

IN THE SUPREME COURT OF THE UNITED STATES

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No. 22-138

BILLY RAYMOND COUNTERMAN, PETITIONER

v.

STATE OF COLORADO

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ON WRIT OF CERTIORARI  
TO THE COLORADO COURT OF APPEALS

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MOTION OF THE UNITED STATES FOR LEAVE TO PARTICIPATE  
IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT

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Pursuant to Rule 28 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae supporting respondent and requests that the United States be allowed ten minutes of argument time. Respondent has agreed to cede ten minutes of argument time to the United States, and consents to this motion.

This case presents the question whether the First Amendment precludes criminal conviction of a defendant who makes a communication that a reasonable person would understand as a threat of injury or death unless the prosecution has proof beyond a reasonable doubt of the defendant's subjective intent or knowledge that it would be taken as such a threat. Petitioner was convicted of

stalking (serious emotional distress), under Colorado Revised Statute § 18-3-602(1)(c) (2016). As required under Colorado law, the jury instructions at petitioner's trial required proof beyond a reasonable doubt that the communications were true threats but did not require proof beyond a reasonable doubt that petitioner subjectively intended or knew that that they would be taken as such. The brief for the United States argues that the First Amendment does not require proof of such subjective intent or knowledge as a prerequisite for a valid criminal conviction for making a true threat.

The United States has a substantial interest in the resolution of the question presented. The Court's decision in this case may affect the application of federal prohibitions on threats, including threats against the President and other public officials, as well as Congress's future ability to proscribe various kinds of threats. See, e.g., 18 U.S.C. 871(a) (threats against the President and successors to the Presidency); 18 U.S.C. 875(c) (threats made in interstate commerce); 18 U.S.C. 876(c) (threats made via U.S. mail); 18 U.S.C. 878(a) (threats against foreign officials); 18 U.S.C. 2332a (threats to use weapons of mass destruction).

The United States has previously presented oral argument as a party and as amicus curiae in other cases involving the First Amendment's application to threatening communications, including one that presented the same question that is presented here. See

Elonis v. United States, 575 U.S. 723 (2015); see also Virginia v. Black, 538 U.S. 343 (2003). In light of the government's substantial interests in the question presented, the United States' participation at oral argument could materially assist the Court in its consideration of this case.

Respectfully submitted.

ELIZABETH B. PRELOGAR  
Solicitor General  
Counsel of Record

MARCH 2022