No.

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN, PETITIONER

v.

THE PEOPLE OF THE STATE OF COLORADO

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

PETITION FOR A WRIT OF CERTIORARI

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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 that an objective "reasonable person" would regard the statement as a threat of violence.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Counterman* v. *People*, No. 21SC650, Supreme Court of Colorado. Petition for review denied April 11, 2022.
- *People* v. *Counterman*, No. 17CA1465, Colorado Court of Appeals, Division II. Judgment entered July 22, 2021.
- *People* v. *Counterman*, No. 16CR2633, District Court, Arapahoe County, Colorado. Judgment entered April 27, 2017.

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OPINIONS BELOW

The order of the Supreme Court of Colorado (App. 40a) is unreported. The opinion of the court of appeals (App. 1a-39a) is reported at 497 P.3d 1039. The trial court's orders rejecting petitioner's motions to dismiss (App. 41a-57a) are not reported.

JURISDICTION

The Supreme Court of Colorado denied a timely petition for review on April 11, 2022. App. 40a. On June 29, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 9, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I.

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." Colo. Rev. Stat. Ann. § 18-3-602(1)(c).

STATEMENT

This case concerns an important First Amendment question that has divided lower courts and that members of this Court have called on it to answer: What is the mental state necessary to establish that a statement is a "true threat" under the First Amendment? While the First Amendment does not protect true threats, *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), the scope of that exception has generated widespread confusion. In *Virginia* v. *Black*, this Court held that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." 538 U.S. 343, 360 (2003). Within the decade after *Black*, there was a recognized "circuit split" "on the question whether proof of a true threat requires proof of a subjective intent to threaten," or whether it was enough that an "objectively reasonable person would view [the] message as [a] serious expression of intent to harm." Br. in Opp. at 13, 23, *Elonis* v. *United States*, No. 13-983, 575 U.S. 723 (2015).

The Court "granted review in [*Elonis*] to resolve [that] disagreement among the Circuits," *Elonis*, 575 U.S. at 743 (Alito, J., concurring in part and dissenting in part), but ultimately decided the case on narrow statutory grounds rather than constitutional ones, holding that "a guilty mind is a necessary element" of the federal threat offense and a "reasonable person" standard " is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrong-

doing," *id.* at 734, 737-738 (internal quotation marks omitted). Justice Alito lamented that the Court had "compounded—not clarified—the confusion" in the lower courts. *Id.* at 743 (Alito, J., concurring in part and dissenting in part). Justice Thomas similarly observed that the Court's "failure to decide" the acknowledged circuit split "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." *Id.* at 750 (Thomas, J., dissenting).

Since then, lower courts continue to disagree about the standard for determining what constitutes a true threat under the Constitution. The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits, as well as Arizona, Arkansas, Colorado, Connecticut, California, Hawaii, Iowa, Louisiana, Mississippi, Montana, North Dakota, Oregon, Pennsylvania, South Dakota, Washington, and Washington D.C., apply versions of an objective standard that focuses on how reasonable people would interpret the speaker's words. By contrast, the Ninth and Tenth Circuits, as well as Kansas, Massachusetts, North Carolina, and Rhode Island, use a subjective standard, requiring proof that the speaker intended the statement as a threat. Georgia requires knowledge that the statement will be viewed as a threat, and Illinois and Pennsylvania require recklessness as to the statement's threatening nature. At least nine states are subject to conflicting state and federal standards, so that the constitutional protection given speech depends on the happenstance of the courthouse in which the case is prosecuted.

Members of this Court have recognized this conflict and called for its review. See, *e.g.*, *Perez* v. *Florida*, 137 S. Ct. 853, 853-855 (2017) (Sotomayor, J., concurring in denial of cert.) (observing that the Court should "decide precisely what level of intent suffices under the First Amendment—a question [the Court] avoided * * * in

Elonis"); *Kansas* v. *Boettger*, 140 S. Ct. 1956, 1956 (2020) (Thomas, J., dissenting from the denial of cert.) (urging the Court to "resolve the split on this important question"). Lower courts and commentators likewise have recognized that the conflict is important and needs this Court's resolution. See pp. 13-14, *infra*.

This case presents an ideal vehicle to resolve this recurring question. Here, a jury in Colorado convicted petitioner of violating a state statute that prohibits certain speech without regard to the speaker's mental state. The courts below applied a purely objective test for determining whether petitioner's statements were true threats. While petitioner's mental state would have made all the difference in federal district court in Colorado, see, *e.g.*, *United States* v. *Heineman*, 767 F.3d 970, 975 (10th Cir. 2014) ("[T]he First Amendment * * * require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened."), the Colorado courts have made clear that they apply an "objective test" that treats the speaker's mental state as irrelevant to the First Amendment inquiry. App. 12a.

Petitioner's conviction cannot stand. As this Court has explained, "[h]aving liability turn on whether a 'reasonable person' regards [a] communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence." *Elonis*, 575 U.S. at 738 (internal quotation marks omitted). Permitting felony convictions for pure-speech crimes based on negligence alone conflicts with First Amendment principles and this Court's decision in *Black*. Further review is warranted not only to correct a manifest error but to resolve a conflict and provide guidance to the lower courts.

A. Factual Background

1. In 2014, petitioner sent a Facebook friend request to C.W., a Colorado musician. App. 3a. C.W. accepted the request. App. 17a. Over the next two years, petitioner sent periodic messages to C.W.'s account from several different Facebook accounts. App. 3a. The messages were largely text, but some included images of items. App. 6a-7a. The messages included:

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."
- An image of liquor bottles, captioned, "[a] guy's version of edible arrangements."
- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."
- "Your arrogance offends anyone in my position."
- "You're not being good for human relations. Die. Don't need you."
- "Talking to others about me isn't prolife sustaining for my benefit. Cut me a break already.... Are you a solution or a problem?"
- "Your chase. Bet. You do not talk and you have my phone hacked."
- "I didn't choose this life."

- "Staying in cyber life is going to kill you. Come out for coffee. You have my number."
- "A fine display with your partner."
- "Okay, then please stop the phone calls."
- "Your response is nothing attractive. Tell your friend to get lost."

Ibid. C.W. never responded to any of petitioner's messages and blocked him from messaging her. App. 3a, 17a, 49a.

In 2016, C.W. told a family member that petitioner's messages frightened her. App. 4a. C.W. then contacted an attorney. *Ibid.* C.W. also reported petitioner to law enforcement and obtained a protective order. *Ibid.* Petitioner did not contact C.W. after she obtained the order, which he learned of only after his arrest. Pet. C.A. Br. 4.

2. Police arrested petitioner and he was charged with, as relevant here, stalking under Colorado Revised Statute § 18-3-602(1)(c), which prohibits "knowingly * * * [r]epeatedly * * * mak[ing] 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." Colo. Rev. Stat. Ann. § 18-3-602(1)(c). As the Supreme Court of Colorado held in 2006, 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).

B. Proceedings Below

1. Before trial, petitioner moved to dismiss the stalking count. App. 4a-5a, 7a-8a; see also App. 42a-44a.

He argued that his Facebook messages were not true threats and thus were protected speech under the First Amendment. *Ibid.* The trial court denied the motion. Consistent with binding state law, the court applied a purely objective test, considering "the plain language of the statements," App. 45a, the recipient of the statements, App. 48a, the manner in which the statements were made (*e.g.*, on Facebook), App. 48a-49a, and the reaction of the alleged victim, App. 48a. It did not make any findings about whether petitioner intended the statements to be threats, was aware that his messages could be construed as threatening, or even whether he had behaved recklessly. See App. 45a-50a. The court commented that some statements were "borderline delusional," App. 47a-48a, and another "could suggest a loss of control," App. 48a. The trial judge concluded: "I believe that [petitioner's] statements rise to the level of a true threat, although ultimately that will be a question of fact for the jury to decide." App. 49a.

2. After the prosecution's case-in-chief, petitioner renewed his motion to dismiss on the ground that his statements were not true threats and were protected by the First Amendment. App. 55a-56a. The trial court applied the purely objective analysis again, App. 50a, 56a, and denied the request, concluding that "a reasonable jury could find that [petitioner's] statements rise to the level of * * * a true threat," App. 56a. In the trial court's view, petitioner's messages "would not be considered protected speech," and thus "submitting the charges to the jury [would] not impermissibly intrude on or violate [petitioner's] First Amendment rights." *Ibid.*

The prosecution accordingly argued to the jury in closing that petitioner "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 and that these messages were practically certain to be sent." App. 60a-61a. The jury convicted petitioner, and the court sentenced him to four-and-a-half years of imprisonment. App. 5a.

3. Petitioner appealed, arguing that the trial court had erred by applying an objective standard that considered a reasonable listener's interpretation to determine whether his statements constituted true threats. Quoting *Black*, petitioner argued that "true threats" encompass only "those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence." Pet. C.A. Br. 18 (quoting *Black*). Petitioner argued that the court "should adopt the subjective intent requirement [for] its 'true threat' analysis." *Id.* at 32.

The Colorado Court of Appeals affirmed the conviction. The court acknowledged that "[s]ocial media * * * magnify the potential for a speaker's innocent words to be misunderstood." App. 20a. But it nonetheless refused petitioner's request to apply a standard that looked to the speaker's mental state and instead applied "an objective test" that considered the reasonableness of the victim's reaction to determine "that Counterman's statements were true threats that aren't protected under the First Amendment." App. 12a, 21a. The court of appeals wrote that, "[i]n the absence of additional guidance from the U.S. Supreme Court, we decline * * * to say that a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes." App. 12a (quoting *People ex rel. R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020)).

The Supreme Court of Colorado denied a timely petition for review. App. 40a.

REASONS FOR GRANTING THE PETITION

A. There Is An Acknowledged Split On The Standard Of Intent Necessary For "True Threats"

1. More than seven years after *Elonis*—and nearly twenty years since *Black*—the federal courts of appeals and state courts of last resort remain deeply divided about the implications of those decisions on the basic question whether a subjective or objective test (or some combination) governs the true threat inquiry.

Like the decision below, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have applied an objective test. The Fourth Circuit, for example, has held that "*Elonis* [did] not affect [its] constitutional rule that a 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm." *United States* v. *White*, 810 F.3d 212, 220 (2016). That court, in an earlier case decided by a divided vote, had construed *Black* as requiring only a general intent to communicate a statement, not the specific intent that the statement contain a threat. *United States* v. *White*, 670 F.3d 498, 509 (2012), abrogated in part by *Elonis*, as recognized by *White*, 810 F.3d at 220; but see *id.* at 520 (Floyd, J., concurring in part and dissenting in part) ("*Virginia* v. *Black* is a superseding contrary decision that makes our purely objective approach to ascertaining true threats no longer tenable"). Likewise, the Eighth Circuit has reaffirmed its purely objective "reasonable person" standard since *Elonis*, which it has defended by citing concerns that a subjective test would insufficiently protect listeners from the fear of violence. See *United States* v. *Mabie*, 663 F.3d 322, 332-333 (2011); *United States* v. *Ivers*, 967 F.3d 709, 718, 720-721 (2020) (reiterating the objective test, post-*Elonis*), cert. denied, 141 S. Ct. 2727 (2021).

The Second Circuit has continued to apply an objective test, see *Heller* v. *Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 51 n.1 (2016) (summary order) ("The test for whether a communication is a true threat is objective * * * ."), writing that "the Supreme Court's holding in *Elonis* does not significantly alter the standard by which we determine whether a threat is a true threat," *United States* v. *Wright-Darrisaw*, 617 F. App'x 107, 108 (2015) (summary order). That court has acknowledged, however, the uncertainty that both *Black* and *Elonis* have created, see *id.* at 108 n.2; see also *United States* v. *Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013) (noting that "disagreement has arisen among [the] circuits regarding whether *Black* altered or overruled the traditional objective test for true threats by requiring that the speaker subjectively intend to intimidate the recipient of the threat").[1]

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[1] Other circuits have not squarely addressed the question post-*Elonis* but have applied an objective test. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 15 (1st Cir. 2003) ("A true threat is one that a reasonable recipient familiar with the context of the communication would find threatening."); *United States* v. *Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (noting that Supreme Court precedent "does not say that the true threats exception requires a subjective intent to threaten"), rev'd on other grounds, 575 U.S. 723 (2015); *Porter* v. *Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (explaining that "[s]peech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm" (internal quotation marks omitted)); *United States* v. *Jeffries*, 692 F.3d 473, 480-481 (6th Cir. 2012) (applying an objective standard), conviction vacated, in light of *Elonis*, by *Jeffries* v. *United States*, No. 10-CR-100 (TWP), 2018 WL 910669, at *4 (E.D. Tenn. Feb. 15, 2018); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) ("Whether the letter contains a 'true threat' is an objective inquiry."); *United States* v. *Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (declining to "import a subjective-intent analysis

2. By contrast, other circuits use a subjective test. As the Tenth Circuit recognized, "the First Amendment, as construed in *Black*, require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened." *United States* v. *Heineman*, 767 F.3d 970, 975 (10th Cir. 2014).[2]

Likewise, the Ninth Circuit has held that "the First Amendment allows criminalizing threats only if the speaker intended to make 'true threats.'" *United States* v. *Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021). As Judge O'Scannlain explained, "[t]he clear import of [*Black*] 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). The Ninth Circuit has concluded that reading is consistent with *Elonis*. *Bachmeier*, 8 F.4th at 1064.

Although the Seventh Circuit in the past applied an objective standard, it has repeatedly questioned that decision in light of intervening precedents. It has observed that "[b]efore the Supreme Court's decision in [*Black*], we used an objective reasonable person standard to determine whether speech constituted a true threat. After *Black*, we and other courts have wondered whether speech only qualifies as a true threat if the speaker subjectively intended his words to be threatening." *United States* v. *Khan*, 937 F.3d 1042, 1055 (7th Cir. 2019) (internal quotation marks omitted). As

into the true threats doctrine"), vacated in light of *Elonis*, 576 U.S. 1001 (2015).

[2] The Tenth Circuit later appeared to endorse an objective standard, see *United States* v. *Wheeler*, 776 F.3d 736, 743 n.3 (10th Cir. 2015), but *Heineman*, the binding circuit precedent, has not been overruled, see, *e.g.*, *Derosier* v. *Balltrip*, 149 F. Supp. 3d 1286, 1295 (D. Colo. 2016) (adhering to *Heineman* to hold that "a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened").

Judge Sykes explained, it is "likely * * * that an entirely objective definition [of 'true threats'] is no longer tenable" after *Black*. *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008). But "[b]ecause the Supreme Court has not definitively answered the question" of what mental state is necessary to establish a "true threat," the court concluded that the answer to that important question has not been "clearly established." *Maier* v. *Smith*, 912 F.3d 1064, 1072 (7th Cir. 2019).

3. State courts are likewise divided. Some, like Colorado here, apply a purely objective test. See, *e.g.*, *Citizen Publ'g Co.* v. *Miller*, 115 P.3d 107, 114 (Ariz. 2005) (en banc); *Jones* v. *State*, 64 S.W.3d 728, 736 (Ark. 2002); *People ex rel. R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020); *People* v. *Baer*, 973 P.2d 1225, 1231 (Colo. 1999) (en banc); *State* v. *Taupier*, 193 A.3d 1, 18 (Conn. 2018); *People* v. *Lowery*, 257 P.3d 72, 77 & n.1 (Cal. 2011); *In re S.W.*, 45 A.3d 151, 156 & n.14 (D.C. 2012); *State* v. *Valdivia*, 24 P.3d 661, 671-672 (Haw. 2001); *State* v. *Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-1246 (La. 2001); *Hearn* v. *State*, 3 So. 3d 722, 739, n.22 (Miss. 2008); *State* v. *Lance*, 721 P.2d 1258, 1266-1267 (Mont. 1986); *State* v. *Johnson*, 964 N.W.2d 500, 503 (N.D. 2021); *State* v. *Moyle*, 705 P.2d 740, 750-751 (Or. 1985) (en banc); *Austad* v. *Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State* v. *Trey M.*, 383 P.3d 474, 478, 481 (Wash. 2016) (en banc); *State* v. *Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

Others apply a hybrid test that considers *both* the speaker's subjective mental state and whether the statement is reasonably viewed as a threat. Most such states have held that establishing a true threat requires proof of "the *intent* to cause fear of violence." *State* v. *Boettger*, 450 P.3d 805, 818 (Kan. 2019) (emphasis added); accord *State* v. *Taylor*, 866 S.E.2d 740, 753 (N.C. 2021); *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (Mass. 2012),

abrogated on other grounds by *Seney* v. *Morhy*, 3 N.E.3d 577 (Mass. 2014); *State* v. *Grayhurst*, 852 A.2d 491, 515 (R.I. 2004). Others combine an objective test with the speaker's *knowledge* the statement will be viewed as a threat. *People* v. *Ashley*, 162 N.E.3d 200, 215 (Ill. 2020). Some merely require that an objective threat be made *recklessly*. See *Int. of: J.J.M.*, 265 A.3d 246, 270 (Pa. 2021); see also *Major* v. *State*, 800 S.E.2d 348, 351-352 (Ga. 2017) (holding that mens rea of recklessness, "conscious disregard of a substantial risk," is sufficient to satisfy First Amendment). One state, Indiana, requires intent as a matter of state constitutional law, but also has observed that this standard "is consistent with *Black*'s focus on 'whether a particular communication is intended to intimidate.'" *Brewington* v. *State*, 7 N.E.3d 946, 964 (Ind. 2014) (quoting *Virginia* v. *Black*, 538 U.S. 343, 345 (2003)) (brackets omitted). And Vermont has applied an intent test, see *State* v. *Miles*, 15 A.3d 596, 599 (Vt. 2011), but has since suggested that the standard is uncertain, see *State* v. *Noll*, 199 A.3d 1054, 1063 n.6 (Vt. 2018).

4. This case thus involves a question about which lower courts are in conflict and a paradigmatic example of a case warranting this Court's review. See S.Ct. R. 10; *Noll*, 199 A.3d at 1063 n.6 (acknowledging split). In the years since *Elonis*, the lower courts repeatedly have noted "the continuing disagreement and lack of definitive guidance from the Supreme Court," *Trey M.*, 383 P.3d at 483, such that "the necessary subjective intent one needs to make a true threat is rather hazy," *United States* v. *Ackell*, 907 F.3d 67, 77 n.4 (1st Cir. 2018); accord, *e.g.*, *Maier*, 912 F.3d at 1072 ("[T]he Supreme Court has not definitively answered the question * * * ."); *People ex rel. R.D.*, 464 P.3d at 731 n.21 (noting lack of "additional guidance from the U.S. Supreme Court"); *Wright-Darrisaw*, 617 F. App'x at 108 n.2 (recognizing that

Elonis did not resolve the uncertainty); *United States* v. *Nissen*, 432 F. Supp. 3d 1298, 1316 (D.N.M. 2020) ("*Elonis* * * * offers no guidance as to the First Amendment's true-threat requirement"); *Boettger*, 450 P.3d at 811 (noting that "the United States Supreme Court [has not] explicitly decided the question"). Commentators have likewise noted that the courts are "split on the meaning of intent in a true-threat analysis," John Sivils, *Online Threats: The Dire Need for a Reboot in True-Threats Jurisprudence*, 72 SMU L. Rev. Forum 51, 51 (2019), reflecting so much "judicial confusion" that "lower-court opinions in true threat cases are, collectively, a mess," Renee Griffin, Note, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 Mich. L. Rev. 721, 729-730 (2022); see also Caroline Fehr et. al., *Computer Crimes*, 53 Am. Crim. L. Rev. 977, 989 (2016) ("After *Elonis*, lower courts still do not know * * * the required mens rea for the 'true threats' exception to the First Amendment * * * ."); Jessica Miles, *Straight Outta Scotus: Domestic Violence, True Threats, and Free Speech*, 74 U. Miami L. Rev. 711, 733 (2020) ("Resolution of the circuit court split seems likely to bring the issue to the Supreme Court's attention again.").

Underscoring the urgent need for review, at least nine "[s]tate high courts have further muddled the intent question in true-threats jurisprudence by adopting analytical standards that differ from the federal appellate circuits in which they sit." Sivils, *Online Threats*, *supra*, at 51. As noted, the Tenth Circuit considers the speaker's subjective intent, see *Heineman*, 767 F.3d at 975, while Colorado applies a purely objective test, see *People ex rel. R.D.*, 464 P.3d at 731 n.21; see also *Baer*, 973 P.2d at 1231. The First Circuit has applied an objective test, see *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003), but both Massachusetts and

Rhode Island have applied a subjective one, see *O'Brien*, 961 N.E.2d at 557 (Massachusetts); *Grayhurst*, 852 A.2d at 515 (Rhode Island). The Fourth Circuit applies a purely objective test, see *White*, 810 F.3d at 220, but North Carolina, noting the disagreement with that court, "define[s] a true threat as an objectively threatening statement communicated by a party which possesses the subjective intent to threaten," *Taylor*, 866 S.E.2d at 753. And California, Hawaii, Montana, Oregon, and Washington apply an objective definition of true threats, in conflict with the Ninth Circuit's subjective intent standard. Compare *Lowery*, 257 P.3d at 77 & n.1 (California), *Valdivia*, 24 P.3d at 671-672 (Hawaii), *Lance*, 721 P.2d at 1266-1267 (Montana), *Moyle*, 705 P.2d at 750-751 (Oregon), and *Trey M.*, 383 P.3d at 478, 481 (Washington), with *Cassel*, 408 F.3d at 632-633.

These state-federal conflicts are particularly problematic, because they mean that speakers' constitutional rights depend on the courthouse in which they are prosecuted. Cf. *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) ("We granted certiorari to resolve the conflict between the Florida Supreme Court and the Court of Appeals over the constitutionality of the state court's injunction." (citation omitted)). And the growing use of joint federal-state investigations increases the risk of opportunistic behavior by law enforcement officials, who have an incentive to prosecute in whichever jurisdiction applies the objective test.

Beyond that, the conflict here stems from confusion over the intersection of this Court's decisions in *Black* and *Elonis*. This Court often grants review "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.5, pp. 4-23, 4-24 (11th ed. 2019). Only this Court can

clarify the standard of scienter for true threats under the First Amendment and should do so here.

B. The Decision Below Is Wrong

History, tradition, and this Court's prior decisions show that heightened scienter is necessary to true threats.

1. "[A]s a general matter, our criminal law seeks to punish the 'vicious will.'" *Ruan* v. *United States*, 142 S. Ct. 2370, 2376 (2022) (quoting *Morissette* v. *United States*, 342 U.S. 246, 251 (1952)). "With few exceptions," therefore, "wrongdoing must be conscious to be criminal." *Ibid.* (quoting *Elonis*, 575 U.S. at 734). Thus, "consciousness of wrongdoing is a principle 'as universal and persistent in mature systems of criminal law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Id.* at 2376-2377 (quoting *Morissette*, 342 U.S. at 250) (brackets omitted).

The First Amendment broadly protects speech except "in a few limited areas," and it "has never 'included a freedom to disregard these traditional limitations.'" *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)) (brackets omitted). A "hallmark" of the constitutional right to 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 First Amendment thus bars the State from proscribing speech, even if "a vast majority of its citizens believes [it] to be false and fraught with evil consequence." *Whitney* v. *California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

Because this Court has long recognized the essential role that a mental state requirement plays in protecting speech, this Court has declined to allow the "elimination of the scienter requirement" when doing so would "work a substantial restriction on the freedom of speech and of the press." *Smith* v. *People of the State of California*, 361 U.S. 147, 150 (1959). In its incitement cases, for example, this Court has required proof that the speaker's "advocacy of the use of force" was "*directed to* inciting or producing imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (emphasis added). There must be evidence that the speaker's "words were *intended* to produce, and likely to produce, imminent disorder." *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam) (emphasis added).

Likewise, in the obscenity context, "the constitutional guarantees of the freedom of speech and of the press stand in the way of * * * dispensing with any requirement of knowledge" of, or, at least, recklessness as to, the nature of the obscene content. *Smith*, 361 U.S. at 152-153; see also *Osborne* v. *Ohio*, 495 U.S. 103, 114 n.9 (1990).

Employing an exclusively objective standard for identifying true threats is fundamentally inconsistent with First Amendment principles—particularly in a criminal statute:

> In essence, the 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.

Rogers v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (citation omitted); accord *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (observing that "what an objective test does" is "reduc[e] culpability * * * to negligence"; doing so is inconsistent with "[b]ackground norms for construing criminal statutes," which "presume that intent is the required mens rea in criminal laws"), conviction vacated, in light of *Elonis*, by *Jeffries* v. *United States*, No. 10-CR-100 (TWP), 2018 WL 910669, at *4 (E.D. Tenn. Feb. 15, 2018). Thus, the "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized," particularly when that speech concerns "merely crude or careless expression of political enmity." *Rogers*, 422 U.S. at 43-44 (Marshall, J., concurring).

The notion that one could commit a "speech crime" *by accident* is chilling: Imprisoning a person for negligently misjudging how others would construe the speaker's words would erode the breathing space that safeguards the free exchange of ideas. For this reason, First Amendment doctrine in many contexts imposes "*mens rea* requirements that provide 'breathing room' * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 567 U.S. 709, 733-734 (2012) (Breyer, J., concurring in the judgment); see generally Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1295 (2014) (surveying First Amendment law and concluding that a "speaker's intent matters to speech protection").

2. The purely objective test in Colorado and some other jurisdictions is incompatible with this Court's true threats jurisprudence. "'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." *Black*, 538 U.S. at 359. In *Black*, eight justices agreed to overturn the defendant's cross-burning conviction because the Virginia statute had allowed the jury to presume he had "the *purpose* of threatening or intimidating a victim." *Id.* at 366 (plurality) (emphasis added); see also *id.* at 372-373 (Scalia, J., concurring in part and dissenting in part); *id.* at 385-386 (Souter, J., concurring in part and dissenting in part).

This Court also held that "[i]ntimidation 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." *Black*, 538 U.S. at 344 (emphasis added); see *id.* at 372 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[t]he plurality is correct" that it is "constitutionally problematic" to convict someone for burning a cross when the action is not intended to intimidate). Although some courts have read the word "type" to imply there are other "types" of true threats that do not require heightened scienter,[3] "[t]his Court has long stressed that the language of an opinion is not always to be parsed as though [it] were * * * the language of a statute." *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022) (internal quotation marks and brackets omitted). At bottom, all eight justices who concurred in the judgment in *Black* "agreed that intent to intimidate

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[3] See, *e.g.*, *Jeffries*, 692 F.3d at 480 (emphasizing "that intimidation is *one* 'type of true threat'"); *Int. of: J.J.M.*, 265 A.3d at 264 ("That sentence is best read as describing one 'type of true threat,' not the only type." (emphasis removed)).

is necessary" under the Constitution "and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 (O'Scannlain, J.); *Heineman*, 767 F.3d at 979 (Hartz, J.) (noting that the concurring justices in *Black* "obviously assumed" that the majority "had already established that an intent to threaten was required"). And even to the extent *Black* left some ambiguity about the *level* of scienter necessary for true threats, it did not dispense with a heightened scienter requirement altogether.

Focusing on the speaker's subjective intent protects speech in a second respect. Objective tests tend to focus on the reaction of a reasonable recipient of the statement. As this Court has observed, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). "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. They are the ones more likely to abstain from participating fully in the marketplace of ideas and political discourse." *White*, 670 F.3d at 525 (Floyd, J., concurring in part and dissenting in part); cf. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring) ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members of other political groups who might make similar false claims."). But it is a basic tenet of First Amendment law that "[s]peech cannot be * * * burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty.*, 505 U.S. at 134-135. Use of a subjective intent standard would act as a safeguard against potentially discriminatory enforcement.

C. The Question Presented Is Important And Recurring

1. The standard for determining whether a statement is a true threat unprotected by the First Amendment is unquestionably important, as this Court recognized by granting review in *Elonis*. Members of this Court have acknowledged that the question presented here is an important one warranting review. In his partial concurrence in *Elonis*, Justice Alito observed in the statutory context that "[a]ttorneys and judges need to know which mental state is required for conviction" for making threats. 575 U.S. at 742 (Alito, J., concurring in part and dissenting in part). In his dissent, Justice Thomas likewise observed that the "failure to decide" the requisite scienter "throws everyone from appellate judges to everyday Facebook users into a state of uncertainty." *Id.* at 750 (Thomas, J., dissenting).

More recently, Justice Sotomayor lamented the same uncertainty in the constitutional context, observing that this Court should determine "precisely what level of intent suffices under the First Amendment" in true threats cases, "a question [the Court] avoided * * * in *Elonis*." *Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of cert.). Justice Thomas also has expressed that this Court should "resolve the split on this important question." *Kansas* v. *Boettger*, 140 S. Ct. 1956, 1956 (2020) (Thomas, J., dissenting from the denial of cert.). Likewise, in the years since *Elonis*, the lower courts repeatedly have commented on the "the absence of a definitive instruction from the High Court" and requested this Court's guidance—regretfully noting that, in its absence, "we must chart our own course." *Int. of: J.J.M.*, 265 A.3d at 265. As the North Carolina Supreme Court has written, "[s]peakers need clarity on the type of communication

which constitutes a true threat." *Taylor*, 866 S.E.2d at 749.

This issue implicates the validity of numerous threat prosecutions by federal and state authorities each year. There are at least a half-dozen federal threat statutes. See, *e.g.*, 18 U.S.C. § 871(a) (threatening the President), § 873 (blackmail), § 875(c) (threatening to kidnap or injure any person), § 876(c) (mailing threatening communications), § 878 (threats and extortion against foreign officials, official guests, or internationally protected persons), § 879 (threats against former Presidents and certain other persons), § 1503(a) (threats against a jury member), § 1951(a) (interference with commerce), § 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member).

Most, if not all, states criminalize threats.[4] The Commonwealth of Virginia represented in *Boettger* that nearly half of all states—24 of them—have enacted statutes incorporating a *mens rea* of either reckless disregard or knowledge, but stopping short of a requirement of specific intent. See Br. *Amici Curiae* of Virginia et al. at 11-12 & nn.13-14, *Kansas* v. *Boettger*, No. 19-1051.

The preeminence of online communication makes this issue more important today than ever before. While social media and the internet have vastly increased the potential to communicate, they have simultaneously "magnif[ied] the potential for a speaker's innocent words to be misunderstood." App. 20a; Megan R. Murphy,

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[4] Ala. Code § 13A-10-15; Ark. Code Ann. § 5-13-301; Cal. Penal Code § 140; Conn. Gen. Stat. Ann. § 53a-183; D.C. Code § 22-407; Fla. Stat. Ann. § 836.10; Haw. Rev. Stat. § 707-716; Iowa Code Ann. § 712.8; Mich. Comp. Laws Ann. § 750.411i; Okla. Stat. Ann. tit. 21, § 1378; Va. Code Ann. § 18.2-60; Wash. Rev. Code Ann. § 9.61.160; Wis. Stat. Ann. § 940.203.

Context, Content, Intent: Social Media's Role in True Threat Prosecutions, 168 U. Pa. L. Rev. 733, 734 (2020) (noting that the internet "amplifies the potential for a receiving user to interpret a statement as conveying something different than what the speaker intended to convey"). That is because "the tone and mannerisms of the speaker are unknown," and frequently, the speaker is too. Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 89 (2013); accord Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?* 89 J. Personality & Soc. Psychol. 925, 933 (2005) (noting that "[g]esture, voice, expression, context" do "more than merely *supplement* linguistic information, [they] alter it completely").

Moreover, modern media allow statements intended for one particular audience to be viewed by people who are unfamiliar with the context and thus may interpret the statements differently than the speaker intended. Internet-based communication has thus "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), and "different discourse conventions" often "lead[] to misinterpretations," Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats*, 106 Cal. L. Rev. 1885, 1890 (2018). It is therefore unsurprising that online statements have proven to be a major basis (perhaps the *leading* basis) for criminal threat prosecutions. See, *e.g.*, *Taylor*, 866 S.E.2d at 744 (Facebook); *Town of Brookfield* v. *Gonzalez*, 2021 WL 4987976, *4 (Wisc. App. Oct. 27,

2021) (Instagram and Snapchat); *United States* v. *Miah*, 546 F. Supp. 3d 407, 420 (W.D. Pa. 2021) (Twitter); *United States* v. *Bagdasarian*, 652 F.3d 1113, 1115 (9th Cir. 2011) (Yahoo message board). Commentators have thus noted the conflict among the courts and called for this Court's review, observing that "[t]he inadequacy of current true threats doctrine is especially acute in the social media era." Lidsky & Norbut, *supra*, at 1890.

And unlike traditional mail, which is sent to a specific address in a known jurisdiction, e-mail, Facebook messages, and other online communications can be read anywhere, subjecting online speakers to different constitutional standards based on geographical chance.

D. This Case Is An Excellent Vehicle To Decide The Question Presented

This case squarely presents a single purely legal issue. The facts of this case aptly frame the constitutional question presented.

Unlike in *Perez*, where "the lower courts did not reach the First Amendment question," 137 S. Ct. at 854 (Sotomayor, J., concurring in denial of cert.), the decision below squarely addressed the question, explaining that the Colorado Supreme Court had "[j]ust last year" adopted an "an objective test" for true threats that was "control[ing]." See App. 12a. The Supreme Court of Colorado, having only recently written extensively on the mental state required to establish a "true threat" and already "decline[d] * * * to say that a speaker's subjective intent to threaten is necessary," *People ex rel. R.D.*, 464 P.3d at 731 n.21, saw no need to revisit the subject again so quickly and denied review, App. 40a.

This case involves no predicate jurisdictional, factual, or legal disputes. Petitioner squarely raised the mental state question, Colorado addressed the question on the merits without asserting the issue was unpre-

served, and the decision below passed on the issue, holding that the constitutional "true threat" standard "is an objective test." App. 12a; see also Pet. Colo. S. Ct. Cert. Petit., at 9-12; Resp. Colo. S. Ct. Br. in Opp., at 1-8. Nor does this case involve an antecedent statutory-interpretation issue of the sort this Court answered in *Elonis*. As noted, the Supreme Court of Colorado has held that the "knowingly" mens rea in the statute does not apply to the "serious emotional distress" elements, so the statute does not "require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress." *Cross*, 127 P.3d at 77; see also App. 60a-61a. Because this Court is "bound by the construction given [the] statute by the highest court of the State," *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662, 666 (1949), the only question is "precisely what level of intent suffices under the First Amendment," the unresolved question that this Court "avoided * * * in *Elonis*" on statutory grounds. *Perez*, 137 S. Ct. at 855 (Sotomayor, J., concurring in denial of cert.). The issue is squarely presented and ripe for review, and nothing would be gained from delaying review further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX