No. 22-138

In The Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

COLORADO,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Rutherford Institute is interested in this case because it touches on core questions of individual liberty that the First Amendment was created to protect and preserve. Because the Bill of Rights serves as a safeguard against government excess, The Rutherford Institute respectfully submits that the Court should grant the petition and reverse the Colorado Court of Appeals.

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[1] Counsel of record for both parties received timely notice of The Rutherford Institute's intention to file this *amicus curiae* brief in accordance with Rule 37.2(a), and both parties consented in writing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft* v. *ACLU,* 542 U.S. 656, 660 (2004). The Constitution's protection of free speech is accordingly at its highest when government attempts to prosecute someone for his spoken words. Although this Court has recognized exceptions to that bedrock rule, it has equally recognized that they must be clearly delineated and narrowly circumscribed to avoided chilling protected speech. *E.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 399 (1992). Nonetheless, the state of the law with respect to the exception at issue—which allows the state to impose criminal liability for "true threats"—is hopelessly muddled.

The decision below is a regrettable consequence of that confusion. Petitioner was tried and convicted for sending messages over Facebook which the recipient and court construed as threatening. Lower courts are divided on whether such behavior can be criminalized without evidence that the speaker subjectively intended for the speech to be an actual threat. This lack of clarity urgently requires this Court's attention.

Amicus offers three basic points.

First, divisions among the lower courts over the "true threats" doctrine are particularly dangerous to liberty and cry out for this Court's review. Courts have adopted divergent standards for determining when speech is an unprotected "true threat." And

this Court has issued only two opinions on the issue, the last one over 15 years ago (and a fractured one at that). The very existence of ambiguity over whether and when the government may criminally prosecute someone for the content of their speech is a serious threat to liberty. The situation is more alarming given that the Nation is undergoing a communications revolution, driven by unprecedented new forms of online expression—and unprecedented new attempts by government to monitor and restrict such expression. This case is a good vehicle to set clear, badly-needed boundaries on government authority to limit online expression through criminal prosecution.

Second, in clarifying the law, this Court should emphasize that the "true threats" exception, just like obscenity, defamation, and other exceptional categories of unprotected speech, is an exceedingly narrow carveout from the constitutional norm. The First Amendment favors more speech, not less; and the government bears a heavy burden when it seeks to proscribe categories of speech. To keep the "true threats" exception narrow, the Court should confirm what its decisions already suggest: for the exception to apply, the targeted speech must be both objectively threatening *and* subjectively intended as a threat.

Third, the Court's guidance is necessary to avoid chilling protected expression. This Court's longstanding concern with government action that might chill protected artistic or political expression is implicated here, And the particular error here further exacerbates that risk: By adopting an objective-only test, the Colorado Court of Appeals embraced a rule which fails to protect defendants who are prose-

cuted for their speech, and can leave some controversial speakers unprotected even with respect to political or artistic expression.

Accordingly, the Court should grant the petition for certiorari and revisit its "true threats" jurisprudence.

ARGUMENT

I. THE COURT SHOULD ADDRESS PERVASIVE CONFUSION OVER THE "TRUE THREATS" EXCEPTION TO THE FIRST AMENDMENT

"Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. At its fundamental level, the First Amendment prohibits the state from imprisoning people for the content of their speech. Yet the courts are deeply divided over the scope of the judicially-recognized exception permitting prosecution for "true threats." Such confusion would be intolerable in any circumstance, but it is especially intolerable at this moment, as governments seek to control and regulate new forms of online expression. Fresh guidance from this Court on the "true threats" exception is urgently needed—and this case presents a good vehicle for providing such guidance.

A. The Law Governing The "True Threats" Exception Is In Disarray, Threatening Liberty

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States* v. *Stevens*, 559

U.S. 460, 468 (2010) (quoting *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002)). This Court has identified a few very narrow exceptions—"certain well-defined and narrowly limited classes of speech," such as obscenity and defamation—that may be punished without offending the First Amendment. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 399 (1992) (internal quotation marks omitted); *accord United States* v. *Alvarez*, 567 U.S. 709, 716-717 (2012) (listing the "few historic and traditional categories" of expression that may be subject to content-based regulations (cleaned up)).

In *Watts* v. *United States*, the Court postulated that one of those narrowly limited classes of speech might be so-called "true threats." 394 U.S. 705, 708 (1969) (per curiam). But the Court did not find the speech at issue in *Watts*—a statement made at a Vietnam War protest that the petitioner, if drafted, would aim his rifle at President Johnson—was a true threat. *Id.* at 706. Rather, it concluded that the petitioner's performance, even if "a kind of very crude[,] offensive method of stating a political opposition to the President," could not reasonably be interpreted as a threat. *Id.* at 708 (cleaned up). A "'vehement, caustic, and [an] unpleasantly sharp attack[] on government,'" the Court held, is still not a true threat. *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, the Court reversed the petitioner's conviction. *Id.*

Decades passed before this Court revisited the "true threats" exception in *Virginia* v. *Black*, 538 U.S. 343 (2003). In a fractured decision, the Court struck down state action as inconsistent with the First Amendment, holding unconstitutional a Virgin-

ia statute treating the public burning of a cross as "'prima facie evidence of an intent to intimidate.'" *Id.* at 348. Justice O'Connor's plurality opinion explained that cross-burning *could* fall within the category of "true threats" unprotected by the First Amendment, *id.* at 360, but that the statute went too far by presuming that cross-burning is "always intended to intimidate," *id.* at 365.

More recently, the Court had the opportunity to clarify some aspects of the "true threats" exception in *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), which considered whether the petitioner's Facebook posts, including posts involving imagined violence against his ex-wife, violated the federal threats statute. 135 S. Ct. at 2004. But the Court resolved that case entirely on statutory grounds, *id.* at 2010, providing no further guidance as to what constitutes a constitutionally-unprotected "true threat."[2]

Together, *Watts* and *Black* indicate that, at a minimum, a "true threat" must be *both* objectively threating to a reasonable listener and subjectively intended as such by the speaker. *See infra* Part II.A; *see also United States* v. *Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012) (Sutton, J., dubitante) (suggesting that interpretation with respect to the federal threat statute); *United States* v. *Parr*, 545 F.3d 491, 500

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[2] The Court in *Elonis* held only that 18 U.S.C. § 875(c) requires a *mens rea* greater than negligence, declining to consider whether recklessness is sufficient. 135 S. Ct. at 2012-13. In that way, too, the Court refrained from clarifying the laws criminalizing threatening speech. *See id.* at 2014 (Alito, J., concurring in part and dissenting in part) (failure to articulate clear *mens rea* standard "will have regrettable consequences"); *id.* at 2028 (Thomas, J., dissenting) (criticizing failure "to announce a clear rule").

(7th Cir. 2008) (suggesting speech "must objectively *be* a threat and subjectively be *intended* as such" but that, post-*Black*, the rule is "unclear"). Yet with virtually no guidance from this Court on the nature of the "true threats" exception for over a decade, state high courts and federal courts of appeals have become deeply divided on even the most basic questions regarding the exception's scope. Most courts apply some objective reasonable listener standard. *See, e.g.*, *Jeffries*, 692 F.3d at 478 (majority opinion). A minority employ a purely subjective test. *E.g.*, *United States* v. *Heineman*, 767 F.3d 970, 978 (10th Cir. 2014). Further divisions exist on either side of the objective/subjective divide.[3]

There is thus significant confusion over when government may prosecute individuals for their speech. Such ambiguity in the criminal law is dangerous to liberty, as it requires ordinary citizens to decipher "riddles that even … top lawyers struggle to solve." *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1891 (2018). Indeed, such ambiguity contravenes the definitional requirement that, for a category of speech to fall outside of the First Amendment's broad ambit, it must be "'well-defined'" and "'narrowly limited.'" *R.A.V.*, 505 U.S. at 399 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942)); *see also Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) ("government [must] not dictate the content of speech ab-

[3] *Compare United States* v. *Clemens*, 738 F.3d 1, 11 (1st Cir. 2013) (some courts apply a subjective intent standard only to communication of the threat, but not the threat itself), *with United States* v. *Cassel*, 408 F.3d 622, 632-633 (9th Cir. 2005) (requiring "that the speaker subjectively intended the speech as a threat").

sent compelling necessity, and then, only by means precisely tailored").

The "true threats" exception stands in contrast to other categories of unprotected speech that have benefited from this Court's sustained attention. The Court worked hard to define the limits of the obscenity exception, recognizing the "strain" placed "on both state and federal courts" by confusion in the law. *Miller* v. *California*, 413 U.S. 15, 20-23, 24, 29 (1973); *see also Hamling* v. *United States*, 418 U.S. 87, 123 (1974) (setting forth scienter requirement for obscenity exception). As new questions about the obscenity exception arose in the context of early online speech, the Court took those up, too. *E.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 868-869 (1997) (full First Amendment protection accorded to "the vast democratic forums of the Internet").

Similarly, this Court's cases evince a long "struggle[] … to define the proper accommodation between the law of defamation and the … First Amendment," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). After the "actual malice" standard announced in *New York Times Co.* v. *Sullivan* divided the Court, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court revisited the issue just three years later, *Gertz*, 418 U.S. at 333-339, 347. And because confusion over the scope of the defamation exception persisted, the Court repeatedly returned to the issue. *See, e.g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 50 (1988) (parody protected and not subject to defamation exception).[4]

[4] Likewise, with respect to the amorphous "fighting words" exception, *see Chaplinsky*, 315 U.S. at 572, the Court limited

Confusion over the "true threats" exception presents the same significant dangers to liberty as confusion over those other exceptions to the First Amendment—and the same imperative to remedy such confusion and reaffirm First Amendment rights. Defining the scope of First Amendment exceptions with precision "may not be an easy road," but it is part of the Court's "'duty to uphold … constitutional guarantees.'" *Miller*, 413 U.S. at 29 (quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-188 (1964) (opinion of Brennan, J.)).

B. This Is The Right Vehicle For Clarifying The "True Threats" Exception

This case is a good vehicle for the Court to consider the scope of the "true threats" exception and to provide badly needed guidance for the lower courts regarding when government may prosecute people based on the substance of their expression.

First, this case raises the question dividing state and federal circuit courts, namely the nature of the "true threats" test and its objective/subjective components. One aspect of that question is the level of *mens rea* required to render allegedly threatening speech unprotected, which this Court has flagged as worthy of consideration but not yet addressed by applying First Amendment principles, *see Elonis*, 135 S. Ct. at 2004; *see also Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring) (urging the Court to decide the constitutional "question [it] avoided … in *Elonis*"). Another aspect is whether

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that exception's scope, *see, e.g.*, *Cohen* v. *California*, 403 U.S. 15, 19-20 (1971), and ultimately reduced it to near non-existence, *e.g.*, *R.A.V.*, 505 U.S. at 383-384.

the speech at issue must be objectively threatening, subjectively intended as such, or both. *Compare, e.g.*, *Jeffries*, 692 F.3d at 478, *with, e.g.*, *Heineman*, 767 F.3d at 978, *and Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante). The decision by the Colorado Court of Appeals implicates both issues. Granting certiorari would allow the Court to resolve fundamental, unsettled, and urgent questions about the "true threats" exception.

Second, this case is an especially good vehicle because it arises in the context of online speech. As the Court recently recognized, "the 'vast democratic forums of the Internet'" are now "the most important places … for the exchange of views." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1735 (2017). And social media sites like Facebook and YouTube are the most important and broadly used channels of online communication and expression today, used to "debate religion and politics," "look for work," and "petition … elected representatives." *Id.* at 1735-1736*; Elonis*, 135 S. Ct. at 2004-2005 (discussing use of Facebook); *see also* Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014) ("Social media is a necessary part of modern interaction.").

The Internet provides a medium for communication, expression, and commentary to flourish at a historically unprecedented scale; anyone with a computer or smartphone can be a publisher or a performer. But as the Internet changes the fabric of American life, government has tried and will keep trying to monitor, restrict, and prosecute expression on the Internet in myriad new ways. *See, e.g.*, *Packingham,* 137 S. Ct. at 1737 (state law forbidding cer-

tain people from speaking through social media). And the Internet provides those who would police speech with a target-rich environment; indeed, in *Packingham* and *Elonis*, law enforcement officials actively surveilled social media for speech to target. *Id.* at 1734; *Elonis*, 135 S. Ct. at 2006.

As the Internet enhances our ability to communicate and express our views, it also enhances the government's ability to police our communication and expression. Affirming that the First Amendment's protections apply fully to online expression is an independent reason to take up this case.

II. THE COURT SHOULD EMPHASIZE THAT THE "TRUE THREATS" EXCEPTION IS NARROW

The Court should grant the petition to answer urgent questions regarding the "true threats" exception in a manner that expands, rather than contracts, individual liberty. The "true threats" exception must remain an exceedingly narrow carveout to the broad protections of the First Amendment. Requiring courts to consider targeted speech both objectively *and* subjectively is one important way to ensure that result. By contrast, the test employed by the Colorado Court of Appeals works an unwarranted and dangerous expansion of the "true threats" exception.

A. The "True Threats" Exception Is Narrow

The constitutional right to free speech is an essential aspect of American liberty. Accordingly, content-based restrictions on speech are "presumed invalid," and the burden is *always* on the government to show that a speech regulation falls within the con-

fined set of categories that may be subject to content-based prosecution. *E.g.*, *Alvarez*, 567 U.S. at 716-717 (quotation marks omitted). Close questions, moreover, must be resolved in favor of more expression, not less; this Court "give[s] the benefit of the doubt to speech, not censorship." *FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 482 (2007) ("*WRTL*"); *see also, e.g.*, *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.").

Under those principles, this Court has struck down content-based speech restrictions in numerous contexts, even in cases involving repulsive, distasteful, or terrifying speech. *See, e.g.*, *Alvarez,* 567 U.S. at 729-730 (false statements about receiving military honors); *Snyder* v. *Phelps*, 562 U.S. 443, 460 (2011) (picketing of military funerals, which was "certainly hurtful"); *Stevens*, 559 U.S. at 465-466 (depictions of animal cruelty, including "crush videos" that showed "women slowly crushing animals to death"); *Texas* v. *Johnson*, 491 U.S. 397, 419-421 (1989) (flag desecration, despite the "flag's deservedly cherished place in our community"); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (Ku Klux Klan rally).

The Court has been similarly skeptical of efforts to prosecute supposedly threatening speech. In *Watts*, the Court reversed the petitioner's conviction, holding that the government may theoretically prohibit "true threats," but only after a thorough consideration of context, set against the presumption that crude, offensive, abusive, inexact, or unpleasant rhetoric is still protected. 394 U.S. at 707-708. Later, the Court reaffirmed the narrowness of the "true

threats" exception in *Black*, highlighting that even when speech is overwhelmingly viewed as discomfiting or offensive, 538 U.S. at 358, the "First Amendment does not permit … shortcut[s]" in determining that it is a true threat, *id.* at 367 (plurality op.). Going further, Justice O'Connor explained for the plurality that, to fall within the "true threats" exception, the speaker also needed to act with specific intent to intimidate. *See id.* at 359, 366-367. Both *Watts* and *Black* demand a searching, detailed inquiry before declaring that speech is unprotected by the First Amendment and subject to criminal sanction.

B. Requiring Both Objective And Subjective Analyses Will Keep The "True Threats" Exception Narrow And Safeguard Liberty

Together, *Watts* and *Black* provide a strong foundation for holding that (at a minimum) a true threat must be both objectively threatening to a reasonable listener *and* subjectively intended as such by the speaker. *Accord Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante). The Court in *Watts* looked to objective factors—the context in which the statement was made, its conditional nature, and the reaction of the audience—to hold that the speech at issue was not a threat. 394 U.S. at 708; *see also Elonis*, 135 S. Ct. at 2027 (Thomas, J., dissenting) ("*Watts* continued the long tradition of focusing on objective criteria[.]"). And the Court in *Black* repeatedly stressed that a true threat requires threatening intent on the part of the speaker. 538 U.S. at 359 (true threats "encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit" violence (emphasis added)).

Embracing that reasoning would help ensure that the "true threats" exception remains narrow. Neither *Watts* or *Black* considered objective or subjective analysis to the exclusion of the other. And requiring both analyses—considering both the subjective intent of the defendant and also the objective seriousness of the purported "threat"—would set an appropriately high bar for the prosecution and imprisonment of people solely for the content of their speech. *See Alvarez*, 567 U.S. at 726 (noting government's "heavy burden" in seeking to regulate protected speech). There are numerous "legal standard[s] that contain[] objective and subjective components" across the law, from the Eighth Amendment to the immigration law's "well-founded fear" requirement. *Jeffries*, 692 F.3d at 485-486 (Sutton, J., dubitante) (collecting examples). Requiring both objective and subjective components is especially appropriate before someone is locked up for speaking. *E.g.*, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("A law imposing criminal penalties on protected speech is a stark example of speech suppression.").

By contrast, the decision of the Colorado Court of Appeals will, if allowed to stand, lower the bar that the government must meet before criminalizing free expression. It allows for a criminal conviction based entirely on the listener's perception of the nature of the statement, even if the speaker did not intend the speech to be threatening and did not threaten any violent or unlawful act. By incorrectly ignoring the need to prove the defendant's intent, the court below "reduces culpability on the all-important element of the crime to negligence," *see Jeffries*, 692 F.3d at 484, and creates a grave risk that "nonthreatening ideo-

logical expression" will be drawn "within the ambit of the prohibition of intimidating expression," *Black*, 538 U.S. at 386 (Souter, J., concurring in part in the judgment and dissenting in part).

Lowering the bar in this manner would vitiate the law's longstanding preference for more speech, not less. *See, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'"); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas[.]"); *accord WTRL*, 551 U.S. at 482. Lowering the bar for invoking the "true threats" exception would endanger free expression at a time of heightened uncertainty regarding online speech in particular, and it would contravene the reasoning of *Watts* and *Black* as well as fundamental First Amendment principles. The Court should take up this case to ensure that the "true threats" exception to the First Amendment remains narrow.

III. THE COURT'S GUIDANCE IS REQUIRED TO PREVENT THE CHILLING OF PROTECTED SPEECH

The presence or absence of First Amendment protection has real world effects. Ill-defined categories of criminally-proscribed speech are likely to chill otherwise protected expression, as speakers who cannot discern any limiting principle attempt to steer clear of the criminal law. And the error by the court below—the adoption of an objective-analysis-only test—exacerbates those chilling effects.

A. This Case Implicates The Growing Concerns Over The Chilling Of Protected Online Speech

Government action that chills free expression is in "direct contravention of the First Amendment's dictates." *Riley*, 487 U.S. at 794; *see also New York Times*, 376 U.S. at 279 (a rule that "dampens the vigor and limits the variety of public debate … is inconsistent with the First and Fourteenth Amendments."). This is especially true when the regulation at issue chills speech and expression through "'fear of criminal sanctions.'" *E.g.*, *New York* v. *Ferber*, 458 U.S. 747, 768-69 (1982); *see also Black*, 538 U.S. at 365 (plurality op.) (challenged statute "chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech[.]"). Concerns about chilling effects are at their zenith when there is a possibility that government action might stifle artisic or political expression. *See, e.g.*, *Miller*, 413 U.S. at 22-23 ("[T]he courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.").

Criminalizing petitioner's speech unquestionably raises the significant risk of chilling other types of online expression. *E.g.*, *Watts*, 394 U.S. at 708 (even "vituperative" language must be interpreted "'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'"). Online speech is particularly vulnerable to the risk of chilling effects. Users of social media sites such as YouTube and Facebook "employ these

websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S. Ct. at 1735-1736 (quoting *Reno*, 521 U.S. at 870). And the "language of the political arena . . . is often vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708.

The Internet—and in particular social media—is the largest and most important public forum on the planet. *See Packingham*, 137 S. Ct. at 1735 ("[I]n identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace ... and social media in particular."). And it is also the most easily surveilled. Just as in *Watts*, where a federal investigator infiltrated a public political rally and made an arrest based on offensive political statements, 394 U.S. at 708, law enforcement now infiltrate and monitor political fora on the Internet. *See Packingham*, 137 S. Ct. at 1734; *Elonis*, 135 S. Ct. at 2006. The ease with which government agents may monitor speech online greatly magnifies the potential chilling effects caused by confusion over the scope of the "true threats" exception. *Cf. Ferber*, 458 U.S. at 768-769 (statutes permitting punishment of speech must be narrowly drawn to avoid chill); *Gooding* v. *Wilson*, 405 U.S. 518, 521-522 (1972) (same).

The confused state of the law further intensifies those risks. For example, the Ninth and the Third Circuit have adopted *opposing* views of what is required to establish a "true threat." *Compare United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005) (requiring proof that the speaker subjectively intended the speech as a threat, and noting that "eight Justices agreed [in *Black*] that intent to intimidate is

necessary and that the government must prove it") *with United States* v. *Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013) ("[O]ur test asks whether a reasonable speaker would foresee the statement would be understood as a threat."), *rev'd on other grounds*, 135 S. Ct. 2001 (2015). The lack of clarity over how the First Amendment applies makes it likely that the specter of "criminal threats" liability will chill protected expression.

B. Neither The Objective Standard Or The Subjective Standard Alone Satisfies Due Process

The government violates due process when it enacts a criminal law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. A criminal statute, therefore, must give "persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Furthermore, the statute must provide sufficiently clear standards of enforcement such that "those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

The Colorado statute here, Colo. Rev. Stat. § 18-3-602(1)(c) (2020), in requiring only an objective analysis of the perceived threatening nature of a defendant's statements, violates these fundamental due process protections. The statute fails to provide sufficient notice of when one's speech crosses over from permissible expression protected by the First Amendment to impermissible true threats. But re-

quiring analysis and proof of the speaker's subjective intent would reduce the risk of misinterpreting statements *post hoc*.

An objective-only analysis approach invites courts to engage in conjecture and speculation in violation of due process when interpreting the meaning of the statements, as the Colorado court did here. Under that approach, the statute does not provide sufficiently clear standards of enforcement to avoid arbitrary or discriminatory enforcement. None of Counterman's messages expressed any plan or intent to harm the recipient, *Colorado v. Counterman*, 497 P.3d 1039, 1044 (Colo. App. 2021), and it cannot be assumed that Counterman knew the recipient was fearful or distressed by his online messages rather than just uninterested or slightly annoyed.

However, the Colorado Court of Appeals stretched to extract threatening implications from ambiguous and "somewhat suggestive" statements, such as "You're not being good for human relations. Die. Don't need you," and "F[**]k off permanently." *Id.* Although acknowledging that the recipient is a "local public figure" and that Counterman's messages "don't explicitly threaten [the recipient's] life," the Colorado Court of Appeals engaged in a psychological type of analysis, delving into what it thought each of Counterman's statements really meant while still indicating its uncertainty by repeatedly using terms like "imply," "somewhat suggestive," "reflect a feeling of," "indicate," and "contributed to an impression that." *Id.* at 1047-48. Even though this Court explained in *Black* 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*," and "[i]ntimidation … 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*," 538 U.S. at 359-60 (emphasis added), the Colorado court concluded that Counterman's messages "imply a disregard for [the recipient's] life and a desire to see her dead," and were thus true threats rather than mere expressions of frustration. *Counterman*, 497 P.3d at 1047-48.

While the government clearly has a valid interest in protecting people from stalking, Colorado has created and applied a statute so broad and vague in its scope that it can criminalize a wide range of protected speech and activity. For example, someone could write these two very same phrases to their congressional representative out of frustration from the representative's lack of effort ("Die. Don't need you"—i.e., you're not serving any purpose or doing your job) or support of an unfavorable bill ("F[**]k off permanently") without subjectively intending any threat of bodily harm or unlawful activity. But if that representative was emotionally distressed by those messages, then the sender could be found in violation of Colorado's statute and sentenced to years in prison because their representative was disturbed by receiving harsh criticism.[5] Given the severe nature of criminal sanctions and the chilling effect they have on protected speech, constitutional safeguards

[5] A person was convicted of cyberstalking for sending emails to a political candidate, which was then reversed for insufficient evidence "when the statute is interpreted in a way that is consonant with the First Amendment." *United States v. Sryniawski*, No. 21-3487, slip op. at 5 (8th Cir. Sept. 2, 2022).

should be put in place to at least require an inquiry into a defendant's subjective intent.[6]

C. Both Objective And Subjective Analyses Are Needed To Protect Free Expression

This Court has explained that "no reasonable speaker" would engage in expression that could be punished by the state when the "only defense to a criminal prosecution would be that [the speaker's] motives were pure." *WRTL*, 551 U.S. at 468. The error committed by courts which adopt a purely subjective intent test for whether speech is an unprotected "true threat"—is likely to chill free expression for that reason and several others.

First, a subjective-intent-only test makes it harder for courts of appeals to reject criminal liability for speech that, while controversial or offensive, is objectively non-threatening. A defendant's subjective intent is classically a question of fact for a jury. For subjective-analysis-only courts, like the Ninth Circuit, whether speech is a "true threat" thus reduces to a factual issue. *See, e.g.*, *Melugin* v. *Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994). And factfinding typically is (and should be) exceedingly difficult to overturn on appeal. Thus, when courts adopt a subjective-intent-only standard, they effectively insulate the "true threats" determination from appellate review. *See, e.g., Pennsylvania v. Knox*, 647 Pa. 593, 190 A.3d 1146 (2018) (treating the subjective intent

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[6] Even if Counterman's statements could not be criminally punished as true threats, he could still possibly be subject to a protective order, *see Counterman*, 497 P.3d at 1043, presumably prohibiting any further communications to the complainant.

question as a finding of fact, and asking only whether competent evidence supported it).

Such insulation is dangerous. Courts are the appropriate final arbiters of the scope of the First Amendment, especially for speakers who are unpopular or lack political power or social capital. Hampering appellate courts' ability to intercede on behalf of unpopular or controversial speakers undercuts free expression and undermines one of the most important functions of judges in a free society: upholding the Bill of Rights against majoritarian encroachment. *See, e.g.*, *Arizona Free Enter. Club's*, 564 U.S. at 754 ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities … and to establish them as legal principles to be applied by the courts."). The deferential standard of review applicable to findings of fact does not sufficiently protect someone who faces imprisonment for his speech.

Second, even where a defendant *might* have some intent to intimidate, that alone cannot be enough. *Cf. WRTL*, 551 U.S. at 468 (subjective-intent-only test "could lead to the bizarre result that

identical [speech] could be protected speech for one speaker, while leading to criminal penalties for another"). Objective analysis is much better at distinguishing between a genuine threat and protected expression motivated by real pain or anger. *Cf. Snyder*, 562 U.S. 443, 460-61 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain.... [W]e cannot react to that pain by punishing the speaker."). Objective analysis thus helps ensure "sufficient breathing room for protected speech." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). By contrast, critical context is rendered largely irrelevant under a subjective-intent-only standard. And all of this is doubly true online, where background facts may be hard to ascertain, where content is often designed to titillate and provoke, where hyperbole is common, and where context is all the more important to grasp the meaning of disembodied words, images, and media.[7]

A combined objectivity and subjectivity requirement ensures that only real threats of violence are subject to criminal sanctions. *See Jeffries*, 692 F.3d at 480. It ensures that the "true threats" exception remains anchored to its ultimate purpose—protecting listeners from genuine "fear of violence," *R.A.V.*, 505 U.S. at 388, while permitting sufficient "breathing space" for the type of speech the First

[7] Moreover, the gap between a speaker's intentions and their objective capacity to commit real-world harm becomes a chasm in the context of online speech. Ugly and offensive forms of provocation—"trolling," in common parlance—are rampant online. Only by objectively considering the full context could a court fairly determine whether speech in fact conveys to a reasonable observer "a serious expression of an intent to commit" violence. *Black*, 538 U.S. at 359.

Amendment intends to protect, *Elonis*, 575 U.S. at 748. Requiring speech to be *both* objectively threatening to a reasonable listener *and* subjectively intended as such will help ensure that the "true threats" exception does not chill protected expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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