

SJ Quinney College of Law, University of Utah

Utah Law Digital Commons

Utah Law Faculty Scholarship

Utah Law Scholarship

4-2020

Kansas v. Boettger: On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

Paul Cassell

John Ehrett

Allyson N. Ho

Bradley Hubbard

Matthew Scorcio

See next page for additional authors

Follow this and additional works at: <https://dc.law.utah.edu/scholarship>

 Part of the [Criminal Law Commons](#), and the [First Amendment Commons](#)

Authors

Paul Cassell, John Ehrett, Allyson N. Ho, Bradley Hubbard, Matthew Scorcio, Philip Axt, and Thomas Molloy

No. 19-1051

IN THE
Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

TIMOTHY C. BOETTGER & RYAN R. JOHNSON,

Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Kansas**

**BRIEF FOR KANSAS COALITION AGAINST
SEXUAL AND DOMESTIC VIOLENCE, LEGAL
MOMENTUM, NATIONAL CRIME VICTIM LAW
INSTITUTE, AND NATIONAL ORGANIZATION
FOR VICTIM ASSISTANCE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

PAUL G. CASSELL
S.J. QUINNEY COLLEGE OF LAW
AT THE UNIVERSITY OF UTAH
383 South University Street
Salt Lake City, Utah 84112

JOHN S. EHRETT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036

ALLYSON N. HO
Counsel of Record
BRADLEY G. HUBBARD
MATTHEW SCORCIO
PHILIP AXT
THOMAS M. MOLLOY, JR.[†]
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

[†] Admitted only in California.

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Interest of <i>Amici Curiae</i>	1
Statement	4
Summary of Argument.....	6
Argument.....	8
I. Absent This Court’s Review, The Decision Below Will Make It Harder For Domestic-Abuse Victims To Secure Protection And Justice.....	8
II. The Decision Below Misconstrues This Court’s Precedent, Joins The Wrong Side Of A Well-Developed Split, And Needlessly Hampers Victims’ Access To Justice.	12
Conclusion	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	7, 13
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	7
<i>Devenpeck v. Alford</i> , 543 U.S. 146 (2004).....	14
<i>Elonis v. United States</i> , 135 S. Ct. 2001 (2015).....	<i>passim</i>
<i>Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA</i> , 559 U.S. 573 (2010).....	14
<i>People v. Brown</i> , 94 P.3d 574 (Cal. 2004).....	15
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992).....	13
<i>Thurman v. City of Torrington</i> , 595 F. Supp. 1521 (D. Conn. 1984).....	17, 18
<i>United States v. Bradbury</i> , 111 F. Supp. 3d 918 (N.D. Ind. 2015).....	14
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).....	6, 7, 13
Statutes	
Kan. Stat. § 21-5415.....	16
Model Penal Code § 211.3	16

Other Authorities

- Catherine F. Klein & Leslye E. Orloff,
Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law,
 21 Hofstra L. Rev. 801 (1993).....9
- Deborah Tuerkheimer,
Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence,
 94 J. Crim. L. & Criminology 959 (2004) 14
- Evan Stark,
Coercive Control: How Men Entrap Women in Personal Life (2007).....9
- Evan Stark,
Coercive Control, in
Violence Against Women: Current Theory & Practice in Domestic Abuse, Sexual Violence, and Exploitation (2013) 10
- Evan Stark,
Re-Representing Woman Battering: From Battered Woman's Syndrome to Coercive Control,
 58 Alb. L. Rev. 973 (1995)..... 15, 16
- James Ptacek,
Battered Women in the Courtroom: The Power of Judicial Responses (1999) 18
- Joan S. Meier,
Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice,
 21 Hofstra L. Rev. 1295 (1993)..... 15

Maria A. Brusco, Note, <i>Read This Note or Else!:</i> <i>Conviction under 18 U.S.C. § 875(c)</i> <i>for Recklessly Making a Threat,</i> 84 Fordham L. Rev. 2845 (2016)	16
Martin R. Huecker & William Smock, <i>Domestic Violence</i> (2020)	8
Mary Ann Dutton & Lisa A. Goodman, <i>Coercion in Intimate Partner Violence:</i> <i>Toward a New Conceptualization,</i> 52 Sex Roles 743 (2005)	9, 10, 11, 12
Mary P. Brewster, <i>Stalking by Former Intimates:</i> <i>Verbal Threats and Other Predictors</i> <i>of Physical Violence,</i> 15 Violence & Victims 41 (2000).....	10, 17
Mindy B. Mechanic et al., <i>Mental Health Consequences of Intimate</i> <i>Partner Abuse: A Multidimensional</i> <i>Assessment of Four Different</i> <i>Forms of Abuse,</i> 17 Violence Against Women 634 (2008).....	9, 10, 11
National Coalition Against Domestic Violence, <i>National Statistics: Domestic Violence</i> <i>Fact Sheet</i>	8
Tom Lininger, <i>Prosecuting Batterers after Crawford,</i> 91 Va. L. Rev. 747 (2005).....	15
Violence Policy Center, <i>When Men Murder Women</i> (2019).....	8

**BRIEF FOR *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICI CURIAE**

Kansas Coalition Against Sexual and Domestic Violence (KCS DV) is a nonprofit organization devoted to remedying domestic violence through legal, legislative, and policy initiatives, as well as providing advocacy and legal and counseling services to survivors of domestic violence. KCS DV works with survivors of domestic violence, including undertaking extensive efforts to improve the justice system's response to victims of domestic violence. KCS DV also represents clients that are threatened and stalked through the use of social media and other technology.

Legal Momentum—the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women. Legal Momentum advances the rights of all women and girls, with a particular focus on addressing gender-based violence, by using the power of the law and creating innovative public policy. For example, Legal Momentum was the leading advocate for the landmark Violence Against Women Act and its subsequent reauthorizations, which seek to redress the historical inadequacy of the justice system's response to domestic

* Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of the filing of this brief pursuant to Rule 37.2 and each has consented to its filing.

violence. Legal Momentum also represents victims of domestic violence who suffer discrimination and inadequate justice system responses. Legal Momentum's National Judicial Education Program has, since 1981, educated the judiciary on issues related to gender bias and the adjudication of cases involving domestic and sexual violence and, in particular, the intersection of the two.

National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime-victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; research and analysis of developments in crime victim law; and provision of information on crime victim law to crime victims and other members of the public. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide.

National Organization for Victim Assistance (NOVA) is the oldest victims' rights and services organization in the world. Operating since 1975, NOVA promotes training for victim advocates, provides direct services to victims, and seeks to educate legislative, political, law enforcement, and community leaders on issues associated with victimization so that appropriate and effective policies can be implemented. As one of its services, NOVA provides a nationwide toll-free number (800-TRY-NOVA) for victims to call

directly for referrals, resources, and information to enhance their awareness for making choices while seeking justice, remedy, and recovery. NOVA also advocates for crime victims' rights by actively participating as an *amicus curiae* in cases throughout the country.

STATEMENT

The uncertainty and perpetual terror created by violent threats is not just a precondition for domestic violence—it is a pervasive manifestation of that violence. Abusers use threats to exert power over their victims—controlling them through intimidation, fear, and isolation. Not only are violent threats highly correlated with physical violence, but research also shows that violent threats frequently cause trauma as severe as physical violence.

If permitted to stand, the decision below—which requires the state to prove that an abuser had a specific intent to cause fear—will make prosecuting and preventing domestic violence even more challenging, without any corresponding benefit. There is rarely direct evidence of specific intent, and domestic-violence victims often struggle to confront their abusers in court. Indeed, the impact of abusers' psychological, emotional, and physical abuse is often so severe that victims frequently struggle even to seek help.

This Court should grant the petition and reverse the decision below. The First Amendment does not require proof of specific intent to punish violent threats. The Kansas Supreme Court's decision to impose that requirement is inconsistent with decisions from other courts, the law in over a dozen states, the Model Penal Code, and the history and tradition of the First Amendment. Allowed to stand, it will undermine not only the state's ability to prosecute and incapacitate domestic abusers but also victims' ability to obtain justice and protection.

1. By the time respondent Ryan Johnson threatened to kill his mother and burn her house down, the

police had already been summoned twice in the preceding four days in response to Johnson's abusive behavior. Pet. App. 70–71. The first contact was a welfare check to investigate allegations that Johnson was abusing his mother. Pet. App. 70. Johnson's mother "reported [to officers] that Johnson had been causing problems in her home" and that "she was afraid for her safety." Pet. App. 70.

A few nights later, Johnson's mother called 911 when Johnson flew into a violent rage. Johnson's wife had sought refuge in a locked room, but Johnson kicked the door open with such force that he damaged the frame and broke the metal clasp. Pet. App. 70, 88–89. Johnson fled before police arrived. Pet. App. 70.

The next morning, Johnson broke into his mother's home, ripped her phone off the wall, and told her to "[t]ry to call the sheriff now, bitch." Pet. App. 70. Johnson then threatened to kill his mother and burn her house down. Pet. App. 71.

He was eventually apprehended and charged with criminally threatening his mother. Pet. App. 71.

As in many cases of domestic violence, Johnson's mother and wife "downplayed the two incidents" at trial, testifying that "the family commonly threatened to kill each other but did not mean it." Pet. App. 71. The jury nevertheless convicted him and he was sentenced to fourteen months' imprisonment. Pet. App. 73.

2. Respondent Timothy Boettger frequented the Kwik Shop where Cody Bonham worked. Pet. App. 37. Boettger was well acquainted with Bonham—Boettger had dated Bonham's aunt, and had known Bonham's father, a detective in the sheriff's department, since high school. Pet. App. 4.

One night, Boettger showed up at the Kwik Shop “unusually intense”—furious that his daughter’s dog had been shot and left for dead in a ditch, and that the sheriff’s department had failed to investigate the incident. Pet. App. 4. Fists clenched and visibly shaking, Boettger approached Bonham and told him: “[I’ve got] some friends * * * that don’t mess around”—“[You’re] going to end up finding [your] dad in a ditch”—“You remember that.” Pet. App. 4.

A jury convicted Boettger of threatening to commit violence with reckless disregard of the risk of causing fear. Pet. App. 5. He was sentenced to a suspended seven months’ imprisonment.

3. On appeal, both respondents argued that the First Amendment precludes the state from punishing violent threats absent proof of specific intent to place the victim in fear. Pet. App. 5, 73. The Kansas Court of Appeals affirmed both convictions and respondents sought review in the Kansas Supreme Court.

The Kansas Supreme Court reversed both convictions. Pet. App. 35, 81. In doing so, it exacerbated a well-developed split by joining the minority of courts that believe this Court’s decision in *Virginia v. Black*, 538 U.S. 343 (2003), compels the conclusion that specific intent is constitutionally required to punish violent threats. Pet. App. 27; see Pet. 11–16.

SUMMARY OF ARGUMENT

Violent threats strike immediate fear in the hearts of their victims. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part) (“A threat may cause serious emotional stress for the person threatened and those who

care about that person, and a threat may lead to a violent confrontation.”). Like “those personally abusive epithets, which * * * are generally proscribable under the First Amendment,” such threats “are, as a matter of common knowledge, inherently likely to provoke [such a] reaction.” *Black*, 538 U.S. at 359 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971), and citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

That effect—immediate, visceral fear and terror—is precisely what makes violent threats so dangerous and so effective. Nowhere is that more true than in the domestic-violence context. “Threats of violence and intimidation are among the most favored weapons of domestic abusers.” *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part) (noting that “the rise of social media has only made those tactics more commonplace”).

Critically, the effect—and effectiveness—of violent threats does not turn on whether abusers specifically intend to strike fear in the hearts of their victims, or whether they merely consciously disregard the substantial and unjustifiable risk of doing so. The damage is done either way. *Id.* at 2016 (“whether or not the person making a threat intends to cause harm, the damage is the same”). In addition to causing serious emotional distress, violent threats also cultivate and perpetuate an environment of intimidation, isolation, and control that subjects victims to more coercion and abuse.

Particularly given that this Court “generally ha[s] not required a heightened mental state under the

First Amendment for historically unprotected categories of speech,” there is “no reason” why the Court “should give threats pride of place among unprotected speech.” *Id.* at 2027–28 (Thomas, J., dissenting). That is especially true given that this Court has never held that “the First Amendment requires a particular mental state for threat prosecutions.” *Id.* at 2026.

This Court’s review is warranted. The split is well developed and intractable. And the harm to victims is unconscionable and immeasurable. Violent threats are integral to physical domestic violence, which claims twenty victims per minute in this country. Requiring specific intent has no salutary benefits—it only makes it harder for victims to seek protection and obtain justice and for the state to prosecute and incapacitate domestic abusers. The petition should be granted, and the decision below reversed.

ARGUMENT

I. ABSENT THIS COURT’S REVIEW, THE DECISION BELOW WILL MAKE IT HARDER FOR DOMESTIC-ABUSE VICTIMS TO SECURE PROTECTION AND JUSTICE.

Domestic violence is a nationwide scourge that impacts 10 million people each year. Martin R. Huecker & William Smock, *Domestic Violence* (2020), <https://www.ncbi.nlm.nih.gov/books/nbk499891>. That means “an average of 20 people experience intimate partner physical violence every minute.” National Coalition Against Domestic Violence, *National Statistics: Domestic Violence Fact Sheet 1*, https://assets.speakcdn.com/assets/2497/domestic_violence2.pdf. And every day, nearly three women are killed by their current or former intimate partners. Violence Policy Center,

When Men Murder Women 3 (2019), <http://vpc.org/studies/wmmw2019.pdf>.

“Threats of violence and intimidation are among the most favored weapons of domestic abusers,” who use threats to establish dominance and maintain control over their victims by instilling terror, fear, and uncertainty. *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part); see Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes & Case Law*, 21 Hofstra L. Rev. 801, 859 (1993) (“threats of violence * * * are acts of domestic violence because they seek to intimidate and control”).

Domestic abusers frequently use violent threats as part of a “course of calculated, malevolent conduct,” which involves “interweaving repeated physical abuse with three equally important tactics: [1] intimidation, [2] isolation, and [3] control.” Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 5 (2007); see Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 Sex Roles 743, 743 (2005) (abusers assert “power over the[ir] victim[s] through the use of threats, as well as actual violence”).

First, violent threats create and maintain a climate of fear and doubt for the victim. Unlike physical abuse, which has temporal and geographic bounds, violent threats are “unpredictable yet omnipresent,” creating unbounded fear and uncertainty that leads to “hyper-vigilant behavior and symptoms of hyperarousal as a function of the unpredictable nature of the traumatic stressor.” Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner*

Abuse: A Multidimensional Assessment of Four Different Forms of Abuse, 17 *Violence Against Women* 634, 644 (2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2967430/pdf/nihms245802.pdf>.

Indeed, a “large body of research” has found the extreme psychological and physiological stress created by a climate of menace and persistent threats may actually be more damaging than the physical violence being threatened. Dutton & Goodman, 52 *Sex Roles* at 753; see Mechanic et al., 17 *Violence Against Women* at 635.

Second, violent threats prevent victims from seeking help. Violent threats create and reinforce a fear of escalation that is well founded, as research indicates what common sense suggests: violent threats lead to physical violence in over half of domestic-abuse incidents. Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, 15 *Violence & Victims* 41, 41–54 (2000) (“Threats of violence were significantly correlated with actual physical violence in every model.”).

Third, violent threats coerce compliance and exert control by “deflat[ing] the victim’s will to resist.” Evan Stark, *Coercive Control*, in *Violence Against Women: Current Theory & Practice in Domestic Abuse, Sexual Violence, and Exploitation* 17, 23 (2013). “Coercive control * * * is a dynamic process linking a demand with a credible threatened negative consequence for noncompliance.” Dutton & Goodman, 52 *Sex Roles* at 746–47; see *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) (explaining how abusers control their victims by creating “serious

emotional stress for the person threatened and those who care about that person”).

Given “a sufficiently serious threat, coercion can occur in a relationship even when there has been no prior violence or threat to ‘soften’ the [victim’s] resistance.” Dutton & Goodman, 52 *Sex Roles* at 747. “Exposure to coercive acts means exposure to threats of harm, including those that would be considered traumatic stressors such as threats of harm to self or others.” *Id.* at 752. Many violent threats “meet the event criterion for posttraumatic stress disorder.” *Ibid.* So it should come as no surprise that “the consequences of coercive control include the range” of mental and physical health problems “associated with traumatic exposure”—including depression, anxiety, gastrointestinal problems, sleep problems, and hypertension. *Id.* at 753; see Mechanic et al., 17 *Violence Against Women* at 642.

For example, studies show that as many as 84 percent of domestic-violence victims suffer from PTSD—compared to about 10 percent of the general population and 26 percent of crime victims. Dutton & Goodman, 52 *Sex Roles* at 753 (noting the prevalence of depression ranges from 15–70 percent among domestic-violence victims, compared to 10–20 percent among the general population).

In addition to “the adverse mental health outcomes” faced by domestic-violence victims, there is also “a significant relationship between [domestic abuse] and poor [physical] health outcomes, including self-reported health status, somatic symptoms, risk of illness, and exacerbated medical conditions.” *Ibid.* Studies have shown that “[p]sychological violence was

associated with self-reported poor physical health as well as other specific medical problems, including chronic neck or back pain, arthritis, migraines or other frequent headaches, and stomach ulcer.” *Ibid.*; see *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part) (“A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.”).

In sum, violent threats—particularly in the domestic-abuse context—inflict great harm. By making it harder to prosecute such threats, the Kansas Supreme Court has made it easier for domestic abusers to inflict abuse on their victims. This Court’s review is needed to eliminate this unnecessary barrier to protecting victims and securing justice.

II. THE DECISION BELOW MISCONSTRUES THIS COURT’S PRECEDENT, JOINS THE WRONG SIDE OF A WELL-DEVELOPED SPLIT, AND NEEDLESSLY HAMPERS VICTIMS’ ACCESS TO JUSTICE.

Violent threats “inflict great harm and have little if any social value”—they “cause serious emotional stress for the person threatened and those who care about that person.” *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part) (“a threat may lead to a violent confrontation”). The court below erroneously believed this Court’s precedent compelled the result it reached—but this Court has never held that the First Amendment requires any particular mental state (specific intent or otherwise) to punish violent threats. And for good reason.

There is nothing in the First Amendment’s history or tradition that would compel imposing a specific-intent requirement. “‘From 1791 to the present, our society has permitted restrictions upon the content of speech in a few limited areas,’ true threats being one of them.” *Id.* at 2024 (Thomas, J., dissenting) (ellipses omitted) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992)).

Violent threats, like fighting words, inflict injury “by their very utterance” 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.” *Chaplinsky*, 315 U.S. at 572. Such threats “are generally proscribable under the First Amendment” precisely because they “are, as a matter of common knowledge, inherently likely to provoke [harmful psychological and physiological] reaction.” *Black*, 538 U.S. at 359.¹

And the impact on—and harm to—victims is the same “whether or not the person making a threat intends to cause harm.” *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part) (“the fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection”). Focusing on a violent threat’s impact, rather than on the speaker’s subjective intent, better comports with this Court’s First Amendment jurisprudence. Indeed, imposing an “intent-to-threaten requirement * * * would make threats one of the most protected categories of unprotected

¹ As the *Black* Court explained, the government has a compelling interest in not only preventing violence, but also protecting its citizens from the fear, terror, and disruption caused by threats. 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388).

speech,” which in turn would “sow[] tension throughout [the Court’s] First Amendment doctrine.” *Id.* at 2027 (Thomas, J., dissenting).

For example, fighting words can be punished “without proof of an intent to provoke a violent reaction”; obscenity can be punished “without proof that [the perpetrator] knew the materials were legally obscene”; and defamation can be punished “even if the speaker acted negligently with respect to the falsity of [his] statements.” *Ibid.* (citing cases); see *id.* at 2017 (Alito, J., concurring in part and dissenting in part) (“proof that false statements were made with reckless disregard of their falsity” is sufficient to establish both civil and criminal liability) (citing cases).

Imposing a specific-intent requirement is not only unnecessary, but also harmful—unduly burdening victims and impeding the punishment and incapacitation of abusers. “Requiring evidence of specific intent” in violent-threat prosecutions would “prove to be very difficult and time-consuming” without generating any coordinate benefits. *United States v. Bradbury*, 111 F. Supp. 3d 918, 923 (N.D. Ind. 2015); see *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 596 n.14 (2010) (“specific intent * * * is difficult to prove”).

Specific intent “is *always* determined by objective means”—what others heard and can testify about. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004). In the domestic-violence context, the victim—the person best positioned to testify about the content and context of the threat—is often (and understandably) unwilling or unable to do so. See Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call*

to *Criminalize Domestic Violence*, 94 J. Crim. L. & Criminology 959, 994, 1022 (2004).

It is well established that “[v]ictims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to police.” Tom Lininger, *Prosecuting Batters after Crawford*, 91 Va. L. Rev. 747, 768 (2005); see *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (quoting expert’s testimony that “80 to 85 percent of victims ‘actually recant at some point in the process’”). That should come as no surprise, given not only the history of intimidation, isolation, and coercive control frequently experienced by victims, but also the very real risk of future physical and psychological retribution. This dynamic understandably deters victims of domestic violence from invoking the legal process in the first place—to say nothing of having to confront the abuser in open court. See, e.g., Evan Stark, *Re-Representing Woman Battering: From Battered Woman’s Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 1010–11 (1995). As one researcher explained:

Some women may correctly fear retaliation by the abuser, based on their knowledge of the abuser’s personality and psychology. Others who are suffering from PTSD may avoid talking to their legal representatives, miss appointments, or avoid going to court because they cannot bear to re-invoke the traumatic experiences by talking and thinking about them.

Joan S. Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 Hofstra L.

Rev. 1295, 1345 (1993) (victims’ “[a]mbivalence about pursuing legal action” stems from “very realistic concerns”); see also Stark, 58 Alb. L. Rev. at 1025 (describing the “mix of social and psychological factors that makes it seemingly impossible for the [domestic-violence] victim to permanently escape or to effectively protect herself”).

Requiring the state to prove specific intent in domestic-violence cases would needlessly exacerbate an already life-threatening problem and make it even harder for victims of domestic violence to access justice—and safety.²

The Kansas statute declared unconstitutional by the court below—like the Model Penal Code and the statutes in a number of other states (Pet. 23 n.3)—strikes a reasonable balance in protecting abuse victims and free speech by requiring proof of recklessness as to the effect of the threat on the victim. Kan. Stat. § 21-5415(a)(1) (requiring a threat of violence made in reckless disregard for causing fear); Model Penal Code § 211.3 (“A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another * * * or in reckless disregard of the risk of causing such terror.”).

² The collateral consequences of constitutionalizing a specific-intent requirement bring the stakes of this case into even sharper relief. As one commentator has explained, because at least eighteen states link the availability of *civil* protection orders to proof that a *criminal* threat was made, requiring evidence that the abuser acted with specific intent will make it “even more difficult for victims of domestic violence” to obtain such orders—which are one of the most critical legal tools available to victims. Maria A. Brusco, Note, *Read This Note or Else!: Conviction under 18 U.S.C. § 875(c) for Recklessly Making a Threat*, 84 Fordham L. Rev. 2845, 2874–75 (2016).

Requiring recklessness ameliorates any concern that not requiring proof of specific intent “will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously.” *Elonis*, 135 S. Ct. at 2017 (Alito, J., concurring in part and dissenting in part) (“[W]e have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. Requiring proof of recklessness is similarly sufficient here.”) (internal citations omitted).

The Kansas statute here (like those in many other states) also appropriately reflects the reality that domestic abusers regularly follow through on their threats. See Brewster, 15 *Violence & Victims* at 41–54 (“Threats of violence [are] significantly correlated with actual physical violence in every model”—leading to significant physical violence in well over half of the cases).

The facts of *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), prove the point. Tracey Thurman’s estranged husband, Charles, spent the better part of a year threatening to murder her and their infant son, C.J. *Id.* at 1524–25. Tracey’s complaints to the police were “ignored or rejected.” *Ibid.* Things escalated when Charles attacked Tracey and kidnapped their son. *Ibid.* After Charles returned—smashing Tracey’s windshield and screaming threats at her while she was sitting in her car—he was arrested and received a six-month suspended sentence. *Ibid.* For the next five months, he repeatedly threatened to kill Tracey. *Ibid.* She got a restraining order against him, but it did nothing to stop the barrage of threats. *Ibid.*

A month later, Charles stabbed Tracey 13 times in her chest, neck, and throat outside her home. *Ibid.* When the police arrived, they watched as Charles dropped the bloody knife, kicked Tracey in the head, and ran inside her home. *Id.* at 1526. He came back with their son C.J. and dropped the child on Tracey's wounded body before kicking her in the head a second time. *Ibid.* Tracey survived the attack but was left partially paralyzed.

Throughout her ordeal, Tracey sought the protection of the criminal-justice system, reporting the threats to police and obtaining a restraining order and even an arrest—to no avail. Restraining orders and arrests are important first steps, see James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 164–65 (1999), but incapacitation and incarceration are critical to domestic-violence victims' safety and well-being. The First Amendment does not require the criminal-justice system to wait until domestic abusers finally make good on their violent threats before taking action to protect and vindicate victims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted.

PAUL G. CASSELL
S.J. QUINNEY COLLEGE OF LAW
AT THE UNIVERSITY OF UTAH*
383 South University Street
Salt Lake City, Utah 84112

JOHN S. EHRETT
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036

ALLYSON N. HO
Counsel of Record
BRADLEY G. HUBBARD
MATTHEW SCORCIO
PHILIP AXT
THOMAS M. MOLLOY, JR.†
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Avenue, Suite 2100
Dallas, Texas 75201
(214) 698-3100
aho@gibsondunn.com

Counsel for Amici Curiae

March 25, 2020

* Institutional information provided only for identification purposes; does not imply institutional endorsement.

† Admitted only in California.