No. _____

In the
Supreme Court of the United States

GEORGIY CHIPUNOV,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Counterman v. Colorado*, 600 U.S. 66, 73 (2023), the Court clarified that, to comply with the First Amendment's protections, prosecutors "must prove in true-threats cases that the defendant had some understanding of his statements' threatening character." Since then, almost all courts have rejected defendants' facial overbreadth challenges based on *Counterman*'s true-threat doctrine, instead considering as-applied challenges to specific prosecutions and specific threats. The Ninth Circuit has, alone, taken the opposite tack. It has continued to reject as-applied challenges, instead requiring defendants to bring facial challenges under *Counterman*.

The question presented is: To state a claim under the First Amendment's true-threat doctrine, must a criminal defendant bring a facial challenge to the statute with which he is charged?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Georgiy Chipunov and the United States. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Chipunov*, No. 22-CR-1268-W, U.S. District Court for the Southern District of California, Judgment issued August 29, 2023.
- *United States v. Chipunov*, No. 23-2046, U.S. Court of Appeals for the Ninth Circuit, Memorandum disposition issued April 14, 2025.

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INTRODUCTION

This is a petition about the Ninth Circuit's continued channeling of First Amendment claims into facial challenges rather than as-applied challenges. It arises from the true-threats context. This Court most recently addressed true threats in *Counterman v. Colorado*, 600 U.S. 66, 73 (2023), in which it considered the "precise *mens rea* standard" that renders a criminal prosecution for threatening speech permissible under the First Amendment. The Court held that the First Amendment requires "a subjective mental-state element." *Id.*

Since *Counterman*, most federal courts and state supreme courts have, as one would expect, evaluated true threats prosecutions' compliance with the First

Amendment in an as-applied manner: Did jurors consider whether the defendant had the required subjective mental state? The Ninth Circuit, however, requires a facial challenge. It asks: Is the threats statute of which the defendant was convicted facially constitutional?

This case presents an excellent opportunity to once again remind the Ninth Circuit of the roles of as-applied and facial First Amendment challenges, and to remind it to focus first on as-applied challenges. Mr. Chipunov preserved his as-applied true-threats claim, and the split makes a dispositive difference in his case. The Court should therefore grant review.

OPINION BELOW

A Ninth Circuit panel affirmed Mr. Chipunov's conviction in a memorandum disposition. *See* Pet. App. A. Mr. Chipunov subsequently filed a petition for rehearing and rehearing en banc. Judge Mendoza voted to grant the petition, but the remaining two panel members voted to deny. *See* Pet. App. B.

JURISDICTION

The Ninth Circuit affirmed Mr. Chipunov's conviction on April 14, 2025. Pet. App. A. The court denied Mr. Chipunov's petition for rehearing or rehearing en banc on September 15, 2025. *United States v. Chipunov*, No. 23-2046, Docket No. 47. The Court has jurisdiction under 28 U.S.C. § 1254(1)(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const., amend. I.

STATEMENT OF THE CASE

In 2022, Georgiy Chipunov was charged with conveying a false bomb threat under 18 U.S.C. § 1038(a) and § 844(i). He had called 911 early one morning in San Diego, said, "There's a bomb in the courthouse," and hung up. There was not a bomb in the courthouse. Mr. Chipunov had several times before sent similar false threats to a nearby California superior court building when he was not doing well, before following up to ask that he not be taken seriously.

Before trial, Mr. Chipunov moved to dismiss the indictment under the First Amendment. He explained, "Section 1038 does not contain a specific intent to threaten and is overbroad as it regulates beyond the true threats exception to full First Amendment protections." He explained, "In order to save the constitutionality of the statute, courts would need to apply mens rea to all elements of the statute." The district court denied the motion.

At trial in May 2023, the jury convicted based on instructions that required consideration only of whether Mr. Chipunov's statements could be *objectively* considered as threatening violence. The instructions said nothing about Mr. Chipunov's subjective intent as to his statements' threatening nature.

A month after Mr. Chipunov's trial, this Court held that when a true threats defendant "was prosecuted in accordance with an objective standard," "that is a violation of the First Amendment." *Counterman*, 600 U.S. at 82. It explained, "the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.* at 69.

Mr. Chipunov thus filed a motion for a new trial. He explained that his "jury was not required to make a unanimous finding regarding his subjective understanding of the nature of his statements." Yet, he noted, "*Counterman* makes clear that these jury instructions violated the First Amendment." The district court denied the motion, mistakenly believing that the jury had been instructed on the type of subjective intent element dictated by *Counterman*.

On appeal, Mr. Chipunov asked the Ninth Circuit to resolve whether his indictment, jury instructions, or both omitted the subjective intent element required in all true threats prosecutions by the First Amendment as interpreted in *Counterman*. As to the indictment, he explained that even though it "generally tracked the language of §§ 1038(a) and 844(i), it failed to recite a newly required element: subjective intent as to [his] statements' threatening nature." As to the jury instructions, he explained, "[t]here [wa]s a legal gap between what the jury instructions required and what the First Amendment demands."

The memorandum disposition affirmed the district court, relying on a prior published Ninth Circuit case. It rejected Mr. Chipunov's First Amendment indictment claim in the following sentence: "Because Chipunov does not challenge the constitutionality of 18 U.S.C. § 1038(a)(1), his challenge that the indictment was deficient for failing to allege a subjective intent element as required by the First Amendment, *see Counterman*, 600 U.S. at 69, fails, [*United States v.*] *Castagana*, 604 F.3d [1160, 1165 (9th Cir. 2010)] (rejecting the defendant's constitutional challenge to the jury instructions where he 'raised no such First Amendment claim'

regarding the statute)." Pet. App. A at 2–3. As to the jury instruction challenge, the memorandum disposition held that it "fails for the same reasons as his challenge to the indictment." *Id.* at 3.

SUMMARY OF THE ARGUMENT

This petition presents a conflict between the Ninth Circuit and all other others—the Second, Fourth, Fifth, and Eighth Circuits, as well as all state supreme courts to consider the issue—as to how to address true threats claims under the First Amendment after *Counterman*. In every other court, no defendant is required to bring a facial challenge to an entire statute before a court considers an as-applied *Counterman* claim. That makes sense. *Counterman* itself "was an as-applied challenge based on the specific facts in, and posture of, that case," that "did not hold that . . . the [statute at issue] was facially unconstitutional." *State v. Labbe*, 314 A.3d 162, 178 (Me. 2023). This Court has repeatedly reminded courts to "handle constitutional claims case by case, not en masse," "even when a facial suit is based on the First Amendment." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

Yet the Ninth Circuit declines to consider an as-applied true-threats claim when the defendant also "does not challenge the constitutionality of" the statute as a whole. Pet. App. A at 2–3. This is not the first time the Ninth Circuit has channeled parties to "deploy[] the nuclear option"—to bring facial First Amendment claims, rather than proceed slowly and carefully in an as-applied manner. *United States v. Hansen*, 40 F.4th 1049, 1072 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing en banc) *reversed and remanded by United States v. Hansen*, 599

U.S. 762 (2023). The petition should be granted to once again bring the Ninth Circuit's requirement of a facial challenge in line with the Court's requirement to proceed case-by-case whenever possible.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit disagrees with most other courts in requiring facial challenges in true threats cases.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." But some categories of speech are historically unprotected. One category includes "'[t]rue threats' of violence." *Counterman*, 600 U.S. at 74 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). True threats of violence "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.

In *Counterman*, the Court held that, in a prosecution for a true threat, "the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." 600 U.S. at 69. As a result, under the First Amendment, in a true-threats prosecution the government at least "must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Id.*

In the years since *Counterman*, the Second, Fourth, Fifth, and Eighth Circuits, as well as all state supreme courts to consider the issue, have addressed true-threats claims as as-applied challenges, without requiring a facial challenge.

Earlier this year, the Fourth Circuit agreed with a defendant's argument "that under *Counterman*, [a] district court's jury instructions violated the First Amendment and allowed the jury 'to find [him] guilty of conduct the Supreme Court has now made clear is not criminal.'" *In re Rendelman*, 129 F.4th 248, 252–53 (4th Cir. 2025). The Fourth Circuit did not require the defendant to challenge the constitutionality of his entire statute of conviction, 18 U.S.C. § 876(c). Instead, it held that the defendant's trial could have violated the First Amendment based on an "instructional error." *Id.* at 254. It explained, "The jury that convicted [the defendant] wasn't instructed that it must find that he 'had some subjective understanding of the threatening nature of his statements' as required by *Counterman*." *Id.* (quoting *Counterman*, 600 U.S. at 69).

The Fourth Circuit then reiterated this point in *United States v. Chaudhri*, 134 F.4th 166 (4th Cir. 2025). It explained that, under the First Amendment alone, "[t]he Government was required to establish that Appellants were aware [the victim] could have regarded their statements as threatening violence," but "the district court's instructions made no mention of Appellants' state of mind at the time they threatened [the victim]." *Id.* at 186. "Therefore, the district court erred" under *Counterman*. *Id.*

The Second, Fifth, and Eighth Circuits have also considered as-applied *Counterman* claims on the merits—without requiring facial challenges to a statute before considering whether jury instructions contained as-applied First Amendment violations. *See United States v. Dennis*, 132 F.4th 214, 226–30 (2d Cir. 2025)

(rejecting an as-applied challenge on the merits despite defendant's choice to not raise a facial challenge); *United States v. Jubert*, 139 F.4th 484, 489–95 (5th Cir. 2025) (rejecting a facial challenge to a statute and, separately, explaining that the defendant's as-applied *Counterman* failed based on the specifics of the case); *United States v. Unocic*, 135 F.4th 632, 634–36 (8th Cir. 2025) (considering an as-applied *Counterman* jury instruction claim and holding that the jury instructions as a whole advised the jury of the subjective intent required under *Counterman*).

And so have all state supreme courts to consider the issue. As the Maine Supreme Court explained, "*Counterman* did not hold that . . . the [statute at issue] . . . was facially unconstitutional; it was an as-applied challenge based on the specific facts in, and posture of, that case." *Labbe*, 314 A.3d at 178. The New Jersey Supreme Court agreed, rejecting facial overbreadth challenges based on *Counterman*, while simultaneously "hold[ing] that the statute may have been unconstitutionally applied to [a] defendant" due to faulty jury instructions. *State v. Hill*, 256 N.J. 266, 284 (2024). So too did the Massachusetts Supreme Judicial Court. *Commonwealth v. Cruz*, 495 Mass. 110, 110–11 (2024) (rejecting facial Counterman claim but remanding because the jury was "not instructed that . . . they needed to find beyond a reasonable doubt that he acted with the required mens rea; accordingly, his conviction violates the First Amendment.").

The Ninth Circuit alone has taken a different tack. In this case, Mr. Chipunov argued that his specific indictment and jury instructions lacked the subjective intent element required under *Counterman*, 600 U.S. at 69. He did not

bring a facial challenge to the entirety of his statute of conviction, 8 U.S.C. § 1038(a)(1) under the true threats doctrine. The Ninth Circuit panel concluded that argument must "fail[]" "[b]ecause Chipunov does not challenge the constitutionality of [his statute of conviction] 18 U.S.C. § 1038(a)(1)." Pet. App. A at 2–3. In so doing, the panel relied on a prior published Ninth Circuit case, *Castagana*, 604 F.3d at 1065, which also required the defendant to bring a facial challenge to the same statute under the First Amendment.

II. This case is the right vehicle to resolve this issue.

This case is a proper vehicle to resolve the split between the Ninth Circuit and all other courts on the role of facial challenges under the true threats doctrine and the First Amendment.

Mr. Chipunov raised only an as-applied challenge to his prosecution under the First Amendment's true-threats doctrine. Both before the district court and on appeal, he argued that his indictment and jury instructions failed to include the subjective mens rea required by the First Amendment to render his speech unprotected.

Mr. Chipunov chose not to bring a facial challenge to the entirety of his statute of conviction, 8 U.S.C. § 1038(a)(1), because, among other reasons, § 1038(a)(1) criminalizes a broad variety of speech. Some of that speech is likely governed by *other* First Amendment doctrines. Section 1038(a)(1) is an umbrella statute that prohibits giving misleading information about lots of things, ranging from drive-by shootings to importing explosives. *See* 18 U.S.C. § 1038(a)

(incorporating offenses under §§ 922 and 842, among many others). These crimes are just as likely to be analyzed under First Amendment doctrines about incitement or fraud.

The Ninth Circuit rejected Mr. Chipunov's First Amendment claim solely "[b]ecause Chipunov does not challenge the constitutionality of 18 U.S.C. § 1038(a)(1)," citing to prior published Ninth Circuit case law requiring such a facial challenge. Pet. App. A at 2–3 (citing *Castagana*, 604 F.3d at 1065). Because Mr. Chipunov did not bring a facial challenge, the Ninth Circuit declined to consider any other First Amendment challenge, including an as-applied challenge. *Id.* Nor did the Court address whether any error would be harmless. *Id.*

The issue of whether the Ninth Circuit was right to do that—to reject an as-applied First Amendment claim because a defendant did not bring a facial First Amendment claim—is thus both cleanly presented in Mr. Chipunov's case and case-determinative.

III. The Ninth Circuit is wrong to require a facial challenge before resolving an as-applied First Amendment challenge.

This Court should take this case because this Ninth Circuit panel was wrong.

As this Court warned the Ninth Circuit only two years ago, even in the context of the First Amendment, facial challenges are "unusual." *Hansen*, 599 U.S. at 769. They are "disfavored for several reasons." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Not only do they "often rest on speculation." *Id.* But they "also run contrary to the fundamental principle of judicial restraint," while simultaneously "threaten[ing] to short circuit the democratic

process by preventing laws embodying the will of the people from being implemented in a manner consistent with the constitution." *Id.* at 450–51. Indeed, Justice Thomas has "emphasize[d] how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role." *Hansen*, 599 U.S. at 785 (Thomas, J., concurring).

As all other courts have recognized since *Counterman*, there is no reason to channel true-threats claims first into facial challenges. *Counterman* itself was "an as-applied challenge based on the specific facts in, and posture of, that case." *Labbe*, 314 A. 3d at 178. Courts have recognized that facial challenges, even in the First Amendment overbreadth context, are "'strong medicine' to be used 'only as a last resort.'" *Hill*, 256 N.J. at 283 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982), and *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Yet the Ninth Circuit alone has continued down its path of "expand[ing] the doctrine" of First Amendment overbreadth, *Hansen*, 40 F.4th at 1072 (Bumatay, J., dissenting from denial of rehearing en banc), now into the arena of true threats. In so doing, it continues to encourage litigants to "speculate about 'imaginary cases' and sift through 'an endless stream of fanciful hypotheticals,'" *id.* at 1071—while avoiding its obligation to consider real-world facts in real-world cases.

The Court should grant this petition to bring the Ninth Circuit into conformity with this Court's case law on both the First Amendment and the limited role of facial challenges.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Date: December 15, 2025

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