No. 123989

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

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

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
9/27/2019 1:56 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

REPLY BRIEF FOR DEFENDANT-APPELLANT

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

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

The State does not argue that the "threatens" provision that the legislature actually enacted complies with the First Amendment. Because that statute's plain language criminalizes threatening to boycott as equally as threatening to kill, it sweeps far beyond what the constitution allows. (Def. Br. 15-24)

Instead, the State asks this Court to accept the implausible position that the same legislature that intended to criminalize *all* distressing communications also simultaneously intended, *sub silentio,* that one particular type of communications – those that "threaten" – would only be criminalized when the threat was one of unlawful violence. (St. Br. 10) Elsewhere, the State tells this Court, when the legislature sought to "broaden" the stalking statute, it actually meant to retain the specific narrower definition of "threat" in the predecessor stalking statute. (St. Br. 15)

The State's efforts to rewrite the statute are implausible. (See Def. Issue III, Def. Br.50-54) Indeed, as this case was in briefing, the Appellate Court rejected similar efforts at circumlocution to hold the "threatens" provision unconstitutional on its face for much the same reasons that Ashley has offered this Court. *People v. Morocho,* 2019 IL App (1st) 153232.

Rather than defend the statute the legislature actually enacted, the State asks this Court to rewrite the "threatens" provision to add in the element that

the threat be a threat of unlawful violence, so as to shoehorn it into the "true threats" exception. However, the statute's plain language, history, and purpose all direct the conclusion that a narrow definition that limits "threatens" to threats of unlawful violence is not what the legislature intended, but what the legislature rejected. (Def. Br. 50-54)

The task of writing constitutionally permissible laws belongs to legislators in the first place, not judges on review. Thus, the canon of constitutional avoidance cannot be employed to redraft legislation into a form the legislature did not enact and did not intend. *United States v. Stevens*, 559 U.S. 460, 481 (2010). For a court to "draw[] one or more lines between categories of speech covered by an overly broad statute, when [legislators have] sent inconsistent signals as to where the new line or lines should be drawn" is a "serious invasion of the legislative domain." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995). Instead, the canon can be applied only where a statute is "readily susceptible" to the saving interpretation, and "only when ambiguity exists" in the term at issue. *People v. Relerford,* 2017 IL 121094, ¶60; *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019).

Ashley and the State agree that under the "true threats" exception, the government can prohibit only those threats that "communicate a serious expression of an intent to commit an act of unlawful violence." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The State's posits that "threatens" should be construed to mean only threats to commit unlawful violence. But, the plain meaning of "threatens" includes threatening to boycott, to foreclose, or to divorce just as naturally as it reaches threatening to commit an unlawful violent act. *See Morocho,* 2019 IL App

(1st) 153232, ¶¶39-48, *Seals v. McBee*, 898 F.3d 587, 598 (5th Cir. 2018) (each interpreting plain term "threaten"). Because the legislature said what it meant when it chose the bare term "threatens," there is no ambiguity for this Court to resolve.

The State, like Ashley, reviews dictionary definitions of "threaten" and "threat." (St. Br. 11; Def. Br. 20) Ashley's brief followed the Fifth Circuit in using the Oxford Dictionary to define "threat" as a "statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done." *Seals v. McBee*, 898 F.3d 587, 595 (5th Cir. 2018). (Def. Br. 20) The State cites Merriam-Webster to define a threat as "an expression of an intention to inflict evil, injury, or damage, and a similar Black's Law Dictionary of "threat" as a "communicated intent to inflict harm or loss on another or on another's property." (St. Br. 11)

None of these definitions limits the harm to harm by physical violence. Instead, they establish that the statute's plain reach sweeps far beyond the "true threats" exception. To read these definitions as limited to threats of violence entails the absurdity that when we speak of an activist who *threatens* to boycott, a bank that *threatens* to foreclose, or a spouse who *threatens* to divorce, we are using the word in some secret or improper sense, and not in its "plain or ordinary meaning." *Wingert v. Hradisky*, 2019 IL 123201, ¶43. The State's implication that "injury," "harm," "damage," and so on, are always the result of unlawful violence is false. For example, to threaten to boycott is to express intent to inflict *economic* injury, harm, or damage, and to threaten to divorce portends *emotional* injury, harm, or damage. *See Morocho,* ¶42 (explaining how boycott example is reached by statute's

plain words). Indeed, this Court's precedent routinely uses phrases like "emotional injuries," *Cochran v. Securitas Sec. Services USA, Inc.*,2017 IL 121200, ¶19, "financial harm," *In re Cutright*, 233 Ill. 2d 474, 491 (2009), or "economic damages." *Vancura v. Katris*, 238 Ill. 2d 352, 382 (2010). If injuries, harms, or damages only resulted from physical violence, these commonplace phrases would be nonsensical.

Indeed, when the Fifth Circuit concluded that "the definition of 'threat' is broader than true threats," and thus struck down the Louisiana threats statute, it cited the same Merriam-Webster definition that the State offers. *Seals*, 898 F.3d at 595 n.15. And, in finding the "threatens" provision facially unconstitutional, *Morocho* described how the term swept in protected speech:

> a lender or his agent who repeatedly threatens an individual mortgagor who is behind on payments with foreclosure . . .would be subject to felony prosecution . . . if he or she should know the threats of foreclosure would cause a reasonable person in the mortgagor's circumstances to suffer emotional distress.[1]

Id., ¶42.

Seals and *Morocho* are not alone in finding "threaten" or "threat" to plainly reach threats to act lawfully and non-violently. Ohio's Supreme Court, for example, found Merriam-Webster's "definition connotes almost any expression of intent to do an act of harm against another person *irrespective of whether that act is criminal*." *State v. Cress*, 858 N.E.2d 341, 345 (Ohio 2006) (Emph. added). One federal court recently cited that definition as encompassing an attorney threatening to withdraw from representing a client. *Guzik v. Albright*,, 2019 WL 1448358, at *5 (S.D.N.Y. Feb. 8, 2019). The Black's Law definition has been cited in debt

[1] The State has chosen not to seek review of *Morocho* in this Court and the mandate for that decision has issued.

collection cases to describe threats creditors may make, such as "threats to sue, threats to garnish wages [and] threats to contact the debtor's neighbors and/or employer" — none a threat of violence. *Ferguson v. Credit Mgmt. Control, Inc.*, 140 F. Supp. 2d 1293, 1299, n.11 (M.D. Fla. 2001).

The State, by contrast, cites no case that has interpreted the bare term "threaten" or "threat" to mean only threats of unlawful violence. In passing, the State cites an 18-year-old Arizona appellate decision, *In re. Kyle M.*, 27 P.3d 804 (Ariz. Ct. App. 2001). (St. Br. 12) However, the Arizona statute at issue in *Kyle M.* did not use the bare term"threaten," but specified that one must "threaten[]" to "cause physical injury to another person or serious damage to the property of another." *Id.* at ¶8. Illinois' definition of a stalking "course of conduct" lacks this limiting element. And, of course the old Arizona statute did not share the history of Illinois' stalking statute, where the legislature, seeking to broaden the statute's reach, amended away a narrower definition of threat. (Def. Br. 51-52)

Seals offers a model for this Court to follow to hold the "threatens" provision overbroad. 898 F.3d 587. (Def. Br. 19, 22-23) Seeking to distinguish *Seals*, the State notes Illinois' stalking statute allows a speaker to raise an affirmative defense that his acts exercised the right to free speech, where the Louisiana statute at issue in *Seals* did not. (St. Br. 13-14) Courts have "sound[ed] the alarm" against such arguments. *United States v. Stevens*, 533 F.3d 218, 231 (3d Cir. 2008), *aff'd*, 559 U.S. 460 (2010); *Relerford,* ¶61. The Supreme Court has repeatedly found statutes including similar exemptions not to be saved from invalidity. *See id.* (collecting cases). This Court joined them in *Relerford*, recognizing that a speaker considering whether his speech might risk imprisonment needs more guidance

than an untested statutory assurance that he might be allowed to raise an affirmative defense at trial, months or years after his arrest. *Id.*

Looking beyond the bare word "threatens" to the statute's context confirms that the legislature sought to criminalize threats beyond threats of violence. This Court has already found that when it amended the statute, it intended to criminalize not just "threats," but "significantly broadened the types of conduct proscribed" to include any "communicat[ion] to or about" someone that knowingly or negligently caused distress. *Relerford,* ¶27. The legislature further sought to reach any "non-consensual conduct" as part of an open-ended list of possible predicates, seemingly including every kind of speech or action which it thought might cause distress.720 ILCS 5/12-7.3(c)(1). Legislative intent to sweep this broadly is incompatible with simultaneously intending an especially narrowed understanding of "threatens."

What is more, when the legislature amended the statute, it *rejected* a definition of "threatens" that would be limited to threatening violent crime. (Def. Br. 44-45; 51-52) Where the predecessor statute, now recodified as subsection (a-3), defined "transmits a threat"to specifically require a threat of an unlawful act, the legislature chose not to retain that definition for subsection (a) and (c)(1), but to instead substitute the unqualified, bare term "threatens." 720 ILCS 5/12-7.3(a)(c)(1), (a-3), (c)(9). Statutory amendments have consequences. *Illinois Landowners All., NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶42. (Def. Br. 52) Where the legislature knew how to specifically define a threat in a narrow way, had done so previously in the same general statute, yet chose to omit the qualifying definition in the amended statute, it intended the new statute to reach more broadly. To read in a "limitation[], or condition[]" on the term "threatens"

that the legislature chose to write out would subvert that intent. *People v. Wright*, 194 Ill. 2d 1, 29 (2000).

The State argues that interpreting "threaten" to include threatening lawful acts would render "threatens" redundant with the prohibition on distressing "communicat[ions] to or about" a person. (St. Br. 13) Basic grammar refutes the State's argument. While all threats are communications, many distressing communications do not threaten at all. Insults, mockery, and rumor-mongering may all be communications that distress their target. Yet, none is a "threat" as none expresses the speaker's "communicated intent" to act in the future. *See Relerford*, ¶¶37-39.

The State's interpretation of the statute though, would newly create redundancy. If the bare term "threatens" necessarily meant "threaten unlawful violence," the limiting definition of "transmits a threat" in the predecessor statute would have been unnecessary. 720 ILCS 5/12-7.3(a)(c)(1), (a-3), (c)(9).

The legislative history explains *why* the legislature rejected the old, narrow definition. Per the sponsoring senator, the amendment sought to "redefine[] stalking" by "broaden[ing] the definition of stalking" Illinois Senate Transcript, 2009 Reg. Sess. No. 54 (statement of Hutchinson, Sen.) But, to retain an old definition *sub silentio* is the opposite of "redefin[ing]," and to retain an explicit, narrow definition is the opposite of "broaden[ing]." *Id.* As the State notes, the legislature sought to "capture[] all behavior" causing "apprehension and emotional distress." (St. Br. 22-23) Discarding the old narrow definition of "transmit[ting] a threat" for one that ensnared more of what potential defendants might say was a natural, if unconstitutional, way to implement this purpose.

This history refutes the State's suggestion that the express, limited definition that the legislature reserved for subsection (a-3)'s term "transmits a threat" should be appended to subsection (c)'s bare term "threatens," as if the legislature inadvertently forgot to include a cross-reference. (St. Br.15) The State quotes the maxim that "unless a contrary legislative intent is clearly expressed, the presumption is that the word is used with the same meaning throughout the act." (St. Br.15-16) But, these are different terms – "threatens" compared to "transmits a threat" – arising from different legislative acts – the original 1992 statute compared to the newly added section in 2010. Further, "contrary legislative intent" was expressed by the choice to explicitly define "transmits a threat" for the 1992 statute, while not referencing that definition in the broadened the offense in 2010. Thus, the cited maxim "readily yields to context, especially when a statutory term . . . takes on distinct characters in distinct statutory provisions." *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (internal quotation omitted). The statute's history and sweeping purpose are a "context" to which any presumption that the legislature sought identical threats to be actionable under the old and new statutes must "readily yield[]." *Id.*

Finally, this Court has already found that the legislature was brazenly neglectful of free speech rights when it amended the stalking statute. *Relerford*, ¶¶49-63. In the three years since the Appellate Court first held it unconstitutional, the legislature has not acted to clarify that it intended the statute to be narrowly construed. *See People v. Relerford,* 2016 IL App (1st) 132531; *compare People v. Bailey*, 167 Ill. 2d 210, 225-26 (1995) (subsequent amendment narrowing stalking statute clarified legislature's intent). The canon of constitutional avoidance starts

from the presumption that legislators would not have intended a statute with unconstitutional reach. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). Where this Court has already found that the legislature intended an unconstitutional scheme, the presumption cannot hold. And, where the legislature has neglected to respond by enacting new or amended legislation after the *Relerford* decision, invalidation is warranted to ensure the legislature sees the "incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481.

In short, where the "threaten[s]" provision cannot be read to be limited to threatening unlawful violence, its sweep far exceeds the limits of the "true threats" exception. Thus this Court should find it to be unconstitutional on its face as overbroad. (Def. Br. 20-24)

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

The State is mistaken to assert that this Court should not resolve Ashley's challenge, because, in its view, Ashley's own conduct could have been criminalized under a statute that required an intentional mental state as to the content of a threat. (St. Br 17-18) Ashley's challenge to the mental state elements of the"threatens" provision is as much a facial challenge as is his challenge to the content element. *See, e.g., Black*, 538 U.S. at 360-61 (plurality) (invalidating cross-burning statute on its face where it was construed to presume intent). The State cites no authority for the proposition that it can circumvent a facial challenge by arguing that the defendant's speech was itself unprotected. Ill Sup. Ct. R. 341(h)(7), (I) (appellee that fails to cite authority forfeits proposition). Conversely, the State addresses none of the precedent Ashley has offered holding that the

State cannot avoid a facial challenge to a statute by asserting that an as-applied challenge would have been unsuccessful. (Def. Br. 14-15) This is a general rule of constitutional jurisprudence, *see, e.g.*, *People v. Aguilar,* 2013 IL 112116, ¶¶11-12, and a basic matter of First Amendment law. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949); *People v. Melongo*, 2014 IL 114852, ¶24 (facial challenge proper "even when that person's own activities are not protected").

If this Court does not find the "threatens" provision overbroad as to what the content of the threat must be, it must go on, to resolve whether the mental state elements violate the First Amendment. The State does not argue that the statute can be construed to circumvent its criminalization of communications that negligently convey a threat. (Def. Br. 16, 24, 29-30, 52-53)

To begin, this Court should reject the State's notion that the "true threats" exception is so expansive as to allow Illinoisans to be imprisoned for uttering words that were never intended to threaten. (Def. Br. 25-31)

Black directs that "true threats" "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence[.]" 538 U.S. at 359. The State, though, asks this Court to adopt a purely "objective" understanding of threats, one where a speaker's words can be criminalized, so long as a reasonable recipient would understand them to issue a threat, regardless of whether the speaker actually intended or knew they would be interpreted to threaten. To square its position with *Black*, the State selectively quotes the decision's language to suggest *Black* did not wholly foreclose the possibility that unintended threats could be criminalized; the State, for example, seizes on the ambiguity of the term "encompass" to suggest that the court's

subsequent definition of the exception was not exhaustive. *Contra People v. Dye*, 2015 IL App (4th) 130799, ¶9-10; *People v. Wood,* 2017 IL App (1st) 143135, ¶13 (each reading *Black* as requiring intentionality). (St. Br 19-20) But, the "'natural reading' of *Black*'s definition of true threats 'embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim.'" *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014), *quoting United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). And, *Black*'s repeated references to intentionality resolve any ambiguity. *Black*'s focus on what a speaker "means to" convey would be superfluous were the court equally comfortable with criminalizing messages that speakers might not have meant to convey. 538 U.S. at 359. And, as *Heineman* found, *Black*'s discussion of "intimidation in the *constitutionally proscribable sense"* as requiring a speaker direct a threat "with the intent of placing the victim in fear of bodily harm or death," expressly invoked constitutional limits. 767 F.3d at 981(emph. in orig.),*rejecting United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012).

The State's parsing of *Black*'s language, moreover, wholly ignores what the Supreme Court actually *did* in *Black*, where it found the Virginia statute invalid because it presumed intent to intimidate. *Id.* at 363-65(plurality); *see also Black*, 538 U.S. at 385 (Souter, J., concurring). If unintended threats could be criminalized, the presumption of intent would not have led to a finding of unconstitutionality.

The State does not answer Ashley's argument that a stringent mental state requirement is a feature of many First Amendment exceptions, such as libel, incitement, or obscenity, so that speakers do not fall into "self-censorship" out of fear that they may be mistaken, and thus exposed to prosecution. *New York*

Times Co. v. Sullivan, 376 U.S. 254, 278 (1964). (Def. Br. 25) The "true threats" exception ought not be stretched to break from this tradition.

Instead, the State argues an expanded exception is warranted because there would be fewer hurtful statements in the world if governments were permitted to criminalize unintended threats. Bypassing decades of First Amendment jurisprudence, the State seeks to justify its position by quoting part of the definition of "fighting words" from *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). (St. Br. 20) A long time has passed since *Chaplinsky*, and few think that the fact that words may "inflict injury" suffices to allow their criminalization, even as a basis for the "fighting words" exception. *See, e.g., Purtell v. Mason*, 527 F.3d 615, 623 (7th Cir. 2008) (surveying Supreme Court precedent, including *Black*, to conclude that the Court has "dropped the 'inflict-injury' alternative."); *see also, e.g.,* 1 Smolla & Nimmer on Freedom of Speech § 2:70 (view that government, under *Chaplinsky*, may criminalize "words that 'by their very utterance inflict injury,' should be regarded as a dead letter in modern First Amendment law.") If merely "inflict[ing]" some "injury," regardless of intent, were enough to ground a First Amendment exception, our free speech jurisprudence would look very different. False, reputation-damaging statements, for example, inflict injury, yet the First Amendment requires a libel plaintiff to prove knowledge, or at least recklessness with regard to the falsity. *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). Although incitement "inflicts" the "injury" of criminal unrest, incitement cannot be prosecuted unless a speaker "intend[s] to produce" unrest, *Hess v. Indiana,* 414 U.S. 105, 108 (1973). Moreover, this logic was rejected by *Relerford* – communications, such as insults, that negligently cause emotional distress "inflict

injury," yet there is no general "hurtful words" exception to the First Amendment. 2017 IL 121094, ¶¶38-59.

The State does not directly address several decisions cited by Ashley, including, for example, *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014), or the decisions in *Heineman* and *Cassel*, which expressly rejected the kind of close reading of *Black* the State pursues here. (Def. Br. 27)

The State's most-cited authority is the Third Circuit decision which the Supreme Court reviewed and reversed. *United States v. Elonis*, 730 F.3d 321, 330 (3d Cir. 2013), *rev'd and remanded*, 135 S. Ct. 2001 (2015). (St. Br. 18-19) In reversing the Third Circuit, *Elonis* concluded that a negligence mental state failed "to separate wrongful . . . from otherwise innocent conduct" as a matter of substantive criminal law, 135 S. Ct. at 2010-11. *Elonis*' logic has just as much force as a matter of constitutional interpretation. (Def. Br. 28-30) A construction of the "true threats" exception which allows prosecution of "innocent conduct" like hyperbolic rhetoric or mere jokes cannot be reconciled with a deep tradition of ensuring robust and open debate.

Many of the State's cited decisions predate *Elonis*, and one was even vacated in light of *Elonis*, then reversed. *United States v. Martinez*, 736 F.3d 981, 987 (11th Cir. 2013), *vacated* 135 S. Ct. 2798 (2015), *and reversed,* 800 F.3d 1293, 1295 (11th Cir. 2015); *see also Jeffries v. United States*, 2018 WL 910669 (E.D. Tenn. Feb. 15, 2018), *granting post-conviction relief after* 692 F.3d 473.

Others do not stand for the propositions that the State cites them for. The State cites *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017), and *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015). But *Dutcher* approved an

instruction which required the jury to find – in addition to the fact that the words objectively contained a "true threat" – that the speaker "either *actually intended* his statement to be a true threat, or that he *knew* that other people reasonably would view his statement as a true threat[.]" *Id.* at 762. (emph. added) *following United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008). And the Tenth Circuit likewise requires the government prove the speaker "intended the recipient to feel threatened." *Heineman*, 767 F.3d at 975. Illinois' stalking statute lacks these additional subjective intent requirements.

The State argues a mere negligence mental state suffices, because a trier of fact can look to the context in which the threat was received. (St. Br. 21) To be sure, the context of a purported threat ought to be considered. But context matters most because of what it says about what the *speaker intended*, the very element that the State wants written out of the First Amendment.

To look only at the *recipient's* context is especially inadequate in an era of digital communication, where messages are often brief and the speaker and recipient separated in distance and time. Slightly varying the State's own example illustrates the problem. It hypothesizes a student who, after a friend took the last dessert in the cafeteria, jokingly says to them, "I'm going to kill you." (St. Br. 21) But, what if the student briefly delayed the joke, and instead sent the message by text an hour later when the two were no longer together? The friend, out of the context of the cafeteria line, might reasonably conclude they had been threatened. Thus, the same joke, uttered with the same intent, could support a stalking conviction, just because of bad timing. This is the circumstance that troubled the *Elonis* court and should trouble this one as well. *See* 135 S. Ct. at 2008.

The State chooses not to address many of the examples offered by Ashley as to the kind of protected speech that is swept in by such an approach. It ignores how frequently county State's Attorneys have brought prosecution based on ambiguous phrases, like "I'm gonna get you," which recipients understood as intimidating, and how easily figure's of speech like "I'm so angry, I could shoot someone" can easily be misconstrued to be threats. *See Dye,* 2015 IL App (4th) 130799, ¶¶11-12. (Def. Br. 30-31)

More importantly, it ignores the consequences when speech is about graver public matters than lunchroom desserts."[V]ehement, caustic, and sometimes unpleasantly sharp attacks" comprise much of our public discourse and can often easily be misconstrued to suggest a threat. *Sullivan*, 376 U.S. at 270. Rhetoric suggestive of threats is part of this discourse because "[p]leasantries seldom induce positive action in a private setting or give rise to political action in a public one." Morocho 2019 IL App (1st) 153232, ¶45. Political hyperbole that alludes to violence is a common rhetorical tool, one that today is often echoed by an accusation that a political opponent has made a threat. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*). Because such rhetoric is prone to be misconstrued – or willfully spun – a mere negligence standard that ignores the speaker's true intent will inevitably lead to self-censorship, thereby "restrict[ing] the public's access" to what a speaker may have had to say. *Sullivan*, 376 U.S. at 270, 278. Such a regime is incompatible with the First Amendment's guarantee of robust, open debate. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 927 (1982).

This Court should therefore conclude that the "true threats" exception only allows prosecutions of statements that are meant to be threatening. Because the

"threatens" provision of the stalking statute cannot be read to comply with this requirement, this Court should find it unconstitutional on its face.

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

The State does not dispute that the "threatens" provision, like the "communications" provision at issue in *Relerford*, is a content-based speech restriction, and is therefore subject to strict scrutiny. *Relerford*, 2017 IL 121094, ¶¶34, 52. (Def. Br. 32-25) The State also makes no argument that the statute is narrowly tailored to a compelling interest but that, if the statute is reread to proscribe only true threats, it escapes constitutional scrutiny. (St. Br. 7) That misunderstands First Amendment law: even if a statute is read to be limited to statements falling within a First Amendment "exception," the statute's content-based determination must still survive heightened scrutiny. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (ordinance banning hate speech violated First Amendment even though it was construed to be limited to "fighting words") As a minimum consequence, this means that the statute's ban on threatening that causes "other emotional distress" must fall.(Def. Br. 33-34) More broadly, the State's failure to articulate an need for so sweeping a prohibition on threats necessitates that this Court strike down both versions of the "threatens" provision. (Def. Br. 32-35)

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

The State does not dispute that subsection (a) and (c) of the stalking statute create a general felony prohibition on the negligent or knowing infliction of emotional distress. (Def. Br. 39-41) Such a scheme sweeps far beyond the "stalking" behaviors

that portend violence to intrude deeply into our public and private lives. Criminalizing so wide range of ordinary conduct cannot plausibly be "precise[ly]" what the legislature "meant to punish." *People v. Madrigal,* 241 Ill.2d 463, 466 (2011). Moreover, the statute's expansive sweep guarantees enforcement will be piecemeal, and therefore unpredictable and arbitrary. *See City of Chicago v. Morales*, 177 Ill. 2d 440, 457 (1997). (Def. Br. 41, 48-49)

The State cites no case that has upheld a "stalking" statute this broad in the face of a substantive due process challenge. (St. Br. 21-25) Nor does the State offer any example of an analogous statute that this Court has upheld against a claim that it sweeps in innocent conduct.

The State argues that the statute is appropriately tailored to the harm of "stalking," because "stalking" causes psychological harm and may escalate into violence. (St. Br. 21-23)

To argue its psychological harm rationale, the State cites a study for the proposition that "[w]omen who are stalked are at significantly greater risk of suffering psychological distress than their peers." (St. Br. 22, citing Diette, *et. al.,* Stalking: Does it Leave a Psychological Footprint?, Social Science Quarterly 95: 563–580 (June 2014).) But the study only illustrates the legislature's failure to tailor the statute. The cited metastudy did not define "stalking" to encompass all knowingly or negligently distressing conduct. Instead, it defined stalking far more like Illinois' predecessor statute, as "the willful, malicious, and repeated pursuit of another person threatening his or her safety." Diette, *et al.,* 563, 567. The amended stalking statute includes no requirement that conduct prosecuted be akin to "pursuit" and, by newly allowing conviction for mere negligence, rejected

any qualification that the conduct be "willful" or "malicious." Similarly, the State cites decisions that addressed the rationale underlying, the far narrower predecessor statute. (St. Br. 22; *see* Def. Br 43-44) The notion that "stalking" as defined by the 1992 version of the statute, may cause emotional harm thus offers no support for the idea that a sweeping ban on the knowing or negligently distress is remotely tailored to this harm caused by actual stalking behaviors. To rewrite the stalking statute to capture ordinary behaviors like the many examples of infliction of emotional distress described in Ashley's opening brief thus went far beyond this psychological harm rationale. (Def. Br. 46)

Further, the psychological injury rationale conflates cause with effect. Car accidents might cause physical injury, for example, but it would be patently absurd for a legislature to ban everything in society that caused physical injury as a way of targeting the harms caused by poor driving. "If the intent of the legislature *was* to punish" stalking behaviors, "it would seem that the rational approach might have been to punish . . . those who actually did that." *People v. Carpenter*, 228 Ill. 2d 250, 273 (2008). Instead, it enacted a ban on all conduct that could knowingly or negligently cause emotional distress.

The State also argues that stalking, however defined, can escalate to violence. But, where the legislature criminalized *every* kind of conduct directed at others, regardless of whether it was likely to escalate, its means swept far beyond this ends. Moreover, the negligent acts the statutes newly criminalize — those where the actor *should have known* that their conduct 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 only limitation the State points to in the statute is that the expected emotional distress must be "significant."(St. Br. 24-25) But,"significant," not even "substantial," let alone "severe." The State does not address how the plain dictionary definition of "significant" shows its failure to have any limiting effect, or how this term entails that emotional distress which falls far short of being actionable in tort law can now result in a felony conviction. (Def. Br. 42-43)

The State seeks to distinguish some of the examples of distressing conduct offered by Ashley by arguing that no reasonable person would suffer even "significant" anxiety, alarm, or fear in those circumstances. (St. Br. 24-25)

How hard-hearted the State thinks its populace must be. Of course, a parent knows, out at least ought to, that a teenager will be distressed at the violation of privacy in monitoring her social media. Of course, an arrestee paraded before the cameras will be ashamed by the public exposure. And, how can an employee denied a coveted promotion not experience distress that is "significant," yet as this Court found in *Relerford*, a business owner might be significantly distressed by an environmental activist advocating for a boycott? 2017 IL 121094, ¶53. Would the employee actually need to be laid off? To be fired unjustly?

The targets in each of these, the State says, were *really* distressed by something else. But, that is akin to saying that the business owner was not distressed by the activist's advocating a boycott, but by the fact that the business caused pollution, or by the prospect of losing revenue. The State's theory of psychological causation is thus incompatible with *Relerford*, 2017 IL 121094,¶53.

The disputes over these examples underscore how subsection(a) violates due process. To avoid committing stalking, Illinois' citizens must now act as

psychologists to make accurate guesses about emotional causation and how society at large would evaluate the likely psychological effects their words and deeds will have on others. And where the statute encompasses so many examples of ordinary behavior far removed from stalking – the State acknowledges the law empowers it to prosecute a parent, manager, or journalist that, in its view, goes too far in negligently causing emotional distress – arbitrary enforcement is inevitable.(St. Br. 25) A rational legislature could not have intended its people to live under such a regime, let alone enacted it as a reasonable means to target stalking behaviors.

This Court should therefore hold all of subsection (a) of the stalking statute unconstitutional on its face.

CONCLUSION

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

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

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

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, Jonathan Yeasting, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 20 pages.

/s/Jonathan Yeasting
JONATHAN YEASTING
Assistant Appellate Defender

No. 123989

IN THE

SUPREME COURT OF ILLINOIS

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

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Jason Chambers, McLean County State's Attorney, PO Box 2400, 104 W. Front St., Room 605, Bloomington, IL 61701-2400, stateattny@mcleancountyil.gov;

Mr. Marshall Ashley, 3510 15th St N, St Cloud, MN 56303

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 27, 2019, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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