No. _____

IN THE

Supreme Court of the United States

CALVIN FAIR,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED

When the state prosecutes core political speech as a true threat, must the state prove the speaker's intent to terrorize, or is a recklessness standard sufficient?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Calvin Fair respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at *State* v. *Fair*, 307 A.3d 1126 (N.J. 2024), and is attached as Appendix A. The opinion of the New Jersey Appellate Division is reported at *State* v. *Fair*, 266 A.3d 1049 (N.J. Super. Ct. App. Div. 2021), and is attached as Appendix B. The trial court's opinion denying the defendant's motion to dismiss on constitutional grounds is not reported and is attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of

the laws.

N.J. Stat. Ann. § 2C:12-3a provides in pertinent part:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another … or in reckless disregard of the risk of causing such terror ….

STATEMENT OF THE CASE

This Court should grant certiorari and hold that when the government prosecutes core political speech as a true threat, the state must prove the speaker's intent to terrorize via speech instilling a reasonable fear of harm.

Civic "courage" is an essential feature of American democracy. *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Those "who won our independence believed … that public discussion is a political duty," and "they amended the Constitution so that free speech and assembly should be guaranteed." *Id.* at 375-76. To that end, the First Amendment promises a democracy committed to a free exchange of ideas. The government broke that promise when it imprisoned the petitioner for excoriating its officers, without proving that he intended to terrorize. The remedy adopted by this Court's recent decision in *Counterman* v. *Colorado*, 600 U.S. 66 (2023) — imposing a recklessness requirement on a stalking statute, in a true threat prosecution of low-value, non-political speech — is not transferrable to petitioner, who was silenced for protesting officers and challenging their policies. Rather, our constitutional structure, this Court's precedents, and the nation's history of suppressing dissent all point to the necessity of a strong intent requirement when the government prosecutes core political speech as a true threat.

A. Factual Background

Petitioner Calvin Fair is a black man who yelled coarse, furious speech at officers who were called to his home, then published speech lambasting law enforcement on Facebook. The crux of his criticisms was that officers were over-policing. For his unforgiving political protest, the State of New Jersey indicted him on a single count of terroristic threats, including for speech made "in reckless disregard of the risk of causing …. terror." N.J. Stat. Ann. § 2C:12-3a.

Specifically, on May 1, 2015, officers spoke to Fair's girlfriend in his front yard about a verbal dispute. App. 38. She asked officers to retrieve her 32-inch flat-screen television. App. 88. After officers knocked on the door for a quarter of an hour, Fair appeared in the second-story window and repeatedly told officers to "please … leave this property." App. 5. Fair shouted insults at the officers and called them names, including "devil." App. 40. Instead of defusing, officers responded by calling Fair "a six-year-old," by yelling back, "bark it up all you like," and by audibly laughing at him, mockingly asking each other, "What kind of devil are you?" App. 41.

Fair yelled that the officers' policing practices were "petty." App. 5. When officers told Fair's girlfriend that they would "sign a complaint on your behalf" after she had already "opted not to sign a complaint," Fair accused officers of "trying to keep him in the system." App. 4-5; App. 90. He angrily denounced a "$200,000 bail," App. 42 — for charges on which Fair was later acquitted by a jury — and accused

officers of a pattern of policing him unfairly, stating, "How many times you all been through this? …. How many times you going to come here?" App. 5.

In a final heated exchange with officers, Fair stated, "I never did anything …. [F]ucking tough guy." App. 42-43. Again instead of defusing, officers responded in a mocking tone, "I'm not the one hanging out the window. Come out here." App. 43. Fair stated, "Yeah, I'm hanging out the window because I'm taking care of my fucking mother, my 83-year-old-mother, nigga … I don't got nothing to come down there to talk to you about. I didn't do anything, so why I got to talk to you? …. Fucking thirsty ass nigga. You thirsty. Worry about a head shot, nigga." App. 43.

Notwithstanding that unpleasant exhortation, Fair never expressly indicated that he himself would take any action against officers. Officers also later conceded during testimony that Fair never "show[ed] or present[ed] any weapon" and that officers "didn't run for cover." And officers only issued a terroristic threats complaint against Fair after reviewing content published later that day on Facebook. App. 7.

After officers departed, Fair published to Facebook's News Feed: "I think it[']s about th[a]t time to give Mr[.] Al Sharpton & Mr[.] Rev. Jackson, internal affairs & my law[yer] a [c]all." App. 6. Again, Fair complained that law enforcement was over-policing him without just cause: "[O]ne th[in]g y[o]u won[']t do is disrespe[c]t me or my 84 year old mother [c]ause y[o]u [c]arry a badge & another th[in]g y[o]u not doin[g] is tryin[g] to keep me in[] [the] system with [p[e]tty fines & [c]complaints wh[e]n [I']m not [yo]ur job, I don[']t rob, I don[']t steal, y[o]u don[']t see me & [I']m

dam[n] sure not sellin[g] any drugs!!!" App. 95. Fair also complained about excessive force and unreasonable searches against him and his elderly mother: "My 84[-]year[-]old mother didn[']t deserve[] her door bein[g] ki[cked] in[] by 30 armed offi[c]ers with a[xe]s & shields drawn. Who th[e] fu[c]k was y[']all [c]omin[g] for[,] B[i]n La[de]n[?] Smfh [shaking my fucking head.]" App. 95.

Fair continued complaining about law enforcement's past and present treatment of him, and promised accountability: "Y[o]u disrespe[c]ted th[e] only person I have left on this Earth! Y[o]u will pay, whoev[er] had any involvement, wastin[g] tax[]payers['] money! Brin[g]ing all th[e]m offi[c]ers out for a[n] 84[-]year[] old wom[a]n! So sad but we will have th[e] last laugh! #justwaitonit[.]" (original in all caps) (accompanied by a "feeling angry" emoji). App. 95. In a final comment, Fair stated, "Th[e]n y[o]u got these gay ass offi[c]ers thinkin[g] they kno[w] [yo]ur life!!! Get th[e] fu[c]k outta here!! I kno[w] wh[a]t y[o]u drive & where all y[o]u motherfu[c]kers live at[.]" (original in all caps). App. 96.

Again, Fair never expressly indicated that he himself would take any action against officers. His posting to the News Feed also drew at least 27 "likes" and multiple supporting comments from other Facebook users, including, "Wooowwww that's crazy man"; "Smh [shaking my head] i[]s mom okay[?]; "wow"; "Smfh [shaking my fucking head]"; "Do whatever it is that you have to do!! They gon[na] learn today!"; and "I hope your mom is ok …. [T]hat's crazy." App. 96.

The police issued a terroristic threats complaint after reviewing Fair's Facebook postings. App. 7. On August 13, 2015, a Monmouth County Grand Jury

returned Indictment No. 15-08-01454, which accused Fair of a single count of terroristic threats, contrary to N.J. Stat. Ann. § 2C:12-3a "and/or" b, for his speech on May 1. App. 8. For this third-degree charge, Fair faced a penalty of "between three and five years" of imprisonment. N.J. Stat. Ann. § 2C:43-6a.

B. Proceedings Below

Fair moved to dismiss the indictment on numerous grounds, including that N.J. Stat. Ann. § 2C:12-3a violates the First Amendment, both on its face and as applied to Fair. App. 86-121. Fair's trial counsel argued that there was "no 'true threat,'" App. 87, that the speech was "political," App. 100, that Fair lacked the "intention" to terrorize the police, App. 108, and that it was impermissibly overbroad to prosecute Fair for political speech that recklessly criticized the manner in which officers were operating. App. 118.

The trial court denied dismissal. App. 65-85. The motion judge referred to incongruous precedents on the constitutionally required mental state: on one hand, the motion judge found that this Court in *Elonis* v. *United States*, 575 U.S. 723 (2015), "declined to decide whether a defendant's recklessness would be sufficient"; on the other hand, the motion judge relied on *Virginia* v. *Black*, 538 U.S. 343, 360 (2003), for the proposition that "[i]ntimidation is a type of 'true threat,' where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." App. 80, 82. Either way, the motion judge believed "defendant's statements were not protected speech." App. 82. The motion judge found, "Defendant made several threatening statements to law

enforcement officers on Facebook and in person …. [D]efendant's statements towards Officer Healey" about "'a head shot' coupled with his Facebook posts that he ['knows what cars the officers drive and where they live'] constituted a verbal act of intimidation with the intent to place the officer in fear of bodily harm or death[.]" App. 82-83. The motion judge also found, "Defendant's statements were not political[.]" App. 83.

Fair appeared for a jury trial from June 19-26, 2019, on the single combined charge of terroristic threats, N.J. Stat. Ann. § 2C:12-3a "and/or" b. During summation, Fair's trial counsel argued that Fair did not intend to terrorize, and only intended his oral and online remarks to be harsh criticisms of the manner in which law enforcement was operating. However, the court instructed the jury that a reckless mental state sufficed for a guilty verdict. App. 45-46. The jury convicted Fair. On August 19, 2019, the court imposed a 3-year prison term. App. 11.

On December 9, 2021, the Appellate Division reversed Fair's conviction. *State* v. *Fair*, 266 A.3d 1049 (N.J. Super. Ct. App. Div. 2021). The three-judge panel held that N.J. Stat. Ann. § 2C:12-3a "proscribes speech that does not constitute a 'true threat,'" infringing upon the First Amendment. *Id.* at 1056. The court "agree[d]" that the true threat exception "requires proof that a speaker specifically intended to terrorize." *Ibid.* The court also "agree[d]" that a true threat requires a "reasonable listener" to have "believed that the threat would be carried out." *Ibid.* Thus, the court found that N.J. Stat. Ann. § 2C:12-3a was overbroad, because it only requires that a speaker "reckless[ly] disregard[ed] … the risk of causing … terror," and does

not require proof that a reasonable listener perceived a true threat. *Id.* at 1059. The court warned that a "reckless disregard" standard "unconstitutionally encompasses speech and expression that do[es] not constitute a 'true threat' and therefore, prohibits the right of free speech guaranteed by the First Amendment." *Ibid.*

Separately, the Appellate Division also held that the trial court erred by failing to ensure a unanimous verdict. As the Appellate Division explained, "all" of the oral and online statements "were admitted and no limitation was placed on what the jury could find to be a terroristic threat." *Id.* at 1054, 1061. The "instructions allowed the jury to convict even when its members may have disagreed on which of the multiple theories was sustained." *Ibid.*

The State appealed as of right, asserting "a substantial question arising under the Constitution of the United States." N.J. Ct. R. 2:2-1(a)(1). Prior to oral argument in the Supreme Court of New Jersey, this Court decided *Counterman*.

In supplemental briefing, Fair argued that his speech was at a higher rung of First Amendment protection from the low-value stalking in *Counterman*, and that the radical differences in these cases compel different constitutional rules. Fair pointed to the line-drawing in *Counterman*, where this Court explained that although it had sometimes demanded proof of specific intent — where the government sought to suppress "dissenting political speech" that was a "hair's-breadth away from political advocacy" and thus "vulnerable to … prosecutions" that "bleed over" to protected speech — the "reason for that demand is not present here." *Counterman*, 600 U.S. at 81. Fair argued that, in contrast with *Counterman*, the

speech prosecuted in his case — a "strong protest[] against the government" — was paradigmatic dissent, and thus proof of intent was required to avoid criminalizing or chilling vulnerable political speech on a matter of public concern. *Ibid.*

However, on January 16, 2024, the New Jersey Supreme Court affirmed as modified the Appellate Division's order for a new trial, but reversed the Appellate Division's judgment that the state was required to prove the speaker's intent to terrorize. *State* v. *Fair*, 307 A.3d 1126 (N.J. 2024). The New Jersey Supreme Court "substantially adopt[ed]" the true threat standard applied in *Counterman*. *Id.* at 1137. Specifically, the court held that, when prosecuting speech as a true threat, the state must prove subjective and objective elements in order to avoid criminalizing protected speech. *Ibid.* The court "remand[ed] for a new trial … charging on both the objective and subjective components of N.J.S.A. 2C:12-3(a)[,]" neither of which was properly presented to the jury. *Id.* at 1141. As to the subjective element, the court required the state to prove that a defendant "consciously disregarded a substantial and unjustifiable risk that their threat to commit a crime of violence would terrorize another person, and that conscious disregard must be a gross deviation from the standard of conduct that a reasonable person in a defendant's situation would observe." *Id.* at 1137. The court rejected Fair's argument that his speech was constitutionally distinct from Counterman's speech, and held that a recklessness standard was sufficient and not constitutionally overbroad for purposes of both the First Amendment and its state constitutional equivalent. *Id.* at 1137-40. As to the objective element, the court required the state to prove that "a

reasonable person similarly situated to the victim" would have viewed the message as threatening violence, "given the entire interaction with defendant." *Id.* at 1140-41. The court directed the Model Criminal Jury Charges Committee to revise the model charge for N.J. Stat. Ann. § N.J.S.A. 2C:12-3(a) in accordance with its opinion. *Id.* at 1141. The court also affirmed the Appellate Division's holding that a new trial was required because the trial court failed to appropriately instruct the jury on its obligation to deliver a unanimous verdict. *Id.* at 1141-42.

REASONS FOR GRANTING THE PETITION

I. *Counterman* did not resolve the mental state required when the government prosecutes dissenting political speech as a true threat.

In *Counterman*, 600 U.S. at 73, this Court was confronted with "speech not independently entitled to protection": rather, the defendant's communications were unrelated to public policy, low-value, and indeed akin to stalking. This Court still held that it would be "a violation of the First Amendment" for a state to "not have to show any awareness on [a defendant's] part that the statements could be understood" as threats. *Id.* at 82. This Court deliberated upon "what precise mens rea standard suffice[d] for the First Amendment purpose at issue" in *Counterman*, and ordered Colorado to prove that Counterman's statements were at least reckless. *Id.* at 73. Under those circumstances, this Court did "not require that the State prove the defendant had any more specific intent to threaten the victim." *Ibid.*

This Court acknowledged that in its more speech-protective incitement decisions, it had "demand[ed]" the government prove "specific intent, … equivalent to purpose or knowledge." *Id.* at 81. But this Court held that in *Counterman*, "the

reason for that demand is not present here." *Ibid.* The Court articulated that it had been "compel[led]" to "demand" the government prove intent in those decisions, as opposed to settling for recklessness, because the prosecuted speech was:

> • "a hair's-breadth away from political advocacy — and particularly from strong protests against the government and prevailing social order";
>
> • "dissenting political speech at the First Amendment's core" that was "so central to the theory of the First Amendment"; and
>
> • "so vulnerable to government prosecutions."

Id. at 81-82.

Thus, this Court opinion singled out "dissenting political speech" that is "at the First Amendment's core" yet "vulnerable to government prosecutions" — particularly "strong protests against the government and prevailing social order" — as the distinguishing features of prosecutions of speech where a "strong intent requirement" is demanded. *Ibid.* Plainly, this Court was correct that those distinguishing features were glaringly absent from Counterman's nonideological speech: Counterman's speech was not "political advocacy" or "dissent[]," was not a "protest[] against the government" or "prevailing social order," and was not otherwise "central to" First Amendment concerns. *Ibid.* Accordingly, this Court ordered that a "strong intent requirement" was not necessary in Counterman's case to prevent "legal sanction" from "bleed[ing] over" to protected speech. *Ibid.*

But that line-drawing left unresolved, for another day, whether a recklessness standard "suffices for the First Amendment purpose" of preventing a prosecution for an alleged true threat from bleeding over to a speaker's political

opinions and exhortations. *Id.* at 73. When the government prosecutes dissenting political speech as an alleged true threat, "the reason for that demand" for a "strong intent requirement" is as present as it was in "all the cases in which the Court demanded a showing of intent." *Id.* at 81. This Court should grant certification and expressly hold that when the government criminally prosecutes core political speech as an alleged true threat, the state must prove the speaker's intent to terrorize.

II. The decision below is wrong.

A. Our constitutional structure demands a specific intent requirement.

Free expression is fundamental to our democracy. The "theory of our Constitution" is that, rather than let the government "persecute[e] … opposition by speech," it is better to let "opinions and exhortations" be subjected to the "competition of the market." *Abrams* v. *United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

The First Amendment guarantees a "profound national commitment" to that free exchange of ideas. *Watts* v. *United States*, 394 U.S. 705, 708 (1969). It protects the right to express hostile ideas against our "government and public officials" without fear of retaliatory prosecution. *Ibid.* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or other matters of opinion." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943). The "government has no power to restrict expression because of its message, its ideas, its subject matter, or

its content[,]" *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972), no matter how "offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989).

The First Amendment's guarantee also includes the right to express those unorthodox ideas in a manner of speech that is shocking and spiteful. "Words are often chosen as much for their emotive as their cognitive force." *Cohen* v. *California*, 403 U.S. 15, 26 (1971). "[R]hetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with … emotional appeals." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). Thus, "attacks on government and public officials" are not less protected merely because a speaker chooses language that is "'vehement, caustic, and … unpleasantly sharp.'" *Watts*, 394 U.S. at 708 (quoting *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

"[P]olitical speech … is central to the meaning and purpose of the First Amendment[,]" *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 329 (2010), and is entitled to the "highest rung" of protection. *Claiborne Hardware*, 458 U.S. at 913. This Court has extended this "special protection" to "speech on public issues" and "matters of public concern." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes … the manner in which government is operated or should be operated[.]" *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966).

Political speech advances the "primary values the First Amendment is thought to serve." Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism* at 9 (1st ed. 2005). First, citizens must be able to engage in a "robust discussion" on a "broad spectrum of … ideas" to "meet the responsibilities of democracy." *Id.* at 7. Second, conflict in the public sphere promotes "character traits that are essential to a well-functioning democracy," including "skepticism, … distrust of authority, and independence of mind." *Ibid.* Third, freedom of political speech "help[s] check … one of the greatest threats to democracy": "public officials [who] attempt to punish speech that challenges them or their policies." *Id.* at 7-8. Fourth, it "promotes the long-term cohesiveness of society," as citizens are "more likely to accept adverse decisions" if their "dissenting and nonconforming views" are not suppressed. *Id.* at 8. Fifth, it furthers citizens' "search for truth," presuming it is "better for each of us to decide these things for ourselves than for the government to decide them for us." *Ibid.*

Exceptions to our national commitment to the free exchange of ideas are "narrowly limited." *Black*, 538 U.S. at 358. As Justice Holmes warned: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death[.]" *Abrams*, 250 U.S. at 630. That eternal vigilance against silencing ideas is necessary because "'people are prone to … 'sweep away all opposition.'" Stone at 76 (quoting *Abrams*, 250 U.S. at 630).

A too-broadly-applied exception to the First Amendment chills the free exchange of ideas, even if there is no suppression via prosecution. First Amendment

freedoms need "breathing space … to survive." *Houston* v. *Hill*, 482 U.S. 451, 467 (1987). Political speech is "easily chilled" by the prospect of prosecution. Stone at 10. That is because the "direct benefit … of expressing a dissenting view is relatively slight," "but the cost … of being imprisoned … is potentially staggering." *Ibid.* Indeed, "the risk of punishment for … criticism can effectively silence dissent." *Id.* at 39. "[W]ithout a robust protection for free speech," the citizenry get an "impoverished public debate," to the "detriment of democracy." *Id.* at 11.

True threats are a narrow exception to the First Amendment's guarantee of a free exchange of ideas. *Watts*, 394 U.S. at 707. The state's task is to distinguish true threats from disfavored messages; the trouble is, disfavored political messages often convey both threatening and nonthreatening meanings. Prosecuting political expression as reckless, without "requir[ing] proof that the speaker intended his statement to be taken as a threat," creates a "substantial risk of conviction" for a mere "expression of political enmity," and causes political messengers to "give a wide berth to any comment that might be construed as threatening." *Rogers* v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring).

This Court has previously recognized that "fear of serious injury alone cannot justify suppression of free speech and assembly," *Whitney*, 274 U.S. at 376, that allowing feared messages is "not a sign of weakness but of strength," *Cohen*, 403 U.S. at 25, and that the "greatest menace" to democracy is not bombastic rhetoric, but an "inert people." *Whitney*, 274 U.S. at 375. When the state prosecutes political speech as a true threat, our constitution demands a strong intent requirement.

B. This Court's precedents demand a specific intent requirement.

In *Watts* and *Black*, this Court strongly suggested that in a prosecution of political speech for an alleged true threat, the First Amendment requires the state to distinguish punishable from permissible intent.

In *Watts*, 394 U.S. at 705-08, this Court reversed the conviction of a defendant who merely uttered abusive words against government officials, as a means of expressing grievances against the government. Watts slammed the military for its policy of drafting young men into the Vietnam War: "I have already received my draft classification as 1-A …. I am not going." *Id.* at 706. In his next breath, he allegedly threatened the President: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Ibid.*

Watts moved for an acquittal on the grounds that he lacked intent to threaten. *Id.* at 706-07. Rather, Watts merely intended to "stat[e] a political opposition to the President." *Id.* at 707. Counsel urged, "What he was saying," in "a very crude" and "offensive" way, was that the President "symbolized" his "real enemy": a military service that would draft him into combat against his will. *Ibid.*

This Court ordered the lower court to enter that judgment of acquittal. *Id. at 707.* It "distinguished" a "true threat" from "constitutionally protected speech." *Ibid.* Based on the "context, language, and reaction of the listeners," the Court decided that Watt's speech fell into the latter category because Watts intended his speech as "political hyperbole" not meant to be taken literally. *Id.* at 708.

In *Black*, a majority conveyed that the First Amendment required the government to prove the speaker's intent, to avoid suppressing protected political ideology. The hate speech in *Black* was as scary as speech gets, and it was indisputably reasonable for anyone who observed the burning crosses in *Black* to feel threatened. Barry Black led a Klan rally where speakers set fire to a 25- to 30-foot cross in view of passing cars. *Black*, 538 U.S. at 349. At least one witness felt "very … scared." *Id.* at 349. But this Court still took pains to recognize that cross-burning is frequently intended for ideological purposes other than to terrorize, including to recruit, to promote group solidarity, and to express support for political candidates. *Id.* at 353-56.

The majority in *Black* conveyed that the distinguishing feature of a "true threat" is "where a speaker directs a threat … with the intent of placing the victim in fear of bodily harm or death." *Id.* at 344. Virginia's ban on "cross burning carried out with the intent to intimidate" satisfied that definition of the true threat exception, and was "proscribable under the First Amendment." *Id.* at 363.

The court saw "a constitutional need for a distinction between cross burning intended to intimidate and cross burning as a statement of ideology." *Counterman*, 600 U.S. at 92 (Sotomayor, J., concurring) (internal quotation marks omitted). Justice O'Connor's four-justice plurality in *Black* conveyed that a jury instruction which relieved the government of its burden to prove intent "strips away the very reason why a State may ban cross burning." *Id.* at 365. She explained that "a cross burning, even at a political rally," may arouse fear "in the vast majority of citizens,"

but the jury must still decide "whether a particular cross burning is intended" to cause terror, because a particular cross burning "not … intended to intimidate" would "almost certainly be protected expression." *Id.* at 366-67. The jury instruction "would create an unacceptable risk of the suppression of ideas," because relieving the government of its burden to prove intent may punish "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Id.* at 365. Although "burning a cross may mean that a person is engaging in constitutionally proscribable intimidation … that same act may mean only that the person is engaged in core political speech." *Ibid.* The jury instruction short-circuited the jury's consideration of "contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367.

Justice Souter's three-justice coalition likewise found that but for an intent requirement, nonthreatening ideological expression would be suppressed. Justice Souter explained that speech "can broadcast threat and ideology together, ideology alone, or threat alone[.]" *Id.* at 381. He articulated that the dividing line is the intent of the speaker: "[R]ecall that the symbolic act of burning a cross … is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten." *Id.* at 385. Justice Souter explained that the "practical effect" of relieving the state of its burden to prove intent to terrorize is to chill speech, by "draw[ing] nonthreatening ideological expression within the ambit

of the prohibition of intimidating expression, as Justice O'Connor notes." *Id.* at 386. That amounts to "official suppression of ideas." *Id.* at 387.

A reckless disregard standard would not survive this Court's overbreadth analysis in *Watts* and *Black*. Anyone who lights a massive cross on fire in view of a public highway, or who goes to the National Mall and threatens to shoot the President, speaks despite awareness of the risk that the political speech is perceivable as threatening. *Counterman*, 600 U.S. at 96 (Sotomayor, J., concurring) ("[I]t is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened. Recklessness, which turns so heavily on an objective person standard, would not have been enough."). Yet this Court still ordered an acquittal outright in *Watts* and conveyed in *Black* that cross-burning would be constitutionally protected core political speech if intended for a non-terrorizing purpose.

This Court's incitement cases likewise suggest that recklessness is insufficient when a state prosecutes political speech as a true threat. In these cases, the Court recognized that, to avoid suppressing political speech, a state must prove the speaker's intent when prosecuting threatening speech as incitement.

In *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), this Court adopted an intent-based constitutional test. The defendant, wearing "Klan regalia" and surrounded by firearms, denigrated Black and Jewish Americans with racial slurs, warned that the Klan would march "four hundred thousand strong," and promised

"revengeance." *Id.* at 445-46. To prosecute these threatening communications, this Court held that the government must prove the speech was "*directed to* inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added). This specific intent standard was necessary to avoid "punish[ing] mere advocacy" and the "abstract teaching … of the moral necessity for a resort to force and violence." *Id.* at 448-49. The Court overruled *Whitney*, which had held that "'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." *Id.* at 447, 449.

This Court applied *Brandenburg*'s intent-based test to protect similarly-threatening political speech in *Claiborne Hardware* and *Hess* v. *Indiana*, 414 U.S. 105 (1973). In *Claiborne Hardware*, NAACP leader Charles Evers in Mississippi called for a discharge of the police force and for a total boycott of all white-owned businesses; intoned that boycott violators would be "disciplined"; and said that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." 458 U.S. at 902. This Court found that the "emotionally charged rhetoric … did not transcend the bounds of protected speech set forth in *Brandenburg*." *Claiborne Hardware*, 458 U.S. at 928**.** In *Hess*, police ordered antiwar demonstrators to clear the street, and Hess responded, "We'll take the fucking street later." 414 U.S. at 107. Applying *Brandenburg*'s intent-based test, this Court concluded that "there was no evidence … his words were intended to produce, and likely to produce, imminent disorder." *Id.* at 109.

In each of these cases — *Brandenburg*, *Claiborne Hardware*, and *Hess* — this Court decided the speaker's intent distinguished unprotected speech threatening violence from protected political speech that merely advocated violence. That conveys a recklessness standard — where the speaker's intent is not taken into account — would be insufficient to distinguish core protected political speech from unprotected true threats. *Counterman*, 600 U.S. at 98 (Sotomayor, J., concurring) ("this Court's own cases show time and again how true-threat[] prosecutions sweep in political speech"). Indeed, the constitutionally protected yet threatening political speech in these 3 landmark cases — at *Brandenburg*'s white supremacist rally, at *Claiborne Hardware*'s civil rights boycott, and in *Hess*'s officer-citizen encounter — would have been unprotected if the states could have relied on *Counterman*'s recklessness theory. *Counterman*, 600 U.S. at 99 (Sotomayor, J., concurring) ("Under a recklessness rule, *Claiborne*" and *Brandenburg* "would have come out the other way. So long as Evers had some subjective awareness of some risk that a reasonable person could regard his statements as threatening, that would be sufficient …. [And in *Brandenburg*], there would be at least some risk that a reasonable resident of those cities could feel threatened[.]").

C. Historical experience conveys a recklessness standard is insufficient.

If history shows anything, it is that a legal test focused on whether political speech is reckless or reasonable is an insufficient substitute for a showing of intent to terrorize. That is because "well-intentioned citizens" often "inflate the potential dangers of" the non-conforming political ideas of perceived outsiders. Stone at 524.

Hysteria aimed at those who dare to express nonconforming ideas has reared its ugly head throughout American history. In the era leading to the First World War**,** "many established Americans[] fear[ed] that the nation had been inundated by an alien tide" and "distanced themselves from socialists, pacifists, anarchists, German Americans … and other dissenters." Stone at 154, 182. During the First Red Scare, Judge Learned Hand wrote to Justice Holmes about "exaggerated dangers" during "four years of national hysteria," and said, "I own a sense of dismay at the increase in all the symptoms of apparent panic." *Id.* at 224. During the Second World War, there was a "public clamor on the West Coast," including "crie[s]" from "all the West Coast newspapers," "for a prompt evacuation of Japanese aliens and citizens alike." *Id.* at 294. During the Second Red Scare, Judge Learned Hand observed that "hysteria in this country has now reached such a peak that there are few who would dare to acknowledge any Communist inclinations." *Id.* at 399. During the civil rights era, leaders "sought to condemn segregation and discrimination to audiences who hated and feared those messages." Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* at 16 (1st ed. 2018).

Relatedly, government officials have throughout American history "undervalue[d] the dangers of suppressi[ng]" political ideas in the name of security. Stone at 524. "[A]lthough each generation's effort to suppress *its* idea of 'dangerous' speech seemed justified at the time, each proved with the benefit of hindsight to be an exaggerated response to a particular political or social conflict." *Ibid.* During the

First World War, the Postmaster General suppressed dissent in the mail. *See generally Masses Publishing Co.* v. *Patten***,** 244 F. 535 (S.D.N.Y. 1917). During the Second World War, the government acceded to the "public clamor" for internment. Stone at 294. *See generally Korematsu* v. *United States*, 323 U.S. 214 (1944). Then-U.S. Attorney General Frances Biddle later acknowledged the government's "lack of … courage," which resulted in Japanese-Americans being treated as "untouchables" who "had to be shut up." Stone at 294. Biddle belatedly recognized that "in times of panic," free expression is endangered by "the people themselves, who, in fear of an imagined peril," demand that "others must be stifled." *Id.* at 393. During the Second Red Scare, governments "were caught in a frantic contest to enact the most repressive anti-Communist legislation possible," as a "pervasive sense of fear … gripped the American people." *Id.* at 323, 341. During the civil rights era, the FBI "targeted Reverend Martin Luther King, Jr. … and other[]" civil rights leaders, in operations "aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that" activism "challenging racial, social, and economic injustice was dangerous" and that the government had a duty "to combat perceived threats." Leslie Alexander and Michelle Alexander, *The 1619 Project*, Ch. 4 ("Fear") at 116 (1st ed. 2021). It is no accident that King's "historic letter came from a Birmingham jail[.]" Strossen, *Hate* at 16. The government considered King "to be a dangerous radical who had to be locked up," Suzanne Nossel, *Dare to Speak: Defending Free Speech For All* at 50 (2020), and indeed, King was locked up "no less

than twenty-nine times." Jacob Mchangama, *Free Speech: A History from Socrates to Social Media* at 298 (2022).

This Court adopted intent-based speech tests as a reaction against the failure of objective tests to protect political ideas from hysteria and over-suppression. Before the First World War, the few cases that did exist on the Speech Clause "reiterate[d] that states had the power to punish 'bad tendencies' in speech." Melvin I. Urofsky, *Louis D. Brandeis: A Life* at 549 (2009). When this Court upheld a prosecution of wartime criticism in *Schenck* v. *United States*, 249 U.S. 47, 52 (1919), it articulated the "clear and present danger" test. This test "raised objections from free-speech advocates" who recognized it would result in the suppression of "almost any[]" speech "that even questioned the established order," because any critical ideas "could be considered clearly and presently dangerous." *Id.* at 550. Indeed, the author of the *Schenck* test, Justice Holmes, soon found himself in the minority as to what speech constituted a "clear and present danger." When, in *Abrams*, this Court applied the clear-and-present danger test to uphold another conviction for wartime criticism, Justices Holmes and Brandeis dissented. Justice Holmes concluded that Abrams had merely been "trad[ing] in ideas" and had "no … intent" to bring about a proscribable evil. *Abrams*, 250 U.S. at 626. Thereafter, Justice Brandeis in *Whitney* condemned the suppression of speech by "cowards" who "fear political change." 274 U.S. at 377. Brandeis's opinion in *Whitney* on the "political duty" of citizens to engage in "public discussion," *ibid.*, has "informed all discussions of free speech since." Urofsky at 641. Indeed, this Court "adopted Brandeis's notion of free speech

in 1969[,]" *ibid.*, when it overruled the majority in *Whitney*, abandoned the objective bad-tendency and clear-and-present-danger tests, and applied an intent-based test to protect political discussion from state repression. *Brandenburg*, 395 U.S. at 449.

III. This is a recurring issue.

The specter of prosecution for the expression of dissenting ideas has been a recurring worry since the founding. Congressman Matthew Lyon, the first person indicted under the Sedition Act of 1798, warned that it would cause people to "hold their tongues and make toothpicks of their pens." Stone at 20. Today, public polling shows that only 34 percent of Americans say they believe all Americans enjoy freedom of speech completely, *New York Times/Siena College Research Institute Poll* (Feb. 9-22, 2022), only 45 percent of Americans think freedom of speech is "secure," *Free Expression in America Post-2020: A Landmark Survey of Americans' Views on Speech Rights*, Knight Foundation-Ipsos (Jan. 6, 2022), and almost half of Americans — 46 percent — report feeling less free than a decade ago to "express [a] viewpoint" on the subject of politics. *New York Times/Siena Poll*.[1]

An intent-to-terrorize test averts the chilling of political speech, by assuring "the speaker who had no … intention" to "bring about the harms associated with threatening speech" of the "necessary breathing space to speak freely and openly." Paul T. Crane, *Note: "True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1273

[1] The Times/Siena poll is available at https://int.nyt.com/data/documenttools/free-speech-poll-nyt-and-siena-college/ef971d5e78e1d2f9/full.pdf. The Knight Foundation survey is available at https://knightfoundation.org/wp-content/uploads/2022/01/KF_Free_Expression_2022.pdf.

(Oct. 2006). If the speaker is prosecuted anyway, the intent-to-terrorize test guards against an overbroad conviction, by "permit[ting] the speaker an opportunity to explain" to a jury that he was "articulating an idea" and "did not mean to threaten the recipient." *Id.* at 1275-76. But if a recklessness test applies, then the speaker's "actual intent" is "immaterial," and political speech is "unnecessarily chilled." *Id.* at 1276. In short, recklessness "is a troubling standard for juries in a polarized nation to apply in cases involving heated political speech." *Counterman*, 600 U.S. at 99 (Sotomayor, J., concurring). There are numerous contexts where a recklessness test forces speakers to make dissent comfortable to everyone, or risk prosecution:

(A) Speech challenging public officials: Under a recklessness standard, the political criticism in *Watts* itself would be vulnerable to punishment or self-censorship, and would not be entitled to the judgment of acquittal ordered by this Court. When Watts communicated that he would shoot President Johnson, he was surely aware of the risk of causing fear, but continued anyway. Anyone in sight of the White House who threatens to shoot the president is aware of a substantial risk that ordinary listeners will perceive the speech as out-of-bounds — even if the speaker, like *Watts*, only had a protected intent to symbolically attack policy.

(B) Speech challenging police action: This Court has protected verbally abusive messages hurled at police officers that would instead be punished or chilled under a reckless disregard standard, even if intended only as criticism. *See*, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 525-27 (1972) (conviction for "opprobrious" words to an officer "sweeps too broadly" when speech may only have been "intended to

convey disgrace"); *Lewis* v. *City of New Orleans*, 415 U.S. 130, 132 (1974) (reversing conviction for "cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty"). In *Hill*, 482 U.S. at 453, this Court found unconstitutionally overbroad the conviction of a defendant who "began shouting" at officers and challenged their stop of a friend. The Court elaborated that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Id.* at 461. The "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 463. This Court emphasized, "Today's decision reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint …. [T]he First Amendment recognizes, wisely we think that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Id.* at 472. A reckless disregard standard does not provide the "breathing space" necessary for "expressive disorder" in "challeng[ing] police action without … risking arrest." *Id.* at 463, 472.

(C) Hate speech: Although loathsome, the messages in hate speech can have protected intents, despite being incompatible with a recklessness standard. Speakers who intended to express support for President Nixon burned crosses in view of the public, in disregard of the risk of causing fear. *Black*, 538 U.S. at 357.

Another viscerally terrifying example of white supremacist expression also caused great fear, but was nonetheless protected: the 1970s plan of the National Socialist Party of America to march in Skokie, Illinois, a city with a substantial Jewish population that included many Holocaust survivors. A federal court acknowledged "a large segment of the citizens of the Village of Skokie … are … revolted," but called for "'freedom for the thought that we hate.'" *Collin* v. *Smith,* 447 F.Supp 676, 702 (N.D. Ill. 1977) (quoting *United States* v. *Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting)). As the court explained about speakers who cause fear, "it is better to allow those who preach racial hate to expend their venom in rhetoric than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear …. The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country." *Id.* at 702. The Seventh Circuit affirmed. *Collin* v. *Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978) ("civil rights … must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises"), cert. den., 439 U.S. 916 (1978).

(D) Civil rights speech: For marginalized speakers, who are well aware society views them disfavorably, a reckless disregard standard can silence any speech reasonably interpretable as terrorizing, even political messages with protected intents. A Black Lives Matter activist repeating the lyrics of a song

protesting police brutality while standing near police officers might speak about "tak[ing] out a cop or two," thus running a real risk of a conviction for reckless speech, even if the protester did not intend to terrorize and only intended to crudely express displeasure. N.W.A., *Fuck tha Police*, on Straight Outta Compton (Ruthless/Priority 1989). Also, as an ACLU brief in the Skokie case pointed out, "the very same speech-protective principles that permitted the neo-Nazis' provocative march in a community where their ideas were viewed as hateful and dangerous had also permitted 'Martin Luther King, Jr.'s confrontational march into' another Illinois community—Cicero. In 1966, *Time* magazine described Cicero as a 'Selma[, Alabama,] without the Southern drawl.' Accordingly, many of Cicero's officials and other residents viewed the ideas of the pro-civil rights marchers as hateful and dangerous." Nadine Strossen, *Free Speech: What Everyone Needs To Know* at 64 (1st ed. 2024).

(E) Wishing or imagining or hoping for harm: Rulers have historically been "intoleran[t]" toward wishes for harm upon them. *Watts*, 394 U.S. at 709-10 (Douglas, J., concurring) (detailing "suppression of speech" under the English Statute of Treasons, which made it a crime to "compass or imagine the Death of … the King."). One man was indicted for predicting that the king would "soon die." *Id.* at 709. Another was indicted for saying that he "wished all the gentry in the land would kill one another," so that others "might live the better." *Id.* at 710.

This Court has since protected hoping for harm to befall officials. In *Rankin* v. *McPherson*, 483 U.S. 378 (1987), an employee in a constable's office criticized

President Reagan for cuts in government benefits. She also said, "if they go for him again, I hope they get him." *Id.* at 378. The constable's office fired her. *Ibid.* This Court held that McPherson's statements were protected political expression. Specifically, this Court acknowledged that McPherson's "hope" that the president would be shot "plainly dealt with a matter of public concern," especially given that "the statement was made in the course of a conversation addressing [his] policies[.]" *Id.* at 386. This Court agreed that a speaker expressing a "hope" that bodily harm would befall the president was not a "threat to kill," and that "statements criticizing public policy and the implementation of it must be … protected" with "breathing space." *Id.* at 386-87. A recklessness standard is ill-suited to provide that space.

(F) Satirical speech: Speakers intending to make political points often incorporate satirical expressions of bodily harm into their messages. In 2014, comedian Seth Rogen released the film "The Interview," in which he was recruited by the CIA to kill a real person, the head of North Korea's government. Rogen found the leader's deification propaganda to be "insane and hilarious," and he filmed the death of Kim Jong Un in the most "explicit way imaginable": "blast[ing] the wax head with flamethrowers, causing the layers to melt," followed by a "detonat[ion], blowing up what was left of his head." The North Korean government accused Rogen of an "act of terror." Seth Rogen, *Yearbook* at 177-197 (1st ed. 2021).

Most ordinary Americans likely agree with Rogen's viewpoint, so the risk of punishment or self-censorship to avoid punishment in that instance was low. But the same cannot be said for similar speech aimed at an American official by another high-

profile speaker. Comedian Kathy Griffin found President Trump's comments on "blood coming out" of a Fox News reporter's head to be a sexist reference to menstruation, and in 2017 she released artwork portraying blood coming out of the president's decapitated head. This time, it was the United States government that treated a speaker as having committed an act of terror, regardless of apparent intent to criticize. For months, Griffin was "detained at every single airport [she] went to" as she "deal[t] with a full investigation" by the United States government, which notified her that she could be prosecuted. *Kathy Griffin says she faced potential 'conspiracy to assassinate the president' charge over Trump head photo*, The Hill (Dec. 8, 2018).

(G) Speech by the governing class: Like the people being governed, officials themselves make recurring use of expression threatening violence. That is, there is no clear consensus even among office holders that threatening speech is out of bounds. This very month, ex-President Trump released a photograph of President Biden restrained in a hog-tied manner in the back of a pickup truck. Relatedly, Governor Ron DeSantis has threatened to "start slitting throats" of federal employees; House Speaker Nancy Pelosi threatened to "punch Trump out"; House Speaker Kevin McCarthy threatened "to hit" Pelosi with his gavel; and in New Jersey, Governor Chris Christie threatened to "take the bat out" on a state senator, while the state senate president threatened to "punch Chris Christie in the head."[2] It

[2] *Trump Shares Video Featuring Image of a Hog-Tied Biden*, The New York Times (March 30, 2024); *Outrage after DeSantis says he'd 'start slitting throats' if elected president*, The Guardian (Aug. 4, 2023); *Pelosi says she doesn't regret threatening to*

may be that threatening speech by the governing class is not prosecuted because it is generally presumed to be intended as political criticism; it is therefore troubling that, when the government criminally prosecutes ordinary Americans for indistinguishable political expression – and alleges that they crossed the line – the government need not prove intent to terrorize, and it is no defense against conviction if the speaker only intended to be critical of the government.

IV. There is a split on the mental state required for the prosecution of political speech as a true threat.

The New Jersey Supreme Court's decision to implement a recklessness standard under these very un-*Counterman*-like circumstances is in conflict with "the decision[s] of []other state courts of last resort." Sup. Ct. R. 10(b) (Considerations Governing Review on Certiorari). Kansas provides the closest parallel: Like New Jersey, Kansas accused a defendant of a true threat for speaking recklessly to officers about the manner in which the government was operating. *State* v. *Boettger,* 450 P.3d 805, 817 (Kan. 2019), cert. den., 140 S.Ct. 1956 (2020). Unlike petitioner Fair, who criticized officers for over-policing, Boettger criticized officers for under-policing. Boettger "found his daughter's dog in a ditch" from a gunshot wound. *Id.* at 806. He became "upset" when he discovered that "the sheriff's department had not investigated." *Ibid.* He went to his convenience store, and

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punch Trump, CNN (Oct. 18, 2022); *McCarthy says 'it will be hard not to hit' Pelosi with gavel if he becomes House Speaker*, CNN (Aug. 2, 2021); *Democrats say Gov. Christie went too far with remark about N.J. Sen. Loretta Weinberg*, NJ.com (April 15, 2011); *New Jersey Politician on Chris Christie: 'I Want To Punch Him In His Head'*, Huffington Post *(July 3, 2011).*

mouthed off about it: he "complain[ed]" to one employee "about the sheriff department's inaction," and said, "these people … might find themselves dead in a ditch somewhere." *Id.* at 806-07. Boettger then told another employee, whose "father was a member of the sheriff's department," "that [the employee] was going to end up finding [his] dad in a ditch." *Id.* at 807. Kansas prosecuted Boettger for "reckless disregard of the risk of causing … fear." *Ibid.* At trial, Boettger argued "he had no intent to threaten anyone and did not mean … any harm." *Ibid.* On appeal, the Kansas Supreme Court held that a "reckless disregard provision is unconstitutionally overbroad," *id.* at 806, because it would punish or chill "political speech." *Id.* at 817-18. The court identified the specific overbreadth problem: "Acting with awareness that words may be seen as a threat leaves open the possibility that one is merely uttering *protected political speech*, even though aware some might hear a threat." *Ibid.* (emphasis added). The court cited three examples of how a recklessness standard criminalizes political speech. *Id.* at 818. First, the court observed that Watts himself "could have been convicted under the Kansas statute," because Watts "was aware of the risk of causing fear but continued anyway." *Ibid.* Second, the court posed the hypothetical of a Black Lives Matter protester who "runs a real risk of a conviction for reckless threat under Kansas' law," merely for expressing political views in the presence of officers, "even if the protester did not intend to threaten the police." *Ibid.* Third, the court observed that burning a cross within view of a public roadway or other houses, as in *Black*, "could be punishable under Kansas law … even if the protester intended politically protected speech on private property and did not

intend to cause fear of violence," because "the perpetrators would be conscious that it is seen as a threat." *Ibid.* The court "found these examples persuasive illustrations" that the reckless criminal threat provision of the Kansas statute criminalizes political speech. *Id.* at 818-19.

The North Carolina Supreme Court similarly held, in a prosecution of an alleged true threat for speaking about the manner in which the government was operating, that the state must prove intent to terrorize. *State* v. *Taylor*, 866 S.E.2d 740, 753 (N.C. 2021). Taylor criticized under-prosecuting: He was upset that his district attorney had decided "not to criminally prosecute the parents of a child after the younger's death under unusual circumstances." *Id.* at 744. He published Facebook posts criticizing the district attorney for her decision, advocating "rebellion" and "death" and receiving many likes from his social network. *Id.* at 745-46. Like the Kansas Supreme Court, the North Carolina Supreme Court concluded that a standard of proof less than intent to terrorize would punish or chill "political speech." *Id.* at 754. The court emphasized that the "First Amendment interest in fostering speech is particularly substantial when, as in the present case, the speech in question is a message critiquing the manner in which" the government's "public duties" are being "carr[ied] out." *Ibid.* The court "reject[ed] any interpretation" which "would 'chill[] constitutionally protected political speech because of the possibility that the [state] will prosecute — and potentially convict — somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.'" *Ibid.* (quoting *Black*, 538 U.S. at 365).

Other states' high courts have ruled similarly. The Indiana Supreme Court held, in a prosecution of an alleged true threat against a judge, that the state must prove "the speaker intend[ed] his communications to put his targets in fear for their safety[.]" *Brewington* v. *State,* 7 N.E.3d 946, 964 (Ind. 2014), cert. den., 574 U.S. 1077 (2015). The court acknowledged greater protections for political speech, including speech "about public officials or issues of public or general concern." *Id.* at 953. The court agreed with the defendant that the state had to show "he *intended* to put his targets in fear for their safety." *Id.* at 964. Likewise, the New Hampshire Supreme Court presumed in dicta that the state must prove intent when prosecuting political speech against local administrators as a true threat. *State* v. *Hanes*, 192 A.3d 952, 958 (N.H. 2018). Hanes left a voicemail with his town's Department of Public Works, expressing dissatisfaction that he "got two feet of snow" in his yard and stating that he "want[ed] a plow driver fired for this" and would "start shooting these [plow drivers] if they keep this up!" Under the circumstances, the court "assume[d], without deciding, that the First Amendment requires proof that the speaker subjectively intended his words to be understood by the recipient as a threat." *Id.* at 958.

By contrast, some state courts have found a recklessness standard sufficient to prosecute dissenting political speech as a true threat. *State* v. *Mrozinski*, 971 N.W.2d 233, 237 (Minn. 2022). Mrozinski wrote a letter to a county's Children's Protection Services agency in which she criticized its actions and wrote to "sleep with one eye open." The majority concluded that a recklessness standard was not overbroad, *id.* at 246-47, although there was a dissent. *Id.* at 247-56 (Thissen, J., dissenting) ("[The

reckless disregard mental standard is] too murky a signal for a speaker to figure out in advance whether the speaker is doing the thing that is not protected by the First Amendment …. [A] murky line will unnecessarily chill legitimate speech," including "political speech" about "core public" issues where a speaker lacks "intent to cause fear" and where an audience would not have "actually experienced extreme fear").

The New Jersey Supreme Court's decision to implement a recklessness standard here is also in conflict with the "decision[s]" of two "United States court[s] of appeals." Sup. Ct. R. 10(b). The Ninth Circuit implemented a specific-intent standard when the government prosecuted dissenting political speech against President Obama. *United States* v. *Bagdasarian*, 652 F.3d 1113, 1117 at n.14, 1118 (9th Cir. 2011). Just before the president was elected, Bagdasarian posted on a Yahoo! board while "extremely intoxicated": "Re: Obama[,] f[uc]k [him], he will have a 50 cal in the head soon" and "shoot [him,] country f[uc]k[e]d for another 4 years+[.]" *Id.* at 1115. The government prosecuted him for making a threat to kill. *Ibid.* The court determined that although the political "mudslinging" was "repugnant" and advocated "violence," the speaker did not "subjectively intend the speech as a threat[.]" *Id.* at 1114-15, 1118. Rather, the Ninth Circuit concluded the first post was a "prediction," and the second post was either an "exhortation" or "simply an expression of rage and frustration." *Id.* at 1119. As in *Watts*, the Ninth Circuit therefore dismissed with prejudice because "the prosecutor failed to present sufficient evidence to establish beyond a reasonable doubt that Bagdasarian had the subjective intent to threaten a presidential candidate." *Id.* at 1123.

Similarly, the Tenth Circuit emphasized that "it may be worth protecting speech that creates fear when the speaker intends only to convey *a political message*." *United States* v. *Heineman,* 767 F.3d 970, 981-82 (10th Cir. 2014) (emphasis added). Aaron Heineman emailed a poem which "espoused white supremacist ideology." *Id.* at 972. The Tenth Circuit found, "When the speaker does not intend to instill fear, concern for the effect on the listener must yield." *Id.* at 982.

Finally, this is an "important question of federal law," and the New Jersey Supreme Court's decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). It conflicts with the through line in *Watts* and *Black*, that the intent of the speaker matters when the government prosecutes political dissent as a true threat. It conflicts with this Court's incitement jurisprudence, where this Court has required proof of intent when the state prosecutes threatening political speech. It conflicts with the majority opinion in *Counterman*, which singled out "strong protests against the government and prevailing social order" as "vulnerable" political speech that demands a "strong intent requirement." 600 U.S. at 81-82. And it undermines this Court's vigilance in protecting our democracy's exchange of ideas. This Court should grant certiorari because the government's constitutional burden when prosecuting core political speech as a true threat is an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

V. This case is an ideal vehicle to decide the question presented.

This case is an ideal vehicle to decide the government's constitutional burden when it prosecutes dissenting political speech as a true threat. First, this was a

prosecution of pure speech. Petitioner Fair was prosecuted for speaking in person and online on May 1, 2015. That is unlike the conduct at issue in *Counterman*, where the communications were incidental to years of stalking and harassment.

Second, New Jersey prosecuted the petitioner under a statute, N.J. Stat. Ann. § 2C:12-3a, that only required it to prove the petitioner spoke "in reckless disregard of the risk of causing … terror." That is also unlike in *Counterman*, where Colorado proceeded against the defendant under a negligence theory, and the constitutional sufficiency of a recklessness standard was not a contested issue.

Third, the pure speech here appears indistinguishable from the threatening speech at issue in this Court's incitement cases, where this Court has required proof of intent. The petitioner even held an online rally with his Facebook connections. *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."). Nonetheless, to obtain a conviction, New Jersey was still only required to prove that he spoke recklessly.

Fourth, the pure speech here was political. That is not a close call. The petitioner complained about a litany of perceived issues with how the police force was carrying out its duties, and sought to have his grievances addressed. That criticism of over-policing fits comfortably into this Court's definition of core political speech, which includes "discussion of governmental affairs" and "the manner in which government is operated or should be operated." *Mills*, 384 U.S. at 218. Moreover, as the Appellate Division correctly explained, all of the defendant's in-person and

online statements from May 1 "were admitted and no limitation was placed on what the jury could find to be a terroristic threat." *Fair*, 266 A.3d at 1061. It is presumed that the jury followed the court's instructions, and therefore — as the Appellate Division also explained — jurors may have convicted Fair for any of the oral or online speech in which he criticized the government's operations. *Ibid.* The New Jersey Supreme Court failed to apply this Court's longstanding definition of political speech, and also — unlike the Appellate Division — never acknowledged that the judge admitted all of the speech criticizing officers' operations as evidence of terroristic threats, with no limiting instruction. *Fair*, 307 A.3d at 1138-39. The New Jersey Supreme Court also erroneously characterized the most threatening oral statements as categorically separate from petitioner's political opinions. *Ibid.* That is contradicted, for example, by this Court's decision in *McPherson*, 483 U.S. at 386, where this Court explained that McPherson's wish for the president's death "plainly dealt with a matter of public concern" because "[t]he statement was made in the course of a conversation addressing the policies of the … administration."

Fifth, the petitioner's speech was not merely political; it was "vulnerable" to prosecution and chilling, *Counterman*, 600 U.S. at 81, because it concerned "verbal criticism and challenge" to how officers should operate. *Hill,* 482 U.S. at 461.

Sixth, New Jersey acknowledged that the appropriate constitutional standard here is "an important federal question." Sup. Ct. R. 10(b) and (c). Normally, the Supreme Court of New Jersey only hears appeals on discretionary review, via petitions for certification. However, New Jersey circumvented

discretionary review by asserting "a substantial question arising under the Constitution of the United States." N.J. Ct. R. 2:2-1(a)(1).

Finally, the decision below will have a sweeping chilling effect. The New Jersey Supreme Court ordered revised jury instructions that cement reckless disregard as a sufficient standard, without any carve-out for political speech. *Fair*, 307 A.3d at 1141. The decision ensures New Jerseyans must give a wide berth to any political message that could be construed as threatening, whatever the intent.

Under the state's theory of our constitution, the jury may have convicted the petitioner for speaking even if he did not intend to terrorize, and no actual audience was terrified. That hardly constitutes a narrowly tailored prosecution justifying the official suppression of dissenting political ideas to prevent an emergency.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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