No. 22-138

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

COLORADO,

Respondent.

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

BRIEF OF HUMAN RIGHTS FOR KIDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Human Rights for Kids (HRFK) is a non-profit organization dedicated to the promotion and protection of the human rights of children. HRFK combines research and public education, coalition building and grassroots mobilization, as well as policy advocacy and strategic litigation, to advance critical human rights on behalf of children. A central focus of its work is advocating in state and federal legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child.

SUMMARY OF ARGUMENT

How often do parents tell their children to be careful about what they say online? Likely every day. Yet few parents would envision their child being prosecuted or imprisoned for a hastily crafted, tactless social media post. Permitting the government to criminalize speech through a negligence or reckless *mens rea* standard will disproportionately harm children, who, because of their under-developed brains and impetuous nature, are more likely to engage in speech that a reasonable person would find offensive, abrasive, or threatening. The Court should ensure parents do not have to fear such a fate.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than *amicus curiae*, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Americans' First Amendment right to free speech encompasses broad protections. Any exceptions to this right must be clearly delineated, extremely limited, and narrowly circumscribed to avoid chilling protected speech. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). *Amicus* argues that for the "true threat" exception to meet this standard, the speech at issue must be *both* objectively threatening to a reasonable listener *and* specifically intended by the speaker to constitute a threat, evaluated in the context of the totality of the circumstances.

In particular, *amicus* calls to the Court's attention the impact of the Court's choice of a *mens rea* standard on the rights of children. Kids are inveterate users of the internet—contemporary society's primary form of communication. Although still kids, they are subject to adult criminal sanctions for speech involving threats because of transfer laws that allow them to be prosecuted in adult court. The importance of the First Amendment's free speech protections requires a finding of specific intent for the true threat exception to apply, as this is the most narrowly tailored means of avoiding the harm it is intended to prevent without unduly burdening the speaker's rights. This standard is particularly important when children's speech is involved, given their cognitive immaturity and the attendant inability to self-regulate.

People—especially children—speak differently on social media platforms than face-to-face. The absence of contextual clues found in one-on-one encounters can lead to serious misunderstandings. The application of an objective-only or subjective-only test can result in overcriminalization, particularly of children. To avoid this injustice, *amicus* urges the Court to adopt a

"totality of the circumstances" test focusing on all relevant contextual factors for determining whether pure speech falls within the true threat exception—a test that requires a showing of *both* a reasonable listener's objective fear of violence *and* the specific intent of the speaker to communicate a threat.

ARGUMENT

I. THE TRUE THREAT EXCEPTION TO FIRST AMENDMENT PROTECTION OF SPEECH MUST BE BASED ON THE TOTALITY OF THE CIRCUMSTANCES, REQUIRING EVIDENCE OF BOTH OBJECTIVE HARM AND SPECIFIC INTENT.

Any exception to the First Amendment's protections of speech must be extremely limited, clearly delineated, and narrowly circumscribed to avoid chilling protected speech or otherwise frustrating the First Amendment's purposes. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). For the "true threat" exception to meet this standard, the speech at issue must be *both* objectively threatening to a reasonable listener *and* specifically intended by the speaker to constitute a threat.

A. This Court's Prior Decisions Require Evidence of Both Objective Harm and Specific Intent to Establish a True Threat.

This Court's decisions in *Watts* and *Black* point the way. *Watts v. United States*, 394 U.S. 705 (1969), reversed the conviction of an 18-year-old defendant for threatening, at a rally against the Vietnam War,

to take the life of the President. Looking at the context in which the words were uttered, the Court concluded that the statement could not be deemed threatening because it was made during a political debate at a public rally at the Washington Monument—circumstances where such language is often "vituperative, abusive, and inexact." *Id.* at 706-08. Moreover, the threat "was expressly made conditional upon an event —induction into the Armed Forces—which petitioner vowed would never occur." *Id.* at 707. Tellingly, both the defendant "and the crowd laughed after the statement was made." *Id.*

In a per curiam opinion, the Court held that "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted" as anything other than "a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708.

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court turned its attention more directly to the subjective intent of the speaker. A Virginia statute criminalized the burning of crosses with an "intent to intimidate," but it provided that the conduct, standing alone, was *prima facie* evidence of the requisite specific intent. *Id.* at 348. The Court held that while "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation," *id.* at 363, the *prima facie* attribution of intent was unconstitutional, as it "strip[ped] away the very reason why a State may ban cross burning *with* the intent to intimidate." *Id.* at 365 (emphasis added). The statute unconstitutionally allowed the jury to infer, without

any evidence, a constitutionally required element of the offense—that the speaker intended to intimidate. *Id.*

Neither *Watts* nor *Black* looked solely to either the objective effect on the listener or the subjective intent of the speaker in analyzing the challenged speech, but rather to a combination of the two. Reading the decisions together further underscores the Court's application of a "totality of the circumstances" test, focusing on contextual factors. As Justice Sotomayor has explained:

> Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.

Perez v. Florida, 580 U.S. 1187, 1189 (2017) (Sotomayor, J., concurring in denial of certiorari).

B. To Be "Extremely Limited" and "Narrowly Circumscribed" as the First Amendment Commands, the True Threat Exception Requires a Finding of Specific Intent.

This Court's First Amendment jurisprudence considers criminal sanctions to be "matter[s] of special concern" because of the significant risk that they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and

images." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). A purely objective standard for criminal liability, such as applied by the court below, which focuses solely on the effect of the speech on the listener, reduces the requisite *mens rea* to mere negligence by excluding any evidence of whether the speaker intended to convey a threat. A "specific intent" requirement provides assurance that a speaker will not be punished for speech that might be misunderstood or taken out of context by a recipient (actual or hypothetical), who may not even be the speaker's addressee.

Assessing a speaker's intent, applying a "totality of the circumstances" analysis, is consistent with the Court's decisions interpreting the narrow strictures of the true threat exception established in *Watts* and *Black*. In *Elonis v. United States*, 575 U.S. 723 (2015), a majority of the Court agreed that a "guilty mind" is a necessary element of the federal threat offense. *Id.* at 734. This Court further explained that a "reasonable person" standard "is inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.* at 737-38. This approach is consistent with the "heavy burden" on the government when seeking to criminalize protected speech. *United States v. Alvarez*, 567 U.S. 709, 726 (2012) (plurality opinion).

Justice Marshall long ago underscored that the Court "should be particularly wary of adopting . . . a [negligence] standard" when regulating pure speech, because the "degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers v. United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring). Proof that a

speaker acted with specific intent prevents this chilling effect.

Two circuits already interpret *Black* to require evidence of a speaker's specific threatening intent for the true threat exception to apply. The Ninth Circuit has emphasized that "[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). Similarly, the Tenth Circuit interprets *Black* to mean that "in any true-threat prosecution," the First Amendment requires the government to prove that "the defendant intended the recipient to feel threatened." *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014); *see also United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (post-*Black*, the rule is "unclear").

Under this Court's decisions in *Watts*, *Black*, and *Elonis*, those two circuits are correct. This Court should make the rule clear by confirming that specific intent, demonstrated through analysis of all the facts and circumstances, is the applicable *mens rea* standard in true threat analysis.

C. The So-Called Objective Test, Focusing Solely on the Effect of the Challenged Speech on the Listener, Is Only Appropriate for Establishing the Conduct Element of the True Threat Exception.

The *actus reus* of a "true threat" is proved by showing the impact the challenged communication actually had on a reasonable listener given the context of the remarks. This is commonly referred to as the objective test. As the Sixth Circuit explained, the *actus reus* of a true threat is "a communication . . . that a

reasonable person . . . would perceive . . . as being communicated to effect some change or achieve some goal through intimidation." *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997).

Other circuits have similarly framed the conduct element as requiring what a reasonable recipient would understand as a threat. *E.g.*, *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("The physical act of the crime—the *actus reus*—is the transmission of a communication" that constitutes a threat); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) ("The test is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury."); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) ("Speech 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.'").

The purpose of criminalizing threats is to "'protect individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Black*, 538 U.S. at 359-60 (citing *R.A.V.*, 505 U.S. at 388). If no one could reasonably feel threatened, then there is no crime. Evidence of this conduct element thus is critical in establishing criminal liability for allegedly threatening speech. But without more, the objective test sweeps too broadly in failing to protect a speaker's rights.

Proponents of the objective-only analysis wrongly argue that a speaker's First Amendment rights are adequately protected by "forc[ing] jurors to examine

the circumstances in which a statement is made." *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012). But criminalizing a statement merely because it is objectively threatening to the recipient, even though "considering the circumstances," fails to protect the speaker's constitutional rights as the pre-*Black* decision in *Planned Parenthood of the Columbia/ Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), demonstrates.

There, anti-abortion activists created "WANTED" and "GUILTY" posters that identified doctors who performed abortions and subsequently were murdered. The group then circulated the posters on, among other places, the internet. They also created a "Nuremberg Files" website page, listing the names of murdered physicians "lined out in black." *Id.* at 1064–65. While the posters did not explicitly threaten harm, the Ninth Circuit en banc found that they constituted proscribed threats under the objective test because the group "was aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor . . . given the previous pattern of 'WANTED' posters identifying a specific physician followed by that physician's murder." *Id.* at 1063.

Significantly, however, the court also noted that the first "WANTED" posters may originally have been protected political speech, even though those and subsequent posters, circulated after previously "wanted" individuals were murdered, were not. *Id.* at 1079. But a reasonable person, having seen the earlier posters and knowing that their targets had subsequently been murdered, would have suffered the requisite fear of harm the objective test requires. *Id.* The court therefore concluded that excluding "true threats" from protected

speech "is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm," but rather on "how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm." *Id.* at 1076.

As one of the *Planned Parenthood* dissents pointed out, however, a listener's mere awareness of prior violent acts is insufficient to justify encroaching on protected political speech. "[A] statement does not become a true threat because it instills [generalized] fear in the listener." *Id.* at 1091 (Kozinski, J., dissenting). Rather, "for the statement to be a threat, it must send the message that *the speakers themselves*—or individuals acting in concert with them—will engage in physical violence." *Id.* (emphasis added). Absent consideration of a speaker's intent and knowledge at the time of speaking, an innocent speaker could be convicted of speech that when uttered would not have been deemed illegal. Such a result cannot be squared with the First Amendment.

D. A Comprehensive Analysis of the Context in Which Speech Is Offered Is Required to Determine If Both the Conduct and the Speaker's Intent Elements of the True Threat Exception Are Satisfied.

"[A] determination of what a defendant actually said is just the beginning of a threat analysis." *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012). "What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707. Illustrative of the many contextual factors that need to be consid-

ered are the following: audience reaction,[2] method of delivery of the speech,[3] privacy issues,[4] racial bias,[5] and cultural unfamiliarity.[6]

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[2] *Watts*, 394 U.S. at 708.

[3] "[T]he method of delivering a threat illuminates context, and a song, a poem, a comedy routine or a music video is the kind of context that may undermine the notion that the threat was real." *United States v. Jeffries*, 692 F.3d 473, 482 (6th Cir. 2012).

[4] People are so accustomed to using social media they forget to check their privacy settings when they go online. *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886, 1910 (2018); *Tips for Protecting Your Social Media Privacy* (Feb. 9, 2022), https://us.norton.com/blog/privacy/protecting-privacy-social-media#; *see also Ten Things You Should Never Post on Social Media* (reminders to college kids and recent graduates about the consequences of internet postings) https://collegegrad.com/blog/10-things-you-should-never-post-on-social-media.

[5] Use of a rap performance medium by a young black male arguably makes it less likely that the questioned speech is a threat, but it also may have the opposite result, triggering racial bias and awakening stereotypes about the criminality of young black men. *See* Renee Griffin, *Searching for Truth in the First Amendment's True Threat Doctrine*, 120 MICH. L. REV. 721, 740-41 (2022).

[6] Social science research shows that jurors' racial, ethnic and cultural backgrounds influence their reactions to defendants. Members of unpopular groups, including immigrants, minorities, and anyone who seems "different" from the jurors, who are the arbiters of reasonableness and who, statistically tend to be members of majority groups, are more likely to seem threatening than people who look, think, and speak like they do. *See* Jennifer S. Hunt, *Race, Ethnicity and Culture in Jury Decision Making*, ANNUAL REV. LAW SOC. SCI. 2015. 11:269-88; *see also* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 377 (1985) (noting that the dangers of a decisionmaker's negative view of

This Court has recognized the need for a full contextual analysis in its true threat jurisprudence, regardless of whether it is looking at the content of the speech or the intent of the speaker. This is, in fact, the common thread among the *Watts*, *Black*, and *Elonis* opinions. *See Watts*, 394 U.S. at 708 ("Taken in context," the Court concluded that the speaker's words could not be interpreted as anything other than political hyperbole protected under the First Amendment); *Black*, 538 U.S. at 367 (in ruling a statute's *prima facie* evidence provision unconstitutional, the Court concluded that it "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut."); *Elonis*, 575 U.S. at 747 (in rejecting a speaker's argument that his rap-style vitriol in a social media post deserved the same First Amendment protection as similar lyrics in rap music performed for audiences, Justice Alito noted that "context matters") (Alito, J., concurring in part and dissenting in part).

II. THE NATURE OF THE MODERN WORLD'S COMMUNICATIONS MEDIA, COMBINED WITH THE UNIQUE CHARACTERISTICS OF CHILDREN, UNDERSCORES THE NEED FOR A TOTALITY OF THE CIRCUMSTANCES TEST.

The way in which people communicate is changing rapidly. The national discourse has moved online, where misunderstandings are frequent. Children, with their cognitive immaturity and heavy use of new media for communicating, are especially at risk for

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the parties is likely to lead to oversuppression in applying free speech principles).

such misunderstandings. These reasons necessitate a test that requires *both* objective harm *and* specific intent for the true threat exception.

A. Online Speech, One of the Most Common Methods of Expression in Today's World, by Its Nature Creates Serious Risks of Misunderstanding the Speaker's Words and Intent.

While in earlier times it may have been difficult to identify the most important physical space for the exchange of views, the marketplace of ideas is now, without question, "cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal citation omitted). The reach of social media in America is massive. Seven out of ten adult Americans use social media—up from one in twenty in 2005.[7] For example, 69% of Americans use Facebook; 40% use Instagram; and, 25% use Snapchat.[8] Over half of the users visit these platforms daily.[9] A majority of American teens use platforms catering to younger audiences—TikTok, Instagram, and Snapchat.[10] And 35% of American teens say they use YouTube, TikTok, Instagram, Snapchat, or Facebook "almost constantly."[11] Individuals use these

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[7] *See* Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, Pew Research Ctr. (Apr. 7, 2021).

[8] *Id.*

[9] *Id.*

[10] Emily A. Vogels, et al., *Teens, Social Media and Technology 2022*, Pew Research Ctr. (Aug. 10, 2022).

[11] *Id.*

platforms to share their views on a wide range of protected First Amendment topics, reflecting subjects and positions as varied as the human mind can conjure. *Packingham*, 137 S. Ct. at 1735.

The anonymity and unmediated colloquy of internet postings result in more spontaneous and less formal speech than older forms of communication. The internet's ubiquity and ease of access have exponentially increased both the volume of discourse and audience exposure. While in many cases this brings welcome educational opportunities and the rich interplay of ideas, it has simultaneously "magnif[ied] the potential for a speaker's innocent words to be misunderstood."[12] And misunderstandings do abound—in too many cases triggering unjustified criminal investigation and prosecution.

B. The Relevant Contextual Aspects of Speech That Must Be Considered Will Vary Widely in Online Communication, Especially That of Children.

A comprehensive analysis of context is of paramount importance when the challenged speech involves online communication, where judges belonging to an older generation may misperceive the nature of new technology and online communication.[13] The internet's failure to provide traditional contextual clues that are available in face-to-face interactions is responsible for much of this confusion.[14] With internet submissions,

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[12] Lidsky & Norbut, *supra* note 4, at 1885.

[13] *See* Griffin, *supra* note 5, at 746.

[14] John Sivils, *Online Threats: The Dire Need for a Reboot in True Threats Jurisprudence*, 72 SMU L. REV. F. 51, 56 (2019).

the tone, body language, and other physical mannerisms of the speaker are not available to correct misimpressions. Social media users sometimes add emoticons to their posts to compensate for the lack of contextual clues. But while these "typographical representations of facial expressions . . . were invented for the very purpose of adding context to electronic communications . . . they too are subject to misunderstandings."[15] For example, although a "thumbs up" emoji is a common image, its interpretation varies across demographics. For Generation Z and younger crowds, the symbol connotes passive aggression, while for the older generation, it just means "ok."[16]

To correctly interpret both the content of an internet posting and the speaker's intent, an analysis of all relevant contextual factors is essential.[17] Understanding the architecture of social media platforms and the associated discourse conventions is a first step. Snapchat deletes posts automatically, and a post's fleeting existence, for example, limits understanding of it to the unreliable, and possibly biased, memories of the participants.[18] Facebook dialogue is relatively civilized

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[15] Petitioner's Br., at 49-50, No. 13-983, *Elonis v. United States* (Aug. 2014).

[16] *See* Madeline Merinuk, *How the Thumbs-Up Emoji Sparked a Generational War That No One Is Winning*, TODAY (Oct. 13, 2022), https://www.today.com/news/news/thumbs-up-emoji-debate-rcna52089.

[17] *See United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (reviewing message board postings "in the context of all of the relevant facts and circumstances" and finding that the prosecution failed to present sufficient evidence to meet either the subjective intent or objective harm requirements).

[18] Lidsky & Norbut, *supra* note 4, at 1911.

when compared with Reddit's,[19] but even within those platforms, speakers of different ages and backgrounds have different conventions, "adding another layer of contextual complexity."[20] Speech among routine users or "insiders" of these platforms can easily be misunderstood by "outsiders"—those unfamiliar with the site's conventions.[21] Twitter's 280-character limit eliminates nuance. Viewing only one of a series of tweets[22] makes it difficult to determine whether a post is intended as a threat or rather meant as a joke, sarcasm, or hyperbole. This analysis is even more complicated if the tweet includes a reposting of a third party's submission or a hyperlink to another site, if the incorporated or referenced posting is scrutinized absent the packaging of its transmitter.[23]

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[19] *Id.* at 1924-25.

[20] *See id.* at 1891.

[21] *Id.* at 1909 ("[W]ithin Facebook the way fifteen-year-old teens speak to each other is unlikely to be the same way that forty-eight-year-old lawyers speak to each other.").

[22] *See Jeffries*, 692 F.3d at 482 (Facebook messages linked with a video via YouTube are part of a single communication and form the backdrop for evaluating the video's content).

[23] *See* Megan R. Murphy, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. PA. L. REV. 733, 734-35 (2020); *see also* Callum Borchers, *Retweets ≠ endorsements? Oh, Yes, They Do, Say the Hatch Act Police* (describing the decision of the U.S. Office of Special Counsel to issue a warning to U.N. Ambassador Nikki Haley, whose retweet of a tweet supporting a candidate for political office was interpreted as an endorsement of the candidate in violation of the Hatch Act), https://www.washingtonpost.com/news/the-fix/wp/2017/10/04/retweets-endorsements-hatch-act/.

C. Failure to Require a Finding of Specific Intent to Satisfy the True Threat Exception Especially Burdens Speech Where the Challenged Speech Is Child-Generated and Delivered Via Social Media.

1. Children Throughout the Country Are Subject to Both State and Federal Prosecution as Adults for Threat-Based Offenses.

More than 30 years ago, lawmakers, responding to the now-debunked Super Predator Theory, passed legislation making it easier to transfer children from juvenile to criminal court in nearly every state.[24] "These reforms lowered the minimum age for transfer, increased the number of transfer-eligible offenses, or expanded prosecutorial discretion and reduced judicial discretion in transfer decision-making."[25] As a result, over a six-year period beginning in 1993, the number of children housed in adult jails more than doubled.[26] By 2009, approximately 200,000 children were being charged as adults annually.[27] While today that number

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[24] Patrick Griffin, Sean Addie, Benjamin Adams, and Kathy Firestine, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, OJJDP (September 2011), available at https://www.ojp.gov/pdffiles1/ojjdp/232434.pdf.

[25] Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP (June 2010), available at https://www.ojp.gov/pdffiles1/ojjdp/220595.pdf.

[26] *Statistical Briefing Book*, OJJDP available at https://www.ojjdp.gov/ojstatbb/corrections/qa08700.asp.

[27] *National Prison Rape Elimination Commission Report*, at 155, OJP (June 2009), available at https://www.ojp.gov/pdffiles1/226680.pdf.

has fallen to 53,000 annually,[28] every state in the country allows children to be tried, convicted, and sentenced as adults. As a result, nearly every issue that comes before this Court that deals with the government's ability to prosecute or punish specific conduct, necessarily implicates the constitutional rights of children, even if the defendant in the particular case before the Court was already an adult at the time the offense occurred.

HRFK research shows that more than 37,000 people are currently incarcerated in U.S. prisons for crimes they committed as children.[29] This constitutes approximately 3.7% of the entire national prison population. Youth whose crimes were committed when they were sixteen or seventeen years old make up more than 80% of this population.

Several states each have more than 1,000 incarcerated individuals who have been in prison since childhood. Georgia, Texas, and Wisconsin are among those with the highest number of people incarcerated for crimes committed as children. These states are especially relevant as they exclude *all* 17-year-olds from juvenile court jurisdiction and refer *all* such matters to criminal court. They also are in federal jurisdictions that do not examine the specific intent of the speaker

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[28] Charles Puzzanchera, Melissa Sickmund, Hunter Hurst, *Youth Younger than 18 Prosecuted in Criminal Court: National Estimate, 2019 Cases*, National Center for Juvenile Justice (2019), available at https://www.ojp.gov/sites/g/files/xyckuh176/files/media/document/youth-prosecuted-criminal-court-2019-cases.pdf.

[29] *A Crime Against Humanity: The Mass Incarceration of Children in the United States*, Human Rights for Kids, forthcoming publication (2023).

when determining whether a statement is a true threat outside the protection of the First Amendment.[30]

These three states are not alone, however, in how their transfer statutes pose a significant risk to children prosecuted pursuant to the true threat exception. In Florida, for example, prosecutors may directly charge any 16- or 17-year-old in criminal court if the charge involves a felony offense.[31] Under federal law, a child fifteen years of age or older who commits a felony constituting a crime of violence may be prosecuted as an adult.[32] A crime of violence is defined as "an offense that has as an element the . . . threatened use of physical force against the person or property of another . . ."[33] There are numerous threat-related offenses with which a child therefore could be charged under federal law. *See, e.g.*, 18 U.S.C. § 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member); *id.* § 871(a) (threatening the President); *id.* § 873 (blackmail); *id.* § 875(c) (threatening to kidnap or injure any person); *id.* § 876(c) (mailing threatening communications); *id.* § 878 (threats and extortion against foreign officials, official guests, or internationally protected persons); *id.* § 879 (threats against former Presidents and certain other persons); *id.* § 1503(a) (threats against a jury member); *id.* § 1951(a) (interference with commerce). And if a child is 16 or 17 and has previously been convicted of a felony drug or violent offense,

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[30] Petitioner's Writ of Certiorari, *Counterman v. Colorado*, at 3.

[31] Fla. Stat. § 985.557(1)(b).

[32] 18 U.S.C. § 5032.

[33] 18 U.S.C. § 16.

he or she is automatically prosecuted as an adult, regardless of circumstances.[34]

2. Children's Cognitive Immaturity and Speaking Style Should Be Considered in Establishing the Appropriate *Mens Rea* Requirement of the True Threat Doctrine.

This Court should consider the attributes of youth —in particular, a child's limited cognitive abilities— when establishing the *mens rea* standard for true threats. Children's obsessive use of social media underscores this need: often using rhetoric that obtains the most "likes" and online praise. At bottom, they speak and think differently, and frequently act in a way that might alarm adults while being completely harmless from their perspective.[35]

Developed over the last few decades, this Court's child sentencing jurisprudence is instructive in this regard, providing guidance for distinguishing protected (albeit exaggerated, unthinking, or crude) speech from a true threat. Recognizing their cognitive immaturity, this Court consistently holds that children are different from adults and should not be subject to the state's harshest penalties. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

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[34] *Id.*

[35] Because their brains are still developing, adolescents have limited ability to consider the consequences of their actions and are more susceptible to outside influences and pressures. *See* Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 385 (2013).

Beginning with *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), this Court has recognized that juveniles do not process decisions like adults, and that "[e]ven the normal 16-year-old customarily lacks the maturity of an adult." In *Thompson v. Oklahoma*, the Court further noted that juveniles are more motivated by emotions and outside pressures and less capable of considering the consequences of their actions than adults. 487 U.S. 815, 835 (1988); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993) (juveniles lack maturity and a sense of responsibility that "often results in impetuous and ill-considered actions and decisions"); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (juveniles are categorically less culpable than adults because they have "a lack of maturity and an underdeveloped sense of responsibility" and are "more vulnerable or susceptible to negative influences and outside pressures"); *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("developments in psychology and brain science continue to show differences between juvenile and adult minds").

Even more than in sentencing proceedings, these developmental limitations must be considered when seeking to impose criminal liability on a child for thoughtless, ill-considered, or hyperbolic speech transmitted online. Young people are impetuous and drawn to risk-taking behaviors.[36] They typically lack planning skills, appreciation for long-term consequences, and the ability to self-regulate like adults.[37] Peer pressure encourages impressionable and "eager to please" chil-

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[36] *See* Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 682 (2016).

[37] *Id.* at 683-85.

dren to inflate their experiences. To boost their personal status by getting "likes," comments, or shares that adolescent social media users crave, they endeavor to "Wow!" their contemporaries.[38] The need to obtain "likes" is addictive, and can cause individuals, especially young teens, to say things they would not say normally.[39] Hyperbole and exaggeration are time-tested ways to garner the desired attention, but not everyone "on the other side of the screen" may discern the true intent behind the presentations.[40]

Research reveals that "[m]ost threats made by children or adolescents are not carried out."[41] The anonymity of social media, however, enables cyber bullying, often committed by teens who lack the cognitive maturity to understand the risk of harm their conduct engenders.[42] "Many such [purported] threats are a child's way of talking big or tough, or trying to get attention. Sometimes these threats are a reaction

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[38] *See* Alyson Shontell, *A Teen Was Jailed for a 'Sarcastic' Facebook Post Even Though the Cops Never Saw the Actual Conversation*, BUS. INSIDER (Feb. 14, 2014), http://www.businessinsider.com/justin-carters-facebook-comment-scandal-2014-2.

[39] *See* Maureen O'Connor, *Addicted to Likes: How Social Media Feeds Our Neediness*, N.Y. MAG. (Feb. 20, 2014), https://perma.cc/HQ33-VGFY.

[40] Lidsky & Norbut, *supra* note 4, at 1913.

[41] *See Threats by Children: When are they Serious?*, American Academy of Child & Adolescent Psychiatry (2019), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Childrens-Threats-When-Are-They-Serious-065.aspx.

[42] *See* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1701-02 (2015).

to a perceived hurt, disappointment, or rejection."[43] But as one high school official noted while addressing student posts facially indicating violence: "I don't think many young students recognize [that] when they post something on social media, whether it's as a joke, or it's out of frustration or anger, the consequences can last their entire life."[44]

Only a comprehensive test that requires *both* objective harm *and* the subjective intent of the speaker, determined through consideration of all the facts and circumstances, can insulate children from overcriminalization of innocent speech in an arena where they are some of the most active yet vulnerable participants.[45] "The generation gap within certain social media platforms—especially when combined with the distinct communication conventions that develop within each cohort—may lead courts and lawmakers unfamiliar with those conventions to criminalize normal or common adolescent behavior, which has increasingly included the use of hyperbole in almost any given online situation."[46]

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[43] *Threats by Children: When are they Serious?*, *supra* note 41.

[44] Statement of Albemarle County Public Schools' spokesperson approving of police action charging three teens at an Albemarle County, Va. high school for making threats (Dec. 8, 2022), https://www.cbs19news.com/story/45405622/minors-charged-for-making-threats-against-schools.

[45] Lidsky & Norbut, *supra* note 4, at 1922.

[46] *See* Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), https://www.nytimes.com/2015/11/29/fashion/death-by-internet-hyperbole-literally-dying-over-this column.html; *see also* Lidsky & Norbut, *supra* note 4, at 1911-12.

For example, lacking familiarity with social media platforms' conventions, a judge might erroneously conclude that a multitude of postings using the words "dead" and "dying" presaged the impending demise of the posters, either through murder or suicide, when in actuality the use of "OMG dying" is commonly used by girls and young women "as filler for anytime anyone says anything remotely entertaining."[47] This generational convention is the lingua franca of young people who have grown up using the internet as their primary mode of communication and must be taken into consideration by "outsiders," including legal decision-makers, seeking to understand the actual meaning and intent of their online musings.[48]

3. An Objective Test Reduces the Requisite Mental State for Criminality to Mere Negligence, a Standard That When Applied to Children Will All Too Frequently Result in Loss of Their First Amendment Right of Free Speech.

For criminal culpability to attach, this Court has consistently subscribed to the view that "consciousness of wrongdoing," "[w]ith few exceptions," is essential. *Elonis*, 575 U.S. at 734 (internal citations omitted). Use of an objective test that applies either a reasonable listener *or* a reasonable speaker standard[49]

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[47] Lidsky & Norbut, *supra* note 4, at 1912.

[48] *Id.* at 1913.

[49] *See Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc) (noting that, while some courts using the objective test have applied a reasonable-listener standard, others have embraced a reasonable-speaker standard).

contravenes this established precedent, reducing the requisite *mens rea* to mere negligence and thereby impermissibly burdening speakers' First Amendment rights. *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). The emotion of fear is so variable and so difficult to predict that, standing alone, the mere fact that speech puts someone in fear cannot and should not be the basis for criminal liability.[50] The reasonable person standard has the potential for transforming even negligent misunderstandings, often generated by the architecture of the social media themselves, into felonies.

In the context of children's speech, this is manifestly inappropriate and unjust. Kids, as any parent will attest, are not reasonable. They do not self-regulate. They neither think before they act nor appreciate the consequences of their actions. Holding them to a standard of evaluating the effect of their words on others is tasking them with a responsibility they are physiologically incapable of shouldering. "That after all is what an objective test does: It asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but *because he should have known others would see it that way*." *Jeffries*, 692 F.3d at 484-85 (Sutton, J., dubitante) (emphasis added). Accordingly, as Judge Sutton correctly noted, "The reasonable man rarely takes the stage in criminal law." *Id.* at 485. And there is absolutely no justification for extending this demonstrably inappropriate adult standard to children,

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[50] Lidsky & Norbut, *supra* note 4, at 1917.

whose cognitive immaturity the *Graham, Roper*, and *Miller* Courts relied on to exempt them from the "State's harshest penalties."

The consequences of kids' cognitive immaturity are further exacerbated on social media platforms that often create a permanent record of their colloquy. These often ill-conceived, impetuous utterings can take on completely different meanings when encountered at a later time or when viewed by "outsiders" unfamiliar with the "insiders" language and usage of common internet conventions.[51]

This is exactly the scenario that subjected Justin Carter, a 17-year-old Texas boy, to criminal prosecution for a Facebook post made while he was playing an online battle game, in which he stated, among other things: "I think I'ma SHOOT UP A KINDERGARTEN." Taken completely out of context, Justin's words so alarmed a total stranger—a Canadian, middle-aged woman—that she contacted Texas police, who arrested and charged Justin with making a terrorist threat.

Justin was charged without consideration of any of the attendant circumstances, including the fact that the participants in his battle game, generally ranging in age from 16 to 30, routinely engaged in "trash talk and hyperbolic exaggeration," and that the immediate recipient of the comment made no effort to alert authorities. Evidence indicating that the post was more of a rant than a threat was the use of capital letters, which is internet code for shouting. Justin's immediate subsequent post saying, "LOL"

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[51] Lidsky & Norbut, *supra* note 4, at 1907, 1909-10.

and "J/K," which are common internet abbreviations for "laughing out loud" and "just kidding," respectively, was also ignored.

The judge set bail at $500,000. Justin spent four months in jail, where he was physically abused and put in solitary confinement for his own safety. He awaited trial for five years before prosecutors finally offered him a deal dismissing the felony charges in exchange for a guilty plea to an unrelated misdemeanor charge.[52]

Justin Carter suffered this injustice because the police, prosecutors, and judge applied the objective-only test, focusing solely on the effect of Justin's literal words on a supposed "reasonable listener," without any consideration of the relevant contextual evidence that would have conclusively demonstrated he lacked the specific intent to communicate any true threat.

Another disturbing example is that of 17-year-old Jashon Jevon Taylor, who was charged with making a terrorist threat when, angry that his favorite team did not win the Super Bowl, he took to Snapchat to express his hatred of the New England Patriots and their fans, threatening to kill some of his classmates.[53] Jashon's youth, combined with a consideration of the rhetoric often employed in sports rivalries where "trash talk" between opposing teams is routine, was ignored

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[52] *See* Alyson Shontell, *When A Teen's 'Sarcastic' Facebook Message Goes Terribly Wrong*, BUS. INSIDER (July 8, 2013), https://www.businessinsider.com/teen-justin-carter-faces-trial-and-jail-for-facebook-comment-2013-7. *See* Lidsky & Norbut, *supra* note 4, at 1886-88.

[53] Max Londberg, *Belton High teen charged with felony after threat on Snapchat*, KANSAS CITY STAR (Feb. 8, 2017), http://www.kansascity.com/news/local/crime/article131622874.html.

in determining whether his outburst was anything more than hyperbole.[54]

In *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002) (en banc), the court upheld a seventh-grader's suspension based on threats to a former girlfriend who had recently broken up with him. "Angry and frustrated" (306 F.3d at 627), JM included the rants in a song/letter he composed at home, but never delivered. He did let a friend read the letter, who informed the girl, KG, about its contents. KG asked to see the letter, but JM refused to provide it. At KG's urging, the boy's friend stole the letter from JM's bedroom and gave it to KG. She read its contents at school in the presence of other students, one of whom told a security guard, who then reported the incident to the school administrators. While the court criticized the school board's disciplinary action as "unnecessarily harsh," it refused to intrude on the board's autonomy to overturn the suspension.[55]

Tragically, in numerous other cases involving kids, use of the objective test or reasonable person standard—focusing solely on the effect of a speaker's words on a listener or the effect the speaker supposedly should have anticipated—has resulted in arrest, criminal prosecution, and/or school expulsion.

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[54] *See* Lidsky & Norbut, *supra* note 4, at 1911.

[55] *See also* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006) (positing several hypotheticals).

4. Only Upon a Showing of Subjective Intent to Transmit a Threat, Considering the Totality of the Circumstances, Should Children Forfeit First Amendment Protection.

The subjective intent requirement is a rule of construction reflecting the basic principle that "wrongdoing must be conscious to be criminal." *Elonis*, 575 U.S. at 734 (quoting *Morissette v. United States*, 342 U.S. 246, 252 (1952)). This Court has repeatedly confirmed that in the First Amendment context, any restrictions on free speech must be extremely limited, clearly delineated, and narrowly circumscribed to avoid chilling protected speech. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Accordingly, identifying the *mens rea* component of the subjective test should err on the side of potentially allowing some marginal speech to retain its constitutional protection.

A standard requiring merely a showing of "reckless disregard" would be too low a bar. This is particularly the case when a child speaker's intent is being reviewed. Reckless behavior is the hallmark of kids' cognitive immaturity. A subjective intent standard of reckless disregard as a basis for conviction would realistically provide kids with no more First Amendment protection for their routine outbursts than an objective intent standard that excludes any consideration of actual speaker intent.

But adopting a specific intent standard is only the first step. A factfinder must also step into the child's shoes and interpret their words through his or her perspective. Without undertaking a serious analysis of all the facts and circumstances to see if the requisite *mens rea* exists, the standard may be nothing more

than the improper "objective intent" test masquerading as a requisite "subjective intent" analysis. This appeared to be the case in *Pennsylvania v. Knox*, where the teenage defendant's conviction for making a terrorist threat in the form of a rap song containing violent lyrics aimed at the police in general and two specific officers was upheld on appeal. 190 A.3d 1146, 1153 (Pa. 2018). The Court found the requisite intent based on *its own* interpretation of the lyrics, augmented solely with a cursory consideration of four other contextual factors. *Id.* at 1159-61.[56]

5. Application of the Specific Intent Test Standing Alone Can Result in Unfair Punishment for Kids Simply Being Kids.

Kids make rash, thoughtless statements all the time as a consequence of their lack of physiological development in the area of the prefrontal cortex responsible for "executive function" or judgment.[57] Yet, they may fully "intend" to communicate the essence of their statements. But just as this Court has recognized in the juvenile sentencing context, these adolescent outbursts must be recognized as symptoms of cognitive immaturity and—no matter how vitriolic, crude, disparaging, and even threatening they sound—they cannot, standing alone, subject the child to criminal prosecution. This inquiry into the speaker's intent

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[56] *See* Griffin, *supra* note 5, at 739-43.

[57] Nat'l Institute of Mental Health, *The Teen Brain: 7 Things to Know* (Revised 2023), https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know.

must be coupled with an objective determination of the actual effect of the speech on a reasonable person.[58]

In the absence of any objective harm actually perceived by a reasonable listener, when all contextual evidence is considered, even the most reprehensible intent in the mind of the speaker is protected by the First Amendment's free speech guarantee. In other words, while subjective intent to communicate a threat is the requisite *mens rea* for speech to lose its constitutional protection, there must also be a showing of the requisite *actus reus*, or a showing of harm in the form of fear or intimidation in a reasonable listener. *See, e.g.*, *North Carolina v. Taylor*, 866 S.E.2d 740, 755 (N.C. 2021) (requiring the state to "prove both an objective and subjective element"). The best way to evaluate the conduct element of the offense is through use of the objective or reasonable person standard, once again after considering all the relevant contextual evidence.

Any test that fails to consider subjective intent as well as the effect on the listener precludes a court from taking into account children's developmental limitations. Under the objective test standing alone, for example, a 12-year-old and a 32-year-old who utter

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[58] Conversely, a subjective-intent-only standard might effectively eliminate appellate review of "true threat" determinations. *See, e.g., Pennsylvania v. Knox*, 190 A.3d 1146 (Pa. 2018) (treating subjective intent as a question of fact and restricting review to whether "competent evidence" supported finding). Because a defendant's subjective intent is classically considered a question of fact for a jury, appellate courts may consider their hands tied. *See* Griffin, *supra* note 5, at 732-35. This Court should make clear that the "constitutional facts" doctrine extends to findings of "subjective intent" in true threat cases.

the same words are treated the same—their words are analyzed solely in terms of how a reasonable person would react. A test that includes consideration of subjective intent, by contrast, would allow a factfinder to assess a child's intent according to his or her level of cognitive development. Given the jeopardy faced by children across the country, this Court should ensure that children who do not have a specific intent to threaten are not unfairly and unconstitutionally prosecuted for reckless or negligent statements made during youth or adolescence.[59]

[59] If this Court adopts the objective standard, essentially one of mere negligence, as the appropriate *mens rea* element under the true threat doctrine, *amicus* argues that in cases involving children's speech, due process requires a showing of specific intent assessed upon consideration of the totality of facts and circumstances.

CONCLUSION

For the foregoing reasons, this Court should hold that, to invoke the true threat exception to the free speech guarantee of the First Amendment, there must be evidence of *both* a fear of violence perceived by a reasonable listener *and* the speaker's specific intent to transmit a threat, through examination of the totality of the circumstances.

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