ADVANCE SHEET HEADNOTE
May 12, 2025

2025 CO 22

No. 24SA226, *In re People v. Crawford*—Stalking—First Amendment—*Counterman v. Colorado*, 600 U.S. 66 (2023)—Contents of Speech.

In this opinion, the supreme court considers whether the U.S. Supreme Court's holding in *Counterman v. Colorado*, 600 U.S. 66 (2023), applies to a case where the prosecution's charges under Colorado's stalking statute, § 18-3-602(1)(c), C.R.S. (2024), were based on the fact of the defendant's repetitive contacts with the victim, not on the contents of his speech. The court concludes that stalking charges not rooted in the contents of any communications do not trigger First Amendment protections and therefore do not require proof that the defendant communicated with a reckless state of mind.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 22

Supreme Court Case No. 24SA226
Original Proceeding Pursuant to C.A.R. 21
Jefferson County District Court Case No. 23CR1098
Honorable Diego Hunt, Judge

In Re
Plaintiff:

The People of the State of Colorado,

v.

Defendant:

David Samuel Crawford.

Order Made Absolute
en banc
May 12, 2025

Attorneys for Plaintiff:
Alexis King, District Attorney, First Judicial District
Kevin E. McReynolds, Senior Appellate Deputy District Attorney
Golden, Colorado

Attorneys for Defendant:
Mika & Associates, P.C.
Patrick D. Mika
Kelly K. Caldwell
Colorado Springs, Colorado

Attorneys for Respondent Jefferson County District Court:
Holland & Hart LLP

Christopher M. Jackson
Denver, Colorado

Attorneys for Amicus Curiae Colorado District Attorneys' Council:
Beth McCann, District Attorney, Second Judicial District
Robert M. Russel, Chief Deputy District Attorney
Johanna G. Coats, Senior Deputy District Attorney
Denver, Colorado

Thomas Raynes
Denver, Colorado

Attorney for Amicus Curiae Rocky Mountain Victim Law Center:
Katherine Houston
Lakewood, Colorado

Attorneys for Amicus Curiae Office of the Attorney General:
Philip J. Weiser, Attorney General
Jillian J. Price, Deputy Attorney General
Helen Norton, Deputy Solicitor General
Joseph G. Michaels, Assistant Solicitor General
Talia Kraemer, Assistant Solicitor General
Denver, Colorado

JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined**.**

JUSTICE HART delivered the Opinion of the Court.

¶1 Two years ago, the U.S. Supreme Court interpreted a provision of Colorado's stalking statute and explained that a defendant could not be held criminally liable for stalking based on speech containing "true threats" unless the prosecution proved that the defendant had at least a reckless mens rea—that is, that the defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). In this original proceeding, the district court extended *Counterman*'s holding to a case in which the prosecution's stalking charge was not based in any way on the content of the alleged stalker's speech, but instead on the repetitive nature of his efforts to contact or observe the victim.

¶2 After considering these different types of stalking charges, we hold that the charges the prosecution brought here, carefully based on repeated *actions*—including contacts (i.e., texts, phone calls, and emails) but not their *contents*—do not require proof that the defendant communicated or otherwise acted with a reckless state of mind. Accordingly, we make the order to show cause absolute, reverse the portion of the district court's orders expanding *Counterman*'s holding, and remand the case for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶3 In 2018, David Samuel Crawford and the named victim, A.L., ended a four-year relationship. About a year before their separation, A.L. moved from Florida to Colorado. During that one-year period, Crawford and A.L. periodically broke up and got back together. A.L. then firmly ended their relationship, but Crawford continued to pursue her in a manner that A.L. found distressing.

¶4 For over four more years, until Crawford's arrest on A.L.'s doorstep, Crawford persistently contacted, surveilled, and approached A.L. despite being warned repeatedly to stop by both A.L. and local law enforcement. Crawford's conduct consisted of repeatedly calling, emailing, and texting her; messaging her on social media; contacting her friends and family; surveilling her online to find her home and work addresses; sending letters and gifts to her workplace; and showing up uninvited at A.L.'s Colorado home.

¶5 In her request for a civil protection order, A.L. reported that she suffered serious emotional distress from Crawford's repeated and unwanted conduct. However, law enforcement and the court determined that A.L. was not subject to an imminent threat of harm because Crawford's conduct did not include true threats. A.L. repeatedly asked law enforcement for help to keep him away from her and her friends and family. Local police officers told Crawford to leave when

he showed up uninvited to A.L.'s Colorado home in 2021. Two years later, the police arrested Crawford when he was caught peering through her windows.

¶6 After his arrest, the People filed a complaint against Crawford, charging him with two counts of stalking in violation of section 18-3-602(1)(c), C.R.S. (2024). To support the charges, the People sought to introduce evidence of Crawford's repeated contacts with A.L., including not only his visits to her home and peering through her windows, but also emails, calls, text messages, and social media messages. Relying on *Counterman*, Crawford challenged the constitutionality of these charges, arguing that they violated the First Amendment. In response, the People clarified that they were not charging Crawford for the content of his communications and that they intended to limit the evidence of Crawford's communications to ensure the jury could not use their contents as a basis for the conduct charged. The district court concluded that *Counterman* nonetheless required the People to prove Crawford had recklessly disregarded that his repeated contacts would cause A.L. to suffer serious emotional distress.[1]

[1] The district court clarified in its briefing that it did not hold that the prosecution must also prove that Crawford had recklessly disregarded a risk that his contacts would be viewed as threatening violence, so we do not address that claim in this opinion.

¶7 The People petitioned this court pursuant to C.A.R. 21, and we granted the petition.[2]

II. Analysis

¶8 This petition presents questions of statutory and constitutional interpretation, which we review de novo. *Kulmann v. Salazar*, 2022 CO 58, ¶ 15, 521 P.3d 649, 653.

¶9 We begin by addressing our decision to exercise original jurisdiction in this case. We then explain the rationale underlying the *Counterman* decision and its roots in the First Amendment derived from the content-based nature of the stalking charges at issue in that case. Finally, we explain why, like other courts around the country, we conclude that stalking charges not rooted in the contents of any communications are not subject to the *Counterman* rule. Ultimately, we hold that stalking charges brought under section 18-3-602(1)(c), based on a repeated

---

[2] The People presented the following issues in the petition:

1. Whether the district court erred by expanding *Counterman v. Colorado*, 600 U.S. 66 (2023), to require proof of a reckless mens rea in stalking charges that are based on a repeated course of conduct rather than "true threats."
2. Whether the district court erred by holding that stalking based on text, email, and phone "contacts," where the contents of those "contacts" are not the basis for a criminal charge, require proof that an offender recklessly disregarded an unjustifiable risk that these contacts would be viewed as threatening violence (i.e., a "true-threat communication" under *Counterman*).

course of conduct, do not require proof that the defendant acted with a reckless mens rea.

A. Original Jurisdiction

¶10 The decision whether to exercise original jurisdiction under C.A.R. 21 lies within our sole discretion. C.A.R. 21(a)(2). Such relief is "extraordinary in nature" and will only be granted "when no other adequate remedy is available." *Id.* We have generally exercised our original jurisdiction when the petition raises an issue of first impression that has significant public importance, an appellate remedy would be inadequate, or a party may suffer irreparable harm. *People v. Howell*, 2024 CO 42, ¶ 5, 550 P.3d 679, 682–83. We have also exercised our original jurisdiction to resolve conflicts or tensions among lower court decisions. *See, e.g.*, *Hagan v. Farmers Ins. Exch.*, 2015 CO 6, ¶ 2, 342 P.3d 427, 430 (noting inconsistencies in the application of court rules and "[r]ecognizing the need to promote a uniform application" of the rules).

¶11 This matter is appropriate for review under C.A.R. 21 for several reasons. First, the district court's order raises an issue of first impression that has significant public importance and is likely to recur. Second, the district court's order conflicts with several other Colorado district court and court of appeals' decisions that have addressed *Counterman*'s applicability to stalking charges outside of the true-threats context. *See, e.g.*, *People v. Trujillo*, 2025 COA 22, ¶¶ 55–57, __ P.3d __;

People v. Morris, 2025 COA 15, ¶¶ 4–7, __ P.3d __; *People v. Sharpe*, No. 22CR139 (Dist. Ct., Chaffee Cnty., Sept. 12, 2023) ("*Sharpe* order"); *People v. Spiers*, No. 22CR1730 (Dist. Ct., Jefferson Cnty., Aug. 1, 2023 & Aug. 8, 2023) ("*Spiers* orders").

¶12 Lastly, the People might not have an adequate appellate remedy because double jeopardy would preclude retrial if Crawford were acquitted. *See, e.g.*, *People v. Ellison*, 14 P.3d 1034, 1036 n.3 (Colo. 2000) (noting that C.A.R. 21 review is appropriate for addressing a trial court's decision to alter a criminal statute's mens rea requirement based on constitutional concerns and that "the prosecution has no other adequate appellate remedy because of double jeopardy principles").

¶13 Accordingly, we exercise our original jurisdiction under C.A.R. 21.

B. Understanding the Content-Based Nature of the True-Threats Stalking Charges in *Counterman*

¶14 The crime of stalking, defined by section 18-3-602(1), may include the contents of repeated communications. *See, e.g.*, *Counterman*, 600 U.S. at 70. However, stalking does not always involve the content of the communications; sometimes it is primarily or solely about the conduct itself. *See id.* at 85 (Sotomayor, J., concurring in part and concurring in the judgment) ("Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in."). Section 18-3-602(1)(c), states that a person commits stalking if the person:

> *Repeatedly* follows, approaches, *contacts*, places under surveillance, *or makes any form of communication with another person*, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship *in a manner that would* cause a reasonable person to suffer serious emotional distress *and does cause that person*, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship *to suffer serious emotional distress*.

(Emphases added.)

¶15 In *Counterman*, the U.S. Supreme Court reviewed a case in which the defendant was prosecuted for stalking under section 18-3-602(1)(c). 600 U.S. at 70. Counterman sent "hundreds of Facebook messages" to C.W., his victim, causing her to experience anxiety and fear of harm. *Id.* Some messages were "utterly prosaic," some "suggested that Counterman might be surveilling C.W.," and a number "expressed anger at C.W. and envisaged harm befalling her." *Id.* These statements made C.W. fearful that Counterman was following her and would attempt to harm her, which "upended her daily existence" due to sleep deprivation and severe anxiety. *Id.* The prosecution charged Counterman, "bas[ing] its case solely on Counterman's '[r]epeated[] . . . communication[s]' with C.W." *Id.* at 71 n.1 (alterations and omission in original).

¶16 The *Counterman* Court held that the prosecution "must prove in true-threats cases that the defendant had some understanding of his statements' threatening character" and that "a recklessness [mens rea] standard is enough" to hold a defendant criminally liable for the crime of stalking based on true-threats speech.

Id. at 73. True threats are "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence'" *Id.* at 74 (alteration in original) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)), and are well established as a category of speech that "lie[s] outside the bounds of the First Amendment's protection." *Id.* at 72. Therefore, the prosecution can prove a recklessness mens rea when the defendant "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Id.* at 79 (alterations in original) (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)).

¶17 The true-threats exception to the First Amendment allows the government to prohibit even a single, isolated statement based on its content. However, "prohibitions on speech have the potential to chill, or deter, speech outside their boundaries," often referred to as "a chilling effect." *Id.* at 75; *see also id.* at 85, 104 (Sotomayor, J., concurring in part and concurring in the judgment) ("True-threats doctrine covers content-based prosecutions for single utterances of 'pure speech'" and could excessively criminalize "a wide range of political, artistic, and everyday speech based on its content alone."). Thus, to strategically protect against this chilling effect in the true-threats context, the *Counterman* Court concluded that the First Amendment requires the defendant be at least reckless in his subjective understanding of the threatening nature of his speech. *See id.* at 75–76, 79 (majority opinion). Understandably, in order to cabin the potential overreach of this true-

threats doctrine, the Supreme Court thus focused on the defendant's understanding of the impact the content of his communication would have on his target—his reckless disregard of that impact—in concluding that such speech could be criminalized. *See id.* at 76–79.

¶18 Although conduct is generally not subject to First Amendment scrutiny, the Supreme Court has recognized that First Amendment protections may extend to conduct that is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). For conduct to cross this threshold and raise First Amendment concerns, courts must determine whether there is "[a]n intent to convey a particularized message" and "[whether] the likelihood was great that the message would be understood by those who viewed it." *See Johnson*, 491 U.S. at 404 (alterations in original) (quoting *Spence*, 418 U.S. at 410–11). Therefore, when a defendant seeks to challenge criminal charges by raising First Amendment concerns, the defendant must establish that the conduct was expressive enough to warrant First Amendment protection. Crawford has not established that his conduct meets this threshold for First Amendment protection.

¶19 Since *Counterman*, several lower court rulings have recognized that that opinion's recklessness mens rea requirement only applies to true-threats cases based on the actual content of the speech involved. For example, in *Morris*, ¶ 33,

a division of the court of appeals concluded that "because stalking . . . does not always require proof that the accused engaged in the type of communication or expressive conduct that implicates the First Amendment . . . *Counterman* does not apply to stalking prosecutions not premised on the *content* of the defendant's communication or expression." (Emphasis added). In *Trujillo*, ¶ 56, another division recognized that the *Counterman* recklessness mens rea requirement specifically applies in true-threats cases. The Chaffee County district court recognized that *Counterman* "did not hold that that subjective mens rea applied to the other conduct prohibited by [section] 18-3-602(1)(c)" such as "contacting." *Sharpe* order, at 2. And the Jefferson County district court recognized that communications that are not offered to prove the content of the communication, but instead to prove the defendant's knowledge of a protective order he was accused of violating, are not on point with *Counterman*. *Spiers* orders.

¶20 Courts in other states have reached the same conclusions. The Supreme Judicial Court of Maine reasoned that "[s]ome stalking prosecutions, like Counterman's, may rely in whole or in part on words used by a defendant to establish the 'course of conduct' and consequent effect upon the victim" and concluded that "[i]t does not follow . . . that the *Counterman* standard applies to every stalking prosecution in which words are spoken or electronic communication devices are used." *State v. Labbe*, 314 A.3d 162, 179 (Me. 2024). The

Court of Appeals of Minnesota similarly concluded that "[w]hen the defendant's stalking conviction is based not on words or expressive speech but on conduct, the mens rea requirement announced in *Counterman* does not apply." *Corrigan v. State*, No. A23-1942, 2024 WL 3493348, at *4 (Minn. Ct. App. July 22, 2024) (unpublished opinion).

C. Stalking Charges Not Rooted in the Contents of Any Communications Are Not Subject to the Standards Set Forth in *Counterman*

¶21 This petition before us is neither a true-threats case nor a case about the content of any communications. This case involves allegations that Crawford's conduct—repeatedly approaching, following, surveilling, and contacting A.L.—caused A.L. to suffer serious emotional distress. Like Counterman, Crawford repeatedly contacted his victim. However, unlike Counterman's charges, which were based solely on the content of his speech, the charges against Crawford are based entirely on his repeated and unwelcome contact, explicitly disavowing any reference to the content of any communications.

¶22 The prosecution carefully specified that none of the allegations would rely on the content of the repeated communications. Therefore, because Crawford's stalking prosecution is based on his repeated, unwelcome, and content-neutral conduct, *Counterman*'s recklessness requirement does not apply.

¶23 The *Counterman* Court limited its review to defining the bounds of the First Amendment's true-threats exception and did not consider Colorado's stalking statute outside of that context. 600 U.S. at 72 (noting that the Supreme Court granted certiorari because "[c]ourts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, what *mens rea* standard is sufficient."). The Supreme Court zeroed in on the true-threats exception because a criminal prosecution based on the content of speech naturally raised First Amendment concerns. *See id.* at 73–78. The case before us, based solely on a repeated course of conduct, does not involve one of those criminal prosecutions because Crawford did not convey true threats in his communications.

¶24 The district court argues that (1) *Counterman* does apply because Crawford's electronic communications will be introduced into evidence, which inevitably will include their contents, and (2) even if *Counterman* does not directly govern this case, the intermediate scrutiny standard for content-neutral prosecutions supports imposing a recklessness mens rea. We disagree.

¶25 First, the district court argues that because the prosecution relies on Crawford's communications as evidence to prove he "repeatedly contacted" A.L., the First Amendment is implicated and *Counterman*'s recklessness mens rea standard should apply. However, there is an important distinction between

prosecuting the *frequency* of contacts and the *content* of contacts; any evidence proving that alleged criminal contacts *occurred* does not automatically create First Amendment protections for such contacts. The issue the prosecution seeks to present here is not whether the speech contained in Crawford's communications was threatening, but whether the repetitive nature of his communication and other contacts could be the basis for concluding that he committed a crime. It is the fact of, not the content of, Crawford's repeated contacts directed to the home, phone, and privacy of the unwilling recipient, A.L., that constitutes the crime of stalking. *See id.* at 86 (Sotomayor, J., concurring in part and concurring in the judgment) ("Repeatedly forcing intrusive communications directly into the personal life of 'an unwilling recipient' also enjoys less protection." (quoting *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970))).

¶26 The district court also expressed concern that despite the prosecution's intent to focus on the frequency, rather than the content of the communications, the content would nevertheless be introduced as evidence to the jury. The court suggests that any communication being used as evidence of a defendant's criminal conduct should require application of the First Amendment. However, if that suggestion were to hold true, *Counterman*'s reasoning would make it nearly impossible to introduce any evidence for any crime whenever a defendant's communications were needed to prove an element of the crime. We agree with

the Supreme Judicial Court of Maine that "the *Counterman* standard [does not] appl[y] to every stalking prosecution in which words are spoken or electronic communication devices are used." *Labbe*, 314 A.3d at 179.

¶27 The introduction of the fact of communications to show that Crawford was repeatedly contacting A.L.—one of the statutory elements—is fundamentally distinct from those same communications being introduced to show that Crawford was trying to threaten A.L. with their content. If the jury hears about the content but is not being asked to convict based on the content, the First Amendment is not offended. *See id.* at 178–81; *Corrigan*, 2024 WL 3493348, at *4.

¶28 The district court erred by expanding *Counterman*'s holding to require a recklessness mens rea in this case simply because it involved "any use of communications." *Counterman* only applies to communications where the content of such communications is at issue.

¶29 The district court further argues that, even if *Counterman* itself does not apply to this case, "[a]t the very least, this prosecution is a content-neutral regulation of speech" and therefore intermediate scrutiny should apply. But the district court's suggestion that intermediate scrutiny should apply here and that it supports imposing a recklessness mens rea is incorrect for several reasons. First, intermediate scrutiny is used to evaluate the constitutionality of statutes regulating expressive conduct or content-neutral speech. This challenge is to the

specific application of a statute in a context where the content of the speech is not being challenged at all. To evaluate a statute under intermediate scrutiny, we consider whether the government's restriction on speech advances a substantial government interest. We then balance that against the question whether that government interest could be achieved without the regulation; but the regulation "need not be the least restrictive or least intrusive means of" achieving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989). However, the Colorado stalking statute, certainly as applied here, does not regulate expressive conduct. Additionally, the Supreme Court has recognized that content-neutral stalking prosecutions "raise even fewer First Amendment concerns" and "enjoy[] less protection" than those that in fact challenge the content of the communication involved. *Counterman*, 600 U.S. at 85 n.2, 86 (Sotomayor, J., concurring in part and concurring in the judgment). Ultimately, because *Counterman* was limited to defining the bounds of the true-threats category of unprotected speech, there is no basis for applying its recklessness requirement into communications-related stalking prosecutions that do not seek to punish a person for the content of their speech. *See Labbe*, 314 A.3d at 179 (concluding that "*Counterman*'s holding is clear: [W]here the [s]tate relies on the content of a defendant's expression as the basis for a stalking charge and to establish harm to the victim, the additional requirement to prove subjective *mens rea* of recklessness applies.").

¶30 The district court erroneously extended *Counterman*'s holding beyond its clear speech-related context, ruling that a stalking charge relying on a defendant's repeated contact requires proof that the defendant acted recklessly with respect to causing the victim to suffer emotional distress. In doing so, we must acknowledge that the court relied on Colorado's model jury instructions, which could be read to suggest that recklessness is required for any stalking case involving a defendant's communications.

> To comply with *Counterman*, the court should give this special instruction in a stalking case where the prosecution is relying, in whole or in part, on the defendant's communications. In a stalking case that does *not* involve communications—e.g., where the defendant allegedly surveilled the victim but did not communicate with them—this instruction does not apply.

COLJI-Crim. 3-6:04.5.SP cmt. 1 (2023).

¶31 We agree with the petitioner that the model jury instruction and comment mistakenly suggest that proof of recklessness is required for any stalking charge including reliance on the defendant's communications. But *Counterman* does not support the conclusion that any stalking charge relying on a defendant's communications must satisfy the recklessness mens rea requirement. *Counterman* only applies to charges targeting the threatening *content* of communications. *See, e.g.*, *Labbe*, 314 A.3d at 179–81 (explaining that *Counterman* did not apply to a stalking charge based on repeated, unwanted content-neutral contacts).

¶32 Our legislature has recognized that the crime of stalking "involves highly inappropriate intensity, persistence, and possessiveness" which leads to "great unpredictability and creates great stress and fear for the victim." § 18-3-601(1)(e). The conduct of repeatedly contacting a victim, regardless of the contents, "severe[ly] intru[des] on the victim's personal privacy and autonomy" and can have "an immediate and long-lasting impact on quality of life . . . even in the absence of express threats of physical harm." § 18-3-601(1)(f). In this case, Crawford is alleged to have repeatedly surveilled, approached, and contacted A.L. in a manner that would cause a reasonable person to suffer serious emotional distress, and it is alleged that A.L. did suffer serious emotional distress. Crawford's alleged course of conduct here was not harmless and is not protected by the First Amendment.

III. Conclusion

¶33 In any stalking prosecution that does not rest on the allegedly threatening content of the communications, *Counterman* is simply inapplicable. We hold that stalking charges based on a repeated course of conduct, including contacts where the content of those contacts do not form the basis for the charges, do not require proof that the defendant acted with a reckless mens rea. Accordingly, we make the order to show cause absolute, reverse the district court's order with respect to

its expansion of *Counterman*'s holding, and remand the case for further proceedings consistent with this opinion.