

# The Supreme Court Should Move to Protect Victims of True Threats

By Allyson Ho and Paul Cassell

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*Allyson Ho of Gibson Dunn and Paul Cassell of University of Utah say prosecutors shouldn't have to prove a defendant's state of mind in cases involving threats of violence to avoid violating a defendant's First Amendment rights.*

Nothing can turn back time to 2014, when singer-songwriter Coles Whalen was on the cusp of making it big. And nothing can restore Whalen to who she used to be before Billy Ray Counterman spent years stalking and threatening her. But the US Supreme Court can protect victims like Coles without offending the First Amendment in an important case that will be argued April 19.

The case is *Counterman v. Colorado*, and it involves what's called the "true threats" doctrine. Everyone agrees that "true threats" of violence aren't protected by the First Amendment.

The question is whether prosecutors pursuing charges against someone who sends threatening messages must prove not only that the messages were objectively threatening, but also that the sender subjectively intended them to be threatening.

The Supreme Court should refuse to put up an unnecessary barrier to protecting victims and rule that the First Amendment doesn't impose a "subjective intent" requirement.

Whalen, the victim in the case, was making a name for herself as a singer-songwriter and an alt country performer. But in 2014, she began receiving thousands of unsolicited messages from Counterman that only intensified in frequency and hostility over time.

Things came to a head in spring 2016,

after Counterman messaged Whalen to "Die, don't need you" and that "Staying in cyber life is going to kill you." He also made clear that he'd been watching her—describing her car and the people around her.

The messages terrorized Whalen, and she eventually sought help—first from family and later from law enforcement, who arrested Counterman for stalking in May 2016. After a three-day trial, the jury convicted Counterman after finding that he knowingly communicated with Whalen in a way that would cause a reasonable person to suffer serious emotional distress.

The judge sentenced him to prison—his third time behind bars for threatening at least five different women. Counterman's incarceration enabled Whalen to begin putting her life back together—knowing she was finally safe from the stalker.

But that's not the end of the story. Earlier this year, the Supreme Court agreed to review Counterman's conviction and decide whether the First Amendment requires his conviction to be overturned because the prosecutor didn't prove that he subjectively intended to threaten Whalen.

The court should reject that argument in no uncertain terms. There's no dispute that Whalen reasonably understood Counterman's messages as threats—the objective test that most states use to protect free speech.



Allyson Ho



Paul Cassell

Requiring additional proof that Counterman subjectively intended to threaten Coles—by telling her to “die,” for example—would lead to the absurd result that the more delusional the stalker, the harder it will be to protect victims.

That’s because a stalker who’s out of touch with reality will be beyond the reach of law enforcement. Many stalkers harbor dangerous delusions or other mental conditions that underlie their obsessive contacts with their victims. Nothing in the First Amendment requires the perverse result that they can’t be prosecuted—and that their victims can’t be protected.

Accepting Counterman’s argument wouldn’t just make it harder to protect victims from delusional stalkers. It would also create a dangerous roadmap for devious stalkers.

To evade prosecution, a devious stalker would just need to send purportedly delusional messages along with his threats—e.g., “Die, don’t need you.” A specific-intent requirement would not only make an arrest warrant harder to get, but also erect a near-insurmountable hurdle to prosecuting, convicting, and incarcerating devious stalkers.

Given these realities, it’s unsurprising that 25 states and the District of Columbia filed a friend-of-the-court brief supporting Colorado in the Supreme Court. In fact, most states have used an objective standard for years to protect crime victims while safeguarding free speech.

A jury properly put an end to Counterman’s years-long campaign of stalking, harassing, and threatening Whalen. His actions inflicted grave harm, as she feared that this stranger—whom she had never met or even seen—could emerge at any moment from the crowd to hurt her or someone she loved.

The constant fear and threat of danger forever changed Whalen’s life and cost her years of a music career that she can never get back. The First Amendment isn’t offended by insisting that Counterman be held responsible for those consequences.

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## AUTHOR INFORMATION

*Allyson Ho is Co-Chair of the Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher.*

*Paul Cassell is a professor of criminal law at the S.J. Quinney College of Law at the University of Utah.*