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 ON THE MERITS FOR RESPONDENT

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QUESTION PRESENTED

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would understand the statement as a serious expression of intent to commit an act of unlawful violence, that the defendant knowingly made the statement, that the statement would cause a reasonable person to suffer serious emotional distress, and that the victim, in fact, suffered serious emotional distress.

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INTRODUCTION

C.W., a singer-songwriter, dedicated her life to making music, touring, and growing her fan base. J.A. 114–23. After years of unwanted messages from Billy Counterman, that dream ended. Counterman sent C.W. waves of Facebook messages that escalated into alarming claims and aggressive invectives—including telling her to "fuck off permanently," stating he had seen her out and about, and telling her to "die" because he did not "need" her. She repeatedly blocked him from messaging her, to no avail. Counterman kept returning. *People v. Counterman*, 497 P.3d 1039, 1048 (Colo. App. 2021). C.W. cancelled shows, declined engagements, and withdrew from public appearances. Her mental health deteriorated.

Colorado charged Counterman with "stalking – serious emotional distress." This law protects victims from the intrusive, threatening, and escalating course of conduct characteristic of stalking. Stalkers "often maintain strong, unshakable, and irrational emotional feelings," and often cause their targets, like C.W., to fear for their physical safety and change what they do and say—regardless of the stalker's state of mind. *People v. Cross*, 127 P.3d 71, 72–73, 75–77 (Colo. 2006);[1] *see also* COLO. REV. STAT. § 18-3-601 (2016) (providing same).

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[1] *Cross* cites the legislative declaration for COLO. REV. STAT. § 18-9-111(4), which previously housed Colorado's stalking provisions. Those provisions, and the legislative purpose discussed in *Cross*, were relocated to COLO. REV. STAT. § 18-3-602, but are otherwise unchanged. *See* 2010 Colo. Sess. Laws, Ch. 88, sec. 1, at

Counterman's threats harmed C.W. by making her fear for her safety and disrupting her life. His threats show why "threats of violence are outside the First Amendment": to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). And threats cause these harms no matter what the person making the threat intends.

Defining true threats too broadly or too narrowly poses serious risks. A too-broad definition will limit protected speech; a too-narrow approach will harm the individuals and communities terrorized and silenced by threats. A context-driven objective approach like that used below protects against the fear of violence (and the life-altering disruption this fear engenders) while preventing governmental overreach that could chill protected expression. It does so by recognizing that a "reasonable speaker" or "reasonable listener" test, standing alone, cannot distinguish true threats from protected speech. *See People in Interest of R.D.*, 464 P.3d 717, 731 (Colo. 2020). Instead, the context-driven objective standard requires courts to consider the circumstances of the potential threat to determine whether an intended or foreseeable recipient would reasonably perceive the statement(s) as a serious expression of intent to commit unlawful violence. *Id.* In this way, such a standard safeguards political hyperbole, artistic expression, and other protected speech

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293–95 (H.B. 10-1233) (re-enacting and providing legislative declaration and statutory provision); *id.* sec. 2, at 295 (repealing prior placement).

from governmental overreach while preventing serious harm to those threatened.

STATEMENT OF THE CASE

A. Facts

C.W., a musician looking to grow her audience, created personal and professional Facebook pages and a website. J.A. 118–20, 122–23, 150. To increase her fan base, C.W. relied on a Facebook feature to automatically accept all friend requests. J.A. 119, 122–23, 139, 167, 225.

In 2014, C.W. began receiving "distressing" messages from Counterman, a complete stranger. J.A. 125–27, 228. He called her "pet names" and implied that they were "going back and forth conversationally"—although C.W. never responded—and then sent "invasively intimate," "aggressive," and "blame oriented" messages. J.A. 126–27. Over the next two years, Counterman sent her hundreds, if not thousands, of messages, often in "clusters"—sometimes going weeks without contact, sometimes sending many messages at once. C.W. did not engage Counterman for fear he would become "more aggressive" and more dangerous. J.A. 128–30, 249.

Counterman's messages included rating C.W.'s attractiveness ("Five [star]s and stunning"); telling C.W. to respond ("jump in at any time"); expressing frustration when she did not; and recognizing C.W. would be "putting a[] block up," i.e., blocking his messages, something she did repeatedly. J.A. 136–38, 448–50. Counterman asked her for a "hot[] date at Wal-Mart" and sent an image about what men should do for "their" women, projecting a fictional relationship onto C.W. J.A. 142, 147–48, 454, 460, 463. When C.W. did not respond, Counterman expressed anger and frustration, noting he "fe[lt] neglected," "miss[ed

her]," and had had "only a couple physical sightings." J.A. 144–45, 455–56.

Crossing another line, Counterman sent C.W. a picture of his bare leg. J.A. 149–50, 469. Again, she blocked him. J.A. 149–50. But Counterman sent messages through her website's contact form requesting C.W. "take me off BLOCK" and, recognizing the leg photo had been inappropriate, offered to "never expose my leg again." J.A. 150–53, 480–82. Because blocking somebody was the "strongest way" on Facebook to tell them to stop contacting you, C.W. never unblocked him. J.A. 165, 182.

In fact, C.W. repeatedly blocked Counterman—"between four and eight" times, J.A. 138, never personally accepting any friend request from Counterman, J.A. 166–67. But Counterman created new accounts, and he used one to comment on C.W.'s mother, whom C.W. had seen that very day. J.A. 169, 279, 470.

A month later, Counterman wrote again, telling her to "Fuck off permanently," which alarmed C.W. given its anger and aggression. J.A. 170–72, 470–72. Thirty minutes later, Counterman messaged, "Your arrogance offends [the] existence of anyone in my position." J.A. 171–72, 472. C.W. worried that Counterman was mentally unstable and therefore unpredictable. J.A. 172–73. An hour later, he said she was "not being good for human relations," and "Die, don't need you." J.A. 172–73, 472–73. He warned that "Talking to others about me isn't pro-life su[s]taining for my benefit." J.A. 173–74, 473. C.W. feared "if he showed up somewhere near" her, she "would get hurt." J.A. 193.

A week later, Counterman sent another cluster of messages, asking if she was "a solution or a problem," accusing her of "hav[ing his] phone hacked," and apologizing "for the interventions into your space." J.A. 174–75, 474–76. He also told C.W., "It would be a productive feature of you to come out with your real personality," and "Staying in cyber life is going to kill you. Come out for coffee." J.A. 176–77, 476–77.

Counterman claimed C.W. messaged him covertly through other websites. But authorities found no posts from C.W. to Counterman on any website, and Counterman was unable to show them any. J.A. 331–33.

C.W. asked her family for help, took self-defense measures, and did not go anywhere alone. J.A. 181–83, 205–06. Her anxiety spiked, she had trouble sleeping, and she constantly looked over her shoulder. J.A. 194–95, 198, 232. She cancelled shows, declined engagements, and stopped going to music venues to watch friends perform. J.A. 199, 201–02. This significantly lowered her income, her quality of life, and her professional standing. J.A. 202–03. C.W. "believe[d] [she] could easily [have been] the victim of serious physical harm at his hands." J.A. 435.

B. Proceedings Below

1. *Charging.* Colorado charged Counterman with "stalking – serious emotional distress," for "knowingly" and "repeatedly" following, approaching, contacting, placing under surveillance, or making any form of communication "in a manner that would cause a reasonable person to suffer serious emotional distress" and did cause C.W. to suffer serious emotional distress. COLO. REV. STAT. § 18-3-602(1)(c) (2016). Unlike 18 U.S.C. § 875(c) in *Elonis v. United States*, 575

U.S. 723, 732–33 (2015), which had no mens rea requirement, Colorado's stalking statute requires both that the defendant knowingly communicate with the victim and that the victim suffer serious emotional distress.

Many messages by Counterman supported the charge. Three messages referred to physical surveillance, and the rest, together and in context, threatened C.W.:

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- An image of stylized text that stated, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."
- An image of liquor bottles that was captioned "[a] guy's version of edible arrangements."
- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."
- "Your arrogance offends anyone in my position."

- "You're not being good for human relations. Die. Don't need you."
- "Talking to others about me isn't prolife sustaining for my benefit. Cut me a break already.... Are you a solution or a problem?"
- "Your chase. Bet. You do not talk and you have my phone hacked."
- In a message sent the next day from the "[y]our chase" message, a statement that "I didn't choose this life."
- "Staying in cyber life is going to kill you. Come out for coffee. You have my number."
- "A fine display with your partner."
- "Okay, then please stop the phone calls."
- "Your response is nothing attractive. Tell your friend to get lost."

Counterman, 497 P.3d at 1044.

2. *Mental health*. Counterman neither asserted an insanity defense nor timely moved to introduce expert evidence of any mental health condition. *See* COLO. REV. STAT. §§16-8-107(3); 18-1-802(2)(a) (2016); *see also* J.A. 28 (defense acknowledging it did not use these procedures). Nor did Counterman pursue another option to admit other testimony of his mental condition. COLO. REV. STAT. § 16-8-109 (2016).

Because Counterman did not use any of the available mechanisms to present mental health information, the prosecution moved to limit such evidence.

J.A. 30–33. In response, the defense acknowledged it was not offering an insanity defense or expert evidence of Counterman's mental health. J.A. 36–37. The court ultimately ruled that because the defense had not followed the procedure for raising mental health expert evidence, such evidence would not be admitted. J.A. 89. However, the court indicated it would permit the defense to introduce testimony about what other people observed about Counterman's behavior, said it could reconsider expert testimony, and invited briefing from the parties. J.A. 89–92. The defense did not submit further briefing.

3. *Trial.* After the prosecution's case-in-chief, Counterman moved to dismiss. The court held that his messages "would not be considered protected speech," and a jury could find they were true threats. J.A. 345–46. Counterman did not testify,[2] the defense presented no evidence, and it did not submit any instructions concerning true threats. J.A. 348–63, 369; *see Counterman*, 497 P.3d at 1050–51.

In closing, the prosecution explained that Counterman had to "know that he was repeatedly contacting [C.W.]. He had to know he was repeatedly following her," but "did not need to know that a reasonable person would suffer serious emotional distress" or that C.W. suffered serious emotional distress. J.A. 373. It also said the jury "can't consider" whether Counterman "believed" that C.W. was communicating with him through other websites. J.A. 389.

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[2] During his advisement, Counterman stated that he was not suffering from any mental disorder or psychological problem. J.A. 349.

4. *Sentencing*. At sentencing, the prosecution noted that Counterman sent threats to C.W. while he was on supervision for previous convictions for sending threats over the internet. J.A. 419–21. Witnesses testified about the "disastrous [e]ffect [Counterman's threats] had on [C.W.'s] life and music career" and how C.W. used to be outgoing, but now had anxiety and post-traumatic stress. J.A. 423–35. Both C.W. and her mother described their fear of escalation. J.A. 425, 435. The defense argued that Counterman believed he was in conversation with C.W.; it conceded, however, Counterman's only mental health diagnosis was "anxiety and depression." J.A. 435–36. The court acknowledged Counterman's possible mental health issues, but found that the harm inflicted was "significant" and "terrifying" and that he failed to change his behavior despite two prior convictions for online threats. J.A. 438–39. The court concluded that a four-and-a-half-year prison sentence was warranted. J.A. 438–40.

5. *Appeal*. The Colorado Court of Appeals affirmed, applying the Colorado Supreme Court's recently adopted context-driven objective inquiry to hold that Counterman made true threats. *Counterman*, 497 P.3d at 1046–49 (citing *R.D.*, 464 P.3d at 731–34). This inquiry, contrary to what Petitioner suggests, considers more than "only the reasonableness of the recipient's reaction." Pet. Br. 11. Notably, the context-driven objective test in *R.D.* requires consideration of multiple factors, including whether the communication is direct, public, or private; its platform, method, and characteristics of conveyance; and its impact on the intended or foreseeable recipient, thus safeguarding free speech while also protecting victims from

harm. 464 P.3d at 731 ("[T]his refinement of the objective standard strikes a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict.").

SUMMARY OF THE ARGUMENT

Of course, the government cannot "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also* Pet. Br. 13. But true threats fall outside the First Amendment not because they are offensive or disagreeable. Rather, they shut down the recipient's own speech while inflicting the life-changing harms identified by this Court: "the fear of violence," "the disruption that fear engenders," and "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

Threats have long fallen outside the First Amendment because they injure those threatened no matter what the person making the threat had in mind. Consistent with history, precedent, and this Court's approach to certain other speech categories that fall outside the First Amendment, the context-driven objective test does not look to the speaker's subjective intent, but instead focuses on the direct and substantial harm that the threat causes to its target. In so doing, this standard recognizes the First Amendment interests of speakers and listeners alike. Statements that express a serious intent to commit physical violence are not statements that invite further discourse; instead, they cause harm and often silence their recipients' speech and thus lie outside First Amendment protection.

By requiring attention to a range of contextual factors, this test protects the recipients of true threats while safeguarding free expression. The comprehensive context-driven approach to defining true threats used here looks to the entire context, including the

broader exchange, the relationship between the person making the threat and the recipient, how the threat was conveyed, and the reaction of the intended recipient. It thus effectively distinguishes true threats from political hyperbole, artistic expression, religious speech, and poorly chosen words.

Petitioner raises concerns about individuals with mental health conditions to argue that a context-driven objective test may result in unjust outcomes. But long-established criminal state-law doctrines account for individuals with different capacities—protections that Counterman did not use in this case. Moreover, requiring proof of what the person making the threat was thinking as part of the true threat analysis—as Petitioner requests—does not adequately account for the harms true threats cause.

In short, a context-driven test ensures that valuable and even careless speech is protected while also safeguarding victims from the fear of violence and the disruption that fear brings to their lives, including the fear and disruption Counterman inflicted upon C.W.

ARGUMENT

I. True threats are, and have been, unprotected by the First Amendment because they inflict substantial harms on those threatened regardless of the intent of the person making the threat

Threats inflict physiological and psychological injury on, and substantially disrupt the lives of, those threatened. They do so regardless of the mental state of the person making the threat: "whether or not the person making a threat intends to cause harm, the damage is the same." *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part). And they do so while chilling the speech of—or outright silencing—their recipients and thus undermine important First Amendment interests.

Threats have historically been punished irrespective of the subjective intent of the person making the threat, and this Court's true threats jurisprudence has focused on contextual inquiry rather than the threatener's mental state. A context-driven objective standard thus aligns with both tradition and precedent.

A. Regardless of the mental state of the person making the threat, threats harm their victims by causing them to fear for their physical safety, disrupting their lives, and silencing their speech

"[T]hreats of violence are outside the First Amendment" to protect individuals from specific harms: "the fear of violence," "the disruption that fear engenders," and "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. And true threats, unlike some other speech, are not effectively

countered with rebuttal or responsive speech. Indeed, as C.W. recognized here, talking back can make the threats worse—for instance, by provoking the threatener to anger and escalation, giving the threatener clues about where the recipient can be found, or feeding a delusional and dangerous fantasy that there is an actual relationship. *See Cross*, 127 P.3d at 75 (citing the legislative purpose of Colorado's stalking statute, which recognizes that a stalker "will often maintain strong, unshakable, and irrational feelings for his or her victim, and may likewise believe that the victim either returns these feelings of affection or will do so if the stalker is persistent enough" and "often maintains this belief . . . despite efforts to restrict or avoid the stalker").

Threats cause those threatened to fear for their safety. *See* Rachel E. Morgan & Jennifer Truman, BUREAU OF JUSTICE STATISTICS, STALKING VICTIMIZATION, 2019, NCJ 301735, at 3, 11, 17 (2022), https://bjs.ojp.gov/content/pub/pdf/sv19.pdf (calculating that around 300,000 victims who were stalked through technology, which includes unwanted phone calls, texts, and online messages, feared being killed or physically injured).

This harm has real impacts. The terror experienced by those threatened causes physiological changes, and threats' "unpredictable yet omnipresent" nature can lead to constant vigilance and alertness to potential danger. Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, 17 VIOLENCE AGAINST WOMEN 634, 644 (2008), http://www.ncbi.nlm.nih.gov/pmc/articles/pmc

2967430/pdf/nihms245802.pdf. Indeed, many victims experience this omnipresent terror as causing more damage than actual violence. *See* K. Daniel O'Leary, *Psychological Abuse: A Variable Deserving Critical Attention in Domestic Violence*, VIOLENCE & VICTIMS 14, 1999 at 3, 13 ("Seventy-two percent of the women rated emotional abuse as having a more negative impact on them than the physical abuse."). In 2019 alone, an estimated 900,000 victims of stalking through technology reported taking self-protective measures, which included changing day-to-day activities to avoid unwanted contacts; installing new locks and security systems; taking self-defense and martial arts classes; buying pepper spray, guns, and other weapons; blocking unwanted calls and messages; changing personal information; and applying for restraining, protection, or no-contact orders. *See* Morgan & Truman, Table 7. And, in another survey, over a quarter of stalking victims reported missing work, with some victims never returning to work, and the others missing an average of eleven work days. *See* Patricia Tjaden & Nancy Theonnes, *Stalking in America: Findings from the National Institute Violence Against Women Survey*, Nat'l Inst. of Just. & Ctrs. for Disease Control & Prevention, at 11 (Apr. 1998), https://www.ojp.gov/pdffiles/169592.pdf.

As C.W.'s experience shows, those facing threats disengage from others and suffer as a result. Counterman's threats caused C.W. to experience persistent fear and withdraw from performing as an artist, largely silencing her expression. Notably, not only does telling a recipient to "die" have no First Amendment value of its own, but it chills and mutes its target's speech irrespective of what the person making

the threat had in mind. Consequently, the First Amendment interests of those who are threatened, not just the asserted First Amendment interests of those who make threats, are at stake here.

These life-altering disruptions are neither rare nor isolated—in 2019 alone, around 473,000 victims of stalking through technology feared losing their jobs, freedom, or social networks and friends because of such threats. *See* Morgan & Truman, Table 8. Additionally, the harms of true threats include the risk that they escalate, "lead[ing] to a violent confrontation." *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part); *see also* Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, VIOLENCE & VICTIMS, 15(1), 2000 at 41, 50 (reviewing 187 former stalking victims' experiences and concluding that "verbal threats are a strong and statistically significant predictor of violence," thus "reinforc[ing] the need to take verbal threats seriously").

Nor are these harms limited to individuals: they affect schools and houses of worship, among others targeted by threats. For example, even though most bomb threats are hoaxes, the "disruption caused by bomb threats is considerable whether the bomb is real or not." Graeme R. Newman, *Bomb Threats in Schools*, CTR. FOR PROBLEM-ORIENTED POLICING 11 (2011), https://rems.ed.gov/docs/COPS_Bomb_Threats_in_Schools.pdf. Threats on the twentieth anniversary of the Columbine shooting, for example, closed hundreds of schools across Colorado. *See R.D.*, 464 P.3d at 730–31; *see also D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011) (holding, in

a case where a student threatened to shoot others, that "[t]he First Amendment did not require the District to wait and see whether D.J.M.'s talk about taking a gun to school and shooting certain students would be carried out").

Threats made against houses of worship also cause significant disruption, preventing Americans from worshiping together. *See, e.g.*, Anti-Defamation League, *Audit of Antisemitic Incidents 2021*, https://www.adl.org/resources/report/audit-antisemitic-incidents-2021 (highlighting threats made to synagogues); Family Resource Council, *Hostility Against Churches Is on the Rise in the United States* (Dec. 2022), https://downloads.frc.org/EF/EF22L24.pdf (listing churches closed or disrupted due to threats or violence). Again, threats cause these disruptions regardless of the mental state of the person making the threats.

B. Threats have traditionally been punished regardless of the mental state of the person making the threat

Governments have long regulated threats based on whether the person making the threat knew what they were saying and whether an objective person would understand it as a threat, rather than on the actual intent of the person making the threat.

Early English courts instructed juries that "if they were of opinion that" the "terms of the letter conveyed an actual threat to kill or murder," "and that the prisoner knew the contents of it, they ought to find him guilty." *King v. Girdwood*, 168 Eng. Rep. 173, 173 (K.B. 1776); *see also Rex v. Boucher*, 172 Eng. Rep.

826, 827 (K.B. 1831) (defendant's indictment was sufficient because "th[e] letter very plainly conveys a threat to kill and murder").[3] These courts did not inquire into the defendant's state of mind. Rather, they conducted an objective analysis: the relevant question was whether the defendant knew what he was saying and the defendant's statement expressed a threat.

In the United States' early years, states and territories enacted statutes penalizing those who knowingly sent a message that contained threats, but did not require any further intent.[4] *See* 1795 N.J. Laws § 57, at 108 (making it a crime to "knowingly send or deliver any letter or writing, with or without a name subscribed thereto, or signed with a fictitious name, . . . threatening to maim, wound, kill or murder any person, or to burn his or her [property], though no money, goods or chattels, or other valuable thing be demanded"); 1816 Ga. Laws § 27, at 178 (same); 1816 Mich. Territory Laws § 48, at 128 (same); 1827 Ill. Crim. Code § 108, at 145–46 (same); 1832 Fla. Laws § 34, at 68–69 (same).

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[3] Petitioner contends that the sender's intent in these cases was inferred from language that plainly conveyed an intent to kill. Pet. Br. 17. But the decisions focus on the message's plain meaning to its recipient, not on the speaker's state of mind; that the prosecution might have involved a speaker who intended to threaten does not mean that such intent was a required element of the prosecution.

[4] These statutes included separate provisions that prohibited letters sent "with *intent* to extort." *See* 1795 N.J. Laws § 57, at 108 (emphasis added); 1816 Ga. Laws § 27, at 178; 1816 Mich. Territory Laws § 48, at 128; 1827 Ill. Crim. Code § 108, at 145–46; 1832 Fla. Laws § 34, at 68–69. Only for letters sent to extort did the statutes require "intent."

State courts also interpreted threats statutes to require only general intent. In *Hansen v. State*, 34 S.W. 929, 929 (Tex. Crim. App. 1896), for example, the court reversed a defendant's conviction for sending a threatening letter. The court ultimately concluded that the letter did not contain a "definite and explicit" threat to do violence to the recipient when it stated, "woe be unto you and yours" if the recipient failed to do as the letter writer instructed. *Id.* In so doing, the court conducted no inquiry into the defendant's subjective intent; instead, it interpreted the statute under an objective analysis, assessing that phrase's meaning when used in a dictionary and the Bible. *Id.*

When asserting that threats prosecutions traditionally required a showing of the defendant's subjective intent, Petitioner often relies on sources describing other offenses, like breach of the peace, libel, and criminal law matters more generally. Pet. Br. 15–20.[5] And the single early English case involving threats cited by Petitioner as requiring subjective intent does not actually address the question of whether subjective intent was necessary for a threat conviction. In particular, Petitioner suggests that the court relied on a defendant's intent in *Regina v. Hill*, 5 Cox C.C. 233 (1851), and therefore courts historically considered intent to be an element of the crime of making

[5] For instance, Petitioner relies on cases involving breach of the peace to suggest that threats have historically been prosecuted after considering the threatener's intent. Pet. Br. 16, 18–19 (citing *King v. Philipps*, 102 Eng. Rep. 1365 (K.B. 1805); *People ex rel. Ware v. Loveridge*, 42 N.W. 997 (Mich. 1889)). But while certain threats might qualify as breaches of the peace, these cases do not support Petitioner's claim that as a general matter *threats* have historically been prosecuted as subjective intent crimes.

a threat. Pet. Br. 16–17. But that was not *Hill*'s holding. There, the court considered the defendant's mental state to decide whether his threatening letter made the specific type of threat prohibited by the statute (a threat to burn stacked corn). After considering both the defendant's explanation about the type of threat he meant to make as well as what the court considered to be a "fair construction" of his letter, the court concluded that the letter threatened to burn standing corn, not stacked corn, and thus fell outside the conduct prohibited by statute.[6] *Id*. at 235. In short, *Hill* did not address whether the defendant must subjectively intend to threaten to be convicted.

Petitioner also notes that by the nineteenth century, some states' threat statutes required malicious intent. Pet. Br. 18. But while some legislatures may have chosen to enact subjective intent requirements as a statutory matter, this does not mean that the Constitution required such subjective intent. By contrast, the ongoing practice in many states of allowing threat convictions upon a showing of general intent reflects that subjective intent was not consistently understood as a constitutional requirement.

Into the twentieth century, courts continued to interpret threat statutes to require only general intent. *See, e.g.*, *State v. Lizotte*, 256 A.2d 439, 442 (Me. 1969) ("We ask only whether or not he used words which would under the circumstances then existing be heard by an ordinary person as being spoken not in jest but as carrying the serious promise of death."). Today,

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[6] Stacked corn has been cut at the base of the cornstalk and bundled together; standing corn remains in the field unharvested.

moreover, nearly all jurisdictions to have considered the question analyze true threats through an objective lens. *See* Brief in Opposition at 15–17, *Counterman v. Colorado*, No. 22-138 (U.S. S. Ct. Oct. 12, 2022).

In short, threats have long been prosecuted regardless of the mental state of the person making the threat. *See Elonis*, 575 U.S. at 760–65 (Thomas, J. dissenting) (discussing the history of prosecuting threats under a general intent standard).

C. A context-driven objective standard is consistent with this Court's true threats decisions

This Court's true-threat decisions reflect a listener-based approach that examines the context of the threat. In *Watts v. United States*, for example, this Court focused on the context of the statement when holding it was protected political dissent rather than a true threat. 394 U.S. 705 (1969). There, Watts joined a small group discussing police brutality at a public rally. *Id.* at 706. Watts responded to a call for young people to get more education by saying, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." *Id.* This Court focused on context to conclude that this claim was not a threat: "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners [who laughed in response to Watts's statement], we do not see how it could be interpreted otherwise." *Id.* at 708.

Petitioner nevertheless suggests that in *Watts*, the Court expressed "grave doubts" that a person's speech could be penalized consistent with the First

Amendment based solely on a finding that the person voluntarily stated the words with "an *apparent* determination to carry them into execution," rather than a finding of subjective intent. *See* 394 U.S. at 707–08 (emphasis added); Pet. Br. 25. In fact, the *Watts* Court expressed "grave doubts" that this standard could satisfy the statute's "willfulness" requirement, not that this standard was compatible with the First Amendment. *Id.*

Colorado's context-driven test also adheres to *Virginia v. Black*, 538 U.S. 343 (2003). There, a criminal statute both banned cross-burning performed with the intent to intimidate *and* allowed the act of cross-burning to serve as prima facie evidence of the requisite intent. *Id.* at 348. A plurality of the Court held that the statute's prima facie evidence provision contradicted the First Amendment, because it allowed convictions "based solely on the fact of cross burning itself," without considering context. 538 U.S. at 365. In other words, the statute impermissibly impeded consideration of context. By contrast, a context-driven analysis ensures that speech cannot be treated as an unprotected true threat based solely on the content of the expression.

Petitioner insists that *Black*'s plurality identified subjective intent as a constitutionally required element of proscribable threats. Pet. Br. 27. But in fact, the plurality's concern was that the statute allowed the mere act of cross-burning to serve as the presumptive basis for the statutorily required intent to intimidate. *Black*, 538 U.S. at 365. Thus, the Court did not consider whether the state could have chosen to ban cross-burning that, in context, a reasonable person

would perceive as a serious expression of intent to commit an act of unlawful violence. *See Elonis*, 575 U.S. at 765 (Thomas, J., dissenting) ("[T]he Court [in *Black*] had no occasion to decide whether [subjective intent to threaten] was necessary in threat provisions silent on the matter.").

Petitioner also asserts that Justice Scalia's concurrence in *Black* provided a fifth vote for a holding that the First Amendment requires subjective intent because he concluded it was "a 'constitutional defect' to convict them without considering whether 'the cross burning[s] [were] done with an intent to intimidate.'" Pet. Br. 27 (alterations in original). But what Justice Scalia actually said was that the state's applicable jury instruction, which informed the jury that it could infer the statutorily required intent based solely on the burning of a cross, made it impossible to assess whether the jury had issued its verdict based on all the evidence before it, including any rebuttal evidence presented by the defense, or had instead ignored such evidence and focused solely on the cross-burning. 538 U.S. at 380. For Justice Scalia, it was the jury instruction that reflected the "constitutional defect." *Id.*

Finally, Petitioner asserts that *Black* imposed a subjective intent requirement when it explained that true threats "*encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," and that intimidation is a "*type* of true threat." *Id.* at 359–60 (emphases added). But "encompass" does not mean "limited to," and describing intentional intimidation as a "type of" threat makes clear that the overall cate-

gory of true threats is broader. And in the same paragraph, *Black* explained the purpose behind the true threats exception as grounded in the threat's effect on its recipient, not the culpability of its issuer. *Id.* at 360. Had *Black* sought to announce a new subjective intent rule for true threats, it would not have done so in passing, nor through language that is, at best, ambiguous.

II. A context-driven objective standard adheres to this Court's approach when excluding other speech categories from the First Amendment's protections

A context-driven test fits with this Court's approach to defining certain other categories of unprotected speech by focusing on reasonable listeners' experience of harm, rather than on a defendant's subjective intent.

This is especially, but not only, the case when such harm cannot be remedied by counterspeech. To be sure, counterspeech at times can ameliorate injuries inflicted by certain speech: in some settings, for example, true speech may counter false speech. *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("*If there be time* to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."(emphasis added)). But counterspeech does nothing to alleviate threats' life-changing harms to recipients who alter what they say and do when they reasonably fear for their physical safety.

A. Fighting words

"Fighting words" fall outside the First Amendment's protection regardless of the speaker's subjective intent because of the likelihood that they will provoke imminent violence and thus threaten the public's safety. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (unprotected speech includes "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("It is clear that 'fighting words'—those that provoke immediate violence—are not protected by the First Amendment.").

Under the Court's objective listener-centered approach for identifying unprotected fighting words, the First Amendment poses no bar to punishing "'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.'" *Black,* 538 U.S. at 359 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)); *see also Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (explaining that the First Amendment permits punishment of "statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended"). In *Chaplinsky,* for example, this Court upheld the defendant's punishment for use of "epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." 315 U.S. at 574.

Petitioner wrongly claims that *Chaplinsky* "suggests the speaker's intent *does* matter, if communicated, since even offensive words may not be 'fighting words' if delivered 'with[] a disarming smile.'" Pet. Br.

24 (emphasis by Petitioner) (quoting *Chaplinsky,* 315 U.S. at 573). But the words Petitioner highlights are excised from their context: a long quotation of the state court's objective approach to identifying fighting words, where it explains that certain words delivered "without a disarming smile" are, "as ordinary men know, . . . likely to cause a fight." *See Chaplinsky,* 315 U.S. at 573.

In *Texas v. Johnson,* this Court applied an objective listener-centered standard to hold that flag-burning, by itself, did not constitute unprotected fighting words. 491 U.S. 397 (1989). There it explained that "[n]o reasonable onlooker would have regarded [his] generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." *Id.* at 409; *see also* Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words,* 72 U. CHI. L. REV. 385, 391 (2005) (explaining that "prosecuting fighting words" requires law enforcement to "evaluate the speech to determine if its utterance to an objective listener in that situation was likely to cause a breach of the peace").

Because they are likely to provoke a violent reaction, fighting words pose direct and substantial harm. They do so, moreover, in a context where the immediacy of the harm means that listeners cannot prevent that harm through counterspeech. So too do threats inflict direct and potentially life-changing harm upon victims by causing them to fear for their physical safety.

B. False or misleading commercial speech

Governments can prohibit false or misleading commercial speech regardless of the speaker's subjective intent because of the harm such speech inflicts on listeners' autonomous and informed decision-making interests protected by the First Amendment. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."). For this reason, the First Amendment protects only commercial speech that is "neither misleading nor related to unlawful activity." *Id.* at 564; *see also Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.").

Many false advertising laws have long prohibited false or misleading commercial speech because of the harm such speech poses to consumers-as-listeners no matter what the commercial speaker intended. *E.g., Fed. Trade Comm'n v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934) (explaining that advertisers' "innocence of motive" does not relieve them of liability for violating the Federal Trade Commission Act's bar on deceptive trade practices). Similarly, securities laws protect investors by prohibiting some false or misleading statements regardless of the speakers' subjective intent. *E.g., Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pens. Fund*, 575 U.S. 175, 179 (2015) (observing that to prove a violation of Section 11 of the Securities Act of 1933 the buyer "need not prove . . .

that the defendant acted with any intent to deceive"); *Aaron v. SEC*, 446 U.S. 680, 696–702 (1980) (Section 17(a)(3) of the Securities Act of 1933 "quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible").

In short, false or misleading commercial messages are unprotected by the First Amendment because of the harm they inflict on the First Amendment interests of consumers and investors in autonomous and informed decisionmaking regardless of the defendant's subjective intent. Like with true threats, consumers and investors cannot protect themselves from harm through counterspeech. In the context of commercial speech, this is because companies have considerably greater access to accurate information about their own goods, services, and performance than do others.

C. Defamation

This Court's defamation jurisprudence reinforces its approval of listener-centered standards in settings where speech poses substantial harm to listeners and where such harm cannot be effectively remedied by additional speech.

This Court permits a private figure to recover actual damages for defamatory falsehoods on matters of public concern upon a showing of the speaker's negligence (while requiring a showing of the speaker's actual malice to recover presumed or punitive damages in such cases). *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–50 (1974). This Court also permits private figures to recover presumed and punitive damages for defamatory falsehoods on matters of private concern

absent a showing of the speaker's "actual malice" because of the reputational injury such falsehoods inflict on their target. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality).[7]

To be sure, this Court requires public officials and public figures—but not private figures—to prove a defamation defendant's actual malice to recover in a defamation action, a distinction the Court has explained as turning in part on the importance of providing breathing room for speech critical of those in the public eye. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964). But this Court explained its different First Amendment standards for defamation claims as turning in part on public and private figures' varying abilities to protect their reputational interests through counterspeech. *Gertz,* 418 U.S. at 344 ("Public officials and public figures usually enjoy significantly

[7] Making no mention of these precedents, Petitioner inaccurately describes this Court as stating that "'negligence . . . is [a] constitutionally insufficient' standard for penalizing speech." Pet. Br. 4 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964)). But what the Court actually said was "[w]e think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Sullivan,* 376 U.S. at 287–88. For the context Petitioner omits, earlier in that opinion the Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. Importantly, as noted above, the Court's standards for private figure plaintiffs are different.

greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.").[8]

As these precedents make clear, this Court's defamation jurisprudence offers another illustration of the value of attending to the harm inflicted upon targets regardless of the speaker's subjective intent (especially in settings where counterspeech offers little redress) when defining the contours of categories of unprotected speech. *See New York v. Ferber*, 458 U.S. 747, 763 (1982) ("Leaving aside the special considerations when public officials are the target, a libelous publication is not protected by the Constitution." (citation omitted)).

D. Obscenity

This Court has also defined obscenity, another category of speech unprotected by the First Amendment, by an objective listener-centered standard. The Court's test asks whether "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; "whether the work depicts or describes,

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[8] The Court also distinguished public officials and public figures from private figures for defamation purposes because they voluntarily expose themselves to "the risk of closer public scrutiny" and thus "to increased risk of injury from defamatory falsehood concerning them." *Gertz,* 418 U.S. at 344–45. But surely public officials and public figures do not voluntarily expose themselves to threats to their and their families' physical safety, and the harms that accompany such threats.

in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). Consequently, whether materials are unprotected by the First Amendment as obscene turns on the jury's objective assessment of community reactions rather than on the defendant's subjective intent. *See id.*; *see also Elonis,* 575 U.S. at 766–67 (Thomas, J., dissenting) (explaining that the Court has "held that a defendant may be convicted of mailing obscenity under the First Amendment without proof that he knew the materials were legally obscene").

E. Incitement, unlike true threats, does not cause harm by its mere utterance

By contrast, the category of unprotected incitement involves advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), where proof of the defendant's subjective intent is generally required, *see, e.g.*, *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

Unlike threats, incitement does not cause harm by its mere utterance. Rather, incitement creates a risk of harm that only takes place if its listeners engage in violent or other illegal action. While threats inflict direct harm on their target, speech that advocates violence may (or may not) persuade its listener to harm a third party's person or property. And because language that advocates violence or other illegal action does not inevitably lead to that violence, the government is at considerable risk of overestimating the danger of harm in that situation. *See, e.g.,* Geoffrey

R. Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 184–98 (2004) (describing the federal government's aggressive prosecution of political dissent during World War I). For these reasons, requiring a showing of the speaker's subjective intent helps safeguard valuable speech from punishment as incitement.

But incitement is distinct from situations where, as in this case, the causal connection between threats and substantial harm is direct and uncontested. *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 568 (2004) ("[U]nder the doctrine of true threats, the speaker's goal is significantly different from the inciter's. The threat-maker is focused on his targeted victim, not third parties.") The reason for greater caution in the incitement context—where a speaker is engaging in advocacy and could be punished for speech that ultimately causes no harm—is thus absent from the true threats context.

* * *

These precedents make clear that a context-driven objective approach to defining unprotected true threats adheres to this Court's First Amendment jurisprudence.

III. A context-driven objective standard protects victims from the harms of true threats without chilling valuable speech or unfairly punishing the unwary

Consistent with the traditions described above, a context-driven objective test for true threats "giv[es] breathing room to free expression" while "protecting

against the harms that true threats inflict." *R.D.*, 464 P.3d at 731. In particular, this test requires heightened attention to context and cautions against mistaking protected speech for true threats, recognizing that what a person says "is just the beginning of a threats analysis." *Id.* at 732 (citations omitted). The ultimate inquiry is whether an intended or foreseeable recipient would reasonably perceive the statements as a serious expression of intent to commit physical violence. *Id.* at 731.

The context-driven objective test used here requires attention to all circumstances, including:

> (1) the statement's role in a broader exchange, if any, including surrounding events;
>
> (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features;
>
> (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly);
>
> (4) the relationship between the speaker and recipient(s); and
>
> (5) the subjective reaction of the statement's intended or foreseeable recipient(s).

Id.

This test recognizes that words that may seem facially threatening on their own could actually be "just creative expression, jest, or hyperbole" when construed in context. *Id.* at 732. And this context-driven test is particularly attentive to the challenge of "evaluating online communication," including assessment of the "larger exchange" and "surrounding events," as

well as whether it was "spontaneous or responsive to some other communication." *Id.* It also accounts for distance between the person uttering the statement and the recipient, including "the vast temporal, geographic, and cultural distance current technology permits speech to travel." *Id.* at 733. In other words, this test recognizes that "constru[ing] the true threats exception to protect every passive internet user" would not sufficiently protect valuable speech. *Id.*

A context-driven objective test also looks to whether additional details heighten or undermine a threat's credibility and recognizes that violent or hyperbolic language can be a feature of particular forums. *Id.* at 732–33. This test also recognizes that anonymous messaging and direct messaging carry different considerations that impact whether a message is a threat, with statements "pointedly directed at their victims" much more likely to be understood as threats. *Id.* at 733 (quotations omitted). And the focus on context emphasizes that "courts should be wary of placing significant weight on the subjective reaction of a statement's *unintended* recipients" because "[t]o do so risks punishing a speaker for the content of a message that has been decoupled from its context." *Id.* (emphasis in original). Finally, it makes clear that a target's subjective reaction is not dispositive. *Id.* In this way, a context-driven objective test protects political hyperbole, art, other valuable expression, and even poorly chosen words by requiring that the entire context be considered.

Petitioner relies on claims of mental health conditions to claim this objective test may result in unjust

outcomes. But long-established state-law doctrines account for different capacities—protections that Counterman did not use. And requiring proof of what the person making the statement was thinking as part of the true threat analysis—as Petitioner requests—does not adequately account for the harms inflicted by true threats and would undermine the very basis for treating true threats as unprotected by the First Amendment. In short, a context-driven objective test both protects innocent listeners from the harm threats cause and protects unwary speakers from unfair punishment.

A. A context-driven objective inquiry protects political hyperbole, art, and other valuable expression

A context-driven test enables courts to distinguish true threats from artistic speech or political hyperbole. For example, Petitioner suggests that Thomas Jefferson's famous quotation—"the tree of liberty must be refreshed from time to time with the blood of patriots & tyrants"—could appear threatening "in some contexts." Pet. Br. 37. That's exactly the point: context matters. *R.D.*, 464 P.3d at 732. Petitioner hypothesizes a tweet of Jefferson's words without identifying any contextual cues like the audience, any background exchange, any history or relationship between the parties, or any other details that enhance or undermine the statement's credibility. All of these factors—and more—must be considered under a context-driven test.

A comprehensive objective test embraces the concept that "an advocate must be free to stimulate his audience with spontaneous and emotional appeals for

unity and action in a common cause." *Claiborne Hardware*, 458 U.S. at 928. Again, context matters: Petitioner's messages, unlike in *Claiborne Hardware*, involved one-to-one speech that neither advocated for any cause nor implicated any sort of political commentary. Similarly, the standard used here requires consideration of a range of contextual factors that enable courts to "distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn"; to distinguish "cross burning directed at an individual" from "cross burning directed at a group of like-minded believers"; and to protect the depiction of cross-burning in movies and plays. *See Black*, 538 U.S. at 366.

Petitioner alleges that an objective inquiry would chill artistic expression in the music industry, particularly rap music. Pet. Br. 39. But, "'[t]aken in context,' lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person." *Elonis*, 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part) (quoting *Watts*, 394 U.S. at 708). "Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar." *Id.*; *see also R.D.*, 464 P.3d at 732 (requiring consideration of "prevailing norms" inherent in particular forms of speech, including features or genres that "recast violent language in a less threatening light"). Along these lines, a context-driven objective test considers the platform through which an artist communicates (lyrics in an album or at a concert); how the statement was

conveyed (publicly, on the album or at a concert); and the subjective reaction of the message's intended and foreseeable recipients (wide commercial attention and purchase). The inquiry also takes into account the conventions of the genre.

In their amicus brief, the Cato Institute and Rutherford Institute note that if one were to change the context of Counterman's language—e.g., by writing a letter to one's congressional representative telling them to "F[**]k off permanently" or "Die. Don't need you"—one would change the statements' meaning. Amicus Curiae Cato Inst. & Rutherford Inst. at 16, *Counterman v. Colorado*, No. 22-138 (U.S. S. Ct. Feb. 28, 2023). But, again, that's precisely the point of a test that looks to context: to evaluate the surrounding circumstances to protect both valuable speech and innocent victims like C.W.

Petitioner also raises fears that an objective standard will "stifle[] minority religious expression." Pet. Br. 37. But Petitioner's examples do not support a subjective intent requirement for threats, nor do they show that a context-driven objective test would punish such expression. Petitioner warns that an objective test may curtail a person's use of the word "jihad" in religious speech because some listeners wrongly perceive that word as inherently threatening. Pet. Br. 38. Because Petitioner provides no example of "jihad" being misconstrued as a threat, there is no context to evaluate; nonetheless a context-driven analysis ensures that speech cannot be treated as an unprotected true threat based solely on words untethered from context.

Petitioner also suggests that a subjective intent standard is necessary because religious speech often "deliberately generate[s] deep psychological discomfort," including through techniques like "'hell fire and damnation' preaching." Pet. Br. 38–39 (citations omitted). But statements that create "psychological discomfort" are not the same as true threats. In *Bible Believers v. Wayne Cnty.*, 805 F.3d 228 (6th Cir. 2015), on which Petitioner relies, the Sixth Circuit did not even discuss whether the statements made by Christian evangelists to a largely Muslim audience were true threats; it instead considered subjective intent in concluding that the statements did not meet this Court's test for incitement and applied an objective test to conclude that the statements were not fighting words. *Id.* at 244, 246. Moreover, in its analysis, the Sixth Circuit emphasized that "more speech" is the proper remedy for listeners who find a speaker's message to be unpersuasive or offensive. *Id.* at 234, 243. But while counterspeech is an important option for listeners who disagree with religious speech, counterspeech is unrealistic and potentially dangerous for the targets of true threats, including stalking victims. *See supra* I.A.

In short, a context-driven objective standard provides the tools for separating unprotected threats from valuable speech.

B. A context-driven objective inquiry protects speech that is merely "poorly chosen words"

Petitioner alleges that an objective standard "fails to separate threats from poorly chosen words." Pet. Br.

31 (citation omitted). Not so. Again, attention to context is crucial.

Petitioner suggests that if a speaker tells somebody they "will regret" a course of action, that could either mean: (1) "the listener will later think better of it, or that it will turn out badly"; or (2) "that the speaker will make the listener regret the action by inflicting harm if that course is pursued." *Id.* (emphasis removed). To advance that argument, Petitioner points to an email exchange between journalist Bob Woodward and senior aide to President Obama Gene Sperling, in which Sperling emailed Woodward "You will regret doing this." *See* Exchange Between Bob Woodward and White House Official in Spotlight, CNN Politics (Feb. 27, 2013), http://bit.ly/3Iezmyp; *see also* Pet. Br. 31.

Yet this very example illustrates the importance of considering all circumstances surrounding the exchange, as well as the parties' relationship. Sperling's full statement was, "I know you may not believe this, but as a friend, I think you will regret staking out that claim." *See* Exchange Between Bob Woodward and White House Official in Spotlight. Looking at this larger context, as Colorado's test requires, makes quick work of Petitioner's claim.

A contextual inquiry also addresses the concerns Justice Sotomayor raised respecting the denial of certiorari in *Perez v. Florida,* where the defendant was convicted for threatening a store employee "solely on the basis of what [he] stated." 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari) ("Context in this case might have made a difference."). Consideration of context would be essential

in evaluating whether the defendant's statements were "a joke" or "the ramblings of an intoxicated individual" instead of a true threat. *Id.*

Petitioner also argues that an objective standard would criminalize misunderstandings on the internet, and that "emojis exacerbate such misunderstandings." Pet. Br. 33. Petitioner uses the example of a thumbs-up emoji, which is "'hideously offensive in parts of the Middle East, West Africa, Russia, and South America.'" Pet. Br. 33 (quoting Marcel Danesi, THE SEMIOTICS OF EMOJI: THE RISE OF VISUAL LANGUAGE IN THE AGE OF THE INTERNET 31 (2016)). This example misses the mark for two reasons.

First, Petitioner fails to recognize that offensive speech, whether conveyed by emoji or otherwise, differs from true threats. To be sure, a thumbs-up emoji may offend some recipients, but without more context, such a communication does not reasonably cause them to fear for their physical safety.

Second, a context-driven objective inquiry requires that courts assess a message containing the thumbs-up emoji by considering all relevant circumstances, including the entire message thread containing the emoji, the relationship between the parties, and the cultural meanings that may attach to such symbols. *See R.D.*, 464 P.3d at 734 (recognizing that "community norms and conventions" provide important context).

Petitioner also insists that a "reasonable person" standard is unworkable because it is vague and disregards diverse viewpoints. Pet. Br. 33. But legal tests based on objective reasonableness are employed routinely, including when fundamental liberties are at

stake. *See, e.g.*, *Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (test for whether force used by an officer was "excessive" is determined by an objective reasonableness standard, considering the "facts and circumstances of each particular case" (quotation omitted)). Moreover, currently, most jurisdictions employ some version of an objective test for true threats, *see* Brief in Opposition at 15–17, *Counterman v. Colorado*, No. 22-138, and Petitioner identifies no evidence that these jurisdictions are systematically incapable of appropriately assessing threats. Petitioner's handful of examples demonstrates how a context-driven inquiry is essential in effectively distinguishing misunderstandings from true threats.

C. State criminal law doctrines afford additional protection to those with mental health conditions who make threats subject to criminal prosecution

Petitioner posits that an objective standard "unfairly criminalizes" speech by persons who have mental health conditions that impair their ability to interpret context and emotion. Pet. Br. 34. But true threats are excepted from First Amendment protection because of the direct and life-altering harm they cause to their targets, not because of any moral judgment about the speaker's culpability. And threats made by persons with mental health conditions are just as capable of causing life-altering harms.

Just as important, under a context-driven standard, a speaker's mental health or disability can be considered in the true threat analysis. These considerations can bear on whether a foreseeable or

intended recipient of the threat would reasonably perceive it as threatening. This is the case, for instance, if the recipient knows, from prior exchanges or due to their relationship, that the speaker tends to "misinterpret context and emotion" or often says things that come across as "antisocial," Pet. Br. 34–35, but in fact does not pose harm.

Moreover, when a person makes threats that are subject to criminal prosecution, existing criminal law doctrines afford protections to individuals with mental health conditions. Here, Colorado law provided Counterman with multiple avenues for introducing evidence of his mental health in his criminal case. He chose, however, not to pursue them at the trial stage. For example, Counterman could have chosen to assert an insanity defense, which Colorado law requires him to do at the time of arraignment. *See* COLO. REV. STAT. § 16-8-103(1.5)(a) (2016). Because Counterman did not, the State moved to exclude any such evidence he might have sought to offer. J.A. 31, 36.

Or he could have offered evidence of his mental health or disability without pleading insanity if such evidence was relevant to other defenses, so long as the evidence did not tend to prove insanity (in which case, an insanity plea would have been required). *See People v. Wilburn*, 272 P.3d 1078, 1079 (Colo. 2012). But Counterman did not do that, either, even after the trial court noted it would allow the defense to introduce testimony about what others observed about Counterman's behavior and invited further briefing from the parties. J.A. 88–92.

"Within broad [constitutional] limits," this Court has explained, judgments about how mental illness affects criminal responsibility "must remain 'the province of the States,'" because they involve "balancing and rebalancing over time complex and oft-competing ideas about 'social policy' and 'moral culpability.'" *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell v. Texas*, 392 U.S. 514, 536 (1968)). Because "uncertainties about the human mind loom large," states have wide latitude in formulating "the many 'interlocking and overlapping concepts' that the law uses to assess when a person should be held criminally accountable for 'his antisocial deeds'"—including how and when such considerations should mitigate criminal sentencing.[9] *Id.* at 1028, 1031–32. Indeed, for these reasons, this Court has "'hesitated to reduce 'experimentation, and freeze [the] dialogue between law and psychiatry into a rigid constitutional mold.'" *Id.* at 1028 (quoting *Powell*, 392 U.S. at 536–37). Petitioner's arguments ignore these teachings.

D. A context-driven objective test requires attention to a range of factors that protect unwary speakers along with innocent listeners

A context-driven test ensures that unwary speakers are not penalized for careless speech while preventing the significant harm true threats inflict upon

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[9] Colorado's sentencing laws require courts to consider multiple factors in determining an appropriate sentence, including mitigating evidence that would encompass mental health concerns. *See* COLO. REV. STAT. §§ 18-1-102.5, 18-1.3-401(1) (2016). At sentencing, the defense explained Counterman was diagnosed with "anxiety and depression." J.A. 436.

their recipients. It provides a framework for appropriately assessing the types of statements identified in the examples raised by Petitioner and amici.

Petitioner, for example, references a Texas teenager who was jailed after making statements in an online gaming forum about "shoot[ing] up a kindergarten" and "eat[ing] the beating heart of one of them." Pet. Br. 33–34. But the teenager was jailed under a statute that required specific intent, not under a statute that employed an objective listener standard. *See* TEX. PENAL CODE ANN. § 22.07(a) (2017) (defining terroristic threats when a person "threatens to commit . . . violence . . . with intent to . . . place the public . . . in fear of serious bodily injury").

By contrast, several considerations in a context-driven objective test would have weighed against finding this a true threat. First, in examining the context, medium, and broader exchange, the conversation was an ongoing one among gamers—including one who told the speaker that he was a "prick" for his comment, but did not otherwise take it as an actual threat. *See* Craig Malisow, *The Facebook Comment That Ruined a Life*, Dallas Observer, at 1 (Feb. 1, 2014), https://bit.ly/dallas_observer. Second, the statement was reported to law enforcement by an unforeseeable and distant source in Canada. But a context-driven test accounts for this by emphasizing that "courts should be wary of placing significant weight on the subjective reaction of a statement's *unintended* recipients" because "[t]o do so risks punishing a speaker for the content of a message that has been decoupled from its context." *R.D.*, 464 P.3d at 733 (emphasis in original). Third, the

medium—a gaming subforum—was predisposed to violent language, which a context-driven test would consider to "recast [that] violent language in a less threatening light." *Id*. at 732. In short, a context-driven test provides appropriate tools for determining whether statements like these are protected speech or instead true threats.

Similarly, in its amicus brief, Alliance Defending Freedom offers several anecdotes of students and professors who faced school disciplinary actions for speech.[10] Amicus Curiae Alliance Defending Freedom at 2–8, *Counterman v. Colorado*, No. 22-138 (U.S. S. Ct. Mar. 6, 2023). While the brief does not provide the full story behind these examples, even the limited context makes clear that in each case these students and teachers were making statements that a context-driven test would have been well-equipped to address, including the statements' role in any broader exchange, the relationship between the speaker and recipient, how the statements were conveyed, and the recipients' reactions upon hearing the statements.

[10] Note that public schools' discipline of students' speech may implicate different First Amendment standards. *See generally Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *see also Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685–86 (1986).

E. Standards that require proof of the mental state of the person making the threat do not adequately protect the targets of threats from fear for their physical safety and the disruption caused by such fear

Tests that require proof of the mental state of the person making the threat do not protect victims from the harms inflicted by threats. Stalkers' threats highlight how subjective intent standards fail to address threats' debilitating impact. Stalkers often "maintain strong, unshakable, and irrational" feelings about their targets, and they may be "oblivious to objective reality." *Cross*, 127 P.3d at 77. Yet while stalkers' detachment from reality may prevent them from recognizing the impact of their behavior, victims still experience "severe intrusions on [their] personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to [their] security and safety." *Id.* at 75.

Online technologies contribute to threats' ease and disruptive impact, even while they complicate the task of establishing a stalker's mental state when making threatening statements. "Online communication—in particular, the ability to communicate anonymously—enables unusually disinhibited communication, magnifying the danger and potentially destructive impact of threatening language on victims." *R.D.*, 464 P.3d at 731. These same features of internet communication can pose heightened barriers to discerning the mental state of the person making threatening statements, particularly if that

person's identity is unknown, and there is no indication of their proximity to or relationship with the target beyond their online contact.

As a practical matter, Petitioner's proposed standard will affect how law enforcement agencies and prosecutors' offices allocate limited resources in deciding when to pursue the perpetrators of threats, further depriving victims of critical resources. No matter, says Petitioner; the targets of threats can take refuge in restraining orders instead. Pet. Br. 41 n.4. But this is cold comfort. While civil protection orders are a critical resource, their deterrence value has its limits. In one survey of 16,000 participants, 69 percent of women and 81 percent of men who had obtained restraining orders against a stalker reported that the stalker violated the order. *See* Tjaden & Theonnes, at 11.

Petitioner also fails to acknowledge that victims' ability to defend themselves from threats by use of civil remedies, too, including through civil protection orders, would be governed by any First Amendment true threat standard. *See, e.g.*, *Williams v. Williams*, 905 N.W.2d 900, 904 (N.D. 2018) (remanding for evaluation of whether disorderly conduct restraining order was wrongly issued based on speech that was constitutionally protected). As a First Amendment matter, statements determined to fall within a category of unprotected speech have been treated as unprotected from the government's regulation regardless of whether that regulation takes civil or criminal form.[11]

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[11] Petitioner asserts that criminal penalties raise "special concern" under the First Amendment. Pet. Br. 3–4. But the cases

See Herbert v. Lando, 441 U.S. 153, 156 n.1 (1979) ("Criminal libel prosecutions are subject to the same constitutional limitations [as those set forth in *New York Times v. Sullivan* for civil defamation actions]." (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964))); *Haughwout v. Tordenti*, 211 A.3d 1, 9 (Conn. 2019) (applying true threats doctrine in a case challenging a university expulsion and noting that "[b]ecause the true threats doctrine has equal applicability in civil and criminal cases, case law from both contexts informs [the] inquiry"). In other words, Petitioner conflates the First Amendment question at issue in this case with a criminal law question when he insists that subjective intent is required.[12]

Petitioner cites for this proposition do not involve the government's regulation of speech within an unprotected category. Instead, they involve the application of heightened scrutiny to the government's content-based regulation of *protected* speech, where the type of penalty may be relevant to the requisite narrow tailoring. *Reno v. ACLU*, 521 U.S. 844, 868, 879 (1997) (invalidating Communications Decency Act's content-based restrictions on "indecent" internet speech); *United States v. Alvarez*, 567 U.S. 709, 732–33 (2012) (Breyer, J., concurring) (proposing to apply intermediate scrutiny to the regulation of lies about military honors).

[12] Even though the First Amendment does not require proof of the mental state of the person making the statement for the statement to qualify as a true threat, legislatures are free to predicate criminal liability for threats on those mens rea requirements. While this Court refrains from interpreting criminal statutes that lack any clear state-of-mind standards as requiring only low levels of mens rea, *see Elonis*, 575 U.S. at 736–38, legislatures may criminalize conduct committed with an array of mental states, most often ranging from criminal negligence to purpose. *See Borden v. United States*, 141 S. Ct. 1817, 1823

Moreover, in many states, a person who seeks to obtain a protection order based on threats must first establish that the person against whom the order is sought has or is likely to commit a criminal offense under that state's laws, thereby carrying the standard for criminal threats directly into the civil protection order context. *See, e.g.*, ALA. CODE §§ 30-5-2, 30-5-5 (2022); ALASKA STAT. ANN. § 18.66.100 (2022); GA. CODE ANN. §§ 19-13-1, 19-13-3 (2022); MONT. CODE ANN. § 40-15-102(1) (2022); *see also* Am. Bar Ass'n, Domestic Violence Civil Protection Orders (CPOs) (2020), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Resources/charts/cpo2020.pdf.

And outside of stalking, a subjective standard would make it tougher for authorities to keep people safe. It could hinder schools, for example, from taking protective steps when a person issues a gun violence or bomb threat. An objective standard, on the other hand, provides a more workable standard for public entities struggling to ensure public safety (and facing civil liability for their failure to do so) along with their constitutional responsibilities.

IV. Counterman's conviction satisfies a context-driven objective test

A context-driven objective test underscores just how threatening Counterman's messages were. His direct and private messages ranged from references to seeing C.W. in public to words assaulting her right to

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(2021). For example, Colorado, like almost all other states, criminalizes negligent homicide. *See* COLO. REV. STAT. § 18-3-105 (2022).

exist. Nothing suggested these references were made in jest or were hyperbolic. Nor were they political discourse. On the contrary, they contributed to an invasive course of conduct: there was no broader exchange; it was simply Counterman (a complete stranger to C.W.) sending hundreds of messages without response *and* repeatedly being blocked—an "unequivocal indication" that C.W. did not want contact from him. *Counterman*, 497 P.3d at 1048. In short, a test that examines the context reveals that Counterman's messages—including "fuck off permanently" and "die, don't need you"—were neither innocuous nor taken out of context, but instead were unjustified and harmful.

For C.W., that Counterman's messages implied a detachment from reality substantially heightened her fear. As she explained, because Counterman "crossed so many social boundaries," she reasonably believed there was "no way to know how many other boundaries he could cross, especially if he's living in a delusion that's not in a reality that everyone else is living in." J.A. 175.

As made plain by the comprehensive context-driven standard used here, Counterman was not prosecuted for purely innocent conduct. Rather, Counterman continued to "create[] accounts and sen[d] messages to C.W.," despite "an unequivocal indication that she wished not to be contacted" and his awareness "that the messages would cause an emotional response." *Counterman*, 497 P.3d at 1048. Counterman's behavior thus targeted and silenced a victim. And nothing about Counterman's speech implicates protected free expression. Using the First Amendment to

immunize harmful, aggressive, and repeated behavior, like Counterman's here, would distort the protections our Constitution provides by enabling more harm and less speech.

* * *

A comprehensive context-driven objective test provides the breathing room to free expression that this Court envisioned in *Watts* and beyond. It ensures a robust examination of the words used, the circumstances surrounding the message, the relationship between the speaker and the listener, and the medium used for the communication. In so doing, it also safeguards victims from the fear of violence and the disruption that fear brings to their lives, including the fear and disruption Counterman inflicted upon C.W.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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