

No. 25-6429

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In the  
**Supreme Court of the United States**

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GEORGIY CHIPUNOV,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**REPLY BRIEF FOR PETITIONER**

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## REPLY BRIEF FOR PETITIONER

In this true-threats case, the Ninth Circuit has once again demanded a First Amendment challenge go big. The court refused to evaluate Petitioner's First Amendment challenge to his specific indictment, and his specific jury instructions, because he did not facially challenge the entire statute with which he was charged.

The Solicitor General does not dispute that such a refusal would be worthy of the Court's attention. Nor does the Solicitor General dispute that the Ninth Circuit has repeatedly made similar mistakes in recent years.

The Solicitor General argues only about vehicle problems. It argues that the best reading of the Ninth Circuit's resolution of this case is that it considered the appeal to "not raise any kind of First Amendment challenge." BIO at 7.

That reading is simply not plausible. The motions before the district court challenged the indictment's and jury instructions' failure to include a subjective intent element under the First Amendment. C.A. E.R. 286–88, 307–09. The opening brief mentioned the First Amendment's application to this case twenty-five times, explaining, "[n]either the indictment nor the jury instructions included the subjective mens rea the First Amendment requires." Pet. C.A. Br. at 20. The government's answering brief agreed this element was missing and argued it wasn't needed. It explained that the Ninth Circuit had "foreclosed" the as-applied argument because it had previously upheld a facial First Amendment challenge to the relevant statute. Resp. C.A. Br. at 17. Despite the post-trial issuance of

*Counterman v. Colorado*, 600 U.S. 66, 73 (2023), the Ninth Circuit agreed. It refused to consider the presented as-applied challenge. Pet. App. A at 2–3.

No other court has continued to channel First Amendment claims this way. The Ninth Circuit did so because a focus on facial challenges, as opposed to as-applied challenges, remains a problem in that court.

Because the government does not dispute that the issue is an important one worthy of the Court’s consideration, and because it does not dispute the issue is case-dispositive, the Court should grant the petition.

**I. The Solicitor General does not dispute that the question presented is an important one that has recurred in the Ninth Circuit.**

The government does not dispute that the question presented is an important one. Nowhere does it disagree that it would be a significant and important conflict for a court of appeals to require a defendant to bring a facial challenge to an entire statute before considering an as-applied true-threats challenge under *Counterman*. See BIO 7–11.

Nor does the government dispute that the Ninth Circuit has had a long-running problem of funneling First Amendment challenges into facial disputes when it should, instead, consider as-applied issues case-by-case. It is, of course, what the Ninth Circuit did in both *United States v. Sineneg-Smith*, 910 F.3d 461, 469 (9th Cir. 2019), *vacated and remanded by United States v. Sinenneg-Smith*, 590 U.S. 371 (2020), and *United States v. Hansen*, 40 F.4th 1103, 1107 (9th Cir. 2022), *vacated and remanded by United States v. Hansen*, 599 U.S. 762 (2023). In both, the Ninth Circuit had refused to “stick to the facts presented in the record.” *United*

*States v. Hansen*, 40 F.4th 1049, 1071 (9th Cir. 2022) (Bumatay, J., dissenting from denial of rehearing en banc). The Court had to repeatedly remind the Ninth Circuit to “handle constitutional applications” as it should “usually do—case-by-case.” *Hansen*, 599 U.S. at 770.

Instead, the government argues only that this case presents vehicle problems. Because that is not so, as explained below, the Court should grant the petition.

**II. The Ninth Circuit required a facial challenge in this true-threats case despite the defendant raising an as-applied challenge, as it often does.**

The government’s first vehicle-problem claim—that the Ninth Circuit “did not consider [Petitioner] to have raised any First Amendment challenge at all”—cannot be squared with Petitioner’s briefs, the government’s answering brief, or the court of appeals’ holding. BIO at 9. The Ninth Circuit rejected Petitioner’s clear as-applied First Amendment claim. It did so only “[b]ecause Chipunov d[id] not challenge the constitutionality of 18 U.S.C. § 1038(a)(1),” the statute of conviction. Pet. App. A at 2–3.

Petitioner brought an obvious as-applied challenge that the Ninth Circuit could not have reasonably considered waived. The first sentence in Mr. Chipunov’s opening brief read, “This is a case about the First Amendment’s ‘true threat’ doctrine.” Pet. C.A. Br. at 1. The first issue was framed as whether his “indictment and jury instructions” contained “only an objective standard of how [his] statements would be believed, and thus [contained] error under the First Amendment.” *Id.* at 3.

The summary of argument explained, “*Counterman* holds that the objective test the grand jury and the trial jury relied on in the indictment and the jury instructions . . . violates the First Amendment.” *Id.* at 18. Ten pages of argument that followed explained exactly how and why “[n]either the indictment nor the jury instructions included the subjective mens rea the First Amendment requires.” *Id.* at 20; see *id.* at 20–30.

These arguments built on the motions to dismiss the indictment and for a new trial under the First Amendment that Mr. Chipunov filed in district court. C.A. E.R. 286–88, 307–09. Before the issuance of *Counterman*, Petitioner argued before the district court that it should dismiss the indictment under the First Amendment because it “fail[ed] to allege that Mr. Chipunov had an intent to threaten.” C.A. E.R. 309. After trial, shortly after the issuance of *Counterman*, Petitioner renewed his arguments. He explained, “he was prosecuted with jury instructions that permitted the jury to find him guilty based only [on] how a ‘reasonable person’ would have interpreted his statements,” and “*Counterman* makes clear that these jury instructions violated the First Amendment.” C.A. E.R. 288.

The government’s answering brief encouraged the Ninth Circuit to reject this claim because it was not a facial challenge, as the court of appeals had done before. The government framed the question presented in relevant part as follows: “This Court has held that the federal hoax law . . . does not violate the First Amendment. Do these cases foreclose Chipunov’s argument that the indictment and jury instructions improperly omitted a subjective-intent element?” Resp. C.A. Br. at 1–2.

The government pointed to two Ninth Circuit cases that had held that the charged statute did not contain a subjective-intent element and yet that this did not facially violate the First Amendment. *Id.* at 14–20 (citing *United States v. Castagana*, 604 F.3d 1160, 1165 (9th Cir. 2010), and *United States v. Keyser*, 704 F.3d 631, 639–40 (9th Cir. 2012)). The government emphasized that the Ninth Circuit had already held that, generally, “the law did not require that finding” of subjective awareness of a statement’s threatening nature. *Id.* at 16–17.

The Ninth Circuit took the government up on its suggestion to rely on its facial challenge cases. In line with those prior published cases, the Ninth Circuit held that it would not consider Petitioner’s as-applied indictment and jury instruction First Amendment challenge because he had not *also* brought a facial First Amendment challenge to the entire statute with which he was charged. It held, “[b]ecause 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, *Castagana*, 604 F.3d at 1165 (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 (emphasis added).

This tack—rejecting an as-applied claim because it had not been brought alongside, or instead of, a facial claim—was nothing new for the Ninth Circuit. As the Ninth Circuit explained in this case, it had taken this approach in *Castagana*, 604 F.3d at 1165. There, it considered the defendant to have not raised a First

Amendment true-threats claim to his specific jury instructions when he had not brought a full facial First Amendment attack to the statute as a whole. *Id.* It did so even though the defendant had cited the foundational true-threats case *Virginia v. Black*, 538 U.S. 343 (2003). It used the defendant’s failure to bring a facial First Amendment attack as a way to avoid “concern[ing] ourselves with whether” the specific conduct at issue could “be expressive conduct not constituting a threat and therefore subject to First Amendment protection.” *Castagana*, 604 F.3d at 1165 n.4.

The government’s argument that the Ninth Circuit considered Petitioner’s true-threats claim entirely waived in this case thus misreads the record, the law, and the court of appeals’ history. As a result, as Mr. Chipuov explained in the petition, this case is thus the right vehicle to once again remind the Ninth Circuit of the essential role as-applied challenges play, under the true-threats doctrine specifically, and under the First Amendment generally.

**III. Most other courts would have reversed, as *Counterman* requires, resulting in a conflict this Court should resolve.**

The government’s remaining vehicle-problem claim also fails. It argues that no other court of appeals would have “deemed” Petitioner “to have raised an as-applied constitutional claim,” so no other court would have resolved Petitioner’s claim any differently than the Ninth Circuit did here. BIO at 10.

The Second, Fourth, Fifth, and Eighth Circuits certainly would have. Each has addressed a true-threats challenge by considering whether, on the facts presented in each specific case, the “district court’s jury instructions violated the First Amendment and allowed the jury ‘to find [the defendant] 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); accord *United States v. Dennis*, 132 F.4th 214, 226–30 (2d Cir. 2025); *United States v. Jubert*, 139 F.4th 484, 489–95 (5th Cir. 2025); *United States v. Unocic*, 135 F.4th 632, 634–36 (8th Cir. 2025). The Fourth Circuit ordered that a district court should evaluate exactly that claim in a habeas case in which the petitioner raised *only* an as-applied jury instruction claim, without an accompanying facial attack to his statute of conviction as a whole. *Rendelman*, 129 F.4th at 252–56. The Second Circuit still considered a defendant’s as-applied true-threats challenge last year even though the defendant there “d[id] not contend that, on its face, the statute violate[d] the First Amendment.” *Dennis*, 132 F.4th at 226. So did the Eighth Circuit. *Unocic*, 135 F.4th at 634–46.

The supreme courts of Maine, New Jersey, and Massachusetts also would have evaluated the claim differently than the Ninth Circuit here. See *State v. Labbe*, 314 A.3d 162 (Me. 2023); *State v. Hill*, 256 N.J. 266 (2024); *Commonwealth v. Cruz*, 495 Mass. 110 (2024). Each has avoided a facial true-threats challenge to an entire statute by instead considering whether the specific instructions in the relevant case “require[d] the jury to find that the defendant was aware that others could regard his statement as threatening violence and delivered it anyway.” *Cruz*, 495 Mass. at 114; accord *Labbe*, 314 A.3d at 178; *Hill*, 256 N.J. at 284.

The Ninth Circuit alone, as it has often done in its recent history, took a conflicting approach. It was asked in one of the issues presented for review to decide whether “the indictment and the jury instructions” in this case incorporated “only

an objective standard of how the statements would be believed, and [were] thus error under the First Amendment.” Pet. C.A. Br. at 3. It answered that, “[b]ecause Chipunov does not challenge the constitutionality of” the statute as a whole, his challenge . . . fails.” Pet. Appx. A at 2–3. It relied on a published Ninth Circuit case that had resolved an as-applied claim the same way, dismissing it because it was not a facial challenge. Pet. Appx. A at 2–3 (citing *Castagana*, 604 F.3d at 1165).

As a last-ditch effort, the government claims that the Ninth Circuit has not always, in every unpublished case, erred in the way it did in Petitioner’s case here. It points to three cases that are mostly irrelevant. It cites one unpublished case in which the defendant “himself requested, over the government’s objection,” an erroneous instruction, and thus “waived” his claim by intentionally relinquishing it. BIO at 10 (citing *United States v. Martis*, No. 22-10056, 2024 WL 957522, \*2 (9th Cir. Mar. 6, 2024)). It cites another in which the court of appeals “assume[d] without deciding . . . that true-threats case law applied to the[] facts,” and held that the district court had included the proper subjective intent element anyways. BIO at 10 (citing *United States v. Isho*, No. 22-10150, 2024 WL 135247, \*1 (9th Cir. Jan. 12, 2024)). It cites a third unpublished case, issued before *Counterman*, in which the Ninth Circuit held that an indictment need not “allege the objective prong of a true threat.” BIO at 10 (citing *United States v. Weiss*, No. 20-10283, 2021 WL 6116629, \*1 (9th Cir. Dec. 27, 2021)).

To the extent these cases have anything to say about this one, none have broken the Ninth Circuit’s habit—in published as well as unpublished cases—of

channeling First Amendment claims into facial overbreadth analyses. As the Ninth Circuit explained here, its published cases have disregarded case-specific First Amendment challenges to jury instructions if a facial First Amendment challenge to the statute is not brought as well. Pet. Appx. A at 2–3 (citing *Castagana*, 604 F.3d at 1165). As a result, that is the same approach it took in this case. *Id.*

Despite this Court’s repeated insistence, the Ninth Circuit has continued to “expand the doctrine” of First Amendment overbreadth. *Hansen*, 40 F.4th at 1072 (Bumatay, J., dissenting from denial of rehearing en banc). Its recent foray of pushing the doctrine into the true-threats doctrine should fare no better than it did in either *Sineneng-Smith*, 590 U.S. 371, or *Hansen*, 599 U.S. 762. This Court should grant the petition to once again bring the Ninth Circuit in line with the other courts of appeals, the Court’s case law on the First Amendment, and the Court’s case law on the importance of as-applied challenges and the limited role of facial challenges.

#### CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

Date: April 7, 2026

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