

No. 13-983

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In The  
**Supreme Court of the United States**

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ANTHONY DOUGLAS ELONIS,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Third Circuit**

—◆—  
**BRIEF OF AMICUS CURIAE NATIONAL CENTER  
FOR VICTIMS OF CRIME IN SUPPORT  
OF RESPONDENT UNITED STATES**

—◆—  
REBECCA J. ROE  
SCHROETER, GOLDMARK & BENDER  
810 Third Avenue, Suite 500  
Seattle, Washington 98104  
Telephone: (206) 622-8000  
E-Mail: roe@sgb-law.com

*Counsel for Amicus Curiae  
Counsel of Record*

**QUESTIONS PRESENTED**

(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten, or whether it is enough to show that a “reasonable person” would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and

(2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.

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**STATEMENT OF INTEREST<sup>1</sup>**

The National Center for Victims of Crime (National Center), a nonprofit organization based in Washington, DC, is the nation's leading resource and advocacy organization for all victims of crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to serving individuals, families, and communities harmed by crime, the National Center, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. The National Center is particularly interested in this case because of its commitment to serving victims of stalking and domestic violence. In 2000, the National Center founded the Stalking Resource Center, which serves as the official training and technical assistance provider on stalking issues for the U.S. Department of Justice, Office on Violence Against Women. The Stalking Resource Center is the leading authority on issues related to the legal application of statutes prohibiting stalking, threats, and other conduct which may place a victim or a reasonable person in fear – conduct which is distinguishable from constitutionally protected acts.



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<sup>1</sup> Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

## SUMMARY OF ARGUMENTS

The issues in this case impact laws prohibiting stalking as these laws criminalize speech and conduct (ostensibly non-criminal acts) that is part of a course of conduct and that, implicitly or explicitly, threatens the victim and instills fear for safety or of bodily harm or death.

Victims of stalking are financially, emotionally, and socially burdened by the crime regardless of the subjective intent of a speaker. A subjective intent standard gives undue protection to speech that serves no legitimate function and will erect additional barriers to reporting and prosecuting stalking.



## ARGUMENTS

### **1. Victims Bear Significant Emotional, Financial And Social Burdens Regardless Of The Subjective Intent Of A Speaker.**

Under the subjective intent test, identical words and conduct may be criminal activity or protected speech depending on the speaker's state of mind. Because the impact on the victim is the same in both instances, the subjective test does not adequately address the great burden that victims of threatening speech and conduct must bear. *United States v. Elonis*, 730 F.3d 321, 329-330 (3d Cir. 2013) (internal citations omitted) ("limiting 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”).

Petitioner was charged and convicted of “transmitting in interstate commerce communications containing a threat to injure the person of another.” 18 U.S.C. § 875(c). This statute is commonly used to prosecute “cyberstalking.” Casey O’Connor, *Cutting Cyberstalking’s Gordian Knot: A Simple and Unified Statutory Approach*, 43 Seton Hall L. Rev. 1007, 1032 (2013). Cyberstalking includes the receipt of threatening communication via the internet. Matt R. Nobels, et al., *Protection Against Pursuit: A Conceptual and Empirical Comparison of Cyberstalking and Stalking Victimization Among a National Sample*, Justice Quarterly, 31:6, 986-1014 (2012). Stalking laws also criminalize “ostensibly innocent acts that would normally be considered benign and noncriminal – such as sending letters, delivering unwanted gifts, or making phone calls to the victim – if they form part of a course of conduct or that, implicitly or explicitly, threatens the victim and instills fear of bodily harm or death.” National Center for Victims of Crime, *Creating an Effective Stalking Protocol*, 10, April 2002 available at <http://victimsofcrime.org/docs/src/creating-an-effective-stalking-protocol.pdf?sfvrsn=2>. All fifty states, the U.S. Territories, the District of Columbia, and the federal government, have stalking-related provisions in their criminal codes. *Id.* at 7.

Stalking victimization is associated with significant psychological, financial and social stress. Katrina Baum, Ph.D., et al., *Bureau of Justice Statistics, Stalking Victimization in the United States*, NCJ 224527 (2009). Victims of stalking frequently feel anxious, vulnerable, out of control, frightened, helpless, depressed and angry. *Id.* at 7. The worst fear for most victims is the uncertainty about what will happen next, followed by a fear that the behavior will never stop. *Id.* at 7. “Though perhaps counter to expectations, it appears that the sense of looming vulnerability that accompanies threats may be more productive of psychological distress in stalking victims than the reality of actual physical assault, which importantly, may precipitate a more sympathetic response, particularly from law enforcement.” T.E. McEwan, et al., *Violence in Stalking Situations*, *Psychological Medicine*, 39(9), 1469-1478 (2009).

In addition to creating fear and anxiety, stalking is often the precursor to physical violence and homicide. Stalking behavior commonly begins or escalates after one party ends an intimate relationship. Karl Roberts, *Associated Characteristics of Stalking Following the Termination of Romantic Relationships*, *Applied Psychology in Criminal Justice*, 1 (2005). Intimate partner stalking appears to pose the greatest risk of interpersonal violence. Shannan Catalano, Ph.D., Bureau of Justice Statistics, NCJ 224527, *Stalking Victims in the United States – Revised*, U.S. (2012) at 1, available at [http://www.bjs.gov/content/pub/pdf/svus\\_rev.pdf](http://www.bjs.gov/content/pub/pdf/svus_rev.pdf); K. Mohandie, et al., *The*

*RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*, *Journal of Forensic Science* 51(1) (2006): 147-155. Seventy six percent of female homicide victims killed by a current or former intimate partner were stalked by their murderer prior to death. Judith McFarlane, et al., *Stalking and Intimate Partner Femicide*, *Homicide Studies*, Vol. 3, No. 4, 300-316 (1999). Eighty five percent of female attempted homicide victims were stalked prior to being attacked. *Id.*

Prior to her murder, one victim wrote a letter addressed to the perpetrator:

I'm so sorry that you're still so angry and you feel a need for vengeance and punishment. You're accomplishing your goal. I feel like a walking dead person going through the motion of life. Like a small wild animal who knows it's surrounded by a pack of wolves. The smallest sound or movement makes me jump. The sound of the phone now is frightening. Another hang-up . . . I'm so locked up in my own house afraid of every sound the walls have probably always made. I walk out of my house, a coffee shop, a gym, looking. Terror. Until I get into my car and I know that the doors are locked and I can breathe again until I get out. Then it starts all over again. How long is it going to go on?

*People v. Riccardi*, 281 P.3d 1, 14 (Cal. 2012). Stalking victims suffer economic harm in the form of time off from work, costs associated with moving residences,

mental health treatment and legal fees. T.K. Logan, Ph.D., National Institute of Justice, *Research on Partner Stalking: Putting the Pieces Together* (2010) 12 available at <http://www.nij.gov/topics/crime/intimate-partner-violence/stalking/documents/research-on-partner-stalking.pdf>. One in seven stalking victims moves as a result of being victimized. *Baum, supra*, at 6. One in eight stalking victims who were employed lost time from work because of fear for their safety, to obtain a restraining order, to testify in court, or to move, fix damaged property, or change their phone number. *Baum, supra*, at 6. Stalking victims are socially impacted when they become disconnected from their social networks as they attempt to avoid the offender. *Logan, supra*, at 12. Victims may avoid going out alone out of fear that they will be attacked. Stalking victims take other protective actions such as changing email accounts and other personal information, changing routines, and purchasing security systems and pepper spray.

According to one victim:

I had my telephone number changed three times already this month. I want my children to know who their father is, so I would try . . . like when I thought that he would be calm, I tried to give him my number, allow him to have communication with his children because they would ask for him. . . . But then he starts acting like a nut again, I changed my number.

Mary P. Bruster, *An Exploration of the Experiences and Needs of Former Intimate Stalking Victims*, Final Report Submitted to the National Institutes of Justice (1999) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/175475.pdf>.

Victims of cyberstalking, as opposed to stalking generally, take more self-protective measures, pay higher financial costs to combat the problem, and experience greater fear. *Nobels, supra*, at 1005-1010. A victim must bear these costs regardless of the defendant's subjective intent. The First Amendment should not be interpreted in a way that prevents states from protecting stalking victims against the real harm caused by threats.

## **2. The Subjective Intent Standard Provides Additional Barriers To Reporting And Prosecuting Stalking.**

Most victims of stalking do not report the crime to law enforcement. Baum, *supra*, at 8. Victims fail to report stalking for a number of reasons. *Id.* at 14. Many victims believe that the police cannot or will not do anything to help them. *Id.* at 14. Victims also fail to report stalking because they are afraid of reprisals by the offender. *Id.* at 14. Indeed, in over 20 percent of cases, stalking behavior worsened after a victim reported the crime to the police. *Id.* at 15. When victims do report stalking to law enforcement, charges are filed in only 21 percent of cases. *Id.* at 15. According to one victim:

If you're going to stay in the same location . . . work through the [court] system. But you'd better be prepared to give up your life, because it's a full-time job, it takes up every penny you have, and you get very little recourse. So you're putting out 90 percent of energy and you're getting back maybe 10 percent. But it's all you can do. . . .

*Bruster, supra*, at 58.

Stalking is difficult for police and prosecutors to identify, investigate and prosecute. *Mobilizing a Community Response to Stalking: The Philadelphia Story*, Police Chief Magazine (September 2014) available at [http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1702&issue\\_id=12009](http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1702&issue_id=12009). As a result, most State laws prohibiting stalking no longer require that the Government prove that the Defendant had the "subjective intent" to place the victim in fear. National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, January 2007, 10-13, available at <http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0>. The majority of State laws prohibiting stalking use an objective or reasonable person standard. Alaska Stat. Ann. § 11.41.270(a); Ariz. Rev. Stat. Ann. § 13-2923(A); Ark. Code Ann. § 5-71-229(a)(1), (b)(1), (c)(1); Colo. Rev. Stat. Ann. § 18-3-601; Del. Code Ann. tit. 11, § 1312(a); Ga. Code Ann. § 16-5-90(a)(1); Idaho Code Ann. § 18-7906(b)(1); 720 ILCS 5/12-7.3(a); Iowa Code Ann. § 708.11; La. Rev. Stat. Ann.



§ 14:40.2; Me. Rev. Stat. tit. 17-A, § 210-A; Mich. Comp. Laws Ann. § 750.411h(d); Minn. Stat. Ann. § 609.749; Miss. Code Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.C. Gen. Stat. Ann. § 14-277.3A; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; S.D. Codified Laws § 22-19A-1(2); Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Vt. Adv. Legis. Serv. 150, 2014 Vermont Laws No. 150 (S. 195); Va. Code Ann. § 18.2-60.3; Wash. Rev. Code Ann. § 9A.46.110; W. Va. Code Ann. § 61-2-9a; Wis. Stat. Ann. § 940.32.

The subjective intent standard makes it difficult to prosecute offenders because some stalkers operate without the specific intent to cause the victim fear. A stalker will maintain a strong, irrational belief that the victim will return his feelings of affection if he is persistent enough. *See* Colo. Rev. Stat. Ann. § 18-3-601 (2010). The subjective intent standard also makes it difficult to enforce laws prohibiting stalking because many stalkers are skilled manipulators. Stalkers “create and exploit vulnerabilities in their victims and rely on technology and their ability to manipulate the justice system in order to conceal their crimes and cast doubt on their victim.” J.G. Long, et al., *Stalking: Effective Strategies for Prosecutors*, Aequitas, Issue 11 (2002) available at [http://www.aequitasresource.org/Stalking\\_Effective\\_Strategies\\_for\\_Prosecutors\\_Issue\\_11.pdf](http://www.aequitasresource.org/Stalking_Effective_Strategies_for_Prosecutors_Issue_11.pdf). Offenders claim that

what looked like behavior reasonably calculated to make the victim afraid was just “a series of unfortunate accidents.” *People v. Johnson*, 164 Cal. App. 4th 731 (2008). See *People v. Riccardi*, 281 P.3d at 15 (Defendant argued that that the encounters were “only due to coincidence because they had the same favorite restaurants and her fitness center was along his regular jogging route.”); *Comm. v. Gupta*, 2 N.E.3d 903, 906 (Mass. App. Ct. 2014) (Defendant claimed coincidence when he was shopping at the same retail clothing store as his estranged wife.); *State v. Becklin*, 182 P.3d 944 (Wash. 2008) (Defendant claimed that his friends spontaneously followed the victim and reported her activities to him). Offenders also claim misunderstandings even where explicit threats are made. *People v. Sucic*, 928 N.E.2d 1231, 1238 (Ill. App. Ct. 2010) (“Defendant testified that his statement that he was going to kill himself and take [the victim] with him was ‘just spiritual’ and ‘a figure of speech.’”). The subjective test adds an additional tool to the offender’s arsenal . . . that the jury has to see into his mind. The subjective intent test will “allow carefully crafted statements by speakers who actually intend to threaten to go unpunished.” Jordan Strauss, *Context is Everything: Towards a more flexible rule for evaluating true threats under the First Amendment*, 32 SW U. L. Rev. 231, 263 (2003).

In contrast, the objective standard emphasizes the importance of context in determining whether words or behavior constitute a threat.<sup>2</sup> Under the objective standard, the fact finder must consider the context in which the statements were made in order to determine if a reasonable speaker would understand that the words and conduct would be threatening.

For example, if a stalker sends a dozen roses, this gesture may seem benign and loving to the casual observer. However, if that same victim has been told by her stalker numerous times that the day she receives a dozen roses is the day he is going to kill her, those same roses, understood in the context of the victim's experience, mean a very different thing. Those roses may be viewed as a direct threat to kill the victim.

National Center for Victims of Crime, *The Model Stalking Code Revisited, Responding to the New Realities of Stalking*, January 2007, 10-13, available at <http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf?sfvrsn=0>.

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<sup>2</sup> Context of speech is important to determining if it is "protected activity" or a "true threat." *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1402, 22 L.Ed.2d 664 (1969). See *Virginia v. Black*, 538 U.S. 343, 345, 123 S. Ct. 1536, 1540, 155 L.Ed.2d 535 (2003) ("The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.").

The practical impact of a subjective intent standard will not be to protect speech, but to protect threats. A defendant, exercising his right to remain silent, can nonetheless posit a number of possible “legitimate” purposes of the communication. The prosecution cannot disprove nor even challenge any such theoretical reasons without commenting on the defendant’s exercise of his Fifth Amendment right. Victims may be advised by law enforcement to communicate their feelings of being threatened in order to defeat an “I didn’t know she’d think it was a threat” defense – but such communications create risk of retaliation or escalation. In fact, any contact by the victim, even negative contact, can reinforce a stalker’s behavior. Conduct that is more persistent, violent, frequent or hostile will be of no value in assessing the commission of a crime because none of it will meet “the subjective intent” of the perpetrator without an admission of intent.

The government has the right “to protect through application of the criminal law the basic human need for security.” *United States v. Gillenwater*, 749 F.3d 1094 (9th Cir. 2014) (affirming involuntary medication to defendant being prosecuted for threats to government officials), citing *Sell v. United States*, 559 U.S. 166, 123 S. Ct. 2174, 156 L.Ed.2d 197 (2003). The trial courts charge to the jury to consider the context of the communication, and that a true threat is to be distinguished from idle, careless joking and exaggeration, strikes the balance between the free

speech right of the speaker, and the victim's right not to live in continual fear.



## CONCLUSION

Laws prohibiting stalking serve an important purpose. Victims are harmed by stalking behavior regardless of the subjective intent of the offender. The subjective intent standard provides yet another hurdle to reporting and prosecuting stalking offenses.

Respectfully submitted,

REBECCA J. ROE  
SCHROETER, GOLDMARK & BENDER  
810 Third Avenue, Suite 500  
Seattle, Washington 98104  
Telephone: (206) 622-8000

*Counsel for Amicus Curiae*  
*Counsel of Record*