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 Writ Of Certiorari To The Colorado Court Of Appeals, Division II

BRIEF AMICUS CURIAE OF JACK JORDAN IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

Amicus Curiae is a lawyer who was a soldier. For many years in conflicts around the world, Amicus and people he represents supported and defended our Nation and Constitution by risking or giving life or limb. Many gave their health and happiness. To honor the millions who have given much to honor their oaths to support and defend the Constitution (America's constitution), Amicus now supports judges fulfilling their duty to honor their own oaths, and he exposes and opposes judges and government attorneys violating their oaths by attacking and undermining the Constitution and the people and principles that it protects.[1]

Of considerable concern to Amicus is defending the freedom of speech in America for its core purpose (helping ensure government truly is good and for the People). *See*, *e.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 688 (1992) (Stevens, Blackmun, O'Connor, JJ., dissenting):

> As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws." To counter that tendency, he reminds us:
>
> "He that would make his own liberty secure must guard even his enemy from oppression;

[1] No counsel for any party authored any part, or contributed any money intended to (or that did) fund preparing or submitting, this brief.

> for if he violates this duty he establishes a precedent that will reach to himself."

Amicus is profoundly concerned by the precedent and examples being set by some of today's judges and government attorneys who are dangerously lacking in respect for the Constitution and its restraints on their powers. Amicus, himself, was viciously "punished" by (and to protect) malicious judges and government attorneys who lied about facts and evidence and knowingly violated much law and much of the Constitution. So Amicus seeks to prevent persecution for speech exposing and opposing judges and government attorneys who knowingly violate their oaths to support the Constitution.

SUMMARY OF ARGUMENT

Colorado's incarceration of Counterman is clear and convincing evidence of a system that, in multiple respects, is egregiously unconstitutional and frighteningly dysfunctional. It should be universally feared. Counterman in prison is analogous to the canary in the coal mine.

The words used by Counterman, as well as those used by the legislators, prosecutor and judge who incarcerated Counterman, are clear and convincing evidence that far too many Americans—including far too many involved in creating or enforcing law—are frighteningly far from understanding or respecting the scope and purpose of "the freedom of speech" and

"press." U.S. Const. Amend. I. The "true threat" in Counterman's case comes from those who put him in prison for nearly (or, ultimately, maybe considerably more than) five years for a couple ill-considered emails.

Counterman's case and the words used to discuss it and similar matters are clear and convincing evidence that education, not incarceration, is a remedy that is required, not only for people like Counterman, but also the people responsible for incarcerating Counterman.

Instead of intelligent discussion of constitutional principles and this Court's precedent, those in favor of incarceration urge this Court (and the People) to accept mere labels and succumb to a dangerous siren song. References to a "reasonable" person and "objective" analysis are dangerous extensions of the dangerous pretense that the People can and should trust, presume the good faith of and have "confidence" in the "legitimacy" of public officials and their actions. This case and others prove that such confidence is something the People certainly should not have.

One of the most important and most fundamental aspects of the repression of speech by government is that it reverses the natural relationship between sovereign and servant. In America, the People are the ultimate sovereign, and our governors are our servants.

The relationship of sovereign citizen to governor is perhaps best viewed as analogous to the concept of a governor for a willful child. Guidance, not punishment, should the goal. Education of strong sovereigns should

be the objective. To the extent practicable, America's public servants should be in the business of educating and empowering kings and queens, not filling prisons.

ARGUMENT

I. Courts Should Emphasize Uniform Analysis of Repression of Expression with Emphasis on the Purpose of Freedom of Expression.

All speech is subject to the First Amendment and all repression of speech should be subjected to disciplined, rigorous due process of law. Courts "always" have "widely understood that" the First Amendment "codified" multiple "pre-existing right[s]," which were not "granted by the Constitution" or "in any manner dependent upon" the Constitution for their "existence." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

"Constitutional rights" (*e.g.*, the freedom of speech and the right to petition) "are enshrined with the scope they were understood to have *when the people* [*enshrined*] *them*." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111, 2136 (2022) (emphasis by the Court). "Constitutional rights are enshrined with the scope they were understood to have when the *people* [enshrined] them, whether or not future *legislatures*" or "*judges* think that scope too broad." *Heller*, 554 U.S. at 634-635 (emphasis added). *See also*, *e.g.*, *Herbert v. Lando*, 441 U.S. 153, 183-185 (1979) (Brennan, J., dissenting) (cleaned up):

> the First Amendment serves to foster the values of democratic self-government [] in several senses. The First Amendment bars [public servants] from imposing upon [sovereign] citizens [mere public servants' purported] vision of truth. It prohibits [public officials] from interfering with the communicative processes through which [sovereign] citizens exercise and prepare to exercise their rights [and powers] of self-government. And the Amendment shields those [sovereign citizens] who would [exercise their power to] censure [public servants] or expose [such servants'] abuses.

See also id. quoting Mills v. Alabama, 384 U.S. 214, 219 (1966) (emphasis added):

> [The People with the power of speech and press serve and were] designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping [public] officials [] responsible to all the people whom they [purport] to serve. Suppression of [the power of the People, to use speech and] press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

The First Amendment "is the very product of an interest balancing by the people" and it clearly "elevates above all other interests the right of law-abiding,

responsible citizens" to freely use means of communication. *Bruen*, 142 S.Ct. at 2131 *quoting Heller*, 554 U.S. at 635. "It is this balance—struck by the traditions of the American people—that demands" the "unqualified deference" of all public servants, even judges. *Id*.

The First "Amendment's plain text covers" Counterman's "conduct" so "the Constitution presumptively protects" such "conduct. To justify" punishing Counterman, the government "must demonstrate" that its putative "regulation" is "consistent with this Nation's historical tradition" of protecting such conduct. *Bruen*, 142 S.Ct. at 2126. The government "must affirmatively prove that" its putative "regulation" is within this Nation's long and strong "historical tradition" of protecting speech, assembly and petitioning within "the outer bounds" of such "right[s]." *Id*. at 2127.

II. Education, Not Repression, Fosters Confidence.

"A result considered untoward may undermine public confidence" in courts and the justice system. *Richmond Newspapers v. Va*., 448 U.S. 555, 571 (1980) (opinion of Burger, C.J., White, Stevens, JJ.). "The educative effect of public" access to information about how and whether justice is being served "is a material advantage" of our system of justice. *Id.* at 572. "Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy" or repression. *Id*.

People like Counterman need education, not incarceration. People need to be better taught to better exercise the fearsome power of the freedom of expression. Clearly, "education in the abandonment of foolish" conduct "is itself a training in liberty." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940). Education promotes "the self-confidence of a free people." *Id*.

"Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread" the "truth." *Wood v. Georgia*, 370 U.S. 375, 388 (1962) *quoting Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Judges and lawyers should be among the leading educators in America, leading in making America think. Analysis and discipline should not be eliminated in favor of mere labels. Otherwise, America will cease to be what it was meant to be. America will cease to be exceptional and serve only as another cautionary tale.

Thomas Jefferson admonished that we all must "with courage and confidence pursue" and secure our "Federal and Republican principles," *i.e*., creating and securing the "union and representative government" because we should not be confident we have "found angels" to "govern." First Inaugural Address (1801) (https://www.loc.gov/item/rbpe.1900040a/).

He also emphasized that the freedom of speech and press is "the only safeguard of the public liberty." Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787) (available at https://press-pubs.uchicago.edu/founders/tocs/amendI_speech.html). Jefferson

emphasized that critical thinking and critical speech, not mere confidence, were crucial to good government.

"The people are the only censors of their governors: and even" their "errors [in criticism] will tend to keep" public servants "to the true principles of their institution." *Id*. To minimize or mitigate errors, "full information of" public "affairs" must be given to the "people," and such communication "should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right." *Id*. Otherwise, "under pretence of governing," purported public servants will act like "wolves" and attack people like "sheep." *Id*. "If" the people "become inattentive" to "public affairs," then legislators, "judges and governors shall all become wolves." *Id*.

James Madison also emphasized the "great importance" to our "republic" of "guard[ing our] society against the oppression of its rulers." The Federalist No. 51 (https://guides.loc.gov/federalist-papers/full-text). A "thirst for absolute power is the natural disease" of government that is "trusted without being looked after." Thomas Paine, *Common Sense* at 5 (Jan. 1776) reprinted London, H.D. Symonds (1792) (available via Google Books).

Many a world power has been undone by excessive confidence in the purported or perceived propriety or wisdom of putative leaders in politics or opinion. "[T]he nation which reposes on the pillow of political confidence, will sooner or later end its political existence in

a deadly lethargy." *Garrison v. Louisiana*, 379 U.S. 64, 86 (1964) (appendix to Douglas, J., concurring, *quoting* James Madison's Address, January 23, 1799).

III. Labels and Names Are Dangerous Things.

"So insatiable is a love of power that" from this Nation's very founding, those who love power have "resorted to a distinction between the freedom" of expression and purported "licentiousness" for "the purpose of converting the" First Amendment, itself, "into an instrument for abridging" the "freedom" that amendment was designed to "preserve." *Id*. at 85-86 (referring to the Sedition Act of 1798).

Labels like "reasonable" and "objective" are deceptive and dangerous and amenable to egregious abuse by judges and government attorneys. Labels like "exempt" or "excepted" from or "not immunized by" the mere "First Amendment" are dangerous to, and often abused to deny, Americans' freedom to speak and publish. Such expressions should be eliminated entirely. Expression is expression and all potential repression should be subjected disciplined scrutiny.

The central dichotomies here (purportedly reasonable, objective perception versus subjective intent or knowledge) also are central to prosecuting or persecuting lawyers and litigants for their speech in many jurisdictions. Throughout history and in many areas, "Men" have used "names without understanding them." *Common Sense* at 11. That includes "the

unmeaning name of king." *Id*. at 4. Would-be kings by any other name would be as bad.

History provides copious evidence of the danger of names and labels—including those made and applied by judges. Three judge-made labels that proved among the most dangerous to First Amendment freedoms are "seditious libel," "common law" (*see* pages 15-17, below) and even "clear and present danger."

"Justices Holmes and Brandeis" wisely emphasized the importance of requiring identification of a particular "clear and present danger" before government proposed or permitted restriction or punishment of expression. *See*, *e.g.*, *Konigsberg v. State Bar of California*, 366 U.S. 36, 63 (1961) (Black, Douglas, JJ., Warren, C.J., dissenting). Requiring public officials to identify "a clear and present danger" greatly "broaden[ed] the then prevailing" judicial "interpretation of First Amendment freedoms;" it "protected speech in *all* cases except" when a *harm* or a "*danger* was" proved to exist or be "*so imminent* that there was no time for rational discussion." *Id*. (emphasis added).

Many judges, however, egregiously abused what they (merely) called the "clear and present danger test" to "justify" their unconstitutional "refusal to apply the plain mandate of the First Amendment." *Id*. Many judges merely labeled certain speech a "clear and present danger." Such labels allowed and allow judges to be lazy and undisciplined and even misrepresent facts.

It is well-settled that judges sometimes say things merely because they sound legitimate when, in fact,

they are not. So this Court has reminded judges that due process of law requires much more than the mere "enunciation of a constitutionally acceptable standard" by judges merely purportedly "describing the effect" of "conduct" being punished. *Wood*, 370 U.S. at 386. In *Wood*, the Court wisely accentuated the absence of evidence to protect a court officer who criticized and opposed multiple judges.

Shortly thereafter, the Court was more emphatic but more cryptic. A decision famous for one warning should be famous for another warning: "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Miranda v. Arizona*, 384 U.S. 436, 479-480 (1966) *quoting Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

In such manner, judges invite anarchy by knowingly undermining First Amendment freedoms and other express language of the Constitution. *Cf*., *e.g*., 18 U.S.C. §§241, 242. One reason they have done (and still do) so is to repress expression that judges consider merely offensive. *See*, *e.g*., *Garrison*, above); *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. State of Fla*., 328 U.S. 331 (1946). Judicial repression of purportedly-offensive expression has deep roots and a very long, very dark history. *See* pages 16-17, below.

Even today, it is not uncommon that lawyer or litigant speech is punished by judges and government attorneys based on distinctions such as are central to

this case. The same or similar labels and concepts regarding speech are central (*e.g.*, "reasonable" or "objective" perceptions versus the speaker's "subjective" intent or knowledge, or speech that is "exempt" or "excepted" from or "not immunized by" the First Amendment).

Judges and the government attorneys in judges' disciplinary apparatus commonly state or imply that the foregoing dichotomies are dispositive. They pretend that such distinctions justify flouting this Court's considerable precedent repeatedly emphasizing that the government must prove each material fact.

In attorney discipline cases, any purported "proof presented to show" each material fact must have "the convincing clarity which the constitutional standard demands." *New York Times v. Sullivan*, 376 U.S. 254, 285-286 (1964). The "First Amendment mandates a 'clear and convincing' standard" of proof of each material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Such "standard of proof" is "embodied in the Due Process Clause" to establish "the degree of confidence" each court must "have in the correctness" of its "factual conclusions." *Addington v. Texas*, 441 U.S. 418, 423 (1979). It "serves to allocate the risk of error" to the court punishing attorney speech, and "to indicate the" great "importance attached to the ultimate decision." *Id*. It "reflects the" great "value society places" on the "liberty" at stake. *Id*. at 425.

The "clear" and "convincing" standard "reduce[s] the risk to" a person "of having his reputation tarnished erroneously by increasing" the government's "burden of proof." *Id*. at 424. Such "level of certainty" is "necessary to preserve fundamental fairness" in "government-initiated proceedings that threaten" an "individual" with a "significant deprivation of liberty" or "stigma." *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

Instead of ensuring the government bears its burden of proof with evidence, judges sometimes camouflage the true nature of government conduct with nice-sounding names and labels. Regarding Counterman, government implied its conduct was "reasonable" and its analysis was "objective." Judges, themselves, repeatedly provide good reason to distrust their labels.

To justify flouting this Court's precedent, some judges contend they "adopted" a "standard" that "evaluates" what "what the reasonable attorney" supposedly "would do" and "whether" an "attorney had a reasonable factual basis for making the statements." *Disciplinary Counsel v. Frost*, 909 N.E.2d 1271, 1277 (Ohio 2009) (imposing indefinite suspension). They do so specifically to flout the *New York Times* "subjective 'actual malice' standard" and tout their own "objective standard." *Id*. at 1277.

When judges and government attorneys employed in judges' so-called disciplinary authorities repress attorney criticism of judges, they sometimes claim to apply "reasonable subject-matter limitations." *In re Jordan*, 518 P.3d 1203, 1235 (Kan. 2022). They imply

that they act reasonably when they disbar attorneys for exposing the lies and crimes of judges merely because "attorneys" have a "duty to maintain the respect" purportedly "due" to "judicial officers." *Id*. at 1236 *quoting In re Johnson*, 729 P.2d 1175, 1179 (Kan. 1986). In truth, judges sometimes protect each other with obvious (and even knowing) falsehoods, including by merely contending that criticism has "no reasonable basis in fact." *Id*. at 1237.

Judges and government attorneys engage in such conduct expressly to flout this Court's precedent. *See id*. at 1224, 1234, flouting *Milkovich v. Lorain Journal Co*., 497 U.S. 1 (1990), *Pickering v. Board of Ed*., 391 U.S. 563 (1968) and *Garrison* and *New York Times*, above (each requiring the government to prove that criticism was false); *id*. at 1224 flouting *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), *In re Primus*, 436 U.S. 412 (1978) (each requiring disciplinary authorities to prove that punishment served a compelling court interest and avoided abridging First Amendment freedoms).

In another context (to purport to justify concealing information and records in violation of the Freedom of Information Act (FOIA)), government attorneys urge, and judges commonly "accord," an unconstitutional "presumption of good faith" to assertions of agency employees. *Immerso v. U.S. DOL*, 2022 U.S. App. LEXIS 33011, at *2 (2d Cir. Nov. 30, 2022). Judges do so even when they know agency employees' declarations are obviously (and even knowingly) false. *See id*. Government attorneys and judges have knowingly misrepresented that efforts to expose and oppose such

government misconduct were mere "bad faith" purportedly "slanderous accusations." *Id*. at *4.

IV. To the Freedom of Speech, the Judiciary May Be the Most Dangerous Branch.

It is dangerous to liberty and the freedom of expression "to play make-believe" and "assume that men in gowns are angels." *Pennekamp*, 328 U.S. at 359 (Frankfurter, J., concurring). The Founders knew better than to make that mistake.

They designed the Constitution to compel all "judges to do their duty as faithful guardians of the Constitution." The Federalist No. 78 (Alexander Hamilton) (https://guides.loc.gov/federalist-papers/full-text). The Constitution pointedly deprived judges of powers that the common law gave them. Under the Constitution, judges have "neither FORCE nor WILL, but merely judgment." *Id*. The Constitution requires "government in which" the judiciary is separate from the other branches, so that "the judiciary" will "be the least dangerous" branch. *Id*.

The Founders also revealed what would make judges, themselves, a clear and present danger. When judges exercise "judgment," alone, "liberty can have nothing to fear from the judiciary alone." *Id*. But the People "have every thing to fear from" a "union" of "judiciary" powers with the powers of "either of the other departments." *Id*. When "the power of judging" is "not separated from the legislative and executive powers,"

the People will have "no liberty." *Id*. *quoting* Montesquieu.

Such statements and copious plain language of the Constitution confirmed that the common law was the epitome of evil and the enemy of freedom of expression. The People had "every thing to fear from" judges because the common law was a "union" of "judiciary" powers with the powers of *both* "other departments." *Id*. "[T]he power of judging" was "not separated from" either "the legislative" or the "executive powers," so the People had "no liberty" to expose misconduct by public officials. *Id*.

Particular aspects of the common law are crucial to understanding its devastating failings and judges' ferocious attacks on the freedom of expression and the people who attempted to exercise it. First, judges and courts were creatures of the King (extensions of executive power). Second, because judges protected and projected the King's power, they were not accountable to (or particularly concerned with) Parliament or the People. Third, judges were not governed by the common law. Fourth, the common law was created by individual judges who then, individually and collectively, enforced or applied what they wanted when they wanted.

"Blackstone" and his "*Commentaries*" and "Coke" and "his report of the case *De Libellis Famosis* in 1606" should serve as compelling reminders (and warnings) that some of the blackest blots on the history of freedom of expression were put there by judges punishing

those who dared to speak. Stephen D. Solomon, *Revolutionary Dissent: How the Founding Generation Created the Freedom of Speech* (2016) at 100.

The infamous "Star Chamber," for example, fabricated and enforced the cruel fiction that exposing "corrupt or wicked Magistrates" was a "criminal act" ("seditious libel") because such expression (merely) revealed the greatest "scandal of government," *i.e.*, that "corrupt or wicked Magistrates" had been "appointed." *Id*. at 39. In 1606 "with *De Libellis Famosis*, the Star Chamber" judges fabricated the especially cruel fiction that "a true statement" about "corrupt or wicked Magistrates" especially required punishment. *Id*. The monstrous "precedent set in *De Libellis Famosis* lived on as part of English common law" and became a horrific "common maxim" that judges used to justify truly brutal repression of critics of government: "the greater the truth, the greater the libel." *Id*.

That was the "common law" that was "exported to the colonies." *Id*. at 39. The "common law" and "legal commentators in America followed the lead of Coke and Blackstone," which shaped how "lawyers and judges viewed freedom of expression" for far more than "fifty years following the Revolution." *Id*. at 100.

"Blackstone" in his "*Commentaries*" in 1765 "endorsed the idea that freedom of the press meant nothing more than the right" to print "without prior censorship," *i.e.*, not freedom from punishment for seditious libel. *Id*. at 4. Before he reconsidered this issue, even Justice Holmes emphasized that the common law

"of criminal libel" called for "punishment" of even "true" criticism "in most cases, if not in all," and "the rule applied to criminal libels" (somehow) applies" even "more clearly to" purported "contempts" of court. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

One very useful purpose that "the Sedition Act of 1798" served was to sharply focus American "national" attention (near the Founding) on "the central meaning of" not merely "the First Amendment," but also America's political constitution. *New York Times*, 376 U.S. at 273. The Act punished federal officials' critics "inten[ding]" to "defame" or "bring them" into "contempt or disrepute" or "to excite against them" the "hatred of" the "people." *Id*. at 274.

Everyone understood the Constitution and America's constitution precluded punishing truthful criticism of public officials' official conduct. So the Sedition Act required the government to bear the burden of proving that criticism was both "false" and "malicious." *Id*. at 273. It also "allowed" the "defense of truth," and (of profound historical importance regarding so-called seditious libel) "the jury were" the "judges both of the law and the facts." *Id*. at 274.

Even so, Jefferson and Madison very vigorously opposed the Act. *See*, *e.g*., *id*. at 273-276. Madison insisted Americans enjoy full "freedom in canvassing the merits and measures of public men, of every description," and he emphasized that such freedom "has not been confined" by "the common law." *Id*. (emphasis

added). "On this" sturdy "foundation" the "freedom of the press" has "stood" and still "stands." *Id*.

In 1794, Madison had emphasized that in "Republican Government" the "censorial power is in the people over the Government, and not in the Government over the people." *Id*. at 275. Earlier, in Madison's proposed First Amendment, he emphasized why: the People's "right to speak," "write," and "publish" and "the freedom of the press" were "the great bulwarks of liberty." 1 Annals of Cong. 434 (1789).

Significantly, Madison's and Jefferson's statements about the freedom of expression were not entirely their own thoughts. They were echoes of thoughts made popular throughout pre-revolutionary America, including by America's most famous revolutionary-newsman. In 1722, Benjamin Franklin reprinted a letter from a collection known as *Cato's Letters* that, like *The Federalist Papers*, explained the foundations of republican government.

Franklin published under a pseudonym that was supposed to be a woman's name, Silence Dogood. Silence spoke about (and helped establish) the freedom of speech in America. Much of the nascent American press helped establish that Americans are free to expose the lies and crimes of purported public servants abusing their powers. Franklin and *Cato's Letters* led the way decades before Adams, Jefferson and Madison.

Franklin *showed* the freedom of speech and press by publishing a crucial excerpt from *Cato's Letters*, thereby endorsing and promoting the thunderous

principles therein that roared throughout America, first as speech, and then as gunfire, and then as cannon fire that defeated the military and economic might of an empire. *See* Benjamin Franklin, Silence Dogood No. 8, The New-England Courant, July 9, 1722 (https://founders.archives.gov/documents/Franklin/01-01-02-0015).

"Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech." *Id*. Americans' "Freedom of Speech" is a "sacred Privilege" that "is so essential to free Governments" that "the Security of Property, and the Freedom of Speech always go together; and in those wretched Countries" (or courts) "where a Man cannot call his Tongue his own, he can scarce call any Thing else his own. Whoever would overthrow the Liberty of a Nation, must begin by subduing the Freeness of Speech." *Id*.

"A free People will" show "that they are" free "by their Freedom of Speech." *Id*. "Freedom of Speech is ever the Symptom, as well as the Effect of a good Government." *Id*. "The best Princes have ever encouraged and promoted Freedom of Speech; they know that upright Measures would defend themselves, and that all upright Men would defend them." *Id*. "Misrepresentation of publick Measures is easily overthrown, by representing publick Measures truly; when they are honest, they ought to be publickly known, that they may be publickly commended; but" when "they are knavish or pernicious" (as they are here), "they ought

to be publickly exposed, in order to be publickly detested." *Id*.

"Men ought to speak well of *their Governours*" *only* "while *their Governours* deserve to be well spoken of" because for public officials "to do publick Mischief, without" the public "hearing of it, is only the" corrosive "Prerogative" of "Tyranny" and evil-meaning tyrants. *Id*. "Government" is "nothing" but "Trustees of the People" acting "upon the Interest and Affairs of the People: And" it "is the Part and Business of the People" to actually "see whether" such "publick Matters" have been "well or ill transacted." *Id*.

"[S]o it is the Interest, and ought to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scann'd." *Id*. "Only the *wicked Governours* of Men dread what is said of them." *Id*. "*Guilt* only dreads Liberty of Speech, which drags it out of its lurking Holes, and exposes its Deformity and Horrour to Daylight." *Id*. For that reason, "Freedom of Speech" is a "*Thing* terrible to Publick Traytors." *Id*.

Excerpts of *Cato's Letter* were "printed in virtually all the newspapers in the colonies and widely quoted in political essays, making them among the most influential political essays for the American founding generation." Solomon, *Revolutionary Dissent* at 44. They also were very famous because they were instrumental in establishing political freedom of speech in America by virtually entirely thwarting (starting in 1735) the

despicable judicial practices used to punish so-called seditious libel.

Among those who know anything about the origin of "the freedom of speech" in the First Amendment, the 1735 trial of Peter Zenger for seditious libel in New York is famous. Zenger's attorney caused to be reprinted the portions of *Cato's Letters* that Franklin printed. *See id*. at 44. So Zenger's "case enlarged public participation in politics. An entire city reverberated with debate over the conduct of government" (including judges' abuse of despicable fictions to repress speech) "to an extent never before seen in the colonies." *Id*. at 55.

Based on *Cato's Letters*, above, Zenger's attorney pointed out that public officials first "injure[d] and oppress[ed] the people under their administration," thereby "provok[ing] them to cry out and complain" and then those same officials made "that very complaint the foundation for new oppressions and prosecutions." *Id*. at 53.

Zenger's attorney further argued that the People have the "right publicly to remonstrate the abuses of power, in the strongest terms," and they have the right "of exposing and opposing arbitrary power by speaking and writing the truth." *Id*. The judge (the Chief Justice of New York) disagreed, but he (and the common law of seditious libel) were overruled by the jury.

"To a people aggrieved by royal officials and their overbearing policies, the idea that a man could be" punished "for speaking the truth" about public officials

or "expressing a critical opinion" about them "was an affront to liberty." *Id*. at 55. So "in less than thirty minutes," the jury found Zenger "not guilty of seditious libel." *Id*. at 54. "News of the verdict spread" like wildfire "up and down the coast," and Zenger also "published a book" about the "trial, which was probably the most popular book in America up to that time." *Id*.

As a result of *Cato's Letters*, the arguments of Zenger's attorney, the jury's verdict, newspaper coverage, and Zenger's book, "until independence, common law cases against dissidents [for seditious libel] all but disappeared," and Zenger's "acquittal is often noted as a landmark in the history of freedom of the press" and speech. *Id*. at 55.

"[P]amphleteers of the founding generation put talismanic weight" on "*Cato's Letters*" for the way they presented "political liberty and freedom of the press" and speech. *Id*. at 187.

Despite the foregoing history and the plain language of the Sedition Act (protecting truthful criticism of public officials), judges continued to persecute people for merely criticizing public officials, especially judges. Some judges even have been impeached for egregiously abusing their powers to repress government critics. *See*, *e.g*., *Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, Marshall, JJ., concurring) (Supreme Court Justice Samuel Chase's "impeachment" for not "respect[ing] the law" (the Sedition Act) when persecuting government critics); *Cammer v. United States*, 350 U.S. 399, 406 (1956) (federal Judge Peck's

"impeachment" for jailing lawyer and suspending "right to practice" law for mere "published criticism of" judge's "opinion").

Many lessons of history teach that labels often lead to overconfidence, laziness and obvious falsehoods by those who would undermine the freedom of expression.

V. Government Must Prove Each Fact Material to Showing Clear and Present Danger Before Punishing Speech.

Even today, in the minds of far too many lawyers, judges and legal commentators, Blackstone and English common law continue to strangle the freedom of expression. But "one of the objects of the Revolution was to get rid of the English common law" abridging Americans' "liberty of speech" and "press." *Bridges*, 314 U.S. at 264. *See id*. at 263:

> What finally emerge[d with] the 'clear and present danger' cases is [the] principle that the [government must prove a] substantive evil [that is] extremely serious and [a] degree of imminence [that is] extremely high before utterances can be punished.

Such a rule does "no more than recognize a *minimum* compulsion of the Bill of Rights. For the First Amendment" speaks "explicit[ly]" and "[un]equivocally" and "prohibits *any* law" that "abridg[es] the freedom of speech" or "press," which "must be taken as a command of the broadest scope that" such "language,

read in the context of a liberty-loving society, will *allow*." *Id*. (emphasis added).

There is no reason "that criminal" offensive-speech laws (such as are at issue here) "serve interests distinct from those secured by civil" offensive-speech "laws, and therefore should not be subject to the same limitations." *Garrison*, 379 U.S. at 67. Regardless of "whether the use" of "laws" is "civil or criminal," the Constitution controls, and "constitutional limitations protecting freedom of expression" govern. *Id*. n.3. "Whether" the "law be civil or criminal, it must satisfy relevant constitutional standards." *Id*. "What [this Court] said" of "civil" offensive-speech "law" necessarily "applies equally to" any "criminal" offensive-speech "rule." *Id*. at 74.

In Counterman's case (and in so-called attorney discipline cases) the government's explicit or implicit "rejection of" or disregard for "the clear-and-present-danger standard as irrelevant," especially when "coupled with the absence of any limitation in the statute itself to speech *calculated* to cause" a public harm necessarily "leads" to the conclusion that a restriction on speech "is not" constitutionally "narrowly drawn." *Id*. at 70 (emphasis added).

It should go "without saying that penal sanctions cannot be justified merely by the fact that" speech is merely "damaging to a person in ways that entitle" a "person" to "civil" relief; "criminal law" must be "reserve[d]" for "behavior" that is "harmful" to or

"exceptionally disturbs the community's sense of security." *Id*. at 69-70 (*quoting* ALI Reports).

The community's "preference for" a "civil remedy" for personal harm means "it can hardly be urged that" the community's security "requires a criminal prosecution" for Counterman's speech merely because a public figure purportedly was somewhat fearful. *Id*. at 69. That is especially true when the public figure proved any such fear was fairly insignificant (and Colorado failed to prove punishment was necessary). She chose to refrain from protecting herself by even serving the protective order that she already obtained or even instructing or asking Counterman to cease communicating with her.

"Any variation from" the "opinion" people hold "may inspire fear. Any word spoken" that "deviates from the views of another person may start an argument or cause a disturbance." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969). "But our Constitution says we must take this risk," and "our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id*. at 508-509. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id*. at 508.

VI. The Constitution Requires Proof of a Clear and Present Danger.

The Constitution stands in striking contrast with the abominable common-law history of repressing expression. This Nation and the federal government were constituted to establish and ensure that all public officials are public servants. None have the power to deprive the People of any "Privileges" or "Immunities of Citizens," and all must "guarantee" all Americans a "Republican Form of Government." U.S. Const. Art. IV. "No Title of Nobility" may "be granted by the United States." Art. I, §9. "No State" may "grant any Title of Nobility." *Id*., §10.

Relevant to this case, the "Constitution, and" federal "Laws" that are "made in Pursuance" of the "Constitution" are "the supreme Law of the Land," and all "Judges in every State" are "bound thereby" despite "any Thing" to "the Contrary" in any other purported source of authority. Art. VI. Moreover, "all [state and federal] executive and judicial Officers" are "bound," not merely to comply with, but to "support this Constitution." Art. VI.

No state" employee whatsoever may "make or enforce any law" that "abridge[s]" any "privileges or immunities" of American "citizens" or "deprive any person" of any "liberty" or "property, without due process of law; nor deny to any person" essentially "equal protection of the laws." Amend. XIV, §1.

"[I]t must be remembered that" all "courts" and all "legislatures" must be "guardians of the liberties and

welfare of the people." *Mo., K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904). No state or federal court or legislature may make any law "abridging" the "freedom of speech" and "press." U.S. Const. Amend. I.

VII. The 1776 Declaration Constituted the U.S. and Declared the Nation's Constitution.

The primary issue here is not merely one individual's right to speak and publish. It is the most fundamental aspect of America's constitution and the Constitution: the right and power of the People to self-govern, *i.e.*, the People's power to create—and the fact that they did create—government *for* the people. That fact is explicit in parts of the Constitution. *See* U.S. Const. Preamble, Amend. X. It is implicit in much more of the Constitution. And it was stated even more emphatically in the Declaration of Independence.

The power "to decide" America's "political constitutions" was "reserved to the people" in 1776, so in 1787 the Founders "called upon" the People "to deliberate on" another "new Constitution." The Federalist No. 1 (Alexander Hamilton) (https://guides.loc.gov/federalist-papers/full-text). People, "by their conduct and example," decide "the important question" of how to establish "good government." *Id*. Then as now, "the most formidable" opposition to "the new Constitution" came from men who "resist all change" that would diminish "the power" or "consequence" of their "offices" or motivated by "perverted ambition." *Id*. at 4.

"Justice is the [objective] of government" and "civil society," and it "ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." *Id*. By declaring the sovereignty of the People, the Constitution's Preamble provided "better recognition of popular rights" than any mere "bills of rights." The Federalist No. 84 (Alexander Hamilton) (https://guides.loc.gov/federalist-papers/full-text).

The first statement constituting the United States and stating America's constitution (truly America's first written constitution) was a document known by a different name. But labels and names (especially in government) often are misleading.

In 1776, "Congress" hurriedly constituted the "united States" and declared America's constitution. Declaration of Independence of 1776 ¶32. "[T]he Representatives of the united States of America," *i.e*., "Congress," under the "Authority of" the "People" (of the "united States of America") did "declare, That these United Colonies" have the "Power to levy War, conclude Peace, contract Alliances, establish Commerce." *Id*.

"[F]or the support of" that "Declaration" 56 members of Congress personally "pledge[d]" their and their families' "Lives," "Fortunes" and "sacred Honor." *Id*. Fifty-six men speaking as the "Congress" of and for the "People" of the "united States of America" declared "War" on "Great Britain." *Id*. Nearly all were prominent lawyers, legislators or merchants. Nearly all were serious students of serious law and true government. All knew their "Lives," "Fortunes" and "Honor" were

forfeit if they failed; yet, all courageously signed. They signed as "Congress" for the "united States." *Id*. In doing so, they signed a contract with the "People" who had the "Power" to wage "War" to secure the "united States" (as well as the signers' own "Lives," "Fortunes" and "Honor"). *Id*.

Some of America's most prominent, prosperous people and profound thinkers pledged and did what they did in 1776 to constitute America and declare America's bold new political constitution. They stated and demonstrated America's constitution and the judgment of Congress: "We hold" that "all men are created equal" and equally "endowed" with "unalienable Rights," including "the Right of the People to alter" or "abolish" any aspect or even "any Form of Government" to secure their "Life, Liberty" and "pursuit of Happiness." *Id*. ¶2. Moreover, when government "abuses and usurpations" evidence "Despotism," the People have the "right" and "duty, to throw off such Government, and to provide new Guards for their future security." *Id*.

The 1776 Declaration declared rights, grievances, independence, war and America's constitution. It declared and constituted a nation founded on equality of people who possessed and exercised the power to create and secure the nation. To the People (for their service, sacrifices and suffering), the Declaration promised a life of liberty from the tyranny of government and the opportunity to pursue individual happiness. The Constitution delivered on Congress's 1776 promises and contract. *See* U.S. Const. Amends. I, V, IX,

X, XIII-XV, XIX, XXIV, XXVI. "We the People" constituted this Nation and "establish[ed]" (and repeatedly amended) the "Constitution" specifically to "establish Justice" and "secure the Blessings of Liberty." U.S. Const. Preamble.

The Declaration and the Constitution constitute strong historical evidence of the purpose of, and the meaning of the text of, the other document. The Federalist Papers serve the same purpose for the relevant aspects of the Declaration as for the Constitution.

VIII. The Constitution Protects People from Each Other.

When the Founders wrote the Constitution, they constituted this Nation and described America's constitution, *i.e.*, "the genius" of "America." The Federalist No. 63 (James Madison or Alexander Hamilton) (https://guides.loc.gov/federalist-papers/full-text).

They protected against "misguided people" using "iniquitous measures" to bring about "calamities." *Id*. They protected people and this Nation from "people" being "subject to the infection of violent passions" and "the danger of" their "combining in pursuit of unjust measures." *Id*. They guarded against "the people" being "stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men" to "call for measures which they themselves will afterwards be the most ready to lament and condemn." *Id*. They did so to prevent the "bitter anguish" of "the people of Athens" because "their

government" and constitution "contained" no comparable "safeguard against the tyranny of" the People's "own passions." *Id*.

They did so to ensure that in "these critical moments," more than one "temperate and respectable body of citizens" ensures "salutary" and essential "interference" to "check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind." *Id*. "[S]uch an institution" is "sometimes necessary as a defense to the people against their own temporary errors and delusions." *Id*.

"Responsibility, in order to be reasonable, must be limited to objects within the power" given, "and in order to be effectual, must relate to operations of that power." *Id*. "The people can never wilfully betray their own interests; but they may possibly be betrayed by the representatives of the people." *Id*.

CONCLUSION

The history of this case should be a source of great concern, not only for the people of Colorado, but for the legal profession, the judiciary and the people of America. The future of this case should be a source of pride and enlightenment.

Criminal prosecutions propped up by purported fear of mere offensive speech promote a dangerous tyranny of the timid. The fear used to convict Counterman is frighteningly reminiscent of the fear that fed some of the most evil adjudications in U.S. and world history. The power of public officials and public figures (including people who see themselves as "influencers") to procure criminal prosecutions and convictions for mere offensive or unpopular speech (or people) is frighteningly similar to those who fueled seditious libel and witch trials, inquisitions, red scares and Reigns of Terror.

History highlights that sometimes courts' view of history regarding fundamental rights is dangerously myopic. Far too often for far too long, some of the most precious rights of the People were not defined or defended by judges or legislators. *See generally*, Solomon, *Revolutionary Dissent*. Far too often, courts' conduct—writing produced by judges—has obscured, rather than illuminated, fundamental rights (and egregious wrongs). The history of First Amendment rights and freedoms and the repression thereof provide important illustrations. *See id*. Others include *Dred Scott* and the *Slaughter House Cases*.

Americans' freedom to speak and publish was created, defined and fought for primarily directly by the People, not judges or legislators. *See id*. For generations, the People, including lawyers, juries, defendants, popular assemblies and the entire Continental Army fought for the freedom of speech and press *against* judges, governors, the King and even Parliament. *See id*. For that reason *no public servant* may abridge "the freedom of speech" and "press" or "the right of the people peaceably to assemble" or "to petition the Government for a redress of grievances" against public servants violating their public duties. U.S. Const. Amend. I.

Far too often in cases pertaining to First Amendment rights and freedoms, judges egregiously fail the People and the Constitution. They fail to state or discuss the plain text and plain purpose of the Constitution and some of the most relevant law. They avoid disciplined thought and analysis of the Constitution, the law, and this Court's precedent. They resort to mere labels or conclusory contentions. They claim entitlement to great and powerful trust, confidence or presumptions, all favoring and facilitating abuses of their power and diminution or elimination of the People's power to self-govern.

This Court must speak strongly to counter the cacophony of judges and attorneys who, over many generations, have intimidated or conned Americans into forsaking or abandoning "the freedom of speech" and "press." U.S. Const. Amend. I. Such freedoms (and judges, lawyers, juries and publicists who exercise

and defend them) are foremost among Americans' vital weapons and warriors securing Americans' self-government and self-defense. They are of vastly greater importance to this Nation's greatness (past, present and potential) than the right of self-defense acknowledged in the Second Amendment.

Mock trials and terrorizing punishments insidiously steal from the arsenal of democracy the People's sharpest swords and strongest shields, their best defense against deceitful, dangerous purported servants scheming to overthrow and brutally oppress the sovereign. The confidence games being played on the People by political figures demanding confidence in themselves and punishing speech that merely threatens such confidence are among the most dangerous games in America today. The sad and sickening truth is that too many judges and government attorneys play such an evil confidence game precisely to perpetuate the Star Chamber's reign of terror. Everyone should be required to play by the same rules, all conforming to the Constitution. Every aspect of government should be consistent with the pillars of America's Constitution: a strong union and a strong people, each fortified by equality of civil and political rights.

Respectfully submitted,

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