

No. 22-138

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IN THE  
**Supreme Court of the United States**

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BILLY RAYMOND COUNTERMAN,  
PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,  
RESPONDENT.

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

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**BRIEF OF SOUTHWESTERN LAW  
STUDENT ELENA CORDONEAN, AND  
PROFESSORS NORMAN M. GARLAND  
AND MICHAEL M. EPSTEIN, IN  
ASSOCIATION WITH THE AMICUS  
PROJECT AT SOUTHWESTERN LAW  
SCHOOL, AS AMICI CURIAE IN SUPPORT  
OF THE PETITIONER**

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**QUESTION PRESENTED**

Whether to establish that a statement qualifies as a “true threat” unprotected by the First Amendment, the government must demonstrate that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is sufficient to merely show that an objective “reasonable person” would perceive the statement as a threat of violence.

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<i>Reno v. Am. Civil Liberties Union</i> 521 U.S. 844 (1997) .....	26

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## OTHER AUTHORITIES

ADOBE, THE FUTURE OF CREATIVITY: 2022 U.S. EMOJI TREND REPORT (2022) .....	23
Alix Spiegel, <i>Give and Take: How the Rule of Reciprocation Binds Us</i> , NPR (Nov. 26, 2012, 4:49 AM), <a href="http://bit.ly/3xRgktr">bit.ly/3xRgktr</a> .....	20
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Austin Sanders, <i>Felony Charges Dropped in “Facebook Threat” Case</i> , AUSTIN CHRONICLE (Apr. 6, 2018, 11:00 AM), <a href="http://bit.ly/3Y4QhcR">bit.ly/3Y4QhcR</a> .....	17
Cass R. Sunstein, <i>Constitutional Caution the Law of Cyberspace</i> , 1996 U. CHI. LEGAL F. 361 (1996) .....	8

## OTHER AUTHORITIES—Continued

- Christine Reyna et al., *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GRP. PROCESSES AND INTERGROUP RELS. 361 (2009) ..... 11
- Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1 (2014) ..... 8
- Colleen McClain, *More So than Adults, U.S. Teens Value People Feeling Safe Online Over Being Able to Speak Freely*, PEW RES. CTR. (Aug. 30, 2022), [bit.ly/3Iy9Qo7](https://bit.ly/3Iy9Qo7) ..... 18
- Donovan A. McFarlane, *Social Communication in a Technology-Driven Society: A Philosophical Exploration of Factor-Impacts and Consequences*, 12 AM. COMM. J. 1 (2010) ..... 19
- Elise Hu, *As Supreme Court Considers Online Threats, an Update on Justin Carter*, NPR (Dec. 1, 2014, 1:35 PM), [bit.ly/3EGbjHS](https://bit.ly/3EGbjHS) ..... 16

## OTHER AUTHORITIES—Continued

- Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH. L. REV. 183 (2011) ..... 17
- Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. 1127 (2018) ..... 22
- Ethan Kutlu, *Does Race Impact Speech Perception? An Account of Accented Speech in Two Different Multilingual Locales*, 7 COGNITIVE RSCH.: PRINCIPLES AND IMPLICATIONS 1 (2022) ..... 23
- G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of Federal Criminal Law*, 2002 BYU L. REV. 829 (2002) ..... 29
- GUILLERMO SANTAMARÍA-BONFIL & ORLANDO GRABIEL TOLEDANO LÓPEZ, BECOMING HUMAN WITH HUMANOID: FROM PHYSICAL INTERACTION TO SOCIAL INTELLIGENCE (2020) ..... 22
- How Has Social Media Emerged as a Powerful Communication Medium?*, UNIV. CAN. W. (Sept. 26, 2022), [bit.ly/3EGya5Z](https://bit.ly/3EGya5Z) ..... 20

## OTHER AUTHORITIES—Continued

- Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech*, 71 *CAMB. L.J.* 355 (2012) ..... 19
- Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, *N.Y. TIMES* (Nov. 28, 2015), [bit.ly/3xXHqQG](https://bit.ly/3xXHqQG) ..... 25
- Josh Horwitz, *All the Big Tech Companies Are Ditching Their Handgun Emojis for Toy Gun*, *QUARTZ* (Apr. 25, 2018), [bit.ly/3EHDUMO](https://bit.ly/3EHDUMO) ..... 23
- Josie Cassano Rizzuti, *Social Media: Are the Lines Between Professional and Personal Use Blurring?*, 12 *MCMMASTER J. COMM'N* 78 (2020) ..... 24
- Jimit Bagadiya, *500+ Social Media Statistics You Must Know in 2023*, *SOCIALPILOT* (Feb. 7, 2023), [bit.ly/3ZnbHTt](https://bit.ly/3ZnbHTt) ..... 20, 21
- Judge Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 *HARV. L. & POL'Y REV.* 361 (2010) ..... 18

## OTHER AUTHORITIES—Continued

- Katy Hollingsworth, *What Happened to Justin Carter, League of Legends ‘Terrorist,’* GAME SKINNY (Feb. 13, 2014), [bit.ly/3IrlGQI](http://bit.ly/3IrlGQI) ..... 17
- Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228 (2011) ..... 20
- Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013) ..... 8
- Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147 (2011) ..... 17, 26, 27
- MacKenzie Wutzke, *The Psychology of Social Media Sharing: How You Can Use It to Boost Your Content*, COSCHEDULE BLOG (Jan. 25, 2022), <http://bit.ly/3Z3Z5B3> ..... 20
- MARK KNAPP & JUDITH A. HALL, NONVERBAL COMMUNICATION IN HUMAN INTERACTION (7th ed. 2010) ..... 21
- Noam Shpancer, *Why You Might Share More Intimately Online*, PSYCHOL. TODAY (June 24, 2014), [bit.ly/3xWek36](http://bit.ly/3xWek36) ..... 24

## OTHER AUTHORITIES—Continued

- Qiyu Bai et al., *A Systematic Review of Emoji: Current Research and Future Perspectives*, 10 FRONTIERS IN PHSYC. 1 (2019) ..... 22
- R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121 (2017) ..... 12
- Randy Borum et al., *Threat Assessment: Defining an Approach for Evaluating Risk of Targeting Violence*, 17 BEHAV. SCI. & L. 323 (1999) ..... 29
- S. Dixon, *How the Internet Has Affected Free Speech According to Adults in the United States as of March 2022*, STATISTA (June 14, 2022), [bit.ly/3ZmdN6e](https://bit.ly/3ZmdN6e) ..... 18
- Sarah Morrison-Smith & Jaime Ruiz, *Challenges and Barriers in Virtual Teams: A Literature Review*, 2 SN APPLIED SCIS. 1 (2020) ..... 24
- Steffen Steinert & Matthew James Dennis, *Emotions and Digital Well-Being: On Social Media's Emotional Affordances*, 35 J. PHILOSOPHY & TECH. 1 (2022) ..... 21

OTHER AUTHORITIES—Continued

Steven G. Gey, *The Nuremberg Files and the First  
Amendment Value of Threats*, 78 TEXAS L. REV.  
541 (2000) ..... 7

Tanya Dua, *The Year in Emojis, in 5 Charts*,  
DIGIDAY (Dec. 9, 2016), [bit.ly/3Z1MluA](http://bit.ly/3Z1MluA) ..... 22

**INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner, Billy Raymond Counterman. Norman M. Garland is a professor of law at Southwestern Law School and the author of numerous books and articles on criminal law and evidence. Michael M. Epstein is a professor of law and the Director of the pro bono Amicus Project at Southwestern Law School. He is the Supervising Editor of the *Journal of International Media & Entertainment Law*, published by the Biederman Institute in cooperation with the American Bar Association. Amicus Elena Cordonean is an upper-division J.D. candidate at Southwestern Law School with an extensive academic and professional interest in appellate and civil litigation law. Amici have no interest in any party to this litigation, nor do they have a stake in the outcome of this case other than their interest in the correct and consistent interpretation of constitutional law. Amici share a strong interest in there being clarity and certainty in the lower courts' evaluation of what constitutes a "true threat," because the existing

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<sup>1</sup> No counsel for any party has authored this brief in whole or in part, and no counsel or party has made any monetary contributions intended to fund the preparation or submission of this brief. Southwestern Law School provides financial support for activities related to faculty members' research and scholarship, which helped defray the cost of preparing this brief. (The school is not a signatory to the brief, and the views expressed here are those of the amici curiae.) Otherwise, no person or entity other than the amici curiae or its counsel of record has made a monetary contribution intended to fund the preparation or submission of this brief.

circuit split threatens free expression online and the core principles guaranteed under the First Amendment apply with equal weight whether speech is shared in a public square or in cyberspace.

### SUMMARY OF THE ARGUMENT

The parties in this case argue whether, to establish that a statement is a true threat unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, *or* whether it is sufficient to show that an objective “reasonable person” would regard the statement as a threat. In support of Petitioner, Billy Raymond Counterman, this brief argues that to establish that a statement is unprotected speech under the “true threat” exception to the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement *and* that the statement is objectively so egregious in nature as to qualify as a true threat and thus be worthy of criminal sanction.

In the absence of clear guidance from this Court, lower courts have struggled to determine the appropriate standard when analyzing the constitutionality of a true threat conviction and the test that should be applied to evaluate true threat cases. Despite the uncertainty that permeates every aspect of a true threat case, courts frequently find defendants guilty of making “threatening” statements. *See e.g., United States v. Khan*, 937 F.3d 1042 (7th Cir. 2019); *Looney v. State*, 785 S.E.2d 432 (Ga. Ct. App. 2016), *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

Since *Watts v. United States*, 394 U.S. 705 (1969), the test for what constitutes a true threat has

included an objective element centered on the circumstances of the communication. *See United States v. Bagdasarian*, 652 F.3d 1113, 1120 (9th Cir. 2011) (noting that “[w]hen our law punishes words, [courts] must examine the surrounding circumstances to discern the significance of those words’ utterance”). The First, Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits use an objective test by determining how a “hypothetical reasonable speaker or a hypothetical reasonable recipient/listener” would interpret the alleged threat. *Knox*, 190 A.3d at 1163 (Wecht, J., concurring in part and dissenting in part). The Fifth and Eleventh Circuits apply a broad objective test, without considering how the alleged threat would be perceived by a reasonable speaker or listener. *Id.*

Based on the idea that the First Amendment prohibits criminalizing pure speech, the Ninth and Tenth Circuits have read *Virginia v. Black*, 538 U.S. 343 (2003) as holding that a “true threat” requires a *mens rea* or that the speaker intend to place his victim in fear of harm. *See Bagdasarian*, 652 F.3d at 1117-1118; *see also United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005). The Ninth Circuit added that some threat statutes require both an objective and subjective standard, while others only require a subjective standard. *Bagdasarian*, 652 F.3d at 1117. The court noted that a choice between a subjective or objective analysis “reflects a false dichotomy,” especially when the law “criminalizes pure speech.” *Id.* at 1117. As Justice Sotomayor acknowledged in *Perez v. Florida*, 137 S. Ct. 853 (2017) (denial of certiorari) “[t]ogether, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere

utterance of threatening words—*some* level of intent is required.” *Id.* at 855 (Sotomayor, J., concurring).

Due to a national divide on what standard applies to true threat cases, it is possible to prosecute individuals solely based on their words. The transformation of the First Amendment application on social media platforms deepens the potential for an innocent speaker’s words to be misconstrued and criminally prosecuted as a result. The objective standard, when applied in isolation, fails to reconcile the unique interpretive difficulties inherent in online speech. A test that fails to consider a speaker’s true intent magnifies the possibility of inflammatory language seamlessly crossing the line into true threats. Likewise, the subjective standard allows guilty defendants to use speech as a frighteningly powerful tool to escape criminal prosecution, effectively using the First Amendment as both a sword and a shield.

Amici write to propose a reasonable solution to the circuit split and set a uniform national standard for what constitutes a true threat. To avoid chilling online speech, this Court should adopt a dual standard in the narrow context of true threats, considering the context of the speech *and* the speaker’s intent. The mental state of a person at the time of speech is crucial for protecting individuals who make impulsive, provocative statements while in a state of strong affect. Individual behavioral patterns and the contextual understanding of the speech are essential considerations. Facilitating the free flow of ideas lies at the core of the First Amendment. Accordingly, there is a pressing need for a uniform standard in the true threat context.

## ARGUMENT

### I. APPLYING EITHER STANDARD IN ISOLATION IS CONSTITUTIONALLY PROBLEMATIC

“Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The First Amendment presents a powerful obstacle to the rational human desire to punish threatening language. It shields from government restrictions a wide range of speech, including speech that some individuals may find upsetting, inaccurate, or offensive. *See Watts*, 394 U.S. at 708. This Court has recognized the “prized American privilege to speak one’s mind.” *Bridges v. California*, 314 U.S. 252, 270 (1941). Yet this principle can be easily violated because speech that some perceive as a threat may legitimately be perceived by others as a mere expression or a controversial viewpoint. The First Amendment protects speech apart from a few narrow categories. One category is true threats. *Black*, 538 U.S. at 358-359. Due to their lack of value and high costs to society, this Court has deemed true threats as unprotected speech. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). “True threats” are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359. Excluding true threats from First Amendment protection begs the question: What is a *true* threat? As a result, an individual’s freedom and liberty may depend on which threats are considered *true*—an inherently complex question.

Determining whether a threat is *true* requires some level of actualization, such that the statement must reflect a genuine desire for the communication

to threaten or intimidate. Due to the fact-intensive nature of the inquiry and the lack of a widely accepted standard for conducting this critical analysis, it poses unique constitutional challenges and the free flow of expression that lies at the core of the First Amendment demands that this Court adopt a uniform standard that aligns with modern societal norms.

**A. The Objective Standard Ignores The *Mens Rea* Required In All Criminal Prosecutions Where An Individual May Be Stripped Of His Freedom And Liberty**

In true threat cases, a court's haphazard analysis places protected speech at risk of being unconstitutionally criminalized. Accordingly, the formalistic choice between an objective *or* subjective standard may have severe long-term consequences.

The objective standard is constitutionally intolerable. It fails to reconcile the unique interpretive challenges inherent in online true threat cases and risks criminalizing offensive but constitutionally protected speech. The First Amendment seeks to promote rather than criminalize offensive speech or speech that could merely be perceived as offensive. The objective standard allows for the possibility of silencing a speaker while also stripping him of his freedom and liberty merely because of his word choice. It also increases the possibility for an innocent speaker's words to be misinterpreted and allows a jury to transplant intent in its absence. All crimes, except strict liability, require both a guilty act (*actus reus*) and criminal intent (a guilty mind or *mens rea*). *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is

as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

The distinction between objective and subjective standards is crucial for individuals facing criminal prosecution for their words. For instance, to be found guilty of violating 18 U.S.C. § 875(c), applying to interstate communications, the defendant must have subjectively “intend[ed] that his communication contain a threat.” *Elonis v. United States*, 575 U.S. 723, 732 (2015). Thus, “[h]aving liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence.” *Id.* (citation omitted). *Elonis* clarified that a conviction under 18 U.S.C. § 875(c) cannot be based solely on how a reasonable person would interpret the defendant’s words. *Id.* at 737-739 (recognizing that “a ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrongdoing”) (quoting *Staples v. United States*, 511 U.S. 600, 606-607 (1994)). However, the *Elonis* majority was unable to reach a consensus on the minimal mental state required. *Elonis*, 575 U.S. at 740-741.

Considering the paucity of relevant Supreme Court precedent, some academics have analogized threats to incitement, a category of unprotected speech requiring a subjective intent. Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEXAS L. REV. 541, 590 (2000). This argument is persuasive because the same language can

be read in different contexts as both a true threat and an incitement to violence. Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1, 6 (2014) (describing “incitement” as a “close legal cousin” to “true threats”). The modern incitement test requires that the speaker intend to incite unlawful action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636 (2013) (noting that incitement “is speech that intends and is likely to produce imminent lawless action”). The incitement test inherently considers *both* a subjective standard (the speaker intends to incite violence) *and* an objective standard (violence is objectively likely to occur). See Cass R. Sunstein, *Constitutional Caution the Law of Cyberspace*, 1996 U. CHI. LEGAL F. 361, 369 (1996). This Court reinforced the subjective/objective test for incitement, by stating that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-298 (1961)).

Within the categories of unprotected speech, obscenity offers an alternative comparison. The similarities between threats and obscenity are relevant to the *mens rea* at issue in *Elonis*. In the true threat context, courts must determine if the speaker’s mental state effectively distinguishes “wrongful” from “innocent” speech. *Elonis*, 575 U.S. at 736. Additionally, both types of restrictions mitigate the harm to individuals and society caused by mere exposure to relevant speech. Compare *Roth v. United States*, 354 U.S. 476,

494 (1957) (Warren, C.J., concurring), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-62 (1973) (describing possible effects of obscenity on public safety or quality of life), with *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (noting that a threat can cause fear and disruption). Because laws that target comparable harms must apply the same analysis, it is logical for threats and obscenity to require the same *mens rea*.

An interest raised by the proponents of the objective standard is deterring fear, shielding people from “the fear of violence,” and the “the disruption that fear engenders.” *Id.* Consider the example of “unintended threats.” How would a speaker know to avoid using certain words if he is unaware that his words are threatening? See *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (noting that the “objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners”). In this instance, the objective standard has one deterring effect: it deters protected speech. This outcome violates the Constitution. Unintended threats are protected speech that can only be criminalized if necessary to advance a compelling state interest that cannot be served through less restrictive means. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). This test finds the objective standard wanting. Because unintended threats do not generally result in violence, the objective standard does nothing to satisfy the state’s interest in preventing violence. It also fails to meet the state’s interest in deterring fear because it is not “narrowly tailored” to accomplish this goal and less onerous alternatives, such as civil penalties, are available. Thus, the elimination of unintended fear is not compelling enough to outweigh fundamental speech rights.

The objective standard only does half of what this Court’s *mens rea* presumption requires. It inserts “knowledge” into a defendant’s speech act while ignoring the key element of protected speech: threat. As a result, the reasonable person test “permit[s] a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way.” *United States v. Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012) (Sutton, J., dubitante). And it reduces the subjective intent requirement, which is at the heart of this Court’s criminal jurisprudence, to a “transient notion.” *Morissette*, 342 U.S. at 250. Moreover, the objective standard reduces criminal culpability for threats to negligence. The rule of lenity demands more—at the very least—a standard that also considers the speaker’s subjective motivations.

The idea that the objective standard protects valuable speech ignores the fact that it can also penalize fundamental artistic and political expression. To serve its intended purpose, political speech often “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). However, passionate political speech risks being perceived as “threatening” precisely because such speech must frequently be provocative. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1080 (2002) (en banc). This risk is especially high for unconventional viewpoint advocates, whose often extreme speech is on the periphery of our society, and the halo of scourge that listeners associate with these speakers increases the likelihood that harsh speech will be perceived as a threat by a “reasonable person.”

This pathology is exacerbated by the objective standard, which threatens core expression. In addition to political speech, the objective standard can also criminalize artistic speech. This Court emphasized that the First Amendment protects artistic speech as strongly as political speech. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). Art frequently encompasses cruelty, fear, and violence. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (noting that “[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low”). Thus, “stories of deeds of bloodshed, lust, or crime” are entitled to free speech protection “as the best of literature.” *Winters v. New York*, 333 U.S. 507, 510-512 (1948). The objective standard could lead to the result that art that evokes such themes is objectively threatening and worthy of criminal prosecution. *Jeffries*, 692 F.3d at 477 (analyzing a music video under the objective standard). As a result, non-mainstream artists are particularly vulnerable because they are more likely to be perceived as threatening. A prime example is rap music, regarded by followers as art that represents “the voice of a disenfranchised people.” Christine Reyna et al., *Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12 GRP. PROCESSES AND INTERGROUP RELS. 361, 362 (2009). However, mainstream listeners regard it as “glorification of the criminal lifestyle.” *Id.* As a result, a “reasonable person” unfamiliar with this art form is likely to perceive it as a threat. The reality is that even “reasonable” people are more likely to “impose liability on the basis of the jurors’ tastes or views,” thus criminalizing core artistic expression. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

The legal issue of requisite intent dominates the judicial and academic debate concerning the true threat doctrine. In criminal proceedings, applying an objective standard is problematic because the trier of fact cannot know the defendant's thoughts and must infer intent by using a hypothetical "reasonable person" perspective. See R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 124 (2017) (noting that "[w]hat is thought by the law to be subjective actually pervades and informs, in multiple ways, what is thought to be objective, and vice versa"). Unless this Court carefully crafts an appropriate test, the objective standard applied in isolation will not adequately protect speech.

**B. The Subjective Standard Ignores A Crucial Analysis Under The "True Threat" Doctrine: Context**

The isolated assessment of a speaker's intent reveals nothing about how his words will impact the social order. In fact, it can foster online intimidation and stalking without consequences and allow defendants to avoid criminal prosecution in cases where speech is so egregious that a reasonable person would be scared or intimidated but the defendant lacks the requisite intent to threaten. To determine criminal culpability in the context of true threats, the facts and circumstances of the speech must be connected to the speaker. This task is simply too difficult and too important, and the subjective standard applied in isolation will inherently compel courts to ignore a crucial aspect under the true threat doctrine: context.

Context matters. *Elonis*, 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part). After all, constitutional criminal law often employs a contextual

analysis. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 434 (2000) (analyzing whether a defendant’s confession was voluntary under due process by considering “the totality of all the surrounding circumstances”); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (requiring a totality-of-the-circumstances analysis for probable cause). Context cannot be ignored in cases involving true threats. *United States v. Syring*, 522 F. Supp. 2d 125, 130 (D.D.C. 2007) (noting that several circuit courts analyze threats by considering the “entire factual context”). But *which* context is important, and *how much* context is needed?

This Court’s opinion in *Watts* highlights a few relevant contextual factors. 394 U.S. at 708 (highlighting that context factors such as “language of the political arena,” the “expressly conditional nature of the statement,” and the “reaction of the listeners” are crucial considerations). The subjective standard would simply disregard these contextual factors, especially when this Court’s precedent seems to encourage considerations of context. *Black*, 538 U.S. at 367 (emphasizing that the “prima facie evidence provision . . . ignores all of the 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”). In practice, considering the context of the speech means considering any relevant factor on a case-by-case basis. *United States v. Wheeler*, 776 F.3d 736, 745 (10th Cir. 2015) (finding that the defendant’s social media post urging his “religious operatives” to “commit a massacre” at a day care and preschool is a true threat based on a contextual factor it referred to as “the collective consciousness which includes recent massacres at educational and other institutions by active shooters”). Another

example of a court looking at the speech context is *United States v. Turner*, which charged the defendant for a “blog post declaring that three Seventh Circuit judges deserved to die for their recent decision” on a controversial Second Amendment issue. 720 F.3d 411, 413 (2d Cir. 2013). In upholding the defendant’s conviction, the court considered the context surrounding the speech, such as the “posting [of] photographs, work addresses, and room numbers for each of the judges, along with a map and photograph of the courthouse.” *Id.* at 423.

The isolated subjective standard constitutes a free-for-all approach where the speaker’s statements are shocking and egregious, but the speaker lacked the specific intent to threaten. Consider *Bagdasarian* for example. There, the majority held that the defendant’s possession of a gun and the anonymity of his posts were sufficient context factors to prove specific intent to threaten President Obama, particularly because the platform where the defendant posted was “a non-violent discussion forum that would tend to blunt any perception that statements made there were serious expressions of intended violence.” *Bagdasarian*, 652 F.3d at 1121. Judge Wardlaw disagreed stating that the defendant’s statements qualified as true threats based on the same contextual factors dismissed by the majority, such as the defendant’s access to firearms at the time he made the post and his choice to hide behind a “cloak of anonymity” until he was located. *Id.* at 1131 (Wardlaw, J., concurring in part and dissenting in part). While the dearth of guidance regarding how contextual factors must be weighed could lead to disagreements, context must be considered when the defendant’s liberty for his speech is at risk.

The transformation of First Amendment application on social media platforms amplifies the potential for an innocent speaker's words to be prosecuted, even under a subjective approach. *See infra* Part II.A. Consider a scenario: a speaker makes a provocative online post about a person whom he knows is particularly sensitive, but the speaker lacks the requisite intent for his statement to threaten or intimidate. A jury could conclude that the speaker intended his post to threaten, even if the speaker had no intention of causing harm or fear. The relevant context could imply whether the speaker intended, at the very least, to scare the listener out of habit: an inquiry that is necessarily bypassed under the subjective standard.

## **II. EMPIRICAL DATA SHOWS THAT MODERN SPEECH OFTEN OCCURS ONLINE AND INTERNET SPEECH DEMANDS A DUAL STANDARD ANALYSIS**

We live in a world of social media. The Internet amplifies the impact of speech and makes it easier for someone to misinterpret the speaker's words. To make matters profoundly worse, applying one standard over another to online speech would scatter confusion where clarity is needed. Users speak differently on different online platforms and the architectural aspects of these platforms influence how people speak. In an era of widespread social media speech, increased political divergence and idiosyncratic language, and the lack of self-censorship, it is critical to define precisely what standard must be applied for true threats. Decision-makers can only avoid over-criminalizing First Amendment-protected speech by being aware of modern social media and other online context.

### **A. The Architectural Features Of Online Speech Amplify The Risk Of Criminal Prosecution Of Innocent Speakers**

Today, social media and online platforms are facilitating most modern human interactions. We communicate via email, Facebook, or other popular platforms with our employers, coworkers, family, and friends. Because each person enters the cyberspace with a unique set of experiences, value, and backgrounds, it is nearly impossible to fully assess the meaning of an online message. Readers decode a message and its meaning based on their own experiences, which will never mirror those of the speaker. Because critical features of face-to-face speech, such as vocal intonation, facial expression, and hand gestures, are missing in online speech, the process of interpreting an online message can become even more difficult.

Consider the case of Justin Carter. He posted on Facebook in 2013, two months after the deadly shooting at Sandy Hook Elementary School. Elise Hu, *As Supreme Court Considers Online Threats, an Update on Justin Carter*, NPR (Dec. 1, 2014, 1:35 PM), [bit.ly/3EGbjHS](https://perma.cc/8Q2B-KJHB) [https://perma.cc/8Q2B-KJHB]. His post stated: "I'm f- - - - in the head alright, I think I'ma SHOOT UP A KINDERGARTEN [ . . . ] AND WATCH THE BLOOD OF THE INNOCENT RAIN DOWN [ . . . ] AND EAT THE BEATING HEART OF ONE OF THEM." *Id.* A viewer became alarmed by the post and contacted the police who arrested Carter. He was charged with making a terroristic threat and a judge set bail at half a million dollars. *Id.* The felony charges were eventually dropped in exchange for his guilty plea to a separate misdemeanor charge, after Carter had been awaiting trial for five years. *See*

Austin Sanders, *Felony Charges Dropped in “Facebook Threat” Case*, AUSTIN CHRONICLE (Apr. 6, 2018, 11:00 AM), [bit.ly/3Y4QhcR](https://perma.cc/NG88-KF48) [https://perma.cc/NG88-KF48]. When considering the context of Carter’s words, it is possible that his real offense was choosing the wrong words at the wrong time. Carter’s online activity revealed that he often used dark humor and had a history of suicidal thoughts. Katy Hollingsworth, *What Happened to Justin Carter, League of Legends ‘Terrorist,’* GAME SKINNY (Feb. 13, 2014), [bit.ly/3IrlGQI](https://perma.cc/SPV8-AMG5) [https://perma.cc/SPV8-AMG5]. Scholars argued that Carter’s use of selective capitalization is a clue that his post was just a “hyperbolic rant” *id.*, considering that “[t]yping in all caps is Internet code for shouting.” Alice Robb, *How Capital Letters Became Internet Code for Yelling, and Why We Should Lay Off the All-Caps Key*, NEW REP. (Apr. 17, 2014), [bit.ly/3KGoQ63](https://perma.cc/58SN-M8BN) [https://perma.cc/58SN-M8BN]. Meanwhile, as Petitioner and Justin Carter’s stories illustrate, the failure to apply a clear approach to true threats has real consequences for real people.

The inadequacy of the true threat doctrine is especially acute in the social media age.<sup>2</sup> According to a recent poll, most teens and adults take content they

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<sup>2</sup> See, e.g., Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 148 (2011) (emphasizing that “[a] number of factors potentially contribute to the incendiary capacity of social media speech”); Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH. L. REV. 183, 184 (2011) (noting that “the Internet is a true game changer when it comes to balancing the interests in free speech with the potential harms caused by that speech” and “there is simply no pre-Internet analogy that allows speech to be disseminated so quickly, so cheaply, and to so many for such a long period of time”).

see online too seriously and the attitudes among them vary by demographic factors.<sup>3</sup> Another recent study reveals that more than 80% of people agree that using the Internet makes it easier for people to express their opinions to a large audience and that 76% think using the Internet provides access to a variety of viewpoints. S. Dixon, *How the Internet Has Affected Free Speech According to Adults in the United States as of March 2022*, STATISTA (June 14, 2022), [bit.ly/3ZmdN6e](https://bit.ly/3ZmdN6e) [<https://perma.cc/N2JL-F559>].

Billions of people have migrated to social media and “[t]he more wonderful the means of communication, the more trivial, tawdry, or depressing its contents seem[] to be.” ARTHUR C. CLARKE 2001: A SPACE ODYSSEY 48 (1968). “It is easy to denigrate the value of speech” and “exaggerate the harm that can come from a new means of communication,” which makes it “critical that we not succumb to the temptation to weaken our protections of speech based on concerns about terrorists and hatemongers and their use of the internet.” See Judge Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL’Y REV. 361, 362-363 (2010).

Social media’s technological infrastructure promotes informality and online speech more closely

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<sup>3</sup> Colleen McClain, *More So than Adults, U.S. Teens Value People Feeling Safe Online Over Being Able to Speak Freely*, PEW RES. CTR. (Aug. 30, 2022), [bit.ly/3Iy9Qo7](https://bit.ly/3Iy9Qo7) [<https://perma.cc/KK49-AY6B>] (demonstrating that 59% of teens and 54% of adults believe that people take online content too seriously, and that views of the online environment encountered by teens and adults differ by race, ethnicity, and gender).

resembles chitchat than written communication. Some of the same characteristics that make threatening speech more common on social media also make miscommunication more likely. To determine whether online statements are true threats, it is necessary to understand the various and occasionally peculiar contexts within social media. When people use various devices to access social media platforms, they become psychologically removed from the consequences of their words, causing them to say things online that they would never say in person. See Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech*, 71 *CAMB. L.J.* 355, 359 (2012) (emphasizing that prior to digital communications, “[t]he bulk of everyday communications would normally fall below the radar and escape legal sanction”).

The speed of online communication can promote explosive speech because speakers react to provocation before logic can take over. Additionally, no editor stands between the speaker and the audience to mitigate the potential negative effects of the speech before publication. See generally Donovan A. McFarlane, *Social Communication in a Technology-Driven Society: A Philosophical Exploration of Factor-Impacts and Consequences*, 12 *AM. COMM. J.* 1 (2010) (discussing the communication crisis created by modern technology devices and emphasizing how speed and efficiency ideas are decreasing the quality of online content).

The likelihood that inflammatory language will turn into a threat, incitement, or violence is increased by the social media’s informal, spontaneous, and unmediated discourse. An online statement cannot be understood without considering the reasons behind the speech. Psychologists claim that 68% of people

share online to help others understand who they are and what they care about, and that 78% of people post because sharing keeps them connected to individuals with whom they might not otherwise communicate. MacKenzie Wutzke, *The Psychology of Social Media Sharing: How You Can Use It to Boost Your Content*, COSCHEDULE BLOG (Jan. 25, 2022), <http://bit.ly/3Z3Z5B3> [<https://perma.cc/VQ7U-V52G>]. Another reason why people interact online is the desire for reciprocity. During an experiment, a sociologist sent Christmas cards to 600 strangers and received over 200 in return. Alix Spiegel, *Give and Take: How the Rule of Reciprocation Binds Us*, NPR, (Nov. 26, 2012, 4:49 AM) [bit.ly/3xRgktr](http://bit.ly/3xRgktr) [<https://perma.cc/Z97Q-R9X8>]. When it comes to social media, that is the power of reciprocity.

Social media speech is akin to “open mikes.” Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 242 (2011). Due to the intimacy and spontaneity of online speech, social media is a powerful medium for human communication and interaction. See *How Has Social Media Emerged as a Powerful Communication Medium?*, UNIV. CAN. W. (Sept. 26, 2022), [bit.ly/3EGya5Z](http://bit.ly/3EGya5Z) [<https://perma.cc/R97D-EQJ7>]. Daily, a shocking number of comments are posted on social media that, when taken out of context, may appear much more dangerous than they are. See Dave Chaffey, *Global Social Media Statistics Research Summary*, SMART INSIGHTS (Jan. 30, 2023), [bit.ly/3IylP55](http://bit.ly/3IylP55) [<https://perma.cc/BZ5Q-KC7M>] (noting that more than half of the world’s population now uses social media, that 137 million new users have joined in the last year, and that the average daily time spent online exceeds two and a half hours); see also Jimit

Bagadiya, *500+ Social Media Statistics You Must Know in 2023*, SOCIALPILOT (Feb. 7, 2023), [bit.ly/3ZnbHTt](https://bit.ly/3ZnbHTt) [<https://perma.cc/6TMP-STV7>] (providing demographic, usage, engagement, business, and advertisement statistics for various social media platforms). Preserving free expression in all its riotous and occasionally offensive glory without sacrificing legitimate protections for vulnerable or victimized online speakers requires an understanding of online contexts. Societies should not suppress ideas or speech that merely promotes intolerance.

The same traits that give the impression that social media is rife with harmful and destructive speech also make it more likely that a speaker's innocent words will be misinterpreted. The lack of tone and other nonverbal cues that indicate humor, sarcasm, or hyperbole in oral communications is another factor that contributes to misunderstandings concerning online speech.<sup>4</sup> The law does not presume to regulate everything that people say to one another because people frequently make rash, careless, or exaggerated remarks in the heat of the moment that are quickly forgotten by the speaker and the audience. For example, if one tells another in person, "I'm going to f\*\*\*ing kill you!" while grinning or smirking, nothing is likely going to happen. The comment will probably be

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<sup>4</sup> See generally MARK KNAPP & JUDITH A. HALL, *NONVERBAL COMMUNICATION IN HUMAN INTERACTION* (7th ed. 2010) (exploring the perspectives and roots of nonverbal behavior, and the effects of physical characteristics, gestures, touch, face, eye behavior, and vocal cues on human communication); Steffen Steinert & Matthew James Dennis, *Emotions and Digital Well-Being: on Social Media's Emotional Affordances*, 35 *J. PHILOSOPHY & TECH.* 1 (2022) (discussing the powerful effects of social media technologies on a user's emotions).

quickly forgotten by the speaker and the audience. However, if the same person posts those words online while tagging another, there is a high likelihood that they will be interpreted as a threat.

To compensate for the lack of tonal cues usually present in face-to-face communication, online users have developed acronyms, emoticons, emojis, and GIFs. *See generally* Qiyu Bai et al., *A Systematic Review of Emoji: Current Research and Future Perspectives*, 10 *FRONTIERS IN PHSYC.* 1 (2019) (discussing the role of visual symbols in computer-mediated communication). Emoticons are a combination of keyboard symbols “used to suggest an attitude or emotion in computerized communications.” *Ghanam v. Does*, 845 N.W.2d 128, 133 n.4 (Mich. Ct. App. 2014). To convey sadness, happiness, or humor, one can simply type a symbol to indicate one’s current state of mind. Emojis (pictographs that mimic facial expressions) and GIFs (short videos) are technologically advanced ways for online users to express their emotions. *See generally* GUILLERMO SANTAMARÍA-BONFIL & ORLANDO GRABIEL TOLEDANO LÓPEZ, *BECOMING HUMAN WITH HUMANOID: FROM PHYSICAL INTERACTION TO SOCIAL INTELLIGENCE* (2020) (exploring the role of emojis in human computer-mediated communications); Eric Goldman, *Emojis and the Law*, 93 *WASH. L. REV.* 1127 (2018) (noting the importance of visual online content in bridging the communication gap online). Tens of billions of stickers or emojis are sent around the world daily. Tanya Dua, *The Year in Emojis, in 5 Charts*, *DIGIDAY* (Dec. 9, 2016), [bit.ly/3Z1MluA](https://perma.cc/W5TE-TLDA) [https://perma.cc/W5TE-TLDA]. A recent study reveals that over 90% of social media users use emojis, precisely because they make it easier for users to express themselves and lighten the mood in an online

conversation. ADOBE, THE FUTURE OF CREATIVITY: 2022 U.S. EMOJI TREND REPORT 7 (2022).

In the true threats online speech context, liability may turn on the interpretation of an emoji. Compare the following social media statements:

“I’m going to f\*\*\*ing kill you 🦴 ”

“I’m going to f\*\*\*ing kill you 😏 ”

Humans are prone to misinterpret others and the use of a “skeleton” emoji symbolizing death as opposed to a “winky face” cannot make it patently clear that the speaker is joking. The misleading effect of an emoji is further supported by the fact that technology giants have removed the emoji that symbolized a real gun and replaced it with a toy gun. See Josh Horwitz, *All the Big Tech Companies Are Ditching Their Handgun Emojis for Toy Gun*, QUARTZ (Apr. 25, 2018), [bit.ly/3EHDUMO \[https://perma.cc/R63L-5JFS\]](https://perma.cc/R63L-5JFS).

We hold speakers accountable for the violence resulting from their speech, even though geographical and cultural dislocations of online speech are common and predictable. Speech that is innocent in one geographical area may be viewed as violent in another and humor in one setting may be perceived as an insult in another. See generally Ethan Kutlu, *Does Race Impact Speech Perception? An Account of Accented Speech in Two Different Multilingual Locales*, 7 COGNITIVE RSCH.: PRINCIPLES AND IMPLICATIONS 1 (2022) (noting how living in different locales modulates how listeners assess speech). By the same token, speech that is harmless when *posted* may result in violence when *viewed*.

The rise of social media has blurred the lines between professional and personal behavior. *See* Josie Cassano Rizzuti, *Social Media: Are the Lines Between Professional and Personal Use Blurring?*, 12 MCMMASTER J. COMMC'N 78, 80 (2020) (emphasizing that “social media is an added phenomenon” and a medium “where we consume information for both professional and personal purposes”). As such, there is a widespread concern that comments made on social media platforms may be misconstrued if taken out of context and this concern should be at the heart of any test that this Court decides to adopt for evaluating true threats. This is especially true when the person who makes a statement has no control over how others perceive or interpret it.

A deeper level of the online context may allow for the haphazard development of individual interaction-specific conventions. We communicate differently depending on who is in front of or far away from us. *See generally* Sarah Morrison-Smith & Jaime Ruiz, *Challenges and Barriers in Virtual Teams: A Literature Review*, 2 SN APPLIED SCIS. 1 (2020) (exploring the challenges related to geographical, temporal, and perceived distance). Because social media has become second nature, speakers no longer realize they are being watched. This, according to psychologists, is the result of the “physical distance” between the speaker and his audience. Noam Shpancer, *Why You Might Share More Intimately Online*, PSYCHOL. TODAY (June 24, 2014), [bit.ly/3xWek36](https://perma.cc/UQ9L-2SSH) [https://perma.cc/UQ9L-2SSH]. This “sense of security” inherent in computer-mediated communications “makes intimate sharing easier.” *Id.* “Over-sharing is less noxious from a person who is not physically leaning into your space.” *Id.* This disinhibiting effect of technology encourages

us to speak to our virtual friends as if they were our therapists, which could result in a clash of constitutional freedoms.

Online speech also involves a generation gap problem that is inherent to social media platforms, especially when combined with the unique communication conventions that emerge within each of them. As a result, courts, and lawmakers unfamiliar with these conventions might criminalize typical adolescent behavior, which has increasingly included the use of hyperbole in nearly every online circumstance. *See* Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), [bit.ly/3xXHqQ](https://perma.cc/B838-ZTTN) [https://perma.cc/B838-ZTTN]. For example, if someone were to read an online comment such as “Omg literally dying,” they might conclude that the speaker is “literally dying.” *Id.* But of course, “literally” in this context means “figuratively dying.” *Id.* “It’s almost like ‘dying’ has become a filler for anytime anyone says anything remotely entertaining. . . . Like, if what you’re saying won’t legitimately put me to sleep, I respond with, ‘OMG dying.’” *Id.* There is also the well-known and often used “kms,” or “killing myself,” which, as a high school student explained, “can be used to say something like ‘ugh so much homework kms!’” *Id.* The logical conclusion is that an “older” social media user who is not familiar with the specific jargon used on social media platforms may overreact when reading an online message and perceived it as a threat. Such misunderstandings may include perceiving violent hyperbole as a true threat. However, just because threats fall into the “low-value” category of speech does not mean that the line drawing cannot be as precise with threats as it is with higher-value categories of speech. The challenge lies in creating speech

regulations that allow threat suppression while also foster regular social media conversation in all its banal, profane, and hyperbolic splendor. At a minimum, the First Amendment's protection should shield speakers from criminal liability imposed without proof of the speaker's intent for his statement to intimidate his target or that the speaker knew with substantial certainty that his words would cause fear or intimidation.

Failing to draw clear distinctions between threats and hyperbole risks criminalizing innocent speakers, many of whom are likely to be teenagers, simply because their speech is more likely to be misinterpreted by those unfamiliar with modern social media conventions. If the end goal is to incarcerate teenagers for using hyperbole, one can reasonably expect that teenagers will never use social media again because all they do online is hyperbolize and rant. But if the goal is more civility, speech criminalization without proof of the speaker's subjective intent to threaten or some other elevated level of culpability, seems like a poor tool to achieve social change. *See generally* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) (examining the flaws of criminal sanctions in promoting social change).

The Internet is a remarkable medium for unrestricted expression, offering "content . . . as diverse as human thought." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 852 (1997). Due to the rapidly evolving environment in which Internet discourse occurs, it is more challenging for speakers and listeners to exchange the context necessary to understand one another's messages or to distinguish between harmless speech and true threats. *See* Lyriisa Barnett Lidsky,

*Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 148-149 (2011) (noting that social media speech “often can be heard, read, or viewed long after the speaker blogged, tweeted, or posted”). Thus, the objective standard provides “the most puritan” users a “heckler’s Internet veto” over speech they seemingly misunderstood. *Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring in part and concurring in judgment). Because another online user could misread or misinterpreted the message, the conclusion is that online speakers must give “a wide berth to any comment that might be construed as threatening in nature.” *Rogers*, 422 U.S. at 47 (Marshall, J, concurring). Even if threats are of *de minimis* value, criminalizing them chills legitimate speech—on the Internet and elsewhere. Ultimately, free expression is about pushing boundaries.

One source of concern is that Internet communications are frequently not directed at the subject of the communication—or at anyone really—but are still viewed by millions. This concern requires greater speech protection and would seem to necessitate a stricter showing of culpability, especially since common sense indicates that threatening speech delivered online, no matter how extreme, is much less likely to intimidate a reasonable listener who is not interacting face-to-face with the speaker. Applying the objective approach to online speech reeks of strict liability, which has no place in the criminalization of expression. Accordingly, courts must give the defendant an opportunity to show that the statement made or posted was not an actual threat based on the surrounding context. In examining context, it is important to understand that the totality of the

surrounding context affects both the *mens rea* and *actus reus* of the offense.

**B. A Dual Standard Will Ensure The Most Equitable Balance Of Interests In Any Type Of Speech**

The objective and subjective standard frequently produce the same result. If a speaker's words are objectively threatening, it is more likely that they were intended to threaten or intimidate. Likewise, if there is evidence that the speaker subjectively intended to threaten the recipient, it is more likely that the message will be perceived as objectively threatening. A mixed standard requirement, on the other hand, will prevent the suppression of protected speech.

Words can both heal and cause harm. What has prompted the individual to make a statement? Has the individual engaged in additional intimidating conduct, such as stalking or harassment? Does the speaker suffer from a mental illness that could have prompted the statement? What is the relationship between the speaker and the recipient? How did the recipient react? Was the statement spontaneous and impulsive, or was it part of a larger pattern of calculated behavior? These questions provide a useful framework for assessing context and an individual's thinking and behavior during the act of speech. However, the answers to these crucial questions are ignored if the objective *or* subjective approach is applied in isolation without considering the intent of the speaker *and* the surrounding context of the speech.

Trained forensic psychiatrists, not jurors, are better equipped to conduct threat assessments and determine a speaker's intent and motivations. While

speech may serve as evidence of a pattern of violence, speech alone is not used as a risk assessment threshold because while some people who make threats do pose a threat, many do not. See Randy Borum et al., *Threat Assessment: Defining an Approach for Evaluating Risk of Targeting Violence*, 17 BEHAV. SCI. & L., 323, 323-337 (1999).

Although most courts do not apply a dual analysis for true threats, legal scholarship argues that Internet communication should be subject to both an objective *and* subjective analysis. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of Federal Criminal Law*, 2002 BYU L. REV. 829, 1076-1077 (2002). This hybrid approach would ensure the most equitable balance of interests, such as the individual's autonomy in forming thoughts and beliefs free of government interference and the listener's interest in not fearing violence. The dual analysis would compel courts to closely scrutinize speech, resulting in a careful balancing of these interests.

## CONCLUSION

To safeguard free speech rights, this Court should endorse a dual standard for what constitutes a true threat. Such a framework would provide the much-needed guidance to lower courts on how to interpret the context that is vital to separating true threats from protected speech. Without a subjective intent requirement, stripping individuals of their freedom and liberty for their speech is fatal to the protections that the First Amendment was designed to guarantee.

Punishing intentional threats is unquestionably proper. However, by also criminalizing unintended consequences, the objective standard punishes

political and artistic expression as harshly as worthless cruelty. This Court must consider the elevated concerns of selective targeting of disfavored speakers who are disproportionately likely to be adolescents engaged in social media discourse. It is critical to ensure that the proposed cure for disorderly discourse is not worse than the disease. The antidote, in the form of a dual standard analysis, enables the government to prosecute defendants for egregious speech that is objectively threatening, but also affords defendants the right to prove context where they lacked the subjective intent for their speech to threaten or intimidate. This, and nothing less, is how this Court should interpret the First Amendment, as it has in other criminal contexts when an individual is deprived of his freedom and liberty.

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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