No. 22-138

In the Supreme Court of the United States

Billy Raymond Counterman,
Petitioner,

v.

The People of the State of Colorado,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato 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, *amicus* respectfully submits that the Court should grant the petition.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

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 or her words. Although this Court has recognized exceptions to that bedrock rule, it has equally recognized that such exceptions must be clearly delineated and narrowly circumscribed to avoid 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 a series of admittedly abrasive online messages to a musician. Lower courts are divided on whether such behavior can be criminalized without evidence that the speaker actually intended to convey any threat. This lack of clarity urgently requires this Court's attention.

Amicus writes to offer two primary 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 people 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 the right vehicle to set clear, badly needed boundaries for government authority to limit online expression through the harsh cudgel of 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.

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 courts are deeply divided over the scope of the judicially recognized exception permitting prosecu-

tion for "true threats." Such confusion would be intolerable in any circumstance, but it is especially intolerable at this moment, as governments seeks to control and regulate new forms of online expression. Fresh guidance from this Court on the "true threats" exception is urgently required—and this case presents a good vehicle for providing it.

A. The law governing the "true threats" exception is in disarray, threatening liberty.

"'[A]s 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*, 535 U.S. at 573) (brackets in original). 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. *E.g.*, *R.A.V.*, 505 U.S. at 399 (internal quotation marks omitted); *accord United States* v. *Alvarez*, 567 U.S. 709, 716–17 (2012) (listing the "few 'historic and traditional categories'" of expression that may be subject to content-based regulations (quoting *Stevens*, 559 U.S. at 468)).

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 Lyndon Johnson—was a true threat. *Id.* at 706. Rather, it concluded that the petitioner's commentary, 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 707–08. A "'vehement, caustic, and … unpleasantly sharp attack[] on government,'" the Court held, is still not a true threat. *Id.* at 708 (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 held unconstitutional a Virginia statute treating the public burning of a cross as "'prima facie evidence of an intent to intimidate.'" *Id.* at 348 (internal quotation marks omitted). The Court explained that cross-burning *could* fall within the category of "true threats" unprotected by the First Amendment, *id.* at 360, but, as Justice O'Connor's plurality opinion explained, the statute went too far by presuming that cross-burning is "always intended to intimidate." *Id.* at 365.

Most 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, 18 U.S.C. § 875(c). 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]

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[2] The Court in *Elonis* held only that § 875(c) requires a *mens rea* greater than negligence, declining to consider whether recklessness is sufficient. 135 S. Ct. at 2012–13. In that

Together, *Watts* and *Black* indicate that (at a minimum) a "true threat" must be *both* objectively threatening to a reasonable listener and subjectively intended as such by the speaker. *See infra* Part II; *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 (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 employs 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]

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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").

[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, 632–33 (9th Cir. 2005) (requiring "that the speaker subjectively intended the speech as a threat").

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, 571–72 (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 absent 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, 868–69 (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 333–39, 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]

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, 187–88 (1964) (opinion of Brennan, J.)).

B. This is the right vehicle for clarifying the "true threats" exception.

This case is an excellent 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.

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[4] Likewise, with respect to the amorphous "fighting words" exception, *see Chaplinsky*, 315 U.S. at 572, the Court limited 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 383–84.

First, this case squarely raises the central question dividing state and federal circuit courts, namely the nature of the "true threats" test and its objective and 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 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 Colorado Court of Appeals' decision 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, Twitter, 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 1735–36*; Elonis*, 135 S. Ct. at 2004–05 (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 certain people from speaking through social media). And the Internet provides those who would police speech with a target-rich environment; indeed, in *Packingham*, in *Elonis*, and in this case, 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 confined set of categories that may be subject to content-based prosecution. *E.g.*, *Alvarez*, 567 U.S. at 716–17 (internal 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 729–30 (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 465–66 (depictions of animal cruelty, including "crush videos" that showed "women slowly crushing animals to death"); *Texas* v. *Johnson*, 491 U.S. 397, 419–21 (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 707–08. The Court reaffirmed the narrowness of the "true threats" exception in *Black*, noting that even speech that is overwhelmingly viewed as discomfiting or offensive may be protected. 538 U.S. at 358–59; *see also id.* at 367 (plurality opinion) ("The First Amendment does not permit . . . shortcut[s]" in determining whether speech is a true threat). Even in the case of cross burning, the Court explained, to fall within the "true threats" exception, the speaker also needed to act with the intent to intimidate. *See id.* at 359–60 (majority opinion); *id.* at 366–67 (plurality opinion). 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 (majority opinion) (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* nor *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 485–86 (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 without any evidence that speaker intended to convey a threat, effectively creating a negligence standard for "true threats." 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 WRTL*, 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.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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