No. 22-138

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

REPLY BRIEF FOR THE PETITIONER

MEGAN A. RING
State Public Defender
MACKENZIE SHIELDS
COLORADO STATE PUBLIC DEFENDER
1300 Broadway
Suite 400
Denver, CO 80203
(303)764-1400

JOHN P. ELWOOD
Counsel of Record
ANTHONY J. FRANZE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

WILLIAM T. SHARON
ARNOLD & PORTER KAYE SCHOLER LLP
250 W. 55th St.
New York, NY 10019
(212) 836-8000

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 22-138

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

REPLY BRIEF FOR THE PETITIONER

Colorado concedes that the federal courts of appeals are split on the question presented. Opp. 14-16. While Colorado seeks to minimize the conflict as "lopsided," *id.* at 1, this Court repeatedly has granted much more lopsided (and significantly shallower) splits. And Colorado ignores that the smaller side of the federal split now covers a quarter of the nation's population, to say nothing of the fact that, as Colorado concedes, "states are more divided on the issue than the circuit courts." *Id.* at 16. Colorado also does not dispute that, in some nine states, federal and state courts apply conflicting constitutional standards. Thus, by Colorado's own reckoning, *id.* at 14-17, the constitutional protections governing millions of people turn on the happenstance of whether they are prosecuted in state or federal court. Bottom line: There is an indisputable conflict on a question this Court has *already* deemed certworthy, and the lower courts are calling out for guidance. That alone is reason to grant review.

Colorado urges the Court to ignore the intractable divide in the lower federal and state courts, because the case supposedly is a "poor vehicle." *Id.* at 1, 9-14. But although Colorado struggles to portray this as a

"stalking" case, it cannot deny that it was prosecuted based *entirely* on petitioner's online speech. The court below affirmed based on petitioner's statements alone, Pet. App. 13a-19a, concluding that under Colorado's "objective standard," *id.* at 20a, "Counterman's messages were true threats—threats that are not protected speech under the First Amendment," *id.* at 19a. Colorado's futile attempt to recast this case as one concerning conduct rather than speech is no reason to delay this Court's review.

Finally, Colorado argues that review is unwarranted because its purely objective standard is correct. But the State's own formulation of the test confirms why the objective standard for true threats sweeps far too broadly. In Colorado's view, someone who merely "knowingly says the words"—things that are "weird" and "creepy," Opp. 3—with no criminal scienter whatsoever can be imprisoned for making a true threat, *id.* at 1, 21, 24. As Judge Sutton has observed, "what an objective test does" is "reduc[e] culpability * * * to negligence." *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*). That is at odds with this Court's precedents, and underscores why the Court should clarify the constitutional standard for true threats.

At bottom, the trial court was able to sentence petitioner to *four and a half years in prison* for negligently sending Facebook messages because of continuing confusion over what *mens rea* is constitutionally required to establish a true threat. "[E]veryone from appellate judges to everyday Facebook users" await this Court's guidance. *Elonis* v. *United States*, 575 U.S. 723, 750 (2015) (Thomas, J., dissenting). The Court should grant review.

A. Colorado Concedes That Federal And State Courts Are Divided

1. Colorado acknowledges that the federal courts of appeals are divided, but argues that the split is too "lopsided" to warrant review. Opp. 1, 14, 18. But this Court routinely grants review of more lopsided splits.[1] Lopsidedness can be a consideration if there is a chance a split will resolve itself, but only this Court's review can resolve the split here. As Colorado concedes, "[t]he Ninth Circuit reaffirmed its prior decision" post-*Elonis*, Opp. 15, and—contrary to Colorado's claim, *ibid.*—the federal split has deepened since this Court previously granted review, as the Tenth Circuit joined the Ninth in holding that true threats require proof of intent, see *United States* v. *Heineman*, 767 F.3d 970, 975 (10th Cir. 2014); *id.* at 983 (Baldock, J., concurring) (noting grant of review in *Elonis*). Courts on the smaller side of the federal split include just over a quarter of the nation's population.[2]

Moreover, Colorado admits that the state courts are "more divided on the issue that the circuit courts." Opp. 16. The state split likewise has deepened since *Elonis*. At least six states have since held that *mens rea* is a requirement for conviction. See *State* v. *Boettger*, 450 P.3d 805, 818 (Kan. 2019) (intent); *State* v. *Taylor*, 866 S.E.2d 740, 753 (N.C. 2021) (intent); *People* v. *Ashley*, 162 N.E.3d 200, 215 (Ill. 2020) (knowledge); *State* v.

---

[1] See, *e.g.*, Pet. at 11-12, *Wilkins* v. *United States*, No. 21-1164, 2022 WL 566430 (7-1 split); Pet. at 14, *Perez* v. *Sturgis Public Schools*, No. 21-887, 2021 WL 5983251 (11-1), Pet. at 3, *Pereira* v. *Sessions*, 2017 WL 4326325, No. 17-459 (6-1).

[2] According to 2020 census data, the total population of states in the Ninth and Tenth Circuits was 25.8 percent of the U.S. population. See U.S. Census Bureau, Explore Census Data (available at https://data.census.gov/cedsci/).

Mrozinski, 971 N.W.2d 233, 245 (Minn. 2022) (recklessness); *Int. of: J.J.M.*, 265 A.3d 246, 270 (Pa. 2021) (recklessness); *Major* v. *State*, 800 S.E.2d 348, 351-352 (Ga. 2017) (recklessness). And Colorado does not dispute that a growing number of states (at least nine) are subject to conflicting state and federal standards. See Opp. 13-19; see also Pet. 14-15. Thus, across a broad swath of the United States, the breadth of First Amendment protection turns on the happenstance of which prosecutor brings charges. That situation is so intolerable that this Court has granted review to remedy 1-1 federal-state splits. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994).

2. The uncertainty has grown substantially since 2015, with the lower courts repeatedly lamenting "the continuing disagreement and lack of definitive guidance from the Supreme Court." *State* v. *Trey M.*, 383 P.3d 474, 478, 483 (Wash. 2016) (en banc); see also Pet. 13-14 (collecting authorities).[3] As *amici* point out, post-*Elonis*, there remains "significant confusion over when government may prosecute individuals for their speech," leaving true threats "in contrast to other categories of unprotected speech that have benefited from this Court's sustained attention." Br. of Rutherford Inst. 7-8. Only this Court can bring needed uniformity to the lower courts.

B. This Case Is An Excellent Vehicle

1. Given the undeniable conflict, Colorado seeks to evade review by characterizing this case as a "poor vehicle." Opp. 9. This is so, Colorado contends, because

[3] Although this Court denied review in *Boettger*, Opp. 18, the "wording and structure of the Kansas statute" at issue there was "sufficiently distinct from other states' formulations" that the Kansas Supreme Court decision at issue had little relevance to other state statutes. Opp. 17, *Kansas* v. *Boettger*, No. 19-1051.

"[t]his case is about stalking," *id.* at 2; "a combination of conduct and statements," *id.* at 11. That is belied by the record.

Colorado charged petitioner under a "stalking" statute that includes as a means of commission "mak[ing] any form of communication with another person * * * in a manner that would cause a reasonable person to suffer serious emotional distress." Colo. Rev. Stat § 18-3-602(1)(c). Petitioner's messages were the State's focus throughout and the *entire* basis for the prosecution. The prosecutor asked the jurors in closing, "how have [we] proven to you that it was the defendant that did this?" And the prosecutor answered: "The Facebook account says Bill Counterman, Billy Counterman * * *. * * * [H]e sent these messages to [C.W.], simple as that." Supp. App. 10a. Likewise, when arguing petitioner had the requisite mental state, Colorado argued that "[a]ll [petitioner] had to know was that he was *sending these messages* and that these *messages* were practically certain to be sent." Pet. App. 61a (emphasis added). The trial court likewise did not focus on any claimed "physical surveillance," but instead found that that "a reasonable jury could find that [petitioner's] *statements* rise to the level of a true threat." *Id.* at 9a (emphasis added).[4]

---

[4] In support of its claim of "[e]vidence that Petitioner placed the victim under surveillance," Opp. 11, or "admitted surveillance," *id.* at 9, the State identifies *only* petitioner's messages, *id.* at 9 (citing statements), 11 (same), which the defense explained could simply have been based on photos or videos that C.W. frequently posted on Facebook rather than any actual surveillance, Supp. App. 5a-6a. For example, petitioner's claim to have seen a "white Jeep," Opp. 11 (citing Pet. App. 6a), referenced a car C.W. sold years earlier, which may have appeared in Facebook posts, Supp. App. 2a. The State has never identified any evidence of surveillance besides petitioner's statements.

Nor did the court of appeals base its decision on any supposed "physical surveillance." That court recognized that it "must address whether [petitioner's] *speech* consisted of true threats or, instead, consisted of protected speech." *Id.* at 10a (emphasis added). And after reviewing petitioner's statements and applying the objective standard, that court affirmed not because the evidence suggested physical surveillance, but because the court "conclude[d] that [petitioner's] *statements* were true threats." *Id.* at 14a (emphasis added).

Indeed, the court below rejected this very argument. The State argued that the court of appeals "need not even address the First Amendment question" because petitioner's statements "established three separate incidents of surveillance by Counterman." Colo. Ct. App. Br. 13. The court of appeals disagreed and squarely addressed the First Amendment question here. Pet. App. 48a. Thus, whether petitioner's statements were "true threats" has been the dispositive issue at every stage of the case.

2. Colorado next contends that this case is a poor vehicle because it does not implicate Justice Sotomayor's concerns in *Perez* v. *Florida*, 137 S. Ct. 853 (2017), because Colorado's objective true threats test is "context-driven" and thus more protective than Florida's test. Opp. 12-13. But in *every* jurisdiction true threats are "[t]aken in context." *Watts* v. *United States*, 394 U.S. 705, 708 (1969). Justice Sotomayor's concern in *Perez* was that a speaker could be convicted for an ostensibly serious statement nevertheless *intended* as a joke. Colorado's "context-driven" test presents the very same problem.

Colorado also argues that its true threats test addresses Justice Thomas's concerns in *Kansas* v. *Boettger*, 140 S. Ct. 1956, 1959 (2020), because "Colorado law is * * * distinguishable from the standards at issue

in" that case. Opp. 13. But Justice Thomas's concern was precisely that state standards differ, and that "[t]his split regarding the mental state required by the First Amendment for these offenses will only deepen with time." See 140 S. Ct. at 1959 (Thomas, J., dissenting from denial of cert.). As discussed above, it has.

C. Colorado's Negligence Test Is Wrong

1. Although Colorado goes to great lengths to emphasize how "context-driven" its objective test supposedly is, Opp. 1, 3, 6, 7, 10, 12, 13, 19, 20, 21, 23, 24, 25, it cannot deny that its test prohibits consideration of one critical bit of context: the mental state of the speaker. As the prosecutor explained in closing, in response to the defense's argument that petitioner was "annoying" and "weird" because he was "mentally ill":

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

Supp. App. 25a-26a. As Justice Marshall noted, such an "objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Rogers* v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). Colorado makes no effort to deny that, much less explain how such a negligence standard could possibly avoid "creat[ing] a substantial risk that crude,

but constitutionally protected, speech might be criminalized." *Id.* at 43-44 (Marshall, J., concurring).

2. Colorado contends that its objective standard satisfies the First Amendment as interpreted in *Watts* and *Virginia* v. *Black*. This view, as noted, has divided the state courts and federal circuits, and Colorado's *ipse dixit* provides no basis to avoid review.

In any case, Colorado misreads both decisions. *Watts* overturned a speaker's conviction for making a threat, but the Court "declined to address the mental state required under the First Amendment for a 'true threat,'" *Elonis*, 575 U.S. at 765 (Thomas, J., dissenting), much less limit true threats to an objective standard. *Watts* also emphasized the "profound national commitment" to "robust" free speech, 394 U.S. at 708, relying on *New York Times Co.* v. *Sullivan*, which required proof of mental state in the context of defamation to provide sufficient "breathing space" for free speech, 376 U.S. 254, 272, 280 (1964). Colorado is right that *Watts* considered the statement's context, but *Watts*—which was decided summarily without full briefing or argument—did not limit true threats to a negligence standard.

Colorado also misconstrues *Black*. *Black* invalidated a provision of Virginia law that presumed that burning a cross was prima facie evidence of intent to intimidate a person, and thereby authorized criminal punishment without proof of the defendant's actual intent. As the plurality observed, the presumption was constitutionally problematic because it did not "distinguish between a cross burning at a public rally" as "a statement of ideology" and "symbol of group solidarity," which the First Amendment protects, and a "constitutionally proscribable" "cross burning done with the purpose of threatening or intimidating a victim." 538 U.S. at 365-366 (plurality). Every concurring Justice

endorsed a similar view. See *id.* at 372 (Scalia, J., concurring in part and dissenting in part); *id.* at 386 (Souter, Kennedy, and Ginsburg, JJ., concurring in part and dissenting in part). The concurring justices thus "obviously assumed" that the majority "had already established that an intent to threaten was required." *Heineman*, 767 F.3d at 979. As Judge O'Scannlain explained, *Black*'s "clear import" is that "only *intentional* threats are criminally punishable consistently with the First amendment." *United States* v. *Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

Colorado wrenches out individual phrases in *Black* in an attempt to avoid that conclusion. But when the Court said true threats "encompass" statements intended to intimidate, it meant that intent is a defining characteristic of true threats, not merely the obvious point that some statements intended to intimidate are true threats. Contra Opp. 20. And when it said "a prohibition on true threats protects individuals from the fear of violence," *id.* at 21, it was to clarify that speakers need not "actually intend to carry out" their threats. 538 U.S. at 360 (cleaned up). None of these sentences broaden true threats to include negligence, as Colorado suggests.

In any event, whether Colorado or petitioner's interpretation is correct, it is indisputable, as *amici* point out, that the lower court divide here stems from confusion over this Court's decisions in *Watts* and *Black*. See Br. of Rutherford Inst. 4-9; Br. of Cato Inst. 4-7. Only this Court can clarify the confusion and fill the gap left by *Elonis*.

3. Colorado attempts to defend its negligence standard on grounds of expedience, arguing that objectively threatening statements can cause harm regardless of the speaker's mental state. Opp. 22-23.

But that a type of statement causes harm has never been thought a sufficient basis for imposing even strict *civil* liability, much less subjecting a person to imprisonment. 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").[5] First Amendment protections are most needed by "speakers whose ideas or views occupy the fringes of our society" and whose words are more likely to elicit unintended interpretations. See *United States* v. *White*, 670 F.3d 498, 525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part). This protection is especially warranted when states seek to impose lengthy prison sentences for negligent speech, as "wrongdoing [typically] must be conscious to be criminal." *Ruan* v. *United States*, 142 S. Ct. 2370, 2376 (2022) (quoting *Elonis*, 575 U.S. at 734).

Colorado also contends that objectively threatening statements can never "invite[] further discourse." Opp. 22. But the law imposes "*mens rea* requirements that provide breathing room [for speech] * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[5] Colorado is simply wrong that this Court applies an objective test for the narrow and rarely invoked "fighting words" doctrine. Opp. 24-25. "[A]n intent requirement is implicit in the elements the state must prove to proscribe speech under the fighting words doctrine.'" Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U. L. Rev. 1, 33 n.211 (2004).

Respectfully submitted.

MEGAN A. RING
State Public Defender
MACKENZIE SHIELDS
COLORADO STATE PUBLIC DEFENDER
1300 Broadway
Suite 400
Denver, CO 80203
(303)764-1400

JOHN P. ELWOOD
Counsel of Record
ANTHONY J. FRANZE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.elwood@arnoldporter.com

WILLIAM T. SHARON
ARNOLD & PORTER KAYE SCHOLER LLP
250 W. 55th St.
New York, NY 10019
(212) 836-8000

OCTOBER 2022

SUPPLEMENTAL APPENDIX