No. 22-138

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN, PETITIONER

v.

THE PEOPLE OF THE STATE OF COLORADO

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS,
DIVISION II

REPLY BRIEF FOR THE PETITIONER

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The State all but concedes that it could not have convicted Billy Counterman under a standard requiring proof of subjective intent to threaten or even recklessness. Resp. Br. 50-52. This Court can affirm Counterman's conviction and sentence to more than four years in prison only if the First Amendment authorizes imprisonment for the "mere utterance" of negligent speech—essentially, allowing the State to criminalize misunderstandings. Resp. Br. 32. It does not.

The State does not come close to carrying its heavy burden of establishing a "long-settled tradition" of punishing speech as a "true threat" based only on a showing of negligence. *United States* v. *Stevens*, 559 U.S. 460, 469 (2010). The State fails to explain away historical practice it admits "considered the defendant's mental state," Resp. Br. 21, offers farfetched readings of this Court's true-threats decisions, and struggles to conjure a tradition of punishing negligent speech by analogies to other categorical exceptions that require at least recklessness.

Lacking support from history and tradition, the State assures the Court that its "context-driven objective standard," Resp. Br. 2—an open-ended "totality of the

circumstances" test, Pet. App. 12a, 19a—protects all valuable speech. But an "open-ended rough-and-tumble of factors" is too indeterminate and unpredictable to be the sole safeguard for speech. *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (plurality opinion) (citation omitted). And for all the State's talk of "context," it omits the foundational piece of context in criminal law: the "ancient requirement" that "an injury can amount to a crime only when inflicted by intention." *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). That bedrock element is especially important in First Amendment cases, where a *mens rea* requirement provides "breathing room" to protect speech.

The State emphasizes that words can cause fear and disruption regardless of the speaker's intent. See Resp. Br. 14-18. But this Court has never allowed the potential for fear and disruption alone to exempt speech from First Amendment protection. See, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (advocacy of violence); *Virginia* v. *Black*, 538 U.S. 343 (2003) (cross-burning). States can and should protect individuals from the fear of violence, just as they protect individuals from *actual* violence. But courts have always required a guilty mind even to punish violent conduct—which, unlike speech, does not receive First Amendment protection.

The State has not shown that allowing evidence of subjective intent will hinder prosecutions, since, "[f]requently, the most probative evidence of intent will be objective evidence of what actually happened." *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). A subjective-intent standard already governs in numerous states with no discernable effect on enforcement. And that standard will not disrupt civil protection orders and other laws that afford strong protections under lower standards of proof.

The Court should reverse.

ARGUMENT

A. The State Fails To Meet Its Burden Of Showing A Historical Tradition Of Punishing Negligent Speech

1. The State and United States fall well short of demonstrating "*historical* evidence" of criminalizing negligent threats. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). Neither cites a single historical decision—not one—in which a court held that the speaker's intent was irrelevant. Resp. Br. 18-22; U.S. Br. 13-17. That alone dooms the State's position.

Instead, the State relies on two decisions involving letters that "plainly conveyed a threat to kill" but did not expressly discuss *mens rea*. *King* v. *Boucher*, 172 Eng. Rep. 826, 826 (K.B. 1831); see also *King* v. *Girdwood*, 168 Eng. Rep. 173, 173 (K.B. 1776); U.S. Br. 14-15. But objective words can always be used to demonstrate subjective intent. See Pet. Br. 17-18, 41. "[C]ourts and juries every day pass upon knowledge, belief and intent * * * having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *United States* v. *Williams*, 553 U.S. 285, 306-307 (2008) (citation omitted)). Where a letter is so clear that "[n]o one who received it could have any doubt as to what the writer meant," *Boucher*, 172 Eng. Rep. at 827, there is no need to discuss intent further. But "if * * * the letter itself" does not resolve the issue, courts consider whatever extrinsic evidence "may prove the intent at the time." Francis Wharton, *Treatise on the Criminal Law of the United States* 169 (1846).

The State and United States similarly argue that *Hansen* v. *State*, 34 S.W. 929 (Tex. Crim. App. 1896), considered intent irrelevant. Resp. Br. 20; U.S. Br. 16. Not so; *Hansen* concluded that the defendant's letter itself belied the intent to threaten. The court wrote that

the letter "d[id] not indicate by direction that *the writer herself intended* to visit upon [the recipient] any calamity or affliction," but rather a wish for misfortune "without herself bringing it about." 34 S.W. at 929 (emphasis added). Like other early threat cases, *Hansen* stands for the unremarkable proposition that intent (or the lack thereof) "can[] be inferred from the letter itself." Wharton, *supra*, at 169.

The United States' other cases fare no better. See U.S. Br. 14-15. They involve letters unambiguously evidencing intent, see *Rex* v. *Tyler*, 168 Eng. Rep. 1330, 1331 (K.B. 1835); letters that did not contain the type of threat prohibited, see 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 1105, 1115-1116 (1806); or issues of authorship or "sen[ding]" that rendered intent irrelevant, see *Rex* v. *Paddle*, 168 Eng. Rep. 910, 911 (K.B. 1822); *Regina* v. *Grimwade*, 169 Eng. Rep. 137, 138-139 (K.B. 1844); *O'Neal* v. *State*, 126 S.E. 863, 863-864 (Ga. Ct. App. 1925).

2. The State's and United States' limited efforts to neutralize Counterman's authorities also fail. The State argues that *Regina* v. *Hill*, 5 Cox C.C. 233 (1851), "did not address whether the defendant must subjectively intend to threaten to be convicted." Resp. Br. 21. But the State concedes that "the court considered the defendant's mental state" to decide his words' meaning, *ibid.*, and because "the threat *intended to be made* by the prisoner" was not within the statute's scope, the judge directed acquittal, *Hill*, 5 Cox C.C. at 235-236 (emphasis added); see also 3 Sir Wm. Oldnall Russell, Knt., *A Treatise on Crimes and Misdemeanors* 248-249 (4th ed. 1865) (citing *Hill*). The State and United States also make much of some early threat statutes that included no textual subjective intent requirement. Resp. Br. 19; U.S. Br. 15 & n.8. But they ignore that many decisions, like *Hill*, read an intent requirement into such statutes, and similarly fail

to mention the treatises emphasizing the centrality of intent. See Pet. Br. 18.[1] Indeed, the United States does not dispute that period treatises support a subjective intent requirement for threat prosecutions, instead dismissing them because they "primarily discuss prohibitions on threats made in order to extort." U.S. Br. 16. But the overlapping discussion of simple threats and extortion threats reflects that the requisite intent was identical. That is why one treatise "fail[s] to distinguish" between intent for "threats made in order to extort" and "prohibitions on threatening letters." U.S. Br. 16-17 (citing Wharton, *supra*, at 169).

The State dismisses Counterman's additional historical authorities because they addressed "other offenses, like breach of the peace, libel, and criminal law matters more generally." Resp. Br. 20. But in analyzing a historical tradition of punishing speech, breach of the peace and libel are material because they reflect a unified feature of founding-era law: Whatever the context, speech was not punished unless it was *intended* to cause harm. Pet. Br. 16. In each case, "intent was considered a material fact to be averred and proved," *Commonwealth* v. *Willard*, 39 Mass. (22 Pick.) 476, 478 (1839) (Shaw, C.J.), either from the defendant's words and actions or from extrinsic evidence, *King* v. *Philipps*, 102 Eng. Rep. 1365, 1369 (K.B. 1805). The State offers no reason why courts discussing breach of the peace (the progenitor of "fighting words"), would insist that "[a] threat, * * * must be intended to put the person threatened in fear," *State* v.

[1] Cf. *Thomas* v. *State*, 2 N.E. 808, 817 (Ind. 1885) ("The statute in defining the [lewd-materials] offense does not use the word 'knowingly,' nor the word 'intentionally,' but evidently, in order to make out the offense, it was necessary for the state to prove guilty knowledge on the part of appellant.").

Benedict, 11 Vt. 236, 239 (1839), but would not say the same about a threat statute.

3. The State fails even to mention *People* v. *Croswell*, 3 Johns. Cas. 337 (N.Y. 1804), the "leading state case" on libel, which captured the "common sense of American criminal libel law" at the founding, see *Beauharnais* v. *Illinois*, 343 U.S. 250, 295-296 (1952) (Jackson, J., dissenting). And the United States' assertion that *Croswell* "principally addressed whether particular issues should go to the court or the jury," U.S. Br. 23, cannot obscure that "the jury [was] permitted to take into consideration the only thing that constitutes the crime, which is the malicious intent," 3 Johns. Cas. at 364.

4. Ultimately, the State and United States ignore the governing standard. The *State* has the burden of showing a "long-settled tradition" of punishing speech as a true threat based on negligence. *Stevens*, 599 U.S. at 468-469. Contra U.S. Br. 21. The State's and United States' dubious historical analyses at best provide ambiguous support for their position, which is the antithesis of a settled tradition. See U.S. Br. 16 (acknowledging "sparse" domestic case law supporting its position).

B. No Other Categorical Exception Penalizes Negligent Speech

The recognized exceptions to the First Amendment's prohibition on content-based restrictions confirm that subjective intent is constitutionally required for true-threat prosecutions.

1. *Incitement*. The State concedes that incitement "requir[es] a showing of the speaker's subjective intent." Resp. Br. 33. And it does not dispute "the common history of 'incitement' and 'true threats,'" Pet. Br. 45 (quoting G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. Rev. 829, 1069 (2002)), "since each springs from

[Justice] Holmes's 'clear and present danger' test," and involves similar circumstances, Blakey & Murray, *supra*, at 1069-1070. Incitement thus offers "strong support for * * * a subjective element (intent) in the analysis of 'true threats.'" *Ibid.*

The State nonetheless argues that the categories are dissimilar because true threats "inflict direct harm on their target" by their "mere utterance," whereas "speech that advocates violence may (or may not) persuade its listener to harm a third party[]," and thus subjective intent is necessary to protect against over-enforcement. Resp. Br. 32-33.

That hair splitting does not justify any difference in required *mens rea*, much less demonstrate a tradition of punishing negligent speech. Incitement is just as "direct"; it requires proof that the speech was "likely" to produce "*imminent* lawless action." *Brandenburg*, 395 U.S. at 447 (emphasis added). And in public incitement cases, the target of the incitement often hears the statement and fears "imminent" violence. See *id.* at 445 (public message that "there might have to be some revengeance taken" during upcoming Ku Klux Klan march); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (discussing remarks that "might have been understood as * * * intending to create a fear of violence"). Incitement thus is just as likely to cause harm as threats, which are prosecuted even if never received. See, *e.g.*, *United States* v. *Geisler*, 143 F.3d 1070, 1071 (7th Cir. 1998).

2. *Obscenity and child pornography.* This Court in *Elonis* v. *United States*, 575 U.S. 723 (2015), rejected the State's argument that obscenity is judged "by an objective listener-centered standard." Resp. Br. 31-32. The Court held that it was not "enough for liability that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of

the materials." 575 U.S. at 739 (citation omitted). "[T]he mental state requirement * * * turns on whether a defendant knew the character of what was sent, not simply its contents and context." *Ibid.* The State relies on the dissenting opinion without acknowledging that the majority rejected that view. See Resp. Br. 32.

The State's reliance on *Miller* v. *California*, 413 U.S. 15 (1973), Resp. Br. 32, is particularly inapt because the statute there expressly required that the defendant "hav[e] knowledge that the matter is obscene," and proof of that element was not disputed, 413 U.S. at 16 n.1 (quoting statute). And this Court struck down a statute that purported to eliminate any *mens rea* requirement for possessing obscene material. *Smith* v. *California*, 361 U.S. 147, 153 (1959).

As the United States acknowledges, a similar analysis governs child pornography cases. U.S. Br. 18-19. In that context, "the age of the performers is the crucial element separating legal innocence from wrongful conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). A statute without a *mens rea* as to age would thus present "substantial constitutional questions." *Id.* at 69.

3. *Fighting words.* This Court's few "fighting words" cases are best interpreted, consistent with their common-law antecedents, to require subjective intent. Pet. Br. 23-24. The State fails to address *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726 (1978), which explained that the "fighting words" exception allows the government to "forbid speech *calculated* to provoke a fight." *Id.* at 745 (plurality opinion) (emphasis added).

Texas v. *Johnson*, 491 U.S. 397 (1989), similarly explains that the fighting words exception requires a "*direct* personal insult or an *invitation* to exchange fisticuffs." *Id.* at 409 (emphases added). Whether the speaker extended an "invitation" and whether it was

"direct" necessarily depends on the speaker's intent. *Ibid.* And the Court rejected the permissibility of banning expression merely because its "very disagreeableness will provoke violence," instead emphasizing the importance of "asking whether the expression 'is directed to'" causing violence. *Ibid.* (quoting *Brandenburg*, 395 U.S. at 447).

Regardless, this Court has confined the fighting words exception to a "narrowly limited" category of nose-to-nose interactions involving acute risk of immediate violence, see *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571 (1942), and has rejected every request to expand the exception beyond that limited context, see, *e.g.*, *Mahanoy Area Sch. Dist.* v. *B. L.*, 141 S. Ct. 2038, 2046 (2021); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 381 (1992); *Johnson*, 491 U.S. at 409. There is no basis for transforming a limited protection against imminent violence into a catch-all to prohibit disfavored speech.

4. *Defamation*. Unable to demonstrate a historical tradition of *criminally* punishing negligent speech, the State turns to civil defamation. But the State overlooks the "special concern" that "[t]he severity of criminal sanctions" poses far greater risk of chilling speech than civil liability. *Reno* v. *ACLU*, 521 U.S. 844, 871-872 (1997). Indeed, the State concedes that "[c]riminal libel prosecutions are subject to the same constitutional limitations as those set forth in *New York Times* v. *Sullivan*." Resp. Br. 49 (cleaned up).

Even in the civil context, heightened intent is required where the First Amendment stakes are raised. The State acknowledges that *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), requires knowing falsity or recklessness for public figures to obtain compensatory damages. Resp. Br. 30 & n.7. But even for private figures, "the States may not permit recovery of * * * punitive damages" absent "knowledge of falsity or reckless

disregard for the truth." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).[2]

5. *Commercial speech*. The State likewise tries to shoehorn commercial speech into its listener-focused standard. Resp. Br. 28-29. But the State fails to acknowledge *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600 (2003), which recognized that the First Amendment limits actions for commercial fraud and emphasized the "prime importance" of requiring proof that the defendant "kn[ew] that the representation was false" and "inten[ded] to mislead the listener." *Id.* at 620. Clear and convincing evidence of intent was precisely the kind of "[e]xacting proof requirement[]" that "provide[s] sufficient breathing room for protected speech." *Ibid.*

The State's reliance on older commercial-speech cases, see Resp. Br. 28-29, underscores the need for greater constitutional protection for criminal true threats. Those cases turn on a "'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980) (citation omitted). The distinction rests on "[t]wo features" not present "[i]n most other contexts." *Id.* at 564 n.6. First, "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages * * * ." *Ibid.* Second, because commercial speech is motivated by "economic self-interest," it is less likely to be chilled. *Ibid.*

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[2] For similar reasons, *amici* are incorrect that a subjective intent requirement in *criminal* threat cases would affect non-punitive civil "harassment and discrimination [suits] under Title VII." See First Amend. Scholars (Mandell) Br. 32-34.

C. The State Misreads This Court's True-Threats Cases

The State contends that "[t]his Court's true-threat decisions reflect a listener-based approach that examines the context of the threat." Resp. Br. 22. That reading is difficult to square with this Court's most recent true-threats case, *Virginia* v. *Black*, 538 U.S. 343 (2003), where witnesses felt "very … scared," "'awful' and terrible,'" *id.* at 349, and where "contextual factors * * * [we]re necessary to decide whether the [speech] [wa]s *intended to intimidate*," *id.* at 367 (plurality opinion) (emphasis added). At minimum, this Court's true-threats cases do not support a "long-settled tradition" of punishing negligent speech.

1. The State contends that *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam), did not address whether the *mens rea* standard applied there "was compatible with the First Amendment." Resp. Br. 23. But the Court emphasized the importance of construing the governing statute "against the background of a profound national commitment" to free speech. 394 U.S. at 708 (citation omitted). The Court's "grave doubts" about the prevalent construction of the statute's *mens rea* reflected constitutional concerns regarding the importance of the speaker's intent, as "the dissenting opinion below" explained. *Ibid.*; see *Watts* v. *United States*, 402 F.2d 676, 691 (D.C. Cir. 1968) (Wright, J., dissenting) ("Where statutes impinge upon protected speech, statutory provisions governing intent will be read to require specific intent.").

The State does not even mention *Rogers* v. *United States*, 422 U.S. 35 (1975), where Justice Marshall—who joined *Watts*—clarified that *Watts*'s "grave doubts" concerned using an "objective" *mens rea* standard for a crime of "pure speech" without considering what the speaker "actually intended." *Id.* at 43-44, 47-48 (Marshall,

J., concurring). The State has no answer for Justice Marshall's concern that "a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners * * * would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Id.* at 47-48 (citation omitted).

2. The State similarly misreads *Black*, where this Court vacated two convictions under the First Amendment because the governing statute allowed the jury to presume the defendants' intent to threaten. The State does not dispute that "the defendants' acts were objectively threatening" and that "the Court never intimated that [this] was enough." Pet. Br. 26. Instead, the State argues that "the Court did not consider whether [Virginia] could have chosen to ban cross-burning" under a purely objective standard. Resp. Br. 23. But *Black* would have been an easy case if intent were unnecessary to the constitutionality of threats prosecutions.

The Court vacated the defendants' convictions because the statute allowed Virginia to convict them for true threats without proving intent, *even though* their cross-burnings unquestionably "were objectively threatening." Pet. Br. 26. Four Justices concluded that "[t]he First Amendment does not permit [the] shortcut" of allowing the jury to presume "inten[t] to intimidate." 538 U.S. at 367 (plurality opinion). A fifth Justice said it was a "constitutional defect" to convict the defendants without considering whether "the cross burning[s] [were] done with an intent to intimidate." *Id.* at 380 & n.6 (Scalia, J., concurring in the judgment in part and dissenting in part). And three more said the statute was overbroad because it proscribed cross-burnings "free of any aim to threaten." *Id.* at 385-386 (Souter, J., concurring in the judgment in part and dissenting in part). "Thus, eight Justices agreed that intent to intimidate is necessary and

that the government must prove it in order to secure a conviction." *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.).

According to the State, the plurality did not care about intent, but concluded "that the statute's prima facie evidence provision contradicted the First Amendment[] because it allowed convictions 'based solely on the fact of cross burning itself,' without considering context." Resp. Br. 23 (quoting *Black*, 538 U.S. at 365). But the State neglects to mention *why* the plurality cared about "context": The prima facie evidence provision "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is *intended to intimidate*." *Black*, 538 U.S. at 367 (plurality opinion) (emphasis added).

The State discounts Justice Scalia's vote on the ground that, "[f]or Justice Scalia, it was the jury instruction that reflected the 'constitutional defect,'" not the presumption of intent. Resp. Br. 24. But Justice Scalia's point was that the First Amendment requires that the jury "must" consider "evidence that might rebut the presumption that the cross burning was done with an intent to intimidate." 538 U.S. at 380 (Scalia, J., concurring in the judgment in part and dissenting in part). If intent were not constitutionally required, there would have been no "constitutional defect" in allowing the jury to ignore evidence rebutting intent. *Ibid.*

3. Parsing "the language of an opinion * * * as though [it] were * * * a statute," *Brown* v. *Davenport*, 142 S. Ct. 1510, 1528 (2022) (citation omitted), the State and United States argue that *Black* merely made the trivial point that true threats "encompass" the "type of" threats meant to intimidate, Resp. Br. 24-25; see U.S. Br. 24. But as explained, Pet. Br. 29, the centrality of intent in *Black* is irreconcilable with the idea that intentional threats are

just one type of "true threat," rather than a limit on what is "constitutionally proscribable," 538 U.S. at 360.

4. The State argues that *Black*'s language demonstrates that "the true threats exception [i]s grounded in the threat's effect on its recipient, not the culpability of its issuer." Resp. Br. 25. But when the Court said "a prohibition on true threats protects individuals from the fear of violence," that statement merely clarified a point made in the preceding sentence: A "speaker need not actually intend to *carry out* the threat" for it to be proscribed. 538 U.S. at 360 (emphasis added).

5. To be sure, the statute in *Black* expressly required intent to intimidate, unlike the Colorado statute here. But the Virginia statute's "constitutional defect" was that it *did not go far enough* toward protecting unintentional threats because it permitted *some* convictions without proof of intent. Colorado's statute does not even go that far; "[a]ll [Colorado] ha[d] to prove [wa]s that * * * [Counterman] knew he was communicating." J.A. 389. Under *Black*, that test is unconstitutional. And even if *Black* is, "at best, ambiguous," Resp. Br. 25, that falls far short of satisfying the State's burden of demonstrating a settled tradition of punishing negligent threats.

D. The State's "Context-Driven Objective Inquiry" Is Constitutionally Deficient

Unable to establish a "long-settled tradition of subjecting [negligent] speech to regulation," *Stevens*, 559 U.S. at 469, the State attempts to defend its "context-driven" objective test on its own merits, assuring the Court that context cures all. This too fails.

1. This Court has noted time and again that "multifactor, 'context-specific' inquir[ies]" are insufficient safeguards because they do not provide even "relative predictability." *Medellin* v. *Texas*, 552 U.S. 491, 514-515 (2008) (citation omitted); accord *Lexmark Int'l, Inc.* v.

Static Control Components, Inc., 572 U.S. 118, 136 (2014) ("open-ended balancing tests[] can yield unpredictable and at times arbitrary results"). Without a *mens rea* requirement, the indeterminacy of the State's test chills speech by requiring speakers to "give a wide berth to any comment that might be construed as threatening in nature," thereby "discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers*, 422 U.S. at 47-48 (Marshall, J., concurring) (citation omitted).[3]

The State asserts that "tests based on objective reasonableness are employed routinely, including when fundamental liberties are at stake." Resp. Br. 41-42. But the State's lone example is a *civil* excessive-force case, see Resp. Br. at 42 (citing *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015)), not a criminal prosecution where "the 'general rule' is that a guilty mind is 'a necessary element,'" *Elonis*, 575 U.S. at 734 (citation omitted). And it concerned not pure speech, but conduct. Even then, courts "must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer." *Kingsley*, 576 U.S. at 399. That is far more protection than the State afforded Counterman before sentencing him to four-and-a-half years in prison.

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[3] Contrary to *amici*'s contention, *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), supports a subjective standard. First Amendment Scholars (Mandell) Br. 4. The Court there criticized tests using an "open-ended rough-and-tumble of factors," as Colorado's test does. 551 U.S. at 469 (plurality opinion) (citation omitted). Although the Court was concerned about a purely subjective test, a subjective element for true threats would not implicate that concern because it would *add* a speech-protective *mens rea* to Colorado's objective test. Regardless, *Wisconsin Right to Life* turned on "strict scrutiny" of a law that merely "burden[ed]" speech, *id.* at 464 (majority opinion), whereas Counterman's felony conviction rests on a *categorical* exception to the First Amendment.

2. The State offers virtually no support for its assertion that its totality-of-the-circumstances test avoids chilling protected speech. Thirteen pages of assurances rest on citations to a single case. See Resp. Br. 33-46 (citing *People ex rel. R.D.*, 464 P.3d 717 (Colo. 2020)). That case did not involve political hyperbole, art, minority religious expression, mentally ill speakers, or unwary speakers. Nor did it involve "poorly chosen" words that appeared more menacing than intended (*e.g.*, "A guy's version of edible arrangements," J.A. 462 (capitalization altered)). The speech at issue in *R.D.* was "ill come to [your school] and kill you." 464 P.3d at 722. In short, the State has identified precisely *zero* decisions that applied its objective test to safeguard protected speech.

3. The State does not meaningfully dispute that individuals with disabilities and disorders are more vulnerable under its purely objective standard because their behavior is often perceived as threatening. Resp. Br. 42-43. And it does not contest that certain "disorders [can] make [speakers] more likely to misinterpret context and emotion," and thus more vulnerable to prosecution under a purely objective standard. Pet. Br. 34. In fact, that was the prosecution's theory in this case: "Crazy people do crazy things." J.A. 374; see also Resp. Br. 5 ("C.W. worried that Counterman was mentally unstable and therefore unpredictable.").

The State instead asserts that "Colorado law provided Counterman with multiple avenues for introducing evidence of his mental health," and he "chose * * * not to pursue" them. Resp. Br. 43. But Colorado law narrowly circumscribes mental health evidence unless relevant to *mens rea*, *People* v. *Sommers*, 200 P.3d 1089, 1093 (Colo. App. 2008)—precisely the thing the State constitutionally should have had to prove, but did not. The State thus took advantage of the lack of a subjective intent requirement to exclude evidence of Counterman's mental

state as irrelevant to the crime charged. Pet. Br. 9. Throughout the trial, the State emphasized that "[a]ll [it] ha[d] to prove [wa]s that * * * [Counterman] knew he was communicating. Nothing else about his mental health matter[ed]." J.A. 389.

The best the State can manage is that "'community norms and conventions' provide important context." Resp. Br. 41. But the State provides no reason to believe that community norms will protect views *inconsistent* with those norms that seem threatening to those unfamiliar with them—such as religious speech featuring violent or apocalyptic rhetoric, Pet. Br. 38 ("Prepare to Meet Thy God" "Turn or Burn"); Alliance Defending Freedom Br. 3 (listener "will not be saved when the rapture comes"); lyrics featuring violent imagery, which have resulted in numerous arrests under objective standards, Pet. Br. 39; unfamiliar expressions, Pet. Br. 32 ("silver bullets are coming"); or just speaking Arabic on an airplane, Pet. Br. 38.

E. The Subjective Standard Will Not Hinder Prosecutions Or Disrupt Civil Protections

1. The State and its *amici* argue that intent is difficult to prove and that a subjective test will not "protect victims from the harms inflicted by threats." Resp. Br. 47; accord Multistate Br. 22-26. But they have not shown that the subjective standard would inhibit prosecutions. To the contrary, a subjective standard "already governs in federal prosecutions since *Elonis*," ACLU Br. 25, and the State offers no evidence that federal threat prosecutions have suffered. Nor does it provide any evidence that threats are underenforced in the numerous jurisdictions that already require proof of intent, encompassing more than a quarter of the nation's

population. Pet. Br. 40; see Multistate Br. 18 (identifying states that apply "a hybrid subjective mental standard").[4]

That is no surprise. "Frequently the most probative evidence of intent will be objective evidence of what actually happened." *Davis*, 426 U.S. at 253 (Stevens, J., concurring). In subjective-intent jurisdictions, trial courts "trust juries to make such inferential decisions" from objective circumstances, including the defendant's words. *Brewington* v. *State*, 7 N.E.3d 946, 964-965 (Ind. 2014); accord *United States* v. *Haddad*, 652 F. App'x 460, 462 (7th Cir. 2016) (upholding threat conviction where subjective intent determined from statements); *United States* v. *Howard*, 947 F.3d 936, 946 (6th Cir. 2020) (upholding threat conviction because jury "ma[d]e pragmatic inferences about [speaker's] *mens rea*"). The prosecution recognized as much at Counterman's trial, to establish *C.W.*'s mental state. See J.A. 378 ("How do you know what someone is thinking? * * * You look at the way they're acting.").

Nor is allowing a jury to consider whether the defendant knew a statement would cause fear "immunity." U.S. Br. 7, 9. The subjective intent requirement "simply permit[s] the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether []his communication was articulating an idea or expressing a threat." Paul T. Crane, *"True Threats" and the Issue of*

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[4] *Amici* identify statutes purportedly embodying an objective standard, Multistate Br. 16-18, but many *expressly* require intent, see, *e.g.*, Ala. Code 1975 §§ 13A-6-90.1(a), 13A-6-92(b) (prohibiting threats made with "improper purpose" and "intent * * * to carry out the threat"); D.C. Code § 22-3133(a)(3) (similar). In any event, this "Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law in toto, but rather to reverse the particular conviction." *New York* v. *Ferber*, 458 U.S. 747, 773 (1982).

Intent, 92 Va. L. Rev. 1225, 1275 (2006). Subjective intent matters only in exceptional cases in which the defendant can offer credible reason to negate the apparent intention of his words. Jurors are well-equipped to assess such explanations.

The State notes that "the harms of true threats include the risk that they escalate, leading to a violent confrontation." Resp. Br. 17 (cleaned up). But those concerns are present only if the speaker *intends* to threaten, not when a speaker accidentally uses language that sounds threatening. Respondent's *amici* also warn that perpetrators of domestic violence "often use threats as a method of control and intimidation, traumatizing and deflating the victim's will to resist." Legal Momentum Br. 6 (cleaned up). But a subjective standard would allow a jury to consider whether speakers *knew* their language would cause fear, and juries are fully capable of assessing whether explanations ring true.

The State also asserts that a subjective standard could hinder schools from taking protective steps "when a person issues a gun violence or bomb threat." Resp. Br. 50. But police can respond to apparent threats before learning whether the speaker is serious. And police need not go beyond the speaker's *apparent* intent to obtain probable cause to arrest. See, *e.g.*, *United States* v. *Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983).

Amici proffer other extreme examples of plainly threatening speech and claim that a subjective intent standard would "undermine the States' ability to protect their residents from hate crimes." Multistate Br. 25-26. But, again, jurors are perfectly capable of assessing whether a person who "uttered 'I will kill you,'" "while armed with a knife," Multistate Br. 26, understood her words would cause fear. Enforcement concerns are no reason to require juries to disregard substantial evidence

that a defendant acted from "a lack of understanding, as [o]pposed to a malicious intent." J.A. 439.

2. Civil restraining orders, which "effectuate the goal of prevention to a greater degree than may be widely realized," Nat'l Fam. Violence L. Ctr. Br. 20, provide another strong protection, see *Nollet* v. *Justs. of the Trial Ct. of Mass.*, 83 F. Supp. 2d 204, 212 (D. Mass. 2000); accord Helen Eigenberg et al., *Protective Order Legislation: Trends in State Statutes*, 31 J. Crim. Just. 411, 414 (2003), and are subject to lower standards of proof than criminal prosecutions, see, *e.g.*, D.C. Code § 16-1005(c) ("good cause"); Ohio Rev. Code. Ann. § 3113.31(D)(1) ("good cause" in court's discretion); Pa. Const. Stat. Ann. § 6107 (preponderance); ABA Comm'n on Domestic Violence, *Standards of Proof for Domestic Violence Civil Protection Orders (CPOs) By State* (2009). And "[e]mpirical studies have consistently shown a high level of satisfaction among women who have obtained protection orders." Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence*, 29 Cardozo L. Rev. 1487, 1510 (2008).

Nor would an intent requirement for true threats "invalidate" Colorado's stalking law or inhibit the State from prosecuting stalkers under statutes based on their conduct rather than the content of their speech. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (holding the First Amendment did not insulate related conduct from prosecution).

3. Some of the State's *amici* seek to avoid the question presented by recasting this prosecution as a simple stalking case. *Amici* law professors contend that "the constraints the First Amendment imposes on the government in stalking cases are meaningfully different than those imposed on the government when it regulates threats." First Amendment Scholars (Taylor) Br. 2-3. But as both the State and United States acknowledge,

Colorado prosecuted this as a *threats* case. Resp. Br. 9-11; U.S. Br. 5-6. The trial court allowed the charges to go to the jury on the ground that a reasonable jury could find that Counterman's "statements rise to the level of a true threat," J.A. 88, and the prosecutor "ask[ed] [jurors] to take a look at the words themselves," J.A. 378, in determining whether Counterman's "communication[s]" would cause "a reasonable person to suffer serious emotional distress," Colo. Rev. Stat. § 18-3-602(1)(c). The court below expressly rejected the State's invitation to forgo a true-threat analysis and treat the case as a stalking-by-conduct case, recognizing that the court "must address whether [Counterman's] speech consisted of true threats or, instead, consisted of protected speech." Pet. App. 10a; see also Cert. Reply 6; U.S. Br. 5. However *amici* might have tried this case, the State tried it as a threats case, based on Counterman's words. This Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella* v. *United States*, 445 U.S. 222, 236 (1980).

4. Finally, the United States argues as a fallback that the Court "should adopt a standard of recklessness and remand for application of that standard." U.S. Br. 28-31. Recklessness is insufficient as a matter of history and doctrine. See Pet. Br. 44-46. But even if the Court adopts that standard, Counterman's conviction cannot stand.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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