No. 22-138

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IN THE
Supreme Court of the United States

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BILLY RAYMOND COUNTERMAN,

*Petitioner*,

v.

PEOPLE OF THE STATE OF COLORADO,

*Respondent*.

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On Writ of Certiorari to the Colorado Court of Appeals, Division II

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# BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

Amicus the Reporters Committee for Freedom of the Press ("Reporters Committee") is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect the newsgathering and publication rights of journalists around the country.

Amicus has a keen interest in ensuring that good-faith reporting on matters of public concern is not chilled by the prospect of a meritless threat or harassment prosecution. As past examples of overreach highlight, an overbroad conception of the true-threats exception to the First Amendment would have just that effect.

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[1] Pursuant to Supreme Court Rule 37, counsel for amicus curiae states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the amicus curiae, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The right to bring the public the news, like other First Amendment freedoms, "need[s] breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Throughout this Court's jurisprudence, strict "*mens rea* requirements" play an essential role in safeguarding that space—ensuring that journalists acting with a good-faith intent to inform the public need not fear that they "may accidentally incur liability" when covering challenging but important subjects. *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment). The domain of 'true threats' should be no exception: The press must be able to pursue its work without concern that reporting intended to promote public deliberation will be misconstrued—or pretextually mischaracterized—as an effort to threaten or harass.

That prospect, unfortunately, is far from hypothetical. Members of the news media have been investigated, threatened with liability, or even arrested for publishing political cartoons,[2] relaying a speaker's offensive opinion (even if only to expose it to scrutiny) via a letter to the editor,[3] writing about

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[2] *Cartoon in* Times *Prompts Inquiry by Secret Service*, L.A. Times (July 22, 2003), https://perma.cc/QF7Y-9HDR (editorial cartoon of "a man pointing a gun at President Bush").

[3] *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 521 (2005) (letter to editor advocating retaliatory violence against Iraqi Muslims in response to U.S. soldier deaths in second Iraq War).

personal traumatic experiences,[4] or making routine efforts to obtain comment from a public servant[5]—all on the theory that those exercises of the freedom of the press could be construed as a threat. Those examples of overreach make clear that reporting and commentary on matters of clear public concern would be at risk under an overbroad conception of the First Amendment's exception for true threats. And the concern is made more acute by the recent rise of 'anti-doxxing' legislation that could easily—in the absence of a strict *scienter* requirement—be misused to punish the publication of lawfully acquired truthful information about public officials. *See, e.g.*, *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1019 (E.D. Cal. 2017) (invalidating California law that restricted sharing lawmakers' information without distinguishing lawful and threatening purposes for doing so).

To avoid chilling valuable journalism that intends only to "inform citizens about the public business," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975), this Court should clarify that the First Amendment requires proof that the speaker

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4 Alba Villa, *Reporter Arrested on Suspicion of Stalking Story Subject*, Reporters Comm. for Freedom of the Press (June 3, 2004), https://perma.cc/ED8F-NQQK (personal essay expressing past anger at perpetrator of sexual violence).

5 *See, e.g.*, Gary A. Harki, *WTKR Reporter Accused of Harassing Former Mayoral Candidate*, The Virginian-Pilot (Aug. 21, 2015), https://perma.cc/8VQE-QE2J; Jonathan Jones, *Sheriff's Spokesman Charges Editor with Harassment*, Reporters Comm. for Freedom of the Press (July 27, 2009), https://perma.cc/9H6V-YXZN; Cassandra Belter, *Journalist Arrested, Charged with Harassment over Two Phone Calls*, Reporters Comm. for Freedom of the Press (Nov. 16, 2004), https://perma.cc/3CGW-8DPN.

subjectively "means to communicate a serious expression of an intent to commit an act of unlawful violence"—as the best reading of precedent already counsels, *Virginia v. Black*, 538 U.S. 343, 359 (2003). The judgment below is inconsistent with that safeguard for free speech and a free press. Amicus respectfully urges that it be reversed.

## ARGUMENT

### I. The prospect of a meritless threat or harassment prosecution can chill journalism on matters of public concern.

Statutes intended to punish threatening or harassing conduct can be, and have been, misused to target members of the press engaged in routine newsgathering on matters of public concern. To hold that the First Amendment's exception for true threats is indifferent to intent—that reporters confronting that kind of retaliation cannot present a defense that their only purpose was to "inform the people," *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)—would sharpen the risk of abuse. The result would be a chilling effect on press functions as routine as making phone calls to a source, publishing satire or a speaker's political hyperbole, and surfacing information relevant to "public discussion of the stewardship of public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

Consider efforts to contact potential sources. Few "routine newspaper reporting techniques," *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979), are more conventional—or more obviously protected by

the First Amendment—than "asking various witnesses" to a newsworthy development for their perspective, *id.* at 99; *see also In re Express-News Corp.*, 695 F.2d 807, 808–09 (5th Cir. 1982); *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 237 (1998). To ensure their reporting is as accurate and informative as possible, journalists are expected to interview "as wide a range of people as possible" and to make determined efforts to obtain comment from the subject of a story. *How to Write a Profile Feature Article*, N.Y. Times (1999), https://perma.cc/57EL-MAE6. Those steps might extend to contacting a public servant's friends and family to build a full picture of their life, or waiting outside an office building to speak to an executive about the conduct of the corporation they lead. *See* Keith Woods, *The Steps to Finding, Developing and Vetting News Sources*, NPR (Sept. 25, 2017), https://perma.cc/B6XS-UVNM. In each case, it should be clear that inquiries that might be offensive or intrusive "when done for socially unprotected reasons [such as] harassment [or] blackmail" are indispensable to an informed public "when employed by journalists in pursuit of a socially or politically important story." *Shulman*, 18 Cal. 4th at 237.[6]

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[6] For much the same reason, no objectively reasonable person would construe "routine newspaper reporting techniques" as a threat in the first place. *Daily Mail*, 443 U.S. at 103; *see also, e.g.*, *Citizen Publ'g Co.*, 210 Ariz. at 521 (noting, for purposes of an objective inquiry, that newspapers are "hardly a traditional medium for making threats"). But as discussed in more detail below, this Court has often insisted on a showing of both objective harm *and* subjective bad intent when defining unprotected speech in order to ensure good-faith speakers and publishers can exercise their rights with confidence. So too here.

Still, subjects of important investigative stories have attempted to quash that kind of reporting by claiming a threat to their safety. In a high-profile case just last year, for instance, a cosmetic surgeon leveraged false claims that he was threatened with violence to obtain a restraining order against two *Los Angeles Times* reporters investigating allegations that he was practicing medicine without a license. *See* Jack Dolan & Brittny Mejia, *A Russian Thug and a Fake Yelp Account: An Ex-Doctor's Wild Campaign Against Reporters*, L.A. Times (Aug. 3, 2022), https://perma.cc/X8DK-NKAS. Journalists have confronted similar legal risk—up to and including arrest or criminal charges—for routine efforts to report on or obtain comment from candidates for public office, *see WTKR Reporter Accused of Harassing Former Mayoral Candidate*, *supra*; law enforcement officials, *see Sheriff's Spokesman Charges Editor with Harassment*, *supra*; *Journalist Arrested, Charged with Harassment over Two Phone Calls*, *supra*; and a range of other public servants, *see, e.g.*, *Kern v. Clark*, No. 01-CV-450S, 2004 WL 941418, at *2 (W.D.N.Y. Apr. 9, 2004) (housing authority commissioner).

The chilling threat of liability extends past the initial newsgathering process; journalists have also faced the prospect of a meritless threat or harassment prosecution for what they publish. Editorial cartoons, for instance, often rely on exaggerated imagery to make their point and (while "usually as welcome as a bee sting") have "played a prominent role in public and political debate." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 54 (1988) (citation omitted). If any depiction of cartoon violence invited a knock on the door from the Secret Service—as when its agents

visited the *Los Angeles Times*' offices over a cartoon depicting "a man pointing a gun at President Bush," *see Cartoon in* Times *Prompts Inquiry*, *supra*—"our political discourse" would be "considerably poorer" for it, *Falwell*, 485 U.S. at 55. And the *Los Angeles Times* incident makes the chilling risk of misinterpretation especially clear. Where the Secret Service saw "material that might be construed as a threat against the president," the cartoonist intended "the opposite"—an expression of frustration that "Bush [was] being undermined by critics" in a "political attack." *Cartoon in* Times *Prompts Inquiry*, *supra*.

The absence of an intent requirement would likewise chill the publication of "political hyperbole" more broadly. *Watts v. United States*, 394 U.S. 705, 708 (1969). Often, important public debates "cannot be nicely channeled in purely dulcet phrases," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982), and newspapers in turn cannot fully inform the public about those political disputes without relaying the language that their officials or their fellow citizens use—even if "vehement, caustic, and sometimes unpleasantly sharp," *Sullivan*, 376 U.S. at 270. But media organizations have nevertheless confronted the threat of a tort suit for publishing that commentary without sanitizing it, "for printing," for instance, "a letter to the editor about the war in Iraq" that advocated offensive and illegal retaliation against Iraqi Muslims for the deaths of U.S. soldiers. *Citizen Publ'g Co.*, 210 Ariz. at 515; *see also id.* at 519 (noting that the *Tucson Citizen* also published "numerous *critical* letters to the editor" condemning the letter writer (emphasis added)). If a speaker's intent were irrelevant to the analysis, news organizations could

face a chilling threat of liability whenever they accurately communicate the reality that participants in important policy conversations are not "follow[ing] Marquis of Queensberry rules," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992), and would risk litigation for surfacing extreme views even if only to expose them to public scrutiny.

Finally, the concern that an overbroad conception of 'true threats' could chill important journalism is perhaps most acute with respect to the recent rise of 'anti-doxxing' laws that seek to penalize the publication of truthful information about public officials. Without guidance from this Court that 'true threats' require subjective intent to threaten, statutes that regulate "the mere release of personal identifying information" without reference to a publisher's purpose, *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1141 (W.D. Wash. 2003), may raise troubling obstacles to important accountability reporting.

Multiple states, for instance, have enacted statutes that prohibit the dissemination of personal information about specific classes of public officials—from law enforcement officers to public health workers—where the publisher "reasonably should know" of a threat to the individual's safety, regardless of whether the speaker intends to harm or instead to inform the public. Colo. Rev. Stat. § 18-9-313(2.7); *see also* Kan. Stat. Ann. § 21-5905; Minn. Stat. Ann. § 609.5151(2)(a)(2). But that same information may be emphatically newsworthy where, for instance, a Senator's second home provides evidence of undisclosed financial gains, or a candidate's address is relevant to allegations of carpetbagging. *See* Frank

D. LoMonte & Paola Fiku, *Thinking Outside the Dox: The First Amendment and the Right to Disclose Personal Information*, 91 UMKC L. Rev. 1, 1 (2022) (offering the example of controversy over Mayor Eric Adams's New York residency); *cf. Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (distribution of realtor's phone number to encourage criticism of his business practices is protected speech). To prohibit sharing that information without reference to a publisher's purpose for doing so would chill important "public discussion of the stewardship of public officials." *Sullivan*, 376 U.S. at 275.

Doubtless, a public figure may feel stress or anxiety on learning that the local paper intends to expose his conduct to public scrutiny—but that work is fundamental to "the function of a newspaper." *Org. for a Better Austin*, 402 U.S. at 419. As the examples above demonstrate, reading the intent requirement out of the First Amendment's exception for 'true threats' would force journalists to think twice before making a determined effort to obtain comment; reporting a speaker's incendiary—but newsworthy—hyperbole; or publishing personal information relevant to evaluating the conduct of public officials. That chilling effect, in "limiting the stock of information from which members of the public may draw," would offend the core purposes of the First Amendment. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

## II. The First Amendment shelters good-faith reporting—like other valuable speech—by requiring proof of intent to threaten.

The Constitution guards against that chilling effect by requiring proof of a speaker's subjective intent to threaten. This Court has permitted a limited range of restrictions on speech that has historically fallen outside the First Amendment's purview. But these "historic and traditional categories" are "well-defined and narrowly limited." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (citations omitted). 'True threats' are no exception. *See Black*, 538 U.S. at 359. The best reading of this Court's precedent defines true threats to require that the "speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence." *Id.* (emphasis added). To the extent that *Black* left open any question about whether a 'true threat' requires subjective intent, this Court—to avoid chilling valuable journalism—should clarify that *Black*'s "clear import . . . is that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

Strict *scienter* requirements play a similarly critical role in other areas of this Court's First Amendment jurisprudence, "provid[ing] 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability." *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in the judgment). Punishable incitement, for instance, must be "*directed* to inciting or producing imminent lawless action," because a broader framework risks "sweep[ing] within its condemnation speech which our Constitution has immunized from governmental control." *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (emphasis

added). Liability for defamation of a public official requires "actual malice," because a less stringent rule raises "the possibility that a good-faith critic of government will be penalized for his criticism." *Sullivan*, 376 U.S. at 279–80, 292. And the First Amendment similarly precludes punishing mere membership in a group with both lawful and unlawful aims, absent "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence,'" to avoid impairing "legitimate political expression or association." *Scales v. United States*, 367 U.S. 203, 229 (1961) (quoting *Noto v. United States*, 367 U.S. 290, 299 (1961) (alterations in original)).

This Court should strictly enforce the same line in the true-threats context—a boundary all the more important when "the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). If the threat of liability shadowed any dogged effort to contact the subject of a story, the press could not fulfill its constitutional role as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry." *Estes v. Texas*, 381 U.S. 532, 539 (1965). And that prospect could not be squared with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *Sullivan*, 376 U.S. at 270.

This Court should ward off that risk by reiterating what precedent already supports: the First

Amendment demands "proof that the speaker intended his statement to be taken as a threat." *Rogers v. United States*, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring). Without that safeguard, statutes intended to punish intentional harassment or stalking will risk chilling journalists engaged in good-faith newsgathering, or weighing whether to publish newsworthy, lawfully obtained information about matters of public concern. And because the decision below is inconsistent with that principle, the judgment below should be reversed.

## CONCLUSION

For the foregoing reasons, amicus respectfully urges that the judgment below be reversed.

Respectfully submitted,

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March 1, 2023