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 THE DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT AND PROFESSOR MARGARET DREW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The Domestic Violence Legal Empowerment and Appeals Project (DV LEAP) is committed to combatting domestic violence through litigation, legislation, and policy initiatives. DV LEAP has extensive experience working with survivors of domestic violence and engaging in legal and policy reform efforts on their behalf, and has filed many *amicus curiae* briefs in this Court.

Prof. Margaret Drew is nationally recognized legal expert on domestic violence. She has represented survivors of intimate partner violence since 1981. She is Associate Professor and Director of Clinics and Experiential Learning at the University of Massachusetts Law School. Prof. Drew directed domestic violence clinics at the University of Cincinnati College of Law, the University of Alabama College of Law, and Northeastern University School of Law. Prof. Drew is a former chair of the American Bar Association's Commission on Domestic and Sexual Violence. She trains judges, lawyers, medical personnel, and others on the dynamics of domestic violence and related topics.

Amici share a profound concern for victims of domestic violence and a deep appreciation for the essential role played by the criminal and civil justice

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

systems in protecting victims of abuse, both of which are implicated by the Court's ruling in this case.

SUMMARY OF ARGUMENT

The court below affirmed petitioner's conviction under 18 U.S.C. § 875(c) for, *inter alia*, threatening to injure and kill his wife. His conviction was based on proof beyond a reasonable doubt that he knowingly and intentionally made threats that, in context, a reasonable person would view as a serious expression of an intent to injure and kill. Petitioner claims that the First Amendment provides an additional protection for his threat of domestic violence, namely that the government must also prove that he subjectively intended to threaten his wife.

1. Petitioner's argument is premised on a fundamental misunderstanding of First Amendment principles. Except in limited circumstances involving political speech or speech about public officials and public figures, the First Amendment does not impose any requirement of proof of subjective intent when the speech at issue inflicts significant immediate injury. The First Amendment permits objective standards to govern the determination of whether speech constitutes fighting words, is obscene, or has a defamatory meaning. In private figure libel cases involving speech on matters of public concern, liability for publishing a false statement of fact also is governed by an objective standard of reasonable care. Proof of a speaker's subjective intent is required only when core political speech on matters of public concern is at issue, such

as in incitement cases and public-official and public-figure libel claims. The First Amendment grants no such special protection to threats of domestic violence or other criminal behavior.

2. Petitioner's argument that his threats are entitled to special protection because they were disseminated online, or because they allegedly were inspired by rap music, should be rejected. The objective standard for threats followed by the court below fully takes into account the context in which a statement is made, eliminating any need to vary the constitutional requirements based on the mode of communication a speaker chooses to employ.

3. Strong historical support for interpreting the First Amendment as permitting an objective evaluation of true threats is found in the common law remedy of "swearing the peace," a remedy well-known to the Framers and still recognized by several states. At common law, as Blackstone explained, persons with "just cause to fear" injury or death by reason of another's "menaces, attempts or having lain in wait for him" could apply for and obtain a peace warrant. 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803). This historical practice of employing an objective standard for protection orders indicates that the First Amendment was never seen as limiting the government's ability to intervene in response to a speaker's threats of violence if those threats, when viewed in context, were reasonably

understood as a serious expression of an intent to harm the victim.

4. Imposing a constitutional requirement of a subjective intent to threaten in criminal cases could have far-reaching and deleterious effects on civil protection orders, which are critical to deterring and limiting recurring domestic violence. Most civil protection order cases involve conduct that is also criminal, and many states require proof of a "crime" to obtain a civil protection order. Despite being civil orders designed to protect, not to punish, these state law systems inevitably will be required to impose new barriers to orders of protection if petitioner's view of the First Amendment prevails, frustrating state efforts to protect at-risk domestic violence victims. Should the Court decide to impose a subjective intent requirement, the requirement should be strictly limited to criminal cases.

5. Finally, should the Court adopt a more protective standard for criminal prosecutions of threats of domestic abuse, that standard should not be a subjective inquiry into the speaker's intent. At most, criminal threats should require the objective standard of recklessness found in the Model Penal Code, which applies even to threats of terrorism. See MODEL PENAL CODE § 2.02(2)(c).

ARGUMENT

The jury below found beyond a reasonable doubt that petitioner (a) "knowingly" threatened to injure and kill his wife in his Facebook postings, *i.e.* he did so "intentionally and voluntarily, and not because of

ignorance, mistake, accident or carelessness," *United States* v. *Elonis*, 897 F. Supp. 2d 335, 341 n.5 (E.D. Pa. 2012); and (b) made those threats "intentionally," *i.e.* "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual," *id.*

Petitioner claims that the First Amendment requires more before a husband can be convicted of threatening to injure and kill his wife. According to petitioner, the government also must prove that he subjectively intended his statements as threats.[2] However, the First Amendment was not intended to provide "breathing space" for threats of domestic violence. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 271–272 (1964) (citation omitted); see generally *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) (focus of First Amendment was to "protect the free discussion of governmental affairs").

Petitioner's approach should be rejected. It is a dangerous, unwarranted, and perverse extension of fundamental First Amendment principles. If adopted, it not only would subvert the criminal prosecution of true threats of domestic violence, but also would frustrate the ability of victims to obtain even civil legal protections based on such threats. In

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[2] There is no dispute that the government need not show the defendant intended to commit the threatened crime. *Virginia* v. *Black*, 538 U.S. 343, 359–360 (2003) ("The speaker need not actually intend to carry out the threat.").

short, petitioner's approach would open the floodgates to even greater victimization of abuse victims than is commonly seen today.

I. THE FIRST AMENDMENT DOES NOT REQUIRE PROOF OF SUBJECTIVE INTENT IN CASES INVOLVING THREATS OF DOMESTIC VIOLENCE.

A central premise of petitioner's constitutional argument is that the First Amendment requires proof of a speaker's subjective intent before speech can be the subject of governmental sanctions. Not so. Except in limited circumstances involving political speech or speech about public officials and public figures, the Court has not imposed any requirement of proof of subjective intent in cases where, as here, the very content of the communication inflicts a significant harm that the State rightly seeks to prevent. While speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), threats of domestic violence, like threats of other crimes, are entitled to no such protection.

A. Courts Have Long Used Objective Standards To Distinguish Protected And Unprotected Speech.

The First Amendment has long permitted courts to apply objective standards in myriad contexts, including fighting words, obscenity, and defamatory meaning, as well as in private-figure libel cases

involving speech on matters of public concern. Threats of domestic violence are entitled to no greater protection.

In *Chaplinski* v. *New Hampshire*, 315 U.S. 568, 573 (1942), for example, the Court upheld a criminal conviction under a statute prohibiting the use in a public place of words "likely to cause a breach of the peace." Like petitioner, the defendant in that case claimed that the First Amendment required the trial court to permit him to testify about his "mission" ("to preach the true facts of the Bible") at the time he uttered the offending words. *Id.* at 570. The Court rejected the argument, citing with favor the lower court's application of an objective standard for evaluating the speech at issue:

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.

Id. at 573 (quotation and alterations omitted); see generally *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976) ("[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'").[3]

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[3] See *United States* v. *Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2544 (2012) (describing the "fighting words" doctrine as among

Watts v. *United States*, 394 U.S. 705, 708 (1969), similarly applied an objective standard in a true threats prosecution. In holding that a "crude offensive method of stating a political opposition to the President" could not reasonably be construed as a true threat, the Court relied on the context in which the statement was made, the conditional language employed, and the audience's reaction—all factors considered under the objective standard applied in this case. *Id.*

Obscenity prosecutions also are governed by an objective, not a subjective, standard. See generally *Miller* v. *California*, 413 U.S. 15, 24 (1973). In *Hamling* v. *United States*, 418 U.S. 87, 120 (1974), for example, the Court rejected a defendant's argument that a conviction on obscenity charges requires proof both of knowledge of the contents of the material and subjective awareness of the material's obscene character. "It is constitutionally sufficient," held the Court, "that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Id.* at 123; see also *Smith* v. *California*, 361 U.S. 147, 153 (1959) (for obscenity law to be constitutionally applied to a book distributor, it must be shown that he had "knowledge of the contents of the book");

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the "historic and traditional categories [of expression] long familiar to the bar" and stating that the "vast realm of free speech and thought * * * can still thrive, and even be furthered, by adherence to those categories") (citations omitted) (brackets in original); see also *Snyder* v. *Phelps*, __ U.S. __, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring); *id.* at 1223 (Alito, J., dissenting).

Ginsberg v. *New York*, 390 U.S. 629, 643–644 (1968) (requirement that defendant had "knowledge of" or "reason to know" of the character and content of the material is sufficient); *Rosen* v. *United States*, 161 U.S. 29, 41 (1896) (regardless of whether the defendant "knew or believed that such [material] could be properly or justly characterized as obscene," so long as the content of the work was obscene and the work "was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete").

Finally, in civil and criminal libel cases, an objective standard governs whether a statement has a defamatory meaning, *i.e.* whether the publication "would hurt the plaintiff in the estimation of an important and respectable part of the community." *Peck* v. *Tribune Co.*, 214 U.S. 185, 190 (1909). See generally *Garrison* v. *Louisiana*, 379 U.S. 64, 65 n.1, 78 (1964); *Beauharnis* v. *Illinois*, 343 U.S. 250, 255 n.5 (1952). "The court determines whether the communication is capable of bearing the meaning ascribed to it by the plaintiff and whether the meaning so ascribed is defamatory in character." RESTATEMENT (SECOND) OF TORTS § 614, cmt. *b* (1977). The jury then determines whether the statement, if "capable of a defamatory meaning, was so understood by its recipient." *Id.*, § 614(2). There is no First Amendment requirement that the defendant subjectively intend the statement at issue to be defamatory.

Other aspects of defamation claims also are governed by an objective standard. Even when the speech at issue is a matter of public concern, a

speaker who publishes false statements about a private figure is held to the objective standard of reasonable care. See *Phila. Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 770 (1986); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

B. Proof Of A Speaker's Subjective Intent Is Limited To Core Protected Speech On Matters Of Public Concern.

The Constitution requires proof of a speaker's subjective intent only in cases involving core First Amendment speech on matters of public concern. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444, 446 (1969) (Ku Klux Klan rally protesting alleged governmental "suppress[ion]" of the "Caucasian race"); *Dennis* v. *United States*, 341 U.S. 494, 497 (1951) (Communist Party organizers charged with advocating the overthrow of the United States government); *Abrams* v. *United States*, 250 U.S. 616, 620 (1919) (leaflets decrying "the President's shameful, cowardly silence about the intervention in Russia").

There is good reason, moreover, to impose a subjective intent requirement in incitement cases, while not in true-threat cases. A true threat inflicts injury on its intended audience, *i.e.* the victim placed in fear. Incitement, in contrast, creates a possible future risk of harm to third parties against whom an inflamed audience may take unlawful action. Because no present, actual injury is required in incitement cases, proof of subjective intent is a necessary safeguard against government censorship and oppression. That is not so in cases of domestic

violence threats, where the injury is suffered immediately upon communication of the threat.[4]

In the civil and criminal defamation contexts, only cases involving speech concerning public officials and public figures require proof of the defendant's state of mind, and even then only with respect to the element of falsity (but not the defamatory meaning) of statements at issue. See *Sullivan*, 376 U.S. at 279–280; *Garrison*, 379 U.S. at 67; *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 134–135 (1967). This special protection for public-official and public-figure cases exists because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and * * * may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 367 U.S. at 270. There is no comparable commitment to promoting threats of domestic violence, and there is no comparable justification for imposing a subjective intent requirement in such private speech cases.

Nor does *Virginia* v. *Black*, discussed at length in the parties' briefs, require otherwise. *Black* involved a statutory requirement of proof of subjective intent. 538 U.S. at 347–348. In addition, the statute at issue in *Black* applied to only one specific mode of symbolic speech (cross-burning), a form of expression which the Court found sometimes carries a political message and sometimes is used purely for intimidation. *Id.* at 354–357. This case, in contrast,

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[4] This is true even when a spouse later claims that the threats were made in jest, Pet. Br. 10, or were a form of "art" beyond the ken of their victims., *id.* at 12.

involves a statute that applies to "any threat to injure the person of another," so long as the threat was made knowingly and intentionally and so long as a reasonable person would foresee that, viewed in context, the threat expresses a serious intention to kill or injure. In such a case, "[i]t is constitutionally sufficient that the prosecution show that [petitioner] had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U.S. at 123. To require further proof that he intended the reasonable consequences of his intentional conduct would amount to allowing him to escape punishment simply by claiming that he did not understand the reasonable meaning of his own words. Cf. *id.* at 123–124 (requiring proof of the defendant's subjective awareness of material's obscene character would allow a "defendant to avoid prosecution by simply claiming that he had not brushed up on the law").

C. The First Amendment Does Not Grant Special Protections To Social Media Or Rap Music.

Petitioner suggests that his threats are entitled to heightened First Amendment protections because they were disseminated by use of the Internet and because he allegedly was inspired by rap music. Perhaps similar claims were made by the first person charged with making a death threat conveyed by telegraph or telephone. Petitioner's argument should be equally unavailing.

Reduced to essentials, petitioner's argument fails for the same reason that the Court has rejected claims made by print journalists that so long as statements of fact are labeled "opinion" and inserted in articles called "columns" they are immune from liability. *Milkovich* v. *Lorain Journal*, 497 U.S. 1, 21 (1990). So too here, the First Amendment does not place form over substance. The dispositive issue is not whether a threat is delivered in person, by letter, or by email, Facebook, tweet, or blog. Such factors are all part of the context in which a communication is made and should be fully considered under the reasonable person standard. No special standard is necessary or appropriate.

As the Court has noted in an analogous context, "it would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" *Id.* at 19 (citation omitted). It would be equally destructive of the compelling interests served by laws criminalizing true threats to permit those who threaten domestic violence to escape liability simply by testifying "I was only kidding."

In this case, for example, the fact that petitioner posted his threats on Facebook was considered by the jury pursuant to trial court's instruction to consider whether petitioner's statements were made in a "context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life

of an individual." *Elonis*, 897 F. Supp. 2d at 342 n.5. Once that test is met by proof beyond a reasonable doubt, the requirements of the First Amendment are satisfied, no matter by what mode of communication the threat was conveyed.

II. SINCE THE TIME OF THE FRAMERS, ORDERS TO PREVENT THREATENED VIOLENCE HAVE BEEN PERMITTED WITHOUT PROOF OF SUBJECTIVE INTENT.

Evidence of the appropriate First Amendment standard for threats can be found in the robust historical record involving orders enjoining future threatening conduct.[5] See generally *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982) ("[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices."). Such orders were well-established before the Constitution's adoption, and were based not on the subjective intent of the alleged threatener, but on the victim's reasonable basis for fear.

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[5] See *Beslow* v. *Sargent*, 76 N.W. 1129, 1130 (Minn. 1898) ("[A]t common law * * *, whenever a private person had just cause to fear that another would do him injury, he might demand surety of the peace against such person, on making oath that he was actually under fear of death or bodily harms, and showing just cause for such apprehension, and that he was not doing this out of malice or mere vexation."); see generally *Melson* v. *Tindal*, 1 Del. Cas. 79, 79 (Com. Pl. 1795); *Tackett* v. *State*, 11 Tenn. 392, 393–394 (1832); *Bellows* v. *Shannon*, 2 Hill 86, 86–87 (N.Y. Sup. Ct. 1841).

The power to enter orders preventing threats of violence has its roots in English common law. Blackstone described a remedy that "[w]ives may demand * * * against their husbands; or husbands, if necessary, against their wives." 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS THE FEDERAL GOVERNMENT OF THE U.S. & OF VA. 18 (1803) (hereinafter *Blackstone*). The cause arose "only from a probable suspicion[] that some crime is intended or likely to happen." *Id.* It was a form of "preventive justice" that obliged those from whom there was "probable ground to suspect * * * future misbehavior[] to stipulate with and give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges and securities for keeping the peace, or for their good behavior." *Id.*

As Blackstone explained, at common law, anyone with "just cause to fear that another" would "do him a corporal injury, by killing, imprisoning, or beating him," had the right to "demand surety of the peace against such person." *Id.* All that was required was that the victim "make oath[] that he is actually under fear of death or bodily harm," and that "he has just cause * * * by reason of the other's menaces, attempts, or having lain in wait for him." *Id.*

This procedure was called "swearing the peace against another." *Id.* A party who did not produce the required sureties could "immediately be committed till he" did. *Id.* The sureties were "forfeited by any actual violence, or even an assault

or menace, to the person[s] * * * who demanded" them. *Id.*

In short, during and after the Framing era, only "just cause to fear" and actual fear were required in order to obtain an injunction against threatened violence.

Proceedings to "keep the peace," with elements of both criminal and civil actions, carried over into the twentieth century. See *Fedele* v. *Commonwealth*, 138 S.E.2d 256, 259 (Va. 1964) ("A proceeding in which security is required to be given for good behavior and to keep the peace is more in the nature of a criminal, or quasi criminal, rather than civil, procedure.") (citing *State ex rel. Yost v. Scouszzio*, 27 S.E.2d 451, 453–454 (W. Va. 1943)); see also *Bradley* v. *Malen*, 164 N.W. 24, 25 (N.D. 1917) ("Such proceeding is not a prosecution for the commission of an offense, but is a criminal or quasi criminal proceeding to prevent the commission of a crime.").

Into the late twentieth century, states continued to apply an objective standard in determining whether an order to keep the peace should issue. See, e.g., *Caldwell* v. *Mullins*, 553 N.E.2d 1083, 1084–1085 (Ohio Ct. App. 1990); *State* v. *Gray*, 580 P.2d 765, 766 (Ariz. Ct. App. 1978); *State ex rel. Fortin* v. *Harris*, 253 A.2d 830, 830 (N.H. 1969); *Fedele*, 138 S.E.2d at 258–259; *In re Satterthwaite*, 90 P.2d 325, 325 (Cal. Ct. App. 1939); *Engler* v. *Creekmore*, 119 S.W.2d 497, 498 (Ark. 1938); *Areson* v. *Pincock*, 220 P. 503, 504 (Utah 1923); *Bradley*, 164 N.W. at 25; *Cox* v. *State*, 47 So. 1025, 1026 (Ala. 1908).

This historical practice of employing an objective standard for peace warrants indicates that legal restraints on threatening behavior, based on a purely objective inquiry into the reasonable fear of the victim of the threat, has always co-existed without implicating the First Amendment. This historical record also strongly supports *Amici's* particular concern—discussed below—that petitioner's view of the First Amendment would undermine protection-order practices and reduce legal protections for victims of abuse and terrorizing.

III. A RULING THAT THE FIRST AMENDMENT REQUIRES PROOF OF SUBJECTIVE INTENT TO THREATEN COULD EVISCERATE MODERN CIVIL PROTECTION ORDERS.

While "peace orders" still exist to varying degrees in some states, see, e.g., *Quansah* v. *State*, 53 A.3d 492, 500–501 (Md. Ct. Spec. App. 2012); MD. CODE CTS. & JUD. PROC. § 3-1501 *et seq.*, since 1970 another, more targeted type of violence preventive order has become a dominant remedy specifically for victims of domestic violence: civil protection orders.[6] Should this Court rule in favor of petitioner by holding that subjective intent to threaten must be

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[6] The types of relationships covered by states' protection-order laws have evolved over time, ranging from marriage to dating relationships to ex-partners and other family members. See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law,* 21 HOFSTRA L. REV. 801, 814–842 (1993) (hereinafter Klein & Orloff). In contrast, peace orders were historically not limited to particular relationships.

proven in criminal threats prosecutions, such a ruling inevitably will carry over to the civil protection order context as well.

Even if the ruling is framed as a purely criminal law doctrine, the criminal law casts a long shadow over civil protection order practice; indeed, many states require proof of a "crime" before a protective order may issue. Moreover, should subjective intent be framed as a blanket First Amendment requirement, it will directly control protection order proceedings as well. These orders are critical to the deterrence and limitation of domestic violence. Thus, although this case involves a criminal prosecution, a decision in petitioner's favor would inevitably undermine this most critical remedy for victims of abuse.

A. Protection Orders Are Essential To Protect Adults And Children At Risk Of Ongoing Abuse.

While in Blackstone's time peace orders may have been available to husbands and wives, for most of the twentieth century domestic violence was too often treated as a private family matter not appropriate for the criminal justice system. See, e.g., Emily J. Sack, *Battered Women & the State: The Struggle for the Future of Domestic Violence Pol'y*, 2004 WIS. L. REV. 1657, 1663–1664 (2004) (hereinafter Sack).

As modern society began to turn its attention to this problem, the first and arguably most important legal remedy for domestic violence became the civil

protection order. As a leading domestic violence lawyer wrote:

> A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. * * * One that could provide stability and predictability in the lives of women and children. * * * One that could afford economic support so that the abused woman would not be compelled to return to the abuser to feed, clothe and house her children. * * * One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders[7] were this new remedy.

Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary & Recommendations*, 43 JUV. & FAM. CT. J., No. 4, at 23 (1992) (hereinafter Hart).

First invented in the District of Columbia in 1970, civil protection orders eventually were adopted by every State, and are an essential *protective* legal remedy for victims of abuse. See Sack, *supra*, at 1667; *Cruz-Foster* v. *Foster*, 597 A.2d 927, 931 (D.C. 1991) (the IntraFamily Offenses Act "was designed to counteract the abuse and exploitation of women and children" through establishment of a civil

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[7] Names for these civil protective proceedings vary from state to state, *e.g.*, "civil protection orders," D.C. CODE § 16-1003, "protection from abuse orders," 23 PA. CONS. STAT. ANN. § 6101 *et seq.* This brief uses the terms "civil protection orders" and "protection orders" to refer to all such remedies.

injunctive remedy); see also Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1503–1504 (2008) (citations omitted) (hereinafter Goldfarb).

Civil protection orders are designed to offer flexible remedies, tailored to a victim's particular circumstances. Hart, *supra*, at 23–24. They can enjoin abusers from further abusing the victim, while also containing a variety of other specific family-related remedies, including child support, temporary custody and visitation arrangements, and monetary remedies. See D.C. CODE § 16-1005; Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "the Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1108–1109 (2001). In almost all states, when harm seems imminent, a victim of domestic violence can seek an emergency protection order, which is obtained through an *ex parte* hearing and is very time-limited. See, e.g., D.C. CODE § 16-1004(b)(2) (noting that "[a]n initial temporary protection order shall not exceed [fourteen] days"); Goldfarb, *supra*, at 1506.[8]

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[8] The *ex parte* process has been repeatedly found to comport with constitutional due process rights. See *Baker* v. *Baker*, 494 N.W.2d 282, 286–288 (Minn. 1992) (finding state's Domestic Abuse Act provision granting *ex parte* protection order fulfills procedural due process requirements when it requires petitioner to show "immediate and present danger of domestic abuse" and to provide an affidavit made under oath stating specific facts, and when "it is undisputed that notice to the opposing party could exacerbate the risk of abuse"), *superseded by statute on other grounds*, *Burkstrand* v. *Burkstrand*, 632 N.W.2d 206, 212 (Minn. 2001); accord *Kampf* v. *Kampf*, 603

A full adversarial hearing is required in order to generate a full civil protection order, which, depending on the state, may extend for one or more years. See *Civil Protection Orders: Domestic Violence, Statutory Summary Charts,* ABA COMM'N ON DOMESTIC VIOLENCE (Mar. 2014) (hereinafter ABA Chart), *available at* http://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/statutorysummarycharts/2014%20CPO%20Availability%20Chart.authcheckdam.pdf; see also D.C. CODE § 16-1005(d) (civil protection order may issue for up to one year).

Like peace orders, protection orders are not aimed at punishing potential abusers, but rather at *protecting* victims by enjoining recurring threats and abuse. *Cruz-Foster*, 597 A.2d at 929 (the IntraFamily Offenses Act "was designed to protect victims of family abuse from acts and threats of violence"); see also D.C. COUNCIL, COMM. ON THE JUDICIARY, REPORT ON BILL 4-195, at 2, 10 (May 12, 1982) (adding a private right of action under the IntraFamily Offenses Act in order to enable victims to seek their own civil protection orders and to ensure that the remedy effectively protects victims); *Cloutterbuck* v. *Cloutterbuck*, 556 A.2d 1082, 1086 (D.C. 1989) (the government's interest in protection order proceedings is "to protect potential victims of domestic violence").

N.W.2d 295, 299 (Mich. Ct. App. 1999); *Sanders* v. *Shephard*, 541 N.E.2d 1150, 1155 (Ill. App. Ct. 1989); *State ex rel. Williams* v. *Marsh*, 626 S.W.2d 223, 232 (Mo. 1982).

Protection orders alone—distinct from their enforcement[9]—actually effectuate the goal of prevention to a greater degree than may be widely realized. See Goldfarb, *supra*, at 1510–1512 (surveying research indicating substantial rates of victim satisfaction as well as batterer compliance, although approximately half of batterers violated orders in some (usually non-physical) way); Victoria Holt et al., *Civil Protection Orders & Risk of Subsequent Police-Reported Violence,* 288 J. AM. MED. ASS'N 589, 593 (2002). It has become apparent that an authoritative legal and social statement that abuse is unjust and impermissible, even without sanctions or punishment, can powerfully affect both perpetrators and victims. See James Ptacek, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES 164–166 (1999) (eighty-six percent of women said protection order either stopped or reduced the abuse). "For a number of women, the restraining order process seems to have strengthened their sense that the violence was unjust," and the state's intervention reduced the batterer's power over them. *Id.* 164–165 "[B]y taking action, they had forced a shift in the balance of power." *Id.*

Civil protection orders are thus deemed a—if not the—critical legal remedy for individuals whose intimate partners or family members pose an ongoing threat to their safety and peace of mind. Goldfarb, *supra*, at 1504 (citations omitted).

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[9] In most states, violations of protection orders are punishable as a misdemeanor and/or contempt of court. See Goldfarb, *supra*, at 1509; Klein & Orloff, *supra*, at 1095–1120.

B. Threats Are The Essence Of Domestic Violence And Most Protection Order Cases.

Abusers use threats as a method of intimidation and control, traumatizing and "deflat[ing] the victim's will to resist." Evan Stark, *Coercive Control*, *in* VIOLENCE AGAINST WOMEN: CURRENT THEORY & PRACTICE IN DOMESTIC ABUSE, SEXUAL VIOLENCE & EXPLOITATION 17, 23 (Nancy Lombard & Lesley McMillan eds. 2013) (hereinafter Stark); see also Klein & Orloff, *supra*, at 859 ("[T]hreats of violence or acts which place the petitioner in fear of imminent bodily harm * * * are acts of domestic violence because they seek to intimidate and control the petitioner."). Some victims of domestic violence may never be physically abused, "yet the threat of physical assault is so pervasive, [they] fear they will be." Pamela Powell & Marilyn Smith, *Domestic Violence: An Overview*, UNIV. OF NEV. COOP. EXTENSION, at 2 (2011), *available at* http://www.unce.unr.edu/publications/files/cy/2011/fs1176.pdf.

Often, perpetrators threaten not only the victim, but also the victim's children, family, friends, and pets. See *id.*; Stark, *supra*, at 24. Because violence typically escalates after a victim separates from her abuser, separated women are particularly vulnerable to continued threats and stalking from their current or former husbands or intimate partners. Those who shelter them often become targets too. Klein & Orloff, *supra*, at 838. Threats and stalking often last for months or years after separation, causing many victims of domestic violence to avoid seeking help

from friends or family lest they too be put in danger. *Id*.

Threats have serious and long-lasting psychological and emotional consequences for victims of domestic violence. In fact, women who are battered generally "identify psychological abuse as inflicting greater distress compared to physical acts of violence." Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, NAT'L INST. OF HEALTH, at 2 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2967430/pdf/nihms245802.pdf. Threats, harassing behaviors, and emotional and verbal abuse are significant contributors to post-traumatic stress symptoms in women who have been battered. *Id*. at 8. Even when assaults have not yet occurred, women who have been battered can suffer severe harm from threats because of the uncertainty of whether—or when—they will be carried out. Stalking and harassment pose an "unpredictable yet omnipresent threat * * * [that] may result in hypervigilant behavior and symptoms of hyperarousal as a function of the unpredictable nature of the traumatic stressor." *Id*. at 10.

Finally, threats and harassment are an important predictor of actual physical attacks. Such threats often escalate and culminate in acts of physical violence. See *id*.; Joanne Belknap et al., *The Roles of Phones & Computers in Threatening & Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER L. & POL'Y 373, 378 (2012) (indicating that abusers' threats of violence are "highly predictive of actual violence" against

their victims, and that "threats of violence by former partners who are * * * stalking are an even better predictor of future violence than the prior violence used by these ex-partners"); Klein & Orloff, *supra*, at 860–861. In fact, one study found that of the women killed by their abusers, 41–50% had previously been threatened with death, and 39% had been threatened or assaulted with a weapon. Klein & Orloff at 859. Thus, victims' fears in response to threats are well-founded.

Ashleigh Lindsey's story is unfortunately not atypical. In 2012, twenty-year-old Lindsey obtained a protection order and fled from her boyfriend of six months, Joshua Mahaffey, to escape his emotional and physical abuse after finding out she was three weeks pregnant. Despite having changed her phone number several times and leaving the state, Mahaffey was able to obtain her information and continue harassing Lindsey. Mahaffey repeatedly threatened to kill Lindsey and her family in Texas if she returned home. He and a friend continuously called Lindsey, insisting she drop the abuse charges. Mahaffey also called Lindsey's work place, threatening to come and harm the employees. A few months later, Mahaffey eventually tracked Lindsey down the day before she planned to enter a shelter for battered women. Mahaffey shot and killed Lindsey, and then himself. Her unborn child died soon thereafter. Hours before killing Lindsey, Mahaffey had posted a photograph of a .22 caliber revolver to his Facebook page. See Ralph Blumenthal, *Stop Calling it Domestic Violence. It's Intimate Terrorism.*, COSMOPOLITAN (Apr. 16, 2013),

available at http://www.cosmopolitan.com/sex-love/advice/a4322/intimate-terrorism/.

In short, threats are integral to most domestic violence cases, and are typically at the top of the list of behaviors that protection orders enjoin. See Lori A. Zoellner et al., *Factors Associated With Completion of the Restraining Order Process in Female Victims of Partner Violence*, 15 J. INTERPERSONAL VIOLENCE 1081, 1085–1088 (2000) (noting that 48 percent of women interviewed in a Philadelphia study were prompted to seek a civil protection order after being threatened "in such a way that they believed their life was in danger"); Susan L. Keilitz et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. DEP'T OF JUSTICE (Jan. 1998) (finding that in a study of three jurisdictions in the United States, ninety-nine percent of women "had been intimidated through threats, stalking, and harassment" before receiving protection orders), *available at* https://www.ncjrs.gov/pdffiles/fs000191.pdf; Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS & RESTRAINING ORDERS WORK? 214, 237 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (eighty-nine percent of women seeking restraining orders reported threats or property damage).

C. Protection Proceedings Parallel—And Are Influenced By—Criminal Law Norms.

Given that most protection order proceedings involve conduct which is independently criminal,[10] judges in these proceedings are inevitably influenced by and cognizant of the criminal implications of the civil proceedings. In fact, approximately 18 states require litigants to *prove the crime of threats* in order to receive a *civil* protection order based on threats. See, e.g., D.C. CODE § 16-1003(a); N.Y. Fam. Ct. Act § 812(1); 23 PA. CONS. STAT. ANN. § 6102; ABA Chart, *supra*.

Thus, it is not uncommon for judges to reference the criminal law in adjudicating a civil protection order. For instance, *Amici* have been before judges who expressed concern about making findings of child abuse for purposes of visitation or protection orders because they believe their civil finding may expose the respondent to criminal prosecution. Judges sometimes express concern about civil protection proceedings being a substitute for a criminal prosecution.[11]

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[10] See Klein & Orloff, *supra*, at 848-874; ABA Chart, *supra*.

[11] In a recent oral argument in the D.C. Court of Appeals concerning the scope of a "vacate the home" remedy in the protection order statute, one appellate judge expressed concern about the possibility that making such "vacate orders" available to victims of sexual assault in civil protection orders would allow asserted victims to use such orders as an end run around criminal prosecution. E-mail from Rachel Applestein to

Similarly, *Amici* have heard of and appeared in cases where judges considered imposing criminal defendants' procedural rights within these civil proceedings. Indeed, some courts explicitly adopt constitutional criminal procedures, such as the confrontation right, in civil proceedings such as child protection or custody and visitation. See *In Interest of C.B.*, 574 So. 2d 1369, 1374 (Miss. 1990) (holding that "the right of confrontation should be accorded to an accused parent" when petitioner for child alleged child's father sexually abused the child, because such accusation is so shameful that civil courts shall ensure that parents are not wrongfully accused); *Doe* v. *Doe*, 644 So. 2d 1199, 1210 (Miss. 1994) (stating in a custody case that the accused's right to confront witnesses is a fundamental right and so "any attempt to abridge" it must survive "strict scrutiny," and reversing lower court's termination of father's visitation rights because of sexual abuse); *In re Interest of T.S.*, 732 S.E.2d 541, 542 (Ga. Ct. App. 2012) (relying on Confrontation Clause language from a criminal case to define the right to confrontation in a civil parental termination hearing).

Thus, should this Court rule that a threat may not be prosecuted criminally unless the subjective intent of the defendant can be proven, this standard will inevitably carry over to the civil protection order context. Because defendants can be expected in most cases to deny having the requisite subjective intent, imposing such a standard will create a

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Joan Meier (Sept. 18, 2014); E-Mail from Luke Meisner (Sept. 29, 2014).

significant hurdle to the issuance of protection orders for victims in appropriate fear for their own and their loved ones' safety. Even though protection orders in no way punish or sanction the persons found to have committed the threats, such preventive and protective measures will have been rendered far more difficult.

D. A First Amendment Ruling In Favor Of Elonis Will Also Preclude Protection Of At-Risk Domestic Violence Victims.

Protection order proceedings will also be directly affected by any ruling based on the First Amendment in this case. Scholars have noted that judges sometimes restrict the scope of civil protection orders because they are especially concerned with offenders' constitutional and due process rights. Douglas L. Yearwood, *Judicial Dispositions of* Ex-Parte *& Domestic Violence Protection Order Hearings: A Comparative Analysis of Victim Requests and Court Authorized Relief*, 20 J. FAM. VIOLENCE 161, 161 (2005).

First Amendment challenges in protection order proceedings, while not necessarily common, are not infrequent. See, e.g., *Banks* v. *Pelot*, 460 N.W.2d 446 (Wis. Ct. App. 1990) (table) (appealing an order enjoining respondent from harassing petitioner on grounds that the injunction was impermissibly broad); *Peters-Riemers* v. *Riemers*, 624 N.W.2d 83, 89 (N.D. 2001) (respondent argued that protection order violated his constitutional right to free speech

because it restrained him from having any contact with petitioner).

To *Amici's* knowledge, courts to date have used various rationales for rejecting First Amendment defenses, including the assertion that threats are not constitutionally protected in the domestic violence context, *Gilbert* v. *State*, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) ("We first reject any notion that the First Amendment to the United States Constitution * * * ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse."); that the context, time, and place of respondent's "picketing" render it unprotected, *Kreuzer* v. *Kreuzer*, 761 N.E.2d 77, 80 (Ohio Ct. App. 2001) (finding that although former husband's picketing activities would possibly qualify as protected speech in another context, targeting his former wife's home, located on an unlit back street, after dark, did not qualify as protected speech); and that the Constitution does not create a right to force one to endure speech over their objection in their own home, *Schramek* v. *Bohren,* 429 N.W.2d 501, 506 (Wis. Ct. App. 1988) ("Even if the sanctions of the statute indirectly prohibit speech, the state can ban speech directed primarily at those who are unwilling to receive it" because "[i]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.").

However, a ruling that the First Amendment requires proof of subjective intent in prosecutions for domestic abuse threats would jeopardize the

protections afforded victims in the cases cited above, and in countless comparable situations. Should the Court require proof of subjective intent in true threat prosecutions, *Amici* respectfully urge the Court to distinguish and carefully safeguard civil protection orders from its holding.

IV. IF AN INTENT REQUIREMENT IS ADOPTED, RECKLESSNESS SHOULD SUFFICE.

Even if the First Amendment required that threats of domestic violence are entitled to some heightened level of protection, the appropriate standard would not be proof of a subjective intent to convey a threat. Drawing distinctions between equally destructive and disruptive threats made by two speakers based on their undisclosed subjective intent would frustrate the compelling state interests underlying statutes criminalizing true threats without any countervailing benefit to the free exchange of ideas.

A more appropriate alternative standard would be the objective standard of recklessness found in the Model Penal Code. Section 211.3 of the Model Penal Code, for example, provides that a person is guilty of a felony in the third degree if he "threatens to commit any crime of violence with a purpose to terrorize another * * * or in reckless disregard of the risk of causing such terror * * * ." MODEL PENAL CODE § 211.3.

Under this standard, "[a] person acts recklessly with respect to a material element of an offense

when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(c); see also *J.I. Case Credit Corp.* v. *First Nat'l Bank*, 991 F.2d 1272, 1278 (CA7 1993) ("To consciously ignore or to deliberately close one's eyes to a manifest danger is recklessness, a mental state that the law commonly substitutes for intent or actual knowledge"). "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c); see also *Bullock v. BankChampaign, N.A.*, __ U.S. __, 133 S. Ct. 1754, 1759–1760 (2013).

Although *Amici* respectfully submit that the current objective standard for a true threat passes First Amendment scrutiny, if an alternative standard were to be adopted for criminal prosecutions, an objective standard of recklessness would strike a far better balance between the competing interests at stake than would a subjective "intend-to-threaten" standard.

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the Court should affirm the judgment.

Respectfully submitted,

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