23-5902

No. 23A127

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KALEB COLE - Petitioner

v.

UNITED STATES - Respondent

On Petition For Writ of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Kaleb Cole, Pro se
Reg. No. 13964-579
United States Penitentiary
USP Marion
P.O. Box 1000
Marion, IL 62959-7500

QUESTIONS PRESENTED

1. Whether the First Amendment, Post Counterman v. Colorado permits a criminal conviction for retaliatory speech which is inherently threatening not on the basis of its objective expression but rather because of the grossly disparate worldviews held by the sender and his recipients? To wit, does the Constitution permit imprisonment of a person on the basis that his speech caused fear in its' intended recipients due in part to starkly different worldviews held by the respective parties? Is it constitutionally tolerable to imprison the expositors of radical speech on the basis that said speech can be inherently fear-producing to its non-radical recipient?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- United States v. Cole, No. CR-20-032JCC, U.S. District Court for the Western District of Washington. Judgment entered January 11, 2022.

- United States v. Cole, No. 22-30015, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 12, 2023. En Banc denied May 22, 2023.

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TABLE OF AUTHORITIES CITED

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the conviction of the petitioner. The memorandum of the Ninth Circuit appears at Appendix A and can be found on Lexus Nexus 2023 U.S. App LEXIS 8757 as an unpublished opinion. The order of the Ninth Circuit denying rehearing En Banc appears at Appendix B and is unpublished. There is no district court opinion on the docket.

JURISDICTION

A Rule 29 Motion for acquittal was raised orally during trial and summarily denied by the court on September 29, 2021. The district court had entered its judgment on January 11, 2022. The Ninth Circuit Court of Appeals denied the petitioner's appeal on April 12, 2023. His petition for rehearing En Banc was denied May 22, 2023. The petitioner made an application to this Court for an extension of time with which to file a petition for a writ of certiorari and the application was granted on August 17, 2023 extending the time to file to and including October 19, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. Amend. I, The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assembly, and to petition the Government for a redress of grievances.

- 18 U.S.C. § 876(c), Mailing Threatening Communications
- 18 U.S.C. § 371, Conspiracy to Commit offense or defraud the United States
- 18 U.S.C. § 245, Interfering with Federally Protected Activities

Statement of the Case

Petitioner Kaleb Cole is a Nazi sympathizer and political dissident. In Autumn of 2019, Cole made national news when journalists attempted to harass him at his family's home, one of many such instances. Cole, among several others, was charged with criminal violations of 18 U.S.C. §§ 371, 876(c) and 245. Specifically, the charges relate to sending posters via mail to journalists and lobbyists and affixing them to their doorsteps and offices. The problem though was that from Cole's perspective, it was not a campaign of threats but an exercise in activism, specifically demonstrative and retaliatory speech. The flyer campaign, "Operation Erste Saule" had the following internal mission statement:

> "we're conducting this nationwide operation called Operation Erste Saule, named after the first pillar of Stat[e] power... We will be postering journalists houses and media buildings to send a clear message that we to [sic] have leverage over them, and that we aren't scared of their articles or public defamation. The goal, of course, is to erode the media/states air of legitimacy by showing people they have names and addresses to..."

The FBI was monitoring the progress of Operation Erste Saule as it began to take form. They had access to private online chats where participants coordinated, discussed ideas and recorded conversations while they visited Cole. Before the leafletting of the journalists' and lobbyists' homes and offices began, the FBI preemptively notified several intended recipients of the leafletting and that they foresaw no indication of danger whatsoever. The posters in question list the recipients' addresses and phone numbers. They featured messages such as "Two can play at this game [,] these people have names and addresses" showing an effigy of a nondescript reporter. Another states "your actions has consequences [,] our patience has its limits", which shows a figure wearing a hoodie holding a molotov cocktail outside a

neighborhood, which the government contended was a violent threat of arson despite the fact that arson has been ruled not to be a crime of violence (let alone the presence of a molotov cocktail in the picture). See United States v. Moore, 802 Fed. Appx. 338, 340-342 (10th Cir. 2020) (unpublished opinion) (ruling federal arson is not a crime of violence even though defendant ignited a homemade explosive while attempting to destroy a shopping mall). The last leaflet states "we are no one [,] we are everyone [,] we know where you live [,] do not fuck with us", featuring swastikas. This kind of provocative propaganda featuring weapons, molotov cocktails, militancy and abusive rhetoric is typical of the speech which Cole routinely exercises.

At trial, the government asserted that the posters were threats of violence but was unable to quantify what exactly that threat entailed. They maintained from the criminal complaint onward that Cole had caused "emotional distress" in his alleged victims and had derived subjective intent to threaten from the aforementioned information.

In order for a true threat conviction to stand, the Ninth Circuit requires a subjective intent to threaten and that an objective reasonable person would feel that the communication is a threat. "The First Amendment allows criminalizing threats only if the speaker intended to make a 'true threat'... We concluded, the subjective test set forth in Black must be read into all statutes that criminalize pure speech." United States v. Bachmeier, 8 F.4th 1059, 1064 (9th Cir. 2021) (emphasis added). See also United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011) (holding that explicit statements of harm befalling then candidate Barack Obama did not amount to true threats, even when stating that Mr. Obama "will have a 50 cal in the head soon"). The Ninth Circuit reasoned that the statements could not be considered as threats because they "Convey[ed] no explicit or implicit threat on the part of [the defendant] that he himself will kill or injure [another person]." Id. at 1119.

Despite previous Ninth Circuit rulings, Supreme Court caselaw and the jury instructions altogether requiring the objective and subjective standards both to be met: the jury convicted Cole on all counts and the judgment of the district court was entered on January 11, 2022. Cole filed a notice of appeal and his former counsel attended oral argument before the panel on March 28, 2023. The panel denied Cole's appeal on April, 12 2023 deferring to the jury verdict and erroneously ruling that Cole's communications amounted to true threats without devoting the time to distinguish Ninth Circuit rulings or other precedent from Cole's case. Cole Motioned for rehearing En Banc, which was summarily denied on May 22, 2023.

Reasons for Granting the Writ

I

This Court has opened a pandora's box with its decision in Counterman v. Colorado, No. 22-138, 600 U.S. ____ (2023) for it has endangered expressive speech that has been protected in this country for decades, at least. In a nation that has never been timid about the expression of its opinions, being filled with diverse worldviews of every stripe, is it constitutionally tolerable to rest a person's conviction and imprisonment upon expressive speech which, because of his worldview, others find inherently fearful? The new recklessness standard puts all power in the hands of alleged victims who can arbitrarily decide, at will, whether they feel "threatened" by the particular speech in question. Providing the power to prosecute someone for expressive speech will cause that speech Ipso Facto to be censored, for it is in the very nature of dissident speech that those with a majority opinion will want to suppress what is said under the rubric that it is fear-inducing. Radical speech cannot be constitutionally prohibited simply because others may be

intimidated by its exercise. This is the slippery slope whereby many examples of formerly protected expressive speech can now suddenly, after Counterman, be met with criminal prosecution. Societal discourse cannot be dictated by the hypersensibilities of its audience, for what is "radical" or controversial is a matter that happens to be constantly shifting, especially in a multi-cultural society. By means of analogy, the FBI was recently caught investigating the Catholic Church for alleged "extremism" and as such it conducted surveillance upon a 2000 year old religion whose church many Americans attend, including the Justices of this Court.

II

As the syllabus summarizes in Counterman [quoting Voisine v. United States, 579 U.S. 686, 691 (2016)]:

> "...a recklessness standard - i.e., a showing that a person consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another..."

This standard is more appropriate with respect to civil litigation as it is derived from defamation caselaw with their accompanying harms; one is aware of the potential harm he causes and yet he acts anyway. It may be appropriate in cases where statements are only secondary to conduct (such as outright stalking, harassing telephone calls, etc.). This Court has not considered the broader implications however in equating defamation torts to criminally imprisonable threats, especially in regard to how that may squelch what is supposed to be constitutionally protected speech. Simply put, "recklessness leans heavily on an objective person standard, which is too low of a bar in a criminal case considering that dissident speech may seem inherently "threatening" to those with a majority opinion. As the concurring opinion states in Counterman: "Speech inciting harm is the closest cousin to speech threatening harm. Both incitement and threats put other people at risk, and

both 'Sprin[g] from [Justice] Holmes' 'clear and present danger test...'" (emphasis added).

When considering "conscious disregard", were protestors arrested who demonstrated outside the homes of Supreme Court Justices? Was there a plethora of rhetoric which involved inflammatory, vituperative or otherwise concerning forms of expression which led to criminal charges for threats? Were effigies burned or hanged, and if there were, would that have been sufficient reason to file charges? Likely not. Under the majority opinion in Counterman however all that need be proven is that these people evinced "recklessness" under a threat statutes, when highly charged political expression of this sort is integral to the foundation of this country and protected by the First Amendment. The colonial protest of the Stamp Act in 1765 set the stage in displaying the sort of dissidence which led to the founding. Subsequently, burning or hanging of effigies became an established form of political expression, and that is whether anybody has been placed in fear or not. Nearly every president has been burned in effigy at some juncture along with numerous other public officials such as local politicians or judges all the way down to deans of universities such as in Estaban v. Central Missouri State College, 415 F.2d 1077 (10th Cir. 1969) (students participating in mass demonstrations resulting in property damage and the dean being burned in effigy) as well as other public figures like in Mills v. Steger, 179 F. Supp. 2d 640 (W.D. Va. 2002), aff'd, 64 Fed. Appx. 864 (4th Cir. 2003)(where opera fans protested against a public radio manager by burning effigies of him). These are two stark examples of the use of effigies in protest. Burning or hanging effigies never seems to be met with criminal prosecution. It can be argued that the practice of desecrating effigies--simulating physical harm-- is far more threatening than anything Cole did.

III

Through the lense of the new recklessness standard, the speech of the Founding Fathers would have been criminalized in light of hypersensibilities that were virtually nonexistent at the time as fear would have canceled their speech. This is why the First Amendment is meant to enshrine dissident expression since popular opinion needs no protection. See e.g., R.A.V. v. City of Saint Paul, 505 U.S. 377, 382-386 (1996) (holding a city ordinance banning the display of provocative symbols that arouse anger in others on the basis of race, color, religion or gender facially invalid under the First Amendment). After all before the revolution the Founding Fathers were the radical minority.

Many of this Court's true threats cases involve politically charged expression, inflammatory hyperbole or exhortatory statements. See Virginia v. Black, 538 U.S. 343, 359-62 (2003); Brandenburg v. Ohio, 395 U.S. 444, 446-48 (1969); Watts v. United States, 394 U.S. 705 (1969) (holding that based upon context, statements made by the petitioner about shooting the President were "political hyperbole" instead of "true threats"), and others which upheld First Amendment protected expression despite a backdrop of volatility, violence and disorder. See NAACP v. Claiborne Hardware, 458 U.S. 886, 909-11, 916, 919, 927 (1982) (holding that explicit statements made during boycott rallies, with references to necks being broken or the sheriff not being able to sleep at night with boycott violators, were protected under the First Amendment even when the speaker was intending to create fear of violence); Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding constitutional right under the First Amendment does not permit the state to forbid or proscribe the advocacy of the use of force or of law violation except where such advocacy is directed at inciting or producing imminent lawlessness). It appears as though this Court recognizes the importance of intent to threaten along with

the imminent lawlessness doctrine, however, the problem has not been solved. "the risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. Our society's discourse occurs more and more in the vast democratic forums of the internet in general, and social media in particular..." Counterman v. Colorado, 22-138, 600 U.S. ____ (2023) (concurring opinion). Considering these precedents it stands to reason that, in a broader social context, incitement cases are far more analogous to threats cases when evaluating the kind of harm caused: whereas the harm in defamation is to reputation the harm involved in a true threat deals with physical harm. To compare the harm measured - loss of social standing - to the threat of physical harm is problematic. That is why defamation suits remain in civil court and why comparing the two is like comparing apples and oranges.

IV

How does one measure substantial harm caused? The true threats test is based upon that which is likely to produce or incite "imminent lawlessness." See Brandenburg, Black, and Hess, all of which draw from the "clear and present danger test" set forth in Schenk v. United States, 249 U.S. 47, 52 (1919). Simply put the threat is physical harm or bodily injury, which applies quite explicitly in most convention threat statutes. Though this Court has ruled speech constitutionally protected regardless of a backdrop of volatility or violence in Claiborne Hardware and Hess, the Ninth Circuit has adopted a doctrine holding that a context or a backdrop of imminent lawlessness provides sufficient justification to criminalize speech as true threats under the objective "reasonable person" and the subjective intent-to-threaten standards. See e.g. Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1070-80 (9th Cir. 2002) and United States v. Keyser, 704 F.3d 631, 640 (9th Cir. 2012). Keyser involved conduct in the form of a substance (sugar

used as fake anthrax in a package with the communication itself). Therefore, when considering the context, it was a threat under both the objective and subjective tests. In this instance it was easy to determine that the announced presence of a physically dangerous substance was a threat. In Planned Parenthood the Ninth Circuit adopted its "context" doctrine about a decade earlier. Though this Court decided in Black about a year later, the Ninth Circuit still relies on the incomplete "context" standard. Cases like these are being used as a means to prosecute on the basis of expression or pure speech absent the course of conduct that defined these cases.

V

So what stands as a substantial and "unjustifiable" risk without the essential elements of a true threat? "Unjustifiable risk" is also assumed to be objective on its face yet the "unjustifiable risk" is unspecified. As Justice Barrett states in the dissenting opinion in Counterman: "The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: recklessness is not too much, not too little but instead 'just right.'" So, if the person or property of another remains free from injury, and no specific expression places them on notice of injury, how is victimhood ascertained and from whence is harm derived? At issue here for the petitioner is a demonstration in retaliatory speech. So can someone really be a victim when subjected to retaliatory expression? Applied to this case, is a person still a "reasonable" person, let alone a victim, if he or she assumes the worst from the sender despite the professional opinion of law enforcement to the contrary? Does someone not have the right to respond to the expression of others with counter speech? Or is that person obligated to accommodate the instigator for fear that his speech may elicit fear? By way of analogy, is a Nazi obligated to cease his invective and activism just because it may understand-

community to another... Members of certain groups, including religious and cultural minorities, can also use language that is more susceptible to be misrepresented by outsiders..."; "[S]peakers whose ideas occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." United States v. White, 670 F.3d 498, 525 (4th Cir. 2012) (Floyd J. concurring in part, dissenting in part). "Imposing such a specific intent-to-threaten requirement... has a sound basis in First Amendment jurisprudence. As we have previously recognized, to prevent the chilling and potential suppression of protected speech, certain clases of speech that generally fall outside First Amendment protections require proof of a heightened, subjective mens rea before they be punished." See Id. 525. For example a dissident could become imprisoned for expression that is constitutionally protected because his prosecutor has sought to describe his efforts to speak within the boundaries of the law as a "conscious disregard" for the possibility that his speech may cause fear in others. Therefore prosecutions are opened up more upon the character of the dissident, or his ideas and this presents a double-standard whereby similar conduct perpetrated by someone with more contemporary or popular ideas is never prosecuted. Further, when analyzing counter speech, does the instigator or the initiator not assume the risks of his or her own speech? To make a crude analogy, Person A strike Person B, and Person B strikes back. Is it not self-defense on the part of Person B? Or atleast mutual between both parties? So the result of the foregoing is a prosecution that may be launched as a pretext for simply shutting somebody up. In effect, such an individual charged may incur a miscarriage of justice and greater potential harm by virtue of the deprivation of his liberty, conviction and subsequent imprisonment. This significantly lowers the burden for proscribing speech which amounts at best to vague or

implicit upsetting expressions and this has far reaching consequences.

VI

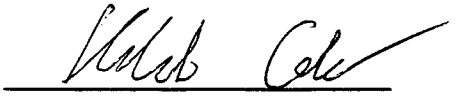
Traditionally the doctrine of true threats has derived meaning from that precedent which concerns political incitement. That precedent recognizes a mens rea element requiring an intent to incite "imminent lawlessness" as in Hess v. Indiana, 414 U.S. 105, 108 (1973) and Brandenburg v. Ohio, 395 U.S. 444, 446-48 (1969). So it stands to reason that the requirement of mens rea in threats cases include an intent to threaten thus allowing true threats to be punished without offending the First Amendment. This explicit measure will prevent overcriminalization and the fanciful prosecution of expression due to its ideological content or the character of the expositor alone, and it will put to rest the present existing conflict between the circuits whereby they are split between regarding threats cases as a "general intent to communicate" or recognizing an "intent to threaten". Furthermore, it will end that conflict which exists within circuits such as the holding within the majority opinion in Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1070-80 (9th Cir. 2002); which seemingly went both ways in its ruling - where depending upon the context the panel is more favorable to the objective prong or to the demands of the subjective standard but is really promulgating an incomplete contextual doctrine which dilutes both standards - along with later holdings in Bagdasarian and Bachmeier being more consistent with the rulings of this Court. This new "recklessness" standard itself could be said to recklessly endanger the very same First Amendment expression that decades of precedent had sought to protect. "[T]he majority opinion correctly distills the following definition of a true threat: a statement [that presents] a serious expression of intent to inflict bodily harm... The emphasized language is crucial because it is not illegal--and cannot be made so-- merely to say

Also regardless of the holding in Counterman this Court still appears to recognize the role incitement cases play in shaping precedent. This Court has also ruled in favor of subjective intent in Elonis v. United States, 575 U.S. 723 (2015), though the petitioner in Elonis did not raise the First Amendment claim which the petitioner in this case does. "It is true that our incitement decisions demand more - but the reason for that demand is not present here... a strong intent requirement was and remains one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that protection is not needed here. [in Counterman]." Counterman v. Colorado, No. 22-138, 600 U.S. ____(2023) (Maj. Op., emphasis added). Unlike in Counterman, the petitioner raises the fundamental First Amendment claim that Billy Counterman failed to do. Even where precedent from this Court and the Ninth Circuit could be said to have formed the basis for the jury instructions - that subjective intent to threaten and the objective standard are both required to support a conviction- the jury still may have convicted Cole because of his worldview and the district court Judge may have been careless in allowing the conviction to stand. The petitioner is a political dissident who now, from his prison cell, brings his case to a Court which does consider the protection of dissident speech to be at the core of the First Amendment and whose case demands the potency of that protection as it relates to dissidents like himself and which by extension effects the expression of countless Americans otherwise.

Conclusion

Petitioner Kaleb Cole respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,



October 16, 2023

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No. 23A127

CERTIFICATE OF COMPLIANCE

KALEB COLE - Petitioner

v.

UNITED STATES - Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4362 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true is correct.

Executed on October 16th, 2023.

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