No. 13-983

In The
Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF WISCONSIN AND SEVENTEEN OTHER STATES, THE DISTRICT OF COLUMBIA, GUAM, AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENT

J.B. VAN HOLLEN
Wisconsin Attorney General

THOMAS C. BELLAVIA*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 / (608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
**Counsel of Record*

ADDITIONAL COUNSEL FOR AMICI CURIAE

Michael C. Geraghty
Attorney General of Alaska
Post Office Box 110300
Juneau, Alaska 99811

Janet T. Mills
Attorney General of Maine
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006

Arizona Attorney General Tom Horne
Office of the Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

Bill Schuette
Michigan Attorney General
Post Office Box 30212
Lansing, MI 48909

John W. Suthers
Attorney General
State of Colorado
Colorado Department of Law
Ralph L. Carr Colorado
Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Main: (720) 508-6000
Phone: (720) 508-6559

Jim Hood
Mississippi Attorney General
Post Office Box 220
Jackson, MS 39205

Irvin B. Nathan
Attorney General for the
District of Columbia
441 4th Street, N.W.
Washington, D.C. 20001

Kay Chopard Cohen
Executive Director
National District Attorneys
Association
99 Canal Center Plaza, Suite 330
Alexandria, VA 22314

Leonardo M. Rapadas
Attorney General of Guam
Office of the Attorney General
590 S. Marine Corps Dr.
ITC Bldg., Ste. 706
Tamuning, Guam 96913

David M. Louie
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawaii 96813

Lawrence G. Wasden
Idaho Attorney General
Post Office Box 83720
Boise ID 83720-0010

Lisa Madigan
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

Tom Miller
Attorney General of Iowa
1305 East Walnut Street
Des Moines, IA 50319

Jack Conway
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601

Gary K. King
Attorney General of New Mexico
Post Office Drawer 1508
Santa Fe, NM 87504-1508

Kathleen G. Kane
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Peter F. Kilmartin
Rhode Island Attorney General
150 South Main Street
Providence, RI 02906

Alan Wilson
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

Sean D. Reyes
Utah Attorney General
Utah State Capitol, Suite #230
Post Office Box 142320
Salt Lake City, Utah 84114-2320

Robert W. Ferguson
Attorney General of Washington
1125 Washington Street SE
Post Office Box 40100
Olympia, WA 98504-0100

QUESTION PRESENTED

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, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; 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.

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INTEREST OF AMICI CURIAE

The *amici* States have a strong interest in the outcome of this case.[1] As sovereign governments elected to serve their citizens, the *amici* States are committed to protecting the freedoms enshrined in the First Amendment. At the same time, the *amici* States are acutely aware of the great harms to individuals and to society created by threats of violence. Such threats disrupt victims' lives, damage their physical and mental health, and interfere with their freedom to conduct legitimate activities. States have a substantial interest in protecting their citizens from such harms.

For that reason, the legislatures in the *amici* States have enacted statutes that prohibit various types of threats. The effectiveness of these statutes would be significantly diminished if the First Amendment were construed as requiring a subjective intent to threaten.

The *amici* States are joined in this brief by *amicus* National District Attorneys Association ("NDAA"). The NDAA has approximately 7,000 members and is the largest and primary professional association of prosecuting attorneys in the United States. With a mission "[t]o be the voice of America's prosecutors and to support their efforts to protect the

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[1] The states joining this brief, the District of Columbia, and Guam are collectively designated herein as "the *amici* States."

rights and safety of the people," the NDAA shares the interest of the *amici* States in the effectiveness of state laws that protect people from the serious harms caused by threats.

To advance these interests the *amici* States and the NDAA submit this brief in support of the position of the United States.

SUMMARY OF ARGUMENT

Speech that threatens harm to others injures individuals and society by causing fear and disruption. To protect against such injury, the states and the federal government prohibit threatening speech in a variety of ways. The First Amendment does not protect genuine threats against such prohibitions, because threats cause great harm while serving no redeeming purpose. That harm does not depend on the subjective intent of the speaker, but rather is inflicted by the very utterance of speech with an objectively threatening meaning.

1. Government has a compelling interest in preventing the harms caused by threats and both federal and state governments have, therefore, enacted statutes that criminalize threats in a variety of circumstances. Many of these laws recognize that the injuries arise from the objective meaning of the threatening speech and thus apply regardless of the speaker's subjective motive.

Particularly important are laws that prohibit stalking and domestic abuse. Such laws typically apply not only to violent or intimidating physical conduct, but also to threatening a victim. Stalking and domestic abuse cause widespread and severe harms that result not only from physical violence, but also from fear and its disruptive effects. By generating fear, the mere utterance of a threat inflicts injury—physical, emotional, social, and economic.

2. a. Threats of violence are one of the limited categories of speech that this Court has found to be unprotected by the First Amendment because they directly harm society while contributing little or nothing to the exposition of ideas. Excluding threats from First Amendment protection is justified by society's interest in protecting people from the fear of violence and the disruptive effects of such fear.

b. The Court has not, however, precisely defined the boundaries of the category of unprotected threats. Most lower courts have applied an objective standard that does not inquire into the speaker's subjective purpose, but asks whether a reasonable person would foresee that the communication, considered in its context, would be understood as a threat. That standard best promotes the purposes of allowing government to prohibit threats.

Threatening speech does not communicate ideas but rather, by its very utterance, directly performs an action that inflicts serious harms. The practical

effect of such performative or situation-altering speech depends on its objective meaning in the relevant context, rather than on any private, subjective intent. The objective approach, therefore, best captures and responds to the fundamental nature of threatening speech.

c. The objective threat standard is also consistent with this Court's precedent. In *Watts v. United States*, 394 U.S. 705, 708 (1969), the Court examined not the speaker's subjective intent, but the objective meaning of his statements in their context. In *Virginia v. Black*, 538 U.S. 343 (2003), the key to the Court's reasoning was the belief that cross burning does not always have a threatening meaning, but rather may have a constitutionally protected meaning in some contexts. In both decisions, the Court's emphasis on the meaning of the expressive activity in the relevant context was consistent with the objective threat standard.

d. The ability of the States to effectively combat the harms caused by threats would be impaired if the subjective threat standard were constitutionally required. A narrow focus on a speaker's subjective intent unrealistically severs threatening speech from the context that gives it meaning and determines its harmful impact. In contrast, the objective approach realistically responds to the harms in question by focusing on the objective meaning of the speech as it would be understood by reasonable persons under all of the relevant circumstances.

The objective approach is especially valuable in the domestic abuse context. Social scientists today understand domestic abuse as patterned in nature and largely defined by non-physical manifestations of intimidation in which threats play a central role. Communications containing veiled threats that appear innocuous standing alone may reasonably have a threatening meaning when viewed in the context of an abusive relationship. The objective approach, therefore, is most consistent with practical realities and best ensures that offenders are held properly accountable for making threats.

ARGUMENT

I. Objectively threatening speech inflicts severe harms, which the States have a compelling interest in preventing.

Making people fear for their safety is a grave wrong that causes great personal and societal harm and serves no desirable purpose. Threats induce emotional and mental disturbance in the threatened person, disrupt and interfere with people's lives and legitimate activities, and divert personal and social resources to defensive efforts aimed at preventing the carrying out of the threats and responding to their effects. The government therefore has a compelling interest in regulating threats and an objective threat standard best promotes that interest.

Various federal and state statutes make the issuance of a threat a basis for civil or criminal

liability. For example, the statute at issue here makes it a crime, punishable by fine or imprisonment, to transmit in interstate commerce "any communication containing . . . any threat to injure the person of another." 18 U.S.C. § 875(c). Other federal statutes are more specific—prohibiting, for example, threats of force or violence against the president or vice president; judges and other federal officials; IRS employees; providers of reproductive health services; and jurors. *See* 18 U.S.C. §§ 871(a), 115(a)(1)(B), 248, and 1503 and 26 U.S.C. § 7212(a).

The State legislatures in all of the *amici* States have likewise enacted statutes to protect their residents against threats of violence and the serious harms caused by such threats. Such state laws prohibit or otherwise regulate threatening communications not only through general criminal restrictions on threats like 18 U.S.C. § 875(c), but also through statutes addressing specific areas of concern. These include statutes prohibiting threats to judges or other government officials or employees, statutes prohibiting all forms of extortion—including blackmail and intimidation of crime victims or witnesses in court proceedings, bomb threats and other terroristic threats—and disorderly conduct statutes that, among other things, prohibit violent or abusive speech under circumstances tending to cause or provoke a disturbance of public order.

Perhaps most significant of all are state criminal prohibitions on stalking and various forms of domestic abuse and intimidation, including related

statutes that provide for restraining orders and injunctions to protect victims of domestic abuse. Anti-stalking laws, typically prohibit a course of conduct that includes not only physical actions—such as maintaining visual or physical proximity to the victim, appearing at the victim's home or workplace, or monitoring the victim through photographic, video, audio, or other electronic means—but also conveying verbal or written threats directed at the victim. Domestic abuse laws, likewise, typically allow courts to enjoin not only violent physical conduct, but also threats to engage in such conduct.

Since the nation's first anti-stalking law was enacted in California in 1990, all 50 states and the District of Columbia have criminalized stalking, either by creating a specific anti-stalking law or by modifying existing harassment statutes to apply in stalking situations. *See* Patricia G. Tjaden, *Stalking Policies and Research in the United States: A Twenty Year Retrospective*, 15 Eur. J. Crim. Policy Res. 261, 262 (2009); Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victims in the United States – Revised* 1 (2012); Adeola Olagunju and Christine Reynolds*, Domestic Violence*, XIII Geo. J. Gender & L. 203, 228 n. 196 (2012) (citing statutes).

All jurisdictions in the nation also allow victims of stalking and domestic abuse to petition a court for a civil protection order, and such orders are one of the most commonly used legal remedies for such conduct. *See* Margaret E. Johnson, *Redefining Harm,*

Reimagining Remedies, and Reclaiming Domestic Violence Law, 42 U. C. Davis L. Rev. 1107, 1131 n. 114 (2009) (citing statutes); Olagunju and Reynolds, *supra* at 241; Melvin Huang, *Keeping Stalkers at Bay in Texas*, 15 Tex. J. C.L. & C.R. 53, 68 (2009).

Congress has further addressed the problem of stalking in federal jurisdictions and stalking that crosses state lines in the Violence Against Women Act of 1994 and subsequent reauthorizations and the Interstate Stalking Punishment and Prevention Act of 1996. *See* Tjaden, *supra* at 268-69. At the direction of Congress, the National Institute of Justice developed a Model Stalking Code for States that has provided many jurisdictions with guidance in drafting or amending their own laws. *See id.* at 262; U.S. Dept. of Justice, National Institute of Justice, *Project to Develop a Model Anti-Stalking Code for States* (1993).

Stalking and domestic abuse cause such widespread harms that they are legitimately considered a serious criminal justice and public health problem. The 1998 National Violence Against Women Survey (NVAWS) found that approximately 8.2 million U.S. women and 2 million U.S. men had been stalked in their lifetimes, while 1 million women and 371,000 men are stalked annually. *See* Patricia Tjaden and Nancy Thoennes, U.S. Dept. of Justice, National Institute of Justice, *Stalking in America: Findings From the National Violence Against Women Survey* 3 (1998). More recent studies have shown even higher prevalence levels, with the Bureau of Justice Statistics estimating that more

than 3 million people are stalked annually in the U.S., and a national survey by the Centers for Disease Control and Prevention estimating that 1 in 6 women (16.2%) and 1 in 19 men (5.2%) in the U.S. have experienced stalking victimization at some point in their lives. *See* Catalano, *supra* at 1; Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 2 (2011) (hereinafter CDC (2011)); Tjaden, *supra* at 270-71; Huang, *supra* at 55.

In addition to being widespread, the harms caused by stalking and domestic abuse are also severe, not only in their association with physical violence, but also in the harm directly caused by fear itself and its disruptive effects. Threats against stalking victims and related persons are common, and many such threats are associated with actual stalker violence. *See* Michele Pathé and Paul E. Mullen, *The Impact of Stalkers on Their Victims*, 170 British J. of Psychiatry 12, 15 (1997). Research shows that threats of violence by abusers against their intimate partners are highly predictive of actual physical violence and are a better predictor of future violence than past violent behavior. *See* Joanne Belknap et al., *The Role of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 378 (2012); Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 Homicide Studies 300, 302 (1999). Studies have found that many women who are murdered by a current or former intimate partner

are first threatened and stalked by that partner. *See* Tjaden, *supra* at 272; McFarlane, *supra* at 312; Cindy Southworth et al., National Network to End Domestic Violence, *A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy* 3 (2005), at 3. All of this research strongly suggests that it is objectively reasonable for victims of stalking and domestic abuse to take their abusers' threats seriously.

Threats of violence by stalkers are very harmful, even apart from the violence that often follows them. "The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991); *see also Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) ("[T]hreats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."). The mere utterance of a threat thus inflicts injury at the moment it is communicated to the target, without need for any further overt act or any specific subjective intent on the speaker's part. The threat itself and its disruptive effects will harm the target and the target's family for an indefinite period of time. *See* Robert Kurman Kelner, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287, 291 (1998); Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 Stan. L. Rev. 1337, 1392 (2006).

The fears and emotional stress engendered by stalking and domestic abuse are many and varied. Nine percent of stalking victims report fear of death. Twenty-nine percent fear the stalking will never stop. More than half of the victims fear bodily harm to themselves, their child, or another family member. *See* Katrina Baum and Shannon Catalano, U.S. Dept. of Justice, Bureau of Justice Statistics, *Stalking Victimization in the United States* 6 (2009). Moreover, it is frequently difficult to determine whether the speaker will attempt to carry out a threat, and the resulting uncertainty can seriously affect the lives of targeted persons and their loved ones. *See* John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 Buff. L. Rev. 653, 663-64 (1994).

According to one report, the most common fear reported by stalking victims is not knowing what will happen next. As one victim described her ordeal:

> I wake up every morning, wondering if this is the day I will die at the hands of my stalker. I spend the day looking over my shoulder for him. I jump every time the phone rings. I can't sleep at night from worrying, and when I do sleep, I have nightmares of him. I can't escape him, not even for a minute. I never have a moment's peace, awake or asleep.

U.S. Dept. of Justice, Office of Community Oriented Policing Services, *Creating an Effective Stalking Protocol,* at 11 (2002).

Victims of domestic abuse often describe these psychological impacts as the most painful harms they suffer. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 968 (2004); Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 Wm. & Mary J. Women & L. 495, 509 (2008). Stalking victims almost always experience a "pervasive sense of loss of personal safety, a constant feeling of stress, and hypervigilance." U.S. Dept. of Justice, Office of Community Oriented Policing Services, *supra* at 11. Victims often complain about feeling exhausted and being unable to concentrate; some experience short-term memory problems, which decrease work productivity or academic performance. *Id.* The psychological harm to victims may be further exacerbated by concerns about the harmful effects stalking may have on the victim's children or other secondary victims. *Id.* at 12.

The threatening conduct of stalkers and domestic abusers also imposes a significant burden on the health care systems in the *amici* States. *Cf.* CDC (2011) at 1; Centers for Disease Control and Prevention, *Intimate Partner Violence in the United States—2010* 1, 65, 67 (2014) (hereinafter CDC (2014)). The severe stress caused by continuous fear adversely affects the functioning of many bodily systems and contributes to a wide range of acute and chronic physical and mental health conditions. *See* Karst, *supra* at 1342, 1344; CDC (2011) at 1; CDC

(2014) at 1; Pathé et al., *supra* at 14; Rachmilovitz, *supra* at 509-10; Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J. L. & Pub. Pol'y 283, 291 (2001) (citing *Tompkins v. Cyr*, 202 F.3d 770, 782 (5th Cir. 2000); *United States v. Alkhabaz*, 104 F.3d 1492, 1498 (6th Cir. 1997); *Simpson v. Burrows*, 90 F. Supp.2d 1108, 1121 (D. Or. 2000)). More health problems for victims means more visits to health care providers and more frequent and longer hospital stays. *See* CDC (2014) at 61.

The fear and disruption caused by threats also generate a variety of social and economic difficulties for victims, decreasing their productivity and burdening them with the costs of trying to protect themselves and their loved ones. More than 80% of stalking victims have reported curtailing social contacts and modifying their usual activities, sometimes radically, so as to reduce their sense of insecurity. *See* Pathé et al., *supra* at 14; Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 Cardozo L. Rev. 525, 530-31 (1993). A substantial majority of victims also report taking a variety of often burdensome and expensive security measures, such as obtaining unlisted telephone numbers and post office boxes; installing caller ID or call blocking; buying a new car; changing their surname; installing elaborate home security systems; or relocating to a new residence. *See* Pathé et al., *supra* at 14; Tjaden and Thoennes, *supra* at 2; Baum and Catalano, *supra* at 6-7.

Given the scope and severity of the harms described above, there can be no question that States have a compelling interest in prohibiting threatening communications so as to protect the safety of their citizens and allow them to live their lives with a basic sense of personal security.

II. The objective threat standard used by most lower courts is consistent with the First Amendment.

A. Threats of violence are not protected by the First Amendment.

Regulating verbal threats is regulating the content of expression and, therefore, implicates the Free Speech Clause of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 403 (1992). That provision, however, does not protect all speech or guarantee an absolute freedom to say anything to anyone at any time. *See Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

As a general matter, the First Amendment prohibits government from imposing content-based restrictions on speech absent a compelling government interest that cannot be promoted through any less restrictive alternative. *See Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). This Court has repeatedly held, however, that content-based restrictions are permissible for certain narrowly-defined categories of speech that directly harm society while contributing little or nothing to the exposition of ideas:

> Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

R.A.V., 505 U.S. at 382-83 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (citations omitted).

These categories of speech—such as obscenity, child pornography, fighting words, and false advertising—are considered by the Court to lie outside the scope of First Amendment protection because "within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (child pornography); *see also Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (fighting words); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (false advertising). This "categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate . . . only upon a showing of compelling need." *R.A.V.*, 505 U.S. at 400 (White, J., concurring).

This Court has repeatedly recognized that threats of violence are one such category of unprotected expression. *See R.A.V.*, 505 U.S. at 388 ("[T]hreats of violence are outside the First Amendment."); *United States v. Watts*, 394 U.S. 705, 708 (recognizing that a true threat to personal safety enjoys no constitutional protection). The Court has identified three governmental interests that justify the exclusion of threats of violence from First Amendment protection: (1) the interest in "protecting individuals from the fear of violence," (2) the interest in protecting them against "the disruption that [such] fear engenders," and (3) the interest in protecting them "from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

B. The objective threat standard best promotes the purposes of allowing government to regulate threats

This Court has not, however, attempted to articulate a rigid, doctrinal definition that would precisely delimit the outer reaches of the category of unprotected threats.

For decades, most lower courts—including the lower courts in the present case—have applied an objective, reasonable person standard for determining whether a particular communication is an unprotected threat. Such an objective standard asks whether a reasonable person would foresee that the communication in question would be understood by those to whom it is directed as a serious expression of an intention to inflict injury on another

person. *See*, *e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20 (1st Cir. 1997); *United States v. Myers*, 104 F.3d 76, 81 (5th Cir.), *cert. denied*, 520 U.S. 1218 (1997); *United States v. Himelwright*, 42 F.3d 777, 783 (3d Cir. 1994); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995); *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. DeAndino*, 958 F.2d 146, 148-49 (6th Cir.), *cert. denied*, 505 U.S. 1206 (1992); *United States v. Schneider*, 910 F.2d 1569 (7th Cir. 1990).

Under this objective approach, the threatening nature of a communication is not determined by "probing [the speaker's] subjective purpose," but instead is "determined objectively from all the surrounding facts and circumstances." *DeAndino*, 958 F.2d at 148. The speaker need not have subjectively intended that any recipients understand the communication as threatening, as long as a reasonable person familiar with all of the relevant context of the communication would understand it as a threat. *See Darby*, 37 F.3d at 1066.

The objective threat standard best promotes the purposes of allowing government to prohibit or restrict threatening communications. To illustrate why this is true, it is helpful to closely examine the particular characteristics of fighting words and threats that place them outside the scope of the First Amendment.

In establishing fighting words as an unprotected category, this Court characterized them as words "*which by their very utterance inflict injury* or tend to

incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. The Court went on to observe that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* Fighting words are unprotected by the First Amendment, not because of the ideas (if any) that they may communicate, but because "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393. That is, "despite their verbal character," fighting words are "analogous to a noisy sound truck" and are excluded from the scope of the First Amendment due to their "'nonspeech' element of communication." *Id.* at 386.

Threats are similar to fighting words in this regard because, by their very utterance, they immediately and directly inflict the fear of personal injury on the target of the threat and disrupt the target's life and activities with the serious consequences of such fear. Threats are largely devoid of First Amendment value in that they typically have little or no political, ideological, or other normative content and do not purport to inform citizens in their decision making, to advance a search for truth, or to aim at a larger social or public good. *See* Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 213-14; Karst, *supra* at 1390. Threatening speech is outside the protection of the First Amendment because, by

its very utterance, it immediately and directly inflicts serious harms that far outweigh any minimal expressive interests it might advance. *See* John Rothchild, *Menacing Speech and the First Amendment*, 8 Tex. J. Women & L. 207, 215-16 (1999).

More generally, verbal utterances may not only declare some fact or describe some state of affairs, but may also directly perform some action. J. L. Austin, *How To Do Things With Words* 1 (2d ed. 1975). Even utterances that look like expressive or descriptive statements may not actually record, describe, or report information, but rather may directly affect the world in different ways. The utterance is itself the performance of an action that cannot accurately be described as simply saying something. *Id.* at 2, 5. The marital declaration "I do" is a familiar example of this. *Id.* at 5. Such an utterance—sometimes called "performative"—is not a description of the speaker's action or a statement that the speaker is doing it, but rather is itself the performance of the action by the speaker. *Id.* at 6.

In the First Amendment context, these performative speech acts are often referred to as "situation altering" utterances. *See*, *e.g.*, Kent Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645, 680, 741-42; Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U. L. Rev. 1081, 1091-95 (1983). The dominant import of these communications lies in directly and immediately altering a situation or inducing an action, not in conveying ideas about facts or value. *Id.*

The reasons for the constitutional protection of free speech apply much more forcefully to statements of fact and value than they do to situation-altering statements because the former may advance individual autonomy and foster creativity and dynamism in the marketplace of ideas, while the latter are largely lacking in substantive content and operate more like a physical action than like a verbal or symbolic communication of ideas or emotions. *Id.*; *Cf. R.A.V.*, 505 U.S. at 386. Moreover, the actions performed by situation-altering communications can be directly and immediately harmful, for in addition to the countless positive and beneficial things that can be done with words, they also can deceive, defraud, misrepresent, defame, discriminate, harass, intimidate, and threaten. *See* O. Lee Reed, *The State Is Strong But I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Targeted Speech that Threatens Individuals With Violence*, 38 Am. Bus. L. J. 177, 177-78 (2000).

For present purposes, the key point is that the practical effect of situation-altering speech depends on its meaning in the relevant context, rather than on any private, subjective intent of the speaker. *See* Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. U. L. Rev. 45, 84 (2011); Austin, *supra* at 9, 13.

All uses of language appeal to known public meanings as informed by contextual framing. Meaning is a function of publicly shared context and usage conventions, not of private facts concerning

the speaker's mental state. *See* Mason, *supra* at 93; Austin, *supra* at 9, 13. It follows that a speaker who makes an utterance with a particular objective meaning within a given linguistic community cannot simultaneously claim that he actually subjectively intended a different meaning. "[W]hat we can mean is at least sometimes a function of what we are saying. Meaning is more than a matter of intention, it is also at least sometimes a matter of convention." Mason, *supra* at 89 (quoting John Searle, *Speech Acts: An Essay in the Philosophy of Language* 45 (1969)).

This is especially true of performative speech acts. The practical effect of a performative utterance depends on a variety of factors, including the grammar and syntax employed, the relationship between speaker and audience, and the historical and contextual background of the utterance. *See id.* at 84 (citing John R. Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* 27 (1985)); Austin, *supra* at 142. The speaker's subjective intent about how the audience will or should interpret the utterance may be one factor in determining its practical effect—at least to the extent subjective intent is known or knowable to other members of the relevant community—but it is not dispositive. *See* Mason, *supra* at 84 (citing Searle and Vanderveken, *supra* at 27). The practical effect of performative speech is neither reducible to nor determined by the speaker's intention. *See id.* at 84-85.

This is fundamental to the law of contracts. When a speaker utters certain words in certain

circumstances, he thereby forms a contract—which is a type of performative utterance. If he does not subjectively intend to bind himself by that utterance, the contract may have been made in bad faith, but it is nevertheless a contract—as long as it was made in appropriate circumstances and in accordance with the applicable conventions. Austin, *supra* at 9-11. Accordingly, in contract law, courts will hold the parties to the intentions objectively manifested by the public meaning of the language used and will not give legal effect to private meanings favored by one party but not conveyed to the other. *See* Restatement (Second) of Contracts § 212 cmt. a (1981). "[T]he relevant intention of a party is that *manifested by him* rather than any different *undisclosed* intention." *Id.* (emphasis added).

This reasoning applies with particular force to the law of threats. Statutes that prohibit or restrict threatening communications are directed at protecting against the harms of fear and disruption caused by those communications. *See* Mason, *supra* at 98. Those harms flow from the utterance and the public meaning of the threat itself and do not depend on the subjective intent of the speaker. *See id*. at 48, 98.

In a threat case, the central question is, what is the objective, public meaning of the allegedly threatening communication? The answer requires an examination of the communication in the context of all the relevant background facts and the rules and conventions of the pertinent community. *See id.* at 90. Relevant contextual factors might include the identities of parties to the communication, their past

and present relationships, the relationships between groups to which the parties belong, the historical setting in which the communication occurs, the place where the communication is made, and the method or mode of communication. *See* Nockleby, *supra* at 659-60, 672.

This effort to determine the objective meaning of an allegedly threatening communication in light of all the surrounding facts and circumstances is precisely what is done by the majority of lower courts that have long applied the objective, reasonable person standard for determining whether a communication is an unprotected threat. That objective standard, therefore, properly responds to the fundamental nature of threatening speech and best promotes the government's legitimate and compelling interests in prohibiting threats.

C. The objective threat standard is consistent with this Court's precedent.

It is true, of course, that courts must "confine the perimeters of any unprotected category [of speech] within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the U.S.*, 466 U.S. 485, 505 (1984). Accordingly, in *Watts*, this Court made it clear that statutes that criminalize threatening speech "must be interpreted with the commands of the First Amendment clearly in mind" and that courts must take care to distinguish between punishable threats and constitutionally protected speech. *Watts*, 394 U.S. at 707. The analysis in *Watts*, however, is consistent

with the objective threat standard adopted by most lower courts.

Watts involved a statement made by an 18-year-old man at an anti-war political rally held on the grounds of the Washington Monument. *Id.* at 705-06. In the course of a discussion at the rally, the young man reportedly stated that, if he was drafted and made to carry a rifle, the first man he would want to get in his sights would be the President. *Id.* at 706. On the basis of that statement, the young man was convicted of knowingly and willfully threatening the President, in violation of federal law. *Id.* This Court reversed the conviction, concluding that the defendant's facially threatening statement did not amount to a genuine or "true" threat because, when interpreted in the context in which it was made, the statement clearly was political hyperbole that was expressly conditional, was spoken in jest, and was not taken seriously by other attendees at the rally, who responded to the statement with laughter. *Id.* at 706-08.

In concluding that Watts' facially threatening speech was not a true threat, the Court did not inquire into the subjective contents of his mind, but instead examined the objective meaning of his statements in their public context. Factors that the court found relevant included the factual circumstances of the rally, its political dimension, the fact that the facially threatening statement was expressly conditional on an intervening event that Watts himself indicated was unlikely to occur (*i.e.* his induction into the U.S. military), and the light-hearted reaction of other listeners. *Id.*

Interpreted against that background, the decision was clear that Watts' facially threatening statement could not reasonably be understood as a serious expression of an intent to harm the President, but rather was potent political rhetoric used in the highly charged context of an anti-war rally. In concluding that Watts' statement was not truly a threat at all, but rather was political speech entitled to full First Amendment protection, this Court employed an analysis similar to and consistent with the objective threat standard accepted by most lower courts.

The Court's most recent discussion of true threats in *Virginia v. Black*, 538 U.S. 343 (2003), is also consistent with the objective threat standard. In *Black*, the court upheld the facial validity of Virginia's statutory prohibition on cross-burning with the intent to intimidate, but invalidated the portion of the statute that allowed a jury to presume an intent to intimidate from the mere fact of burning a cross in public. In upholding the statute's core prohibition, the Court reasoned that cross-burning with the intent to intimidate was simply a particularly virulent form of intimidation, which is a category of expression that is not protected by the First Amendment. *Id.* at 363. The statutory presumption, in contrast, violated the First Amendment because it allowed the statute to effectively prohibit *all* public cross-burning, even though, a majority of the Court found, cross-burning in some contexts has a political meaning, rather than an intimidating or threatening meaning, and therefore is entitled to First Amendment protection in those contexts. *Id.* at 365-66; *see also id.* at

385-86 (Souter, J., concurring in part and dissenting in part).

The petitioner in the present case contends that *Black* abrogated the objective threat standard and instead adopted a subjective standard under which threatening speech can be prohibited only if there is proof that the speaker subjectively intended the speech to be understood as a threat. Petitioner bases that contention on two statements in *Black*. The first is the statement that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359. The second is the statement that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360.

Petitioner's claim that *Black* abrogated the objective standard for true threats and substituted a subjective intent requirement is unpersuasive, for two reasons.

First, the plain language of the two statements in *Black* relied on by petitioner did not purport to delineate the border between true threats and protected speech.

The first of those statements merely said that true threats "encompass" statements in which a speaker purposefully communicates "an intent to

commit an act of unlawful violence." *Id.* at 359. The word "encompass" is not a term of definition or identity, but rather implies two distinct categories: a larger, encompassing category and a smaller, encompassed category. Many courts, including this Court, regularly use "encompass" in this way in cases in which the courts refrain from exhaustively defining a term, while holding that the term encompasses some other term. *See* Mason, *supra* at 53-54 (citing cases).

The *Black* Court's conclusion that the larger category of true threats includes the smaller category of statements made with the subjective intent to threaten does not mean that all true threats must be made with that subjective intent. One could just as well argue that, because the category of fruits encompasses the category of apples, all fruits are apples.

The second statement relied on by petitioner eliminates any possible doubt about this point by explicitly saying that intentional intimidation "is a type of true threat." *Id.* at 360. A statement about a *type* of true threat does not give an exhaustive definition of a true threat.

Second, *Black* did not address the constitutionality of the objective standard at all because the Virginia statute did not employ an objective standard, but rather required subjective intent to intimidate as a *statutory* element. *See id.* at 348. The analysis in *Black* is phrased in terms of subjective intent to intimidate because such intent was an element of the statute the Court was

interpreting. The *Black* Court had no occasion to address whether an objective, reasonable-person standard is constitutionally permissible.

The key to the Court's reasoning, however, was the belief of a majority of the Court that cross-burning does not always have a constitutionally unprotected threatening meaning, but rather, in some political contexts, has a constitutionally protected meaning as a statement of ideology or group unity. *Id.* at 365-66. The problem with the Virginia statute's presumption was that it ignored all the contextual factors that are necessary to distinguish between those two different meanings. *See id.* at 367. In this emphasis on the meaning of the expressive activity in light of relevant contextual factors, *Black* is quite consistent with the traditional, objective threat standard.

D. An objective threat standard is consistent with the realities of threats of violence and ensures that offenders are held accountable for their threats.

The ability of the *amici* States to effectively combat the widespread and severe harms caused by threats of violence would be significantly impaired if this Court were to adopt the subjective threat standard advocated by the petitioner in this case.

Under a subjective standard, courts would be required to protect threatening speech based on what can or cannot be proved about the private, interior meaning attributed to the speech by the speaker, even if the context in which the speech is

uttered is such that any reasonable person would understand it to have an objectively threatening meaning. The harm caused by a threat is not a function of any unexpressed, subjective purpose of the speaker, but rather results directly from the impact of the threat as it is understood by its recipients. A narrow focus on a speaker's subjective intent unrealistically decontextualizes threatening communications from the background that gives them meaning and that determines their harmful impact.

In contrast, the objective threat standard properly promotes the States' interest in combating the harms caused by threats by realistically focusing on the objective meaning of the threatening speech as it would be understood by reasonable persons under all of the relevant circumstances.

The adoption of a subjective threat standard as a First Amendment requirement would be especially damaging to the *amici* States' efforts to combat the widespread and severe harms of stalking and domestic abuse. In the context of a relationship between current or former intimate partners, it is especially easy for communications with an objectively threatening meaning to be made in subtle, implied, and deliberately veiled forms for which it could be difficult or impossible to prove subjective intent as to individual utterances, but which nonetheless have devastating negative effects on victims.

There has been a growing emphasis in social science scholarship on understanding domestic

abuse as involving not only specific incidents of violence, but as patterned in nature and largely defined by non-physical manifestations of dominance and coercive control that extend to all aspects of the relationship and of the victim's living situation. *See* Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L. Rev. 1295, 1317, 1319 (1993); Tuerkheimer, *supra* at 961-62; Cynthia Southworth et al., *Intimate Partner Violence, Technology, and Stalking*, 13 Violence Against Women 842, 843 (2007) (hereinafter Southworth (2007)); Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 Brook. L. Rev. 1207, 1229 (1999).

Domestic abusers use fear, emotional abuse, and social isolation to construct an elaborate system of domination and subordination. *See* Tuerkheimer, *supra* at 985-86. The abusive relationship is a dynamic pattern of intimidation, power, and control that goes beyond discrete abusive incidents. *See* Erskine, *supra* at 1209. A focus on isolated events thus fails to grasp the impact of those events on the victim in the overall context of abuse. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 Hofstra L. Rev. 1191, 1208 (1993).

The use of threats by abusers to psychologically coerce and control their victims is central to the patterns of coercive control that typify domestic abuse relationships. *See id.* at 1206; Belknap, *supra*

at 377-78; Southworth (2007) at 843. The harmful impact of these threats—like that of other abusive acts—is determined by the overall context of the abusive relationship.

Perpetrators of domestic abuse often are highly manipulative and typically have a large amount of personal information about their victims that can be used to threaten in subtle and devious ways. *See* Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 Fam. L. Q. 353, 359 (2008); Belknap, *supra* at 379. Most intimate partner stalking occurs in a relationship that has a history of violence and abuse and the victim, therefore, is often already afraid of the abuser and knows that the threats are not idle. *See id.* It is thus easy for abusers to instill fear in victims through seemingly innocuous messages containing implied or veiled threats. *See id.* at 387-88. In such contexts of prior violence and victimization, behavior which might not appear threatening in other circumstances may reasonably be considered a clear sign of danger. *See* Dutton, *supra* at 1194-95; Bernstein, *supra* at 559. Requiring proof of a subjective intent to threaten in every such case would effectively immunize from liability those individuals clever enough to word their threats in a manner that allows them to subsequently deny any subjective intent to threaten. *See Whiffen*, 121 F.3d at 21; *Malik*, 16 F.3d at 50.

The systemic and patterned nature of domestic abuse makes clear the importance of contextual factors in understanding the impact of threatening

conduct on victims. *See* Dutton, *supra* at 1202. Because stalking and domestic abuse are characterized by ongoing courses of conduct, the history and context of the abusive relationship is probative of the objective meaning of particular threatening statements. *See* Tuerkheimer, *supra* at 997. A view of the entire context that connects and organizes individual acts is, therefore, essential to grasping the full measure of the harm inflicted by the abuser and suffered by the victim. *See id.* at 973-74.

This is not to say that the objective threat standard would enable government to criminalize threatening speech based on a private meaning that might be attributed to it by a particularly vulnerable or sensitive recipient. On the contrary, the objective standard requires the trier of fact to interpret an allegedly threatening statement in the light of the totality of the relevant contextual circumstances and from the perspective of a reasonable listener familiar with that context. *See United States v. Darby*, 37 F.3d at 1066. This test thus "avoids the risk that an otherwise innocuous statement might become a threat if directed at an unusually sensitive listener." *Whiffen*, 121 F.3d at 21. At the same time, the objective approach "also protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten, or, as would be more common, the government is unable to prove such specific intent which, by its nature, is difficult to demonstrate." *Id.* The objective standard thus gives

proper weight to protecting the victims of threats, while not criminalizing innocent statements.

For all of these reasons, the *amici* States are justified in prohibiting or restricting any communications that convey an objectively threatening meaning that causes others to reasonably feel that their safety is seriously threatened. Continued use of the objective threat standard should be allowed, to ensure that unreasonable offenders can be held accountable for causing reasonable listeners to live in fear.

CONCLUSION

The judgment of the Third Circuit Court of Appeals should be affirmed.

Date this 2nd day of October, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Wisconsin Attorney General

THOMAS C. BELLAVIA*
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 / (608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
**Counsel of Record*