

No. ED114341

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI
Respondent,

v.

MATTHEW T. MCMENAMY
Appellant.

Appeal from St. Charles County Circuit Court
Case No. 2311-CR03370-01

Amicus Brief of American Civil Liberties Union of Missouri and Professors Eugene Volokh, Jane Bambauer, and Lyrissa Lidsky in Support of Appellant

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INTEREST OF AMICI CURIAE

The ACLU of Missouri is a nonprofit, nonpartisan organization with over 19,000 members dedicated to defending the principles embodied in the United States and Missouri Constitutions as well as civil rights laws. The ACLU of Missouri has long fought to prevent the criminalization of free speech. *See, e.g., State v. League of Women Voters of Mo.*, 730 S.W.3d 591 (Mo. banc 2026); *Mo. Ass’n of Sch. Librarians v. Johnson*, No. 2316-CV05732 (Jackson Cnty. Nov. 17, 2025); *Johnson v. Mo. Ass’n of Sch. Librarians*, SC101423 (Mo. banc argued Sept. 23, 2026); *Turtle Island Foods, SPC v. Thompson*, No. 2:18-04173-CV-C-FJG (W.D. Mo. Mar. 26, 2024); *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021); *Walker v. City of Grandview, Mo.*, No. 4:16-cv-01316-RK (W.D. Mo. Aug. 1, 2017); *State v. Carrawell*, 481 S.W.2d 833 (Mo. banc 2016); *Walker v. City of Belton, Mo.*, No. 4:16-cv-00716-SBR (W.D. Mo. Sept. 17, 2016); *Gurley v. Mo. Bd. of Private Investigator Exam’rs*, 361 S.W.3d 406 (Mo. banc 2012); *Smith v. Pace*, 313 S.W.3d 124 (Mo. banc 2010).

Additional *amici* are scholars whose teaching and research focus on First Amendment law and theory, including the law relating to criminal harassment prosecutions based on speech, the true threats and speech integral to criminal conduct exceptions to the First Amendment, defamation law, and protection for speech that is offensive or made with bad motives. Each amicus is identified below.¹

¹ The legal scholar *amici* join this brief in their individual capacities and not on behalf of any institution.

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INTRODUCTION

The First Amendment and article I, § 8 of the Missouri Constitution broadly protect the right to speak to the public about other people.² This is true even when the speech “is intended to trouble or annoy, or to make another timid or fearful.” *United States v. Sryniawski*, 48 F.4th 583, 587 (8th Cir. 2022). And it is true even when speech uses “social pressure and the ‘threat’ of social ostracism . . . to embarrass others or coerce them into action.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). While individuals who are the subjects of unwanted speech may be able to limit some speech directed to them, they cannot limit offensive speech *about* them directed to others. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Contrary to this established law, Matthew McMenemy was convicted and sentenced to **10 years** in prison for openly and vigorously criticizing a local police detective he believed had engaged in misconduct. Mr. McMenemy used his public social media

² As the Missouri Supreme Court has explained, the protections afforded by article I, § 8 are “comparable,” if not more extensive, than the protections afforded by the First Amendment to the United States Constitution. *State v. Vaughn*, 366 S.W.3d 513, 517 n.3 (Mo. banc 2012) (describing article I, § 8 as the First Amendment’s “counterpart in the Missouri Constitution”). For that reason, federal decisions interpreting the First Amendment have been, at minimum, “strongly persuasive” authority for interpreting article I, § 8. *See Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006) (“While provisions of our state constitution may be construed to provide more expansive protections than comparable federal constitutional provisions, analysis of a section of the federal constitution is strongly persuasive in construing the like section of our state constitution.” (internal quotation marks omitted)); *Kansas City Premier Apartments, Inc. v. Missouri Real Est. Comm’n*, 344 S.W.3d 160, 170 n.4 (Mo. banc 2011) (explaining, in the context of a constitutional challenge based on both article I, § 8 and the First Amendment, that “[t]his Court has traditionally given due deference to United States Supreme Court precedents when our state constitutional provisions are the same as the United States constitutional provisions”).

accounts and publicly distributed flyers to attempt to draw the community's attention to the detective's actions. He expressed his hope that his revelations would result in the officer's removal.

While Mr. McMenemy's speech was certainly concerning to the detective, the circuit court did not make any finding that either the flyers or any one of the dozens of social media posts submitted as evidence fell within any category of unprotected speech, such as true threats. Nor could the circuit court have done so, as none of Mr. McMenemy's speech was outside the bounds of the First Amendment's protection. His convictions for harassment and stalking violate the First Amendment and should be reversed.

STATEMENT OF FACTS

In August 2023, Matthew McMenemy began posting on social media about what he viewed as misconduct and racism by a local police detective, who years before had been involved in Mr. McMenemy's involuntary commitment. *See* State's Exs. 60A–M. Mr. McMenemy sought to publicize one of the detective's public Facebook posts, where the detective wrote: "If black lives matter then why are they shooting and killing each other at an alarming rate." State's Ex. 60B ("Let's make this racist post go viral . . . #BLM #RacistCop . . ."); State's Ex. 60A ("The people want answers. Is [detective] a racist? Does he feel that people of color do not matter because of an idea that they murder each other at an alarming rate?"). Many of Mr. McMenemy's posts were aimed at sharing with the public his concerns about the detective's fitness for his position. For example, Mr. McMenemy posted he was "in talks with a billboard company to put [detective's] racist quotes up next to a picture of him in uniform" because "[s]omeone like that shouldn't be a detective, an

election [*sic*] official, or let alone anything near public service.” Tr. 736:10–21, State’s Ex. 60K. Mr. McMenemy’s posts also described his feelings about his prior involuntary commitment and thoughts about hurting his parents before getting help. *See* State’s Ex. 60E (Mr. McMenemy’s post that he “had a bad day last Sunday . . . I still need time to heal but . . . I am going to counseling and I will be looking for support groups”).

In early September 2023, over Labor Day weekend, Mr. McMenemy posted flyers around town sharing his concerns about the detective. Tr. 696–97, State’s Ex. 1A. The flyers asked: “Is [detective] a racist?” and included a photo of the detective in uniform, photos of public Facebook posts by the detective containing content Mr. McMenemy deemed racist, a phone number for the local police department that employed the detective, and information directing readers to Mr. McMenemy’s Instagram account and X accounts with the handles @DefundBadPolice and @Billboard4Bcops. State’s Ex. 1A. The flyers were posted around town, including at the local courthouse, a county administrative building, along Main Street, the hospital where Mr. McMenemy was previously involuntarily committed, and on the door of Diamonds n the Ruff, a pet grooming business owned by the detective’s wife. Tr. 699:14–18; 714:3–6; 851:9–20; 1073:16–23.

On September 6, 2023, the State arrested Mr. McMenemy and charged him with one count of first-degree harassment alleging that between September 1 and September 4, 2023, Mr. McMenemy had “without good cause, engaged in an act with the purpose to cause emotional distress to [detective] by distributing fliers containing [detective’s] photo which alleged [detective] is a racist, posting information about [detective] and his family on social media and threatening to take the [detective’s] things, cash, retirement and business.” D52

p.1. Mr. McMenemy posted bond, Tr. 856:19–24, and continued to use his own social media pages to post *about* the detective.

Mr. McMenemy’s posts stated his desire that the detective suffer financial and professional consequences for what Mr. McMenemy viewed as police misconduct. Mr. McMenemy repeatedly explained his intent to use protest and the legal process to ensure the detective was held accountable for his alleged actions. *See, e.g.*, State’s Ex. 61D (“I am going to protest the government and everything else until this is resolved. . . . I want millions because money is the only thing people understand. A huge settlement will ensure people remember my name and no piece of shit cop ever does this same thing to another innocent civilian EVER again.”); State’s Ex. 62J (“I will not give up until you are out of government work and your business @Diamonds n the Ruff is closed. The People do not want racists. You are going to loose [*sic*] everything because this is going national. I will be getting the @The United States Department of Justice involved.”); State’s Ex. 61J (“ . . . I want my compensation. I deserve it. From everyone involved for the defamation. Lies. Rights violations. Illegal detention. Im [*sic*] talking multi million. I will not stop until I hurt their pockets”); State’s Ex. 62N (“You better fear me because I will end your career with just words. Words that seem to be scary to you. Like ‘you are a racist, look at what [detective] said.’”).

In this context, even the string of overnight posts the State identified in its opening statement as the “most concerning,” are properly read as referring to Mr. McMenemy’s intent to use exposure of wrongdoing and litigation to ruin the detective financially and professionally. Tr. 686–87; State’s Ex. 62T (“I have something planned. It is going to gain

national attention.”; “Just three more days. . . what is planned? More interesting things to expose maybe? Shouldn’t have threatened me.”; “Let me make this clear. I will ruin all of your lives. Just as you have done to me but your life will be impacted in a way where you will not want to move forward with life. You will want to settle with me before this 7th year anniversary. God have mercy on your lives when you don’t. . . .”). Mr. McMenemy threatened to expose more wrongdoing to drive the detective from a position of public trust. State’s Ex. 62U (“I am going to continue hitting [detective] until he is gone from my community I grew up in. Since they decided to arrest me, its open season. Lol I have nothing to loose [*sic*]. He does. Probably should settle. Resign. I might let you keep your business. I mean no more public service work. You are being made into an example.”).

Some of Mr. McMenemy’s posts tagged the Facebook business accounts of the local police department or Diamonds n the Ruff. Tr. 928–30, State’s Ex. 62J. There is no evidence that Mr. McMenemy tagged the personal social media accounts of either the detective or his wife. *See* Tr. 953:22–24 (detective’s testimony that he cannot recall a single time Mr. McMenemy tagged his own personal Facebook page); Tr. 1093:18–21 (wife’s testimony that Mr. McMenemy never tagged her personal Facebook account in any of his posts).

On November 8, 2023, the State filed an amended complaint, adding a charge of first-degree stalking of the detective. D64 p. 2. In September 2025, the State issued a superseding indictment with six counts.³ Count One charged Mr. McMenemy with first-

³ Counts IV–VI alleged failure to appear and damage to jail property. *Amici* take no position regarding these counts.

degree felony harassment of the detective's wife "in that on or between August 20, 2023 and December 31, 2023, . . . the defendant, without good cause, posted a flyer, which contained a photo of [detective] and referenced social media accounts, on [detective's wife's] business front; 'tagged' [detective's wife's] business Facebook account; and defendant posted alarming content on Facebook pertaining to [detective's wife] and [detective]." D14 p. 1. Count Two charged Mr. McMenemy with the first-degree felony harassment of the detective "in that on or between August 20, 2023 and December 31, 2023, . . . the defendant without good cause, 'tagged' the Facebook account of [detective's] employer; posted flyers on St. Charles County buildings and the business belonging to [detective's] spouse, which referenced social media accounts; and defendant posted alarming content on Facebook pertaining to [detective], [detective's] spouse and the defendant's family members." *Id.* at 2. Count Three charged Mr. McMenemy with felony first-degree stalking of the detective in that "on or between September 15, 2023 and December 31, 2023, . . . the defendant, through defendant's course of conduct, purposely disturbed [detective] by 'tagging' the Facebook account of [detective's] employer and posted alarming content on social media." *Id.*

Because the indictment did not identify which social media post(s) were the basis for the harassment and stalking charges, Mr. McMenemy filed a Motion for a Bill of Particulars seeking clarity about which posts constituted the alleged "alarming content." D15; *see also* Tr. 27:9–21. In considering the motion, the circuit court noted that "[t]here's been several examples offered both of statements that were made or posted to social media or put on a flyer, et cetera, from the defendant that, while certainly obviously unflattering

to the alleged victim, would likely fall under the protected umbrella of protected First Amendment speech.” Tr. 33:6–11. Nevertheless, the court denied the motion, allowing the State to proceed on its theory that “there’s posts that give context to other posts and you have to take all that altogether . . . to determine the alarming content involved . . . so it’s very much a story.” Tr. 49:10–19. Mr. McMenemy also moved to dismiss the harassment and stalking counts as violating the First Amendment because they were based on his constitutionally protected speech. D18. The court denied the motion. D26.

At trial, the State was permitted to introduce evidence of over *forty-five* Facebook posts (as well as evidence of other social media posts, including Tweets, Instagram posts, and YouTube videos) authored by Mr. McMenemy over more than four months as evidence of stalking or harassment. *See* State’s Exs. 6, 10, 17A–E, 60A–M, 61A–N, 62A–U, 65. The content of these posts ranged from Mr. McMenemy’s reflections on his involuntary commitment to posts about what he viewed as the detective’s racism.

At the close of trial, over Mr. McMenemy’s objection, the circuit court delivered jury instructions that mirrored the State’s theory that it did not have to identify any specific speech as the basis for the harassment and stalking counts. On Count 1 (first-degree harassment of the wife), the jury was instructed it could find Mr. McMenemy guilty if it found that between “August 20, 2023 and December 31, 2023 . . . the defendant posted a flyer, which contained a photo of [the detective] and referenced social media accounts, on [wife’s] business front; and ‘tagged’ [wife’s] business Facebook account; and posted alarming content on Facebook pertaining to [detective] and [wife].” D38 p. 8 (Instruction No. 8); Tr. 1354:18–1355:8. On Count 2 (first-degree harassment of detective), the jury

was similarly instructed it could find Mr. McMenemy guilty if it found that between August 20 and December 31, 2023, he “‘tagged’ the Facebook account of [detective’s] employer; and posted flyers on St. Charles County buildings and the business belonging to [detective’s wife], which referenced social media accounts; and posted alarming content on Facebook pertaining to [detective], [wife], and the defendant’s family members.” D38 p. 11 (Instruction No. 10); Tr. 1358:6–21. On Count Three (first-degree stalking of detective) the court instructed the jury it could find Mr. McMenemy guilty if it found “that between September 15, 2023, and December 31, 2023 . . . that defendant purposely disturbed [detective] by posting alarming content on social media.” D38 p.13 (Instruction No. 12); Tr. 1361: 6–23. The instructions did not identify any particular posts that contained “alarming content,” nor did they define “alarming.” At no point was the jury instructed that under the charging statutes, “[c]onstitutionally protected activity is not included within the meaning of [course of conduct to establish stalking].” § 565.002(4) RSMo;⁴ *see also State v. Collins*, 648 S.W.3d 711, 718 (Mo. banc 2022) (concluding criminal harassment statute is limited to conduct “outside of the First Amendment’s protection”). Mr. McMenemy objected to all these instructions, asking the court to require the State to specifically identify which posts the jury needed to find alarming to find him guilty of harassment or stalking. Tr. 1272:11–16; 1318:19–1319:3. The court rejected Mr. McMenemy’s requests. Tr. 1337–38. The jury found Mr. McMenemy guilty of two counts of first-degree harassment and

⁴ All statutory references are to Missouri Revised Statutes (2016), as updated, unless otherwise noted.

one count of first-degree stalking. D45 pp. 1–3. The court sentenced Mr. McMenemy to 10 years in prison. Tr. 1498–99.

ARGUMENT

All of Mr. McMenemy’s social media posts and his distribution of flyers were protected by the First Amendment. Harassment and stalking laws may, in some circumstances, be constitutionally applied to protect unwilling listeners from unwanted, one-to-one speech directed *to* that listener. The government’s power to protect an unwilling listener from speech *about* them directed to the public, on the other hand, is sharply limited, even when that speech is annoying, offensive, or alarming. Unless such speech falls within one of the narrow, historically recognized categories of speech that the U.S. Supreme Court has held may be regulated without violating the First Amendment, such as “true threats,” it is presumptively protected.

Here, Mr. McMenemy spoke to the public, and his speech did not fall within any unprotected category. This Court should reverse Mr. McMenemy’s convictions. Even if this Court does not find that *all* Mr. McMenemy’s speech is protected from criminal prosecution by the First Amendment, he is at least entitled to a new trial. The circuit court allowed the State to present evidence of more than four months’ worth of social media posts to the jury and then instructed the jury it could find Mr. McMenemy guilty based on unidentified “alarming content” in these posts. This means a juror could have convicted Mr. McMenemy based on speech protected by the First Amendment.

I. The State’s prosecution of Mr. McMenemy for harassment and stalking based on unwanted speech *about* individuals directed *to* the *public* violates the First Amendment.

Speech directed to the public at large is presumptively protected unless it falls into one of the narrow, historic exceptions to the First Amendment. This is because even if some listeners are likely to be offended, others may be willing listeners who find the speech valuable. For this reason, while harassment and stalking statutes may, in some instances, be constitutionally applied to repeated unwanted communications *to* an individual, they cannot be constitutionally applied to communications to the public *about* an individual.

A. Stalking and harassment statutes were originally intended to limit unwanted communications directed *to* a *specific person*.

For decades, laws have “restricted certain kinds of unwanted speech said *to* a particular person.” Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 Nw. U. L. Rev. 731, 740 (2013). For example, state and federal criminal harassment statutes were enacted to prohibit unwanted telephone calls to a particular person. *Id.* at 738, 740; Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 Vanderbilt L. Rev. 991, 998 (1993); *see also*, e.g., La. Rev. Stat. Ann. § 14:285(A)(2) (prohibiting making repeated phone calls or sending repeated text messages “directly to a person anonymously or otherwise in a manner reasonably expected to abuse, torment, harass, embarrass, or offend another”); N.C. Gen. Stat. § 14-196(a) (making it a crime to telephone another repeatedly for the purpose of annoying, threatening or harassing the person called). Similarly, the federal government and some states have banned certain unwanted mailings into the home. *See e.g., Rowan v.*

U.S. Post Office Dep't, 397 U.S. 728, 730 (1970) (upholding constitutionality of federal postal legislation allowing householders to block unwanted mail); *Ramsey v. Edgepark, Inc.*, 583 N.E.2d 443, 452 (Ohio Ct. App. 1990) (upholding injunction against unwanted mailings to homes after recipients provided affirmative notice that they wished to receive no further mailings). These laws reflect an intention to protect individuals from repeated, unwanted communications *to* them, particularly in the home.

More recently, states enacted stalking laws to proscribe behaviors such as physically following, surveilling, or engaging in repeated unwanted personal contacts with a particular person. Volokh, *One-to-One Speech*, *supra*, at 738. Courts have relied on stalking laws or restraining order laws to ban repeated or annoying letters, phone calls, or personal contact from a particular person. *Id.* at 740–41; *see also, e.g., State v. Martin*, 940 S.W.2d 6, 7 (Mo. App. E.D. 1997) (upholding aggravated stalking conviction where defendant repeatedly and purposely made numerous threatening phone calls to the victim). While some of these laws have been struck down in some states, “they have generally been upheld by lower courts; and the U.S. Supreme Court has upheld the federal ban on repeated unwanted mailings.” Volokh, *One-to-One Speech*, *supra*, at 741 & n.45 (collecting cases); *Rowan*, 397 U.S. at 740.

These laws share something in common: In the vast majority of their applications, they restrict unwanted speech *to* a person, not unwanted speech *about* a person. *Id.* at 742. It is in this context—where the laws are being applied to “one-to-one speech”—that they “have generally been upheld against First Amendment challenge.” *Id.*

As the internet has made it easier for communications to reach the public, maintaining this distinction between constitutionally permissible punishment of certain one-to-one speech and constitutionally impermissible punishment of one-to-many speech is critical. Social media is “the modern public square.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). However, the increased exposure for “upsetting” or “frightening” online speech can bring with it an increased risk of overcriminalization. *See Counterman v. Colorado*, 600 U.S. 66, 87 (2023) (Sotomayor, J. & Gorsuch, J., concurring in part and concurring in the judgment). Online communication “lack[s] many normal contextual clues,” including tone of voice and expression. *Id.* “The ubiquity of this speech raises the possibility of highly discretionary enforcement.” *Id.* at 88. Thus, in the context of online speech, courts must exercise particular caution to ensure the state’s application of harassment and stalking laws does not exceed the laws’ original intention or permissible constitutional boundaries.

B. The First Amendment grants broad protection to speech directed to the public at large, even when the subjects of that speech may be alarmed or offended.

The U.S. Supreme Court has consistently recognized a distinction between speech directed to the public at large and interpersonal speech for First Amendment purposes. Even when the content of the speech is subjectively offensive or alarming, the U.S. Supreme Court has typically protected public statements *about* a person—absent a showing of a narrow and well-established First Amendment exception, such as true threats, fighting words, or defamation. Volokh, *One-to-One Speech*, *supra*, at 738; *see also* Eugene Volokh,

Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases), 45 Harv. J.L. & Pub. Pol’y 147, 170–71, 181 (2022).

As now-Justice Alito stated: “There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001); *see also Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quoting and endorsing Justice Alito’s statement); *Iowa Supreme Ct. Att’y Disciplinary Bd. v. Neff*, 5 N.W.3d 296, 308 (Iowa 2024) (likewise). Many courts have endorsed this very point, quoting *Saxe*, in the context of criminal harassment laws and the closely related harassment restraining order laws. *See, e.g., Sryniawski*, 48 F.4th at 587 (reversing cyberstalking conviction where defendant repeatedly emailed political candidate with allegations about the mental health, criminal record, and sexual behavior of candidate’s family members, but the government had not shown any emails fell within an unprotected category of speech); *Gregorwicz v. Villa-Kennedy*, 593 P.3d 1285, 1289 (Ariz. Ct. App. 2026) (holding social media post about former partner could not constitute harassment where it did not fall within one of the recognized exceptions to constitutionally protected speech); *SBB v. LBB*, 302 A.3d 574, 600, 608–09 (N.J. Super. App. Div. 2023) (holding wife’s dissemination of video accusing estranged husband of withholding a document that would allow her to obtain a religious divorce and urging viewers to “press” husband to provide it was protected speech that could not support entry of a restraining order); *Budlove v. Johnson*, 377 So.3d 206, 209, 211–12 (Fla. Ct. App. 2023) (reversing injunctions issued under stalking statute to the extent they prohibited appellant from making public statements about appellees that were not sent directly to appellees and

prohibited speech that did not fall within a category of constitutionally unprotected speech); *Catlett v. Teel*, 477 P.3d 50, 59–60 (Wash. Ct. App. 2020) (concluding that causing public records about ex-girlfriend to be published online was constitutionally protected speech that could not be the basis for a protective order); *TM v. MZ*, 926 N.W.2d 900, 908–09 (Mich. Ct. App. 2018) (reversing entry of personal protective order based on repeated Facebook posts using “inappropriate, crude, and offensive language” about neighbor that did not fall within a category of unprotected speech); *State v. Burkert*, 174 A.3d 987, 989–90, 1000 (N.J. 2017) (vacating harassment conviction that was based on defendant posting flyers throughout the workplace containing coworker’s wedding photo inscribed with “degrading and vile dialogue” in comment bubbles because the speech was constitutionally protected).

Unlike prohibitions on speech said to a particular unwilling listener, restrictions on speech to the public deprive a speaker of the opportunity to communicate with willing listeners. Denying access to potentially interested audiences undermines the use of speech to influence opinion and conduct and, as a result, hinders the robustness of public debate—particularly when the restricted speech concerns a matter of political, social, or other concern to the community. *Claiborne*, 458 U.S. at 910–11 (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (noting the “free trade of ideas” means “the opportunity to persuade to action, not merely describe facts”)); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (holding speech about a matter of public concern is subject to “special protection” under the First Amendment). One’s interest in being free from public criticism is insufficient to overcome protection for speech. *Keefe*, 402 U.S. at 419; *Coates v. Cincinnati*, 402 U.S. 611, 614–15

(1971) (holding “public intolerance and animosity cannot be the basis for abridgement of constitutional freedoms” because “conduct that annoys some people does not annoy others”).

Accordingly, public statements *about* a person that coerce, annoy, alarm, offend, or embarrass are generally protected by the First Amendment.⁵ In *Organization for a Better Austin v. Keefe*, a local civil rights organization believed a local real estate broker’s practices were improper. 402 U.S. at 416–17. After the broker refused to sign an agreement not to solicit property in the organization’s community, the organization distributed leaflets critical of the broker’s supposedly racist real estate practices at a local shopping center, on the doors of his neighbors, and to people going to and from his church. *Id.* at 417. Some leaflets accused him of being a “panic peddler” that employed tactics to scare white homeowners into selling their properties; others encouraged recipients to call his home phone number to express their disapproval. *Id.* The U.S. Supreme Court concluded that the organization’s “inten[t] to exercise a coercive impact . . . does not remove [speech] from the reach of the First Amendment. Petitioners plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the function of a newspaper.” *Id.* at 419. The U.S. Supreme Court explained, “so long as the means are peaceful, the communication need not meet standards of acceptability,” particularly where

⁵ The State may have some power to restrict narrowly defined categories of speech that reveals private information about a person that is “almost never relevant to any discussion on either public or private topics” (e.g., nude photos, Social Security numbers). Volokh, *One-to-One Speech*, *supra*, at 793–94. No such speech is at issue here.

the target of the speech “is not attempting to stop the flow of information into his own household, but to the public.” *Id.* at 419–20.

While speech that is *intended* to solicit violence against particular people may be punishable, speech to the public that harshly criticizes its target or that attempts to persuade through social pressure does not lose its protection even if some listeners may react with threats or violence. In *NAACP v. Claiborne Hardware Co.*, organizers of a boycott of stores owned by white merchants read aloud and published the names of Black residents who weren’t following the boycott to place pressure on them. 458 U.S. at 904–05. As in *Keefe*, the U.S. Supreme Court held the disclosures constitutionally protected, noting the First Amendment extended beyond abstract discussions to protect “offensive” and “coercive” speech intended to influence action. *Id.* at 911. This was true even though some of the people who chose not to comply with the boycott were beaten, had their property damaged, or had shots fired into their homes. *Id.* at 905–06. The U.S. Supreme Court explained that speech designed to persuade “through social pressure and the ‘threat’ of social ostracism. . . . does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” *Id.* at 910.

In other contexts, the U.S. Supreme Court has affirmed that speech remains protected even if it is offensive or, as the State claims here, “alarming.” For example, in *Snyder*, the U.S. Supreme Court held the First Amendment protected the right of picketers to protest a Marine’s funeral with placards that read “God Hates the USA/Thank God for 9/11,” “Priests Rape Boys,” “You’re going to hell” and “Thank God for dead soldiers.” 562 U.S. at 448. While the U.S. Supreme Court acknowledged the picketers’ expression was

hurtful, it could not “be restricted simply because it is upsetting or arouses contempt.” *Id.* at 461, 458.

While the government has greater power to regulate unwanted one-to-one speech directed *to* an unwilling listener (rather than to the public at large), that power is not without First Amendment limits. In considering a prior version of Missouri’s harassment statute, the Missouri Supreme Court explained that to the extent a “privacy interest in avoiding unwanted communication” provides a basis for prohibiting speech, this exception is limited and requires ““a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”” *Vaughn*, 366 S.W.3d at 519 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). Such speech may be restricted where the ““degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,”” such as in the home and its immediate surroundings. *Id.* at 519–20 (quoting *Hill v. Colorado*, 530 U.S. 703, 718 (2000)); *see also Rowan*, 397 U.S. at 736. A rule otherwise would require “individuals picketing a private or public entity . . . to cease once they were informed their protestations were unwanted,” or criminalize “an advertising campaign urging an elected official to change his or her position on a controversial issue.” *Vaughn*, 366 S.W.3d at 519.

Consistent with this case law, Missouri decisions upholding criminal harassment and stalking convictions based on speech have been limited to intrusive and *personally directed* mediums of communication, like phone calls, faxes, emails, and letters. In *State v. Starkey*, for example, the defendant made repeated threatening calls and faxes to victims’ offices and repeated calls to one victim’s home. 380 S.W.3d 636, 638–40 (Mo. App. E.D. 2012). Similarly, in *State v. Wooden*, the defendant sent repeated emails to a group of public

officials, including an alderwoman. 388 S.W.3d 522, 524–25 (Mo. banc 2013). One email contained a 19-minute-long audio attachment in which the defendant repeatedly referenced the alderwoman in crude terms, discussed dusting off a sawed-off shotgun and “making a mess of everything with his sawed-off,” described himself as a domestic terrorist, and referenced the murders of public officials. *Id.* at 524. The defendant continued emailing the alderwoman after being asked to stop. *Id.* at 525.

C. Mr. McMenemy’s speech was directed to the public at large and protected by the First Amendment.

The State failed to show that Mr. McMenemy’s speech was addressed directly to the detective or his wife. Instead, Mr. McMenemy’s speech was to the public. He posted publicly on social media and distributed flyers regarding his concerns about the fitness of a police officer. The detective testified that Mr. McMenemy did not call, email, or text him, nor did he ever follow the detective. Tr. 958:3–16.

Mr. McMenemy also did not tag the detective’s personal Facebook page in any posts; instead, the detective actively searched for Mr. McMenemy’s posts. Tr. 953:16–24. The detective did not receive any notification through Facebook when Mr. McMenemy tagged the police department; he would learn of these posts from the department’s public information officer. Tr. 955:7–956:5. The only post the detective could have seen without seeking it out or being notified by others was a single comment Mr. McMenemy made on a public post by the detective, seeking to draw the public’s attention to the post. State’s Ex. 60B (“Lets make this racist post go viral.”). The State did not offer any evidence of communications by Mr. McMenemy directed to the detective’s wife. *See* Tr. 120:8–16

(wife’s testimony at pretrial hearing that she “never had any contact with [Mr. McMenemy] directly” and that he never called or texted her).

Both the distribution mechanisms and the content of Mr. McMenemy’s speech demonstrate it was directed to the public. Nearly all of Mr. McMenemy’s speech presented to the jury was posted to his public social media accounts, including Facebook, Instagram, Twitter,⁶ and YouTube. Social media, according to the U.S. Supreme Court, is the most important place for the exchange of views today, serving as the “modern public square” by allowing users to “gain access to information and communicate with one another about it on any subject that might come to mind.” *Packingham*, 582 U.S. at 104, 107.

The medium of the remaining speech—flyers—likewise reflects that Mr. McMenemy’s speech was directed to the public. Mr. McMenemy posted flyers along St. Charles’ Main Street, at government buildings, and at a hospital. Tr. 699:14–18; 714:3–6; 851:9–20; 1073:16–23. The First Amendment has long protected and embraced the distribution of leaflets, pamphlets, and handbills—even when offensive or alarming. *Keefe*, 402 U.S. at 419; *see also Schneider v. State*, 308 U.S. 147, 164 (1939) (stating “pamphlets have proved most effective instruments in the dissemination of opinion”); *see also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (identifying pamphlets and leaflets as “historic weapons in the defense of liberty” protected by the First Amendment).

Mr. McMenemy’s act of posting a single copy of his flyer outside the wife’s dog-grooming business does not transform the act of leafleting into one-to-one communication.

⁶ Twitter is now X. Because the trial record typically refers to “Twitter” and “tweets” to reference Mr. McMenemy’s X account, this brief also uses those terms.

Speech aimed at coercing or shaming can be more effective when the audience includes people likely to know the subject. In *Keefe*, for instance, the community organization circulated leaflets to parishioners on their way to and from the broker's church and to residents in his neighborhood; the U.S. Supreme Court held the activity protected by the First Amendment. 402 U.S. at 417, 419–20. Here, similarly, Mr. McMenemy posted a flyer in an area where it might be seen by members of the public who knew the detective.

In addition to the public nature of the medium, the subject matter of Mr. McMenemy's speech showed his intent to address the public at large. The "thrust and dominant theme" of his social media posts concerned issues of public import. *Snyder*, 562 U.S. at 454. Mr. McMenemy's posts discussed topics like police misconduct and racism, attempts to cover up police misconduct, and the harms of improper involuntary commitment. *See, e.g.*, State's Ex. 1A; State's Exs. 60A–60M; State's Exs. 62A–62C. His website, Defund BAD Police Organization, described his mission as "investigat[ing] public officials who violate policy or law." State's Ex. 7; *see also* State's Ex. 10 (social media account for Defund Bad Police). Although First Amendment protections extend to speech on matters of private concern, the protections are particularly strong where, as here, the thrust of the speech evidences a desire to participate in debates related to political and social concerns of the community.

The flyer at issue included a photo of the detective in uniform, two unedited screenshots of the detective's public Facebook posts, and the heading, "Is [detective] a racist?" State's Ex. 1. Like the qualifications for politicians and other public officials, a police officer's fitness for their job is a matter of public concern. *E.g., Shafer v. Lamar Pub.*

Co., Inc., 621 S.W.2d 709, 711 (Mo App. W.D. 1981) (noting the “fitness or unfitness of police officers . . . may be and usually is debated and discussed” and finding even statements regarding private conduct can bear on their fitness to hold office); *Robinson v. York*, 566 F.3d 817, 822 (9th Cir. 2009) (finding First Amendment protected reports of numerous instances of possible corruption by fellow officers because “the competency of the police force is surely a matter of great public concern” (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983))). While it is likely the detective was offended by Mr. McMenemy’s criticisms, speech concerning the fitness of a law enforcement officer sits at the heart of the First Amendment.

The fact that the detective and his wife learned about or were exposed to the speech also does not change the analysis. Here, the detective and wife were informed of the flyers and social media posts by friends and coworkers. Tr. 843:16–24, 938:9–22, 955:11–956:5. When public statements are made *about* a person, it is likely a “reader might alert the subject to the speech.” Volokh, *One-to-One Speech*, *supra*, at 743. However, the fact that others may notify a subject of unfavorable speech about the speech at issue does not amount to “acts of harassment perpetrated by the defendant.” *F.K. v. S.C.*, 115 N.E.3d 539, 546 (Mass. 2019) (third parties telling subjects of defendant’s troubling online speech did not constitute harassment by the defendant).

The fact that the detective and his wife had the ability to avoid Mr. McMenemy’s social media posts also reflects that this is not the type of intrusive, privacy-invading speech that courts have held may be punished under harassment or stalking statutes without violating the First Amendment. Mr. McMenemy posted on his publicly accessible

Facebook page. This content sometimes mentioned the detective by name or tagged the police department or the wife's business. However, these references simply identified to the broader audience the subjects of the speech. *E.g.*, State's Ex. 60A ("The people want answers. Is [detective] of the @ [police department] a racist?"); State's Ex. 60I ("[Detective] of the @ [police department] violated my second amendment right by suggesting that it was paranoia to have a loaded firearm for my protection."); State's Ex. 60K ("I am in talks with a billboard company to put [detective's] racist quotes up next to a picture of him in uniform. Going to link his business, @ Diamonds n the Ruff. Organizing quite a few people who are unhappy about our public servant's racist ideology.").

Rather than blocking Mr. McMenemy's account, the detective and his wife chose to monitor it. Tr. 953:10–21. While they may have believed that approach was appropriate, as a matter of First Amendment law, outside the home, courts "expect individuals simply to avoid speech they do not want to hear." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

Mr. McMenemy is serving a 10-year prison sentence. Despite continued objections by the defense, the circuit court permitted a prosecution based on speech historically at the core of constitutional protection: commentary addressed to the public at large on matters of public concern, including concerns about a government actor. Neither the case law nor the factual record supports his conviction.

II. Mr. McMenemy's speech does not fall into any of the traditional categories of unprotected speech.

Mr. McMenemy's speech was not only directed at the general public criticizing a police officer, but the State failed to prove with any specificity that the content of his speech fell within any of the narrow categories of unprotected speech.

As a general rule, the State "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790–91 (2011) (quotation and citation omitted); *Wooden*, 388 S.W.3d at 525. Only a few "well-defined and narrowly limited" historically recognized categories of speech fall outside full First Amendment protection. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quotation and citation omitted); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitement); *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality opinion) (listing defamation as outside typical First Amendment protections, but noting "substantial protection for speech about public figures" and "limits on liability for defaming a private figure"); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (speech integral to criminal conduct); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words); *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (true threats). Courts may neither create new exceptions based on a judgment that certain speech lacks value nor alter the existing exceptions beyond their traditional bounds. *Stevens*, 559 U.S. at 470–72 (reasoning that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs" and rejecting a new

category for depictions of animal cruelty); *Brown*, 564 U.S. at 792–93 (refusing to expand obscenity to include depictions of violence); *Alvarez*, 567 U.S. at 718–22 (finding no general exception for false statements).

Moreover, both the harassment and stalking statutes at issue exclude constitutionally protected speech. A person commits the offense of harassment if he or she acts “without good cause,” § 565.090.1, and the Missouri Supreme Court has recognized that “the exercise of constitutionally protected acts clearly constitutes ‘good cause.’” *Vaughn*, 366 S.W.3d at 521. “[T]he legislature’s use of the ‘without good cause’ language signals its intent to criminalize only conduct unprotected by the constitution.” *Collins*, 648 S.W.3d at 717. Similarly, stalking means to engage in a certain “course of conduct,” § 565.225.1, where the statute provides that “[c]onstitutionally protected activity is not included within the meaning of course of conduct,” § 565.002(4). Thus, to punish Mr. McMenemy’s speech, the State had to show the speech fell within one of the traditional unprotected categories.

“Alarming content”—the basis on which the jury was instructed they could find Mr. McMenemy guilty of harassment and stalking (D38 pp. 8, 11, 13)—is not a category of unprotected speech. To the contrary, the U.S. Supreme Court has repeatedly recognized that speech does not lose its protection because it offends, outrages, or hurts listeners. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Cohen*, 403 U.S. at 18, 25 (nor for the “asserted offensiveness of the words . . . used”); *Hustler Magazine v.*

Falwell, 485 U.S. 46, 55 (1988) (nor can “outrageousness” remove protection); *Snyder*, 562 U.S. at 458–61 (nor does “hurtful speech” lose protection when it is “outrageous”).

In the hearing on Mr. McMenemy’s motion to dismiss on First Amendment grounds, the State presented various theories for why *all* of Mr. McMenemy’s speech was unprotected: “[T]he speech at issue constitutes speech that is integral to criminal conduct, defamation, and/or true threats, and even if it doesn’t fall within one or more of those unprotected categories, the speech does not address any matter of public concern; therefore, not deserving of 1A protection.” Tr. 140: 5–11. The State was wrong on both the facts and the law.

As discussed above, Mr. McMenemy’s speech—which related to the detective’s fitness as a police officer—plainly relates to a matter of public concern. But speech does not lose protection on the grounds that it discusses matters of private concern. To the contrary, the U.S. Supreme Court has repeatedly recognized that the First Amendment does not allow the State to punish speech “on the ground that it does not touch upon matters of public concern.” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 600 (2008); *see also Connick v. Myers*, 461 U.S. 138, 147 (1983) (“We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.”); *Bey v. Rasaweher*, 161 N.E.3d 529, 545–46 (Ohio 2020) (“We most assuredly have no license to recognize some new category of unprotected speech based on its supposed value.”); *State v. Tracy*, 130 A.3d 196, 201 (Vt. 2015).

Given these principles, to prosecute Mr. McMenemy for his speech, the State was required to show that his speech met one of those historically unprotected categories of speech. But the record does not establish that any of these traditional categories applies.

A. The State cannot punish Mr. McMenemy’s speech as “true threats” because his speech was neither an objective threat of violence nor did he consciously disregard a substantial risk that they could be understood as such.

While a “true threat” is a recognized category of unprotected speech, Mr. McMenemy’s statements were not true threats. A true threat can be found only “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.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). Even when a statement can objectively be viewed as conveying a true threat, a person can only be constitutionally punished if there is a showing of criminal recklessness. *Counterman*, 600 U.S. at 69. Thus, to punish a statement as a true threat, the government must establish that (1) viewed objectively in context, the statement conveyed a serious expression of an intent to commit unlawful violence; and (2) the speaker was at least reckless as to the statement’s threatening character. *See id.* at 74, 78–82.

1. None of Mr. McMenemy’s statements was objectively a “true threat” of violence.

Here, none of Mr. McMenemy’s statements qualify as true threats, nor did the State even attempt to make that showing.

Courts assessing an alleged true threat consider the communication in its full context, including its wording, audience, and other circumstances bearing on whether the communication can reasonably be understood as a threat. *See Watts*, 394 U.S. at 708;

Counterman, 600 U.S. at 74 (reasoning that the word “true” distinguishes punishable threats from “jests, ‘hyperbole,’ or other statements that when taken in context do not convey a real possibility that violence will follow”). In *Watts*, for example, the defendant spoke at a public rally in opposition to the Vietnam War draft: “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” 394 U.S. at 706. The U.S. Supreme Court held that the statement was not a true threat because, given the statement’s hyperbolic nature and speaker’s opposition to the president, it did not suggest a serious expression of intent to inflict violence. *Id.* at 707–08.

Missouri courts likewise evaluate whether the communication, viewed as a whole and in the circumstances in which it was made, reasonably conveyed a serious intent to inflict physical harm. *See State v. Metzinger*, 456 S.W.3d 84, 96–98 (Mo. App. E.D. 2015). *Metzinger* involved Twitter posts referencing pressure cookers and the Boston Marathon bombing during the World Series between the St. Louis Cardinals and the Boston Red Sox. *Id.* at 88. There, this Court found that, while the references “were tasteless and offensive,” a recipient would not have understood them as serious expressions of an intent to commit violence because “they were made in the context of sports rivalry, an area often subject to impassioned language and hyperbole.” *Id.* at 97.

The Eighth Circuit similarly emphasized the importance of context in *Ross v. City of Jackson*. 897 F.3d 916, 921 (8th Cir. 2018). There, the defendant responded to a Facebook post displaying various firearms, “Which one do I need to shoot up a kindergarten?” *Id.* at 918. Although the statement appeared threatening in isolation, the court held that “even a ‘minimal further investigation’” would have revealed that the post

was not a true threat. *Id.* at 922. The post “was in the form of a rhetorical question, which identified no school where a shooting would happen.” *Id.* at 922 n.7. The court found the post political, similar to the one in *Watts* and was used in the context of “political beliefs about gun ownership or gun control measures.” *Id.* at 922. The court also noted the comment was made on social media, which the U.S. Supreme Court had recently called “‘a quintessential forum for the exercise of First Amendment rights’ analogous to ‘a street or park.’” *Id.* at 922 n.7 (citation omitted).

Similarly, in *United States v. Cook*, a federal district court found no true threat where the defendant’s social-media posts were aimed at drawing public attention to perceived wrongdoing within the legal system. 472 F. Supp. 3d 326, 335 (N.D. Miss. 2020). One post stated, “And God willing I’m going to take them out. With or without the help of the people” *Id.* Considering the full context, the court concluded that the defendant’s statements were “nothing more than a manifesto of his grievances regarding people and processes which he perceived to have wronged him” and did “not rise to the level of true threats.” *Id.* at 335. The phrase “take them out” could have been understood as expressing a desire to have the officials removed from “office or their positions of power.” *Id.*

Here, the State did not limit its theory to any particular speech as a threat of violence, and the jurors were not asked to identify any threat of violence. *See, e.g.*, Tr. 1354:15–1356:1 (Instruction No. 8, Count I: Harassment First Degree); Tr. 1358:3–1359:14 (Instruction No. 10, Count II: Harassment First Degree); Tr. 1361:3–1362:19 (Instruction No. 12, Count III: Stalking First Degree); Tr. 71:25–72:10 (confirming the State’s

“alarming content” theory includes all of Mr. McMenemy’s speech). But even if they had, the record is devoid of any speech that could have amounted to a true threat of violence.

On their face, none of Mr. McMenemy’s posts could be considered serious expressions conveying an intent to commit an act of unlawful violence. Even the posts identified by the State as the “most concerning” did not amount to true threats of violence on their face. Tr. 686:14–687:23. But to the extent that any one of the statements are facially ambiguous, the context confirms that Mr. McMenemy’s speech was warning the *public* about what he perceived to be a wrongful act against him when he was committed:

I am going to protest the government and everything else until this is resolved. I want my last six years of my life back that was taken from me. I lost everything. . . . I am innocent and I am fighting for my good name back. I want millions because money is the only thing people understand. A huge settlement will ensure people remember my name and . . . no piece of shit cop has—ever does this same thing to another innocent civilian ever again.

Tr. 910:7–20. *See also* State’s Ex. 60I (posting that the detective violated McMenemy’s Second Amendment right to possess a firearm). This concern was bolstered by his belief that the detective had racial motives behind his practice of law enforcement. *See* State’s Ex. 1A (flyer asking, “Is [the detective] a racist?,” and highlighting what Mr. McMenemy believed were racist social media posts made by the detective).

Mr. McMenemy’s speech, like the speech discussed in *Cook*, was an effort to broadcast his belief that the detective should be held accountable both in the public eye and in the court system. *See, e.g.*, Tr. 929:8–14, State’s Ex. 62J (post about wanting to get the U.S. Department of Justice and civil-rights organizations involved); Tr. 736:10–15, State’s

Ex. 60K (post about being “in talks with a billboard company to put [the detective’s] racist quotes up next to a picture of him in uniform.”); Tr. 902:19–20, Ex. 61A (“I am now protected by god my weapon is advertising and being a member of the free press.”); Tr. 932:12–16; State’s Ex. 62N (“You better fear me because I will end your career with just words. Words that seem to be scary to you. Like ‘You are a racist. Look at what [the detective] said. The whole department backs these statements.’”). Further, Mr. McMenemy never directly contacted the detective. Tr. 954:11–18, 957:20–958:16. The posts were public social-media commentary about a police officer’s conduct and fitness to serve, addressed to the general public. They cannot reasonably be viewed as conveying any threat of violence at all.

2. Even if a statement could be construed as a threat of violence, the evidence does not establish that Mr. McMenemy had the required level of subjective awareness.

Even if the State could establish that the statement objectively constituted a true threat, the First Amendment imposes an additional subjective mental state of criminal recklessness: that a defendant consciously disregarded a substantial risk that the speech would be understood as a threat of violence. *Counterman*, 600 U.S. at 69, 79–80 (Colorado’s stalking statute). Thus, at minimum, the State must establish that “a speaker is aware ‘that others could regard his statements as’ threatening violence and ‘delivers them anyway.’” *Id.* at 79 (citation omitted).

The State produced no evidence to support a finding that Mr. McMenemy consciously disregarded a substantial risk that any of his posts would be understood as threats of violence. Therefore, the U.S. Supreme Court’s mental-state requirement of

recklessness was not established by the State, nor was there a finding by the jury to that effect. Tr. 1354:15–1356:1; Tr. 1358:3–1359:14; Tr. 1361:3–1362:19. Further, neither the Missouri stalking nor harassment statute has the correct mental-state requirement. The harassment statute requires only a finding that the defendant “engages in any act *with the purpose to cause emotional distress*.” § 565.090.1 (emphasis added). Stalking requires only a finding that the defendant “purposely . . . disturbs.” § 565.225.2. Thus, the *mens rea* requirements in the stalking and harassment statutes are insufficient to establish the *mens rea* needed for finding a true threat of violence.

In sum, because his speech was not objectively a threat of violence and there was no evidence that he had the requisite mental state of recklessness when the statements were made, Mr. McMenemy’s speech does not fall into the true-threat exception.

B. Neither does Mr. McMenemy’s speech fall into the “speech integral to criminal conduct” exception because the State identifies only his speech, and no conduct, as the basis for punishment.

Mr. McMenemy’s speech is not speech integral to criminal conduct because flyers and posting on social media are pure speech that traditionally carry full First Amendment protection, and the State cannot punish it merely by labeling the speech conduct. The speech integral to criminal conduct exception applies to speech that is closely connected to a nonspeech crime or a crime involving unprotected speech. *See Chiles v. Salazar*, 607 U.S. 627, 649–50 (2026). As noted above, “harassment” is not itself “unprotected speech”: “[t]here is ‘no categorical ‘harassment exception.’” *Sryniawski*, 48 F.4th at 587 (quoting *Saxe*, 240 F.3d at 204 (Alito, J.)).

Thus, to punish Mr. McMenemy’s speech under the exception, his “speech must be integral to conduct that *constitutes another offense* that does not involve protected speech.” *Id.* at 588 (emphasis added); *Mashaud v. Boone*, 295 A.3d 1139, 1170–71 (D.C. App. Ct. 2023) (same); *State v. Shackelford*, 825 S.E.2d 689, 698–99 (N.C. Ct. App. 2019) (same). For instance, speech that promotes the sale of contraband is integral to criminal conduct because the speech is “bound up with traditional criminal conduct” (the sale of contraband itself), *Chiles*, 607 U.S. at 649; *see also, e.g., United States v. Williams*, 553 U.S. 285, 297–98 (2008) (offers to engage in illegal transactions); *Giboney*, 336 U.S. at 502 (demand that picketed firm violate antitrust law); *Chiles*, 607 U.S. at 649 (citing Brief of *Amicus Curiae* Professor Eugene Volokh in Support of Neither Party at 3–11, *Chiles v. Salazar*, 607 U.S. 627 (2025)).

But the State “‘cannot label speech that mentally distresses people “stalking” [or “harassment”] and then punish all such speech.’” *Gregorwicz v. Villa-Kennedy*, 593 P.3d 1285, 1289 (Ariz. Ct. App. 2026) (quoting Volokh, *Overbroad Injunctions Against Speech*, *supra*, at 188). That is so because speech “that is intended to annoy, offend, or distress does not help cause or threaten other illegal acts.” Volokh, Brief of *Amicus Curiae*, *supra*, at 6. The Eighth Circuit applied that distinction in *Sryniawski*, holding that the speech integral to criminal conduct exception could not be applied to cyberstalking because there was “no other identified criminal conduct to which the jury could have found that [the defendant’s] e-mail communications were integral.” 48 F.4th at 588. The court explained that the government may not criminalize speech itself and then avoid First Amendment scrutiny by asserting that the speech is unprotected because it was integral to violating the very statute

that criminalized it. *Id.* Other courts have likewise refused to apply the exception to stalking. *See, e.g., Mashaud*, 295 A.3d at 1170 (rejecting argument that stalking statute could permissibly criminalize speech “because it was integral to a criminal act—namely, stalking”).

The U.S. Supreme Court recently affirmed that the First Amendment cannot be avoided merely by relabeling speech as conduct. *Chiles*, 607 U.S. at 644–45. Pure speech does not fall within the exception merely because the government characterizes it as conduct; there must be a “close causal connection to some separately unlawful conduct like a traditional crime.” *Id.* at 64–45, 649. This kind of misapplication of the doctrine would allow governments to “easily wield all manner of laws regulating some conduct to silence speech they disfavor.” *Id.* at 648. Therefore, accepting the State’s argument in this case would be a “recipe for clandestinely denying full First Amendment protection to all speech in all media.” Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L. Rev. 981, 1039 (2016).

Here, Mr. McMenemy’s speech cannot fit the speech integral to criminal conduct exception because it does not involve any independently unlawful conduct. Speech alone was the basis for the State’s charges. The State cannot transform Mr. McMenemy’s speech into conduct merely by labeling his speech as a *course of conduct* or *alarming content*. Tr. 71:25–72:10. Thus, because there is no independent criminal conduct capable of bringing the communications within the exception, the exception does not apply.

C. Defamation does not provide a basis for criminalizing Mr. McMenemy's speech.

The State's theory that some of Mr. McMenemy's speech may have been defamatory also fails to provide an alternative basis for sustaining the convictions. Further, Missouri no longer criminalizes libel. The former criminal-libel statute, § 559.410, was repealed in 1979 (L. 1977 S.B. 60 § 1).

But even assuming defamatory speech might supply the unprotected category necessary to sustain the conviction, the State did not establish, and the jury was not instructed on, any of the elements. To prove defamation, a plaintiff must establish (1) the publication (2) of a defamatory statement (3) that identifies the plaintiff, (4) is false, (5) was published with the requisite degree of fault, and that (6) damages the plaintiff's reputation. *E.g.*, *Smith v. Humane Soc'y of United States*, 519 S.W.3d 789, 798 (Mo. banc 2017). Here, the jury made no findings as to any of those elements.

Even if a defamation theory had been properly presented, the evidence at trial did not support that Mr. McMenemy's speech was defamatory. First, only assertions or implications of fact can support a defamation claim. *See, e.g.*, *Sterling v. Rust Commc'ns*, 113 S.W.3d 279, 281 (Mo. App. E.D. 2003). Expressions of opinion are protected under the First Amendment. *Id.* Whether a statement is an opinion or an assertion of fact is a question of law for the court to decide. *Id.* at 281–82. Similar to opinion, imaginative expression and rhetorical hyperbole are not actionable. *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 314 (Mo. banc 1993). “[T]he more vituperative and abusive a statement is, the more likely it is to be protected as an expression of opinion.” *Id.* at n.5.

Here, the circuit court never considered whether any of Mr. McMenemy's statements were capable of being treated as false statements of fact. And even if the court had made that required finding, it did not present to the jury the question of whether any statement was actually understood as a factual assertion. Mr. McMenemy's speech was about a law-enforcement officer and expressed his opinion that the officer was a racist and therefore unfit for the job. *See, e.g.,* State's Ex. 1A. He formed his opinions from personal experience with the officer and the officer's public comments on race issues. All his posts were about "job-related misconduct and violations of his rights." Tr. 1390:21–22; *see also, e.g.,* State's Ex. 61H ("I am making what they did public. Very American."). The State cannot convert Mr. McMenemy's opinions about the officer into unprotected defamation merely by mischaracterizing them as statements of fact.

Second, the State failed to establish falsity. Falsity is an essential element of defamation under Missouri law. *See, e.g., Smith*, 519 S.W.3d at 798. Here, the jury was not instructed to make a finding on whether any of Mr. McMenemy's statements were false. Accordingly, even if defamation had been properly presented as a theory of unprotected speech, the record does not establish the essential elements necessary to place the statements outside the protection of the First Amendment.

Third, the State failed to show any evidence of actual malice. Actual malice exists where a defendant makes a statement with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). "Law enforcement personnel are public officials for purposes of applying the actual malice standard under *New York Times*." *Westhouse v. Biondo*, 990 S.W.2d 68, 70–

71 (Mo. App. E.D. 1999). Even comments on an officer's private conduct that may have bearing on "fitness as a law enforcement officer" are protected. *Id.* at 71. Here, like with the other elements, the record is devoid of any finding of actual malice. Therefore, defamation cannot support Mr. McMenemy's conviction.

III. The circuit court erred in failing to identify even a single statement as unprotected, including when instructing the jury, and by denying Mr. McMenemy's Motion for a Bill of Particulars.

A. Free speech cannot be the basis for criminal liability under a harassment or stalking charge.

Speech that is protected by the First Amendment cannot be the basis for criminal liability. *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (holding that a conviction must be set aside if it could have been based on constitutionally protected speech). The State must have enough evidence, without utilizing constitutionally protected speech, for the jury to find a defendant guilty of harassment or stalking. *See Vaughn*, 366 S.W.3d at 521 (holding that "constitutionally protected acts clearly constitute[] 'good cause'" under the harassment statute); *Collins*, 648 S.W.3d at 718 (holding that second-degree harassment statute is limited to conduct "wholly outside the First Amendment"); *Sryniawski*, 48 F.4th at 587–88 (stating that "the government must identify sufficient evidence for a jury to find that [defendant] acted with intent to 'harass' or 'intimidate' in a sense that is not protected under the First Amendment"); § 565.002(4) (stating that "[c]onstitutionally protected activity is not included within the meaning of course of conduct" under stalking statute).

To avoid convictions of harassment or stalking based on protected speech, jury instructions delivered by the circuit court must specify the unprotected speech that is a

valid basis for conviction. If jury instructions fail to identify which specific speech the charge rests on, it runs the risk that jurors will have rested the decision to convict, in full or in part, on speech protected by the First Amendment. Thus, in *Street v. New York*, the U.S. Supreme Court stated that when a defendant is charged with a crime based both on “a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as ‘intertwined’ and have rested the conviction on both together.” 394 U.S. 576, 588 (1969). The U.S. Supreme Court later emphasized that when a defendant may have been found guilty based on protected speech, a court must set aside the conviction. *Bachellar v. Maryland*, 397 U.S. 564, 570 (1970); *see also Eaton v. City of Tulsa*, 415 U.S. 697, 699 n.* (1974) (explaining uncertainty regarding whether contempt conviction rested on an isolated expletive during cross examination or on other “discourteous responses” directed to the judge provided an alternate grounds requiring reversal, since the record failed to foreclose the possibility that the conviction was based on the protected expletive).

Street is illustrative. The defendant was convicted for violating a New York statute making it a misdemeanor “publicly (to) mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act (any flag of the United States).” 394 U.S. at 578. The information charged the defendant with burning the American flag and shouting “‘If they did that to Meredith, We don’t need an American Flag.’” *Id.* at 589. In other words, the charge was based on both illegal conduct and speech, and the State did not identify whether the speech at issue was unprotected. *See id.* at 591–93. Because the U.S. Supreme

Court did not know whether the jury had returned a guilty verdict based on protected speech (insulting the American flag) or illegal conduct (burning the flag), it reversed the conviction. *Id.* at 594. The U.S. Supreme Court held that it was “unable to sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.” *Id.* at 586, 594.

In *Bachellar*, defendants were convicted of disorderly conduct related to a Vietnam War protest. 397 U.S. at 564–65. The trial court instructed the jury that there were *alternative* grounds on which the defendants could be found guilty. *Id.* at 565. It instructed that the defendants could be found guilty if they had engaged in “the doing or saying” of that which “offends, disturbs, incites, or tends to incite a number of people gathered in the same area.” *Id.* at 565, 570. The trial court also told the jury that a “refusal to obey a policeman’s command to move on . . . may amount to disorderly conduct.” *Id.* at 565. “So instructed, the jury returned a general verdict of guilty” against the defendants. *Id.* at 565–66. The U.S. Supreme Court found that it could not determine whether the basis for the convictions was protected speech. “[S]o far as we can tell, it is equally likely that the verdict resulted ‘merely because (petitioners’ views about Vietnam were) themselves offensive to some of their hearers.’” *Id.* at 571 (citing *Street*, 394 U.S. at 592). The U.S. Supreme Court therefore set aside the convictions. *Id.* at 571.

This Court should do the same. Both *Street* and *Bachellar* establish that the circuit court has a duty to identify speech as unprotected before allowing the jury to deliver a conviction based, even partially, on that speech.

B. The jury instructions failed to identify what specific statements were the basis for criminal liability, leading to the impermissible result that Mr. McMenemy may have been convicted based on his protected speech.

Here, the jury instructions referred to “alarming” speech made over the course of approximately four months but failed to list any specific post(s) as the basis for liability. Mr. McMenemy could have easily been convicted based on speech protected by the First Amendment. For Count One, first-degree harassment of the detective’s wife, the instruction stated “between August 20, 2023 and December 31, 2023 . . . the defendant posted a flyer, which contained a photo of [the detective] and referenced social media accounts, on [the detective’s wife’s] business front; and ‘tagged’ [his wife’s] business Facebook account; and posted alarming content on Facebook pertaining to [the detective and his wife].” Tr. 1354:18–25, Instruction No. 8. For Count Two, first-degree harassment of the detective, the instruction stated “between August 20, 2023 and December 31, 2023 . . . the defendant ‘tagged’ the Facebook account of [the detective’s] employer; and posted flyers on St. Charles county buildings and the business belonging to [the detective’s wife], which referenced social media accounts; and posted alarming content on Facebook pertaining to [the detective and his wife] and the defendant’s family members.” Tr. 1358:6–13, Instruction No. 10. For Count Three, first-degree stalking, the instruction stated “that between September 15, 2023 and December 31, 2023 . . . the defendant purposely disturbed [the detective] by posting alarming content on social media.” Tr. 1361:6–9, Instruction No. 12.

These instructions were all-inclusive and broad. They covered everything from posting flyers on county buildings to dozens of posts on social media. The instructions

permitted the jury to consider simply whether Mr. McMenemy “posted alarming content,” sidestepping the First Amendment. A juror could have voted to convict Mr. McMenemy based on any number of allegedly “alarming” posts authored over a more-than-four-month period without any consideration of whether the post was *also* constitutionally unprotected.

Certainly, a post that raises concerns about what Mr. McMenemy viewed as a detective’s “racially motivated [F]acebook posts” should not form the basis for a criminal conviction. *See* State’s Ex. 62B. For example, Mr. McMenemy posted: “The government is violating my rights with the same cop who violated my rights six years ago. I will not back down. I am going to be very loud. . . . I have an idea. Offer me a settlement that I can not refuse. I will continue my mission and you all can keep what is left of your racist detective.” State’s Ex. 62E; *see also* State’s Ex. 62C (“Yes, I am very angry. I am spreading everything far and wide. That is what I am doing and what I have been doing. Taking down a racist cop so he can not violate any more peoples [*sic*] rights. Seems fair for [detective]. He made his bed. Even judged me. Now it is his time to be judged.”).

To be clear, all of Mr. McMenemy’s posts were protected by the First Amendment because they were directed to the public about an individual and did not fall into any of the narrow, well-defined categories of unprotected speech. But the posts noted above highlight Mr. McMenemy’s concerns about racism in the police force and his feelings regarding involuntary commitment. These are the kind of posts that jurors may have referenced when they found Mr. McMenemy guilty. And a guilty verdict based on such posts would violate the First Amendment.

C. The failure to identify any unprotected speech that could form the basis for the charges has been a problem since the outset of Mr. McMenemy's case.

Even before the circuit court instructed the jury, it erred when it denied Mr. McMenemy's Motion for a Bill of Particulars. The State had argued that a conviction could rest on Mr. McMenemy's posts "altogether." Tr. 49:7–14. The motion asked for "more particularity for exactly what alarming content on Facebook is" because Mr. McMenemy and the citizens of St. Charles "deserve to know what they can and cannot post on Facebook that might result in criminal charges against them." Tr. 27:9–28:23. Besides failing to provide notice to the defendant and the public, the denial of a bill of particulars risks that a defendant will be ill-equipped to prepare a defense and fails to safeguard against multiple prosecutions for the same offenses. *State v. Larson*, 941 S.W.2d 847, 851–53 (Mo. App. W.D. 1997). "Charges are not intended to serve as general examples," and a "principal purpose of a criminal charge is to inform the defendant of the specific charge." *Id.* at 853. In a case involving free speech, the specificity in the charging document becomes paramount. *See United States v. Mostofsky*, No. 21–138, 2021 WL 3168501 at *3 (D.D.C. July 27, 2021) (granting bill of particulars because if the defendant is being charged with nonviolent speech rather than a violent act, he would file a motion to dismiss with a First Amendment challenge).

Despite denying Mr. McMenemy's Motion for a Bill of Particulars, the circuit court admitted there were "several examples offered both of statements that were made or posted to social media or put on a flyer, et cetera, from the defendant that, while certainly obviously unflattering to the alleged victim, would likely fall under the protected umbrella

of protected First Amendment speech.” Tr. 33:6–11. Yet the State was permitted to introduce evidence of these statements as a basis for the harassment and stalking convictions without clarifying to the jury that constitutionally protected activity cannot form the basis of a harassment or stalking charge.

In instructing the jury that guilt could be based on any of Mr. McMenemy’s posts as long as the jury found them “alarming content,” the circuit court erred, and allowed Mr. McMenemy to be convicted even though the jury finding might have rested on speech protected by the First Amendment. Since the beginning of Mr. McMenemy’s case, the circuit court incorrectly allowed the State to proceed on a theory, lacking legal authority, that Mr. McMenemy’s posts should be considered “altogether” without identifying any particular posts as unprotected.

CONCLUSION

Matthew McMenemy was convicted and sentenced to 10 years in prison for exercising his right to speak freely, openly, and critically about a public official. He began speaking because he was concerned about what he viewed as the detective’s misconduct and racism. Because his posts constituted speech to the public at large and did not fall into any unprotected categories, this Court should reverse his convictions on Counts I–III.

October 29, 2026

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CERTIFICATE OF COMPLIANCE

The undersigned certifies I signed the original version of this brief and that this brief includes the information required by Rule 55.03 and complies with the requirements of Rule 84.06(b). I further certify that this brief contains a total of 13,647 words, not including those sections excluded from the word count under Rule 84.06(b).

/s/ Lisa S. Hoppenjans

CERTIFICATE OF SERVICE

I certify that I filed a copy of the foregoing electronically on October 29, 2026, which will cause it to be served on all counsel of record via the Missouri electronic filing system.

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