

No. _____

In the Supreme Court of the United States

BILLY RAYMOND COUNTERMAN, PETITIONER

v.

THE PEOPLE OF THE STATE OF COLORADO

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

1. Pursuant to Supreme Court Rule 13.5, petitioner Billy Counterman respectfully requests a 60-day extension of time, until Thursday, September 8, 2022, within which to file a petition for a writ of certiorari. The Colorado Court of Appeals issued its opinion on July 22, 2021. A copy of the opinion is attached. The Supreme Court of Colorado issued its decision denying certiorari on April 11, 2022. A copy of the decision is attached. This Court's jurisdiction would be invoked under 28 U.S.C. § 1257(a).

2. Absent an extension, a petition for a writ of certiorari would be due on July 10, 2022. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case concerns whether the First Amendment permits a person to be convicted for making a “true threat” without having any mental state regarding the threatening nature of the communication, an issue that has divided lower courts.

4. In *Elonis v. United States*, 575 U.S. 723 (2015), this Court held that a defendant cannot be convicted of violating 18 U.S.C. § 875(c) simply for making a statement that a reasonable person would regard as a threat—that is, under a negligence standard. This Court concluded that the statute’s threat element required “considering the defendant’s mental state,” but the Court solely addressed the statute’s requirements and declined “to consider any First Amendment issues.” *Id.* at 740. Lower courts have since grappled with what level of intent suffices under the First Amendment. *See Perez v. Fla.*, 137 S. Ct. 853, 854–55 (2017) (Sotomayor, J., concurring in denial of cert.) (noting that “[t]he Court should . . . decide precisely what level of intent suffices under the First Amendment—a question [it] avoided two Terms ago in *Elonis*,” but “reluctantly concur[ring]” in denying certiorari “because the lower courts did not reach the First Amendment question”).

5. The present case presents an ideal vehicle to address the question. The jury found petitioner guilty of making a true threat based on a purely objective standard employed by Colorado and some courts, *People v. Counterman*, 497 P.3d 1039, 1046 (Colo. 2021), that does not consider “a speaker’s subjective intent to threaten,” *ibid.*, whereas other courts have held that the First Amendment requires consideration of the speaker’s mental state. *Compare, e.g., United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013) (noting that Supreme Court precedent “does not say that the true threats exception requires a subjective intent to threaten”), *rev’d on statutory grounds*, 575 U.S. 723 (2015); *United*

States v. White, 810 F.3d 212, 220 (4th Cir. 2016) (“*Elonis* does not affect our constitutional rule that a ‘true threat’ is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm.”); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (explaining that “[s]peech is a ‘true threat’ and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm” (quotation marks omitted)); *United States v. Jeffries*, 692 F.3d 473, 480–81 (6th Cir. 2012) (applying an objective standard), *vacated on statutory grounds*, 575 U.S. 723 (2015); *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (“[W]e have adopted an objective test for determining whether a communication is a true threat.” (emphasis omitted)); *United States v. Ivers*, 967 F.3d 709, 718 (8th Cir. 2020) (reiterating the objective test, post-*Elonis*), *cert. denied*, 141 S. Ct. 2727 (2021); *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (declining to “import a subjective-intent analysis into the true threats doctrine”), *vacated on statutory grounds*, 576 U.S. 1001 (2015), *with United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021) (“[T]he First Amendment allows criminalizing threats only if the speaker intended to make ‘true threats.’”); *State v. Boettger*, 450 P.3d 805, 818 (Kan. 2019) (holding that a true threat requires “the intent to cause fear of violence”).

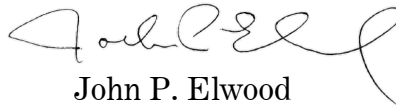
6. Petitioner respectfully requests an extension of time to file a petition for certiorari. Following the Colorado Supreme Court’s denial of certiorari, Petitioner engaged specialized Supreme Court counsel who were not previously involved in the case. A 60-day extension would allow counsel sufficient time to fully examine the decision’s consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally,

newly-retained counsel have several other pending matters that will interfere with their ability to prepare and file the petition by July 10, 2022.

Wherefore, petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to Thursday, September 8, 2022.

June 27, 2022

Respectfully submitted,



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