that could trigger the statute's applicability — there, "to dissuade;" here, "communicates to or about"– the provision should be subject to full First Amendment scrutiny.

Sister states have found laws similar to Illinois' to strike at core First Amendment rights, and not merely noncommunicative conduct. *See e.g., State v. Machholz*, 574 N.W.2d 415, 418 (Minn. 1998) (rejecting argument that harassment statute that used the word "conduct" was a mere prohibition of noncommunicative conduct, and finding statute unconstitutional).

When New York's high court struck down Albany's cyberbullying ordinance as overbroad, it rejected a claim similar to the one the State offers here. *People v. Marquan M.*, 19 N.E.3d 480, 24 N.Y.3d 1, 6 (2014). The defendant in *Marquan M.*, a 16-year-old high school student, posted photographs of high-school classmates with detailed descriptions of their alleged sexual practices on a pseudonymous Facebook page. 24 N.Y.3d at 6.[5] He was charged under an ordinance prohibiting

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[5]This Court may note that the juvenile's multiple Facebook postings in *Marquan M.* would likely result in his felony adjudication under Illinois'

"any act of communicating . . . with the intent to harass . . . or otherwise inflict significant emotional harm." *Id.* Rejecting the State's claim that the prohibition reached only conduct and was thus subject to lesser scrutiny, *Marquan M.* found that the cyberbullying ordinance was a "prohibition[] of pure speech." *Id.* It explained that although the statute used the word "act," it was not a conduct-based prohibition as the

> law facially allows law enforcement officials to charge a crime based on the communicative message that the accused intends to convey, as evidenced by the fact that defendant was prosecuted because of the offensive words he wrote on Facebook.

Id. at 11 n.4. Noting that the "provision would criminalize a broad spectrum of speech outside the popular understanding of cyberbullying," the court found the ordinance unconstitutional. *Id.* at 9.

As in the Albany ordinance prohibiting communicating with intent to cause emotional harm, Illinois' prohibition on communications that negligently cause emotional harm is not a regulation of mere noncommunicative conduct. And like New York's Court of Appeals did, this Court should find that the fact that Relerford was prosecuted for what he wrote on Facebook evidences that the new Illinois provisions are prohibitions on pure speech. *See id.*

The State cites two cases that have found the federal stalking statute to criminalize conduct, not speech. *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012); 18 U.S.C.

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stalking and cyberstalking statutes.

§ 2261A (West 2017). (St. Br. 15-16)

But our legislature amended away the provisions which Congress included in the federal statute that allowed *Osinger* and *Petrovic* to make those holdings. First, the federal stalking statutes lack the direct prohibition on "communicat[ion] . . . to or about" a person that defines the amended Illinois statutes. Where, unlike the federal statute, the Illinois provisions expressly target "communicat[ing]," and require the trier of fact to determine who the communication was "about" to determine if a crime occurred, the new provisions' application depends on what speakers say in ways that the federal statute does not.

Second, each of the two federal cases relied on the federal stalking statute's requirement that the government prove an intentionally harmful criminal *mens rea*. The federal statute requires the defendant act with "intent to kill, injure, harass . . ." 18 U.S.C. § 2261A. It further demands that whatever acts the defendant undertook involved a "pattern of conduct . . . evidencing a continuity of purpose." 18 U.S.C.A. § 2266(2); *Olinger,* 753 F.3d at 944. As the Eighth Circuit emphasized, the federal "statute requires both malicious intent on the part of the defendant and substantial harm to the victim." *Petrovic,* 701 F.3d at 856. The new Illinois provisions, though, abandoned these safeguards where the legislature discarded any requirement of malicious intent, as described below.

Therefore, this Court should find that the legislature did not successfully evade heightened First Amendment scrutiny by relabeling speech as part of a "course of conduct."

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.

There is no general First Amendment exception for making repeated communications that emotionally distress someone. "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,* 132 S. Ct. 2537, 2544 (2012) (plurality op.) (internal citations omitted). Outside of such well-entrenched categories, speech is presumptively protected and generally cannot be curtailed by the government. *Stevens,* 559 U.S. at 468-69.

In the court below, the State's primary defense of the new provisions' constitutionality posited that they qualified under the "true threats" exception. *See generally, Virginia v. Black,* 538 U.S. 343, 359 (2003) (prohibition on cross-burning could only be permitted where statute required proof cross-burning was done with intent to intimidate). The State now acknowledges what the statutes' plain language reveals — that the legislature "eschewed an intentional threat-based

definition of stalking" and "discarded intentional threats" as the gravamen of the offense of stalking or cyberstalking. (St. Br. 11)

Where the legislature eliminated the predecessor statutes' requirement of a knowing or intentional true threat, it discarded the basis on which this Court had found the predecessor statutes constitutional. It was once the case that "[t]he element of a threat in the stalking statute is an integral part of the offense." *People v. Bailey*, 167 Ill. 2d 210, 227 (1995). The predecessor statutes each contained a requirement that the speaker either "transmit a threat of" or place the complainant in "reasonable apprehension of" "immediate or future bodily harm, sexual assault, confinement, or restraint," in order to be criminally liable. 720 ILCS 5/12-7.3(a)(1), (2) (West 2009); 720 ILCS 5/12-7.5(a)(1),(2) (West 2009). This limitation was instrumental to the predecessor statute's constitutionality. *Bailey*, 167 Ill. 2d at 227.[6]

The "true threats" exception has a required content component and a required mental state component. *Black*, 538 U.S. at 359. A ban on knowingly making communications — or even "threats" — that negligently cause emotional distress fails each. As to content, true threats are limited to those statements that "serious[ly] express[] . . . an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* The new provisions contain no requirement

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[6]The legislature retained these provisions as an alternate means of charging the offense in Subsection (a-3) of each statute. 720 ILCS 5/12-7.3(a-3) (West 2012); 720 ILCS 5/12-7.5(a-3) (West 2012).

that the communication even refer to an unlawful act of violence, let alone that they express an intent to commit the act.

Further, the "true threats" exception requires a mental state of intentionality, or at least knowledge, that the recipient will understand the communication as a threat. *Black* limited the exception to circumstances "where the speaker *means* to communicate" an intent to commit a violent crime. 538 U.S. at 359 (emphasis added). This language entails that "a 'true threat' requires intentionality." *People v. Dye*, 2015 IL App (4th) 130799 at ¶ 10, *citing Elonis v. United States,* 575 U.S. ___, 135 S. Ct. 2001, 2012 (2015). This mental state requirement is necessary to protect the right to free speech. A statute that proscribes speech without regard to the speaker's intended meaning risks criminalizing protected First Amendment expression simply because it is crudely or zealously expressed. Where our legislature has expressly written out unlawful intent in favor of a negligence mental state, the statute now lacks this constitutionally required element.

This case provides some examples of how far the legislature has strayed from the core true threat requirements. One of the Facebook posts Relerford was convicted for making suggested that if the complainant would not have sexual relations with him, "bury the entire Michigan State football team from 1993." It is hard to see how the phrase was anything more than sportswriting cliché uttered in an expression of frustration. *See, e.g., Columbus Dispatch,* "Ohio State v. Michigan" (Nov. 23, 2015) (describing "a Buckeye offensive blitz that buried the

Spartans in East Lansing."[7]) And, however else one construes the posts' expressions of wishing for employment or sexual involvement, neither professional nor sexual fantasies can be described as unlawful violence. (R. M73-78)

Therefore, the statutes' ban on "communications," or even its separate ban on "threats," cannot be fit into the "true threats" exception.

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.

"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) (striking down ban on "virtual child pornography"). Under the overbreadth doctrine, a statute is facially invalid when "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). Further, facial invalidation of a statute is especially warranted when necessary to remind legislators to be cognizant of constitutional limits. *Id.* at 481.[8]

The first step in overbreadth analysis is to ascertain the statute's reach.

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[7]Available online at: http://www.dispatch.com/buckeyextra/content/stories/2015/11/23/1123-osu-fb-main.html (last accessed March 7, 2017).

[8]In this case, that risk is no mere abstraction. Legislation is currently pending which would, in some circumstances, create a private right of action for damages under the stalking and cyberstalking statutes. H.B. 3711 (pending).

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).

Turning to the stalking and cyberstalking statutes at issue, section (a) of each statute, read in conjunction with the definitions in section (c), impose a startlingly vast prohibition on protected speech. In fact, the statutes are drafted so broadly that they effectively criminalize mere gossip. This is evident when the statutes are broken down into the following application:

> A person commits stalking when he knowingly engages in 2 acts directed at a specific person, in which he, indirectly or through third parties, communicates to or about that person, and he knows or should know that doing so would cause a reasonable person emotional distress.

To say that virtually every citizen of Illinois has been guilty of stalking or cyberstalking under this broad definition is hardly an overstatement. Individuals routinely speak about others, on more than one occasion, knowing that if the content of their speech were to reach their subject, it would cause that person significant anxiety.

When the legislature, in the sponsoring Senator's words, "broaden[ed]" the

statute's reach, it enacted four major alterations. Illinois Senate Transcript, 2009 Reg. Sess. No. 54 (statement of Hutchinson, Sen.) (May 21, 2009). Specifically, the legislature:

> 1) diluted the required mental state as to the harm from requiring a knowing or intentional *mens rea*, to allow conviction based on a mental state of mere negligence;
>
> 2) replaced the requirement of a threat to newly criminalize communications to — or even about — a person;
>
> 3) expanded the criminalized emotional harm from requiring fear of a violent crime to allow conviction based on any emotional distress, including mere alarm, anxiety or fear of safety from any source; and
>
> 4) abandoned any requirement that the predicate acts or communications alleged as part of the "course of conduct" share a continuity of purpose, in favor of allowing a conviction regardless of how disconnected those acts may be.

Alone, each change is constitutionally suspect. Combined, they produce a "criminal prohibition of alarming breadth." *Stevens*, 559 U.S. at 474.

> **1) By allowing conviction under a mental state of mere negligence as to whether a speaker's communications are distressing, the legislature dramatically expanded the statutes' sweep.**

Where they allow a speaker to be convicted based on his mere negligence as to how others would interpret what he says, the new provisions sweep too broadly.

"Knows or should know" is the traditional way of phrasing a mental state of mere negligence. By including this language in subsection (c), the new stalking

provisions allow conviction based on a mental state of mere negligence as to the "all-important element of the crime" of whether a speaker believes his communications will cause emotional distress. *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001, 2011(2015); 720 ILCS 5/12-7.3(c)(1); 720 ILCS 5/12-7.5(c)(1).

"'Knowledge' is not the same as 'should have known.'" *People v. Nash*, 282 Ill. App. 3d 982, 986 (3rd Dist. 1996). As *Nash* explained:

> The term 'knew or should have known' is commonly used in civil cases; however, it should not be equated with the requisite mental state of 'knowledge' in criminal prosecutions. 'Knowledge' involves conscious awareness, while 'should have known' implicates 'the standard of care which a reasonable person would exercise' and therefore pertains to the lesser mental states of 'recklessness' and 'negligence.'

Id.

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; emphasis in original).

Elonis explains how the new provisions incorporate a negligence mental state and why doing so renders them exceedingly broad. *See* 135 S. Ct. at 2008-12. The *Elonis* defendant was charged under the federal ban on making threatening communications, 18 U.S.C § 875(c), for making a series of statements on his Facebook page. Where that statute is 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 communications. *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 their recipient as threats. *Id.* Instead, the *Elonis* 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. The Supreme Court granted *certiorari* to resolve a split as to whether the First Amendment required that the speaker intend that the recipient understand the communication as a threat.

The Supreme Court, though, 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. *Elonis,* 135 S. Ct. at 2008-12. It found that 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 mental state of mere negligence was an unacceptable option, insufficient "to separate wrongful conduct from otherwise innocent conduct." *Id.* at 2010-11.

Illinois law has long been in accord with *Elonis*' holding as to what kind of statutory language criminalizes actions taken with a mental state of mere negligence. In *People v. Pollock,* this Court found the phrase "should know" to set out a much more "dilute[]" mental state than knowledge alone. 202 Ill. 2d 189, 215, 223 (2002) (reversing conviction where jury was instructed on "should have known" mental state where statute required a mental state of "knowing").

Further, after *Elonis*, that the language of the new stalking and cyberstalking provisions incorporates a "reasonable person" standard, in addition to the phrase "should know," also establishes that they allow conviction under a mere negligence standard as to how the communications' content will be received. The Supreme Court found that where the *Elonis* defendant's conviction was "premised solely on how his posts would be understood by a reasonable person" it was a conviction secured under a negligence standard. *Elonis*, 135 S. Ct. at 2011. The mental states of Illinois' new stalking statutes parallel the *Elonis* court's description of the mental states used in the district court. *See id.* By using "should know" and "reasonable person," the new stalking statutes' plain language thus sets out a negligence standard as to the content of the communications.

Elonis expressly found that a statute that allows a conviction of one 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.

To be sure, *Elonis* did not make an express constitutional holding; because the statute at issue was silent as to the required *mens rea*, the Supreme Court could avoid the First Amendment question on which it had granted review by reading a "knowingly" *mens rea* into the statute. However, because our legislature expressly chose to include a negligence mental state in the new provisions, such avoidance is unavailable. *People v. Zaremba*, 158 Ill. 2d 36, 40 (1994) (where legislation contains express mental state, courts cannot construe a different mental state).

As one court phrased it in reversing a conviction in light of *Elonis*, "having liability turn on a 'reasonable person' standard . . .permits criminal convictions premised on mistakes—mistaken assessments by a speaker about how others will react to his words." *United States v. Houston*, 792 F.3d 663, 667 (6th Cir. 2015). Relerford's case illustrates just the dangers of such mistakes, where the conviction is based on the mere happenstance of a third party forwarding on materials posted in a private forum and the complainant's reaction to an apologetic email from Relerford. Therefore, because the challenged statutes allow a conviction based on a negligence mental state regarding how a "reasonable person" would

perceive the accused's communications, they sweep in innocent communication.

2) By criminalizing communications not only "to," but also "about," a person, the new stalking and cyberstalking provisions ensnare more constitutionally protected speech.

The new definition of "course of conduct" prohibits "communicat[ing] to or about, a person" where communication is one or more of the acts that would distress a reasonable person. 720 ILCS 5/12-7.3(c)(1); 720 ILCS 5/12-7.5(c)(1). By prohibiting communications not only "to" but also "about" a subject, the new provisions ensnare much routine communication, few examples of which would ever be characterized as "stalking" in the ordinary sense of the word.

Speech about someone that would be distressing if its subject what was said is a basic feature of our routine discourse. In our daily lives, we often comment about others in a way that would reasonably distress the subject. Sometimes that is mere gossip, the "'wholly neutral futilities [that] come under the protection of free speech as fully as do Keats' poems[.]'" *Stevens*, 559 U.S. at 479-80, *quoting Cohen v. California,* 403 U.S. 15, 25 (1971). Sometimes, it is to warn a friend to avoid someone, whether out of concern for the friend's well-being or out of mere spite. Sometimes it is an expression of unrequited longing, or just crude sexual bravado — as charged in this case, "express[ing the] desire to have sexual relations with" the subject. (C. 21, C. 22) Other times, we say harsh things about others simply to express ourselves about the facts of our own private lives. To explain to a friend why one is filing for divorce, for example, one might need to explain that the spouse had an affair, was an addict, or is just a bad person.

Our public discourse, as well, is replete with hurtful language about public figures when we express ourselves on political or social topics. Many communications that may be reasonably distressing to their subject might be persuasive polemic or insightful humor to much of their audience. *See Hustler v. Falwell*, 485 U.S. 46, 50 (1988).

And speakers often have little control over whether the subject of their speech will hear of what they said. As this Court noted in invalidating the eavesdropping statute, "[i]f another person overhears what we say, we cannot control to whom that person may repeat what we said." *Clark*, 2014 IL 115776, ¶ 23. The perils of criminalizing republication beyond the author's control are especially true of online communications, as an email, tweet, or Facebook posting can be copied, pasted, screen-captured, and thus republished by anyone in the world with an Internet connection. As the trial court found in this case, "it's clear that the statute is designed and intended to address even those postings or other electronic messages that might be viewed through a third party[.]" (R. Q7)

The new provisions allow a felony conviction for any communications so long as the speaker knows or should know that they would reasonably distress their subject. Especially when the subject of a communication can wield the threat of criminal sanctions over distressing words spoken about them, prohibiting distressing communications "about" someone cowers speakers and silences debate. The doctor who tells her patient a devastating prognosis, the journalist who publishes a humiliating exposé on an elected official, or, for that matter, the

appellate attorney who assails the credibility of a victim at oral argument, are left to hope that they will not draw a State's Attorney's ire.

Conversely, when communications are "about" their subject rather than just "to" them, the interests that justify speech restrictions are severely diminished. "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Klick*, 66 Ill. 2d at 275, *quoting Cohen*, 403 U.S. at 21. When a communication is not targeted "to" an unwilling recipient, but is "about" that subject to the public at large, the interest in intrusion is absent.

What Justice Stevens wrote about the nascent Internet twenty years ago holds true today: "any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). By giving the subject of many communications the power to wield the threat of criminal sanctions against those who speak ill of them, the new provisions risk silencing that voice.

3) The expanded variety of a subject's emotional reactions to communications that the new provisions criminalize sweep in more protected discourse.

Subsection (a)(2) of each new provision renders it a felony where the course of conduct would cause a reasonable person to "suffer . . .emotional distress."720 ILCS 5/12-7.3(a)(2); 720 ILCS 5/12–7.5(a)(2). "Emotional distress" is defined as "significant mental suffering, anxiety or alarm." 720 ILCS 5/12-7.3(c)(3); 720 ILCS

5/12-7.5(c)(3). Subsection (a)(1) of each statute 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); 720 ILCS 5/12-7.5(a)(1).

For each of the emotional harms, one limiting feature is notably missing; the communication or conduct need not actually have caused emotional harm to the complainant. According to the provisions' plain language, the conduct may lead to conviction if it "would 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); 720 ILCS 5/12-7.5(a)(1).

The statute's only qualifier on the degree of emotional distress is that be "significant." 720 ILCS 5/12-7.3(c)(3), 720 ILCS 5/12-7.5(c)(3). "Significant," though, merely means of a "noticeably or measurably large amount." "Significant." *Merriam-Webster.com*[9]

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) (emphasis in original). Even "fright, horror,

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[9]Available online at: http://www.merriam-webster.com/dictionary/significant (last accessed Mar. 4, 2017).

grief, shame, humiliation and worry [are] not sufficient." *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 25.

Where the new provisions criminalize 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. The provisions, in effect, create a new crime of felony negligent infliction of emotional distress by mere words. *See* Eisenberg, Criminal Infliction of Emotional Distress, 113 Mich. L. Rev. 607, 646 (2015).

Our daily lives offer countless examples of communications that speakers know will cause another mental suffering, anxiety or alarm:

- A college student sends text messages to his ex-girlfriend threatening to kill himself if she does not respond. *See, e.g., Doe v. George Mason Univ.*, 149 F. Supp. 3d 602, 610 (E.D. Va. 2016).

- A pastor exhorts his congregation to renounce sin under threat of damnation. *See, e.g.,* "Billy Graham Warns of Fire and Brimstone in Final Book," *Religion News Service* (Oct. 10, 2015)[10]

- An anonymous online commenter accuses a county board candidate of being another "Sandusky." *See, e.g., Hadley v. Doe,* 2015 IL 118000, ¶ 37.

- A woman reveals on her own Facebook page that her coworker is gay and writes a second post condemning him for his sexual orientation.

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[10]Available online at: http://religionnews.com/2015/10/02/billy-graham-warns-of-fire-and-brimstone-in-final-book/ (last accessed Feb. 27, 2017).

- An elected official repeatedly insults his political opponents online, accusing them of being "losers" or "crooked." *See, e.g.*, "The 319 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List," *New York Times*, (Feb. 27, 2017).[11]

- Protestors regularly appear outside an elected official's public events, holding signs that accuse him of being "corrupt," a "bigot," or an "idiot."

The specific enumeration of one kind of emotional distress — "fear for . . . safety" in subsection (a)(1) — shares similar overbreadth problems where it lacks any limitation that the fear be of an unlawful act. The original cyberstalking statute, for example, required that the target of a threat suffer "reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint." 720 ILCS 5/12-7.5 (a) (West 2001).

The new provisions abandoned that restraint, where they no longer require the fear to be fear of violence at the hands of another. Mere "fear for [one's] safety," as phrased now, could be fear from any event. Moreover, when the cause of that fear need no longer be a threat by the defendant, but communication to or about the recipient, ordinary warnings to others about the safety hazards they may face are swept into the statute's reach. For example:

- A person repeatedly warns a friend that the friend's sexual partner is HIV positive.

- An elected official, in a neighborhood meeting, highlights frightening

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[11]Available online at: https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html (last accessed Mar. 10, 2017).

crime statistics warning residents to be careful when going out at night.

- An author, writing an exposé series about the mob, carelessly discloses the identity of a police informant, causing him to fear retaliation. *See, e.g., Tuite v. Corbitt*, 358 Ill. App. 3d 889, 899 (1st Dist. 2005), *rev'd*, 224 Ill. 2d 490 (2006).

- A weather service, concerned that the public has become inured to routine warning language, issues a tornado warning using language warning of "catastrophic" damage, urging listeners to take shelter immediately. *See* "NOAA studying whether new, enhanced warning language improves survival."[12]

- A news radio station, relying on the weather service report, republishes it in a series of email and social media alerts.

In light of these expanded emotional harms, the statutes are strikingly overbroad. For other examples of the kind of protected speech swept in, t his Court needs only look to the facts of Supreme Court decisions where there has been a finding that the communication caused severe emotional distress or fear for safety, yet was constitutionally protected. 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 "intend[ed] to create a fear of violence" in his audience. 458

[12]Available online at: http://www.nws.noaa.gov/com/weatherreadynation/news/130327_warnings.htm (last visited Feb. 19, 2017).

U.S. 886, 927 (1982). In *Snyder v. Phelps,* when members of the Westboro Baptist Church picketed near a soldier's funeral with offensive signs, they caused his father "anguish [that] had resulted in severe depression." 562 U.S. 443, 450 (2011). In *Madsen v. Women's Health Center*, anti-abortion protestors picketed with signs displaying gruesome images outside a clinic, causing patients "anxiety and hypertension." 512 U.S. 753, 758 (1994). In *Hustler v. Falwell*, an adult magazine published a"patently offensive" parody of a television evangelist that was found to be "intended to inflict emotional injury." 485 U.S. 46, 50 (1988).

Under the plain language of the amended stalking statutes, only the discretion of police and prosecutors stands between arrest and felony prosecution for the NAACP activist, the funeral picketer, the abortion opponent, and the crass parodist. The amended stalking statutes thus criminalize an "alarming" volume of protected speech. *Stevens*, 559 U.S. at 474; *see also George Mason Univ.*, 149 F. Supp. 3d at 625-28 (striking down university speech code that banned emotionally distressing speech).

4) Where a felony "course of conduct" now merely requires any two communications or other acts, the broadened definition exacerbates the statutes' overbreadth.

By abandoning the requirement that the acts alleged as a "course of conduct" share any common purpose, the legislature further broadened the statutes' reach. The new provisions define a "course of conduct" merely as any two acts or communications. 720 ILCS 12-7.3(c)(1); 720 ILCS 12-7.5(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 directed at someone with a common 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) (distinguishing other states' statutes, including Illinois,' and 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) (emphasis added). And the federal stalking statute requires not just intent to cause a harm, but requires that the government prove a "course of conduct," "mean[ing] a *pattern* of conduct composed of 2 or more acts, *evidencing a continuity of purpose.*" 18

U.S.C.A. § 2266 (2) (West 2017) (emphasis added). This requirement of "pattern" and "continuity of purpose" imposes an additional *mens rea* component for each alleged predicate act, complementing the statute's demand that the pattern of conduct be motivated by the "intent to kill, injure, harass,[or] intimidate[.]" *Id.*

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 (even if indirectly) 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 under the amended provision. *See People v. Douglas,* 2014 IL App (5th) 120155, ¶¶ 22-23.

By redefining "course of conduct" in this way, the new provisions allow a stalking conviction when any two acts are directed at a person, so long as any one of those acts causes emotional distress. Where a "course of conduct" means no more than the acts themselves, if any single act causes distress, then the "course of conduct" has caused distress.

The bare requirement of two or more acts thus offers no meaningful restriction on the new provisions' overbreadth. As Texas' high court phrased it in striking down its similarly structured stalking statute:

> This situation in essence holds protected [First Amendment] activity hostage once a person engages in one proscribed act that is not protected. For example, a political protester who crosses the line and makes a threat might find himself forever barred from engaging in peaceful, legitimate expression for fear of subjecting himself to punishment for stalking.

Long, 931 S.W.2d at 293.

Where "communicat[ions] to or about" a person are at issue, this redefinition is especially broad. Negligently distress someone once by an ill-considered communication or act, and the threat of "criminal sanctions hovers . . . like the proverbial sword of Damocles" as any subsequent communication "to or about" a complainant risks a stalking conviction. *Reno v. ACLU,* 521 U.S. 844, 882 (1997) (internal quotation omitted). Here, Relerford's case provides the example, where one of the alleged predicate communications charged as stalking was an email in which Relerford apologized for entering the Clear Channel studio unannounced. (R. M23-27, M29)

5) In combination, the new statutory features result in an astonishingly broad criminalization of speech.

By combining a negligence mental state with the diffuse harm of emotional distress, the new provisions sweep in the misspoken, misunderstood, or misinterpreted communication as readily as they reach actual true threats. Almost every instance where a prosecutor believes it provable that a speaker "should have known" better than to say the distressing words he did becomes a potentially chargeable felony.

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.

Id., at 2008.

Illinois' new stalking provisions sweep in far more than the misinterpreted joking threat that troubled the *Elonis* court. Under the new language, if a speaker makes a communication intended as a joke, as sarcasm, or as hyperbole, but that belief turns out to have been unreasonably mistaken and what was said emotionally distresses the recipient, the author has completed a predicate act of felony stalking. By rendering speakers criminally responsible for others' reasonable misinterpretations of the speakers' intent, the new provisions sweep too far.

For example, the employee who spreads malicious gossip about a coworker in the lunchroom, unreasonably unaware the coworker is listening in, or the teenager whose immaturity leads her to underestimate the emotional damage that her teasing a classmate might cause, or the college student who as a misplaced joke or a hyperbolic expression of frustration leaves a friend notes saying he is planning to kill himself, all fall within reach of the statute. The dangers of misinterpretation are even more acute for electronic speech, where character limits, physical distance and Internet jargon often strip away the subtle cues that let in-person listeners comprehend the true intent of a speaker's words .

Where an overbroad statute sweeps in much ordinary discourse, moreover, it raises the prospect that the populace may wield the criminal process as a tool of personal retaliation. Just as this Court struck down the telephone harassment provision of disorderly conduct in part because it would "daily subject countless callers to the stigmatization of the criminal process at the election their listeners who might perceive the call as having been made with intent to annoy," *Klick,*

66 Ill. 2d at 274, readers who might perceive another's emails, tweets, or Facebook postings as distressingly offensive may well invoke the criminal process to serve their own ends.

The danger to our public discourse is even more acute. This Court needs no hypothetical to conclude that in the heat of our political debate, communication by, to, or about public officials is often reasonably (if sometimes willfully) misinterpreted to alarm, render anxious, or distress.

This Court should therefore conclude that the new provisions unconstitutionally sweep in a substantial amount of protected speech.

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.

Although the new provisions are so overbroad as to be facially unconstitutional regardless of whether they are content-based, because the statutes make content-based distinctions, strict scrutiny is due.

The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Stevens*, 559 U.S. at 468. Thus, "[c]ontent-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.*

In general, a provision is content-based if its application"depends on what [people] say." *Humanitarian Law Project*, 561 U.S. at 27. Recently, the Supreme Court has clarified what kind of speech restrictions are content-based classifications demanding strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S.___,135 S. Ct. 2218, 2227 (2015) (municipal signage ordinance was invalid as content-based). A restriction on communication is content-based where it applies "because of the topic discussed [,] the idea or message expressed [. . .or . . .] draws distinctions based on the message a speaker conveys." *Id.* "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.*

The new provisions draw content-based distinctions along three distinct axes. First, the statutes criminalize communications based on their distressing effect on the listener. Second, with the introduction of the phrase "about a person," criminal liability now hinges on the subject matter of the communication. Third, where the legislature retained an exemption for labor picketing, it repeated a content-based distinction the Supreme Court has previously held unconstitutional. Any one of these suffices to require this Court to strictly scrutinize the provisions' justification. *Reed*,135 S. Ct. at 2227; *R.A.V.*, 505 U.S. at 382.

First, the statutes are content-based because they make determining whether communications are a crime depend on listeners' expected emotional reactions to the communications. "Listeners' reaction to speech is not a content-neutral basis

for regulation." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). This includes regulations that the State justifies by a "desire to prevent . . . psychological damage" to a communication's recipients. *Boos v. Barry*, 485 U.S. 312, 321 (1988).Where a restriction on communication depends on its effect on its audience, it is content-based. For example, the Supreme Court has invalidated as content-based a ban on displaying signs near foreign embassies that tend to bring the foreign government into "public odium" or "public disrepute," *id.* at 320-21, a regulation prohibiting the online transmission of offensive communications to minors so as to protect them from the "indecent" and "patently offensive," *Reno v. ACLU,* 521 U.S. at 877, and a regulation of sexually-oriented cable programming that focused on the impact the depictions had on viewers, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000).

Here, the new statutory provisions criminalize speech based on the likelihood the speech would be emotionally distressing. To determine if the communication amounts to a criminal act, the trier of fact must evaluate whether the communication is objectively frightening, alarming or otherwise distressing. Such a feature has led one federal court to find the more-carefully-drafted federal stalking statute content-based. *United States v. Cassidy*, 814 F. Supp. 2d 574, 584 (D. Md. 2011). Indeed, the State's brief before this Court extols the complainant's reaction to what Relerford said as "exactly" the kind of harm the new provisions were meant to prevent. (St. Br. 11-12)

The legislature drew a second content-based-line when it criminalized communications not only made "to" a person, but also those made "about" a person to third parties. The statutes are therefore content-based in the most literal sense. The provisions criminalize communications when they address the particular "subject matter" of a complainant. *Reed*, 135 S. Ct. at 2227; *compare People v. Minnis*, 2016 IL 119563, ¶ 34 (requirement that convicted sex offenders disclose internet identities to authorities "ma[de] no reference to, and the purpose of the provision has nothing to do with, the content of their speech.") To criminalize certain communication based on who they are "about" is the epitome of a facial content-based classification.

Third, by exempting a single class of speakers — those in *bona fide* labor disputes — from the statutes' reach, the legislature retained another content-based distinction. The Supreme Court has specifically held — twice — that when Illinois passes a ban on communications but enacts an exception for labor speech, that exception renders the prohibition content-based, and thus unconstitutional. *Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Despite these holdings, the Illinois legislature — while broadening the statute to criminalize communication thought to cause emotional distress — re-enacted a version of the same labor exemption that had twice led Illinois laws to be struck down.

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.

The criminalization of negligently distressing communications to or about a person is a vastly overinclusive means of reaching the legislature's asserted ends of preventing violent harm toward women. Under any measure of scrutiny, this Court should find the new provisions unconstitutional.

Because the new provisions make content-based distinctions, they may be upheld only if the State proves them "necessary to serve a compelling governmental interest and narrowly drawn to achieve that end." *People v. Jones,* 188 Ill. 2d 352, 358 (1999). Under this strict scrutiny, the State "bears the risk of uncertainty," and "ambiguous proof will not suffice." *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 799-800 (2011). At a minimum, to pass scrutiny, the legislature must use "means that are neither seriously underinclusive nor seriously overinclusive." *Entm't Merchants Ass'n,* 564 U.S. at 805."It is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 799, *quoting Playboy,* 529 U.S. at 818.

The State seeks intermediate scrutiny. (St. Br. 15-16) Under intermediate scrutiny, a statute should be upheld "only where the State establishes it advances important governmental interests unrelated to the suppression of free speech and does not substantially burden more speech than necessary to further those interests." *People v. Clark,* 2014 IL 115776, ¶ 19. Where an "independent judgment

of the facts" underlying the enactment, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989), leads this Court to conclude it criminalizes a wide range of innocent speech, the statute fails. *Melongo*, 2014 IL 114852,¶ 29.

A government interest in preventing homicide and protecting potential victims is undoubtedly compelling. A government action to target this interest by banning repeated negligently distressing communications is just as undoubtedly overinclusive and untailored: "The prospect of crime . . . by itself does not justify laws suppressing protected speech." *Free Speech Coalition*, 535 U.S. at 245. The examples described above are only a few of the myriad circumstances where communications cause emotional distress without the communication being a predicate to homicide, or to any other criminal offense for that matter. (See section (d)(3)-(5), above at pages 37-42, 45-47) By criminalizing distressing communications to prevent homicide, the legislature has "burn[ed] the house to roast the pig." *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (internal quotation omitted). The new provisions of the stalking and cyberstalking statutes therefore fail under any standard of scrutiny.

The legislative history shows that the new provisions' purpose was to prevent violent crime, specifically the homicide of women, by "proactively captur[ing] dangerous conduct before it escalates into violent crime." (St. Br. 12); Ill. Senate Transcript, 2009 Reg. Sess. No. 54, at 125. However, because the speculated crime "does not necessarily follow from the speech, but depends on some unquantified

potential for subsequent criminal acts" prohibiting negligently distressing communications to or about someone is not tailored to this interest. *Free Speech Coalition*, 535 U.S. at 250.

There is no necessary causal link between even communications that cause emotional distress and later violence. Only the most nonsensical political hyperbole would suggest that the distressing communications of the *NAACP* activist or the *Hustler* parodist were steps along the escalation to murder.

The legislature's abandonment of a "knowing" or "intentional" *mens rea* in favor of the negligence mental state of "knows or should know" further "severed the link between the. . .statute's means and its end." *Clark,* 2014 IL 115776, ¶ 23 (internal quotation omitted). The State's "escalation" theory posits that "stalkers," motivated by antipathy for their target, engage in campaigns of harassment that are likely to culminate in a violent crime. (St. Br.10-14) But the negligent acts the statutes newly criminalize — those where the speaker *should have known* that their communications would distress, but *did not actually know* — are by their very nature the product of inattention or mistake. Thus, they are a prelude to nothing, except perhaps more inattentive offense-giving.

The scant findings of the legislature fall far short of satisfying the State's burden. The substantive testimony on the new provisions amounts to a single paragraph of discussion in the Senate. It appears that Senator Hutchinson misspoke when she stated that "A recent U.S. Department of Justice study said that seventy-

six percent of female homicide victims were stalked first[.]" Ill. Senate Transcript, 2009 Reg. Sess. No. 54, at 125. The State has chosen not to offer this study to this Court. In context, the Senator appears to have been referring to a 1999 paper (or a later reference to that study), Judith M. McFarlane, et al., "Stalking and Intimate Partner Femicide," Homicide Studies, Vol. 3 No. 4, (Nov. 1999). That paper in fact reports that about 76% of female homicide victims *who were killed by their intimate partners* were "stalked" *by their intimate partners* in the prior year. *Id.* The study thus does not stand for the startling proposition the Senator cited. The study, based on surveys conducted in the mid- to late-1990s, did not understand "stalking" to have the meaning of the 2009 Illinois legislature's effort to redefine the term years later. Although little of the legislature's actual purpose was expressed, one thing is certain: it sought to "broaden the definition" of "stalking." 2009 Reg. Sess. No. 54, at 125. Moreover, where the study was completed years before Facebook and Twitter were even founded, that study plainly did not consider "stalking" to include negligently distressing social media postings about a person.

At most, the State has offered an out-of-date, imprecise statistical correlation between "stalking," somehow defined, and violence against women by their intimate partners. Mere evidence of "some correlation" between speech and a harm is not enough to criminalize speech. *See Entm't Merchants Ass'n*, 131 S. Ct. at 2739 (evidence of statistical correlation between violent video games and violence by children could not justify restriction on sale of games to minors); *Free Speech*

Coalition, 535 U.S. at 253 (finding, in holding ban on virtual child pornography overbroad, that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it"). Were evidence of a correlation between speech and criminality sufficient, celebratory depictions of crime or persuasive advocacy for law-breaking could each be prohibited. But the Supreme Court has long been clear that they may not. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (advocacy of even violent law-breaking is constitutionally protected); *Winters v. New York*, 333 U.S. 507, 508 (1948) (ban on distributing "stories of deeds of bloodshed, lust or crime" not justified by theory that they "incit[ed] violent and depraved crimes"); *Stevens*, 559 U.S. at 474 (ban on depictions on animal cruelty overbroad, even when limited to cruelty that was criminal in jurisdiction where video was produced). Legislation justified by a misunderstood suggestion of a correlation between negligently making certain communications and later engaging in intentional violent crimes fails just as clearly.

Further, mere "anecdotal evidence" cannot be the basis for a compelling justification. *Playboy*, 529 U.S. at 819. The State offers one such anecdotal account, where, in the State's description, "a California man impersonated a woman in various Internet chat rooms and posted her telephone number and address along with messages indicating that she fantasized about being raped." (St. Br. 11, *citing* Naomi Harlan Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 Mo. L. Rev. 125, 128-32 (2007).

To offer this example to justify the new provisions is misleading. Such abhorrent intentional conduct has long been criminalized in Illinois, and will continue to be so regardless of the outcome of this case. *See* 720 ILCS 5/12-7.3 (a-3), (a-5); 720 ILCS 5/12-7.5 (a-3), (a-5) (other provisions of stalking and cyberstalking statutes, each reaching acts intended to create a "reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint"). Indeed, the acts the State describes would likely be chargeable in Illinois under the far more severe crimes of attempt criminal sexual assault or solicitation of criminal sexual assault. *See, e.g.,* 720 ILCS 5/11-1.20 (West 2017) (criminal sexual assault); 720 ILCS 5/8-4(a) (attempt); 720 ILCS 5/8-1(a) (solicitation).

Where the State's example describes communications made with the intent to place another in fear, the example does nothing to explain, let alone prove, that it was necessary for Illinois to transition to a statutory regime that criminalizes the negligent, in addition to the knowing or intentional. And where the State's hypothetical describes specific, actual fears of a violent crime, it does nothing to explain, let alone prove, that it was necessary for Illinois to criminalize more diffuse harms like the mere prospect of emotional distress such as fear for safety unlinked to any violent act. These alterations — the diluted *mens rea* and expansively defined harm — are the core of the sweeping changes the legislature made and the State wielded against Relerford in this case.

A restriction on communications "cannot be justified if it could be avoided

by a more carefully drafted statute." *Reno v. ACLU*, 521 U.S. at 874. But nothing in the statutes' 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 than the sweeping ban on communications causing emotional distress.

The State's brief suggests what may be its actual interest: to relieve the State of its burden to prove a criminal *mens rea* like intent or knowledge in cases where the State's evidence of actual wrongful intent is weak. Thus, the State suggests, it really wants to pursue true threats or communications intended to harm, but finds it too difficult to do so. (St. Br. 10-11)

If, as the State writes, it is "difficult to prove that a defendant intended to place [his victim] in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint . . .when he posted a message on his Facebook page and his victim was not one of his Facebook 'friends'," that is because such conduct is an unusually roundabout away for someone who actually intends to cause fear to do so when a direct communication would suffice. (St. Br. 11) To criminalize many instances of hurtful postings about third parties online, even mere gossip the author never intended to get back to its subject, is a grossly disproportionate response to the State's difficulty in proving intent in a few marginal cases.

The United States Supreme Court condemned a like rationale as "turn[ing]

the First Amendment upside down." *Free Speech Coalition*, 535 U.S. at 254-55. In *Free Speech Coalition,* the government posited that a prohibition of virtual child pornography was justified, even though no actual children were exploited in the production of virtual child pornography, because prosecutors would find it difficult in some cases to prove that images of actual children were not virtual. *Id.* The Supreme Court rejected the argument, finding that it would amount to a rule that "protected speech may be banned as a means to ban unprotected speech." *Id.* at 255. The court found, "The Government may not suppress lawful speech as the means to suppress unlawful speech."*Id.*

The same reasoning should lead this Court to hold the new provisions' sweeping restrictions unconstitutional. The State may not criminalize distressing discourse just to make cases of actual stalking or cyberstalking easier for prosecutors to prove. "The Constitution requires the reverse."*Id.* Because the new provisions are so poorly tailored and sweep in so much protected speech, this Court should hold them unconstitutional.

g) The legislature — and the public — have ample alternative ways to respond to the behavior the new provisions criminalize.

The Supreme Court has been clear: where a statute's purpose "is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Playboy*, 529 U.S. at 813, *quoting Cohen*, 403 U.S. at 21. The way the Constitution directs us to respond to the

outrageous or contemptible message is with public "outrage and contempt," not the threat of a felony prosecution. *Alvarez,* 132 S. Ct. at 2550. The Constitution's response that one simply look away is especially apt for online communications of the kind at issue under the cyberstalking statute and throughout this case. "Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" *Reno v. ACLU*, 521 U.S. at 869 (internal quote omitted).

Additionally, alternative measures are available to the legislature that would satisfy the State's interest without sweeping in so much protected communication. "If a less restrictive alternative would serve the [State's] purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813. The legislative history offers no explanation why it would not suffice, for example, to require a restraining order before rendering communications to or about someone criminal; an injunction, at least, would provide a speaker some notice of what he could or could not say about whom. And nothing in the legislative history explains why adoption of narrower stalking statutes, such as the federal statute or the Iowa statute that the State's brief discusses would not fulfill its interest. (St. Br.12-13)

Because the legislature's chosen means of criminalizing emotionally distressing communications was a vastly overinclusive way to reach its ends of preventing violent crime, this Court should find that the new provisions fail under any method of scrutiny and that the unconstitutional applications of the new provisions far exceed their legitimate sweep.

h) This Court should sever the unconstitutional provisions from the statutes.

This Court may strike the phrase "communicates to or about a person" from the statutes' definitions of "course of conduct," as that is the provision which most directly offends the First Amendment. *See People v. Sanders*, 182 Ill. 2d 524, 534 (1998) (excising phrase "intent to dissuade" from Hunter Interference Prohibition Act where provision offended First Amendment); *see also, generally*, *People v. Warren*, 173 Ill. 2d 348, 371 (1996) (describing general rules on severability); 5 ILCS 70/1.31 (West 2017). Where an allegation of a communication underlay each charge of the indictment against Relerford, excising the phrase "to or about a person" is sufficient to resolve the case.

This Court should therefore affirm the Appellate Court's vacatur of Relerford's convictions, find the new stalking provisions unconstitutional on their face, and strike the unconstitutional phrases from the statutes.

II. The Appellate Court correctly concluded that the new provisions of the stalking and cyberstalking statutes violate due process where they sweep in innocent conduct.

This Court has a deep tradition of invalidating statutes that, because of the legislature's failure to set a properly culpable mental state, reach so far as to "potentially criminalize[] innocent conduct." *People v. Carpenter*, 228 Ill.2d 250, 269 (2008).

In a mislabeled effort to target actual stalking and cyberstalking, in 2009 the legislature enacted general prohibitions on conduct that knowingly or negligently would cause emotional distress. The sweeping new provisions, by allowing a conviction for almost any repeated conduct that the actor "knows or should know" would emotionally distress, do not "represent a reasonable method of preventing the targeted conduct" of stalking that escalates to violence, and thus violate due process. *People v. Madrigal*, 241 Ill. 2d 463, 468 (2011).

With the new provisions, the legislature discarded the key statutory bases that led this Court to uphold the original stalking statute in *People v. Bailey*, 167 Ill. 2d 210, 225 (1995). Especially in light of the U.S. Supreme Court's recent finding that a narrower, but similarly structured federal statute failed "to separate wrongful . . . from otherwise innocent conduct," this Court should find that the new provisions criminalize innocent conduct and are therefore invalid. *United States v. Elonis*, 575 U.S. ___, 135 S. Ct. 2001, 2010-11 (2015).

The State does not argue that questions concerning the new provisions' constitutionality under due process should not be reached. Instead, the State argues

only that broadening the statutes was a rational way to target conduct leading to violence and that the new provisions do not reach a "significant" amount of innocent conduct unrelated to this purpose. (St. Br. 8-13) It also argues that the recent *Elonis* decision does not speak to the issues before this Court. (St. Br. 13-14)

As in Issue I, this challenge to the statutes' constitutionality is properly raised for the first time on appeal, *Carpenter*, 228 Ill. 2d at 263, and is reviewed *de novo*. *Madrigal*, 241 Ill. 2d at 466.

a) This Court's clear precedent holds that a statute with a mental state so diluted as to sweep in innocent conduct is facially unconstitutional.

Due process limits the legislature's otherwise broad discretion to fashion criminal offenses. *Madrigal*, 241 Ill. 2d at 466; U.S. Const., amend. XIV; Ill. Const. 1970, art 1 §2. 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 without requiring a culpable mental state beyond mere knowledge." *Madrigal*, 241 Ill. 2d at 467; *see also Carpenter*, 228 Ill. 2d at 267; *People v. Wright*, 194 Ill. 2d 1, 28 (2000); *People v. Zaremba*, 158 Ill. 2d 36, 42 (1994); *People v. Wick*, 107 Ill. 2d 62, 66 (1985). In other words, "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952).

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." *Zaremba*, 158 Ill. 2d at 39. 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).

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. This Court found that by failing to require a culpable mental state beyond mere knowledge, the statute reached innocent conduct unrelated to its purpose, such as "using the internet to look up how their neighbor did in the Chicago Marathon" or "a husband who calls a repair shop for his wife, without her 'prior express permission,' to see if her car is ready." *Id.* at 470-71, 472. Because the statute applied to these scenarios, the law was not a rational way of addressing the problem of 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. In light 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 Wright*, 194 Ill. 2d at 28 (invalidating statute that criminalized knowing failure to comply with vehicle title record-keeping laws punished innocent conduct unrelated to its purpose of establishing a system to prevent or reduce the transfer or sale of stolen vehicles); *Zaremba*, 158 Ill. 2d at 38-42 (invalidating theft statute that criminalized knowingly obtaining or exerting control over stolen property in law enforcement custody such as an evidence technician's act of taking for safekeeping proceeds of a theft from the police officer who recovered it); *Wick*, 107 Ill. 2d at 66 (invalidating aggravated arson statute that criminalized knowingly damaging a building by fire where injury to a fireman or policeman results because it could criminalize innocent conduct, such as a farmer's act of demolishing his deteriorated barn if a fireman standing by were injured at the scene).

This Court has appropriately rejected State efforts to abandon this line of authority. *Madrigal*, 241 Ill. 2d at 477, *citing among other cases, Staples v. United States*, 511 U.S. 600, 610 (1994). The State does not repeat that argument here.

With statutes as broad as the new stalking provisions, there are additional due process concerns. 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 comprehensive enforcement is inevitably piecemeal, leaving it to arbitrary enforcement 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 unclear.

b) Due to the failure to require a culpable mental state, the new provisions of the stalking and cyberstalking statutes subject wholly innocent conduct to criminal penalty.

A mental state of "mere knowledge" often fails to mark a proper line between innocent and culpable conduct. *Madrigal*, 241 Ill. 2d at 467. The new stalking provisions include a mental state so diluted as to authorize a felony conviction — not just when an actor knows his conduct will distress — but when he is negligent as to whether his conduct would distress a reasonable person. (See Argument, I, section d, above).

Many of the troubling features of the new provisions' language are discussed in Argument I of this brief. (See Issue I, section (d), above at pp. 28-47) That analysis demonstrates how the provisions make felons out of whoever undertakes any combination of two communications or other acts that knowingly or negligently would distress a reasonable person. A statute that allows felony conviction for any combination of acts directed at a person, one or both of which negligently cause

a person emotional distress, is no more constitutional than a statute that allows for conviction for communications that cause emotional distress. Thus, the Appellate Court was correct to hold that the new provisions of the stalking and cyberstalking statutes violate due process.

The legislature did not limit the new statutes' reach to the "communicat[ions] to or about" or "threat" provisions that most immediately recall First Amendment rights. Instead, the legislature swept in much of our noncommunicative conduct as well. The new provisions' definition of the kind of negligently distressing behaviors that can result in a felony conviction is expressly unlimited, criminalizing conduct ".. including but not limited to" that enumerated in the statutes. 720 ILCS 5/12-7.3 (c)(1); 720 ILCS 5/12-7.5 (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.*

As previously discussed, the asserted purpose behind the new provisions is to broaden the definition of each offense to reach conduct that would escalate to homicide. *See* Ill. Senate Transcript, 2009 Reg. Sess. No. 54, at 125. (St. Br. 10) By broadly criminalizing non-violent conduct without demanding a knowing or intentional mental state as to the distress the conduct might cause, however, the new provisions criminalize a wide range of ordinary, innocent conduct. Much, if not most, of this is conduct entirely unrelated to the statutes' purpose. (See Issue

I, sections d, f, above). Accordingly, the statutes cannot survive the rational basis test, much less a higher degree of scrutiny.

The new provisions allow conviction for conduct that distresses another when the actor's conduct is motivated by wholly legitimate purposes, or even when the distress is inadvertent, merely the result of the unreasonable failure to correctly anticipate another's emotional reaction to what the actor does. The failure of the stalking and cyberstalking statutes to require a culpable mental state thus permits the criminalization of wholly innocent conduct bearing no relationship to the statutory purpose of preventing homicides.

For example, a prosecutorial investigator who twice tries to interview a sexual assault complainant after she has communicated a desire not to press criminal charges is caught by the new provisions' language; the investigator should know that a reasonable person in the complainant's circumstances would be distressed by the repeated efforts to communicate about a painful subject. The same would hold true for a parent who followed and surveilled her teenage daughter to discover if she was using drugs. The parent knows, or at least should know, that the teenager would be alarmed and distressed by the conduct.

The State notes that the legislature intended to make it easier to prosecute actual stalking behavior before it escalates into violence. (St. Br. 12) But that is only a small part of what the statutes do. Did the legislature seriously intend to make it a felony if a reporter who "observe[d]" an elected official in the act of receiving a bribe "follow[ed]" him down the street to get a story? If a paparazzo

followed the official to catch an embarrassing photo? If the official's spouse did it to catch the official in an affair? The conduct of the investigators, the parents, the reporter, and the spouse, though they should know it is likely to distress, is innocent. Criminalizing such conduct is in no way "directly related to the legislature's purpose in responding to new forms of stalking," (St. Br. 13), let alone a rational way of preventing behavior that would escalate into a future homicide.

These examples concern the conduct the statutes specifically mention, but where the statute is written to allow *any* conduct to qualify, and to allow a conviction based on mere negligence, the potential prosecutions of innocent actors proliferate. It would appear than every instance that would support an emotional distress tort could also be the basis for a felony stalking charge (and without even requiring proof of actual intent to distress, or "outrageous" conduct). Recent case law provides one example. *See Schweihs v. Chase Home Finance,* 2016 IL 120041, ¶¶ 26-61 (discussing scope of negligent infliction of emotional distress and intentional infliction of emotional distress torts). The *Schweihs* plaintiff's home was in foreclosure proceedings. Based upon an alleged negligently mistaken belief that the home was vacant and needed to be winterized, employees of a property management company hired by the bank broke into the home and surprised the plaintiff inside. *Id.* at ¶¶ 5-15. The incident led her to suffer anxiety and fear that she may be attacked in her home. *Id.* at ¶ 16. While this Court denied the plaintiff's civil claims of intentional and negligent infliction of emotional distress, *id.* at ¶¶

26-61, the conduct alleged would amount to a predicate act of felony stalking under the challenged statute. Entering the home after failing to verify that it was unoccupied was conduct the workers knew or should have known would likely distress an occupant. And, even if not "interference with . . . property" of the plaintiff, the surprise entry into her home would certainly be captured by the various catch-all terms in the redefined "course of conduct" in 720 ILCS 5/12-7.3(c).

Each of these hypothetical examples, like those considered in *Madrigal*, *Carpenter*, *Wright*, *Zaremba*, and *Wick*, demonstrate that new provisions of the stalking and cyberstalking statutes sweep much too broadly by criminalizing innocent as well as criminal conduct. Without a culpable intent requirement, the statutes do not bear a reasonable, much less a narrowly tailored, relationship to the purpose of preventing homicides and are thus "not reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The new provisions are thus not a "rational way of addressing the problem" of stalking escalating into homicide and are therefore unconstitutional. *Madrigal*, 241 Ill. 2d at 473.

The State does not offer any example of an analogous statute that this Court has upheld against a claim that it sweeps in innocent conduct. (St. Br. 8-14) Nor does the State offer a case from another jurisdiction that has found a stalking statute so broadly written to comport with due process. (St. Br. 8-14)

Instead, the State asks this Court to consider the facts underlying a sufficiency-of-the-evidence appeal of a conviction under Iowa's misdemeanor stalking

statute, *State v. Limbrecht*, 600 N.W.2d 316 (Iowa 1999). (St. Br. 12-13) The analogy is unpersuasive.

Contrary to the State's suggestion that diluting the mental state of stalking was necessary to capture conduct like that *Limbrecht*, it is obvious that the *Limbrecht* defendant's conduct would be captured by requiring actual knowledge that a complainant feared a violent crime. Although the Iowa statute might allow conviction under some circumstances where a defendant "would have known [his conduct would] place [a complainant] in reasonable fear of bodily jeopardy," the *Limbrecht* decision did not rely at all on that possibility. 600 N.W.2d at 320. In fact, the Iowa Supreme Court found that the defendant had actual knowledge, stating his threatening acts were undertaken "with the knowledge that his conduct would cause fear of bodily injury." *Id.*

Limbrecht's facts left no other conclusion. The defendant, convicted of sexual assault, was an inmate at the prison where the complainant worked. *Id.* at 317. While imprisoned, the defendant, among other acts, sent anonymous letters to the complainant and prison administrators describing sexual encounters with the complainant. *Id.* After release, the defendant 1) sent the complainant's husband a card and a letter graphically asserting she had sexual relations with the defendant at the prison, 2) on five separate occasions in one week, drove his car to the complainant's isolated rural home with an unlisted address, 3) on two occasions that week, ended up in a car pursuit as the victim's husband tried to drive him

away from the home, including, 4) one incident where the defendant postured as if to enter a fistfight with the husband. *Id.* at 317-18. Contrary to the State's suggestion, the later incidents of driving past the complainant's home were the basis of the misdemeanor charge, not the letters. *Id.* at 318.

Indeed, the conduct at issue in *Limbrecht* is just the kind of knowingly frightening conduct that is captured by a different subsection of Illinois' stalking statute, the constitutionality of which is not in dispute in this case. Subsection (a-3)(2) makes it a stalking felony to

> knowingly and without lawful justification, on at least 2 separate occasions, follow[] another person or place[] the person under surveillance [when it] places that person in reasonable apprehension of immediate or future bodily harm[.]"

720 ILCS 5/12-7.3(a-3)(2) (West 2017).

Thus, if the legislature in fact enacted the new provisions of subsection (a) to encompass conduct like that in *Limbrecht,* it missed the mark wildly. Because that conduct was and remains criminalized under subsection (a-3), adding subsection (a) was superfluous to capture the conduct it was actually targeting, while it swept in the innocent conduct of the investigator, journalist, parent, or spouse described above.

Second, the fact that the *Limbrecht* defendant was convicted under Iowa's far narrower statute is compelling proof that Illinois new provisions unnecessarily sweep too far. The State's assertion that Iowa's stalking statute "underwent similar amendments to Illinois" risks misleading this Court. (St. Br. 12) Unlike Illinois'

new provisions, Iowa does not prohibit mere communications or other undefined conduct negligently causing emotional distress, but specifically requires the defendant either repeatedly threaten the complainant or follow the complainant. Iowa Code Ann. § 708.11 (1)(b) (West 2017). And, instead of the amorphous fear for safety or other emotional distress that typifies the new Illinois provisions, the Iowa statute requires proof that the "course of conduct" actually "induce. . . fear . . . of bodily injury . . . or . . . death." Iowa Code § 708.11(2).

Illinois' legislature did not face a binary choice between the original stalking statute and its chosen general prohibition on knowingly or negligently causing emotional distress. It had a range of other statutes to model its provision on, such as Iowa's or the federal statute described in Issue I. Instead, it chose the broad language that sweeps in vast amounts of ordinary innocent conduct. To paraphrase this Court in *Carpenter*, "if the intent of the legislature *was* to punish" conduct like the *Limbrecht* defendant's, "it would seem that the rational approach might have been to punish . . . those who actually did that." 228 Ill. 2d at 273.

Finally, the State's examples from the Iowa case and elsewhere rely on a misunderstanding of this Court's due process precedent. Offering anecdotal examples about the kind of conduct the legislature hoped to reach in broadening a statute does not establish that a statute avoids sweeping too far. Many times when this Court had found a statute to violate due process, it has acknowledged that the statute encompasses some activity that could legitimately be criminalized. *See, e.g., Madrigal*, 241 Ill. 2d at 473 (acknowledging it to be "true" that identity

theft statute lacking criminal mental state would more effectively deter actual identity theft). Instead, the question this Court has asked is whether in reaching "culpable conduct" it could legitimately criminalize, the legislature has unreasonably reached too far by "punishing innocent [conduct] as well." *Wick*, 107 Ill. 2d at 66. Criminalizing knowingly or negligently distressing conduct in an effort to target actual stalking behaviors did just that.

c) *Elonis* strongly supports finding the new provisions invalid.

The Appellate Court properly looked to *Elonis* for guidance in this case. *People v. Relerford,* 2016 IL App (1st) 132531, ¶¶ 20-26, *discussing* 135 S. Ct. at 2007-11. This Court too, should find *Elonis* persuasive. In *Elonis*, the U.S. Supreme Court addressed the required mental state for a federal threat statute similar to Illinois' new stalking provisions. 135 S. Ct. at 2007-12; 18 U.S.C. § 875 (c). *Elonis* found that a statute unjustly sweeps in innocent conduct if it allows conviction of one who intentionally made communications but was negligent as to whether the recipient would interpret them to include a threat. 135 S. Ct. at 2008-12. In reaching this conclusion, *Elonis* recognized that precedent required interpreting statutes, when possible, to avoid criminalizing a "broad range of apparently innocent conduct' . . . [that] 'swept in individuals who had no knowledge of the facts that made their conduct blameworthy.'" *Id.*, at 2009, *quoting Liparota v. United States*, 471 U.S. 419, 426 (1985).

To be sure, as the State notes, *Elonis* did not make an express due process holding. (St. Br. 14) The statutory silence concerning the mental state in *Elonis* allowed the Supreme Court to read in a knowingly *mens rea* as to how the recipient would interpret the purported threat, thus separating culpable from innocent conduct. *Compare Carpenter*, 228 Ill. 2d at 270 (this Court will not substitute new *mens rea* into statute).

But *Elonis* did conclude that a mental state of mere negligence as to how a communication would be interpreted failed to draw a sufficient line. It did so using language with clear echoes in this Court's precedent, discussing the minimal mental state necessary to separate "legal innocence from wrongful conduct," declaring it "would fail to protect the innocent actor," and noting that "a 'reasonable person' standard is . . . is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." 135 S. Ct. 2010-11 (internal quotations omitted) (emphasis in original); *compare, e.g., Madrigal*, 241 Ill. 2d at 473 (describing "requirement that statutes contain a culpable mental state to avoid punishing wholly innocent conduct"); *Carpenter*, 228 Ill.2d at 269 (statute "potentially criminalizes innocent conduct"); *Wright*, 194 Ill. 2d at 18 (statute "could be used to punish innocent behavior").

Because the new stalking and cyberstalking provisions allow a conviction based on a negligence mental state — how one "should know" a "reasonable person" would emotionally react — under *Elonis,* they sweep in innocent conduct. 135

S. Ct. at 2008-12. Acts, no less than gestures, may be misinterpreted in a way that creates emotional distress that the actor never intended. As happened in *Elonis,* the new stalking provisions empower Illinois prosecutors to point to the defendant and assert to the trier of fact, "it doesn't matter what he thinks." *Id.* at 2008. A statute which allows *that* cannot be squared with this Court's due process precedent.

The legislature sought to combat the fear of stalking, but enacted a statute where the only way to avoid criminality is to make cautious, reasonable guesses as to how others might react to our conduct, lest we unintendedly cause emotional distress. *Elonis* shows how a framework that allows a felony conviction based on an inaccurate guess as to others' emotional reactions fails to comport with basic guarantees of criminal law.

d) This Court's evaluation of the predecessor stalking statute supports the conclusion that the new broadened provisions violate due process.

This Court has been here before. In *People v. Bailey*, this Court addressed the far narrower initial stalking statute, enacted in 1992, and found that it needed an additional narrowing construction to avoid sweeping in innocent conduct. 167 Ill. 2d 210, 225-26 (1995). The 1992 statute read:

> (a) A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions:
>
> (1) follows the person, other than within the residence of the defendant;

> (2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.

720 ILCS 5/12-7.3 (a) (West 1992).

This Court carefully examined the multiple criminal *mens rea* provisions to ensure the statute did not sweep in innocent conduct. 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 of 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 confidently 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. The 1995 legislature was concerned that, as written — even with its requirement of an intentional threat and an assault-like apprehension of violence — the statute still swept in much ordinary labor protest activity. It added 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; *but see Carpenter*, 228 Ill. 2d at 272 (suggesting, *in dicta*, that the additional element in *Bailey* may not have been necessary where the statute already required criminal intent).

How far we have come. In the two decades since *Bailey,* the legislature, with no discussion of *Bailey* in the legislative history, has amended away every constraint that led this Court to find the predecessor stalking statute constitutional. There is no longer any requirement of a threat, or of an intent 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, even regardless of whether it was undertaken with lawful authority. All the State has to do is show that the accused's conduct knowingly or negligently would cause emotional distress, such as fear for safety.

This Court should find it telling that the State cites *Bailey* only in passing, without acknowledging *Bailey*'s detailed discussion of the constitutionally required *mens rea.* (St. Br. 10) Where this Court found the constitutionality of the original stalking statute was a close call, perhaps demanding an additional element be read in, *Bailey* supports finding the new provisions to violate due process.

Therefore the Court should affirm the Appellate Court's holding that subsection (a) of both the stalking and cyberstalking statutes violates due process and affirm the vacatur of each of Relerford's convictions.

CONCLUSION

For the foregoing reasons, Walter Relerford, Defendant-Appellee, respectfully requests that this Court affirm the Appellate Court's vacatur of his convictions and sever the phrase "communicates to or about" from the stalking and cyberstalking statutes under cross-appeal Issue I and affirm the Appellate Court's vacatur of his convictions and its holding that subsection (a) of each statute is unconstitutional under Issue II. If this Court reverses the Appellate Court's decision, it should remand to allow the Appellate Court to consider Relerford's unresolved trial and sentencing issues.

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 19,954 words.

/s/Jonathan Yeasting
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APPENDIX TO THE BRIEF

2012 Illinois stalking statute.

720 ILCS 5/12-7.3 (2012). 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.

(a-3) A person commits stalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and:

(1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint and the threat is directed towards that person or a family member of that person; or

(2) places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint; or

(3) places that person in reasonable apprehension that a family member will receive immediate or future bodily harm, sexual assault, confinement, or restraint.

(a-5) A person commits stalking when he or she has previously been convicted of stalking another person and knowingly and without lawful justification on one occasion:

(1) follows that same person or places that same person under surveillance; and

(2) transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint; and

(3) the threat is directed towards that person or a family member of that person.

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

for stalking 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.
(2) "Electronic communication" means any transfer of signs, signals, writings, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. "Electronic communication" includes transmissions by a computer through the Internet to another computer.

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

(4) "Family member" means a parent, grandparent, brother, sister, or child, whether by whole blood, half-blood, or adoption and includes a step-grandparent, step-parent, step-brother, step-sister or step-child. "Family member" also means any other person who regularly resides in the household, or who, within the prior 6 months, regularly resided in the household.

(5) "Follows another person" means (i) to move in relative proximity to a person as that person moves from place to place or (ii) to remain in relative proximity to a person who is stationary or whose movements are confined to a small area. "Follows another person" does not include a following within the residence of the defendant.

(6) "Non-consensual contact" means any contact with the victim that is initiated or continued without the victim's consent, including but not limited to being in the physical presence of the victim; appearing within the sight of the victim; approaching or confronting the victim in a public place or on private property; appearing at the workplace or residence of the victim; entering onto or remaining on property owned, leased, or occupied by the victim; or placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

(7) "Places a person under surveillance" means: (1) remaining present outside the person's school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant; or (2) placing an electronic tracking device on the person or the person's property.

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

(9) "Transmits a threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct.

(d) Exemptions.

(1) This Section does not apply to any individual or organization (i) monitoring or attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements, or (ii) picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute, including any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance, and pension or retirement provisions, the making or maintaining of collective bargaining agreements, and the terms to be included in those agreements.

(2) This Section does not apply to an exercise of the right to free speech or assembly that is otherwise lawful.

(3) Telecommunications carriers, commercial mobile service providers, and providers of information services, including, but not limited to, Internet service providers and hosting service providers, are not liable under this Section, except for willful and wanton misconduct, by virtue of the transmission, storage, or caching of electronic communications or messages of others or by virtue of the provision of other related telecommunications, commercial mobile services, or information services used by others in violation of this Section.

(d-5) The incarceration of a person in a penal institution who commits the course of conduct or transmits a threat is not a bar to prosecution under this Section.

720 ILCS 5/12-7.3 (2012); P.A. 96-686 (eff. Jan 1, 2010).

2008 Illinois stalking statute.

720 ILCS 5/12-7.3 (2008). Stalking.

(a) A person commits stalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions follows another person or places the person under surveillance or any combination thereof and:

(1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint and the threat is directed towards that person or a family member of that person; or

(2) places that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement or restraint; or

(3) places that person in reasonable apprehension that a family member will receive immediate or future bodily harm, sexual assault, confinement, or restraint.

(a-5) A person commits stalking when he or she has previously been convicted of stalking another person and knowingly and without lawful justification on one occasion:

(1) follows that same person or places that same person under surveillance; and

(2) transmits a threat of immediate or future bodily harm, sexual assault, confinement or restraint; and

(3) the threat is directed towards that person or a family member of that person.

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

(b-5) The incarceration of a person in a penal institution who transmits a threat is not a bar to prosecution under this Section.

(c) Exemption. This Section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute, or any exercise of the right of free speech or assembly that is otherwise

lawful.

(d) For the purpose of this Section, a defendant "places a person under surveillance" by: (1) remaining present outside the person's school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant; or (2) placing an electronic tracking device on the person or the person's property.

(e) For the purpose of this Section, "follows another person" means (i) to move in relative proximity to a person as that person moves from place to place or (ii) to remain in relative proximity to a person who is stationary or whose movements are confined to a small area. "Follows another person" does not include a following within the residence of the defendant.

(f) For the purposes of this Section and Section 12-7.4, "bona fide labor dispute" means any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance, and pension or retirement provisions, the making or maintaining of collective bargaining agreements, and the terms to be included in those agreements.

(g) For the purposes of this Section, "transmits a threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct.

(h) For the purposes of this Section, "family member" means a parent, grandparent, brother, sister, or child, whether by whole blood, half-blood, or adoption and includes a step-grandparent, step-parent, step-brother, step-sister or step-child. "Family member" also means any other person who regularly resides in the household, or who, within the prior 6 months, regularly resided in the household.

720 ILCS 5/12-7.3 (2008).

1992 Illinois stalking statute.

720 ILCS 5/12-7.3 (1992). Stalking.

(a) A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions:

(1) follows the person, other than within the residence of the defendant;

(2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.

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

(c) Exemption. This Section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute.

720 ILCS 5/12-7.3 (1992).

2012 Illinois cyberstalking statute.

720 ILCS 5/12-7.5 (2012). Cyberstalking.

(a) A person commits cyberstalking when he or she engages in a course of conduct using electronic communication directed at a specific person, and he or she knows or should know that would cause a reasonable person to:

(1) fear for his or her safety or the safety of a third person; or

(2) suffer other emotional distress.

(a-3) A person commits cyberstalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions, harasses another person through the use of electronic communication and:

(1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement, or restraint and the threat is directed towards that person or a family member of that person; or

(2) places that person or a family member of that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; or

(3) at any time knowingly solicits the commission of an act by any person which would be a violation of this Code directed towards that person or a family member of that person.

(a-5) A person commits cyberstalking when he or she, knowingly and without lawful justification, creates and maintains an Internet website or webpage which is accessible to one or more third parties for a period of at least 24 hours, and which contains statements harassing another person and:

(1) which communicates a threat of immediate or future bodily harm, sexual assault, confinement, or restraint, where the threat is directed towards that person or a family member of that person, or

(2) which places that person or a family member of that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint, or

(3) which knowingly solicits the commission of an act by any person which would be a violation of this Code directed towards that person or a family member of that person.

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

(c) 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. The incarceration in a penal institution of a person who commits the course of conduct is not a bar to prosecution under this Section.

(2) "Electronic communication" means any transfer of signs, signals, writings, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. "Electronic communication" includes transmissions through an electronic device including, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail.

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

(4) "Harass" means to engage in a knowing and willful course of conduct directed at a specific person that alarms, torments, or terrorizes that person.

(5) "Non-consensual contact" means any contact with the victim that is initiated or continued without the victim's consent, including but not limited to being in the physical presence of the victim; appearing within the sight of the victim; approaching or confronting the victim in a public place or on private property; appearing at the workplace or residence of the victim; entering onto or remaining on property owned, leased, or occupied by the victim; or placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

(6) "Reasonable person" means a person in the victim's circumstances, with the victim's knowledge of the defendant and the defendant's prior acts.

(7) "Third party" means any person other than the person violating these provisions and the person or persons towards whom the violator's actions are directed.

(d) Telecommunications carriers, commercial mobile service providers, and providers of information services, including, but not limited to, Internet service providers and hosting service providers, are not liable under this Section, except for willful and wanton misconduct, by virtue of the transmission, storage, or caching of electronic communications or messages of others or by virtue of the provision of other related telecommunications, commercial mobile services, or information services used by others in violation of this Section.

(e) A defendant who directed the actions of a third party to violate this Section, under the principles of accountability set forth in Article 5 of this Code, is guilty of violating this Section as if the same had been personally done by the defendant, without regard to the mental state of the third party acting at the direction of the defendant.

720 ILCS 5/12-7.5 (2012) (eff. Jan 1, 2010).

2001 Illinois cyberstalking statute.

720 ILCS 5/12-7.5 (2001). Cyberstalking.

(a) A person commits cyberstalking when he or she, knowingly and without lawful justification, on at least 2 separate occasions, harasses another person through the use of electronic communication and:

(1) at any time transmits a threat of immediate or future bodily harm, sexual assault, confinement, or restraint and the threat is directed towards that person or a family member of that person, or

(2) places that person or a family member of that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint

(b) As used in this Section:

"Harass" means to engage in a knowing and willful course of conduct directed at a specific person that alarms, torments, or terrorizes that person.

"Electronic communication" means any transfer of signs, signals, writings, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electronmagnetic, photoelectric, or photo-optical system. "Electronic communication" includes transmissions by a computer through the Internet to another computer.

(c) Sentence. Cyberstalking is a Class 4 felony. A second or subsequent conviction for cyberstalking is a Class 3 felony.

720 ILCS 5/12-7.5 (2001).

Federal stalking statute.

§ 2261A. Stalking.

Whoever-
(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--
(A) places that person in reasonable fear of the death of, or serious bodily injury to--
(i) that person;
(ii) an immediate family member (as defined in section 115) of that person; or
(iii) a spouse or intimate partner of that person; or
(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or
(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that--
(A) places that person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or
(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) of this title.

18 U.S.C.A. § 2261A (West 2017).

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

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602;

Mr. Walter Relerford, 1510 S. Central Park Ave, Floor 1, Chicago, IL 60623

Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on March 14, 2017. On that same date, we personally delivered three copies to the Attorney General of Illinois, personally delivered three copies to opposing counsel, and mailed one copy to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

/s/Alicia Corona
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