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 THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND NATIONAL WOMEN'S LAW CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTERESTS OF THE AMICI CURIAE[1]

Formed in 1963, the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. To that end, the Lawyers' Committee has frequently participated before this Court representing parties or as amicus. *See, e.g., Gonzalez v. Google LLC*, 143 S. Ct. 80 (2022); *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 142 S. Ct. 896 (2022); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013); *Arizona v. Inter Tribal Council of Arizona*, 570 U.S.1 (2013). It is a leader on digital justice, voting rights, and criminal justice issues, and participates in cases combatting voter intimidation and threats targeting Black communities and other communities of color. The Lawyers' Committee has represented parties or served as amicus in various federal court cases involving threatening speech. *See, e.g.*, *Nat'l Coal. on Black Civic Participation v. Wohl*, No. 20-cv-8668, 2023 WL 2403012 (S.D.N.Y. Mar. 8, 2022) ("*NCBCP III*"); *Dumpson v. Ade*, No. CV 18-1011 (RMC), 2019 WL 3767171 (D.D.C. Aug. 9, 2019).

The National Women's Law Center fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls to change

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[1] Pursuant to Supreme Court Rule 37.6, counsel represent that they authored this brief in its entirety and no one else made a monetary contribution for it.

culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQI+ people, and low-income women and families.

SUMMARY OF ARGUMENT

The true threats doctrine protects people from intimidation by ensuring that the First Amendment does not shield threatening speech. Amici respectfully submit this brief to detail how proper determination of this doctrine's scope is essential to the enforcement of civil rights laws and to ensuring "debate on public issues" is "uninhibited, robust, and wide open." *Watts v. United States*, 394 U.S. 705, 708 (1969).

Over the past 150 years, Congress and states have established legal protections for Black people, people of color, and other protected classes to defend against threats and harassment that interfere with their equal right to fulsome civic participation. These regimes safeguard essential rights by deterring discrimination and intimidation and providing redress to victims. Individuals have relied on these laws to protect their right to vote and to equal opportunity in commerce, housing, and places of public accommodations. Today, these laws continue to protect people of color and others who face heightened rates of threats and intimidation online and offline.

Requiring subjective intent to establish a true threat would vitiate anti-intimidation laws, especially voter intimidation laws. Congress specifically enacted Section 11(b) of the Voting Rights Act of 1965, 52 U.S.C. § 10307(b), without a *mens rea* requirement because prior laws were, according to Attorney General Nicholas Katzenbach, "largely ineffective."

Hearing on the Voting Rights Act of 1965 Before the H. Comm. on the Judiciary, 89th Cong. 12 (1965) (statement of Nicholas Katzenbach, Att'y Gen. of the United States) (hereinafter, "*Katzenbach* Statement").[2] As "modern technology" allows bad actors to reach "vastly greater population[s] … with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief." *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 464 (S.D.N.Y. 2020) ("*NCBCP I*"). Anti-intimidation provisions in other landmark civil rights laws—the Civil Rights Act of 1866, the Ku Klux Klan Act of 1871, the Fair Housing Act of 1968, and numerous state law corollaries—would be more difficult to enforce if plaintiffs were required to show subjective intent.

A subjective intent requirement would particularly hamper the ability to combat hateful online threats, which are often directed at Black and Brown people. This abuse has become a deleterious and disgraceful norm of online life. While using the internet, 25% of adults in this country have experienced stalking, physical threats, sustained harassment, or sexual harassment. Emily A. Vogels, *The State of Online Harassment,* Pew Rsch. Ctr. 4, 8, 17 (Jan. 13, 2021).[3] 50% of Black people and people of color who have experienced harassment online say they were harassed due to their race or ethnicity, compared to 17% of white people. *Id.* at 21. People

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[2] https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf.

[3] https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/.

with intersectional identities, such as women of color and LGBTQ people of color, are even more likely to experience online threats. *See, e.g.*, Dhanaraj Thakur et al., *An Unrepresentative Democracy: How Disinformation and Online Abuse Hinder Women of Color Political Candidates in the United States*, Ctr. for Democracy & Tech. (Oct. 27, 2022);[4] Vogels, *supra*, at 8.

Rather than foster "free trade in ideas," *Virginia v. Black*, 538 U.S. 343, 358 (2003), online threats, intimidation, and harassment silence voices. They cause members of communities to self-censor and withdraw out of fear of retribution—for sharing their ideas or simply for existing. Because Black people and other people of color face disproportionate amounts of online threats and harassment, their voices are suppressed at disproportionate rates. These harmful consequences occur regardless of a speaker's subjective intent. And the nature of online communications makes it harder to disprove abusers who obfuscate their motivations by falsely claiming they were joking or misinterpreted.

Yet, courts must be mindful of the potential risks of over-enforcement of laws criminalizing threatening speech. This is particularly important for Black communities, which have historically been subjected to false prosecution for engaging in activism related to civil rights and social justice movements.

For these reasons, the Court should adopt a totality of the circumstances test like Colorado's, allowing lower courts to examine the full context of an

[4] https://cdt.org/insights/an-unrepresentative-democracy-how-disinformation-and-online-abuse-hinder-women-of-color-political-candidates-in-the-united-states/.

allegedly threatening statement. The Colorado test ensures that courts properly balance the interests of impacted individuals at the receiving end of threats with the rights of the accused.

However, if the Court finds that subjective intent is required in true threats cases, it should not expand such holding beyond criminal prosecutions, which, unlike civil enforcement actions, involve the risk of more severe consequences such as incarceration. In this way, the Court would adhere to its true threats precedents, all of which concern criminal cases, and leave unimpeded civil rights laws protecting essential rights.

Amici respectfully urge the Court to reject a subjective intent requirement and adopt a totality of the circumstances test. Rather than foster the marketplace of ideas, a subjective intent requirement would frustrate enforcement of the Voting Rights Act and other civil rights laws and create a more dangerous internet, one that allows abusers to threaten freely but leaves victims intimidated into silence.

ARGUMENT

I. A subjective intent requirement would frustrate enforcement of civil rights laws protecting Black people and other people of color from threats and intimidation.

Foundational civil rights laws protect against threats and intimidation when people exercise their right to vote or seek equal opportunity in commerce, housing, and places of public accommodations. If the Court requires a showing of subjective intent, it will significantly hamper the ability of threatened

individuals to protect themselves from intimidating speech.

A. Congress passed major civil rights laws shortly after abolition in large part to protect Black people against threats.

The first major federal civil rights statute, the Civil Rights Act of 1866, was intended to give effect to the Thirteenth Amendment's declaration "that all persons in the United States should be free." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431 (1968) (quoting Cong. Globe, 39th Cong., 1st Sess., 474)). That means "[a]t the very least … the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." *Id.* at 443. It prohibits discrimination on the basis of race or national origin in contracts and commercial transactions (42 U.S.C. § 1981) and in property rights (42 U.S.C. § 1982), including interference with these rights arising out of threatening speech and conduct. *See, e.g.*, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987); *Wong v. Mangone,* 450 F. App'x 27, 28 (2d Cir. 2011); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201-02 (5th Cir. 1982); *Evans v. Tubbe*, 657 F.2d 661, 662 (5th Cir. 1981)*; Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1007-08 (S.D. Tex. 1981).

In the years following the passage of the 1866 Act, the Ku Klux Klan and others terrorized newly freed Black people, imposing "a veritable reign of terror" upon Black citizens. *Black*, 538 U.S. at 353; *see also Briscoe v. LaHue*, 460 U.S. 325, 337 (1983); *United Bhd. of Carpenters & Joiners of Am., Loc. 610, AFL-CIO v. Scott*, 463 U.S. 825, 836 (1983). President Grant called upon Congress to curb "the breakdown of

law and order in the Southern States." *Briscoe*, 460 U.S. at 337.

Thus, Congress passed the Ku Klux Klan Act of 1871. Section 2 of this legislation prohibits conspiracies to use "force, intimidation, or threat" to prevent officers from performing their official duties; to obstruct justice or intimidate a party, witness, or juror in any court of the United States; or to prevent a person entitled to vote from giving his support or advocacy in presidential and congressional elections. 42 U.S.C. § 1985.

Since its passage, litigants have relied on the Ku Klux Klan Act to combat conspiracies involving threatening speech and conduct that target Black people and other people of color. *See, e.g.*, *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971); *Paynes v. Lee*, 377 F.2d 61, 64 (5th Cir. 1967); *Sines v. Kessler*, 324 F. Supp. 3d 765, 779-98 (W.D. Va. 2018); *NCBCP III*, 2023 WL 2403012, at *29-31; *League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 1:18-CV-00423, 2018 WL 3848404, at *4-6 (E.D. Va. Aug. 13, 2018) ("*LULAC*"); *Vietnamese Fishermen's Ass'n*, 518 F. Supp. at 1006-07.

B. Congress specifically intended to remove a *mens rea* requirement when enacting the anti-intimidation provision of the Voting Rights Act, which continues to be an essential protection against voter intimidation.

Organized groups and individuals continued to use threats and violence to suppress the Black vote in

the late 19th and 20th centuries. *See, e.g.*, *Black*, 538 U.S. at 353 (discussing resurgence of Ku Klux Klan); Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3d ed., 2017) (documenting 4084 racial terror lynchings in twelve Southern States between 1877 and 1950).[5]

Congress eventually passed the Civil Rights Act of 1957, creating civil liability for any person that threatens another "for the purpose of" interfering with that person's right to vote. 52 U.S.C. § 10101. But the 1957 Act was flawed. In particular, district courts read into the statute a "very onerous burden of proof of 'purpose,'" making it "largely ineffective" in addressing "many types of intimidation, particularly economic intimidation." *Katzenbach* Statement at 12.[6] In a hearing before the House Judiciary Committee, Attorney General Katzenbach described how the Department of Justice had failed to obtain relief against a local grand jury that had intimidated Black voters or against a sheriff and deputy who beat three Black people attempting to register to vote in a registrar's office. *Id.* at 8-9. In the former, the district court found the grand jury had "acted in good faith"; in the latter, "[t]he court ruled that the assault was not the result of bigotry; but of the deputy sheriff's vexation over crowded conditions in the registration office." *Id.*

A provision of the Voting Rights Act of 1965 rectified this deficiency. Section 11(b) created liability for any person who threatens or attempts to threaten

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[5] https://lynchinginamerica.eji.org/report/.

[6] https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf.

another for voting or attempting to vote. 52 U.S.C. § 10307(b). "[N]o subjective 'purpose' need be shown" under Section 11(b) of the Voting Rights Act." *Katzenbach* Statement at 12; *see also NCBCP III*, 2023 WL 2403012, at *22-23; *LULAC*, 2018 WL 3848404, at *4; *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *4 n.3 (D. Ariz. Nov. 4, 2016); *Willingham v. Cnty. of Albany*, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006). Rather, defendants are "deemed to intend the natural consequences of their acts." *Katzenbach* Statement at 12; *see also* H.R. Rep. No. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2462 ("no subjective purpose or intent need be shown").

The Voting Rights Act has since been used to combat state prosecutions of Black citizens who were encouraging others to register and vote, *see, e.g.*, *Whatley v. City of Vidalia*, 399 F.2d 521, 521 (5th Cir. 1968), enjoin the Ku Klux Klan from threatening Black people seeking to exercise their civil rights, *U.S. by Katzenbach v. Original Knights of Ku Klux Klan*, 250 F. Supp. 330, 335 (E.D. La. 1965), and prohibit individuals from following Native American voters to the polls or copying their license plate numbers when driving to or from the polls, *see Daschle v. Thune*, Temporary Restraining Order at 2, Civ. 04-4177 (D.S.D. Nov. 2, 2004);[7] *see also, e.g.*, *NCBCP III*, 2023 WL 2403012, at *19-24; *Beaumont Chapter of the NAACP v. Jefferson Cnty., Tex.*, Order Granting in Part and Denying in Part Plaintiffs' Emergency

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[7] https://www.brennancenter.org/sites/default/files/2020-07/2004%20Daschle%20TRO.pdf.

Motion for Temporary Restraining Order, ECF No. 14, Case 1:22-cv-00488-MJT (E.D. Tex. Nov. 7, 2022).

Black people and other people of color continue to face evolving forms of voter intimidation. *See, e.g.*, *LULAC*, 2018 WL 3848404, at *1 (Latino individuals falsely accused of voter fraud and had personal information published along with the accusations); Hum. Rts. Campaign, *LGBTQ+ Voting Barriers: Results from the 2019 LGBTQ+ Voter Experience Study* (Feb. 11, 2022) (38.4% of Black LGBTQ+ adults and 58.6% of Black transgender adults chose not to vote in an election due to fear of harassment);[8] S. Poverty L. Ctr., *Fight for Representation: Louisiana's Pervasive Record of Racial Discrimination in Voting, the Steadfast Louisianans Who Battle Onward, & the Urgent Need to Restore the Voting Rights Act* 76-82 (Aug. 16, 2021).[9] At the same time, election officials and other public officials such as teachers and school board members report alarming increases in threats. *See, e.g.*, *CISA Election Security Warns of the Impact of Threats to Poll Workers,* CBS News, at 01:51 (Sept. 12, 2022) (as many as one in three election workers quit before the 2022 midterm elections because of fears for their safety);[10] Benenson Strategy Grp., *The Brennan Center for Justice: Local Election Officials Survey* (June 16, 2021) ("1 in 3 local election officials are concerned about facing harassment or pressure

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[8] https://www.hrc.org/resources/lgbtq-voting-barriers-results-from-the-2019-lgbtq-voter-experience-study.

[9] https://www.splcenter.org/sites/default/files/louisiana_hr_4_report_final.pdf.

[10] https://www.cbsnews.com/video/cisa-election-chief-warns-of-workforce-problem-due-to-threats-to-poll-workers/.

while on the job");[11] *see also, e.g.*, Alan Feuer, *"I Don't Want to Die for It": School Board Members Face Rising Threats*, N.Y. Times (Nov. 5, 2021).[12]

The Voting Rights Act is as vital today as it was upon enactment in 1965. Congress specifically dispensed with a subjective intent requirement to achieve its legislative purpose. A holding that the true threats doctrine requires subjective intent would appear to conflict with the longstanding dispensation of Section 11(b)'s mens rea requirement.

C. Numerous other federal and state civil rights statutes prohibit threats without requiring subjective intent.

In addition to the Voting Rights Act and Ku Klux Klan Act, other critical federal and state civil rights statutes prohibit threats without requiring subjective intent. The Fair Housing Act, for example, makes it unlawful to threaten a person in the exercise or enjoyment of housing rights. 42 U.S.C. § 3617; *see also, e.g.*, Md. Code Ann., State Gov't § 20-708; Wash. Rev. Code Ann. § 49.60.2235. In one year alone, the Department of Justice settled eight sexual harassment cases in the housing context, including one alleging that for over 15 years, owners of 80 residential properties around Oklahoma City engaged in a pattern or practice of sexual harassment against female tenants and prospective tenants. Nat'l Fair Hous. All., *2022 Fair Housing Trends Report* 21-22

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[11] https://www.brennancenter.org/our-work/research-reports/local-election-officials-survey-june-2021.

[12] https://www.nytimes.com/2021/11/05/us/politics/school-board-threats.html

(2022).[13] The harassment included evicting or threatening to evict tenants who refused to engage in sexual acts. *Id.* at 22. Fair housing laws prohibiting threats and intimidation are especially important to low-income women of color, who are disproportionately likely to be victims of sexual harassment by their landlords. *See* Rigel C. Oliveri, *Sexual Harassment of Low-Income Women in Housing*, 83 Miss. L. Rev. 597, 618 (2018).[14]

Black people and other people of color also rely on state statutes to combat threats and intimidation in public accommodations and public spaces, including online. *See, e.g.*, Cal. Civ. Code § 52.1 (federal and state constitutional rights); D.C. Code § 2-1402.61 (rights under D.C. human rights law). These laws protect the ability to fully participate in a community and to live life with basic dignity. In 2017, Taylor Dumpson, the first Black woman elected to be student government president of American University, was the target of an online harassment campaign spearheaded by a neo-Nazi website, The Daily Stormer. *See Dumpson*, 2019 WL 3767171, at *1. At the time, The Daily Stormer was the most influential neo-Nazi outlet on the internet. Keegan Hankes*, Eye of the Stormer*, S. Poverty L. Ctr. (Feb. 9, 2017).[15] It published Dumpson's name and photo and directed followers to her Facebook and Twitter accounts. *Dumpson*, 2019 WL 3767171, at *1. The followers then bombarded her with racist, threatening

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[13] https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-Fair-Housing-Trends-Report.pdf.
[14] https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1720&context=facpubs.
[15] https://www.splcenter.org/fighting-hate/intelligence-report/2017/eye-stormer.

messages. *Id.* at *1-2. The threats caused Dumpson to fear for her life, to fear leaving her home at night, and to suffer post-traumatic stress disorder and severe psychological injuries. *Id.* at *2. Because she felt unsafe, she was unable to fully socialize on her school campus. *See id.* at *5. The court held the defendants violated the District of Columbia's Human Rights Law, D.C. Code §§ 2-1402.61, 2-1402.62, which prohibits using threats to interfere in the exercise or enjoyment of civil rights. *Id.* at 4-5; *see also Gersh v. Anglin*, 353 F. Supp. 3d 958, 962 (D. Mont. 2018) (denying The Daily Stormer's publisher's motion to dismiss claims under Montana's Anti-Intimidation Act, Mont. Code Ann. § 27-1-1503, for initiating an online harassment campaign).

In safeguarding the right to live free from threats and to equal access to public establishments, these laws help ensure that Black people and other people of color can participate fully in their communities and live their day-to-day lives with dignity and respect. Requiring plaintiffs to prove subjective intent would increase barriers to enforcement and impair that right to dignity and respect.

II. Online threats cause substantial harm and chill the free expression of impacted individuals.

Online threats—including online stalking, harassment, and other forms of internet-enabled intimidation—are harmful regardless of the subjective intent of the speaker. Among other things, they chill the free speech and association of victims, bystanders, and other members of the targeted

groups. *See* Opp. to Cert at 23-24 (describing how a stalker's detachment from reality does not affect the harm inflicted by the stalking). Some offenders resort to contrived defenses concerning their subjective state of mind, particularly in cases involving online threats like this one. A subjective intent requirement would allow those offenders to escape liability and harmful threats to persist and proliferate without repercussion.

A. Online threats chill free speech.

Roughly four in ten Americans and over six in ten Americans under 30 have experienced intimidation in the form of online harassment. *See* Anti-Defamation League & Ctr. for Tech. & Soc'y, *Online Hate and Harassment: The American Experience 2022* 10 (June 20, 2022);[16] Vogels, *supra*, at 15-16. At least 25% of all adults have experienced severe online harassment in the form of physical threats, sustained harassment, stalking, sexual harassment, doxing, or swatting. Anti-Defamation League & Ctr. for Tech. & Soc'y, *supra*, at 10; Vogels, *supra*, at 4; *see also* Rachel E. Morgan & Jennifer L. Truman, *Stalking Victimization, 2019*, U.S. Dep't of Just. 6 (Feb. 2022) ("In 2019, nearly 1 million U.S. residents aged 16 or older were victims of cyberstalking.").[17] That number rises to 51% for lesbian, gay, or bisexual adults. Vogels, *supra*, at 8. A third of women under 35 report having been sexually harassed online. Morgan & Truman, *supra*, at 17.

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[16] https://www.adl.org/sites/default/files/pdfs/2022-09/Online-Hate-and-Harassment-Survey-2022.pdf.
[17] https://bjs.ojp.gov/content/pub/pdf/sv19.pdf.

Black people and other people of color experience significant amounts of hateful harassment, particularly online. More than half of Black people who have experienced harassment online say they were harassed due to their race or ethnicity, compared to 17% of white people. Vogels, *supra*, at 21; *see also* PEN Am., *Online Harassment Survey: Key Findings* (last visited Mar. 28, 2023) (45% of writers and journalists identifying as people of color reported being attacked for their race or ethnic origin, compared to 22% of white respondents).[18] "Hispanic (20%) or Black (17%) adults who have experienced online harassment are about twice as likely as their White counterparts (9%) to say they were stalked in their most recent online harassment experience." Vogels, *supra*, at 24.

Black women and other women of color are even more likely to experience harassment. *See* Amnesty Int'l, *Troll Patrol Findings* (last visited Mar. 28, 2023) (analyzing millions of tweets and finding that Black women were 84% more likely to be mentioned in abusive tweets than white women).[19] In a study of the 2020 Congressional election, women of color candidates were five times more likely than other candidates to experience online abuse related to their gender and race identity. Dhanaraj Thakur et al., *supra*;[20] *see also* Rebekah Herrick et al., *Gender and Race Differences in Mayors' Experiences of Violence*, Ctr. for Am. Women & Politics (2022) (study of U.S. mayors showed women of color experienced

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[18] https://pen.org/online-harassment-survey-key-findings/.

[19] https://decoders.amnesty.org/projects/troll-patrol/findings.

[20] https://cdt.org/insights/an-unrepresentative-democracy-how-disinformation-and-online-abuse-hinder-women-of-color-political-candidates-in-the-united-states/.

more threats than other groups).[21] Once they assume office, Black women are subjected to death threats and other violent, racist threats. *See* Candice Norwood, *More Black Women Are Being Elected to Office. Few Feel Safe Once They Get There*, PBS NewsHour (July 17, 2021).[22] One website posted near-daily racist and sexist insults about a Black state attorney, along with her home address, and "invited people to pay her a visit." *Id.*

Threats cause significant harm regardless of the subjective intent of the speaker. Roughly a quarter of online harassment targets say their most recent experience with online harassment was very or extremely upsetting. Vogels, *supra*, at 15. In a prior survey, 20% of Americans said online harassment led to problems with friends and family, in romantic relationships, at work, or in school; caused a financial loss; or contributed to trouble finding a job or housing. Maeve Duggan, *Online Harassment 2017* 20, Pew Rsch. Ctr. 20 (July 11, 2017).[23] Another survey found 20% of people who experienced online harassment had trouble sleeping or concentrating or felt anxious; 13% had suicidal thoughts; and 10% took steps to reduce risks to physical safety, such as moving. Anti-

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[21] https://cawp.rutgers.edu/research/cawp-grants-and-awards/cawp-research-grants/research-briefs/gender-and-race-differences-mayors-experiences.

[22] https://www.pbs.org/newshour/politics/more-black-women-are-being-elected-to-office-few-feel-safe-once-they-get-there.

[23] https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017-methodology/

Defamation League & Ctr. for Tech. & Soc'y, *supra*, at 10.[24]

Online harassment has particularly detrimental effects on young people of color. According to one study, "Black and Hispanic teens who used social media more were more likely than not to encounter online racial harassment or discrimination," and that harassment or discrimination caused them to doubt their academic skills and harmed their mental health. *See* Alvin Thomas, *Online Racial Harassment Leads to Lower Academic Confidence for Black and Hispanic Students*, The Conversation (Jan. 23, 2023).[25]

Hateful harassment also inhibits the free speech and full participation of affected communities regardless of the subjective intent of the speaker. Many people preemptively self-censor and withdraw for fear of being targeted. 27% of U.S. adults say they have refrained from posting something online and 13% elected to stop using an online service after witnessing harassment. Duggan, *supra*, at 11. Studies show that when confronted with online harassment, women are more likely to self-censor or withdraw from online platforms altogether. *See* Kalyani Chadha et al., *Women's Responses to Online Harassment*, 14 Int'l J. Commc'ns 239, 247-48 (2020); George Veletsianos et al., *Women Scholars' Experiences with Online Harassment and Abuse: Self-Protection, Resistance, Acceptance, and Self-Blame* 14 (2018) (harassment of

[24] https://www.adl.org/sites/default/files/pdfs/2022-09/Online-Hate-and-Harassment-Survey-2022.pdf.

[25] https://theconversation.com/online-racial-harassment-leads-to-lower-academic-confidence-for-black-and-hispanic-students-197515.

women scholars led to their avoiding certain social media platforms and "turning to silence");[26] Amanda Lenhart, *Online Harassment, Digital Abuse, and Cyberstalking*, Data & Soc'y Rsch. Inst. (Nov. 21, 2016) (41% of women ages 15-29 self-censor).[27] Indeed, numerous prominent women of color have withdrawn from online discourse as a result of online harassment. *See, e.g.*, Jason Guerrasio, '*Star Wars' actress Kelly Marie Tran Left Social Media After Racist and Sexist Trolls Drove Her to Therapy*, Insider (Mar. 3, 2021);[28] James Byrd Jr. Center to Stop Hate at the Lawyers' Committee for Civil Rights Under Law, *Hate in Elections* 8 (Sept. 2020) (Black female lawmaker in Vermont left office after severe harassment online and in person);[29] Lucina Fisher & Brian McBride, *'Ghostbusters' Star Leslie Jones Quits Twitter After Online Harassment*, ABC News (July 20, 2016).[30]

The chilling effects are particularly pronounced when it comes to the experiences of women journalists, who are exposed to increasing numbers of online attacks and consequently withdraw from public discourse. A survey of over one thousand journalists worldwide found that nearly 75% had experienced online violence, including threats of physical violence,

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[26] https://www.veletsianos.com/wp-content/uploads/2011/07/harassment_coping_postPrint.pdf.
[27] https://www.datasociety.net/pubs/oh/Online_Harassment_2016.pdf.
[28] https://www.insider.com/kelly-marie-tran-racist-sexist-trolls-social-media-2021-3.
[29] https://lawyerscommittee.org/wp-content/uploads/2020/09/LC2_HATE-IN-ELECTIONS_RPT_E_HIGH-1.pdf.
[30] https://abcnews.go.com/Entertainment/ghostbusters-star-leslie-jones-quits-twitter-online-harassment/story?id=40698459.

sexual violence, and violence against their children, infants, and other loved ones. Julie Posetti & Nabeelah Shabbir, *The Chilling: A Global Study of Online Violence Against Women Journalists*, Int'l Ctr. for Journalists 8, 11 (Nov. 2022).[31] Rates of online harassment increase significantly for Black women and other women with intersectional identities. *Id.* at 47-48 (81% of women journalists identifying as Black experienced online harassment). 20% of respondents reported offline abuse connected to their online abuse. *See id.* at 12. Besides increasing their physical security, relocating, missing work, and suffering from anxiety and post-traumatic stress disorder (PTSD), 30% of the respondents said they self-censor on social media and 20% withdrew from all online interaction. *Id.* Some quit their jobs or abandoned journalism. *Id.*; *see also* 39th Ring Carlson & Haley Witt, *Online Harassment of U.S. Women Journalists and its Impact on Press Freedom* (Oct. 10, 2022) (women journalists avoided certain stories for fear of online abuse).[32]

B. A subjective intent requirement would allow individuals to escape liability for online threats.

Proving subjective intent for someone behind a screen can be difficult. Individuals sometimes defend their actions by asserting their intent to be humorous or provocative and that no one should take them seriously. In March 2023, a court granted summary judgment against two individuals who used an online

[31] https://www.icfj.org/sites/default/files/2022-11/ICFJ_UNESCO_The%20Chilling_2022_1.pdf.
[32] https://firstmonday.org/ojs/index.php/fm/article/view/11071/9995.

platform to send 85,000 robocalls targeted to Black people in an attempt to scare them from voting by mail in the 2020 election. *See NCBCP III*, 2023 WL 2403012, at *1-3. They falsely claimed that if voters voted by mail, the police would try to track them down, debt collectors would come after them, or the CDC would try to use their information to forcibly vaccinate them. *Id.* at *3. Defendants tried to paint themselves as "goofballs and political hucksters with an irreverent sense of humor." *Id.* at *28. The court rejected that argument. *Id.* And in granting a temporary restraining order in 2020, the court wrote:

> Today, almost 150 years later, the forces and conflicts that animated Congress's adoption of the Ku Klux Klan Act as well as subsequent voting rights legislation, are playing out again before this Court, though with a difference. In the current version of events, the means Defendants use to intimidate voters, though born of fear and similarly powered by hate, are not guns, torches, burning crosses and other dire methods perpetrated under the cover of white hoods. Rather, Defendants carry out electoral terror using telephones, computers, and modern technology adapted to serve the same deleterious ends. Because of the vastly greater population they can reach instantly with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than the approaches taken for that purpose in

> past eras, and hence call for swift and effective judicial relief.

NCBCP I, 498 F. Supp. 3d at 464.

Purported humor also is a common excuse in threats cases outside of the voting context. *See, e.g.*, *Chen Through Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 712, 722 (9th Cir. 2022) (student defended Instagram posts threatening lynching Black students by arguing they were "attempts at 'humor'"); *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399, 423 (Cal. Ct. App. 2010), *as modified* (Apr. 8, 2010) ("When teens were asked why they think others cyberbully, 81 percent said that *cyberbullies think it's funny*.").

These defenses can be difficult to disprove. Unlike in-person communications, there are no witnesses to the drafting of the threat. Indeed, online threats can be made anonymously and from a distance, meaning the recipient cannot testify as to the speaker's demeanor. Online threats often are made using text; the recipient cannot testify as to tone of voice. Individuals also have a plethora of ways to make veiled threats online, including through the use of emojis, images, and memes, all of which allow speakers to hide behind facetious claims invoking satire and humor even while those communications carry their intended threatening weight. *See* Kim Albarella, *The Secret Language of Emoji*, Nat'l Cybersecurity All. (Oct. 2, 2018) (describing how bullies communicate harmful messages while hiding

behind the original meaning of emojis to protect themselves).[33]

To be clear, amici recognize that there are situations where speech is genuinely misunderstood or a listener is not able to take a joke. However, there are instances where defendants falsely invoke satire, humor, or similar excuses to create a veneer of plausible deniability that they never meant to be harmful. In these instances, allowing defendants to escape liability because of such pretexts would significantly undermine enforcement of laws protecting against online threats.

Online threats harm Black people and other people of color and chill the free speech of the listener, regardless of the speaker's subjective intent. Requiring subjective intent would result in the proliferation of online threats against people of color and constrain their ability to seek recourse.

III. The true threats doctrine must balance protecting communities against intimidation and preventing discriminatory enforcement of laws criminalizing threats.

While a subjective intent requirement would hamstring critical civil rights protections and chill free speech, a totality of the circumstances test that allows courts to consider all relevant evidence would help safeguard against risks to Black communities of

[33] https://staysafeonline.org/resources/the-secret-language-of-emoji/.

discriminatory over-enforcement, wrongful prosecution, and persecution of civil rights activists.

Amici are concerned that laws criminalizing threats, like other facets of the justice system, may be used disproportionately and discriminatorily against Black people and other people of color. Racism in the criminal justice system results in higher incarceration rates of Black people and higher rates of wrongful convictions. A Black adult is five times more likely than a white adult to say they have been unfairly stopped by police because of their race or ethnicity. Drew Desilver et al., *10 Things We Know About Race and Policing in the U.S.*, Pew Rsch. Ctr. (June 3, 2020).[34] As of 2021, Black people are incarcerated in state prisons at nearly five times the rate of white people. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (Oct. 13, 2021).[35] The convictions of Black people are overturned at significantly higher rates than white Americans. "As of August 8, 2022, the National Registry of Exonerations listed 3,200 defendants who were convicted of crimes in the United States and later exonerated because they were innocent; 53% of them were Black, nearly four times their proportion of the population, which is now about 13.6%." Samuel R. Gross et al., *Race and Wrongful Convictions in the United States 2022*, Nat'l Registry of Exonerations 1 (Sep. 2022).[36] Black people are 7.5

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[34] https://www.pewresearch.org/fact-tank/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/.

[35] https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/.

[36] https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf.

times more likely to be wrongfully convicted of murder than white people, eight times more likely than white people to be falsely convicted of rape, and about 80% more likely to be innocent than others convicted of murder. *Id.* at 3-4, 18.

Laws criminalizing threats provide law enforcement an additional tool to potentially silence civil rights activists and chill protected free speech on issues of public importance. Law enforcement has a long history of wrongfully and disproportionately persecuting Black leaders and activists. "At the turn of the 20th century, law enforcement targeted Ida B. Wells and Marcus Garvey as 'race agitators.'" Nusrat Choudhury & Malkia Cyril, *The FBI Won't Hand Over Its Surveillance Records on 'Black Identity Extremists,' so We're Suing*, ACLU (Mar. 21, 2019).[37] Dr. Martin Luther King, Jr. was arrested more than 25 times between 1956 and 1967, and many others with him. Equal Justice Initiative, *Persecution of Civil Rights Activists* (Jan. 1, 2014).[38] During nationwide demonstrations following George Floyd's murder, Black demonstrators were arrested at significantly higher percentages than their white counterparts. *See, e.g.*, Karen J. Pita Loor, *An Argument Against Unbounded Arrest Power: The Expressive Fourth Amendment and Protesting While Black*, 120 Mich. L. Rev. 1581, 1611 (2022); Meryl Kornfield et al., *Swept Up by Police*, Wash. Post (Oct. 23, 2020);[39] Melissa Chan, *These Black Lives Matter Protesters Had No*

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[37] https://www.aclu.org/news/racial-justice/fbi-wont-hand-over-its-surveillance-records-black.
[38] https://eji.org/news/history-racial-injustice-persecution-of-civil-rights-activists/.
[39] https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/.

Idea How One Arrest Could Alter Their Lives, Time (Aug. 19, 2020).[40]

The Court should adopt a totality of the circumstances test to safeguard against these harms. Colorado's test in particular, discussed *infra*, strikes the appropriate balance, allowing courts to protect Black people and other people of color from discriminatory enforcement of laws criminalizing threats without frustrating enforcement of civil rights laws.

IV. Colorado's true threats test protects Black people and other people of color from threats and discriminatory overenforcement.

Courts must consider the complete context surrounding putative true threats to protect Black people and other people of color from intimidation while ensuring that laws prohibiting threats are not abused to stifle citizens' constitutionally protected speech. That is exactly what the Colorado test from *People ex rel. R.D.*, 464 P.3d 717 (Col. 2020), accomplishes.

The Colorado test starts "with the words themselves, along with any accompanying symbols, images, and other similar cues to the words' meaning." *Id.* at 731. But because the meaning of a word or phrase is inseparable from its context, "what a [speaker] actually said is just the beginning of a threats analysis." *Id.* at 732 (quoting *Haughwout v. Tordenti*, 211 A.3d 1, 11 (Conn. 2019)). The Colorado

[40] https://time.com/5880229/arrests-black-lives-matter-protests-impact/.

test thus considers the following, non-exhaustive list of factors to determine the full context in which the statement was made:

> (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. at 731. Application of each of these factors, as well as the ability to consider additional factors, protects Black people from voter intimidation and threats while inhibiting discriminatory over-enforcement of laws criminalizing threatening speech. *See id.* (holding contextual factors "are not limited to" the five discussed in the decision).

The first factor, "a statement's role in a broader exchange, if any, including surrounding events," *id.*, allows courts to consider context of and connotations from a statement, such as language or symbols that invoke historic oppression of particular groups. *See, e.g.*, *Black*, 538 U.S. at 354-57 (recounting history of cross burning and holding that "when a cross burning is used to intimidate, few if any messages are more powerful"). This is a persistent theme in threats targeting Black people and other people of color. *See,*

e.g., *Chen Through Chen*, 56 F.4th at 712, 722 (Instagram posts depicted lynching; a Klan member in a white hood; and pictures of a noose, white hood, burning torch, and Black doll, captioned "Ku klux starter pack"); *United States v. Nguyen*, 673 F.3d 1259, 1261 (9th Cir. 2012) (letter drew on fears of deportation and harassment regarding immigration status); *LULAC*, 2018 WL 38404, at *1 (publications with voters' personal information drew on the double entendre "Alien Invasion"); *NCBCP III*, 2023 WL 2403012, at *20-21 (robocall drew upon the history of discrimination in policing and lending, and the "dark history of forced medical experimentation on the Black community"). But it also allows courts to consider immediate context, such as whether a protestor makes intemperate communications in response to contemporaneous social and political debates. Such speech should be considered "against the background of a profound national commitment" to open debate of public issues which "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The second factor, the medium or platform through which the statement was communicated, accounts for unique concerns relating to online threats. What is shocking and threatening in one context may not be in another. For example, saying "I'm going to kill you" in a video game may convey a different meaning from saying it to someone on social media or in a parking lot. *See People ex rel. R.D.,* 464 P.3d at 732 ("[E]vidence regarding prevailing norms in a particular genre or even internet subforum may also help recast violent language in a less threatening

light.") (citing *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 301 (5th Cir. 2014)); *see also Cohen v. California*, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function … words are often chosen as much for their emotive as their cognitive force"). Some platforms also allow speakers to remain anonymous, which may "influence a listener's perception of danger." *People ex rel. R.D.*, 464 P.3d at 733.

Likewise, the third factor, manner of conveyance, accounts for the difference between public and private communications. Public speeches, for example, may contain "[s]trong and effective extemporaneous rhetoric," which "cannot be nicely channeled in purely dulcet phrases." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Private communications, however, do not serve the same purpose of "stimulat[ing] [an] audience with spontaneous and emotional appeals for unity and action in a common cause." *Id.* This distinction is an important nuance of online communications. As Justice Alito noted in *Elonis*, "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…. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously." 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part); *see also NCBCP I*, 498 F. Supp. 3d at 485 (deeming "highly relevant that this message was conveyed directly to individual voters by phone").

The fourth factor, the relationship between speaker and recipients, accounts for the difference between strangers and individuals with pre-existing

relationships. In online communications, this can cut both ways. A lack of a pre-existing relationship may indicate that the speaker is stalking or harassing the listener, as in this case. *See* Pet. App. 18a. But so too can close relationships in which the speaker is familiar with the listener. *See People ex rel. R.D.,* 464 P.3d at 733 (noting that in *Elonis*, "the defendant's alleged threats included lyrics posted to Facebook that threatened violence against his wife soon after she left him and took with her their two children"); Morgan & Truman, *supra*, at 8 (54.3% of victims stalked with "technology only" were stalked by a "known offender," whereas 80.9% of victims stalked with both "traditional stalking" methods and technology were stalked by a "known offender"). Again, considering the total context of the communication is key to assessing whether a threat is "true" or not.

Finally, the fifth factor, the reaction of a statement's intended or foreseeable listener, provides courts with objective guideposts to determine whether speakers are engaged in protected speech—such as whether they are joking—without investigating the often-inscrutable intent of the speaker, an analysis that may be colored by the pre-existing inclinations and biases of prosecutors, judges, and juries. The recipients of the robocall in *NCBCP*, for example, "were frightened, enraged, and distressed upon receiving the call." *NCBCP III*, 2023 WL 2403012, at *22. In *Dumpson*, the victim was diagnosed with PTSD, an eating disorder, depression, and anxiety after being subjected to online harassment. 2019 WL 3767171, at *2. But in *Watts*, the crowd laughed after Watts made his allegedly threatening statement. 394 U.S. at 707. Likewise, in *Perez v. Florida*, "the whole

group laughed" at Perez's "drunken joke" and "at least one witness testified that she did not find Perez threatening." 137 S. Ct. 853 (Mem.), 853, 855 (2017). However, in *Perez* the jury was "directed to convict solely on the basis of what Perez 'stated'" and thus was not required to consider the context of the statement or the reaction of those who heard it. *Id.* at 855. Had the jury been told to consider the reaction of the listeners, Perez's trial might have ended differently.

Under Colorado's test, courts must consider all relevant factors, including any additional factors besides those explicitly delineated in *People ex rel. R.D.* Colorado thus provides a clear framework by which to judge speech, enabling punishment of harmful intimidation while ensuring protection against the discriminatory use of laws criminalizing threats.

V. The Court should not import a subjective intent requirement into civil true threats cases.

Amici agree with Respondent that the First Amendment does not require proof of subjective intent in *any* true threats case—whether it be a criminal prosecution or otherwise. But at a minimum, there is no basis for importing such a scienter requirement into civil statutes aimed at curtailing true threats. First, to conclude otherwise would be a significant expansion of both this Court's and federal appellate courts' "true threat" precedents to date. Second, criminal prosecutions have more serious consequences than civil enforcement actions, including the risk of incarceration and long-term

consequences from having a criminal record. Third, the Court can insulate civil enforcement of the Voting Rights Act, Fair Housing Act, and other civil rights laws by refraining from creating a subjective intent requirement for civil actions.

The few cases in which this Court has considered the scope of the true threats doctrine all involved criminal prosecutions, not civil claims. *See Watts*, 394 U.S. 705; *Black*, 538 U.S. 343; *see also Elonis v. United States*, 575 U.S. 723; *Kansas v. Boettger*, 140 S. Ct. 1956 (Mem) (2020); *Perez*, 137 S. Ct. 853 (Mem). The only two circuits to have imposed a subjective intent requirement in true threats cases on First Amendment grounds likewise did so in the context of criminal proceedings. *See, e.g.*, *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014) (requiring "the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened"); *United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir. 2011) (requiring subjective intent analysis "when examining whether a threat is *criminal*" (emphasis added)).

The Court's concern with criminal prosecutions as opposed to civil actions is reflected in its true threats jurisprudence. In deeming unconstitutional a provision that made cross burning *prima facie* evidence of intent to intimidate, the *Black* plurality noted its unease that the provision permitted the state to "arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *See* 538 U.S. at 365 (plurality). In the opening line of a dissent from the denial of a petition for writ of certiorari in *Perez*, Justice Sotomayor similarly expressed consternation that the defendant would be serving time in prison for

the alleged threat. *See* 137 S. Ct. at 853. And in both *Perez* and Justice Thomas's dissent from the denial of certiorari in *Boettger*, the Justices described the scope of the issue as whether the First Amendment requires subjective intent for statutes "criminalizing" threats. *See Boettger*, 140 S. Ct. at 1956; *Perez*, 137 S. Ct. at 854.

That courts have focused on whether laws criminalizing true threats require proof of subjective intent to sustain a criminal conviction—as opposed to laws enabling civil enforcement—is hardly surprising. There are different consequences in criminal versus civil cases, which justify different elements for liability. *See* Pet. Br. at 3 (noting that "criminalizing speech raises 'special concern' under the First Amendment"). Civil cases do not carry the threat of incarceration, probation, forfeiture of the right to vote or other rights, the persistence of a criminal record on future background checks, and other lasting collateral consequences.

Thus, "when [this Court] interprets criminal statutes," it "normally start[s] from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state." *Ruan v. United States*, 142 S. Ct. 2370, 2377 (2022) (internal quotation marks omitted). The result of this presumption is that this Court has "read into criminal statutes that are *silent* on the required mental state—meaning statutes that contain no *mens rea* provision whatsoever—that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.* (internal quotation marks omitted); *see also Torres v. Lynch*, 578 U.S. 452, 467 (2016). And "[u]nsurprisingly, given

the meaning of scienter, the *mens rea* [this Court] has read into such statutes is often that of knowledge or intent." *Ruan*, 142 S. Ct. at 2377. That is exactly what this Court did in *Elonis* when it concluded that a statute criminalizing certain threats transmitted in interstate commerce (18 U.S.C. § 875(c)) did not reach defendants who acted without the requisite mental state. 575 U.S. at 740. However, the common law "presumption" of a scienter requirement applies only to criminal laws, not civil statutes. Indeed, "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997).

As set forth above, this Nation's civil rights laws have been essential bulwarks against insidious discrimination, including on the basis of race. By limiting any holding requiring subjective intent to criminal cases, the Court can protect essential rights such as voting rights and the right to equal access in housing and public accommodations. Accordingly, if this Court concludes that the government was required to prove Petitioner's mental state in this case, it should not expand that holding to civil actions.

CONCLUSION

The Court should adopt the Colorado test and affirm. However, if the Court holds that subjective intent is required to show a true threat, it should not expand the holding beyond criminal prosecutions.

Respectfully submitted.

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