No. 123989

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
9/13/2019 1:40 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

Page(s)

NATURE OF THE CASE

Defendant, Marshall Ashley, appeals from the Fourth District's judgment affirming his conviction for stalking pursuant to 720 ILCS 5/12-7.3(a)(2), which he claims violates the First Amendment of the United States Constitution and due process protections of the United States and Illinois Constitutions.

ISSUES PRESENTED

Defendant was charged with two counts of stalking Keisha Tinch by engaging in a course of conduct that he knew, or should have known, would cause a reasonable person to (1) fear for her safety (count I), *see* 720 ILCS 5/12-7.3(a)(1), and (2) suffer emotional distress (count II), *see* 720 ILCS 5/12-7.3(a)(2). Following a bench trial, defendant was convicted of count II. C79.[1]

Defendant appealed, arguing that sub-section (a) of 720 ILCS 5/12-7.3 ("the stalking statute") violated the free speech and due process protections of the Illinois and United States Constitutions. *See People v. Ashley*, 2018 IL App (4th) 150293-U, ¶ 3. While his appeal was pending, this Court decided *People v. Relerford*, 2017 IL 121094, which held that the stalking and cyberstalking statutes (cyberstalking is not at issue in this case) were invalid when the course of conduct was based on communications other than threats to or about the victim. *Ashley*, 2019 IL App (4th) 150293-U, ¶ 14. The questions presented here are:

---

[1] "C_" denotes the common law record; "R_" denotes the report of proceedings.

(1) Whether Illinois's stalking statute comports with the First Amendment of the United States Constitution when the course of conduct is based on the "threatens" provision of the statute because that provision covers only true threats, which are not protected speech.

(2) Whether Illinois's stalking statute comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Illinois Constitution because it does not criminalize a significant amount of conduct wholly unrelated to the legislature's purpose in enacting it.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(d), and 612(b). Defendant timely filed a petition for leave to appeal, which this Court allowed on November 28, 2018.

STATUTORY PROVISIONS INVOLVED

5/12-7.3. 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.

* * *

(d) Exemptions.

* * *

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

720 ILCS 5/12-7.3.

STATEMENT OF FACTS

In October 2014, defendant was charged with two counts of stalking for knowingly engaging in a course of conduct directed at Keshia Tinch that defendant knew, or should have known, would cause a reasonable person to (1) fear for her

safety (count I); and (2) suffer emotional distress (count II). C12-13. The People alleged that defendant sent Tinch threatening text messages, made threatening phone calls, and went to her home without permission. *Id.*

The evidence at trial showed that defendant and Tinch had been dating for about two years. R56-57. They had a daughter and lived together in Normal, Illinois at the time of the crime. R57-60. Tinch's mother, Karen Miller, testified that she was at Tinch's home on October 21, 2014, when defendant, who was not home, called. R27-28. Tinch and defendant began arguing, and Miller followed Tinch into the kitchen, where she was able to hear defendant because Tinch had the call on speakerphone. R28, 30. Miller heard defendant threaten "to come over" and kill Tinch with a "banger," meaning a gun. R.28, 31-32. Tinch called the police, and Tinch, Miller, and Tinch's other guests went to Miller's house. R33, 35.

Officer Nicholas Mishevich met them at Miller's house. R37. While he was there, Tinch received multiple calls and text messages from defendant. R38-39. Photographs of the text message exchange were taken from both defendant's and Tinch's phones. R40. Defendant sent Tinch the following relevant text messages:

> 2:24 p.m.: you finna make me come look for you're ass
>
> 3:04 p.m.: I love you too much to see u dead dummy. But [I] guarantee u this. I can make you suffer. If [I] want to.
>
> 3:29 p.m.: You rite start to think more before u talk that shit will get u hurt or killed talking dumb put your mouth bay

> 3:30 p.m.: Out
>
> 7:05 p.m.: So y haven't you text or call me but its cool [K]eshia [I] guess we dont have to talk like that every time
>
> 7:12 p.m.: Just saying bitch u dont check up on me you don't know how [I']m living
>
> 7:12 p.m.: Where the fuck are u
>
> 7:12 p.m.: Cause [I] rode past in seen lights on there
>
> 7:23 p.m.: Answer my fucking question why is there lights on at the house
>
> 7:26 p.m.: You got my blood boiling
>
> 7:45 p.m.: Y u ain't answering the phone scary ass bitch
>
> 7:54 p.m.: So u ain't gon pick up huh
>
> 7:57 p.m.: Rite you not picking up cause uk im fucking rite bitch [I] swear [I] tried to trust you thot ass wen [I] go over there any tim said u had a nigga over there imam go in on you're ass
>
> 8:23 p.m.: I swear bitch if a nigga there its gping to be one
>
> 8:24 p.m.: U them fucked up
>
> 8:31 p.m.: I hope whoever you got it when I got guns
>
> 8:57 p.m.: So u called the law

R79-84. Defendant also sent Tinch a photo of a gun. R76.

Tinch testified that defendant's messages "scared" and "terrified" her, and that she "knew right then and there that [defendant] was going to come after [her]." R80-83.

Defendant testified that he was mad at Tinch because he gave her money to move (Tinch had informed defendant that she was being evicted), but Tinch used the money for other purposes. R101-03. But defendant denied threatening Tinch. R104.

The trial court found defendant guilty of count II (stalking causing emotional distress) and sentenced him to eighteen months in prison and four years of mandatory supervised release. C79.

Defendant appealed, arguing that the stalking statute violates the free speech provisions of the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution, as well as due process. *Ashley*, 2018 IL App (4th) 150293-U, ¶ 14. After this Court held that the stalking statute was invalid when the alleged course of conduct was based on communication other than threats to or about the victim, *see Relerford*, 2017 IL 121094, ¶ 63, the appellate court ordered supplemental briefing, *Ashley*, 2018 IL App (4th) 150293-U, ¶ 14.

The appellate court subsequently rejected defendant's claims, holding that his course of conduct consisted of threatening Tinch, as opposed to merely communicating to or about her. Therefore, his actions did not fall under the portion of the statute invalidated by *Relerford*. *Id.* ¶ 39. The appellate court declined to resolve the split of authority on whether a true threat requires that the defendant have a subjective intent to threaten or, instead, only requires that a reasonable

person would perceive the communication as a threat, holding that defendant's threat to Tinch satisfied either standard. *Id.* ¶ 42. The appellate court also held that *Releford* foreclosed defendant's due process challenge. *Id.* ¶ 26.

ARGUMENT

I. First Amendment Principles and Standard of Review

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Content-based regulations on speech, such as the one at issue here, are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). But that proscription is not absolute: the United States Supreme Court has long recognized that States may regulate, including by banning, certain categories of speech. *Virginia v. Black*, 538 U.S. 343, 358 (2003). As relevant here, the First Amendment permits states to ban "true threats." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam); *accord*, *R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment"). To qualify for the "true threats" exception to First Amendment protections, the speaker need not actually intend to carry out the threat. *Black*, 538 U.S. at 359-60. "Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the

threatened violence will occur.'" *Black*, 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388).

Because defendant is pressing a facial challenge to the stalking statute, the question here is not merely whether defendant's speech constituted a true threat. Traditional rules of standing give way in the First Amendment context to permit challenges to overly broad statutes without requiring the challenger to show that his conduct could not be barred by a narrower, constitutionally permissible statute. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). But applying the overbreadth doctrine to strike down a statute that has legitimate applications because of the statute's potential to punish or chill protected expression is a drastic remedy. Thus, the Supreme Court has instructed that courts should do so "sparingly and only as a last resort." *Id.* at 613; *accord People v. Williams*, 235 Ill. 2d 178, 200 (2009) ("Invalidation for overbreadth is strong medicine that is not to be casually employed.") (internal quotations omitted). A statute should be invalidated as unconstitutionally overbroad only if "a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999); *People v. Minnis*, 2016 IL 119563, ¶ 44, and no reasonable limiting construction would render the statute constitutional, *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Minnis*, 2016 IL 119563, ¶ 21.

Moreover, this requirement of "substantial overbreadth" requires a showing of actual or serious potential encroachments on fundamental rights:

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

City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984) (internal citations and footnote omitted). The burden of establishing the statute's overbreadth rests on the party challenging it. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *Minnis*, 2016 IL 119563, ¶ 21.

Review of issues involving the constitutionality of a statute is *de novo*. *People v. Sharp*e, 216 Ill. 2d 481, 486-87 (2005). "A court must construe a statute so as to affirm its constitutionality, if reasonably possible." *In re Lakisha M.*, 227 Ill. 2d 259, 263 (2008); *see also People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 290-91 (2003); *People v. Greco*, 204 Ill. 2d 400, 406 (2003); *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). If a statute's "construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked." *People v. Fisher*, 184 Ill. 2d 441, 448 (1998) (internal quotations omitted).

II. The Stalking Statute Does Not Criminalize Speech Protected by the First Amendment Because It Requires a True Threat to the Victim.

The first step in an overbreadth analysis is to interpret the challenged statute, because "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707.

Here, no legitimate exercise of speech is captured by the portion of the stalking statute prohibiting conduct that "threatens" "a person." That portion criminalizes knowingly threatening someone where the defendant knows or should know his threat will cause the victim to fear for her safety or suffer significant mental suffering, anxiety, or alarm. 720 ILCS 5/12-7.3. Thus, such speech qualifies as an unprotected true threat: "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008) (citing *Black*, 538 U.S. at 359; *R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 707) (internal quotations omitted), which may or may not include the speaker's actual intent to carry out the threat, *Black*, 538 U.S. at 360. Rather, the "true threats" doctrine allows States to "protect individuals

from the fear of violence" and "from the disruption that fear engenders," not just the possibility that the violence will actually occur. *R.A.V.,* 505 U.S. at 388.

Defendant argues that the "threatens" provision of the stalking statute is overbroad because it criminalizes more than unprotected true threats. Def. Br. 15. But the plain language of this provision shows that the General Assembly intended the term "threatens" to include only speech that falls within the true threats exception to the First Amendment. "Threatens" is not defined in the stalking statute. Defendant points to a dictionary definition: "to express one's intention to do something undesirable." Def. Br. 19 (citing *Merriam-Webster*, (online), *available at* https://www.merriam-webster.com/dictionary/threaten). But the first definition of "threaten" in the dictionary defendant cites to is "to utter threats against," and the same dictionary defines a "threat" as "an expression of an intention to inflict evil, injury, or damage." *Threaten* (2019), *Merriam-Webster,* (online), available at: https://www.merriam-webster.com/dictionary/threaten (accessed Sep. 13, 2019); *Threat* (2019), (online), available at: https://www.merriam-webster.com/dictionary/threat (accessed Sep. 13, 2019); *see also Black's law Dictionary* (11th ed. 2019), *threat* ("A communicated intent to inflict harm or loss on another or on another's property"). In other words, defendant's own dictionary defines "threaten" as: "to utter" "an expression of an intention to inflict evil, injury, or damage against" someone. Interpreting the statute to affirm its constitutionality

if reasonably possible, as this Court must, *see*, *e.g.*, *In re Lakisha M.*, 227 Ill. 2d at 263, the term "threatens" can and should be construed to criminalize only unprotected true threats. *See Watts*, 394 U.S. at 707; *see also, e.g.*, *In re Kyle M.*, 27 P.3d 804, 807-08 (Ariz. Ct. App. 2001) (interpreting "threaten" consistent with definition of "true threat" to preserve constitutionality of analogous Arizona statute).

For his part, defendant advances an interpretation of the "threatens" provision that would criminalize not only true threats but also lawful communications, such as a parent "threatening" to ground a teenager. Def. Br. 20. But communications of this nature do not express an intent to inflict evil or injury, and thus do not fall within the primary definition of "threatens" in the dictionary cited by defendant.

Defendant's interpretation not only departs from the dictionary definition of "threatens," but it also would improperly read the "communicates to or about" language invalidated by *Relerford* back into the statute. *Relerford* held that interpreting the "communicates to or about" provision as coextensive with the true threats doctrine would render the statute's use of the word "threatens" superfluous. 2017 IL 121094, ¶ 39; *see also In re Jarquan B.*, 2017 IL 121483, ¶ 22 ("we must construe words and phrases in light of the other relevant portions of the statute so that, if possible, no term is rendered superfluous or meaningless"). Similarly,

interpreting "threatens" as coextensive with "communicates to or about" would render "communicates to or about" superfluous. If the legislature intended the term "threatens" to have such an expansive meaning, there would have been no need to include the "communicates to or about" provision. In other words, the "threatens" provision is coextensive with the true threats doctrine, not the "communicates to or about" provision.

Defendant's other examples similarly demonstrate that he has misapprehended the scope of speech covered by the "threatens" provision. For example, defendant discusses a person "threatening" to boycott a polluting business as an example of protected speech that would fall under his definition of "threatens." Def. Br. 20-21. But the Court has already found that this scenario falls not under the "threatens" portion of the statute, but rather under the "communicates to or about" provision, offering it as an example of protected speech covered by that invalidated, overbroad provision. *Relerford*, 2017 IL 121094, ¶¶ 53-54.

Defendant's reliance on *Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018), is similarly misplaced. *See* Def. Br. 22-23. First, the legislative history for the Louisiana statute at issue in *Seals* explicitly referenced an intent to criminalize threats to the victim's character. *Seals*, 898 F.3d at 595. That alone would have made it unreasonable for the Fifth Circuit to interpret "threats" in the Louisiana

statute as criminalizing nothing more than unprotected true threats. Moreover, the Louisiana statute did not include an exception like the one in sub-section (d)(2) of the Illinois stalking statute for the lawful "exercise of the right to free speech." 720 ILCS 5/12-7.3(d)(2). To be sure, *Relerford* held that sub-section (d)(2) was "insufficient to remediate the extreme overbreadth" of the "communicates to or about" provision. 2017 IL 121094, ¶ 62. But *Seals* explicitly distinguished Louisiana's statute from 18 U.S.C. § 112, which the Fifth Circuit had upheld against a similar challenge, because the federal statute included an exception similar to sub-section (d)(2). 898 F.3d at 599 ("we construed Section 112 to avoid such constitutional problems, basing our reading on the statute's safe harbor—'nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment'"). Because of the differences in the legislative history underlying the Louisiana and federal statutes, as well as the exception in the federal statute, the Fifth Circuit construed 18 U.S.C. § 112 to preserve its constitutionality. *Seals*, 898 F.3d at 599. (distinguishing *CISPES (Comm. in Solidarity with the People of El Salvador) v. F.B.I.*, 770 F.2d 468, 470 & 475 (5th Cir. 1985)). Because Illinois's statute includes the (d)(2) exception, and no legislative history suggests that the General Assembly meant to criminalize "threats" to the victim's character, or indeed anything other than true

threats[1], the Illinois statute is more like the federal statute upheld by the Fifth Circuit than the Louisiana statute that it struck down.

Defendant also contrasts the undefined word "threatens" in subsection (c) with sub-section (a-3), which explicitly describes the criminalized conduct as 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." Def. Br. 19 (citing 720 ILCS 7.3 (a-3)(1)). But the statute's use of the word "threat" in other sub-sections in a way that encompasses only threats of violence, *see also* 720 ILCS 7.3 (a-5)(1) ("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"), provides additional confirmation that the General Assembly intended the term "threatens" to cover nothing more than true threats. As this Court has explained, "[w]here a word is used in different sections of the same legislative act, unless a contrary legislative intent is clearly expressed, the presumption is that the word is used with the same meaning throughout the act." *People ex rel. Scott v. Schwulst Bldg. Center, Inc.*, 89 Ill. 2d 365, 372, (1982); *see also People v. Maggette*, 195 Ill. 2d 336, 349 (2001) (unless

---

[1] Indeed, the inclusion of the general "communicates to or about" provision is further evidence the General Assembly intended the "threatens" provision to cover a narrow range of speech limited to true threats.

contrary legislative intent is clearly expressed, words used in one section of statute have same meaning when used in other sections of same statute).

Moreover, limiting the "threatens" provision to true threats best gives effect to the legislature's purpose in enacting the stalking statute. When the General Assembly amended the stalking and cyberstalking statutes in 2009, Senator Toi Hutchinson, one of the bill's sponsors, observed that "[a] recent U.S. Department of Justice study said that seventy-six percent of female homicide victims were stalked first, prior to their death. It's terrifying and it's something that we need to do all we can to protect our victims from." 96th Ill. Gen. Assem., Senate Proceedings, May 21, 2009, at 125. Thus, the drafting history shows that the General Assembly was primarily seeking to criminalize and prevent threats of physical violence, which are the epitome of an unprotected true threat. Defendant's broad interpretation of the term "threatens" disregards the legislature's purpose.

In sum, because the "threatens" provision of the stalking statute criminalizes only unprotected true threats, it is not overbroad and instead is consistent with the First Amendment.

III. The Stalking Statute Is Consistent With the Mens Rea Requirement of the True Threats Doctrine.

Defendant argues that true threats are limited to circumstances where the speaker had a subjective intent to threaten the victim, and that Illinois's stalking statute does not require such intent. Def. Br. at 24. First, as discussed in Section

II, *supra.*, the stalking statute should be interpreted consistent with the true threats exception. And, to resolve this case, this Court need not decide whether the exception for true threats requires a subjective intent to threaten, or only that an objective person would understand the speech to be a threat, because defendant's speech in this case satisfies either standard. If, however, this Court does reach the issue, it should hold that true threats require only that an objective person would understand the speech to constitute a threat.

Black held that "true threats" encompass situations where the speaker had an "intent to threaten." 538 U.S. at 359-60. After *Black*, courts have divided on whether "true threats" are limited to situations where the speaker's subjective purpose was to threaten. For purposes of resolving this case, however, this Court need not determine which standard the State must prove because defendant's communications here satisfy both the objective and subjective standards. On the phone, defendant told Tinch that he was going to kill her with a gun; in a text message, defendant told Tinch: "I can make you suffer;" "that shit will get you hurt or killed;" and that he drove by her house to see if she was home. He also sent her a photo of a gun. Based on this evidence, under either an objective or subjective standard, defendant's statements are true threats. A reasonable person would understand defendant's speech to constitute a "serious expression of an intent to commit an act of unlawful violence," thus satisfying the objective standard. And the

evidence is also sufficient to demonstrate that defendant subjectively intended to communicate a threat of unlawful violence against Tinch.

While it is not necessary for this Court to decide which test applies, if it reaches the question, it should hold that the objective standard applies. As explained, federal courts of appeals have split on the issue in the years since *Black*. For example, in *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Ninth Circuit held that *Black* requires "proof that the speaker subjectively intended the speech as a threat." *Id*. at 633. But most circuits have held that under *Black* "true threats" are defined objectively—that is, by asking whether a reasonable person would foresee that the recipient would perceive the speech as a threat. *See, e.g.*, *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) ("a 'true threat' . . . is defined objectively"); *United States v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015) ("[w]e apply an objective test to determine whether the speaker made a true threat"); *United States v. Martinez*, 736 F.3d 981, 987 (11th Cir. 2013) (holding that *Black* does not require a subjective-intent analysis for true threats) (vacated on other grounds by *United States v. Martinez*, 800 F.3d 1293 (11th Cir. 2015)); *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (*Black* does not hold that true threats require a subjective intent to threaten) (overruled on other grounds by *Elonis v. United States*, 135 S. Ct. 2001 (2015)).

Although *Black* described "true threats" as encompassing situations where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359-60, the circuits that have adopted the majority rule have reasoned that *Black* had no reason to distinguish between subjective and objective standards for true threats because (1) the Virginia law at issue required subjective intent; and (2) the provision that the Court invalidated included no standard for intent. *United States v. Jeffries*, 692 F.3d 473, 479-80 (6th Cir. 2012); *see also Elonis*, 730 F.3d at 329 (holding *Black* did not "invalidate the objective intent standard the majority of circuits appl[y] to true threats" because the Virginia statute "already required a subjective intent"). Thus, rather than reading *Black*'s intent requirement as setting forth a subjective intent requirement, these courts concluded that *Black* requires only that the speaker "intend to make the communication," not the threat. *Elonis*, 730 F.3d at 329; *see also Martinez*, 736 F.3d at 986–88; *Jeffries*, 692 F.3d at 480.

Indeed, *Black's* definition of true threats is fully consistent with an objective standard for true threats. *Black* defined "intimidation" as a "type of true threat"—one directed with the subjective intent to place listeners in fear of bodily harm or death. 538 U.S. at 360. The Court was clear that true threats "encompassed" intimidation, but that intimidation was sub-class of true threats. By defining intimidation as a true threat under circumstances where the speaker has a

subjective intent to threaten, the Court indicated that other true threats do not require an inquiry into the speaker's subjective mental state. In other words, intimidation is merely one type of true threat: a true threat delivered with a particular subjective intent. Requiring subjective intent for one type of true threat makes little sense if the Court intended all true threats to require such intent.

In addition, as courts applying *Black* have explained, "[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening." *Elonis*, 730 F. 3d at 330 (internal quotation marks omitted). And an objective standard also furthers the rationale for excluding threats of violence from First Amendment protection in the first place. True threats "by their very utterance inflict injury" on the recipient. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Thus, the exclusion of true threats from First Amendment protection is rooted in their effect on the listener. As a result, identifying true threats requires a test that focuses not on the intent of the speaker but on the effect on a reasonable listener.

Nor, contrary to defendant's argument, Def. Br. at 24, is there a risk that protected speech will impermissibly be criminalized in the absence of a subjective intent requirement. The reasonable-person standard winnows out protected speech

because the factfinder must consider contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm." *Jeffries*, 692 F.3d at 480. For example, applying the reasonable person standard, the words of a frustrated student telling a friend, "I'm going to kill you" after the friend purchased the last dessert in the cafeteria line will be interpreted very differently than a reasonable person would interpret defendant's statements in this case.

In sum, this Court need not determine whether true threats require a subjective intent to threaten the victim, or merely that a reasonable person would perceive the speech to constitute a threat. Regardless of which standard the true threats exception imposes, defendant's speech in this case satisfies it. If the Court does reach the question, an objective standard is consistent with Supreme Court precedent and best advances the rationale underlying the true threats exception.

IV. The Stalking Statute Does Not Violate Due Process Because It Does Not Criminalize a Significant Amount of Conduct Wholly Unrelated to the Legislature's Purpose in Enacting That Law.

This Court has held that a statute violates due process when it criminalizes "a significant amount of . . . conduct . . . wholly unrelated to the legislature's purpose in enacting the law." *People v. Hollins*, 2012 IL 112754, ¶¶ 27 & 28. That is not the case with the stalking statute. The conduct criminalized by the stalking

statute is directly related to the General Assembly's goals of protecting public health and safety.

Stalking is a serious threat to the public health. Approximately one in ten women reports being stalked by the age of forty-five. Diette, T. M., Goldsmith, A. H., Hamilton, D., Darity, W. and McFarland, K. (2014), *Stalking: Does it Leave a Psychological Footprint?*, Social Science Quarterly 95: 563–580. Women who are stalked are at significantly greater risk of suffering psychological distress than their peers. *Id.* The government has a compelling interest in deterring and punishing conduct that causes such distress. *See People v. Bailey*, 167 Ill. 2d 210, 233 (1995) (holding prior version of stalking statute served legitimate government interest in preventing "terror, intimidation, and justifiable apprehension caused by the stalker's conduct").

Consistent with this compelling governmental interest, the purpose of the stalking statute is "to prevent violent attacks by prohibiting conduct that may precede them," and "avert the terror, intimidation, and justifiable apprehension caused by the harassing conduct itself." *People v. Holt*, 271 Ill. App. 3d 1016, 1021 (3d Dist. 1995); *see also Bailey*, 167 Ill. 2d at 224; *People v. Sucic*, 401 Ill. App. 3d 492, 502 (1st Dist. 2010). Indeed, in 2009, the General Assembly amended the stalking statute to "broaden the definition of stalking" and ensure that the statute captured all behavior relevant to the State's dual interests in preventing the

conduct that precedes violent attacks, and averting the apprehension and emotional distress associated with such conduct. 96th Ill. Gen. Assem., Senate Proceedings, May 21, 2009, at 125 (statements of Senator Hutchinson).

Thus, far from criminalizing "a significant amount of . . . conduct . . . wholly unrelated to the legislature's purpose in enacting the law," *Hollins*, 2012 IL 112754, ¶¶ 27 & 28, the stalking statute criminalizes only conduct directly related to the legislative purpose. The statute is limited to course of conduct that a reasonable person would know would cause the victim to fear for her safety or experience significant mental suffering. Moreover, when that course of conduct consists of threats, that speech requires a serious expression of an intent to commit an act of unlawful violence against the victim. The speech covered by the "threatens" provision thus relates directly to the legislature's goal of averting fear and mental suffering, and also deterring future violent attacks. .

Defendant's reliance on *People v. Madrigal*, 241 Ill. 2d 463 (2011), and *People v. Carpenter*, 228 Ill. 2d 250, 269 (2008), to argue that the stalking statute violates due process is misplaced. *Madrigal* dealt with a statute that swept in conduct wholly unrelated to the identity theft problem that the General Assembly set out to remedy. 241 Ill. 2d at 470-72. For example, that statute criminalized searching for a friend's name on an internet search engine or social media site. *Id.* Similarly, the statute at issue in *Carpenter* was designed to protect police from hidden guns or

contraband, but criminalized conduct that involved neither guns nor contraband by making it illegal to have a hidden compartment in one's vehicle, regardless of its use. 228 Ill. 2d at 268-69. In contrast, the stalking statute requires that a defendant engage in a course of conduct that he knew, or should have known, would cause a reasonable person to fear for her safety or experience significant mental suffering. In other words, its application is explicitly limited to conduct that the defendant knew or should know will cause the precise harm the General Assembly set out to prevent.

Defendant also contends that the "other emotional distress" provision of the stalking statute violates due process, arguing that innocent conduct is captured by this provision. Def. Br. 42. Defendant is incorrect. The statute defines "emotional distress" as "significant mental suffering, anxiety or alarm," and a "reasonable person" as "a person in the victim's situation." 720 ILCS 5/12-7.3(c)(3). The examples defendant provides, such as a parent viewing her child's Facebook page or a manager telling a worker that a colleague received a coveted promotion, Def. Br. 46, would not satisfy the requirements of the stalking statute. A reasonable person in defendant's examples would not suffer "emotional distress" as defined by the statute—that is, "significant mental suffering, anxiety or alarm" caused by the speaker's threats. The child in defendant's example might be upset about her parents' lack of trust in her, and the worker might be disappointed or even angry

not to receive a hoped-for promotion, but neither could reasonably experience "significant mental suffering, anxiety or alarm." Nor, in another of defendant's examples, would a journalist be guilty of stalking for waiting outside the home of a corrupt elected official to capture his arrest. *See* Def. Br. 46. While the elected official's anxiety or alarm might be severe, that would be due to the fact that he had been caught in an illegal act, not to the journalist attempting to obtain a statement or photo. And, should the conduct of the parent, manager, or journalist discussed above rise to the level where he knew or should have known that it would cause a reasonable person to suffer "significant mental suffering, anxiety or alarm," then, indeed, that person would be guilty of stalking, and there is no reason why the General Assembly would be barred from criminalizing such conduct. The government has a compelling interest in deterring and punishing conduct that causes such distress. *See Bailey*, 167 Ill. 2d at 233 (holding prior version of stalking statute served legitimate government interest in preventing "terror, intimidation, and justifiable apprehension caused by the stalker's conduct").

In sum, because the statute at issue here does not criminalize "a significant amount of . . . conduct . . . wholly unrelated to the legislature's purpose in enacting the law," *Hollins*, 2012 IL 112754, ¶¶ 27 & 28, it does not violate due process.

CONCLUSION

This Court should affirm the appellate court's judgment.

September 13, 2019

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Plaintiff-Appellee
People of the State of Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(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 twenty-six pages.

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

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 13, 2019, the foregoing **Appellee's Brief**, was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by email:

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

Counsel for Defendant-Appellant
Marshall Ashley

/s/ Garson S. Fischer
Counsel for Plaintiff-Appellee
People of the State of Illinois