NO. 22-138

IN THE
# Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,
*Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO,
*Respondent.*

*On Writ of Certiorari to the Colorado Court of Appeals, Division II*

## BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY


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## INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom (ADF) is a not-for-profit, public-interest legal organization that protects speech, religious liberty, and the right to life. ADF regularly defends students, adults, and organizations in cases before this Court involving the right to free speech. *E.g.*, *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021); *Thompson* v. *Hebdon*, 140 S. Ct. 348 (2019) (per curiam); *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361 (2018); *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015). Since its founding in 1994, ADF has played an indirect role in still other free speech cases involving university students. *E.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217 (2000). It is counsel in a free speech case pending before the Court this Term: *303 Creative LLC* v. *Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert granted* 142 S. Ct. 1106 (2022).

ADF represents students, student organizations, and faculty who challenge threats to their free speech rights. *E.g.*, *DeJohn* v. *Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Adams* v. *Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *OSU Student All.* v. *Ray*, 699 F.3d 1053 (9th Cir. 2012); *Meriwether* v. *Hartop*, 992 F.3d 492 (6th Cir. 2021). So, ADF has a strong interest in ensuring that the Free Speech Clause's protections remain robust and that any exceptions remain narrow and well-defined.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

## BACKGROUND

ADF and its clients know firsthand the perils of creating exceptions to the First Amendment's free speech protections. Religious speech often provokes debate and inflames passions. But that is precisely why the First Amendment protects it. Such speech expresses the deeply held beliefs of the speaker and contributes to what universities are supposed to be—the "marketplace of ideas." *Healy* v. *James*, 408 U.S. 169, 180 (1972). As the training ground for our citizens and future leaders, public universities should celebrate this diversity of perspectives for the betterment of all. *E.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."). But today, universities are quick to clamp down on speech simply because it might cause subjective offense and to evade accountability for their censorship by invoking one of the First Amendment's narrow exceptions.

### I. Maggie DeJong—Southern Illinois University, Edwardsville.

A year ago, Maggie DeJong was counting down the weeks to graduating, along with her 10 classmates, with her master's degree in art therapy. See Compl., *DeJong* v. *Pembrook*, No. 3:22-cv-01124 (S.D. Ill. May 31, 2022), ECF No. 1. Thus, she was shocked when she suddenly received not one, not two, but three no-contact orders from her university. These orders banned her from having "any contact" or "indirect communication" with three students, two from her graduating class and one from another. If she violated these orders, officials threatened her with "disciplinary consequences," and they copied a university police officer on each one to drive that threat home.

Before issuing these orders, no University official had even informed Maggie that she was under investigation. Nor did anyone give her a chance to tell her side of the story. No one even told Maggie what she had supposedly done to merit this punishment.

One month later, after Maggie was forced to retain legal counsel, the picture became clearer. Three students complained because Maggie expressed her Christian and conservative views on current events. These three students found her views offensive, as was their right, but they also claimed that Maggie's speech itself had threatened them.

On social media, Maggie frequently expressed her religious beliefs. To one student, this content "directly attacks and belittles my own religious beliefs." This student also claimed Maggie told her "I will not be saved when the rapture comes" and "claims to have 'objective truth.'" Of course, the student failed to mention that this conversation occurred over a year before and that the two were joking with each other at the time. Instead, the student told officials that she felt "unable to speak about my own belief system" in Maggie's presence, and that Maggie's mere words represented discrimination, harassment, or retaliation.

To another student, Maggie explained why she "refused to succumb to critical race theory"—because she considered it "divisive and racist in its essence." In her report, this student also omitted how the conversation occurred ten months earlier, and how Maggie immediately followed up by saying "how much I value you" and how she saw in this student "a beautiful heart," "a compassion for children," and "a strong warrior." All the student told officials was that she "perceived" this spoken message "as threatening."

Based on these incomplete complaints about speech, University officials issued the three no-contact orders, and they accused Maggie of committing "oppressive acts" and "misconduct." This led to her being accused of "creating a toxic and harmful learning environment" and of making "threats . . . against members of our community." All this because of disagreement and subjective offense—cloaked in the language of discrimination, harassment, and threats.

## II. Peter Perlot, Mark Miller, Ryan Alexander, and Richard Seamon—University of Idaho.

Peter Perlot, Mark Miller, Ryan Alexander, and Richard Seamon—three law students and a law professor—can feel Maggie's pain. They, too, received no-contact orders without warning, jeopardizing their careers. See Am. V. Compl., *Perlot* v. *Green*, No. 3:22-cv-00183-DCN (D. Idaho May 17, 2022), ECF No. 17.

In response to an anti-LGBT slur from an unknown individual, the University held a "moment of community." Peter, Mark, and Professor Seamon—all committed Christians involved with Christian Legal Society—attended this event to denounce the slur and marginalization of any members of the community. They and other Christian Legal Society members prayed together at the event. While they did so, a student, Ms. Doe, accosted them about why Christian Legal Society believes that marriage is between one man and one woman. Mark and Professor Seamon explained how this is what the Bible teaches. After all, it is what Christians have believed for millennia and what this Court describes as "decent and honorable beliefs" held "in good faith by sincere and reasonable people." *Obergefell* v. *Hodges*, 576 U.S. 644, 657, 672 (2015). The conversation ended with Ms. Doe and

Mark civilly disagreeing with each other. Later, Peter left a note at her desk, inviting her to Christian Legal Society meetings if she wanted to discuss the issue or the group in more detail.

Three days later, Ryan and Peter attended a meeting with an American Bar Association accreditation panel. Ms. Doe and others complained about Christian Legal Society's allegedly bigoted religious views. Ryan offered a different perspective, highlighting how Ms. Doe had approached the group. He also expressed concern about religious freedom on campus, noting that Christian Legal Society's recognition had recently been delayed because of objections to its beliefs about marriage.

Three days after the panel, Peter, Mark, and Ryan all received no-contact orders, prohibiting them from contacting Ms. Doe in any way on or off campus, ordering them to sit on the opposite side of the classroom if she were present, and threatening further discipline or expulsion if they violated this order.

Meanwhile, Professor Seamon emailed Ms. Doe, offering to meet with her if she wanted to discuss everything further and making it clear that there was no problem if she didn't. Ms. Doe thanked him for "reaching out" and expressed a desire to meet with him. Days later, she changed her tune and copied the dean and associate dean on an email accusing Professor Seamon of "caus[ing] me to fear for my life at the [U]niversity of Idaho." She continued: "I fear you. I fear CLS. My life, my grades, my law school career are not safe with a professor that is actively working towards taking away my human rights." What led to this? She explained: "The group you are the admin for, subjected me and others to violent verbal abuse, in

which you took the lead on and agreed with." And she threatened to seek "a restraining order from the police" if he contacted her again.

The associate dean reviewed Professor Seamon's emails with Ms. Doe and declared them all innocent. No matter. Within weeks—and after Peter, Mark, and Ryan filed suit—Professor Seamon received a no-contact order. Like Peter, Mark, and Ryan, he was barred from contacting Ms. Doe in any way—even though she was in his class—beyond what is "required for classroom assignments, discussion, and attendance"—terms the University never defined.

In short, law school officials, who should know the First Amendment's protections for religious speech, used one student's ideological disagreement and subjective offense as an excuse to slap four people with no-contact orders, again because she cloaked her emotional offense as "threats" to her life and safety.

### III. Chike Uzuegbunam—Georgia Gwinnett College.

In July 2016, Chike tried to share his religious beliefs with his fellow students in an outdoor plaza near the library "where students often gather." *Uzuegbunam*, 141 S. Ct. at 796. But College officials quickly stopped him, explaining he "could speak about his religion or distribute materials only in two" speech zones, "which together make up just 0.0015 percent of campus." *Id.* at 796–97.

Chike reserved a speech zone, and on the appointed day, he began sharing how Jesus Christ died on the cross and rose from the dead to provide salvation and eternal life to all. After about 20 minutes, "a campus police officer again told him to stop, this time

saying that people had complained about his speech." *Id.* at 797. According to the officer, Chike's speech violated College policy "because it had led to complaints." *Ibid.* This is because the College's speech code prohibited students from saying "anything that 'disturbs the peace and/or comfort of person(s).'" *Ibid.* So officers threatened Chike with punishment if he continued speaking in the speech zone.

To defend this unconstitutional policy, the College tried to hide behind "fighting words." It claimed Chike "used contentious religious language that, when directed to a crowd, has a tendency to incite hostility." Pet.App.155a, *Uzuegbunam* v. *Preczewski*, No, 19-968 (U.S. Jan. 31, 2020). Thus, to these officials—and to the Office of the Attorney General of Georgia—Chike's presentation of the Christian Gospel "arguably rose to the level of 'fighting words.'" *Ibid.*; *Uzuegbunam*, 141 S. Ct. at 797. Again, an institution of higher education tried to censor speech by shoehorning it into one of the First Amendment's exceptions.

* * *

As this Court defines the First Amendment's "true threats" exception, it should consider what these students and professors have experienced. More and more, the idea that "speech is violence" is gaining traction. As a professor explained, "If words cause stress, and if prolonged stress can cause physical harm, then it seems that speech . . . can be a form of violence."[2] Too many students internalize this, concluding violence is a proper response to speech they dislike. Studies reveal that 51% think shouting down

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[2] Lisa Feldman Barrett, *When Speech Is Violence*, N.Y. TIMES (July 14, 2017), https://nyti.ms/3Zjlbzk.

a speaker is appropriate, and almost 20% think violence is.[3] Chike's attorney experienced this when over 100 students at Yale Law School tried to shout her down—at an event designed to show how the right and left worked together to protect civil rights.[4]

Too often, universities abandon their role of training students to have the resilience and thick skin necessary to engage in the unfettered exchange of ideas that is the hallmark of a free society. Instead, they foster a culture that incentivizes students to view themselves as victims and ideological views they dislike as threats—all in an effort to claim the moral high ground while censoring protected speech and then punishing the speaker. This Court should not give these universities and their administrators more tools to chill speech and cast the prohibited "pall of orthodoxy" on campus. *Keyishian* v. *Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

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[3] Catherine Rampel, *A Chilling Study Shows How Hostile College Students Are Towards Free Speech*, WASH. POST (Sept. 18, 2017), https://wapo.st/3tp1IQd.

[4] Aaron Sibarium, *Hundreds of Yale Law Student Disrupt Bipartisan Free Speech Event*, WASH. FREE BEACON (Mar. 16, 2022), https://bit.ly/3xRf89n; David Lat, *Is Free Speech in American Law Schools a Lost Cause?*, ORIGINAL JURIS. (Mar. 17, 2022), https://bit.ly/3m2FhiQ; Kristen Waggoner & Monica Miller, *The Anti-Free Speech Sickness Plaguing America Has Infected Our Future Lawyers*, DAILY MAIL (Mar. 23, 2022), https://bit.ly/3ZeQKtL.

## SUMMARY OF THE ARGUMENT

"At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Mag., Inc.* v. *Falwell*, 485 U.S. 46, 50 (1988). That is why its protections encompass "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of [its] guarantees." *Roth* v. *United States*, 354 U.S. 476, 484 (1957).

To be sure, the First Amendment allows some content-based restrictions in a few areas. *United States* v. *Alvarez*, 567 U.S. 709, 717 (2012) (listing the "historic and traditional" categorical exceptions "long familiar to the bar"); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384–91 (1992) (limiting restrictions even in these categories). But this Court has consistently limited the scope of these exceptions so that they are "well-defined and narrowly limited classes of speech." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72 (1942). The reason for this is "to allow more speech, not less." *Alvarez*, 567 U.S. at 720. This Court should define "true threats" with these principles in mind.

As Maggie, Peter, Mark, Ryan, Professor Seamon, and Chike attest, religious students often face persecution *because of* their speech. This is contrary to the First Amendment, which "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs" and which "forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States* v. *Stevens*, 559 U.S. 460, 470 (2010). But it still happens far too often.

Accordingly, this Court should make clear that government officials—including those in public schools and universities—cannot regulate speech based on how listeners feel. This is particularly critical in a polarized age when too many seek to vilify those with whom they disagree and to punish them for holding views they dislike. Nowhere is the need for this clarity more needed than on our campuses, which are all too often closer to an ideological echo chamber than the marketplace of ideas, places where those who simply differ from the prevailing orthodoxy can suddenly find themselves receiving no-contact orders.

Before the government can criminalize pure speech as a threat, it should have to prove that the speaker either knew his speech would be perceived as a threat or intended this result. This is the only way to prevent government officials from using an accusation of threats as a tool of censorship.

After all, the lower court here considered many factors in assessing the speech at issue—the statements, the broader exchange, the medium, the manner, the speaker's relationship with the reader, and the reader's emotional reaction. Pet.App.14a–18a. The only factor that did *not* matter was the speaker's intent or knowledge. Pet.App.12a. These are basically the same factors officials considered when slapping Maggie, Peter, Mark, Ryan, and Professor Seamon with no-contact orders, and they are the factors officials cited to argue that Chike uttered fighting words. Especially on campus, it is not difficult to imagine that administrators would assume that reasonable people hold progressive views and reasonably perceive any other perspectives as hostile attacks on human rights and individual dignity. Thus, the speaker's intent matters a great deal.

## ARGUMENT

Since at least the 1980s, universities have used various tools to curtail free speech. Some use speech codes—vague policies that prohibit speech that officials deem "uncivil," "insensitive," or "discriminatory."[5] Others use "bias response teams" to investigate speech that sparked complaints and officials deemed problematic.[6] Some seek to compel students or faculty to say things they do not believe.[7]

When forced to defend these unconstitutional policies, university officials frequently invoke one of the First Amendment's narrow exceptions, often fighting words (as with Chike),[8] sometimes threats (as with Maggie, Peter, Mark, Ryan, and Professor Seamon),[9]

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[5] *E.g.*, *McCauley* v. *Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn*, 537 F.3d 301; *Cohen* v. *San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Dambrot* v. *Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Iota Xi Chapter of Sigma Chi Fraternity* v. *George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993); *Coll. Republicans at S.F. State Univ.* v. *Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts* v. *Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair* v. *Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher* v. *Bd. of Regents of N. Ky. Univ.*, No. 96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998); *Dambrot* v. *Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *UWM Post, Inc.* v. *Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe* v. *Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

[6] *E.g.*, *Speech First, Inc.* v. *Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc.* v. *Fenves*, 979 F.3d 319 (5th Cir. 2020).

[7] *E.g.*, *Meriwether*, 992 F.3d 492; *Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012).

[8] *E.g.*, *Dambrot*, 55 F.3d at 1184–85; *DeJohn*, 537 F.3d at 320; *UWM Post, Inc.*, 774 F. Supp. at 1169–73; *McCauley* v. *Univ. of V.I.*, No. 2005-188, 2009 WL 2634368, *16 (D.V.I. Aug. 21, 2009), *aff'd*, 618 F.3d 232 (2010).

[9] *E.g.*, *Doe* v. *Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602, 626–30 (E.D. Va. 2016).

and sometimes both.[10] This Court should not give these officials more tools to silence the unfettered exchange of ideas on our nation's campuses by subjecting students to long, intrusive investigations simply because someone does not like what they happen to say. The only way to prevent this is to interpret true threats as requiring some showing that the speaker either knew his words would communicate a threat or intended to communicate one.

## I. This Court should construe the "true threats" exception very narrowly to avoid burdening First Amendment freedoms.

### A. This Court should ensure that this First Amendment exception, like the others, is narrow and well-defined.

For over eight decades, this Court has recognized that the First Amendment's categorical exceptions extend only to "certain well-defined and narrowly limited classes of speech." *Chaplinsky*, 315 U.S. at 571; *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (same). This is because "[c]ontent-based prohibitions," especially those "enforced by severe criminal penalties," "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004). Outside these narrow exceptions, the government cannot "punish the use of words or language." *Hess* v. *Indiana*, 414 U.S. 105, 107 (1973) (per curiam) (cleaned up); accord *Cohen* v. *California*, 403 U.S. 15, 24 (1971) (noting

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[10] *E.g.*, *Doe*, 721 F. Supp. at 862–67; *Bair*, 280 F. Supp. 2d at 370–72; *Roberts*, 346 F. Supp. 2d at 872; *Coll. Republicans*, 523 F. Supp. 2d at 1012–25.

government "has a justifiable interest in regulating speech" only in these "established exceptions").

Especially since statutes like the one at issue here criminalize "a form of pure speech," this Court has long required that they "be interpreted with the commands of the First Amendment clearly in mind," meaning "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). The First Amendment allows the government to regulate speech "only with narrow specificity," not "[b]road prophylactic rules." *NAACP* v. *Button*, 371 U.S. 415, 433, 438 (1963); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217–18 (1975) (noting need for "precision of drafting and clarity of purpose" when "First Amendment freedoms are at stake").

Indeed, over time, this Court has narrowed further the scope of these narrow, well-defined exceptions. *E.g.*, *R.A.V.*, 505 U.S. at 383 ("Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity[.]" (citations omitted)). It once described fighting words as "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. Later, it narrowed this to include only speech that is (1) "directed to the person of the hearer," and (2) "inherently likely to provoke violent reaction." *Cohen*, 403 U.S. at 20. Still later, it ruled that government cannot regulate this speech based on hostility to the speaker's message. *R.A.V.*, 505 U.S. at 384–88.

The true threats exception can be narrow and well-defined only if it requires some showing that the

speaker knew he was communicating a threat or intended to do so. Criminalizing speech based on a "reasonable person" standard means speech protections will fluctuate based on things like "the background knowledge and media consumption of the particular [factfinder]." *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1890 (2018). Whatever confidence one may place in jurors' common sense and the legal system's protections disappears in other contexts. For if true threats in criminal law depend only on the "reasonable person," then universities will restrict speech using similar standards but without safeguards.

As Chike knows, if someone complains, university officials think it is reasonable to silence speech—even in a "free speech zone"—claiming it "disturbs . . . peace and/or comfort." As Peter, Mark, Ryan, and Professor Seamon know, all it takes is for one student to claim civil, respectful speech "threatens" her, and university officials think it is reasonable to impose no-contact orders. The more complaints they receive, the more ammunition they think they have to say that a reasonable person would view this speech as a threat, as Maggie can attest. "True threats" should not become a "heckler's veto" by another name.

### B. This Court should once again ensure that speech cannot be punished merely due to its emotional impact.

The First Amendment's "bedrock principle" is that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). After all, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123,

134 (1992). This principle applies even when speakers have "inflict[ed] great pain" on the grieving families of our nation's fallen servicemen, *Snyder* v. *Phelps*, 562 U.S. 443, 460–61 (2011); lied about earning our highest military decoration, *Alvarez*, 567 U.S. at 726 (invalidating statute "even if true holders of the Medal [of Honor] might experience anger and frustration"); or used racial epithets, *Matal* v. *Tam*, 137 S. Ct. 1744, 1763 (2017).

This principle applies to the First Amendment's exceptions. For obscenity, courts apply community standards to prevent jurors from relying on their "personal opinion" or on the "effect on a particularly sensitive or insensitive person or group." *Hamling* v. *United States*, 418 U.S. 87, 107 (1974). When trying to prevent incitement, the government cannot convict someone "because the form of the protest displeased some of the onlookers." *Gregory* v. *City of Chi.*, 394 U.S. 111, 119 (1969) (Black, J., concurring). When religious speech that "naturally would offend" listeners did "highly offend[]" them and tempted some "to throw [the speaker] off the street," their reaction still did not justify restricting the speech. *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940).

In defining true threats, this Court should not open the door to restricting speech based on its effect on the recipient. *E.g.*, *Hustler*, 485 U.S. at 55 (noting "our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience"). Otherwise, university officials, who already view speech as violence, would weaponize this against students who hold minority or disfavored views on campus—students like Maggie, Peter, Mark, Ryan, and Chike.

### C. This Court should once again ensure that government officials do not have discretion to limit speech.

This Court "consistently condemn[s]" laws that "vest in an administrative official discretion" to restrict speech. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969). With vague criteria, officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988). Speech restrictions must contain "narrow, objective, and definite standards to guide" officials, *Shuttlesworth*, 394 U.S. at 150–51, and must not involve the "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Forsyth Cnty.*, 505 U.S. at 131 (cleaned up). The existence of this discretion chills speech. *Id.* at 133 n.10.

Without a showing of the speaker's knowledge or intent, there is no way to confine discretion in threat cases. What the reasonable person would think after considering all the facts and circumstances (except the speaker's intent) is very indeterminate. And it "is 'self-evident' that an indeterminate prohibition carries with it 'the opportunity for abuse, especially where it has received a virtually open-ended interpretation.'" *Mansky*, 138 S. Ct. at 1891 (cleaned up).

Nowhere is this potential for abuse more real than on university campuses, where there is a prevailing culture of hostility to free speech (*e.g.*, "speech is violence"), even in the Ivy League. *E.g.*, *supra* note 4. This atmosphere gives officials all the cover they need to claim that the "reasonable student" would view speech on a host of social, political, and cultural issues as a threat. After all, simply answering a student's

question about what Christians believe led to accusations of threats on her life and "violent verbal abuse" for Peter, Mark, Ryan, and Professor Seamon. Discussing the plan of salvation led to accusations of threats and fighting words for Maggie and Chike. Given today's tendency to label one's ideological opponents as evil or on the "wrong side of history," this potential for abuse is great.

We simply cannot assume university officials will respect free speech. This Court should not adopt an objective, "reasonable person" standard for true threats as this would entrust students' free speech rights "to the tender mercies of [a] discriminatory harassment/affirmative action enforcer" or the diversity, equity, and inclusion office. *Dambrot*, 839 F. Supp. at 482 n.7; accord *Stevens*, 559 U.S. at 480 ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.").

### D. This Court should continue its history of extending protection to speech some dub worthless to ensure that we protect the worthwhile.

At times, "[i]t might be tempting to dismiss" unsympathetic speech "as unworthy of the robust First Amendment protections." *Mahanoy Area Sch. Dist.* v. *B.L. ex rel. Levy*, 141 S. Ct. 2038, 2048 (2021). Indeed, Colorado succumbed to that temptation here, downplaying the threat that the objective standard it advocates poses for a wide range of speakers, including university students and faculty. But this Court has long recognized that "it is necessary to protect the superfluous in order to preserve the necessary." *Ibid.* It has applied this principle in a host of cases involving unsympathetic speech, including profanity, *Cohen*,

403 U.S. at 24–25; flag-burning, *Johnson*, 491 U.S. at 414, 416; lying about receiving the Medal of Honor, *Alvarez*, 567 U.S. at 723; animal crush videos, *Stevens*, 559 U.S. at 470; violent video games, *Brown*, 564 U.S. at 791–92; and attacks on fallen servicemen, *Snyder*, 562 U.S. at 458.

This principle applies to the First Amendment's exceptions. When discussing obscenity, this Court observed that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideals hateful to the prevailing climate of opinion—have the full protection of the [First Amendment's] guaranties." *Roth*, 354 U.S. at 484. So it limited the scope of this exception accordingly. *Id.* at 487–88.

When discussing defamation, this Court observed that false factual statements have "no constitutional value," but ruled that the "First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974). Thus, it limits defamation claims, even for private figures. *Id.* at 347–50.

Similarly, this Court distinguished between unprotected incitement and the protected "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence." *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (cleaned up).

True threats are no different. The First Amendment protects even the "vituperative, abusive, and inexact," especially without any evidence the speaker meant to communicate a serious threat. *Watts*, 394 U.S. at 708. Cross-burning, given its abominable history, ranks high in the loathsome speech category.

*Virginia* v. *Black*, 538 U.S. 343, 352–57 (2003). But this Court parsed that expression with care, noting different possible messages. *Id.* at 357, 365–66 (message can be "political" or "meant to intimidate").

The First Amendment's "hallmark . . . is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Id.* at 358 (citation omitted). If this "free trade" should happen anywhere, it is at our universities. *Healy*, 408 U.S. at 180; *DeJohn*, 537 F.3d at 314 ("[F]ree speech is . . . the lifeblood of academic freedom."). But in these environs, sharing your religious beliefs can get you accused of engaging in "fighting words"—and by the state attorney general's office no less—or of making threats. There, if you answer a question and offer to discuss it further, you can be punished for causing the listener to "fear for my life." At institutions of higher education (including a state's flagship law school), officials believed these claims were reasonable enough to justify no-contact orders. This Court should not empower these officials to evade accountability for their censorship by adopting a "reasonable person" standard for true threats that they will abuse because they think some views are not worth protecting. But see *Stevens*, 559 U.S. at 470 ("Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

## II. This Court should limit the "true threats" exception to instances where the speaker knew his remarks would communicate a threat or intended this.

### A. This *mens rea* requirement aligns with this Court's precedents.

This Court's earliest true threats cases held statutes criminalizing "a form of pure speech" "must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 U.S. at 707. This includes our "profound national commitment" to "uninhibited, robust, and wideopen" discourse, including the "vehement, caustic, and sometimes unpleasantly sharp," as well as the "vituperative, abusive, and inexact." *Id.* at 708; *Rogers* v. *United States*, 422 U.S. 35, 44 (1975) (Marshall, J., concurring) (noting *Watts'* "eye to the danger of encroaching on constitutionally protected speech"). Thus, the government must "prove a true 'threat,'" *Watts*, 394 U.S. at 708, one that is real, genuine, or authentic, not hyperbole or crude humor. *Id.* at 707 (noting crowd's laughter). This requires assessing the speaker's knowledge or intent.

Where only civil penalties were at stake, finding that an employer engaged in an unfair trade practice by threatening employees required the government to assess two things: "What did the speaker intend and the listener understand?" *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 619 (1969) (cleaned up). If the speaker's *mens rea* matters in the civil context, it should matter all the more in the criminal.

This Court reinforced this focus on the speaker's knowledge or intent when it ruled true threats "encompass 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. The "clear import" and "natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *United States* v. *Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *United States* v. *Heineman*, 767 F.3d 970, 978, 980 (10th Cir. 2014) (same).

*Black* added that the "speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60. This qualification is meaningful only "if there is a requirement that the defendant intend[ed] the victim to feel threatened." *Heineman*, 767 F.3d at 980. After all, if the speaker's intent does not matter because we look only to the reasonable person, why did *Black* parse which intent counts?

*Black* also defined "constitutionally proscribable" intimidation as when "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." *Black*, 538 U.S. at 360. It is hard to see how intent matters for intimidation but not for other true threats. *Heineman*, 767 F.3d at 981.

What's more, the *Black* plurality and concurring Justices all agreed that the conviction must be set aside because the prima facie provision absolved the state of its need to prove the defendant's intent. *Black*, 538 U.S. at 365; *id.* at 379–80 (Scalia, J., concurring in part, concurring in the judgment, dissenting in part); *id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part). Thus, "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to

secure a conviction." *Cassel*, 408 F.3d at 632–33; accord *Heineman*, 767 F.3d at 979.

Further, when construing federal law, this Court held that government would satisfy the required mental state by proving the speaker intended to communicate a threat or knew he was doing so. *Elonis* v. *United States*, 575 U.S. 723, 741 (2015). This is consistent with legislative history and avoids undermining the uninhibited debate the Constitution protects. *Rogers*, 422 U.S. at 45–48 (Marshall, J., concurring).

### B. This *mens rea* requirement would provide the needed breathing space for First Amendment freedoms.

First Amendment rights "are delicate and vulnerable, as well as supremely precious," and so the "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433. Thus, these freedoms "need breathing space to survive," a principle that has regulated the scope of First Amendment exceptions. *Ibid.*

This Court recognized that "sex and obscenity are not synonymous" and safeguarded the right to discuss the former. *Roth*, 354 U.S. at 487–88. For defamation, because false statements are "inevitable in free debate," "the First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U.S. at 340–41; accord *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in judgment) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements[.]"). The actual malice standard for public figures provides this required "breathing space." *Hustler*, 485 U.S. at 52.

For true threats, the only way to provide this breathing space is to require some showing that the speaker knew he was communicating a threat or intended to do so. This is the only way to allow the government to regulate speech "only with narrow specificity." *Button*, 371 U.S. at 433.

This breathing space is vital to us all, but university cases perhaps best illustrate how delicate First Amendment rights are, even where they should be most cherished. University officials did not give the freedoms of Peter, Mark, Ryan, and Professor Seamon any breathing space. Rather, they thought it reasonable to use one student's complaints, couched in melodramatic threat language, to deal out no-contact orders, punishing people for answering a question. University officials concluded that multiple complaints meant it was reasonable to slap Maggie with a no-contact order, merely for expressing her political and religious views. Nor did Chike get any breathing space—not even in a speech zone, not even from the state's attorney general's office. Only requiring these officials to consider the speaker's knowledge and intent will prevent them from abusing true threats to suppress speech.

### C. This *mens rea* requirement would ensure that only wrongful conduct is beyond First Amendment protection.

Furthermore, we have historically required that "wrongdoing must be conscious to be criminal," so that citizens can "choose between good and evil." *Elonis*, 575 U.S. at 734 (cleaned up). That is, one must "know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Id.* at 735 (cleaned up).

Thus, a *mens rea* requirement seeks to "separate wrongful conduct from otherwise innocent conduct," or here, protected speech. *Id.* at 736 (cleaned up). "Having liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence." *Id.* at 738 (cleaned up).

If negligence is not good enough to criminalize pure speech under federal law, it's not good enough for the First Amendment. Otherwise, speech—which should be uninhibited and unfettered—would become ripe for "technical offense[s]" where "innocent acts [are] punishable." *Rogers*, 422 U.S. at 46 (Marshall, J., concurring). As Maggie, Peter, Mark, Ryan, Professor Seamon, and Chike know, this risk is acute in the culture that pervades higher education. A speaker's knowledge or intent should matter for true threats.

### D. This *mens rea* requirement would prevent any ambiguities in this area from chilling protected speech.

"The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin* v. *New York*, 383 U.S. 502, 511 (1966). This requires proving the defendant knew "the character of the material" at issue. *Id.* at 510. If this is a risk in the obscenity arena, it is more acute for true threats. The only way to prove that a speaker knows the "character" of his remarks is to show that he knew he was communicating a threat or intended to do so.

Even when prosecution is only likely, "speakers may self-censor rather than risk the perils of trial."

*Ashcroft*, 542 U.S. at 670–71. This creates "a potential for extraordinary harm and a serious chill upon protected speech," *id.* at 671, particularly when criminal sanctions attach "to a mistaken judgment about the contours of [a] novel and nebulous category of . . . speech," *id.* at 675 (Stevens, J., concurring).

If this is true for citizens facing prosecution (with the accompanying procedural protections and affirmative defenses), the risk is far greater for faculty and students who risk punishment, firing, or expulsion. *Keyishian*, 385 U.S. at 604 ("When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." (cleaned up)). Students should not be "forced to guess at whether a comment about a controversial issue would later be found to be sanctionable" as a threat, especially when a wrong one can find them on the wrong end of a career-impacting no-contact order. *Doe* v. *Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989). If they are forced to guess, a "pall of orthodoxy" will descend on campus, as students like Maggie, Peter, Mark, Ryan, and Chike quickly deduce that officials, who have drunk deeply from the "speech is violence" well, will wield the "reasonable person" standard selectively. *Keyishian*, 385 U.S. at 603.

### E. This *mens rea* requirement aligns with the limits on other categorical First Amendment exceptions.

No First Amendment exceptions allow speech to be restricted, let alone criminally punished, based solely on what a reasonable person would conclude. True threats should not become the first.

### 1. Obscenity & Child Pornography

Even early obscenity cases recognized that "sex and obscenity are not synonymous," and required the government to prove the material in question "deals with sex in a manner appealing to prurient interest." *Roth*, 354 U.S. at 487. They also required fact-finders to use "contemporary community standards" and to assess "the dominant theme of the material taken as a whole." *Id.* at 489. This prevented speech from being restricted based on how "isolated passages" might impact "the most susceptible persons." *Id.* at 489. It also prevented a juror from relying on his own "personal opinion" or the material's "effect on a particularly sensitive or insensitive person or group." *Hamling*, 418 U.S. at 107. Later, this Court also required that (1) the "work depicts or describes" sexual conduct "in a patently offensive way" and (2) the "work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973); *Brown*, 564 U.S. at 792–93 (limiting obscenity to "depictions of sexual conduct" (cleaned up)).

The required *mens rea* provided more safeguards. In *Miller*, defendants had to "hav[e] knowledge that the matter is obscene." *Miller*, 413 U.S. at 16 n.1. Later, this Court ruled the "Constitution requires proof of scienter," meaning proof the defendant was "aware of the character of the material." *Mishkin*, 383 U.S. at 510–11. And it upheld this requirement at least twice, *Ginsberg* v. *New York*, 390 U.S. 629, 643–45 (1968); *Hamling*, 418 U.S. at 123; accord *Elonis*, 575 U.S. at 739 (noting *Hamling* required "calculated purveyance"), and applied it to child pornography. *E.g.*, *New York* v. *Ferber*, 458 U.S. 747, 765 (1982) (requiring "scienter on the part of the defendant"); *id.* at

751 (noting statute required defendant to "know[] the character and content" of child's sexual performance).

The true threats exception should be no broader, and the only way to know the "character and content" of a threat is to assess the speaker's knowledge or intent. *Elonis*, 575 U.S. at 739 ("'[C]alculated purveyance' of a threat would require that Elonis know the threatening nature of his communication.").

### 2. Defamation

On top of the traditional requirements for slander or libel (*e.g.*, a false statement made to a third party that damages one's reputation), the First Amendment imposes additional safeguards. Public figures must prove the speaker acted "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279–80 (1964); *Hustler*, 485 U.S. at 56 (requiring same for intentional infliction of emotional distress). Even for private figures, states may not "impose liability without fault," *Gertz*, 418 U.S. at 347, or "permit recovery of presumed or punitive damages" without "a showing of knowledge of falsity or reckless disregard for the truth," *id.* at 349–50.

True threats lack any standards like the traditional requirements for defamation. Thus, the *mens rea*—knowledge or intent—must be included to protect speakers like Maggie, Peter, Mark, Ryan, Chike, and Professor Seamon.

### 3. Speech Integral to Crime

When this Court assessed whether the First Amendment protects speech integral to crime, it did not employ a reasonable person standard. After all,

the union "adopted a plan which was designed to" restrain trade, and the "avowed immediate purpose of the picketing was to compel Empire to agree to stop selling ice to nonunion peddlers." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 492 (1949). It was so clear that the union was intentionally violating the law that this Court concluded it was their "sole, unlawful immediate objective." *Id.* at 502.

Furthermore, the exception applies only to speech "used as an integral part of" a crime, not speech a reasonable person might deem associated with it, given all the facts and circumstances. *Id.* at 498. True threats should be no broader. The only way to prevent this is to assess the speaker's knowledge or intent.

**4. Fraud**

While the First Amendment gives no protection to fraud, *Stevens*, 559 U.S. at 468, these statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring). In federal court, these claims face heightened pleading requirements. FED. R. CIV. P. 9(b).

True threats have no similar guardrails. The only way to separate the truly threatening from the intemperate is to assess the speaker's knowledge or intent.

**5. Incitement**

The reasonable person does not determine whether speech qualifies as incitement. Rather, this exception applies only when advocacy of force or illegal conduct (1) "is directed to inciting or producing imminent lawless action" and (2) "is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

"Directed to" belies the speaker's intent. *Hess*, 414 U.S. at 109 (rejecting incitement argument because "there was no evidence . . . that his words were intended to produce . . . imminent disorder"). Indeed, this Court distinguished "abstract teaching" from "preparing a group for violent action and steeling it to such action," again emphasizing the speaker's intent. *Brandenburg*, 395 U.S. at 448 (cleaned up).

To be sure, when something is "likely to incite" imminent lawlessness is a judgment call, but that judgment call alone does not determine whether the speech falls outside the First Amendment. Under Colorado's objective standard for true threats, the reasonable person does—and that should not be.

### 6. Fighting Words

Nor does the reasonable person alone decide whether speech qualifies as fighting words. Instead, fighting words must be "directed to the person of the hearer" and use "personally abusive epithets, which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen*, 403 U.S. at 20 (cleaned up). This Court even considered the speaker's intent. *Ibid.* ("There is . . . no showing . . . that appellant intended [to arouse anyone to violence].").

To the lower court, true threats depend on whether the recipient, knowing all the content and circumstances, "would reasonably perceive [the statement] as a serious expression of intent to commit an act of unlawful violence." Pet.App.12a. That is, would the reasonable recipient feel threatened? But fighting words require (1) that the speech be directed to the "person of the hearer," and (2) that it be so "personally

abusive" that the reasonable person does not just feel offended or threatened, does not just want to retaliate physically, but would be "inherently likely" to respond by "exchang[ing] fisticuffs." *Cohen*, 403 U.S. at 20; *Johnson*, 491 U.S. at 409; accord *Hess*, 414 U.S. at 107–08. Indeed, even when a speaker's religious views caused listeners to want to hit him and throw him off the streets, and even when justices of this Court viewed those sentiments as "natural[ ]," this Court still declined to find that he had breached the peace. *Cantwell*, 310 U.S. at 309.

Not even these high, long-established safeguards are enough to protect everyone's freedoms. Just sharing with people how Jesus Christ died on the cross and rose again to give them eternal life was enough for officials to accuse Chike of engaging in fighting words—all because he allegedly disturbed someone's "peace and/or comfort." But given this reality—and the "speech is violence" mentality that afflicts too many administrators—allowing true threats to fluctuate based solely on the reasonable person is dangerous. A speaker's knowledge or intent should matter before he is punished for his speech.

## CONCLUSION

Amicus takes no position on the ultimate resolution of this case. But in formulating the test for determining that a statement is a "true threat" unprotected by the First Amendment, Amicus urges the Court to construe the exception narrowly and limit it to instances where the speaker knew his remarks would communicate a threat or intended this.

Respectfully submitted,

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