No. 22-138

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN, PETITIONER
v.
THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS,
DIVISION II

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show solely that an objective "reasonable person" would regard the statement as a threat of violence.

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OPINIONS BELOW

The order of the Supreme Court of Colorado (Pet. App. 40a) is unreported. The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 497 P.3d 1039. The trial court's order (Pet. App. 41a-57a) is unreported.

JURISDICTION

The Supreme Court of Colorado denied a timely petition for review on April 11, 2022. Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to August 9, 2022. The petition was filed on that date and granted on January 13, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.

Colorado Revised Statutes § 18-3-602(1)(c) provides, in relevant part:

> (1) A person commits stalking if directly, or indirectly through another person, the person knowingly: * * * (c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person * * * in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person * * * to suffer serious emotional distress.

STATEMENT

The State of Colorado sentenced petitioner Billy Counterman to four and a half years in prison for sending Facebook messages he never intended as threatening, which even the trial judge suggested reflected "a lack of understanding, as [o]pposed to malicious intent." J.A. 439. On and off over a two-year period, Counterman sent C.W., a professional musician and singer, Facebook direct messages ("DMs"), including inspirational quotes, humorous memes, and occasional "garbled," "rambling," and "delusional" responses to what he perceived as an ongoing conversation. J.A. 85, 130, 137. The defense was precluded from submitting evidence that Counterman, who suffers from mental illness, thought that C.W. was regularly corresponding with him through other websites and did not understand—much less intend—his messages as threatening. Instead, the prosecution and courts below applied a purely objective standard for the "true threats" exception to the First Amendment, requiring the jury to convict if it found that Counterman's messages "would cause a reasonable person to suffer serious emotional distress." Colo. Rev. Stat. § 18-3-602(1)(c).

Although this Court has recognized a categorical exception to speech protections that permits regulation of "true threat[s]," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam) (quotation marks omitted), it has emphasized that such exceptions must be "well-defined and narrowly limited," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942), and that speech cannot be "exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation," *United States* v. *Stevens*, 559 U.S. 460, 469 (2010). The State cannot show a "long-settled tradition" of punishing speech as a "true threat" irrespective of whether the speaker understood it was threatening. To the contrary: Even the early threat cases considered "the explanation given by the prisoner * * * of what *he meant*," *Reg.* v. *Hill*, 5 Cox C.C. 233, 235 (1851) (emphasis added), and this Court's most recent pronouncements explain that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence," *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (emphasis added).

Colorado's purely objective standard poses two particular risks to free expression. First, criminalizing speech raises "special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). The mere "threat of criminal prosecution * * * can inhibit the speaker from making [lawful] statements, thereby chilling * * * speech that lies at the First Amendment's heart." *United States* v. *Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment). Second, basing liability solely on the objective reasonableness of the recipient's reaction represents "a negligence standard,"

Elonis v. *United States*, 575 U.S. 723, 739 (2015), and "negligence * * * is [a] constitutionally insufficient" standard for penalizing speech, *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 288 (1964). While an objective standard may ensure that a statement meets some minimum threshold of seriousness to warrant concern, subjective "*mens rea* requirements * * * provide 'breathing room'" necessary to "reduc[e] an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in the judgment).

Imposing criminal liability under a pure negligence standard—essentially criminalizing misunderstandings—chills broad swaths of protected speech, including political speech, minority religious beliefs, and artistic expression. Colorado's negligence standard is especially dangerous during the Internet age, because social media brings together strangers in an increasingly polarized society while simultaneously removing nonverbal cues that provide critical context about meaning.

This Court should reverse.

A. Factual Background

1. C.W. is a professional musician and singer in Colorado. During the relevant period, she maintained both a personal and a professional profile on Facebook, as well as a professional website. J.A. 119, 150. In 2010, Counterman sent C.W. a message through Facebook to inquire whether she would be interested in playing in a benefit concert he said he was organizing. C.W. responded enthusiastically, but after a handful of messages, the correspondence stopped and she forgot about the exchange. J.A. 186-187, 334.

2. Four years later, around April 2014, Counterman began sending C.W. Facebook DMs on and off. Sometimes there were long gaps between messages, and sometimes

Counterman sent several per day. J.A. 129. C.W. never responded. J.A. 128-129. Counterman did not attempt to contact C.W. by telephone or in person; he contacted her only online. J.A. 242-244.

As C.W. recounted, many of Counterman's messages were "[v]ery every-day life * * * as if we had been going back and forth conversationally, although we weren't." J.A. 126. "I am going to the store would you like anything?" J.A. 465. "[J]ust home from work, need to do some things. I'll be back on fb little later." J.A. 449. "Listening to supertramp, what u doing." J.A. 478. "My niece is getting married…yaaaay." J.A. 458. Counterman asked C.W. to call him and provided his telephone number. J.A. 449. C.W. never called him. J.A. 136, 210. Counterman forwarded C.W. memes that struck him as funny about coffee and junk food (*e.g.*, "A guy's version of edible arrangements"), J.A. 453, 462-463 (capitalization altered), and phrases he found humorous[1] or inspirational.[2] Interspersed throughout were photos and emojis of frogs, J.A. 454-460, which C.W. did not understand, J.A. 144.

C.W. described Counterman's messages as "garbled," "rambling," and sometimes nonsensical. J.A. 130, 137, 141. C.W. commented that it was like Counterman was "trying to continue a conversation with me * * * which I am not engaging in." J.A. 137. Counterman described the correspondence this way: "I make and send weirde messages to you~assuming you are playful about some

---

[1] J.A. 461 ("If this weekend goes as planned, it will not include any actual plans." (capitalization altered)); J.A. 462 ("I am currently unsupervised[.] I know, it freaks me out too. But the possibilities are endless!" (capitalization altered)).

[2] J.A. 464 ("The prettiest smiles hide the deepest secrets. The prettiest eyes have cried the most tears and the kindest hearts have felt the most pain."); J.A. 455 ("i have too many flaws to be perfect. But i have too many blessings to be ungrateful.").

dumb stuff that comes out of my mouth. I think you're an awesome performer, but who am I to say that you outclass many on stage, not just Janis [Joplin]." J.A. 140, 452.

Counterman has been diagnosed with mental illness. Presentence Report 7 (6/21/17). When Counterman was messaging C.W., he was being treated by a therapist. J.A. 436. Counterman asked C.W. to respond through DMs: "Through this channel please." J.A. 468. Counterman believed that, although C.W. had not responded to him using Facebook DMs since 2010, she was responding to him "covertly" through other websites and Facebook pages, such as Radio One Lebanon, Sarcastic Bad Bitches, and other sites. J.A. 333. Thus, Counterman "very much thought that he was conversing with [C.W.]." J.A. 436. Many DMs referenced communications Counterman believed were occurring on other sites, asking C.W. "If you're part of radio one," and saying "Wow to covert response…," "Sssssseeeeemmmsss like, I am being talked about more than I am being talked to. This isn't healthy, just like covert communication…. * * * I've had tapped phone lines before..what do you fear…," "Cannot believe I almost responded to another covert m[essage]." J.A. 455-458. C.W. found "the timbre of the messages" to be "weird" because of the familiar tone and because they sometimes "d[id]n 't make any sense," so C.W. inferred that Counterman was "mentally ill," J.A. 141, 172, increasing her apprehension. Several times, C.W. blocked Counterman from messaging her. J.A. 138. Each time, Counterman created a new profile (always as either Bill or Billy Counterman, J.A. 211), and because C.W. routinely accepted friend requests, J.A. 166, he resumed messaging her.

Some of Counterman's messages expressed frustration that C.W. was not responding to him through DMs: "You can jump in any time"; "If you are the wrong choice please tell me." J.A. 449, 454. In October 2015, he

messaged her: "Was that you in the whiteJeep? Sophisticated…but vanished. I d like to talk directly to U, I feel neglected. * * * five years on FB. I miss you, only a couple physical sightings, you've been a picker upper for me more times than I can count…." J.A. 455-456. Although C.W. had sold her white Jeep years earlier, and may have posted pictures of it on Facebook, J.A. 143-144, the statement alarmed her because it made her wonder whether Counterman was "following me around." J.A. 144. He was not.

In February 2016, Counterman, in frustration, wrote C.W. a long message that figured prominently in the prosecution:

> I have a need to address this. During the time of knowing of you and asking for your interest in a production of non-for-profit, like some other friends I've meant along the way. My prior family establishment has been embarked. My history has been exsumed, and all of that being what I didn't have a feel of substaining my existance. I left that, don't you know. I am out for a life without them, would that be a trouble. Anyhow. How can I take your interest in me seriously if you keep going back to my rejected existence. * * * Sighned not normal of tradition. Where are you at is the natural inquire? Fuck off permanently.

J.A. 471-472.

Three days later, he messaged her: "Your arrogance offends existence of anyone in my position. * * * Friend are you? You have my number.. Say. I am not avoiding you. That was opt. Your not being good for human relations. Die, don't need you." J.A. 472-473. Several weeks later, Counterman messaged her referencing one of the websites where he believed she had been covertly messaging him: "Sarcastic Bad Bitches is only one side. Generalized personality is what I can handle[.] Still can't

talk straight on. Closet. Why? * * * Staying in a cyber life is going to kill you. Come out for coffee. You have my number." J.A. 476-477.

A week later, perhaps in response to a Facebook post C.W. had made about someone she was "in a relationship with," J.A. 178-179, Counterman sent her a DM: "A fine display with your partner, and content you seem. Wheather beung of a traditional well educated shown of the established of wall street type or could be product of blissful show. * * * He may be right for you! I am good." J.A. 477-478.

Counterman apologized for messaging her repeatedly. "Unbelievable as it may seem, truly, I am sorry for the interventions into your space. Having said that, also, my existences isn't my fault. So, of I've offended you, please accept my appologies. FYI. I didn't ask for this life." J.A. 475. On another occasion, he added, "You may tell me to stop any time." J.A. 466. At one point, Counterman sent C.W. a photo of his ankle saying "look at this messed up leg tan." J.A. 469. According to C.W.'s bandmate, that was "kind of [a] turning point," and C.W. blocked Counterman again. J.A. 282. Counterman reached out through C.W.'s professional website and apologized. J.A. 153-154, 482.

C.W. was increasingly apprehensive because she found Counterman's DMs "more aggressive." J.A. 127. She "canceled a few shows," and began taking security measures. J.A. 202, 204-207. In mid-April 2016, C.W. spoke about the messages to her aunt, whose law partner reported the matter to law enforcement. J.A. 184-184, 273. C.W. also obtained a restraining order prohibiting Counterman from contacting her, J.A. 185, although he was not informed or served with a copy at the time, Pet. App. 4a; Pet. C.A. Br. 4. A month later, law enforcement agents arrested Counterman. J.A. 325-326. Only when

Counterman told police about his 2010 DMs did C.W. realize that he had contacted her before 2014. J.A. 334.

Although Counterman had not been served C.W.'s protective order, he had not sought to contact her during the entire time that she had it. Pet. C.A. Br. 4. Counterman sent his last message on April 10, 2016, before C.W. visited her aunt and the matter was reported to police. J.A. 168, 260.

B. Proceedings Below

1. The State charged Counterman in a three-count complaint. J.A. 19-20. One count alleged Counterman had made "a credible threat" against C.W., see Colo. Rev. Stats. § 18-3-602(1)(b); another, that he had acted "with intent to harass, annoy, or alarm," *id.* § 18-9-111(1)(e). The State later dismissed both, leaving a single charge that Counterman had "knowingly," "directly or indirectly through another person," "[r]epeatedly * * * contact[ed] * * * or ma[de] any form of communication with [C.W.] * * * in a manner that would cause a reasonable person to suffer serious emotional distress, and d[id] cause [C.W.] serious emotional distress." *Id.* § 18-3-602(1)(c). The Colorado Supreme Court has held that conviction under that provision requires proof only that the speaker "knowingly" make repeated communications, and does not "require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress." *People* v. *Cross*, 127 P.3d 71, 77 (Colo. 2006) (en banc).

2. Before trial, the State moved *in limine* to preclude evidence related to Counterman's mental health and whether Counterman knew that his conduct "would cause a reasonable person to suffer emotional distress." J.A. 30-35. The State argued that under *Cross*, "[a]ny testimony, evidence, or argument that the defendant did not know that his actions were 'in a manner that would cause a

reasonable person to suffer serious emotional distress' would not only be irrelevant, but would also mislead the jury." J.A. 35 (citation omitted). The court granted the motion. J.A. 88.

Counterman moved to dismiss. Pet. App. 42a-44a. He argued that his messages were not true threats and thus were protected speech under the First Amendment. *Ibid.* The trial court denied the motion. Consistent with Colorado Supreme Court precedent, the court applied a purely objective test, considering "the plain language of the statements," J.A. 83, and whether the objective circumstances surrounding the statements "to a reasonable person would be frightening," J.A. 85. The court found some of Counterman's statements "border[ed] on delusional," J.A. 85, but did not consider whether Counterman intended the statements to be threats or was even aware that his messages could be construed as threatening, see J.A. 81-88.

3. The case was tried to a jury in April 2017. After the prosecution's case-in-chief, Counterman renewed his motion to dismiss on the ground that his statements were not true threats and were protected by the First Amendment. J.A. 345. The court again applied a purely objective standard and denied the request, concluding that "a reasonable jury could find that [Counterman's] statements rise to the level of * * * a true threat," and thus Counterman's messages "would not be considered protected speech." J.A. 346.

Consistent with the court's rulings, the prosecution argued to the jury in closing, "[Counterman] did not need to know that a reasonable person would suffer serious emotional distress, and he did not need to know that [C.W.] suffered serious emotional distress. * * * All he had to know was that he was sending these messages * * * ." J.A. 373. The prosecutor emphasized:

> You could believe that [Counterman] actually believed in his reality that [C.W.] was talking to him covertly through other Web sites. You could believe that. But you can't consider it * * * .
>
> Because we don't have to prove that he knew that this would cause her to be distressed. We don't have to prove that he knew that she wasn't talking to him. All we have to prove is that * * * he knew he was communicating. Nothing else about his mental health matters.

J.A. 389. The jury found Counterman guilty. J.A. 397.

4. At sentencing, the prosecution and its witnesses invoked Counterman's "serious mental health problem" in advocating a heavy sentence. J.A. 425; J.A. 422, 426, 429. The judge acknowledged that "most people" would believe that Counterman committed his offense because of "a lack of understanding, as [o]pposed to a malicious intent." J.A. 439. But, in part because Counterman had prior convictions for making telephonic threats to his ex-wife and her family in 2002 and 2011, the judge sentenced him to four and a half years in prison. J.A. 440.

5. The Colorado Court of Appeals affirmed. Pet. App. 1a-39a. The court rejected Counterman's argument that it "should adopt the subjective intent requirement [for] its 'true threat' analysis." Pet. C.A. Br. 32. The court acknowledged that "[s]ocial media * * * magnify the potential for a speaker's innocent words to be misunderstood." Pet. App. 20a (alteration in original) (citation omitted). But it nonetheless applied "an objective test" that considered only the reasonableness of the recipient's reaction to determine "that Counterman's statements were true threats that aren't protected under the First Amendment." Pet. App. 12a, 21a. Following a then-recent holding of the Colorado Supreme Court, the court "decline[d] * * * to say that a speaker's subjective intent to threaten is necessary for a statement to

constitute a true threat for First Amendment purposes." Pet. App. 12a (quoting *People ex rel. R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020)). The Colorado Supreme Court denied review. Pet. App. 40a.

SUMMARY OF ARGUMENT

Counterman's conviction under a purely objective "true threats" standard is invalid. The First Amendment's basic command is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable. Content-based speech restrictions are presumed invalid, and speech cannot be exempted from First Amendment protections absent a long-settled tradition of subjecting that speech to regulation.

I. The State cannot carry its burden of proving an established tradition of imposing criminal liability for negligent threats. Early English and American decisions required proof of the speaker's intent. Since the Court first required proof of subjective intent in its incitement cases, it has repeatedly required heightened *mens rea* before penalizing speech. The Court thus incorporated this *mens rea* requirement when reversing threat convictions in *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), and *Virginia* v. *Black*, 538 U.S. 343, 359 (2003).

II. A "true threat" standard that considers the speaker's intent is necessary to avoid criminalizing inevitable misunderstandings. Such misunderstandings are increasingly common in the Internet age, where discourse conventions differ dramatically and words on a screen are divorced from context. The State's purely objective test thus impermissibly chills protected expression because speakers—particularly those voicing unpopular political views or minority religious beliefs—must "give a wide berth to any comment that might be

construed as threatening in nature." *Rogers* v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring).

III. Counterman's conviction is constitutionally invalid. Viewed as part of a conversation, Counterman's statements were "[v]ery every-day life" (J.A. 126) and, at most, heated but nonthreatening. C.W. considered them menacing because Counterman's mental illness made him unaware the conversation was one-sided. Because the state has not shown that Counterman knew C.W. considered his statements threatening, or even that he was aware others *could* regard his statements as threatening, the facts do not support conviction under an intent standard or even a recklessness standard. Because the State reduced criminal culpability for pure speech to a negligence standard, and obtained conviction by telling the jury to ignore what Counterman "actually believed," J.A. 389, the Court should reverse.

ARGUMENT

I. TO ESTABLISH A TRUE THREAT, THE GOVERNMENT MUST PROVE THE SPEAKER'S SUBJECTIVE INTENT TO THREATEN

The "bedrock principle underlying the First Amendment" is "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Rather, a "hallmark" of free speech is "to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358 (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The Constitution thus "demands that

content-based restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) (citations omitted).

"'From 1791 to the present,' however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992)). These exceptions are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have," as a matter of history and tradition, been deemed constitutionally permissible. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). Thus, to carry its burden of demonstrating the validity of a content-based speech restriction, "the government must generally point to *historical* evidence about the reach of the First Amendment's protections." *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022) (citing *Stevens*, 559 U.S. at 468-471). In *Watts*, this Court recognized a limited exception for "true threats" of physical violence. 394 U.S. at 708. But in the half-century since, this Court has never upheld a conviction under that exception.

The State cannot come close to meeting its burden of showing a history and tradition of allowing criminal liability to be based solely on an objective standard that considers a hypothetical listener's reaction and not the speaker's mental state. To the contrary, the English common law, early American law, and this Court's modern free speech jurisprudence all demonstrate that prosecutions for pure speech crimes have consistently required proof of subjective intent.

A. Threat Prosecutions Traditionally Required Proof Of Intent To Threaten

1. It is an elemental rule of Anglo-American law that "[t]here can be no crime without an evil mind." *People* v. *Croswell*, 3 Johns. Cas. 337, 364 (N.Y. 1804). By the founding, it was settled that "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). Intent is so inherent in the idea of the offense that it requires no statutory affirmation. See *id.* at 250-252 (collecting cases).

2. Against this "ancient" principle, *id.* at 250, the English common law required proof of a vicious will to punish speech. As Lord Mansfield explained in the criminal libel context:

> [W]here an Act in itself indifferent, if done with a particular intent becomes criminal; *there the intent must be proved and found*: but where the Act is in itself unlawful (as [with libel]) the proof of justification or excuse lies on the defendant; and *in failure thereof*, the law implies a criminal intent.

Rex v. *Woodfall*, 98 Eng. Rep. 398, 401 (K.B. 1770) (emphasis added). While common-law courts would infer the requisite intent from the defendant's language, intent was still an essential element and could be refuted. That was increasingly true by the early 19th century, when the common-law presumption that defendants intended the "natural consequences" of their actions "had fallen into general disrepute." Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 839-840 (1980). By "this period * * * the need to show actual knowledge of danger by the defendant, not just knowledge by the reasonable person, was emphasized and the [intent] presumption became increasingly rebuttable." *Id.* at 839.

Common law prosecutions for sending communications confirm that where defendants contested their words' meaning, English courts considered intent a key element. In *King* v. *Philipps*, 102 Eng. Rep. 1365 (K.B. 1805), the court held that intent was an element of the offense of breaching the peace in a prosecution based on a letter instigating a duel. *Id.* at 1369-1370. Elaborating on Lord Mansfield's distinction between statements that imply criminal intent and "indifferent" statements, the court concluded that the defendant could not have been convicted under either category had he "shewn it in evidence" that he lacked "the bad intention either inferable from and arising out of the act itself" or demonstrated through extrinsic evidence. *Id.* at 1369. The court emphasized that the defendant could not have been convicted had he shown that his intent was to keep rather than breach the peace. *Ibid.*; see *Commonwealth* v. *Willard*, 39 Mass. (22 Pick.) 476, 478 (1839) (Shaw, C.J.) (in *Philipps*, "intent was considered a material fact to be averred and proved").

3. English courts considered intent to be an element of the crime of sending threatening letters. By statute, it was a crime to "knowingly send any letter * * * threatening to kill or murder any of his Majesty's subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money, or venison or other valuable thing shall be thereby demanded." 27 Geo. II, ch. 15, in 7 Eng. Stat. at Large 61 (1754). In a prosecution under a similar threat statute for a letter referencing a recent arson incident and the Biblical story of Samson attaching firebrands to foxes' tails, the court in *Regina* v. *Hill*, 5 Cox C.C. 233, 234 (1851), held that "the explanation given by the prisoner to [a witness] of what *he meant* by what he had written in the letter must be taken into consideration * * * ." *Id.* at 235 (emphasis added). Because "the threat *intended to be made* by the prisoner

was a threat to burn standing corn"—whereas the statute prohibited threatening to burn *stacked* corn—Lord Chief Baron directed the jury to acquit the defendant. *Ibid.* (emphasis added).

Early treatises likewise noted the need to prove the speaker's intent: "On a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning *and intent* of the particular letter upon which the indictment is framed, if the intent cannot be inferred from the letter itself." Francis Wharton, *Treatise on the Criminal Law of the United States* 169 (1846) (emphasis added) (footnote omitted). "Whatever may prove the intent at the time, in fact, may be admissible, either to show scienter or guilty of knowledge." *Ibid.*

To be sure, some early English cases did not expressly address the *mens rea* requirement for threat convictions. Some have argued that those cases "required only that the letter contained language conveying a threat and that the defendant knew of the contents of the letter." See U.S. Br. at 43-45, *Elonis* v. *United States*, 575 U.S. 723 (2015) ("U.S. *Elonis* Br.") (citing, *inter alia*, *King* v. *Girdwood*, 168 Eng. Rep. 173 (1776); *King* v. *Boucher*, 172 Eng. Rep. 826 (K.B. 1831)); *Elonis*, 575 U.S. at 761-762 (Thomas, J., dissenting) (citing same). But an influential early American treatise cautioned that "prosecutions grounded on the English statutes on this subject[] do not exactly apply in our practice" to threat prosecutions grounded "on the principles of the common law." 7 Nathan Dane, *A General Abridgment of American Law* 31 (1836). Those decisions do not demonstrate that intent was irrelevant—only that there, it was undisputed. Those cases at most reflect the common-sense principle that, when a "letter very plainly convey[s] a threat to kill," the defendant likely *intended* that meaning. *Boucher*, 172

Eng. Rep. at 827 ("No one who received [the letter] could have any doubt as to what the writer meant to threaten.").

4. By the early 19th century, many American statutes explicitly required that threats be made "maliciously." Even when the statutes addressed extortionate threats, maliciousness was distinct from the textual intent to extort. *E.g.*, Rev. Me. Stat., ch. 154, § 26 (1840) ("maliciously threaten to accuse another of a crime or offense * * * with intent thereby to extort any money * * * [or] to do any act against his will")); La. Acts No. 64 § 1 (1884) ("maliciously threaten to wound, maim, kill, murder or inflict bodily harm on another, or * * * maliciously threaten to burn, or destroy, or damage his or her building or other property, with malicious intent, though no money, goods or valuable thing be demanded"); see also *State* v. *Bruce*, 24 Me. 71, 72 (1844); *State* v. *Goodwin*, 37 La. Ann. 713, 716-717 (1885).

And even when statutes did not expressly require intent to threaten, juries were instructed to determine whether "th[e] defendant intended to threaten." *State* v. *Stewart*, 2 S.W. 790, 792 (Mo. 1886); *Commonwealth* v. *Morton*, 131 S.W. 506, 508 (Ky. 1910) (construing statute to prohibit letters "written * * * for the purpose of intimidating, alarming, disturbing, or injuring"). "[E]vidence tending to show that the letter was sent as a practical joke [wa]s admissible in defense." 25 Charles F. Williams, *The American & English Encyclopedia of Law* 1073 (1894).

Some states "made [it] a crime to threaten another in manner to amount to disturbance of the public peace." 2 Francis Wharton, *Criminal Law & Proc.* § 803 (Ronald A. Anderson ed., 12th ed. 1957). "[I]t [wa]s usually held, however, that a threat * * * *must be intended to put the person threatened in fear of bodily harm* and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness." *Ibid.* (emphasis added). As the Vermont Supreme Court

explained: "A threat, in order to [be punishable], * * * *must be intended to put the person threatened in fear of bodily harm*." *State* v. *Benedict,* 11 Vt. 236, 239 (1839) (emphasis added); accord *People ex rel. Ware* v. *Loveridge,* 42 N.W. 997, 998 (Mich. 1889) ("[T]he authorities have very plainly held that [language tending to provoke a breach of the peace] covers nothing that is not meant and adapted to bring about violence directly.").

5. Grounded in the Colonies' experience during the American Revolution, founding-era American sentiment embraced an even stronger right to free expression than English law. See, *e.g.*, *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Erwin Chemerinsky, *The First Amendment* 4 (6th ed. 2019) (discussing the American rejection of English common law).[3]

People v. *Croswell*, 3 Johns. Cas. 337, 363 (N.Y. 1804), reflected the Founders' understanding that crimes of pure speech require proof of the speaker's intent. The case arose when Federalist editor Harry Croswell published an article criticizing President Jefferson. When the Anti-Federalist New York Attorney General charged Croswell with criminal libel, Alexander Hamilton came to the defense.

New York Supreme Court Justice (later Chief Justice and Chancellor) James Kent authored the leading opinion, adopting Hamilton's arguments and noting that, unlike the English, "the people of this country have always classed the freedom of the press among their fundamental rights." *Id.* at 391. Justice Kent explained that "the truth [of a publication] is admissible in evidence to explain th[e] [defendant']s intent" in a libel action, *id.* at 393, so the jury could decide "whether the intent was wicked or virtuous,"

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[3] Even the Sedition Act did not punish negligent speech. See Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (expired 1801) (requiring "intent to defame").

id. at 365-366. Observing that "[t]here can be no crime without an evil mind," *id.* at 364, Kent explained:

> Opinions and acts may be innocent under one set of circumstances, and criminal under another. This application to circumstances, and this *particular* intent, are as much *matters of fact*, as the printing and publishing. Where an act, innocent in itself, becomes criminal, when done with a particular intent, that intent is the material *fact* to constitute the crime. * * * . The intention of the publisher * * * must, therefore, be cognisable * * * .

Id. at 364-365 (citations omitted).

Although the court divided equally and Croswell's conviction was affirmed, New York's legislature codified Kent's opinion by statute, and the court ordered a new trial. See James Kent, II, *Commentaries on American Law* 20 (2d ed. 1827). The legislature later amended the state constitution modeled on Kent's opinion, and other legislatures and courts followed. See *Beauharnais* v. *Illinois*, 343 U.S. 250, 295-296 (1952) (Jackson, J., dissenting).

Croswell—and the constitutional amendments that followed—reflected the importance of subjective intent in speech prosecutions that carried forward in this Court's jurisprudence. See *id.* at 297. Courts thereafter recognized the importance of "good motives [a]s a defense." *Id.* at 300; see also *McKee* v. *Cosby*, 139 S. Ct. 675, 681 (2019) (Thomas, J., concurring in denial of cert.) (citing *Croswell* as embodying founding-era free speech views).

B. This Court Has Repeatedly Required Proof Of Subjective Intent Before Punishing Speech

1. Although common law and early American practice reflect the original understanding of "free speech," the First Amendment was not applied to the states until the

early 20th century. See *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 723-724 (1931). Sedition Act prosecutions were controversial even at the time, and the first federal law addressing threats was enacted well into the 20th century. See Act of July 8, 1932, Pub. L. No. 72-274, 47 Stat. 649, codified at 18 U.S.C. § 876. Thus, the modern understanding of the First Amendment began with World War I Espionage Act prosecutions and the development of the incitement doctrine. See, *e.g.*, David Rabbant, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514, 516 (1981); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of Federal Criminal Law*, 2002 BYU L. Rev. 829, 897 (2002).

This Court recognized that the First Amendment protects speech advocating violence or lawlessness unless it constitutes proscribable "incitement," which commonly "require[s] * * * [that] the speaker subjectively intended incitement." John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries*, 10 Hastings Commc'ns & Entm't L.J. 969, 972 (1988). The speech must be "*directed to* inciting or producing imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (emphasis added). Without evidence a speaker's "words were *intended* to produce, and likely to produce, imminent disorder * * * those words could not be punished." *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (emphasis added).

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982), underscored the subjective intent requirement. There, Mississippi merchants sought damages for an NAACP-organized boycott against the organization and its officers, including Charles Evers. Evers warned boycott violators, "[I]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Ibid.* The organization publicized names of boycott

violators, and some experienced violent retaliation, creating an "atmosphere of fear." *Id.* at 904 (citation omitted). This Court acknowledged that Evers's remarks "*might have been understood as* * * * intending to create a fear of violence." *Id.* at 927 (emphasis added). But the Court explained that listeners' reactions were irrelevant to the constitutional protection afforded speech. Evers "did not exceed the bounds of protected speech" because his advocacy was not "*directed to* inciting or producing imminent lawless action," *id.* at 928-929 (emphasis added), and there was no evidence that "any [speaker] *specifically intended* to further an unlawful goal," *id.* at 925 n.68 (emphases added).

2. This Court has also held that, to protect First Amendment interests, public figures alleging defamation must demonstrate that the speaker acted with "'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). The Court reasoned that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* at 271-272 (ellipses omitted) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). The Court reiterated that "punishment of error" risks "inducing a cautious and restrictive exercise of" First Amendment rights, and "strict liability * * * may lead to intolerable self-censorship." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, a standard of "negligence * * * is constitutionally insufficient." *N.Y. Times Co.*, 376 U.S. at 288. Those constitutional guarantees "compel application of the same standard to * * * criminal [libel]" prosecutions, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), which have "virtual[ly] disappear[ed]," *id.* at 69, under statutes commonly requiring proof of knowing falsity, *e.g.*, Kan. Stat. Ann.

§ 21-6103(a)(1); N.H. Rev. Stat. Ann. § 644:11; Va. Code Ann. § 18.2-209.

3. In numerous other contexts, this Court has reaffirmed the importance of requiring a culpable *mens rea* before punishing speech. In determining whether a prohibition on fraudulent fundraising calls satisfies the First Amendment, this Court considered it "[o]f prime importance" that civil liability not attach absent "clear and convincing evidence" the speaker "kn[ew] that the representation was false" and acted with "intent to mislead the listener." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). The Court emphasized that "[e]xacting proof requirements * * * provide sufficient breathing room for protected speech." *Ibid.* And in *Alvarez*, which invalidated a federal statute prohibiting false claims to military decorations, a majority emphasized the importance of limiting the statute's sweep to "knowing or reckless falsehood," which "allow[ed] more speech." 567 U.S. at 719-720 (plurality opinion). Construing the statute to reach only "statements made with knowledge of their falsity and with the intent that they be taken as true" "diminish[ed] the extent to which the statute endangers First Amendment values," but "d[id] not eliminate the threat." *Id.* at 732 (Breyer, J., concurring in the judgment).

4. Other free speech exceptions do not undermine the subjective intent requirement here. Some have argued that the "fighting words" exception, which permits punishment of certain face-to-face speech inherently likely to provoke a breach of the peace, requires no proof of intent. See U.S. *Elonis* Br. at 48. But this Court's few "fighting words" decisions do not resolve the required mental state. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-574 (1942), did not address whether there is a constitutional minimum *mens rea* but only the statute's alleged vagueness and whether "epithets [and] personal

abuse" warrant protection. The opinion suggests the speaker's intent *does* matter, if communicated, since even offensive words may not be "fighting words" if delivered "with[] a disarming smile." *Id.* at 573. And *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940), reversed the breach-of-peace conviction of someone who had publicly played offensive recordings, emphasizing that citizens must be allowed to espouse views listeners consider "the rankest error," "resort[ing] to exaggeration, to vilification * * *, and even to false statement," because such "liberties are * * * essential to" the "right conduct on the part of the citizens of a democracy."

Those cases embrace a rule that "[t]he government may forbid speech *calculated* to provoke a fight." *F.C.C.* v. *Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality opinion) (emphasis added). That reading accords with the common-law tradition that permitted punishing speech likely to cause "a breach of the peace * * * including profanity, obscenity, and threats," *Chaplinsky*, 315 U.S. at 568, only on proof the speaker intended to breach the peace, see pp. 18-19, *supra.* And scholars have observed that "an intent requirement is implicit in the elements the state must prove to proscribe speech under the fighting words doctrine, especially the requirement that the words must be 'directed to the person of the hearer.'" Roger C. Hartley, *Cross Burning-Hate Speech As Free Speech: A Comment on* Virginia v. Black, 54 Cath. U. L. Rev. 1, 33 n.211 (2004) (quoting *Cantwell*, 310 U.S. at 309).

C. This Court's True Threats Decisions Are Best Read To Require Subjective Intent

While this Court has recognized that "true threats" represent a categorical free speech exception, it has never suggested any tradition of allowing threat convictions to rest solely on the reaction of a hypothetical reasonable listener. To the contrary, the best reading of this Court's true threats cases, *Watts* v. *United States* and *Virginia* v.

Black, is that "it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat." *Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of cert.).

1. The *Watts* Court found no true threat when a Vietnam War protester said "[i]f 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 Court did not hint that speech could be punished based solely on whether a reasonable person might have understood the words as a threat. Indeed, the Court's brief unsigned opinion expressed "grave doubts" that it was enough to voluntarily utter words with the "*apparent* determination to carry them into execution." *Id.* at 707 (quotation marks omitted).

Interpreting *Watts*, Justice Marshall later concurred in the reversal of a decision involving an alleged threat against President Nixon. Justice Marshall, who had joined *Watts*, wrote that the decision's reference to "grave doubts" involved the "correctness" of the objective threat standard, which "would support the conviction of anyone making a statement that would reasonably be understood as a threat, as long as the defendant intended to make the statement and knew the meaning of the words used." *Rogers*, 422 U.S. at 43 (Marshall, J., concurring) (citations omitted). He concluded that the statute at issue should be construed to require "proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature." *Id.* at 47. He explained:

> [T]he objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes; we should

> be particularly wary of adopting such a standard for a statute that regulates pure speech.

Ibid.

2. *Black* put intent front and center. Neither the *Black* majority nor plurality so much as hinted that speech could be punished based solely on whether a reasonable person might have understood it as a threat. Rather, the majority wrote: "'True threats' encompass those statements 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." 538 U.S. at 359 (emphasis added). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

The *Black* defendants were convicted of violating a Virginia statute that criminalized burning a cross "with the intent of intimidating any person or group of persons." Va. Code § 18.2-423 (1996). The statute added that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate." *Ibid.* The defendants did not dispute that their acts were *objectively* intimidating; one had visibly burned a massive cross at "a Ku Klux Klan rally * * * on an open field just off [a public highway]," 538 U.S. at 348, and the other had attempted to burn a cross on "the yard of * * * an African-American[] * * * next-door neighbor," *id.* at 350. It is widely understood that "burning a cross is a particularly virulent form of intimidation" because it has a "long and pernicious history as a signal of impending violence," *id.* at 363 (plurality opinion), and is "widely viewed as a signal of impending terror," *id.* at 391 (Thomas, J., dissenting).

But the Court never intimated that it was enough that the defendants' acts were objectively threatening. The

Court vacated their convictions because, given the statute's prima-facie-evidence provision, the jury had not necessarily found the *intent* to intimidate. The defendants may have been convicted even if they had intended to burn the crosses as "a symbol of Klan ideology and of Klan unity," not to intimidate anyone. *Id.* at 357 (majority opinion).

A four-Justice plurality reasoned that the prima-facie-evidence provision was facially unconstitutional because a subjective intent requirement was necessary to distinguish "constitutionally proscribable intimidation" from protected "core political speech," such as when a cross is burned as a statement of ideology or expression of group solidarity. *Id.* at 365-366 (plurality opinion). The prima-facie-evidence provision "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning [wa]s intended to intimidate," and "[t]he First Amendment does not permit such a shortcut." *Id.* at 367. Virginia had "strip[ped] away the very reason why a State may ban cross burning with the intent to intimidate." *Id.* at 365. The plurality thus concluded that even objectively threatening cross burnings undertaken for non-intimidation reasons are protected speech. See *United States* v. *Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) ("The plurality obviously assumed * * * that an intent to threaten was required.").

Although he did not agree that the provision was *facially* unconstitutional, Justice Scalia provided a fifth vote for the narrower holding that the First Amendment prohibits *convictions* without intent to intimidate. While the defendants had undoubtedly committed objectively threatening acts, it was a "constitutional defect" to convict them without considering whether "the cross burning[s] [were] done with an intent to intimidate." 538 U.S. at 380 (Scalia, J., concurring in the judgment in part and dissenting in part). For the convictions to pass First

Amendment muster, the jury was required to consider "the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate." *Ibid.* "Justice Scalia [thus] agreed that the Virginia statute was unconstitutional insofar as it failed to require the state to prove the defendant's intent." *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.). "Justice Souter, joined by Justices Kennedy and Ginsburg, agreed that the prima facie evidence provision rendered the statute facially unconstitutional because it effectively eliminated the intent requirement." *Ibid.* In fact, "each of the [Justices'] opinions—with the possible exception of Justice Thomas's dissent—takes the same view of the necessity of an intent element." *Ibid.*

3. *Elonis* did not depart from this interpretation of *Black*. Although the Court resolved the case on statutory grounds, it emphasized that "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to negligence.'" 575 U.S. at 738 (quoting *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., *dubitante*)). The Court reiterated that "we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'" *Ibid.* (quoting *Rogers*, 422 U.S. at 47 (Marshall, J., concurring)).

4. To be sure, some lower courts (including the court below) have concluded that *Black* did not impose a subjective intent requirement. See *State* v. *Boettger*, 450 P.3d 805, 812-813 (Kan. 2019) (collecting authorities). Some of those courts have sought to limit *Black* to the Virginia statute. See, *e.g.*, *United States* v. *Martinez*, 736 F.3d 981, 986-987 (11th Cir. 2013), vacated and remanded in light of *Elonis*, 576 U.S. 1001 (2015). But the *Black* plurality said the statute was *unconstitutional* because it

ignored the "factors that are necessary to decide whether a particular cross burning is intended to intimidate." 538 U.S. at 367 (plurality opinion). And Justice Scalia's fifth vote turned on the "*constitutional* defect" that the defendants might have been convicted even if "the cross burning[s] [were not] done with an intent to intimidate." *Id.* at 380 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Some courts have reasoned that two words from *Black* mean that there is no subjective intent requirement: "'True threats' *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," and "[i]ntimidation in the constitutionally proscribable sense of the word is a *type* of true threat, where a speaker directs a threat * * * with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 359-360 (emphasis added); *e.g.*, *In re J.J.M.*, 265 A.3d 246, 263-264 (Pa. 2021).

But that wooden reading violates this Court's admonition not to parse "the language of an opinion * * * as though we were dealing with the language of a statute." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022) (brackets and quotation marks omitted). And it is impossible to square with *Black*'s holding that the defendants' convictions were invalid although their conduct was objectively intimidating. When the Court said true threats "encompass" statements intended to intimidate, it meant that intent is a defining characteristic of true threats, not merely the self-evident point that some statements intended to intimidate can be true threats. And the reference to "a type" of true threat is best read to mean that intimidation is "constitutionally proscribable" when made "*with the intent* of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360 (emphasis added).

* * * * *

At the very least, whatever its quibbles with the interpretation of common law and American history and this Court's First Amendment jurisprudence, the State cannot carry its burden of demonstrating an established tradition of punishing speakers for making threats regardless of their intent. See *Stevens*, 559 U.S. at 468. The Court's true threats decisions—and its decisions involving other restrictions on speech—support the opposite conclusion.

II. COLORADO'S NEGLIGENCE STANDARD IMPERMISSIBLY CHILLS PROTECTED SPEECH

Criminal prohibitions are "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). "Because First Amendment freedoms need breathing space to survive, government may regulate [speech] only with narrow specificity," *Button*, 371 U.S. at 433, "extreme care," *Claiborne Hardware*, 458 U.S. at 927, and "exacting proof requirements," *Madigan*, 538 U.S. at 620.

The purely objective standard here is the polar opposite of careful. It "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way." *Jeffries*, 692 F.3d at 484-485 (Sutton, J., *dubitante*). "That is a negligence standard." *Elonis*, 575 U.S. at 739.

There is a reason why there is no clearly established American tradition of imposing criminal liability for speech crimes based on a negligence standard. It is a

terrible way to safeguard what "the people of this country have always classed" as one of their most cherished rights, *Croswell*, 3 Johns. Cas. at 391: the right of free expression.

A. A Purely Objective Standard Would Criminalize Misunderstandings, Which Abound In The Internet Era

The inherent limitations of language and differences in how people perceive and interpret social cues mean that miscommunications are inescapable. Colorado's negligence standard is blind to such misunderstandings. The potential for miscommunication is especially pronounced on the Internet, where context is limited, discourse conventions vary dramatically, and audiences are too disparate to support a "reasonable person" standard. In many instances (as here), the evidence of criminal conduct consists of bare words on a screen.

1. Colorado's criminal negligence standard fails to separate threats from "poorly chosen words." Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 350 (2001). For example, a statement that the listener "will regret" a course of action is frequently intended to convey the belief that the listener will later think better of it, or that it will turn out badly. But a listener also could interpret the statement as a threat that the speaker will *make* the listener regret the action by inflicting harm if that course is pursued. Such misunderstandings are common; different "reasonable observers" routinely construe the same words differently although the context is identical. See, *e.g.*, *Exchange Between Bob Woodward and White House Official in Spotlight*, CNN Politics (Feb. 27, 2013), http://bit.ly/3Iezmyp. A purely objective standard inevitably punishes speech that is in no way culpable, but simply results from good-faith miscommunication.

In *United States* v. *Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997), for example, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." The agent found the phrase to be "chilling" and "scary." *Ibid.* Despite evidence that the defendant used "silver bullets" to refer to "clear-cut" evidence of wrongdoing, the court upheld the conviction under an objective standard. *Id.* at 1490-1492.

2. The Internet multiplies the risk of such misunderstandings. "[T]he Internet as a forum for speech has * * * eroded the shared frame of background context that allowed speakers and hearers to apply context to language." Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011). Conventional tools for assessing context are absent from online statements "lack[ing] [the] tonal and other nonverbal cues that signal sarcasm, jests, or hyperbole." Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats*, 106 Calif. L. Rev. 1885, 1907 (2018).

More than two thirds of American adults use social media. *Social Media Fact Sheet*, Pew Research Ctr., http://bit.ly/3Ed62az (Apr. 7, 2021). But "underlying assumptions concerning how audiences respond to incitement, threats, or fighting words, are confounded by the new reality social media create." Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 Tex. Tech L. Rev. 147, 148 (2011). And "different social media platforms have different discourse conventions and architectural features which complicate attempts to discern both the speaker's true intent and the meaning of her postings." Lidsky & Norbut, *supra*, at 1891. Social media posts are especially vulnerable to misinterpretation because, unlike spoken words, they "persist[]," are

"visib[le]" to a massive audience, are "spreadable" to an even greater and often unintended audience, and are "searchable" by entirely unexpected viewers—some of them seeking out threatening language. Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* 11-12 (2014).

Beyond that, generational and other differences affect how an "objective" listener perceives internet speech. "[S]peakers of different ages and backgrounds use social media differently to convey their messages, adding another layer of contextual complexity." Lidsky & Norbut, *supra*, at 1891. Indeed, given the diversity of social media, it is difficult even to identify what the characteristics of a hypothetical "reasonable person" would be—adding further uncertainty to a test that has long been criticized for vagueness and indeterminacy and for inviting jurors to substitute personal attitudes about acceptable behavior. See generally Oliver Wendell Holmes, *The Common Law* 112 (1909); Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633, 654 (2003).

Emojis exacerbate such misunderstandings. The "seemingly universal" thumbs-up gesture, for instance, "is hideously offensive in parts of the Middle East, West Africa, Russia, and South America." Marcel Danesi, *The Semiotics of Emoji: The Rise of Visual Language in the Age of the Internet* 31 (2015). While a generic gun emoji will appear on some phones as an innocuous sci-fi laser pistol, it will appear on others as a revolver. See Lidsky & Norbut, *supra*, at 1908. "In speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations" of a statement or image. Boyd, *supra*, at 31-32.

One example illustrates the potential for grave misunderstanding on social media. A Texas teenager discussing a videogame on Facebook responded to a

comment that he was crazy by jokingly agreeing that he was so crazy he would "shoot up a kindergarten * * * and eat the beating heart of one of them." Craig Malisow, *The Facebook Comment That Ruined a Life*, Dallas Observer (Feb. 13, 2014) (capitalization altered), http://bit.ly/3Z1NHoX. Although "players commonly engage in trash talk and hyperbolic exaggerations," the teenager was using Facebook, a "platform frequented by more middle-aged women than teenage boys." Lidsky & Norbut, *supra*, at 1888. After a woman in Canada noticed the message and reported it to police, they arrested the teenager for making a terroristic threat. He spent four months in jail, where he was physically abused. See *id.* at 1886-1887; Malisow, *supra*. Similar misunderstandings are easy to envision on platforms where strangers in an increasingly polarized society discuss not just videogames but fraught topics like abortion, elections, immigration, politics, religion, and discrimination.

Internet communication thus underscores the importance of requiring a check on such misperceptions, protecting those familiar with too little of the online world (or those too immersed in it) from inadvertently contravening uncertain norms. In short, "specific intent provides some insurance against a speaker being punished for speech taken out of context." Lidsky & Norbut, *supra*, at 1918.

3. A purely objective "reasonable person" standard unfairly criminalizes the speech of individuals with disabilities and disorders that make them more likely to misinterpret context and emotion. See, *e.g.*, Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders §§ 295.90, 297.1, 299.00 (5th ed. 2013). Such individuals also are more vulnerable under a purely objective standard because their behavior and reactions are often perceived as threatening. See Marchell Goins et al., *Perceiving Others as Different: A Discussion on the*

Stigmatization of the Mentally Ill, 19 Annals Health L. 441, 442-443 (2010). "[L]aypersons' perceptions of [mental] illnesses are particularly important in the legal field, as jurors' reactions to evidence of mental illness can * * * cause the defendant to be perceived as dangerous." Kathleen Wayland & Sean D. O'Brien, *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 Hofstra L. Rev. 519, 526 n.48 (2013).

Similarly, "[o]ffenders with autism spectrum disorder tend to lack theory of mind (especially empathy and the ability to see from other perspectives)," as well as "the ability to appreciate the whole context." Astrid Birgden, *Enabling the Disabled*, 42 Mitchell Hamline L. Rev. 637, 655 (2016). They are often perceived as threatening "[d]espite the paucity of evidence linking [such disorders] with criminal behavior." Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)construe Autism in the Criminal Trial Process*, 82 U. Pitt. L. Rev. 585, 596-597 (2021). Because such disorders can cause "inadequate understanding" of cues, "both on the giving and receiving end," individuals "can often be viewed as exhibiting antisocial behavior." Jeffrey A. Cohen et. al., *A Legal Review of Autism, A Syndrome Rapidly Gaining Wide Attention Within Our Society*, 77 Alb. L. Rev. 389, 413 (2014). A subjective standard at least permits a defendant to explain why their condition may have caused their statement to be misconstrued. See *Heineman*, 767 F.3d at 972 (reversing conviction because district court applying objective standard excluded evidence of defendant's "Asperger's Disorder, which impair[ed] his 'ability to understand how others will receive the things he says'").

B. A Purely Objective Standard Would Stifle Unpopular Political Views, Minority Religious Beliefs, And Artistic Expression

Under a purely objective standard, "individuals would have difficulty discerning what a jury would consider objectively threatening, and may rationally err on the side of caution by saying nothing at all." Comment, United States v. Jeffries, 126 Harv. L. Rev. 1138, 1145 (2013). Thus, a purely objective standard chills swaths of protected speech, causing speakers to "give a wide berth to any comment that might be construed as threatening in nature," and imposing "substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers*, 422 U.S. at 47-48 (Marshall, J., concurring) (citation omitted).

Members of unpopular groups, religious minorities, immigrants, and ethnic or racial minorities—anyone whose beliefs might differ from the police, prosecutors, and jurors who enforce the reasonable person standard—are most likely to be affected. "[T]hose who are unpopular may fear that the government will [enforce speech restrictions] selectively * * * while ignoring members of other [groups]." *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring in the judgment). The addition of a subjective component protects against the "self-censorship that speakers would have to engage in to avoid prosecution if the standard were wholly objective." Blakey & Murray, *supra*, at 1067.

1. A purely objective standard discourages political advocates from vehemently criticizing officials or political opponents using forceful and sometimes hyperbolic language that the First Amendment clearly protects. See, *e.g.*, *Watts*, 394 U.S. at 708. The boundaries of free speech exceptions are often tested in politically freighted prosecutions. *Ibid.*; *Cohen* v. *California*, 403 U.S. 15, 16 (1971). Yet under a purely objective standard, "protestors

will necessarily lack the ability to gauge accurately the extent to which a 'context' created by others will be taken into account—well after the fact—by a court or a jury in evaluating their speech." Blakey & Murray, *supra*, at 1064. A "negligence standard" is thus "a potentially devastating legal sword * * * for those who seek to silence and delegitimize speech with which they disagree in America's roiling cultural wars." *Id.* at 875-876.

"Allowing convictions for true threats to stand without a showing of subjective intent leaves unpopular or borderline speech that could plausibly be viewed as having a threatening effect underprotected * * * ." Megan R. Murphy, Comment, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. Pa. L. Rev. 733, 745 (2020). A tweet that "the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants" might appear threatening in some contexts but be acceptable political discourse in others, with little reliable basis for distinguishing the two. See Letter from Thomas Jefferson to William Smith (Nov. 13, 1787), http://bit.ly/3Z7fggA. Under a purely objective standard, few prudent advocates would bet a felony conviction on their tweet falling into the protected category. See, *e.g.*, Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 U. Miami L. Rev. 711, 750 (2020) ("A low *mens rea* for true threats * * * [would] chill public protest speech * * * ."). "Under a purely objective test, speakers whose ideas or views occupy the fringes of our society have more to fear," because their statements, "even if intended simply to convey an idea or express displeasure, [are] more likely to strike a reasonable person as threatening." *United States* v. *White*, 670 F.3d 498, 525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part).

2. A purely objective standard likewise stifles minority religious expression. Religious messages that

are not intended as threats often use language that others could perceive as threatening. For example, many people believe the term "jihad" denotes violence or terrorism. See, *e.g.*, Jason R. Silva et al., *Addressing the Myths of Terrorism in America*, 30 Int'l Crim. Just. Rev. 302, 312 (2020). But "jihad" literally translates as "struggle," Karen Armstrong, *Muhammad: A Prophet for Our Time* 7 (2006), and is often used to convey positive religious messages such as "giving charity and feeding the poor, concentrating intently in one's prayers, [and] controlling one's self and showing patience and forgiveness," Parvez Ahmed, *Terror in the Name of Islam: Unholy War, Not Jihad*, 39 Case W. Res. J. Int'l L. 759, 770 (2008). Because the term is often misperceived as inherently violent, "innocent talk of things like jihad * * * can be misconstrued and result in threats to free speech." Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. Pa. J. Const. L. 865, 883 (2013) (footnotes omitted); see also Liam Stack, *College Student Is Removed from Flight After Speaking Arabic on Plane*, N.Y. Times (Apr. 17, 2016), http://bit.ly/3lB6zfQ (detailing removal from airplane and investigation of Muslim student for using the word "'inshallah,' meaning 'god willing'").

A purely objective standard fails to account for the fact that religious speech is often designed "to deliberately generate deep psychological discomfort as a means of motivating 'sinners' to stop 'sinning.'" *Wollersheim* v. *Church of Scientology*, 212 Cal. App. 3d 872, 892 (Ct. App. 1989). For example, after Christian proselytizers were arrested (or threatened with arrest) for carrying signs stating, "Prepare to Meet Thy God" and "Turn or Burn," urging Muslims at a festival to abandon their beliefs, *Bible Believers* v. *Wayne Cnty.*, 805 F.3d 228, 238 (2015) (en banc), the Sixth Circuit applied a subjective intent standard, correctly concluding that although the group may have "intended to anger their

target audience, "the record [was] devoid of any indication that they intended imminent lawlessness to ensue," *id.* at 244. Religious speech often includes confrontational techniques that observers could find threatening: "'hell fire and damnation' preaching," "chastising, [and] a host of subtle and not so subtle techniques." *Wollersheim*, 212 Cal. App. 3d at 892. A purely objective standard creates a substantial risk of chilling such protected speech.

3. A purely objective standard also would chill artistic expression, particularly in the music industry where violent lyrics abound. The extent to which music is perceived as violent often turns on genre, see, *e.g.*, Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 Psych., Pub. Pol'y & L. 280, 284 (2016), or the relative fame of the artist, compare, *e.g.*, rapper Ice T's song, *Cop Killer*, with aspiring rapper Antavio T.O. Johnson's song, *Kill Me a Cop* (for which Johnson was charged with threatening police officers); see *First Amendment Lawyers Say Jailing Rapper for "Kill Me a Cop" Lyrics Violates Rights*, Fox News (Aug. 1, 2009), http://bit.ly/3Iyhujx. And research has shown that listeners express "significantly more negative" reactions to "the *same* lyrics * * * when they believed the artist was black." Erik Nielson & Andrea L. Dennis, *Rap on Trial* 88 (2019). "Unless the defendant-speaker's subjective intent is taken into consideration, such biases and prejudices [among listeners] may subtly cause jurors and jurists to erroneously find true threats where none exist." Amicus Br. for the Marion B. Brechner First Amendment Project at 4, *Elonis*. The risk of chilling is real. See Harley Brown, *Man Jailed for Posting Lyrics to Facebook*, Billboard (Sept. 10, 2014), http://bit.ly/3S6pYld.

While it is "often true that one man's vulgarity is another's lyric," *Cohen*, 403 U.S. at 25, an objective standard takes the decision about meaning away from the artist.

C. An Objective Standard Does Not Survive Exacting Scrutiny

By imposing severe criminal penalties for speech irrespective of the speaker's intent, § 18-3-602(1)(c) creates "a stark example of speech suppression" that fundamentally conflicts with the First Amendment. *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 244 (2002). The State convicted Counterman for the content of his speech; his conviction thus is "'presumptively invalid' and the Government bears the burden to rebut that presumption," *Stevens*, 559 U.S. at 468 (citations omitted), by demonstrating that it survives "the most exacting scrutiny," *United States* v. *Eichman*, 496 U.S. 310, 318 (1990). The State cannot satisfy that burden.

1. Colorado's negligence standard is not the least restrictive means of addressing true threats. It is "not reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The State has attempted to justify the objective standard because, regardless of the speaker's intent, "threats by their very utterance harm their targets by causing fear and attendant emotional distress." Br. in Opp. 22; see also U.S. *Elonis* Br. at 16. While states have an interest in protecting listeners from fear of violence and the disruption that fear engenders, the First Amendment prevents them from placing expedience above free expression. See *Watts*, 394 U.S. at 707.

Moreover, the State points to no evidence that jurisdictions with a subjective standard—which cover a quarter of the nation's population, see Cert. Reply 3—systematically fail to protect their citizens as well as jurisdictions employing the negligence standard. In jurisdictions that include a subjective standard, threats prosecutions are almost identical to those under a purely objective standard. After all, "frequently the most probative evidence of intent will be objective evidence of what

actually happened rather than evidence describing the subjective state of mind of the actor." *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). Thus, "even in cases that implicate free-speech protection," trial courts routinely "trust juries to make such inferential decisions" about the intent of the defendants' statements. *Brewington* v. *State*, 7 N.E.3d 946, 964-965 (Ind. 2014); see also *United States* v. *Haddad*, 652 F. App'x 460, 462 (7th Cir. 2016) (upholding threat conviction where subjective intent was inferred from letters). And in the smartphone era, direct evidence of intent is often available because most people carry with them "a digital record of nearly every aspect of their lives—from the mundane to the intimate," *Riley* v. *California*, 573 U.S. 373, 395 (2014), creating a running record of everywhere they have been, everything they have written, and everything they have seen. A subjective standard simply allows defendants to explain the message they meant to express, while an objective standard categorically prohibits the jury from considering that context.

The State thus cannot demonstrate that its suppression of speech will alleviate the targeted harm "to a material degree," *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993), or that its "chosen restriction on the speech at issue [is] 'actually necessary' to achieve its interest," *Alvarez*, 567 U.S. at 725 (plurality opinion) (citation omitted).[4]

2. More fundamentally, this Court has repeatedly rejected the idea that speech should be sacrificed for

[4] Moreover, criminal prosecutions are not the only tool to address unwanted contact. Every state has provisions allowing people to obtain restraining orders in such situations. See *Nollet* v. *Justices of the Trial Court of Commonwealth of Mass.*, 83 F. Supp. 2d 204, 212 (D. Mass. 2000); accord Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. Crim. Just. 411, 414 (2003).

hypothetical benefits to law enforcement. Time and again, this Court has struck the balance the way the Constitution itself does, by favoring speech. See *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."). This Court has rejected speech restrictions even where the government maintained doing so would cause harm. *E.g.*, *Free Speech Coal.*, 535 U.S. at 253-254.

In an increasingly pluralistic society, some offensive speech "must be expected in social interaction and tolerated without legal recourse." 2 Restatement (Third) of the Law Torts § 46, at 138; accord *Snyder* v. *Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt."). "The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Free Speech Coal.*, 535 U.S. at 255 (cleaned up).

III. COUNTERMAN'S MESSAGES WERE PROTECTED SPEECH

A. Counterman Lacked Intent To Threaten

Counterman's speech was constitutionally protected. This Court has recognized that a statement need not have "serious value" to warrant First Amendment protection: "Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation. Even '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Stevens*, 559 U.S. at 479-480 (quoting *Cohen*, 403 U.S. at 25 (quotation marks omitted)).

Even Colorado did not dispute that most of Counterman's statements were benign. The vast major-

ity were "[v]ery every-day life," J.A. 126, the sort of small updates, questions, comments, and humorous postings common in a long-running conversation. See J.A. 478, 458. But the very thing that made the messages so "alarming" to C.W. was the thing that Counterman did not perceive: C.W. was not responding to his messages. J.A. 144, 149. There is no indication Counterman knew that C.W. considered the conversation menacing. His failure to appreciate how his conduct appeared was central to the prosecution's theory: "Crazy people do crazy things, and I want you to keep that in mind when you are determining whether a reasonable person would suffer serious emotional distress in this situation." J.A. 374.

Even the comments that figured most prominently in the prosecution would be innocuous in the context of a back-and-forth: "Was that you in the white Jeep?," J.A. 455, is just a reference to a believed sighting (though C.W. had sold the car "several years" earlier, J.A. 214). Even the most ostensibly threatening statements, "Fuck off permanently," and "Die, don't need you," J.A. 472-473, were Counterman's response to C.W.'s perceived snubbing after years of "conversation." They were an inartful version of "Go to hell." See *Fuck Off*, Urban Dictionary, http://bit.ly/3YFtQfv ("An exclamation of contempt with the intent of breaking rapport * * * ."); *Die*, Urban Dictionary, http://bit.ly/3IB0HfW ("a handy word to tell a dumbass to stop"). While heated, there is no indication Counterman understood they would instill fear; he merely misconstrued the context. The trial judge appeared to recognize as much, calling Counterman's statements "delusional," J.A. 84, and saying he thought that "most people" would give Counterman "the benefit of the doubt that he is doing it through a lack of understanding, as [o]pposed to a malicious intent," J.A. 439.

The State capitalized on the irrelevance of Counterman's understanding under the purely objective

test. The prosecutor emphasized that "we don't have to prove that [Counterman] knew that this would cause [C.W.] to be distressed," but merely that a "reasonable person" would have been distressed by his words. J.A. 389, 392. In response to the defense's argument that Counterman was "annoying" and "weird" because he was "mentally ill," J.A. 388, the prosecutor argued: "All we have to prove is that * * * [Counterman] knew he was communicating. Nothing else about his mental health matters." J.A. 389.

Ultimately, Counterman was convicted for what he believed to be a few heated conversations.

B. Counterman's Conduct Would Not Support A Finding Of Recklessness

The Colorado courts held that true threats are governed by "an objective test," and "decline[d] * * * to say that a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes." Pet. App. 12a (quoting *R.D.*, 464 P.3d at 731 n.21). The courts did not even require the prosecution to prove that Counterman was *reckless* as to the threatening nature of his statements—that is, that he was "aware that others could regard his statements as a threat, but [chose to] deliver[] them anyway." *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part). Nor did the State proffer that position as a fallback.

As demonstrated, history and doctrine call for a showing of intent—at minimum, a defendant's *knowledge* that his speech will be regarded as a threat. Since the founding, courts have looked to what the defendant "meant by what he had written"—the statement "intended to be made," *Hill*, 5 Cox C.C. at 235—and emphasized that statements "must be intended to put the person threatened in fear of bodily harm," *Benedict*, 11 Vt. at 239. *Black* said a true threat is one "where a speaker directs a threat to a person or group of persons

with the intent of placing the victim in fear of bodily harm or death." 538 U.S. at 360. The *Black* defendants were at least *reckless* when they burned a massive cross at a Ku Klux Klan rally just off a public highway and attempted to burn a cross on a neighbor's yard. But recklessness was not enough to sustain their convictions. Nor was recklessness enough in *Watts*, where the defendant's statement clearly would have satisfied the standard. See, *e.g.*, *State* v. *Boettger*, 450 P.3d 805, 818 (Kan. 2019) ("The protester communicated he would shoot the president * * * [a]nd he was aware of the risk of causing fear but continued anyway.").

And while reckless disregard may be enough in the civil libel context, true threats fall much closer to incitement, which is "[t]he clearest example" of an intent standard. Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1381 (2016). "Given the common history of 'incitement' and 'true threats'" and the similar contexts in which they are applied, "the [incitement] test offers strong support for * * * a subjective element (intent) in the analysis of 'true threats.'" Blakey & Murray, *supra*, at 1069-1070; see also Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1291 (2014). It would be strange for the Court to now conclude "that while a subjective intent for others to cause violence clearly is required under incitement jurisprudence, no such subjective intent is required under the true threats doctrine." Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 Colum. J.L. & Arts 1, 12 (2014).

Counterman's conviction still could not stand under a recklessness standard. He did not "*consciously* disregard[] the risk that the communication transmitted w[ould] be interpreted as a true threat." *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)

(emphasis added). At most, he believed the messages were part of an ongoing conversation.

* * * * *

The notion that a person can spend years in prison for a "speech crime" committed by accident is chilling. Imprisoning speakers for negligently misunderstanding how others would construe their words is contrary to history, doctrine, and common sense. Counterman's conviction cannot stand.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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