No. 22-138

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN, PETITIONER

v.

STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the First Amendment precludes criminal conviction of a defendant who makes a communication that a reasonable person would understand as a threat of injury or death unless the prosecution has proof beyond a reasonable doubt of the defendant's subjective intent or knowledge that it would be taken as such a threat.

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INTEREST OF THE UNITED STATES

This case presents the question whether the First Amendment precludes criminal conviction of a defendant who makes a communication that a reasonable person would understand as a threat of injury or death unless the prosecution can prove the defendant's subjective intent or knowledge that it would be taken as such a threat. The United States has a substantial interest in the proper resolution of that question because the decision in this case may affect its authority to proscribe and prosecute various kinds of threats, including threats against the President and other public officials. See, *e.g.*, 18 U.S.C. 871, 875, 876, 878. The United States has previously participated in cases involving the First Amendment's limits on statutes that criminalize threats. See,

e.g., *Elonis* v. *United States*, 575 U.S. 723 (2015); *Virginia* v. *Black*, 538 U.S. 343 (2003).

STATEMENT

1. This Court has repeatedly made clear that "threats of violence are outside the First Amendment." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992); see *Black*, 538 U.S. at 359; *Watts* v. *United States*, 394 U.S. 705, 707-708 (1969) (per curiam). As the Court has recognized, such "true threats" have minimal (if any) expressive value, and they come at the considerable cost of instilling fear in others, disrupting community life, and increasing the potential for violence. *Black*, 538 U.S. at 360; see *R.A.V.*, 505 U.S. at 388.

The injuries that true threats cause are many and varied. There are psychological harms: the victim (and those close to her) may feel terror, suffer emotional distress, experience anxiety or depression, or withdraw from people or places out of fear.[1] There are economic harms: the victim and law enforcement agencies may expend significant resources assessing the threat and attempting to protect against its perceived dangers; victims, in particular, may take steps such as changing their phone numbers, missing work, losing employment opportunities, or moving.[2] And there are still other, contextual harms: for example, threats of violence against public officials may interfere with their ability

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[1] See Francesca Stevens et al., *Cyber Stalking, Cyber Harassment, and Adult Mental Health: A Systematic Review*, Cyberpsychology, Behavior, and Social Networking, Vol. 24, No. 6 (June 14, 2021), https://perma.cc/3DWY-RCQQ.

[2] See Mary P. Brewster, *An Exploration of the Experiences and Needs of Former Intimate Stalking Victims* 59-63 (June 12, 1998), https://perma.cc/Q6E3-2QNV; see also *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991).

or willingness to carry out their responsibilities,[3] and threats of violence "are among the most favored weapons of domestic abusers," *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting in part).[4]

The internet and social media have expanded not only the number of violent threats but also their reach and effect, enabling activities including online harassment, intimidation, and stalking.[5] The increased prevalence of threats may have a compounding effect: threats beget more threats.[6] Threats of violence against public officials in particular have proliferated in recent years, including threats against Members of Congress, judges, local officials, and election workers.[7]

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[3] See *Watts*, 394 U.S. at 707; *Kosma*, 951 F.2d at 556; National League of Cities, *On the Frontlines of Today's Cities: Trauma, Challenges and Solutions* 24-27 (2021) (*On the Frontlines*), https://perma.cc/QPP2-HDHH.

[4] See Rachel E. Morgan & Jennifer L. Truman, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Stalking Victimization, 2019* (Feb. 2022), https://perma.cc/3MSM-NW6L.

[5] See Emily A. Vogels, Pew Research Ctr., *The State of Online Harassment* 4, 15-16 (Jan. 13, 2021), https://perma.cc/LZ3H-WFNP; Monty Wilkinson, *Introduction* 3-7, 11, U.S. Att'y's Bulletin, Vol. 64, No. 3 (May 2016), https://perma.cc/WM94-ATYH.

[6] See Joint Counterterrorism Assessment Team, *Protection Considerations for Violent Extremist Threats to Public Officials* 3 (Feb. 17, 2022) (*Protection Considerations*), https://perma.cc/XM4J-Q9CK.

[7] See Daniel Anderl Judicial Security and Privacy Act of 2022, Pub L. No. 117-263, Div. E, Tit. LIX, Subtit. D, § 5932(a), 136 Stat 3458-3459; Press Release, U.S. Capitol Police, *USCP Threat Assessment Cases for 2022* (Jan. 17, 2023), https://perma.cc/2VT4-VXW6; Jimmy Balser, Cong. Research Serv., *Overview of Federal Criminal Laws Prohibiting Threats and Harassment of Election*

2. Petitioner has a two-decade history of threatening violence. In 2003, petitioner was convicted on ten counts of making threatening communications in interstate commerce, in violation of 18 U.S.C. 875(c). 02-cr-484 D. Ct. Doc. 27 (N.D.N.Y. Nov. 22, 2004). Then in 2011, petitioner called a family member and threatened to "make a trip back East," "put your head on a fuckin[g] sidewalk block" and "bash it in," and "rip your throat out on sight." 11-cr-133 D. Ct. Doc. 11, at 3-4 (N.D.N.Y. June 28, 2011); see 11-cr-133 D. Ct. Doc. 22, at 3, 5-6 (N.D.N.Y. Nov. 30, 2011). He was charged with, and pleaded guilty to, an eleventh count of violating Section 875(c) for that threat. 11-cr-133 D. Ct. Doc. 27, at 1 (Apr. 17, 2013).

Petitioner carried out his latest course of threatening behavior from 2014 to 2016, while on supervised release from his most recent federal conviction. J.A. 401, 428. His conduct included sending hundreds of direct Facebook messages to a local singer-songwriter, C.W. Pet. App. 6a-7a; J.A. 128, 429. Petitioner's messages were "uninvited, and C.W. didn't send any messages back" or otherwise "engage in a conversation with him." Pet. App. 16a. Instead, C.W. "blocked [petitioner] on Facebook multiple times to prevent him from sending her messages." *Id.* at 3a. But when she did so, he simply "create[d] new Facebook accounts and continue[d] to send her messages." *Ibid.*

Petitioner's messages repeatedly indicated that he was surveilling or watching C.W. Pet. App. 6a-7a. For example, he noted "a couple [of] physical sightings"; referenced a "fine display with your partner"; and asked "[w]as that you in the white Jeep?" *Ibid.* Petitioner told

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Workers 1 (updated Nov. 1, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10781; *Protection Considerations* at 3; *On the Frontlines* at 10-14.

C.W. to "[f]uck off permanently" and "[d]ie," warning her that "[s]taying in cyber life is going to kill you." *Id.* at 7a.

As a result of petitioner's messages, C.W. "was very fearful that [petitioner] was following [her] in person." J.A. 181; see J.A. 140-144, 194. She also was "afraid [she] would get hurt," J.A. 193, and believed that petitioner was "threat[ening] [her] life," J.A. 177. See J.A. 173, 178, 205. Petitioner's messages caused C.W. to develop increased anxiety and "a lot of trouble sleeping." J.A. 200; see J.A. 194-198, 253-254.

In addition, C.W. started taking preventative protective measures, such as never walking alone, buying pepper spray, and hiring extra security for a musical performance. J.A. 182-183, 204-206, 237, 253. C.W. even canceled some of her performances due to fear stemming from petitioner's repeated and threatening communications. J.A. 201-203, 238-239, 247-248.

3. Colorado charged petitioner with, *inter alia*, stalking (serious emotional distress), in violation of Colorado Revised Statute § 18-3-602(1)(c) (2016). Pet. App. 2a, 4a. Section 18-3-602(1)(c) defines stalking to include "knowingly * * * [r]epeatedly follow[ing], approach[ing], contact[ing], plac[ing] under surveillance, or mak[ing] any form of communication with another person * * * in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person * * * to suffer serious emotional distress."

In accord with the Colorado Supreme Court's exposition of statutory and constitutional requirements, the issue of whether petitioner's communications were true threats was litigated on an "objective 'reasonable person' standard," *People* v. *Cross*, 127 P.3d 71, 76 (2006) (en banc), that did not require proof of a "subjective

intent to threaten," *In re R.D.*, 464 P.3d 717, 731 n.21 (2020) (en banc). The trial court, after "consider[ing] the totality of the circumstances," found that petitioner's "statements rise to the level of a true threat." Pet. App. 49a; see *id.* at 45a-49a. The jury subsequently found petitioner guilty of the stalking offense. See *id.* at 5a.

The Colorado Court of Appeals affirmed. Pet. App. 1a-39a. In considering petitioner's as-applied First Amendment claim, the Colorado Court of Appeals emphasized that, "[p]articularly where the alleged threat is communicated online," application of the Colorado stalking statute must account for a number of contextual factors, including:

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

Id. at 12a-13a (quoting *In re R.D.*, 464 P.3d at 721-722). After extensively considering those contextual factors here, *id.* at 14a-21a, the court found that petitioner's messages "were true threats that aren't protected under the First Amendment," *id.* at 21a.

The Colorado Supreme Court denied review. Pet. App. 40a.

SUMMARY OF ARGUMENT

The state courts correctly denied petitioner immunity from criminal liability for sending messages that a reasonable person would understand as threats unless the State can prove that he intended or knew that they would be taken that way. A defendant's unreasonable subjective beliefs, or the mere inability of a prosecutor to conclusively disprove them, are not a license to inspire fear in others.

This Court has long classified "true threats" of violence as outside the First Amendment's protections. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 359-360 (2003). As the Court has recognized, statements that, after full consideration of their language and context, will reasonably be understood as violent threats have minimal (if any) legitimate expressive value and cause substantial harms to their victims and to society more generally. The Court has accordingly analyzed the threatening nature of a communication by examining its content and context, rather than what the defendant may silently have been thinking. See *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam). And threats have been punishable regardless of the speaker's subjective intent since the time of the Founding.

This Court has not required proof of a particular subjective intent for prohibitions on speech similar to true threats, such as fighting words, obscenity, and child pornography. Like those other categories of unprotected speech, threatening language has minimal expressive value and causes substantial societal harms. Those harms are inherent to true threats and in no way turn on a speaker's subjective intent. Law enforcement, victims, and society will not be aware of a defendant's unreasonable subjective views and cannot be expected

to ignore objectively apparent threats based on the possibility that the threatener privately and unreasonably does not view them as such.

Petitioner fails to provide any sound basis why criminal conviction for the harms that threats inflict should turn on the possibility that he harbored an unreasonable mindset. He lacks foundation for his broad claim that threat prosecutions historically required proof of an intent to threaten. This Court's precedents likewise do not support the substantial impediment that he would impose on the regulation of fear-inducing behavior. And petitioner's concerns about chilling public discourse are overblown. Juries that consider and courts that review the full language and context of a statement are capable of distinguishing between threatening speech and expressions of strong emotion, religious enthusiasm, artistic expression, or hyperbole.

If the Court nonetheless concludes that defendants who make objectively threatening statements need more breathing room for legitimate expression, a mens rea of recklessness would suffice. Society should not have to bear the cost of those who consciously disregard the substantial risk that they are making threats. Reckless conduct has traditionally been viewed as morally culpable, and the First Amendment framework for criminal and civil liability for defamatory speech has successfully incorporated recklessness. Indeed, a similar framework for true threats would be more than sufficient even if true threats were protected by the First Amendment because no narrower means are available to address the government's compelling interest in protecting its citizens and communities from unnecessary fear and corollary harm.

ARGUMENT

A DEFENDANT CANNOT CLAIM IMMUNITY TO MAKE VIOLENT THREATS UNDER THE FIRST AMENDMENT BASED ON HIS SUBJECTIVE MINDSET

The "'freedom of speech' referred to by the First Amendment does not include a freedom to disregard * * * traditional limitations" on certain categories of unprotected speech. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383 (1992). Those categories include "threats of violence," which are "outside" the First Amendment because of society's overwhelming interests in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* at 388. None of those interests depends on a defendant's subjective intent or knowledge, and the definition of a true threat should not depend on a prosecutor's ability to conclusively disprove a defendant's subjective beliefs.

A. A "True Threat" Is Defined By How A Reasonable Person Would Understand A Statement's Content And Context, Not The Ability To Disprove A Defendant's Unreasonable Views Of How A Statement Would Be Perceived

Both history and this Court's decisions indicate that a threat of violence may be criminally punished with proof of "general intent," *i.e.*, "knowledge with respect to the *actus reus* of the crime." *Carter* v. *United States*, 530 U.S. 255, 268 (2000) (emphasis omitted). Such general intent encompasses an understanding of the meaning of the words that the speaker used and the context in which he deliberately used them. But the First Amendment does not provide a defendant with immunity for a true threat simply because he may have held an unreasonable subjective belief that his words should not

or would not be taken to mean what, in context, they said.

1. A statement that, based on its content and context, is threatening to a reasonable person has minimal expressive value and is inherently harmful irrespective of the speaker's private views

Statements that are threatening to a reasonable person, even in light of any ameliorating context, have little if any legitimate expressive value. Like other forms of unprotected speech, they "constitute 'no essential part of any exposition of ideas,'" but are instead an inherently harmful type of communication. *R.A.V.*, 505 U.S. at 385 (citation and emphasis omitted).

Such statements do not invite debate and are not readily subject to counterspeech. Words that a reasonable person would, in context, understand as an actual threat to life or limb do not provide fodder for further discussion and cannot simply be shouted down by others. Instead, they are "features" of speech that, "despite their verbal character," are "essentially a 'nonspeech' element of communication." *R.A.V.*, 505 U.S. at 386. "[T]heir content," such as it is, "embodies a particularly intolerable (and socially unnecessary) *mode* of expressing whatever idea the speaker wishes to convey." *Id.* at 393 (emphasis omitted). That "'mode of speech'" does not "ha[ve], in and of itself, a claim upon the First Amendment." *Id.* at 386 (quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result)).

This Court's recognition that threats of violence cause substantial harms, including "the fear of violence" and "the disruption that [such] fear engenders," *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) (citation omitted), has ample empirical support. See pp. 2-3, *supra*.

An expression of dissatisfaction with a school or church gains nothing of value from its packaging as a statement that a reasonable person would interpret as a real threat to hurt or kill the students or parishioners. Instead, it creates fear in the targets of the threat, forcing them, and those charged with protecting them, to bear the cost of responsible precautions.

The harms of a true threat are inherent in the threat itself and in no way depend on the threatener's subjective intent or knowledge. The source of those harms lies not in the private recesses of the defendant's mind, but in what he actually communicated, as viewed in the context in which he communicated it. As the Court has recognized, "an anonymous letter that says 'I'm going to kill you' is 'an expression of an intention to inflict loss or harm' regardless of the author's intent" to actually kill the victim. *Elonis* v. *United States*, 575 U.S. 723, 733 (2015). "A victim who receives that letter in the mail has received a threat, even if the author believes (wrongly) that his message will be taken as a joke." *Ibid.*

By definition, it is reasonable for the target of such a letter, or another statement that a reasonable person would understand as a threat, to be afraid. Were she not, that would itself be an indication that the statement is not actually one that a reasonable person would necessarily understand as threatening. Similarly, in responding to a message that is reasonably understood as a threat, the officials charged with protecting local schools, places of worship or business, and homes do not have the luxury of considering what the threatener might privately have known or intended when he sent that message. They must respond to a realistic threat, and incur the costs of doing so, regardless of what the

speaker might have been thinking. That is what society expects of them, and they would not be forgiven the harms that they would otherwise invite. Neither should the speaker who is the source of those harms.

2. The definition of a true threat, like the harms that it causes, is based on how a reasonable person would understand it

Tracking the harms that they cause, true threats are defined in objective terms as statements that "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. A legislature can choose to engraft, or be presumed to have engrafted, a subjective mens rea onto a criminal prohibition of such threats. See *Elonis*, 575 U.S. at 737. But such a legislative mens rea requirement is an addition to, rather than part of, the definition of a true threat.

The Court's decision in *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam), illustrates the distinction. *Watts* involved a prosecution for "knowingly and willfully making any threat to take the life of or to inflict bodily harm upon on the President." *Id.* at 705 (quoting 18 U.S.C. 871(a) (1964)) (ellipsis and brackets omitted). In assessing the validity of the conviction there, the Court separated "whatever * * * 'willfulness' require[s]" from what "the statute initially require[d]": namely, proof of "a true 'threat.'" *Id.* at 708. The former was a legislative limitation; only the latter was a constitutional one. See *ibid.*

Accordingly, the Court did not look to the defendant's mindset to determine whether his statement—that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," *Watts*, 394 U.S. at

706—qualified as a true threat. See *id.* at 708. Instead, the Court found that "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners," who laughed in response, the defendant's pronouncement amounted only to "'a kind of very crude offensive method of stating a political opposition to the President.'" *Ibid.* Such a statement of mere jest, "political hyperbole," or "'vehement, caustic'" or "'unpleasantly sharp attacks'" would not be understood, in context, as a harmful true threat of violence. *Ibid.* (citation omitted).

As *Watts* demonstrates, context is frequently an ameliorating factor that precludes successful prosecution for a statement that, on its face, might otherwise have come across in an objectively threatening fashion. It is presently undisputed, however, that the language and context of petitioner's Facebook stalking would be understood by a reasonable person as a threat. To the extent that petitioner might have harbored some subjective and unreasonable belief that his messages would not be understood as threatening, that belief cannot override what he plainly communicated: "a serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359.

3. Threats have historically been prohibited without requiring proof of a defendant's subjective intent or knowledge

Prohibition of true threats, as defined by a reasonable person's understanding, was well within the contemplation of the Framers. Legislative proscription and punishment of threats without requiring proof of the threat-maker's subjective mindset dates back to the Eighteenth Century. See *Kansas* v. *Boettger*, 140 S. Ct. 1956, 1957-1958 (2020) (Thomas, J., dissenting from the

denial of certiorari); see also *United States* v. *Stevens*, 559 U.S. 460, 468-470 (2010) (looking to history to inform First Amendment analysis).

In 1754, the English Parliament enacted a statute making it a capital offense to "knowingly send any letter * * * threatening to kill or murder any of his Majesty's subject or subjects, or to burn their houses" or other things, "though no money or venison, or other valuable thing shall be demanded." 27 Geo. II, c. 15 (capitalization omitted). Conviction under that statute, which included no explicit intent-to-threaten requirement, demanded only that the letter contained language conveying a threat and that the defendant knew the contents of the letter.

In *King* v. *Girdwood*, (1776) 168 Eng. Rep. 173 (K.B.), for example, the trial court instructed the jurors that to determine whether the defendant violated the statute they should assess "[w]hether they thought the terms of the letter conveyed an actual threat to kill or murder." *Id.* at 173. "[I]f they were of [the] opinion that it did, and that the [defendant] knew the contents of it, they ought to find him guilty; but * * * if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit." *Ibid.* On appeal following conviction, the reviewing judges "thought that the case had been properly left to the [j]ury." *Id.* at 174.

Other cases similarly focused on the language of the letter at issue, not the state of mind of the sender, in analyzing the existence of a threat. See *Rex* v. *Tyler*, (1835) 168 Eng. Rep. 1330 (K.B.) 1331 (considering whether the "letter threatened" arson); *Rex* v. *Boucher*, (1831) 172 Eng. Rep. 826 (K.B.) 827 (considering whether the letter "plainly convey[ed] a threat to kill and murder," with no

discussion of subjective intent); *Rex* v. *Paddle*, (1822) 168 Eng. Rep. 910 (K.B.) 911 (considering only whether the defendant "intended" the letter to be delivered to the individuals he was threatening); 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 1115-1116 (1806) (considering the letter's "necessary construction" and how it "must be understood" in *Jepson & Springett's Case*); cf. *Regina* v. *Grimwade*, (1844) 169 Eng. Rep. 137 (K.B.) 138-139 (focusing on the intent to send a letter, without discussing subjective intent to threaten, under a similar English statute). Petitioner's only example (Br. 16) of an English threatening-letter case considering a defendant's self-professed intent is one that appears to have done so only in determining whether there was "a construction which could be fairly put on the letter consistent with [defendant's] view of the case." *Reg.* v. *Hill*, (1851) 5 Cox C.C. 233, 235 (Eng.).

Between 1795 and 1887, 17 States and Territories enacted laws similar to the English prohibition on threatening letters.[8] The relevant statutes typically prohibited letters containing certain types of threats made with intent to extort, as well as letters containing certain other types of threats irrespective of intent. See, *e.g.*, 1795 N.J. Laws 108 (making it a misdemeanor for any person to "knowingly send or deliver any letter * * * threatening to accuse any person of a crime * * * with intent to extort from him or her any * * * valuable

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[8] See 1795 N.J. Laws 108; 1816 Ga. Laws 178; 1816 Mich. Terr. Laws 128-129; 1826 Ill. Laws 145-146; 1832 Fla. Laws 68-69; 1838 Iowa Acts 161; Mo. Rev. Stat., ch. 47, art. VII, § 16 (1845); 1850 Cal. Stat. 242-243; 1858 Neb. Laws 64; 1860 Pa. Laws 390; 1863 Idaho Sess. Laws 463-464; 1864 Mont. Laws 205; 1868 Colo. Sess. Laws 219; 1876 Wyo. Sess. Laws 267; 1877 Ariz. Sess. Laws 90; 1885 Nev. Stat. 39; 18 Del. Laws 450-451 (1887).

thing; *or* threatening to maim, wound, kill or murder any person, or to burn" structures or other things, "though no money, goods or chattels, or other valuable thing be demanded") (emphasis added).

Particularly in light of the similarity between those prohibitions and the 1754 English statute, courts in the relevant States presumably applied the "known and settled construction" adopted by English courts—which, as discussed, did not require proof of an intent to threaten. *Pennock* v. *Dialogue*, 27 U.S. (2 Pet.) 1, 2 (1829); see, *e.g.*, *Commonwealth* v. *Burdick*, 2 Pa. 163, 164-165 (1845) (considering English cases persuasive authority in interpreting state statute). Domestic case law, while sparse, is consistent with the absence of an intent-to-threaten requirement. See, *e.g.*, *O'Neal* v. *State*, 126 S.E. 863, 864 (Ga. Ct. App. 1925) (considering sufficiency of evidence to support jury's determination that the defendant "knowingly sen[t] or deliver[ed]" a letter without considering subjective intent); *Hansen* v. *State*, 34 S.W. 929, 929 (Tex. Crim. App. 1896) (reasoning that a charge of sending a letter with intent to kill or injure required that "the *letter* clearly contain[] a threat") (emphasis added).

The purportedly contrary treatises cited by petitioner (Br. 16-18) primarily discuss prohibitions on threats made in order to extort money or things of value, which expressly required proof of intent—not the distinct prohibitions on threatening letters that contained no such requirement. See 7 Nathan Dane, *A General Abridgment and Digest of American Law* 28-33 (1824) (primarily discussing threats with intent to extort); 25 Charles F. Williams, *The American and English Encyclopædia of Law* 1068-1073 (1894) (same); see also Francis Wharton, *A Treatise on the Criminal Law*

of the United States 169 (1846) (failing to distinguish between the two types of prohibitions). Of the two American cases on which petitioner relies (Br. 18), one involved an express "intent to extort" element, *State* v. *Stewart*, 2 S.W. 790, 791 (Mo. 1887) (quoting Mo. Rev. Stat., ch. 24, art. III, § 1306 (1879)), while the other involved a statute construed, for state-law purposes, to prohibit "conspir[ing], confederati[ng], or banding together *for the purpose of* intimidating, alarming, disturbing, or injuring another person," *Commonwealth* v. *Morton*, 131 S.W. 506, 507 (Ky. Ct. App. 1910) (citing *Commonwealth* v. *Patrick*, 105 S.W. 981 (Ky. Ct. App. 1907)) (emphasis added). And petitioner's citation of two States' adoption of statutes requiring that prohibited threats be made "maliciously" (Br. 18) does not suggest that the practices of many other States, and their historical antecedents, impermissibly infringed on freedom of speech.

"In short, there is good reason to believe that States * * * long ago enacted general-intent threat statutes" and did so without perceiving a conflict between such statutes and the provisions in "their own Constitutions [that] protect freedom of speech." *Elonis*, 575 U.S. at 763 (Thomas, J., dissenting).

4. Other forms of unprotected speech are likewise defined in objective terms

The objective definition of true threats is of a piece with the objective definition of other forms of unprotected speech. As the Court has recognized in multiple contexts, courts should not unduly constrain legislatures with constitutional mens rea requirements on the regulation of speech that is inherently harmful and not adjacent to socially valuable advocacy.

The Court has, for example, defined unprotected "'fighting words'" as those "personally abusive epithets which, when addressed to the ordinary citizen are, *as a matter of common knowledge*, inherently likely to provoke violent reaction." *Cohen* v. *California*, 403 U.S. 15, 20 (1971) (emphasis added; citation omitted). The Court has accordingly upheld a fighting-words prohibition where "[t]he test [wa]s what men of common intelligence would understand would be words likely to cause an average addressee to fight." *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 572 (1942); see *ibid.* (referring to "words and expressions which by general consent are 'fighting words' when said without a disarming smile" and that "as ordinary men know, are likely to cause a fight"); see also *State* v. *Chaplinsky*, 18 A.2d 754, 758 (N.H. 1941) ("[T]he only intent required for conviction * * * was an intent to speak the words."), aff'd, 315 U.S. 568 (1942). The Court has also referenced approvingly the "many" decisions holding that someone may be convicted for "breach of the peace" if he "make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940).

The unprotected speech categories of obscenity and child pornography are likewise defined in solely objective terms. The characterization of materials as obscene depends on a reasonable person's perspective—not the speaker's. See *Miller* v. *California*, 413 U.S. 15, 24, 27 (1973) (three-prong test for obscenity); *Pope* v. *Illinois*, 481 U.S. 497, 500-501 (1987) (explaining that "the first and second prongs * * * are issues of fact for the jury to determine applying contemporary community standards" and that a "reasonable person" standard defines the third). And the Court has defined child

pornography by "adjust[ing]" and loosening the test for obscenity. *New York* v. *Ferber*, 458 U.S. 747, 764-765 (1982).

The Court has not interpreted the First Amendment to require subjective awareness as a prerequisite to the regulation of either. Although a State may not impose strict liability on a bookseller for selling obscene materials, the Court has left open whether an "honest mistake as to whether [a book's] contents in fact constituted obscenity need be an excuse[] [or] whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not." *Smith* v. *California*, 361 U.S. 147, 154 (1959); see *Ferber*, 458 U.S. at 765 (same framework for child pornography); *Hamling* v. *United States*, 418 U.S. 87, 115, 121-124 (1974) (reiterating limits of *Smith*); see also *Elonis*, 575 U.S. at 739-740 (rejecting government's reliance on *Hamling* as endorsing objective mens rea for federal statutory purposes).

Just as a speaker's mental idiosyncrasies do not define whether he is purveying (let alone has created) child pornography or obscenity, they do not define a true threat. See *Elonis*, 575 U.S. at 767 (Thomas, J., dissenting) (noting that had the defendant "mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients" and that it "should not[] be the case" that "when he threatened to kill his wife and a kindergarten class, his intent to terrify those recipients * * * suddenly becomes highly relevant"). Like a prohibition of fighting words, a prohibition of true threats regulates a "mode of speech," rather than anything with legitimate expressive value. *R.A.V.*, 505 U.S.

at 386 (analogizing regulation of fighting words to regulation of "a noisy sound truck") (citation omitted). It is accordingly a type of prohibition that need not turn on a defendant's unreasonable subjective mindset.

B. Petitioner's Arguments For A Specific Intent Or Knowledge Requirement Lack Merit

Petitioner nevertheless advances a rule that the First Amendment prohibits the regulation of threats unless the speaker intended to place the target in fear or knew that his threat would do so. But such a rule has no basis in history, this Court's decisions, or general concerns about chilling protected speech.

1. Petitioner misinterprets the historical sources

The sources on which petitioner relies do not support his broad claim that threat prosecutions historically required proof of intent to threaten. As previously discussed, analogous restrictions on threatening letters did not require proof of specific intent to threaten under either English or American law. And petitioner's reliance (Br. 15-16, 18-20) on general common-law principles, prosecutions for breach of the peace, and the history of libel prosecutions is misplaced.

The common law at the time of the Founding did not generally require proof of specific intent in criminal cases. Rather, it often used "a purely objective standard to presume a subjective state of mind and hence wilful and reckless conduct," although that presumption ultimately evolved into a "rebuttable" one. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 839 (1980). Indeed, "historical evidence suggests that courts were unable to undertake [a] subjective inquiry until relatively recently" because such inquiry was thought to be "beyond

the power of juries" and the introduction of evidence that would be "most relevant to the subjective inquiry" was barred. *Id.* at 844-845 (emphasis omitted); see J. W. C. Turner, *The Mental Element in Crimes at Common Law*, 6 Cambridge L.J. 31, 33 (1936) (noting "the practice of imputing *mens rea* from certain given sets of circumstances" and "the well-established rule that a man is presumed to intend the natural consequences of his acts").

Petitioner's focus (Br. 16, 18-19) on early prohibitions on breaching the peace is similarly misguided. Those prohibitions included what today are termed "fighting words," while also encompassing other offenses that did not involve speech. See *Cantwell*, 310 U.S. at 308; see also 2 William L. Clark & William L. Marshall, *A Treatise on the Law of Crimes* § 417, at 983-985 (1900). None of the cases that petitioner cites (Br. 16, 18-19) establishes a broad historical practice—which would conflict with this Court's own practice under the First Amendment, see p. 18, *supra*—of requiring specific intent to convict someone of such a fighting-words offense.

To the contrary, the lone English case on which petitioner relies states that the requisite "intent" could be "self-proved" by "the letter of provocation and insult in which it is conveyed." *Rex* v. *Philipps*, (1805) 102 Eng. Rep. 1365 (K.B.) 1369. Other English decisions likewise indicate that subjective intent was not required in breach-of-the-peace cases. In *Rex* v. *Saunders*, (1682) 83 Eng. Rep. 106 (K.B.), for example, the court rejected a breach-of-the-peace defendant's argument that "the substance of the letter" he had written was "not scandalous," and instead upheld the prosecution because "[t]he letter [wa]s provocative." *Id.* at 106.

Nor do the state cases cited by petitioner show a general shift in focus toward a defendant's subjective intent. In *People* v. *Loveridge*, 42 N.W. 997 (Mich. 1889), the justices focused primarily on the content, context, and result, not the intent, of peace-breaching speech, see, *e.g.*, *id.* at 998-999 (opinion of Campbell, J.), and the only opinion joined by a majority of them stated that "[i]f what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required," *id.* at 1000 (opinion of Long, J.). And *State* v. *Benedict*, 11 Vt. 236 (1839), involved the interpretation of one particular state statute—and explicitly distinguished "[t]he sending of threatening letters" as "an offence of a different character." *Id.* at 239; see *id.* at 238-239.

Petitioner's reliance on defamation law (Br. 19-20) is equally unsound. Even if viewed in purely modern terms, defamation law supports at most a recklessness requirement. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 334 (1974); see also pp. 28-31, *infra*. Historically, however, not even that was required. Instead, "[t]he common law of libel at the time the First and Fourteenth Amendments were ratified" generally only required proof of "'a false written publication that subjected [the defamed individual] to hatred, contempt, or ridicule'"; "[m]alice was presumed in the absence of an applicable privilege, right, or duty." *McKee* v. *Cosby*, 139 S. Ct. 675, 678 (2019) (Thomas, J., concurring in the denial of certiorari) (citation omitted).

The Supreme Court of New York's equally divided decision in *People* v. *Croswell*, 3 Johns. Cas. 337 (1804), does not show otherwise. See *McKee*, 139 S. Ct. at 681 (Thomas, J., concurring in the denial of certiorari) (citing *Croswell*). The specific charge there required "seditious

intention," *Croswell*, 3 Johns. Cas. at 364 (opinion of Kent, J.) (emphasis omitted); the case principally addressed whether particular issues should go to the court or the jury, see *id.* at 363-364; and the subsequent state constitutional amendment was likewise primarily procedural and mandated acquittal only when "the matter charged as libelous" both "is true, *and* was published with good motives, and for justifiable ends," N.Y. Const. Art. VII, § 8 (1821) (emphasis added). Nothing therein immunizes a defendant who sends out a communication that a reasonable person would interpret as a threat.

2. Petitioner overreads this Court's decisions

Petitioner errs in claiming (Br. 24) that this Court's prior decisions addressing true threats are "best read[]" as imposing a requirement that the speaker specifically intended to place the victim in fear. As discussed earlier, see pp. 12-13, *supra*, *Watts* drew a distinction between statutory mens rea requirements and the constitutional definition of true threats—with the latter defined solely based on language and circumstance. See 394 U.S. at 708. And as petitioner acknowledges (Br. 28), the Court resolved *Elonis* v. *United States* on statutory-interpretation grounds—specifically, a presumption as to legislative intent—rendering it "not necessary to consider any First Amendment issues." 575 U.S. at 740. The opinions in *Virginia* v. *Black*, *supra*, and petitioner's analogies to other contexts, are likewise unsupportive of his position.

a. In *Black*, the Court held that a Virginia statute banning cross-burnings with "an intent to intimidate a person or group of persons" was not impermissibly content-based. 538 U.S. at 347 (quoting Va. Code Ann. § 18.2-423 (1996)); see *id.* at 360-363. In so holding, the Court reaffirmed that "the First Amendment * * *

permits a State to ban a 'true threat,'" *id.* at 359 (citation omitted), and explained that Virginia's prohibition regulated a type of unprotected speech particularly "likely to inspire fear of bodily harm," *id.* at 363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate," as interpreted by the jury instructions given in one of the defendant's cases, rendered the statute unconstitutional. *Ibid.* (plurality opinion) (citation omitted). The plurality reasoned that because some cross-burnings may be protected "political speech" rather than "constitutionally proscribable intimidation," the instruction's application of the presumption "strips away the very reason why a State may ban cross burning with the intent to intimidate." *Id.* at 365.

Contrary to petitioner's suggestion (Br. 26-27), the Court did not incidentally and unnecessarily impose a subjective-intent requirement on prosecutions for true threats. The Court instead simply noted that the category of "'[t]rue threats' encompass[ed]" a prohibition, like Virginia's, on "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. But nobody disputes that, as the Court observed, a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat." *Id.* at 360 (emphasis added). And because the Virginia statute at issue banned only a particular type of intimidation (itself only a subset of true threats), the Court had no occasion to consider whether a legislature's constitutional authority to ban true threats is categorically constrained by a speaker's subjective intent.

Petitioner similarly errs in inferring (Br. 27) the existence of a constitutional subjective-intent requirement from *Black*'s holding with respect to the prima-facie-evidence provision. The plurality reasoned that, because cross-burning can have a protected political meaning, a ban on that activity must exclude its protected forms from prosecution, and observed that Virginia's method of achieving that goal was to single out cross-burners who engage in intentional intimidation. See *Black*, 538 U.S. at 365-366 (plurality opinion); see also *id.* at 385-386 (Souter, J., concurring in the judgment in part and dissenting in part). But because the prima-facie-evidence provision's construction effectively eliminated the statute's requirement to prove intent, it had largely neutralized Virginia's own limitation, thereby allowing conviction for burning a cross in the context of a movie, a play, or other situation in which a reasonable observer would have understood the act not to be threatening. See *id.* at 366 (plurality opinion).

Moreover, the Court in *Black* reiterated the governmental interests that "a prohibition on true threats" serves—protecting individuals from "'the possibility that the threatened violence will occur,'" "'the fear of violence,'" and "'the disruption that fear engenders,'" 538 U.S. at 360 (citation omitted)—none of which depend on a speaker's intent. Indeed, even as it listed the "'possibility that the threatened violence will occur'" as one of the reasons legislatures may proscribe such threats, *Black* emphasized that a "speaker need not" have a subjective intent "to carry out the threat." *Ibid.* (citation omitted). *Black* accordingly erects no constitutional impediment to a differently crafted prohibition that focuses on societal and individualized harms that true threats create.

b. Petitioner's effort (Br. 20-24) to derive such an impediment from decisions in other contexts is similarly misconceived. As discussed, the Court has not required a particular subjective intent to restrict fighting words, obscenity, and child pornography. And petitioner's cursory reliance on *United States* v. *Alvarez*, 567 U.S. 709 (2012), and *Illinois* v. *Telemarketing Associates, Inc.*, 538 U.S. 600 (2003), is misplaced. *Alvarez* recognized that where there is a "legally cognizable harm associated with a false statement," it may be prohibited. 567 U.S. at 719 (plurality opinion). And in *Telemarketing Associates*, the Court held only that a specific-intent requirement was necessary to distinguish legitimate fundraising—a protected First Amendment activity—from fraudulent fundraising. 538 U.S. at 620-623. Neither decision implies that legislatures are powerless, based on a defendant's unreasonable subjective mindset, to protect the populace from threats of violence.

Nor can such an implication be drawn from cases addressing incitement. This Court has sometimes described incitement in part by reference to whether particular words were "directed," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), or "intended," *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam), to incite imminent lawless action. But unlike true threats, incitement cannot be defined by measuring the reactions of a reasonable person aware of the context; criminal conduct is never a legally "reasonable" reaction to speech. And speech that is harmful only when others are likely to act upon it may enjoy more First Amendment protection than speech that itself directly causes harm.

3. Petitioner's chilling concerns are unfounded

Finally, petitioner lacks solid footing when he contends (Br. 30-40) that a specific intent to threaten is required to avoid "chilling" protected speech. Contrary to his assertion (Br. 31), a jury properly instructed on the reasonable-person definition of true threats should not find a defendant guilty beyond a reasonable doubt based on a legitimate "misunderstanding[]" or any other circumstance in which it finds the threatening nature of the defendant's statements to be ambiguous.

In cases where the potentially innocuous meaning of a defendant's statement might not be readily apparent to jurors—perhaps given their ages, their backgrounds, their familiarity with a particular forum for expression, or their understanding of a religious practice or art form, see Pet. Br. 32-34, 37-39—a defendant is free to introduce evidence about the relevant context, including his own testimony, testimony of others in his community, or even expert testimony. And in all cases with a general-intent requirement, conviction requires proof beyond a reasonable doubt that the defendant understood the meaning of his words, was aware of all the relevant context, and intentionally conveyed his words. See, *e.g., Ragansky* v. *United States,* 253 F. 643, 645 (7th Cir. 1918).

Those requirements, in combination with "the requirement of proof beyond a reasonable doubt," "address[]" the "fact that close cases can be envisioned." *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). Appellate review then provides yet another layer of protection for defendants with First Amendment claims. For other categories of unprotected speech such as fighting words, obscenity, and child pornography, such review has included "independent" evaluation of the substantive constitutional viability of particular criminal

verdicts, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 504-508 (1984), and a reviewing court could apply a similar standard to true threats.

But, as in those contexts, it is not necessary to require proof beyond a reasonable doubt of a defendant's subjective intent or knowledge. The criminal-justice system traditionally trusts juries and courts to set aside their preconceptions and reach reasoned, disinterested judgments. Such trust is no less warranted in this setting than in others.

C. If The Court Requires A Subjective Mindset In True Threats Cases, It Should Adopt Recklessness

If, however, the Court concludes that the First Amendment requires proof of a defendant's subjective mens rea for communications that a reasonable person would understand as threats, it should adopt a standard of recklessness and remand for application of that standard here. As illustrated by the history of applying recklessness in the public-defamation context, a recklessness standard would provide any necessary reassurance of "enough 'breathing space' for protected speech," *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part and dissenting in part) (citation omitted), without sacrificing too many of the deterrent, retributive, and incapacitating benefits of a criminal prohibition on all communications that a reasonable person would understand as a threat.

1. A reckless defendant subjectively subordinates the likelihood of harm to others to his own ends. See *Voisine* v. *United States*, 579 U.S. 686, 694 (2016). When he does so, he is not entitled to claim innocence in the eyes of the law. Instead, as a matter of both theory and practice, a defendant who "consciously disregards a substantial and unjustifiable risk" of a harmful result

has a culpable state of mind, even if he is not "practically certain" that the result will occur. Model Penal Code § 2.02(2)(b)(ii) and (c) (1985).

This Court has accordingly "described reckless conduct as morally culpable" in "a wide variety of contexts," including in the context of speech regulations. *Elonis*, 575 U.S. at 745 (Alito, J., concurring in part and dissenting in part) (citing *Farmer* v. *Brennan*, 511 U.S. 825, 835-836 (1994); *Tison* v. *Arizona*, 481 U.S. 137, 157 (1987); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964); and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964)); see *Borden* v. *United States*, 141 S. Ct. 1817, 1844 (2021) (Kavanaugh, J., dissenting) ("Reckless conduct is not benign."). And a defendant who "necessarily grasps that he is not engaged in innocent conduct," "is not merely careless," and "is aware that others could regard his statements as a threat, but * * * delivers them anyway," is undeserving of constitutional protection. *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part).

2. The mens rea framework that this Court has imposed in certain defamation cases provides a workable model for a recklessness-based approach to true threats. For potentially defamatory speech directed at a public official or figure or involving a matter of public concern, the Court has allowed criminal or civil liability on a showing of "'actual malice,'" which is satisfied when a statement was made "with knowledge that it was false *or* with reckless disregard of whether it was false or not." *Gertz*, 418 U.S. at 334 (quoting *New York Times*, 376 U.S. at 280) (emphasis added); see *Garrison*, 379

U.S. at 74.[9] A showing of specific intent is not required. See *Masson* v. *New Yorker Magazine., Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent.").

There is no reason to believe that threatening speech requires more "breathing space," *New York Times Co.*, 376 U.S. at 272 (citation omitted), than defamatory speech. Threats of violence that a reasonable person would consider genuinely threatening are *more* harmful than defamatory statements. Defamation damages reputation; true threats place the recipient in fear for her safety or even her life, and bring with them numerous additional harms. The government surely has a strong interest in eliminating such fear and disruption, particularly when the government is called upon to respond by protecting the target and investigating the speaker.

Indeed, the governmental interests in deterring and punishing threats are so strong that recklessness would be the appropriate standard even if true threats were not already categorized as unprotected speech. A strict-scrutiny analysis would similarly yield a recklessness standard as the line "narrowly drawn to achieve" the State's overwhelming interest in protecting its citizens from the fear, disruption, and other harms that true threats cause. *Boos* v. *Barry*, 485 U.S. 312, 321 (1988) (citation omitted). It is hardly too much to ask that, at minimum, speakers refrain from sending communications that they know have a "substantial and

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[9] Defamation that targets a private person on matters of private concern can be punished without proof of recklessness, as long as the State "do[es] not impose liability without fault." *Gertz*, 418 U.S. at 347; see *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 773-775 (1986).

unjustifiable risk" of being interpreted as threats. Model Penal Code § 2.02(2)(c) (1985).

Under petitioner's approach, however, no matter how clear it is that a communication would be taken as expressing a serious intention to inflict violence on others, a defendant would be constitutionally entitled to avoid conviction unless the prosecution has convincing proof of the defendant's subjective belief that the communication would be understood as threatening. But a defendant who is familiar with the meaning of the words spoken and their context can constitutionally be held accountable for the immediate and serious harms that his true threats inflict. The First Amendment's protection of free speech—which has historically coexisted with a categorical denial of protection to true threats—does not demand otherwise.

CONCLUSION

The judgment of the Colorado Court of Appeals should be affirmed.

Respectfully submitted.

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