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 OF ILLINOIS, ALASKA, ARIZONA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE

The States of Illinois, Alaska, Arizona, Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wyoming, and the District of Columbia (collectively, the "amici States") submit this brief in support of Colorado.

For centuries, the States have regulated "serious expression[s] of an intent to commit an act of unlawful violence" against another person in civil and criminal contexts. *Virginia v. Black*, 538 U.S. 343, 359 (2003). As this Court has long recognized, and as petitioner does not dispute, see Pet. Br. 40, these regulations are critical safeguards for the public health and safety: they protect state residents from "the fear of violence," "the disruption that fear engenders," and "the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). The States have a significant interest in maintaining their flexibility to enact and enforce such regulations.

Of course, the States also have an interest in free speech protections. But threats of violence are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the societal interest in order and morality." *Id.* at 383 (internal quotations omitted). Such statements—so-called "true threats"—are thus "outside the First Amendment." *Id.* at 388; see *Elonis v.*

United States, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part) ("True threats inflict great harm and have little if any social value."). By regulating true threats, the States can thus serve their interest in protecting their residents from the harms of threats without compromising their interest in preserving free speech. See *New York v. Ferber*, 458 U.S. 747, 763-764 (1982) (government appropriately balances competing interests when it regulates class of speech whose harms "overwhelmingly outweigh[ ] the expressive interests").

Accepting petitioner's view would upset this balance. Continuing a robust historical practice, many state statutes employ an objective standard—assessing whether a reasonable person would understand the statement, given its context, to be a serious expression of an intent to commit unlawful violence—to identify true threats.[1] Likewise, the majority of state courts to have addressed the question use an objective standard when assessing whether a statement is a true threat. It is the amici States' experience that an objective standard is a powerful tool for reaching threats of violence, which can cause harm by their very utterance, and for intervening before violence occurs in a variety of contexts, including threatened school shootings, domestic abuse, and hate crimes.

[1] The States have varied in whether this standard examines the perspective of a reasonable speaker or a reasonable listener, but the central inquiry remains the perspective of a reasonable person.

To be sure, some States have also used a subjective standard—requiring proof of the speaker's mental state regarding the statement's threatening nature and effects—to assess threats in some circumstances. But those policy decisions have always been reserved to state legislatures. The amici States thus urge this Court to reject petitioner's arguments and hold that the First Amendment is not violated when courts assess threats of violence objectively.

SUMMARY OF ARGUMENT

The Court should reject petitioner's understanding of the First Amendment for multiple overlapping reasons. First, petitioner's standard would divorce the First Amendment from its historical underpinnings, as the States have utilized an objective standard to regulate threats of violence across multiple contexts since the Founding. Second, it would jeopardize a host of present-day state laws—both civil and criminal—that safeguard the public health and safety by subjecting threats to an objective assessment and would constrain state efforts to protect their residents from these threats. While the States have chosen to utilize a subjective standard when regulating threats in some contexts, these regulations represent policy choices to exceed the First Amendment's floor for a variety of reasons. Those policy choices should remain reserved to the States, and this Court should decline petitioner's invitation to upend centuries of state efforts to protect their residents from the undisputed harms that flow from the very utterance of threats of violence.

ARGUMENT

The States' experience confirms that the First Amendment does not protect threats that a reasonable person would understand as a serious expression of an intent to commit an act of unlawful violence—those that satisfy an objective standard.[2] Petitioner's contrary arguments cannot be squared with history, would call into question a wide range of state statutes and efforts to protect their residents, and should accordingly be rejected.

I. Interpreting The First Amendment To Require A Subjective Test For Identifying True Threats Would Contradict Historical Understandings Of That Amendment.

"From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

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[2] Colorado's statute requires that the speaker "knowingly . . . ma[de]" the challenged statement. Colo. Rev. Stat. § 18-3-602(1)(c). The dispute, therefore, is not whether the State must prove that the speaker intended to act or knowingly acted, i.e., that he knew he was sending an electronic message. Instead, the parties dispute whether the First Amendment requires proof of the speaker's mental state as to the statement's nature and effects, i.e., that the speaker knew or intended the threatening nature of the statement, or whether proof under an objective standard is sufficient. See Pet. Br. 44 (arguing that First Amendment "at minimum" requires a showing of "a defendant's knowledge that his speech will be regarded as a threat") (emphasis omitted).

interest in order and morality." *R.A.V.*, 505 U.S. at 382-383 (internal quotations omitted). These restrictions included proscriptions against "threats of violence." *Id.* at 388; see *Elonis*, 575 U.S. at 761 (Thomas, J., dissenting) (noting States' practice of regulating threats began "[s]hortly after the founding"). Importantly, in the 18th and 19th centuries, the States regularly utilized an objective standard when taking and permitting civil and criminal action based on threats of violence—demonstrating that the ratifiers of the First and Fourteenth Amendments did not understand the freedom of speech to protect threats of violence, regardless of whether the speaker knew or intended the threatening nature of his statement, or made it with reckless disregard to its effect on the listener.

This history provides "strong evidence of the original meaning" of the First Amendment. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020). History can be a useful tool for constitutional interpretation because "'a regular course of practice' can 'liquidate [and] settle the meaning' of' disputed or indeterminate 'terms [and] phrases.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting Letter to S. Roane (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (G. Hunt ed. 1908)). To this end, the amici States offer the following historical examples as a supplement to those discussed by Colorado. See Colorado Br. § I.B.

1. Following the English tradition, many States criminalized the use of threats of bodily injury to force another to allow access to, or part with, property—

that is, to commit forcible entry or detainer. E.g., *State v. Cargill*, 4 S.C.L. 445, 466 (S.C. Const. App. 1810); *People v. Rickert*, 8 Cow. 226, 229 (N.Y. Sup. Ct. 1828); *State v. Tolever*, 27 N.C. (5 Ired.) 452, 454 (N.C. 1845) (recognizing common law crime); *Foster v. Kelsey*, 36 Vt. 199, 201, 203 (1863); *Kramer v. Lott*, 50 Pa. 495, 497 (1865) (discussing Pennsylvania criminal statutes from 1700 and 1860); *Hoffman v. Harrington*, 22 Mich. 52, 54-57 (1870) (discussing criminal liability for forcible entry); *Marsh v. Bristol*, 32 N.W. 645, 649 (Mich. 1887) (threat of force constitutes forcible entry); *Winn v. State*, 18 S.W. 375, 375 (Ark. 1892) (discussing 1808 law); *Page v. Dwight*, 170 Mass. 29, 31, 35 (1897) (discussing Massachusetts criminal forcible entry statutes dating back to 1692 and 1701) (citing *Commonwealth v. Shattuck*, 58 Mass. 141, 145 (1849) (threats of violence can constitute forcible entry)). In setting out the elements of these offenses, the state statutes generally did not include a requisite mental state as to the statement's threatening nature or effects. For instance, Pennsylvania's statute provided that an individual would be guilty of forcible detainer if he "shall by force and with a strong hand, or by menaces or threats, unlawfully hold or keep the possession of lands or tenements." *Kramer*, 50 Pa. at 497 (discussing Act of 1860) (cleaned up); see also *Rickert*, 8 Cow. at 232 (discussing elements of state forcible entry and detainer statute without mentioning mental state as to statement's threatening nature or effects); *Foster*, 36 Vt. at 201-202 (same); *Winn*, 18 S.W. at 375 (same); *Dwight*, 170 Mass. at 31 (same).

Additionally, in reviewing prosecutions of these crimes, state courts adopted the approach utilized by

English courts, which permitted criminal prosecution for forcible entry or detainer when the defendant made statements that gave the listener "reasonable cause to fear"—without requiring proof that the speaker knew or intended the threatening nature of his statements, or acted recklessly in this regard. *Shattuck*, 58 Mass. at 145; see, e.g., *Tolever*, 27 N.C. (5 Ired.) at 454; *State v. Davis*, 109 N.C. 809, 883 (1891) (citing *State v. Pollok*, 26 N.C. 305, 309 (1844)); *Commonwealth v. Everhart*, 57 Pa. Super. 192, 205 (1914) (discussing 1860 statute); see also *Smith v. Reeder*, 21 Or. 541, 548 (1892) (recognizing "general rule," for both civil and criminal liability for forcible entry and detainer, that defendant is liable for "menaces or acts giving reasonable cause to fear"); *Goad v. Heckler*, 19 Colo. App. 479, 482 (1904) (explaining that state law reflected requirements of English law, under which criminal liability attached for speech that "tend[ed] to inspire a just apprehension of violence") (internal quotations omitted).

2. This historical practice—permitting liability based on threats of violence without requiring proof of the speaker's subjective mental state as to the threatening nature and effects of his statements—was so widespread that it was also utilized in the civil context, in which the First Amendment can provide a defense against private actions brought under federal law. For instance, many States enacted civil statutes providing for relief for forcible entry or detainer; these statutes were modeled after their criminal counterparts and thus likewise did not require proof that the defendant knew or intended the threatening nature of his statement, or recklessly disregarded the risk that

it would cause fear. See, e.g., *Commonwealth v. Dudley*, 10 Mass. 403, 409 (1813); *Fowler's Adm'r v. Knight*, 10 Ark. 43, 49 (1849); *Harrow v. Baker*, 2 Greene 201, 204 (Iowa 1849); *Dickinson v. Maguire*, 9 Cal. 46, 49 (1858); *Winterfield v. Stauss*, 24 Wis. 394, 398-400 (1869); *Ladd v. Dubroca*, 45 Ala. 421, 428 (1871); *Franklin v. Geho*, 3 S.E. 168, 173 (W. Va. 1887); *Livingston v. Webster*, 8 So. 442, 444 (Fla. 1890); see also *Marsh*, 32 N.W. at 649 (recognizing that civil liability for forcible detainer and entry required "same kind of proof" as criminal liability).

As another example, many States enacted statutes allowing an individual to obtain a divorce upon a showing of extreme cruelty, which state courts held was satisfied by proof that that one's spouse had made threats that would cause a reasonable fear of bodily harm, without requiring any showing as to the speaker's mental state as to the statement's threatening nature and effects. See, e.g., *Warren v. Warren*, 3 Mass. 321, 321 n.1 (1807); *Mason v. Mason*, 1 Edw. Ch. 278, 291 (N.Y. Ch. 1831); *Harratt v. Harratt*, 7 N.H. 196, 198 (1834); *Burns v. Burns*, 13 Fla. 369, 373 (1869). These laws were derived from English law, which focused on whether the "words of menace . . . excite[d] a reasonable apprehension of bodily harm." *Burns*, 13 Fla. at 374; see *Mason*, 1 Edw. Ch. at 291-292. And they protected state residents by allowing them to separate from abusive spouses before "hurt is actually done." *Harratt*, 7 N.H. at 198.

Moreover, state courts historically allowed the victim of a threat of violence to bring a tort action when that threat caused him objectively reasonable fear that led to pecuniary loss. See, e.g., *Grimes v.*

Gates, 47 Vt. 594, 598 (1873); *Gulf, C. & S.F. Ry. Co. v. Levy*, 59 Tex. 563, 568 (1883); *Brooker v. Silverthorne*, 99 S.E. 350, 352 (S.C. 1919). These actions flowed from English common law, which recognized the need to redress the disruptive effects of the fear caused by such threats: it provided a remedy for individuals who receive "threats and menaces of bodily hurt, through fear of which [their] business is interrupted." 3 W. Blackstone, Commentaries on the Laws of England, *120 (1768); see *Gulf C.*, 59 Tex. at 568-569 (collecting English authorities as precursor to such state laws). In analyzing the statutes designed to protect individuals from such disruption, the state courts routinely did not require proof of the speaker's subjective mental state as to the statement's threatening nature or effects, instead assessing only whether the threats would cause fear in "persons of ordinary firmness." *Grimes*, 47 Vt. at 598; see, e.g., *Gulf, C.*, 59 Tex. at 569; *Brooker*, 99 S.E. at 352.

3. Congress and federal courts later followed suit and affirmed the States' use of an objective standard. As one example, state courts consistently concluded that an individual had suffered duress, and thus could be released from contractual obligations, when subjected to threats that would "excite a reasonable fear" in the mind "of a person of ordinary firmness," regardless of the speaker's mental state as to the statement's threatening nature and effects. *Buchanan v. Sahlein*, 9 Mo. App. 552, 557-558 (1881); see, e.g., *McGowen v. Bush*, 17 Tex. 195, 199 (1856); *Harris v. Carmody*, 131 Mass. 51, 53 (1881); *Hines v. Bd. of Comm'rs of Hamilton Cnty.*, 93 Ind. 266, 271 (1884). This Court endorsed that approach as correct

under federal common law the same year that the Fourteenth Amendment was ratified, *Brown v. Pierce*, 74 U.S. 205, 214 (1868), providing important insight into the scope of the First Amendment at the time it was incorporated against the States. Moreover, when Congress entered "the business of regulating threats" in 1917 by enacting a statute that prohibited depositing into the mail letters containing threats to harm the President, federal courts interpreted the statute as requiring only general intent (knowledge with respect to the action, i.e., an intent to deposit the letter), rather than a specific intent to threaten. *Elonis*, 575 U.S. at 760 (Thomas, J., dissenting). State and federal entities thus shared a common understanding that the First Amendment does not protect threats of violence that meet an objective standard.

4. Petitioner, for his part, fails to grapple with this strong historical practice. Instead, he points to a handful of examples in which the States sometimes chose to require proof of a specific intent to threaten when regulating threats. See Pet. Br. 18-20. But that evidence simply shows that the States exercised their discretion to go beyond the constitutional baseline by using the subjective standard in some contexts, depending on policy concerns and local needs. Most obviously, petitioner's historical examples all concern criminal liability. See *ibid.* But the true-threats doctrine applies in both civil and criminal contexts, and the States commonly require heightened proof of a subjective mental state in criminalizing certain conduct but not when enacting civil penalties for the same conduct—a choice petitioner's rule would foreclose. See *infra* pp. 29-30; see also *Elonis*, 575 U.S. at

748 (Alito, J., concurring in part and dissenting in part) (citing both criminal and civil cases when discussing scope of true threats exception). Petitioner's evidence thus reveals little about historical perceptions of the First Amendment's floor and instead demonstrates only that some States have chosen to exceed that floor when enacting criminal laws. And it certainly does not negate the historical understanding that the First Amendment permits the States to proscribe threats of violence based on an objective standard, as many chose to do.

In short, Colorado's interpretation of the First Amendment is "reinforced by centuries of history," *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 556 (2014), which demonstrate that the States have long restricted threats of violence under an objective standard. This Court should be "hesitant to disturb" that longstanding practice and to adopt a view of the First Amendment divorced from its historical understanding. *Ibid.*

II. Imposing A Subjective Standard For Proving True Threats Would Constitute A Dramatic Break From Current Practice And Could Jeopardize A Broad Range Of Important State Laws.

The States' longstanding practice of regulating threats of violence—including without requiring proof of the speaker's subjective mental state as to the statement's threatening nature and effects—continues today. Many state statutes utilize an objective standard for establishing when a statement qualifies

as a true threat. In the amici States' experience, this objective standard is an important tool for protecting their residents from the well-established harms that flow from threats of violence: it facilitates criminal prosecutions and also enables the States to take important civil and administrative action. Accepting petitioners' view of the First Amendment would threaten these state laws and hamper the amici States' ability to shield their residents from the fear, disruption, and potential violence that such threats engender.

1. The States commonly regulate threats of violence in civil and criminal contexts. These regimes—including the many state statutes that use objective standards, see *infra* pp. 16-17—are integral to safeguarding the physical, mental, and emotional wellbeing of the States' residents. And this Court has long recognized that the States have a substantial interest in protecting their residents from the fear and disruption associated with threats of violence, "'which by their very utterance inflict [such] injury,'" and from the occurrence of the threatened violence. *Virginia*, 538 U.S. at 359-360 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see *R.A.V*, 505 U.S. at 388.

Threats of violence adversely impact peoples' lives in a variety of ways. For instance, the fear and stress these threats cause can, and often do, result in severe and lasting damage to the victim's physical

and mental health.[3] For example, a student who receives threats that she and her classmates will be gunned to death may struggle to eat and sleep, experience heightened anxiety, and even suffer delayed cognitive development that inhibits her ability to learn.[4] Threats of violence, moreover, can erode autonomy by forcing individuals to alter their behavior and even uproot their lives. Stalking victims, for example, often quit their jobs, change their phone numbers, and repeatedly move due to fear of threatened

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[3] Magellan Healthcare, *Living with Threats of Violence* (June 2020), https://bit.ly/3ndDR5y; see Lars Peter Andersen et al., *Crisis Social Support After Work-Related Violence and Threats and Risk for Depressive Symptoms: A 3-Months Follow-up Study*, 11:42 BMC Psych. 1, 2 (2023) (threats of violence at work can trigger anxiety, depression, post-traumatic stress disorder, and sleep disorders); D.C. Coalition Against Domestic Violence, *Surviving D.C.: A Research Synthesis of Domestic Violence Survivors' Experiences* at 10 (May 2018), https://bit.ly/3y0nSKw (discussing mental and physical effects of intimate personal violence, including threats of violence, on domestic abuse victims); Adrienne O'Neil & Anna J. Scovelle, *Intimate Partner Violence Perpetration and Cardiovascular Risk: A Systematic Review*, 10 Preventative Medicine Reports 15, 15-16 (2018) (stress caused by intimate partner violence, including threats of violence, can cause cardiovascular damage); Oddgeir Friborg et al., *Violence Affects Physical and Mental Health Differently: The General Population Based Tromsø Study*, 10 Plos One 1, 8 (2015) (threats of violence can cause musculoskeletal pain).

[4] Zara Abrams, *Stress of Mass Shootings Causing Cascade of Collective Traumas*, 53 Monitor on Psych. 20, 24 (2022); Colleen Sikora, *Arizona Schools Got Lots of Threats this Semester. How is it Affecting Students' Mental Health?*, 12 News (Dec. 23, 2022), https://bit.ly/3Y3G4NT; Patsy Montesinos, *Students' Mental Health Impacted by School Threats*, WHSV3 (Sep. 23, 2022), https://bit.ly/3ZvmbR0.

violence—causing them severe financial stress and forcing them to leave behind friends and family at a time when they urgently require emotional support.[5] Victims of threats based on race or religious affiliation, as another example, may stay home from school, stop reporting to work, or cease participating in public life altogether for fear that they will be victims of a hate crime.[6] These adverse consequences affect not only the victims of threats but also their loved ones and communities—such as the parents who remove their children from school following threats of a school shooting, or the individuals of faith who cease attending their place of worship after it is threatened with a bomb attack.[7]

Moreover, these threats and their ensuing harms are on the rise. In recent years, individuals of all walks of life—from public figures such as lawmakers

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[5] Acting Director Allison Randall, *Office on Violence Against Women Observes National Stalking Awareness Month*, U.S. Department of Justice (Jan. 25, 2023), https://bit.ly/3TLiUv2; Stalking Prevention Awareness & Resource Center, *Stalking Fact Sheet* (Jan. 2019), https://bit.ly/2VTGibg.

[6] Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. Rev. 1435, 1448-1450 (2011).

[7] FBI Executive Assistant Director Ryan T. Young, *Violent Extremism and Terrorism: Examining the Threat to Houses of Worship and Public Spaces*, Statement Before the Senate Homeland Security and Governmental Affairs Committee (Mar. 16, 2022), https://bit.ly/3y39il7; Jim Marshall, *FBI Reminds Public Hoax Online Threats Have Serious Consequences*, FBI (Jan. 8, 2020), https://bit.ly/3ZtLy5D.

and judges and their families;[8] to caregivers such as healthcare workers and teachers;[9] to the most vulnerable residents of society, such as domestic abuse victims and students—have been forced to deal more regularly with the fear and disruption caused by threats of violence.[10] Changes in technology, including society's increased reliance on the internet, have

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[8] Vera Bergengruen, *The United States of Political Violence*, Time (Nov. 4, 2022), https://bit.ly/3Z6M4GH (describing a "surge" of violent threats against public officials, with threats against federal judges increasing by 400% in the past six years); Zoe Richards, *Capitol Police Investigated More Than 7,500 Threats Against Lawmakers Last Year*, NBC (Jan. 17, 2023), https://nbcnews.to/3U0N25X (according to Capitol Police, threats against members of Congress remain "historically high").

[9] Patrick Boyle, *Threats Against Healthcare Workers Are Rising*, Association of American Medical Colleges (Aug. 18, 2022), https://bit.ly/41mXYOi; Tim Walker, *Violence, Threats Against Teachers, School Staff Could Hasten Exodus From Profession*, National Education Association (Mar. 18, 2022), https://bit.ly/3SAEIZV; Letter from Executive Board of the American Library Association to FBI Director Christopher A. Wray (Sept. 27, 2022), https://bit.ly/3IXcNQm (expressing "grave[ ] concern" that increasing threats of violence against public library workers will "lead to actual violence").

[10] Zach Crenshaw, *School Threats on the Rise Post-Uvalde Massacre, Officials Say*, ABC (Nov. 22, 2022), https://bit.ly/3SGuyqv; Ruth W. Leemis et al., *The National Intimate Partner and Sexual Violence Survey*, Centers for Disease Control and Prevention at 24-25 (Oct. 2022), https://bit.ly/41tzvHe; World Health Organization, *Violence Against Women* (Mar. 9, 2021), https://bit.ly/2SxhJOU.

facilitated the surge in threats.[11] Now, more than ever, the States need to be able to protect their residents from the fear and disruption caused by threats of violence, as well as to intervene in situations before threatened violence occurs.

2. Consistent with their historical practice, see *supra* Part I, many States achieve these important goals by using an objective standard to penalize threats across multiple contexts—civil and criminal. See, e.g., Ala. Code 1975 § 13A-6-90.1(a) (second-degree stalking); Ariz. Rev. Stat. Ann. § 13-3004 (threatening letter); Ark. Code Ann. § 5-71-229(c)(1) (third-degree stalking); Cal. Fam. Code § 6203(a)(3) (abuse); Cal. Penal Code § 140(a) (threatening witnesses, victims, or informants); D.C. Code § 22-3133(a)(3) (stalking); Iowa Code Ann. § 708.11 (stalking); Iowa Code Ann. § 712.8 (threat concerning incendiary or destructive material); La. Rev. Stat. Ann. § 14:40.2 (stalking); 17-A Maine Rev. Stat. Ann. §§ 210, 210-B (terrorizing and domestic violence terrorizing); Mass. Gen. Laws Ann. Ch. 275, § 2 (complaint of threat to commit crime); Mich. Comp. Laws Ann. §§ 750.411h, 750.411i (stalking and aggravated stalking); Mich. Comp. Laws Ann. § 600.2950a(3)(b) (protection order); Mont. Code Ann. § 45-5-203 (intimidation); Or. Rev. Stat. Ann. § 30.866(1) (protective order); Tex.

[11] Gianna Melillo, *Majority of Americans Report Seeing Online Threats of Violence Based on Race, Gender or Sexuality*, The Hill (Nov. 28, 2022), https://bit.ly/3m8E3Ta.

Fam. Code § 71.004 (family violence);[12] Va. Code Ann. § 18.2-60(A)(1) (threats of bodily harm and death, including on school property); Va. Code Ann. § 18.2-60.1 (threat to Governor and his or her family); Wis. Stat. Ann. § 947.01(1) (disorderly conduct); Wyo. Stat. Ann. § 6-6-103(b) (non-anonymous threats via telephone, electronic medium, or in writing).[13]

These statutes have largely withstood First Amendment challenges. The majority of state courts to have considered the question—15 in addition to the Colorado Supreme Court—have held that statements qualify as true threats when they satisfy an objective

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[12] This statute prohibits *both* intentional conduct and "threat[s] that reasonably place[ ] the [family] member in fear of imminent physical harm." Tex. Fam. Code § 71.004.

[13] Four of these statutes refer to intentional, knowing, or purposeful conduct, but the relevant state court has held that these provisions require a showing of general intent (i.e., an intent to speak) and not of a specific mental state as to statement's threatening nature or effects (i.e., an intent to threaten). See *State v. Neuzil*, 589 N.W.2d 708, 712 (Iowa 1999); *State v. Terrio*, No. 19-K-90, 2019 WL 1285288, *3 (La. Ct. App. Mar. 20, 2019); *SP v. BEK*, 981 N.W.2d 500, 509 (Mich. 2021); *People v. Herzberg*, No. 265546, 2007 WL 839375, *1 (Mich. Ct. App. Mar. 20, 2007); *Holcomb v. Commonwealth*, 709 S.E.2d 711, 714 (Va. App. Ct. 2011). Three other statutes require that an individual knew or should have known that a reasonable person would perceive the statement as a threat, but the state courts have held that those provisions are satisfied by proof under an objective standard. See *Coleman v. United States*, 202 A.3d 1127, 1143 (D.C. 2019); *State v. McCarthy*, 101 P.3d 288, 299 (Mont. 2004) (citing *State v. Lance*, 721 P.2d 1258, 1267 (Mont. 1986) (intent is evaluated under objective standard)); *In re A.S.*, 626 N.W.2d 712, 720 (Wis. 2001); see *id.* at 725 (Bablitch, J., concurring) (statute does not require intent to threaten).

standard, reasoning that this standard provides a sufficient safeguard for protected speech while allowing the States to reach statements that by their very utterance can inflict harm. Colorado Br. in Opp'n 15-17.[14] By contrast, only nine state courts have concluded that the First Amendment requires a hybrid subjective mental standard. *Id.* at 17. An objective standard, therefore, has been widely embraced by States across the nation—including their legislatures and courts—to protect their residents.

3. Accepting petitioner's view would carry serious practical consequences because it would call these statutes and decisions into question. The objective standard is an important tool for the States to protect their residents from threats of violence that, while indisputably harmful, a subjective standard cannot always reach—both because the requisite mental state cannot necessarily be proven and because these statements inflict harm by their very utterance, regardless of the speaker's mental state. The States, moreover, use objective standards in enacting civil laws as well as criminal laws, so holding that a subjective standard is always required would inhibit their ability to

[14] At least two other state courts have suggested that an objective standard is consistent with the First Amendment. See *People v. Lagano*, 39 N.Y.3d 108, 112 (2022) ("A 'true threat' is one that a reasonable person in the victim's position would consider to be an unequivocal statement of intended physical harm."); *Hodson v. State*, No. 50759, 2009 WL 1424492, *1 (Nev. Jan. 8, 2009) (table) (assessing "circumstances" in which threat was made, and not mentioning mental state as to statement's threatening nature and effect, when determining whether statement constituted true threat).

protect their residents in a wide range of circumstances. See *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting n part) (citing both criminal and civil cases when discussing scope of true threats exception); *Haughwout v. Tordenti*, 211 A.3d 1, 9 (Conn. 2019) (recognizing "true threats doctrine has equal applicability in civil and criminal cases"). Three categories of examples demonstrate the importance of the objective standard for state efforts to protect their residents from threats of violence and their attendant harms.

First, an objective standard has enabled the States to protect their students—as well as school staff and parents—from the fear, disruption, and violence that can follow from threatened school shootings. "[M]ass, systematic school-shootings" have unfortunately "become painfully familiar in the United States." *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771 (5th Cir. 2007). Threats of violence often forecast these attacks: as the Director of the Illinois Emergency Management Agency explained, "In almost every case involving a mass school shooting there was someone, usually a fellow student, who had some advance warning or reason to believe that violence was possible."[15] And even when these threats

[15] Press Release, Ready Illinois, *State of Illinois Launches New School Safety Initiative, Safe2Help Illinois* (Oct. 20, 2021), https://bit.ly/3lFvijN (internal quotations omitted). As part of their comprehensive efforts to identify threats of violence, many States, including Illinois, have launched confidential platforms for students to report such threats. *Ibid.*; see Sophie Quinton, *To Prevent Suicides and School Shootings, More States Embrace*

are not followed by physical violence, they disrupt school operations, waste law enforcement resources, and traumatize students and school staff alike.[16]

The States have responded to the increase in school shootings by using an objective standard to prove—and act based on—threats of such shootings. For instance, in *Haughwout*, 211 A.3d 1, a former college student sued his university, complaining that the university violated his First Amendment rights because it expelled him after he stated that "[he] should just shoot up this school," told another student that he was "first on his hit list," "wondered aloud how many rounds he would need to shoot people at the school," and made hand gestures in the shape of a gun at others. *Id.* at 4, 10 (internal quotations omitted). The student who reported these statements acknowledged that they were made "jokingly" but was nevertheless "afraid for everyone's safety." *Id.* at 4 (internal quotations omitted). The Connecticut Supreme Court rejected the plaintiff's challenge, holding that a reasonable person would have understood the statements as threats. *Id.* at 572, 576-577. The court was undeterred by the plaintiff's contention that he lacked a specific intent to threaten his classmates, explaining that the First Amendment does not require a

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Anonymous Tip Lines, Stateline (Mar. 16, 2018), https://bit.ly/2EWA7vv.

[16] Monica Velez, *Real or Not, Threats of Violence Have Serious Consequences in Seattle Schools*, The Seattle Times (Jan. 31, 2022), https://bit.ly/3EN5dFF; Marshall, *supra* note 7.

showing of a specific intent to threaten. *Id.* at 567 n.12, 572.

Other States have likewise successfully relied on an objective standard to protect their students and educators following threats of school violence. See, e.g., *Commonwealth v. Milo M.*, 740 N.E.2d 967, 969-970 (Mass. 2001) (objective standard satisfied where student offered drawing of him killing teacher to depicted teacher); *In re Kyle M.*, 27 P.3d 804, 808-809 (Ariz. Ct. App. 2001) (student's statements met objective standard where he told classmate about his "hit list" and plan to "kill two students in a 'Columbine thing,'" and said that she should "keep quiet" about that conversation or he would kill her). But where courts have applied a subjective standard, they have overturned adjudications based on statements threatening school violence—including statements that "everyone should just die" coupled with a desire to "beat the record of 19" shortly after the Parkland, Florida school shooting. *Int. of: J.J.M.*, 265 A.3d 246, 249-250, 273 (Pa. 2021); see also *Roberts v. State*, 78 S.W.3d 743, 744, 746 (Ark. Ct. App. 2002) (student's "'Hit List (To Shoot List),'" which was written in school notebook and included names of 19 classmates, was insufficient to show speaker had purpose of terrorizing others).

Second, the States have used an objective standard to protect their residents from threats of domestic violence. Threats of violence are a "strong" predictor of domestic abuse, and the threats themselves "often

exacerbate[ ] the effects of prior abuse," causing "serious chronic mental health consequences."[17] Many Americans experience such threats, which are "among the most favored weapons of domestic abusers" and have become "more commonplace" with "the rise of social media." *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting in part).[18]

Employing an objective standard, rather than a subjective one, is often important for protecting victims in these situations. For one, a subjective standard "limit[s] access of many victims to civil protection orders."[19] "Multiple studies have shown that protection orders are effective at eliminating or markedly decreasing abuse."[20] But domestic abuse victims struggle to furnish the necessary evidence to obtain these orders for a range of reasons—from feeling shame or apprehension in sharing "intimate details

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[17] Jessica Miles, *Straight Outta SCOTUS: Domestic Violence, True Threats, and Free Speech*, 74 Univ. of Miami L. Rev. 711, 735 (2020); see Joanne Belknap et al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 378 (2012) ("[T]hreats of violence by former partners who are currently stalking are an even better predictor of future violence than the prior violence used by these ex-partners.").

[18] See Leemis, *supra* note 10, at 24-25 (As of May 2017, an estimated 41 million Americans had received threats of violence from an intimate partner during their lifetimes.).

[19] Miles, *supra* note 17, at 718.

[20] Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 Wash. L. Rev. 333, 352 (2019).

regarding the relationship and sexual assaults, physical abuse, and emotional harms he or she suffered," to fears about testifying in front of their abusers.[21] Requiring victims to *also* prove their abusers' subjective mental state increases the burdens that they already face in obtaining these orders, which can be lifesaving.[22] Many States have responded to these obstacles by deciding not to require victims to prove their abusers' mental state to obtain a protective order, so long as they can show that the abusers' statements could reasonably be perceived as a serious threat of violence.[23]

An objective standard also facilitates the States' ability to prosecute domestic abusers for their threats—and thereby protect victims from further threats and from physical violence—because it focuses the inquiry on the harm to the victim. In the amici States' experience, requiring proof that a speaker intended or knew the threatening nature of the statement, or uttered it with reckless disregard to its effects, is particularly problematic in domestic violence prosecutions because the speaker's mental state in this context can "always be shielded." *State*

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[21] Jane K. Stoever, *Transforming Domestic Violence Representation*, 101 Ky. L.J. 483, 533 (2013).

[22] Miles, *supra* note 17, at 744-746.

[23] *Id.* at 743-744; see Soraya Chemaly & Mary Anne Franks, *Supreme Court May Have Made Online Abuse Easier*, Time (June 3, 2015), https://bit.ly/40Fu8mV (imposing subjective standard for true threats could "undo[ ] years of legislative progress, especially at the state level, to increase protections for victims of domestic violence" through civil protection order process) (internal quotations omitted).

v. Terrio, No. 19-K-90, 2019 WL 1285288, *4 (La. Ct. App. Mar. 20, 2019) (internal quotations omitted). Abusers routinely offer alternative explanations for their threats—which they may genuinely believe or offer to obscure their true purpose. For instance, they often maintain that their threatening statements were simply born out of love and concern for their partner, *State v. Neuzil*, 589 N.W.2d 708, 712 (Iowa 1999), that their statements were innocuous self-expression or means of releasing frustration, *Holcomb v. Commonwealth*, 709 S.E.2d 711, 715-716 (Va. App. Ct. 2011); *State v. Heffron*, 190 A.3d 232, 234, 236 (Me. 2018); or that the victim's hesitancy to report those statements demonstrates that the statements were not intended to be threatening, *Wittig v. Hoffart*, 704 N.W.2d 415, 421 (Wisc. Ct. App. 2005). But these explanations offer no solace to domestic abuse victims, who are harmed by the very utterance of such statements. See *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting in part) (noting that, in domestic violence context, "[a] fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech"). For these reasons, an objective standard is, in the amici States' experience, important to their efforts to protect their residents from the harms associated with threats of domestic violence.

Third, the States rely on an objective standard to protect their residents from threats of hate crimes. The number of reported hate crimes—violence against individuals based on characteristics such as race or religion—in the United States has increased dramatically in recent years, rising 11.6% between

2020 and 2021.[24] Threats of violence often precede attacks by the speaker, and they can also incite others to engage in violence.[25] And even when the threats are not carried out, they may silence the victims and cause them to "withdraw[ ] from public life."[26] Threats to commit hate crimes, moreover, affect not only their subjects; they may "threaten and intimidate an entire community."[27]

Requiring the States to prove a speaker's mental state as to his statement's threatening nature and effects would undermine the States' ability to protect their residents from hate crimes. If a subjective standard were required, then the Chicago resident who yelled to a rabbi in a Jewish school's courtyard that he would "burn" them "in a gas oven"—while performing a Nazi march and chanting "Heil Hitler"—could escape criminal liability by testifying that he did not intend to hurt or scare anyone.[28] Or the

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[24] Press Release, Department of Justice, Office of Public Affairs, *Associate Attorney General Vanita Gupta Issues Statement on the FBI's Supplemental 2021 Hate Crime Statistics* (Mar. 13, 2023), https://bit.ly/3yC9KqP; see Joe Hernandez, *Hate Crimes Reach the Highest Level in More Than a Decade*, NPR (Sept. 1, 2021), https://n.pr/3mdUfm7.

[25] Citron, *supra* note 6, at 1447-1448.

[26] *Id.* at 1448-1450.

[27] *Report Hate Crimes to the FBI*, FBI, https://bit.ly/3Zzs3st (accessed Mar. 30, 2023).

[28] Matt Masterson, *Man Facing Hate Crime Charges Allegedly Threatened to 'Burn' Rabbi 'In a Gas Oven' During Confrontation Outside Jewish High School*, WTTW News (Dec. 13, 2022), https://bit.ly/3JNHqsf (internal quotations omitted).

woman who, while armed with a knife, uttered "'I will kill you; you have coronavirus; go back to China'" to an Asian-American individual living in the District of Columbia could hide behind an insistence that she was merely voicing frustration caused by the Covid-19 pandemic.[29] Whomever the victim—and whatever their targeted characteristic—the States would lose a powerful tool for protecting their residents and their communities from the damaging effects of hate-based threats.

4. As these examples illustrate, the availability of an objective standard is important to the States' efforts to protect their residents from the harms associated with threats of violence, which include not only the threatened violence but also injuries caused by the statements' "very utterance." *Virginia*, 538 U.S. at 359-360 (internal quotations omitted).

Petitioner nevertheless contends that an objective standard raises First Amendment concerns because it would chill protected speech. See Pet. Br. § II. But that concern is misplaced because it relies on a misunderstanding of how an objective standard operates. Objective assessments account for "the entire factual context" in which the threat is made. *State v. Taveras*, 271 A.3d 123, 129 (Conn. 2022) (internal quotations omitted). By examining the entire context, courts can ensure that "statements that seek

[29] Press Release, Department of Justice, U.S. Attorney's Office, *District Woman Sentenced to Prison for Hate Crime Targeting Member of the Asian Community* (June 9, 2021), https://bit.ly/3Ye6fS3.

to communicate a belief or idea, such as political hyperbole or a mere joke"—or other statements that enjoy First Amendment protection—are shielded from penalty. *Ibid.* (internal quotations omitted). As a result, and contrary to petitioner's suggestion, Pet. Br. 31, statements about violence do not automatically qualify as true threats under an objective standard. Instead, courts routinely conclude that, given the context, a reasonable person would not interpret a statement to be a serious expression of an intent to cause violence. See, e.g., *Citizen Publishing Co. v. Miller*, 115 P.3d 107, 109, 115 (Ariz. 2005) (letter to editor suggesting execution of Muslims to stop Iraq war was "plainly political message," not true threat, under objective standard); *People ex rel. C.C.H.*, 651 N.W.2d 702, 707 (S.D. 2002) (statement that student wanted to kill another student did not qualify as true threat under objective standard); *In re Douglas D.*, 626 N.W.2d 725, 731, 742 (Wis. 2001) (story stating that student would behead teacher if he was disciplined did not qualify as true threat under objective standard); *State v. Kohonen*, 370 P.3d 16, 19, 23 (Wash. App. Ct. 2016) (speaker's statements that he intended to punch another person, and that the person "must die," were not true threats under objective standard).

Indeed, in the seminal true threats case, *Watts v. United States*, 394 U.S. 705 (1969), this Court implemented an objective, context-driven inquiry to identify and protect political speech that appeared at first blush to constitute a serious threat of violence. The petitioner was convicted under a statute prohibiting certain threats to harm or kill the President after he stated, at a political rally during the Vietnam War, "If

they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 705-706 (internal quotations omitted). This Court reversed his conviction, concluding that his statement was protected political hyperbole rather than an unprotected true threat. *Id.* at 708. In reaching that conclusion, this Court assessed the statement's "context" (a political rally, at which speech is often "vituperative" and "inexact"), its "expressly conditional nature," and the "reaction of the listeners" (laughter). *Id.* at 707-708. It did not examine the petitioner's mental statement as to the statement's threatening nature and effects, apparently finding that question unnecessary to separate true threats from protected speech. The objective approach is thus grounded in this Court's precedent, as well as a significant—but not limitless—tool for the States to further their important interests in safeguarding the public health and safety while preserving free speech protections.

5. Petitioner also emphasizes that some States utilize a subjective standard when regulating threats in certain contexts. Pet. Br. 40. But that policy choice has no bearing on the question presented here, which concerns the floor established by the Constitution, not whether the States may choose to exceed it.

For one, as a matter of policy, the States may choose to require proof of a speaker's subjective mental state as to the statement's nature and effects for some crimes but not others. As one example, Michigan does not require proof of the speaker's subjective intent to threaten for stalking, Mich. Comp. Laws

Ann. § 750.411h, but it does require proof of subjective intent for cyberbullying, Mich. Comp. Laws Ann. § 750.411x. Through this policy choice, the State has exceeded the First Amendment's floor to address concerns that speech over the internet can be misunderstood, see Pet. Br. 31-34, while recognizing the need for an objective standard to protect victims of in-person stalking.

Similarly, the States may demand proof of a subjective mental state as to a statement's threatening nature and effect for gradations of a crime that carry harsher penalties but not for gradations that carry lesser penalties. Alabama, for instance, requires proof of "intent to place [the victim] in reasonable fear of death or serious bodily harm" to convict for stalking in the first degree (a felony), but not to convict for stalking in the second degree (a misdemeanor). Cf. Ala. Code 1975, § 13A-6-90(a) (first-degree stalking) with Ala. Code 1975, § 13A-6-90.1(a) (second-degree); see also Ark. Code Ann. § 5-71-229 (second-degree stalking requires proof of intent to place victim in fear, but third-degree stalking does not).

Some States also take a similar approach when imposing civil and criminal liability for the same underlying conduct—i.e., using an objective standard for civil liability and a subjective standard for criminal liability. As one example, Oregon requires proof that a defendant "knowingly alarm[ed]" the victim for a conviction under its criminal stalking statute, but it does not require this same subjective showing for an individual to obtain a protective order under its civil

no-stalking statute, which assesses whether an objectively reasonable person would have felt alarmed. *Delgado v. Souders*, 46 P.3d 729, 737 (Or. 2002) (comparing Or. Rev. Stat. Ann. § 163.732(1) with Or. Rev. Stat. Ann. § 30.866(1)) (internal quotations omitted);[30] compare Tex. Penal Code § 25.07(a)(2) (requiring showing of intent to threaten family violence for criminal conviction) with Tex. Fam. Code § 71.004(1) (providing threat of family violence that satisfies objective standard is sufficient for civil liability).

The States thus have a range of policy reasons for using subjective standards for penalizing threats of violence, and their decisions to do so say nothing about the constitutional floor required by the First Amendment. Indeed, the States have recognized as much by shifting from subjective to objective standards based on their practical experience. For instance, in 2001, Louisiana's legislature amended that State's stalking statute to remove the requirement that the offender have intended to place his victim in fear of death or bodily harm and instead to require only a showing of general intent to act. *Terrio*, No. 19-K-90, 2019 WL 1285288, *3 (discussing La. Rev. Stat. Ann. § 14:40.2(A) (1999)). The legislature "shift[ed] the focus from the offender's intentions to the perceptions of the victim," because the offender's intent "can always be shielded" and is, at any rate,

[30] Like Colorado's criminal stalking statute, Colo. Rev. Stat. § 18-3-602(1), Oregon's civil stalking statute also requires proof of the victim's fear and of the defendant's mental state as to the act, i.e., the defendant intentionally, knowingly, or recklessly made unwanted contact, Or. Rev. Stat. Ann. § 30.866(1).

"immaterial" to whether the threats caused the victims alarm or emotional distress. *Id.* at *4 (internal quotations omitted). Other States have, likewise, removed requirements of a subjective intent to threaten from their criminal statutes where circumstances warranted. See, e.g., *In re Kyle M.*, 27 P.3d at 807-808 (discussing Arizona legislature's decision to replace "'intent to terrify'" requirement in threat statute with objective standard). Petitioner's view would constrain the States' discretion, which they have long exercised, to make these policy choices.

* * *

True threats constitute a "limited area" of speech that do not enjoy First Amendment protection because they play "no essential part of any exposition of ideas." *R.A.V.*, 505 U.S. at 383, 385 (cleaned up). Instead, threats of violence impair the lives of state residents in many serious ways—tangible and intangible—and thus the States have always been permitted to regulate them. And the States have always understood the First Amendment to permit them to do so without requiring proof of a subjective mental state as to the statement's threatening nature and effects, which can stymie their efforts to protect even their most vulnerable residents. Holding otherwise would unsettle centuries of historical practice and thwart crucial state efforts to ensure that their residents do not suffer the fear, disruption, and physical violence that undisputedly flow from threats of violence.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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