

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 BILLY RAYMOND COUNTERMAN,)
4 Petitioner,)
5 v.) No. 22-138
6 COLORADO,)
7 Respondent.)
8 - - - - -
9 Washington, D.C.
10 Wednesday, April 19, 2023
11
12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 10:20 a.m.
15
16 APPEARANCES:
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18 of the Petitioner.
19 PHILIP J. WEISER, Attorney General, Denver, Colorado;
20 on behalf of the Respondent.
21 ERIC J. FEIGIN, Deputy Solicitor General, Department
22 of Justice, Washington, D.C.; for the United
23 States, as amicus curiae, supporting the
24 Respondent.
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P R O C E E D I N G S

(10:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-138, Counterman versus Colorado.

Mr. Elwood.

ORAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE PETITIONER

MR. ELWOOD: Mr. Chief Justice, and may it please the Court:

This Court has long held that because of the importance of free speech in our country, categorical exceptions to the First Amendment's prohibition on content regulations must be well defined and narrowly limited, and speech cannot be exempted without proof of a long-settled tradition of subjecting that speech to regulation.

The State has not come close to meeting its burden of showing a long-settled tradition of punishing true threats without proof the speaker knew that his statement would cause fear. In the face of early cases and treatises showing the central importance intent played in speech prosecutions and threat

1 prosecutions specifically, Colorado cannot cite
2 even a single decision holding that subjective
3 intent is irrelevant. The best it can do is
4 cite cases that were silent about the required
5 intent in the face of unambiguous threats.

6 The State tries to conjure a tradition
7 of -- of punishing negligent threats by analogy
8 to other categorical exceptions. But,
9 generally, they require at least recklessness.
10 The closest analogue, incitement, requires
11 specific intent.

12 At bottom, any claim of a settled
13 tradition of criminalizing negligent threats is
14 impossible to square with *Virginia versus Black*,
15 where this Court reversed convictions for
16 cross-burning that would have easily satisfied a
17 negligence standard, and a series of opinions
18 emphasizing the central importance intent plays
19 in making threats constitutionally proscribable.

20 While the State predicts harm, it has
21 shown no difference in criminal enforcement or
22 the availability of civil protective orders in
23 the many jurisdictions that already require
24 subjective intent. There, prosecutors prove
25 mens rea the same way prosecutors always have

1 under countless criminal statutes, through
2 objective evidence of the defendant's words and
3 actions.

4 Criminalizing misunderstanding is
5 especially dangerous in an age when so much
6 communication occurs on social media, which
7 brings together strangers in an environment that
8 removes much of the context that gives words
9 meaning. And it chills expression by imposing
10 prison time on speakers who do not tailor their
11 views to suit their audience.

12 This Court should reverse. I welcome
13 the Court's questions.

14 JUSTICE THOMAS: Mr. Elwood, I don't
15 quite understand why you would cite Black when
16 Black did have an intent requirement. The
17 question was whether or not the presumption of
18 cross-burning in a field overcame that -- that
19 intent requirement or demonstrated that.

20 MR. ELWOOD: If intent wasn't
21 constitutionally required, there isn't any
22 reason why it couldn't be presumed away. Maybe
23 that would raise a due process issue, not a
24 First Amendment issue. And the Court -- it
25 focused the intent -- it focused the discussion

1 on -- on intent and the constitutionality of the
2 First Amendment issue. And it -- the plurality
3 specifically said that the -- the state had
4 presumed away the thing that makes threats
5 constitutionally proscribable. And, in
6 addition, Justice Scalia said that the
7 constitutional defect was in preventing the
8 consideration of the speaker's or the -- the
9 intent of the people who burn the crosses.

10 So I think, from that, you can at
11 least say it doesn't establish -- it's not
12 consistent with a clear tradition of
13 criminalizing negligent threats.

14 JUSTICE THOMAS: One other thing. The
15 -- why -- there are other categories, and just
16 take, for example, obscenity. You don't have a
17 subjective intent requirement there. So why
18 should this -- these true threats receive more
19 protection than obscenity?

20 MR. ELWOOD: I think especially under
21 *Elonis's* gloss of *Hamling*, *Hamling* said that you
22 had to know not only the contents but the
23 character of -- of -- of the obscene materials,
24 which the Court described in *Hamling* as the
25 conscious purveyance of filth. And in *Elonis*,

1 the Court said that that was equivalent of
2 knowing that your statements would cause fear.

3 So I think that it is -- it is
4 entirely consistent with the idea that there is
5 a subjective intent requirement at least at the
6 knowledge level, which is all that we are asking
7 for here.

8 JUSTICE KAGAN: What about fighting
9 words?

10 MR. ELWOOD: I -- fighting words,
11 people always look to Chaplinsky, but I think
12 that's over-reading about a page and a half of
13 analysis in a case that didn't clearly present
14 it.

15 I think what Chaplinsky definitely
16 decided was that that statute wasn't vague and
17 that shouted epithets were not themselves
18 protected, but it didn't really address the
19 mental state element.

20 In addition, I think, if you look at
21 the tradition that it comes from, the common law
22 tradition, breach of peace, when it uses
23 threats, which is part of what is covered in
24 Chaplinsky, there is definitely a specific
25 intent requirement. Subsequent cases by this

1 Court have used language saying "calculated to
2 promote a fight" and things like that.

3 And regardless of all of that,
4 fighting words is a very vanishingly small
5 exception for basically nose-to-nose shouting of
6 epithets that are likely to cause a breach of
7 the peace and where police might need to step in
8 regardless of knowing the person's intent.

9 I don't think it's a -- you know, the
10 Court has declined to extend it under numerous
11 circumstances. It would be smaller steps than
12 extending it to, you know, online
13 communications.

14 JUSTICE SOTOMAYOR: That's why it took
15 --

16 CHIEF JUSTICE ROBERTS: You say --

17 JUSTICE SOTOMAYOR: I'm sorry.

18 CHIEF JUSTICE ROBERTS: You say that
19 even if you prevail, the courts will still be
20 able to freely impose civil restraining orders.
21 And Colorado takes issue with that.

22 Why wouldn't your same standard apply
23 in that context?

24 MR. ELWOOD: Well, a couple of things.
25 To begin with, a lot of -- I mean, especially in

1 the stalking context, you know, Colorado has a
2 statute that, you know, allows prosecutions that
3 don't require looking to the content of speech
4 that are, rather, based on conduct. And so, for
5 that, obviously I don't think it would make any
6 difference at all.

7 But, even with it, the standard is
8 lower for getting a civil protective order.
9 Colorado's is relatively high at a preponderance
10 standard. But most states use a good cause
11 standard or a discretionary standard.

12 And, you know, that's -- that's below
13 probable cause. And people get -- you know, you
14 can get arrest warrants, you can arrest people
15 for specific intent crimes, you know, just based
16 on the objective words. And that is, you know,
17 plenty of -- of evidence of the intent of --
18 plenty of evidence of the intent of the actor,
19 even at the higher standard of probable cause.
20 For good cause, I don't think that it should be
21 an issue.

22 And as we've said and as I said in my
23 opening, there are, you know, many states, over
24 20, that have -- for the threat statute, have a
25 subjective intent standard. For stalking, there

1 are, you know, 14 states that have a intent
2 standard and three more that have kind of a
3 recklessness standard. And, you know, there's
4 no indication that, even when it's baked into
5 the -- the stalking statute, that it presents an
6 issue for getting civil protective orders.

7 JUSTICE GORSUCH: Mr. Elwood, I just
8 want to follow up on that in two respects. One,
9 on the civil protective order side, you're not
10 suggesting, I don't take it -- but I want to
11 make sure -- that the mens rea that we typically
12 require in criminal cases -- you know, the
13 vicious will Morissette talks about as being
14 part of our common law criminal tradition --
15 necessarily carries over into the civil context,
16 right?

17 MR. ELWOOD: Absolutely not.
18 Absolutely not. The only potential feedback is,
19 in states that require proof of a -- of a crime,
20 it might be baked in through that -- that --
21 through that route. But, as a direct measure,
22 the argument we're making is based on the
23 chilling effect of criminal liability.

24 JUSTICE GORSUCH: And, second, with
25 respect to the stalking possibility under

1 Colorado law, I mean, this statute's very broad.
2 I understand this particular prosecution had
3 something to do with speech, but I don't take
4 your argument -- I just want to make sure I've
5 got it right -- I don't take your argument to be
6 upsetting at all prosecutions based solely on
7 conduct so that conduct, stalking, is an
8 entirely separate matter than speech and that
9 what you're -- you're concerned about is the
10 mens rea with respect to speech?

11 MR. ELWOOD: I think that's exactly
12 right, that, essentially, only when, you know,
13 the focus of the prosecution is on the
14 threatening nature of the words, you even have
15 to get into the true threats exception.
16 Otherwise, if it's, you know, frequency and
17 repetitiveness of unwanted conduct, I don't
18 think that presents even a First Amendment
19 question or at least not the First Amendment
20 question we have here.

21 JUSTICE KAGAN: Mr. Elwood, could I
22 take you back to the first part of Justice
23 Gorsuch's question? Because, if your basic
24 argument is one about First Amendment chill, I'm
25 not exactly sure why it should make a difference

1 that there's a criminal prosecution here as
2 opposed to civil action. And, indeed, when we
3 talk about libel, I think, you know, one of the
4 first cases after New York Times v. Sullivan
5 presented exactly that question, and the Court
6 said a sanction is a sanction. Whether it's
7 criminal or civil, it might have the same kind
8 of chilling consequences.

9 So, as far as I know, in past First
10 Amendment challenges of this kind, we have not
11 drawn that distinction, even though it might be
12 a quite natural one.

13 So how -- how -- how do you think we
14 should draw that distinction here?

15 MR. ELWOOD: Well, I -- I think that
16 the -- that that's consistent with the way the
17 Court has treated defamation, because defamation
18 in a civil context, for public figures, it has
19 the elevated kind of recklessness standard, and
20 it's also there in the criminal standard.

21 But, for private individuals, it can
22 be, you know, basically as long as it's not
23 strict liability, with the exception of punitive
24 damages, where they say, again, you need to have
25 the showing of recklessness.

1 And I think that is consistent with
2 the idea that -- that punishment is different
3 from just civil liability, making people whole,
4 that even though the Court in Gertz versus
5 Robert Welch didn't dismiss that that had some
6 chilling effect, civil liability, they said that
7 it wasn't enough of a chilling effect to offset
8 the state's legitimate interest in making people
9 whole in the civil context.

10 JUSTICE ALITO: Mr. Elwood, the briefs
11 are full of discussion of "general intent" and
12 "specific intent," which I find to be very
13 confusing terms because criminal statutes have
14 multiple elements and each element can have a
15 different mens rea.

16 So I would like you to talk about this
17 using the methodology of the Model Penal Code.
18 So, if we look at -- at the elements, do you
19 agree with me that the element that we're
20 talking about here is that, as applied to a
21 prosecution based on the content of
22 communication, the content must -- must be such
23 as to cause a reasonable person to suffer
24 serious emotional distress, and the question is,
25 what is the mens rea for that element? Are we

1 together up to that point?

2 MR. ELWOOD: I -- I think we are
3 together up to that point.

4 JUSTICE ALITO: Okay. So, if we
5 consider that using the mens rea variations set
6 out in the Model Penal Code, was -- is it
7 purposefulness, is it knowing, is it
8 recklessness, is it negligence? What do you
9 think it must be to satisfy the First Amendment?

10 MR. ELWOOD: I think that it -- it
11 should be knowledge of the thing that makes the
12 conduct wrongful. In most threat statutes,
13 that's knowledge that the words you use are
14 going to cause fear. I could see with the
15 Colorado statute that it would be knowledge that
16 it would cause a reasonable person to suffer
17 emotional distress.

18 JUSTICE ALITO: Okay. So you don't
19 think purpose is required, but knowledge is
20 required? It has to be knowing as to that?

21 MR. ELWOOD: Knowledge, yes.
22 That's --

23 JUSTICE ALITO: All right.

24 MR. ELWOOD: -- that is our argument,
25 is that it's kind of the minimum mens rea to

1 make the conduct wrongful.

2 JUSTICE ALITO: Why wouldn't
3 recklessness be sufficient? I mean, it's
4 culpable. Reckless conduct is morally culpable,
5 and a -- a threat causes damage regardless of
6 the intent of the speaker.

7 Why isn't that sufficient?

8 MR. ELWOOD: I think recklessness
9 would be a big improvement over a objective
10 standard because it at least is focusing on the
11 mental state of the speaker, which I think
12 presents less of a chilling risk.

13 I -- I think where recklessness has a
14 problem is in doctrine and in history. I think
15 it has a problem in doctrine in terms of the
16 convictions in Virginia versus Black would have
17 been very easy to uphold on a recklessness
18 standard. One of them burned a neighbor --
19 burned a cross on a neighbor's yard, and I think
20 that that is at least reckless, that it's going
21 to cause somebody fear.

22 And it has a problem, I think, in
23 history just because the early cases, and I'm
24 thinking here of Regina versus Hill, which is a
25 British threat statute case, and the American

1 case, which is a -- a -- a breach of the peace
2 but through threats of -- God -- Benedict versus
3 -- State versus Benedict. It spoke in terms of
4 specific intent.

5 And I -- I think that that is, you
6 know, harder to square with recklessness,
7 because the statements at issue there were at
8 least reckless, that it would cause somebody
9 fear.

10 JUSTICE SOTOMAYOR: Counsel --

11 JUSTICE ALITO: I had --

12 JUSTICE SOTOMAYOR: Oh, I'm sorry. Go
13 ahead.

14 JUSTICE ALITO: No, it's -- well, I
15 have one other question. It's -- it's somewhat
16 different. In order for there to be a
17 conviction based on content, the
18 communication -- the communication must, in
19 fact, constitute a true threat, right?

20 MR. ELWOOD: I -- I believe so. I
21 mean, if it's -- I mean, at least as this case
22 comes to us, the threats were really central to
23 the prosecution, and I think that when,
24 essentially, the basis for the prosecution is
25 the content of the communication that it should

1 be a -- a true threat.

2 JUSTICE ALITO: Okay. So that depends
3 on the meaning of the communication. And my
4 question is whether speaker intent is not built
5 into that, because the meaning of a
6 communication, an utterance, is dependent
7 significantly on the intent of the speaker.

8 MR. ELWOOD: I -- I think that that's
9 true, but I think -- to begin with, there are a
10 lot of statements that are ambiguities, a lot of
11 statements that are ambiguous. And I don't
12 think that this would -- the rule we're asking
13 for would make a big difference in a lot of
14 cases.

15 But it means that, essentially, the
16 jury's going to start out with what do these
17 words normally mean. And in most cases, what
18 those words normally mean is going to be the --
19 the mental state of the defendant too. All that
20 we're asking for is that people should be able
21 to make their case to the jury, and unless they
22 have a persuasive argument for why those words
23 meant something different to them, I think that
24 the jury will say this is enough to that extent.

25 JUSTICE ALITO: Yeah. Well, this

1 isn't meant to be a hostile question for you.
2 It's one that I'd like the -- I'd like the State
3 and the SG to think about. But isn't it
4 inevitable that speaker intent is going to be
5 important regardless of the mens rea that is
6 applied to the other element that we were
7 talking about earlier?

8 I mean, if somebody stood up here and
9 spoke as fast as an auctioneer and I couldn't
10 understand what they were saying and I kept
11 saying, would you please speak a little more
12 slowly, speak more slowly so I could understand
13 what you're saying, and the person just
14 continued to do it, and I said, you know, if you
15 continue to speak that fast, I'm going to have a
16 fit, nobody would think I was actually
17 threatening to have a fit. It depends on my
18 intent in the -- in the context of the --

19 (Laughter.)

20 JUSTICE ALITO: -- in the -- I mean,
21 maybe some people would.

22 (Laughter.)

23 JUSTICE ALITO: So it's built in.
24 Anyway, I just wanted to give you a chance to
25 talk about it, because I think it's -- it's a

1 problem for the State's position.

2 MR. ELWOOD: I think intent is
3 frequently kind of -- well, it can be inferred
4 from the way that the -- the statement is made,
5 but it -- it definitely -- when cases are tried
6 particular ways, they can definitely abstract it
7 out because, here --

8 JUSTICE SOTOMAYOR: Counsel, isn't
9 that the point that Justice Alito is trying to
10 make? Yes, he may well be right that a
11 speaker's intent, it would seem to me whenever
12 you're trying someone for a First Amendment
13 violation involving speech for any conduct,
14 criminal or civil, that the speaker's intent
15 should be part of the presentation the jury
16 gets, because that's part of the circumstances.

17 But, here, the court and the
18 prosecutor argued that the intent was
19 irrelevant, that he couldn't present any
20 evidence about his intent, correct?

21 MR. ELWOOD: That is exactly right.

22 JUSTICE SOTOMAYOR: About his mental
23 state, about what he thought. They precluded
24 him completely from doing that.

25 MR. ELWOOD: That is precisely

1 correct. They said it doesn't matter what he
2 thinks.

3 JUSTICE SOTOMAYOR: So how this was
4 charged was in the *Elonis* sense. In the *Elonis*
5 sense, you just have to know you said these
6 words, not what you thought they meant, but you
7 said these words, and that a reasonable person
8 would understand it that way, and *Elonis* said,
9 no, that's a negligence standard.

10 So the only issue before us is, I
11 think, are we going to approve of a pure
12 negligence standard that doesn't take into
13 account any of the intentions of the speaker
14 when we prosecute for speech. That's really the
15 bottom line, correct?

16 MR. ELWOOD: That -- that is the
17 bottom line, and this case isolates that because
18 it doesn't matter what you meant.

19 JUSTICE SOTOMAYOR: All right. Now I
20 want to go one step further.

21 The SG, who's an amicus, is the only
22 one who raises at the end of their brief that if
23 we reject, as we did in *Elonis*, negligence, that
24 we should go on, even though it wasn't the basis
25 of the case before us, to decide that

1 recklessnes would be enough. But that wasn't
2 what's at issue here, is it?

3 MR. ELWOOD: It's not how the case was
4 presented below, and the actual parties of the
5 case or the -- the -- the party to the case has
6 not ever attempted to affirm the conviction on a
7 basis of recklessnes.

8 JUSTICE SOTOMAYOR: Exactly. And so
9 that issue, like in *Elonis*, just hasn't been
10 raised by this case.

11 MR. ELWOOD: I -- I -- I would agree
12 with you that it is under the principle of party
13 presentation that has not been raised. It's
14 only been raised by the Solicitor General.

15 JUSTICE SOTOMAYOR: All right.

16 JUSTICE BARRETT: Mr. Elwood --

17 JUSTICE SOTOMAYOR: Thank you.

18 JUSTICE BARRETT: -- Mr. Elwood, I
19 have -- I have a question about the civil/
20 criminal line that follows up on Justice Kagan.

21 It seems to me that what we're talking
22 about is defining the content -- or what it
23 means to be a threat, right, because, if the
24 First Amendment excludes threats because they're
25 not socially valuable speech, you know, we're

1 looking at how to define a threat.

2 So I guess I don't understand why --
3 and maybe I misunderstood you -- but it sounds
4 to me like you're defining it a little bit
5 differently in the civil context than the
6 criminal context, right?

7 MR. ELWOOD: I'm not entirely sure how
8 to answer the question because, in the civil
9 protective orders, many of them don't require
10 showing a crime. Some of them do require
11 showing a crime. And so I don't know that there
12 really is an issue about civil threats.

13 JUSTICE BARRETT: But let's imagine --
14 let's imagine this example: Let's say that, you
15 know, a teenager in a high school says something
16 like, you know, I'm going to shoot this place
17 down, and it's devoid of all context. So let's
18 say it's more like the statute in Virginia
19 versus Black, which instructed that just the
20 burning of the cross was sufficient for the jury
21 to infer intent. So let's say there's no
22 context at all.

23 But the school, taking the threat to
24 the school seriously, wants the kid to be barred
25 from the grounds or wants him to be suspended

1 for a few days so they can assess the threat.
2 But it's not a crime. It's just deciding
3 whether to keep him out. But it would be state
4 action. What about that? Could the school do
5 that just based on that one statement?

6 MR. ELWOOD: I believe so. Schools
7 have extra leeway, and schools are a whole ball
8 of wax.

9 JUSTICE BARRETT: Okay. Make it the
10 father.

11 MR. ELWOOD: Specific -- but --

12 JUSTICE BARRETT: Make it the father,
13 not the student. Or make it a teacher.

14 MR. ELWOOD: Well --

15 JUSTICE BARRETT: So Tinker's not
16 implicated.

17 MR. ELWOOD: -- well, if they can bar
18 the -- bar the parent from the school?

19 JUSTICE BARRETT: Or the teacher.
20 Just put the teacher -- the teacher says, I'm
21 going to shoot this place up. And they want to
22 just put the teacher on leave --

23 MR. ELWOOD: I think --

24 JUSTICE BARRETT: -- without pay for a
25 week.

1 MR. ELWOOD: I think, you know,
2 absolutely so. I mean, among other things, just
3 in terms of public safety, they can go forward
4 based on the evidence they have of what the
5 threat is, which is, you know, the words he
6 used. And, frequently, the -- the -- the best
7 evidence you have of intent is the words that
8 somebody used. And, in fact, unless they
9 produce something else, those are the things
10 that they -- as the evidence.

11 JUSTICE BARRETT: But, in a civil
12 context, let's say they plan no -- no criminal
13 action, let's just say that this is civil, and
14 the idea is you should know better as a teacher,
15 whether you intended -- or, you know, maybe the
16 teacher is mentally ill. They don't realize yet
17 whether you understood that we would take that
18 to be a threat. I guess I just don't understand
19 why the standard would be different.

20 MR. ELWOOD: Well, the Court has drawn
21 a distinction between kind of civil penalties
22 and criminal penalties, and, I mean, I -- I
23 don't know that it's a penalty to have to miss
24 work for a couple of days while they, you know,
25 get to the bottom of it --

1 JUSTICE BARRETT: I know, but I guess

2 --

3 MR. ELWOOD: -- and decide whether
4 there is a public safety problem.

5 JUSTICE BARRETT: Well, it is if
6 you're suspended without pay because the school
7 says this is just something you don't joke
8 around.

9 MR. ELWOOD: Well, if -- if the idea
10 is we just want to make him suffer because this
11 is something you don't want to joke around,
12 maybe that is something more like punishment,
13 although, again, everything is kind of different
14 in -- in the educational context.

15 JUSTICE BARRETT: But why does it turn
16 on -- but I guess, again, assuming that it's --
17 because, when you were answering Justice Kagan,
18 you were kind of running to the criminal
19 context, like behind every civil restraining
20 order -- I kind of feel like that's what you're
21 doing with me too -- is the potential of a
22 crime, and maybe my example isn't effectively
23 communicating it because I'm trying to make it
24 solely civil.

25 But I guess I don't understand -- I

1 mean, in the New York Times versus Sullivan
2 context, intent does matter for the definition
3 of defamation, but it's a unique context, right?
4 So, here, I -- I understand why in the *Elonis*
5 sense we would say that what separates culpable
6 from not culpable conduct is the level of
7 intent, and so that mattered in interpreting the
8 mens rea requirements of that statute.

9 But I'm not sure why it changes the
10 definition of threat for purposes of the
11 definitional category of speech that falls
12 outside the First Amendment.

13 MR. ELWOOD: Well, I -- I -- I think
14 part of it is just because of the level of
15 protection you get. And in the civil context,
16 you know, losing a couple days of -- of salary
17 is -- you know, can be a significant penalty,
18 but it's nothing like being sentenced to four
19 and a half years in prison.

20 JUSTICE KAGAN: Do you have any place
21 in our First Amendment law where we've made that
22 distinction? Because I understand you're
23 saying, look, this is a criminal case, this was
24 a very heavy sentence, and -- and -- and really
25 forcing us to say we have this discomfort with

1 crimes that don't have mens rea.

2 But this is a different sort of
3 question. You're not saying, well, just because
4 a crime doesn't have a mens rea element it's
5 unconstitutional. Your argument is a First
6 Amendment argument. And I guess I just don't
7 know of very many of our cases or any of our
8 cases that have made a real distinction between
9 criminal penalties and civil penalties with
10 respect to what's permitted or prohibited under
11 the First Amendment.

12 MR. ELWOOD: Well, the only thing I
13 can point to, again, is the defamation context,
14 where they draw distinctions between civil
15 liability and -- and treble damages or punitive
16 damages, which is -- and the cases like -- I
17 think it's Reno versus ACLU, where they've said
18 that criminal penalties pose special concerns.

19 And the place where this would
20 normally arise is in the civil protective order
21 context, which I think is reduced because, of
22 course, the person who is the -- the recipient
23 of the threats or the statements has a First
24 Amendment interest in not associating.

25 And this sorts itself out in other

1 areas because, like, in the -- in the tort of
2 negligent infliction of emotional distress, you
3 typically can't get that based on -- unless you
4 were physically injured, on a negligent -- on a
5 negligence standard. It requires at most kind
6 of an intentional statement.

7 But I -- I am not aware of kind of a
8 body of First Amendment case law that -- that
9 talks about the civil -- sort of the civil
10 implications of punishing threats. So the focus
11 is, you know, the case before us. And I think
12 defamation is enough of a basis for the Court to
13 say it makes a difference.

14 JUSTICE KAVANAUGH: You said earlier
15 that your position would not make a big
16 difference in a lot of cases. I think you said
17 that. Can you give us examples, not this case,
18 examples of other cases out there where you
19 think someone was criminally prosecuted and
20 should not have been?

21 MR. ELWOOD: Certainly. But I think,
22 you know, the -- the just versus unjust
23 prosecutions or just versus unjust convictions
24 is a very small part of the argument we're
25 making, because the chilling effect comes from

1 being told it doesn't matter -- the speaker
2 being told it doesn't matter what you think, you
3 have to think about the reaction of your
4 audience.

5 And so that is, you know, wholly apart
6 from whether there are unjust convictions. I
7 think that this is, you know, a -- a --

8 JUSTICE KAVANAUGH: Was that -- I'll
9 wait.

10 MR. ELWOOD: Yeah. But, in terms of
11 the convictions that made a difference, it might
12 have made a difference in the Fulmer case.
13 That's the "silver bullets are coming" case.
14 And I think there's another case -- I mean, one
15 of the broader points I'd like to make to the
16 Court is that these kind of prosecutions and
17 these kind of arrests are, I think,
18 substantially underreported because local media,
19 unless it just happens to catch the fancy of
20 local media, it's just not covered. And so some
21 of the best examples are ones that are simply
22 emailed to me by spouses or relatives of the
23 people who are prosecuted.

24 But one example is Glenn Schumacher in
25 Illinois, who is a 58-year-old married man who,

1 on the comments page of a local newspaper, The
2 Elmhurst Patch, responded to an article about,
3 you know, littering and crowds and so forth at
4 an annual event by saying perhaps a few placed
5 -- well -- pressure cooker pots. And the very
6 next commenter said, you know, we all appreciate
7 some cleverness and humor, but that's pretty
8 crass. So, clearly, the first person who saw it
9 immediately knew it was a joke. He was arrested
10 at 2 a.m. the next day and held for six weeks on
11 a bond that he could not afford until he pleaded
12 guilty to essentially disorderly conduct.

13 And I think that's an example of a
14 statement that they would say clearly he did not
15 intend that as a threat. He also had no
16 criminal record. But it -- it made a difference
17 in the outcome.

18 CHIEF JUSTICE ROBERTS: Counsel --

19 MR. ELWOOD: But, again, that's a very
20 small part of the argument we're making here,
21 which is more focused on chilling.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Mr. Elwood.

24 To what extent does your case -- or is
25 it affected by the fact that we're dealing with

1 text messages, where, you know, it seems to me
2 the most threatening message we've got is,
3 "You're not being good for human relations.
4 Die. Don't need you."

5 Now that's there in sort of cold
6 print, but you can convey that message in a
7 hostile way or in a way that's sort of like, you
8 know, you're dead to me kind of thing.

9 If this case didn't involve texts, how
10 -- how would this material get into the record?
11 Would there be testimony or --

12 MR. ELWOOD: I think that there would
13 be testimony. And even though it was by direct
14 messages, it came in through testimony as well,
15 as they described -- as they described that in
16 the trial.

17 CHIEF JUSTICE ROBERTS: By whose
18 testimony?

19 MR. ELWOOD: Through C.W.'s testimony.

20 CHIEF JUSTICE ROBERTS: Okay.
21 Justice Thomas?

22 JUSTICE THOMAS: Yes, just briefly,
23 Mr. Elwood. The -- Justice Alito asked you
24 whether or not intent could be baked into some
25 statements, and that was my problem, by the way,

1 with Virginia v. Black. The burning of a cross
2 in the middle of a field doesn't leave much room
3 to imagination.

4 But the -- what if someone said in a
5 text, "I will kill you"? What -- what -- what's
6 missing there as to the intent of that person?

7 MR. ELWOOD: Well, if it's said
8 between siblings, you know, talking about, you
9 know, you -- you ate the last brownie, it can
10 mean something entirely different than if it is
11 in the case of, I think, In the Interest of
12 R.D., where --

13 JUSTICE THOMAS: Let's just take your
14 client here. "I will kill you."

15 MR. ELWOOD: Well, I -- I think, in
16 that case, it could be open to a lot of
17 different meanings depending on what happens
18 around it.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE ALITO: Suppose someone writes
21 a story and posts it on the internet or
22 publishes it, and it's a story about -- it's a
23 mystery story about one spouse killing the other
24 spouse. Most people are going to read it and
25 think, okay, this is an interesting story or

1 it's not an interesting story.

2 But suppose that all of the details
3 match up with the situation of the author's
4 spouse, and when that spouse reads it, the
5 spouse takes it as a threat.

6 How do you analyze that?

7 MR. ELWOOD: I think, you know, in the
8 sort of law enforcement context, I think you can
9 stop -- I think the application of the test with
10 the objective test is about the same, because it
11 is what would the ordinary person think these
12 words mean given all of the circumstances.

13 And -- and so I think that you would
14 make the same law enforcement decision there,
15 whether you were applying a subjective test or
16 an objective test.

17 If you talk to the guy and you are
18 absolutely convinced that, you know, he didn't
19 mean it, he didn't mean to instill fear, he just
20 thought these are great facts for a story, that
21 makes the law enforcement decision easier.

22 If you have doubts, if you think maybe
23 he's doing this to instill fear, well, then, as
24 they used to say in the old '40s movies, tell it
25 to the judge. You know, you -- you treat it

1 just like you would under an objective standard.
2 You indict the guy, you go to trial, and then he
3 has an opportunity to tell the jury. And if
4 it's a persuasive explanation, it's enough to
5 introduce reasonable doubt, then he might get
6 acquitted.

7 JUSTICE ALITO: What about --

8 MR. ELWOOD: But, if not --

9 JUSTICE ALITO: Okay. What about the
10 converse? So the spouse reads it and it --
11 suppose it's written in the first person and
12 talks about what the author of the story is
13 going to do.

14 The spouse reads it and says, well,
15 you know, this is just my husband or my wife is
16 an author, this is that -- you know, this is --
17 he -- he or she is just trying to write a story.
18 But a neighbor reads it and says, wow, this
19 matches up exactly with their situation and I
20 interpret that as a threat to commit murder.

21 What about that? I mean, this -- this
22 is a problem in -- with internet communications,
23 because they go out to sometimes a vast and
24 unknown audience.

25 MR. ELWOOD: I think that this is an

1 argument in favor of looking to the speaker's
2 intent because it's the same outcome in both
3 cases, whereas, depending on the state that
4 would apply it, you know, sometimes there's a
5 reasonable person, sometimes there's like a
6 reasonable foreseeable audience, and the --
7 the -- the effect may differ depending on what
8 the person thinks a reasonable -- how a
9 reasonable person would view that.

10 I think that's one of the problems
11 with objective standards generally, is it is a
12 rough and tumble of factors and you don't
13 necessarily know how they would apply in any
14 given case. The Court has said time and again
15 how that yields unpredictability, which is bad
16 for speech.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I think, in fact,
21 there's a raps -- rapper who sang a song doing
22 exactly what Justice Alito said, correct?

23 MR. ELWOOD: Yes, Eminem, as we may
24 remember from 2014.

25 JUSTICE SOTOMAYOR: Exactly what he

1 said. And -- and I think you've made the point,
2 but I want to underscore it for myself, which
3 is, if you don't have some sort of subjective
4 intent in a -- in a circumstantial case, you're
5 baking in in the objective reasonable viewer a
6 societal -- a sort of bias to whatever that jury
7 thinks might be the community standard.

8 And what's okay for a video game
9 person, player, or a -- a rapper is a very
10 different thing than would be for a -- a
11 non-parent rapper.

12 MR. ELWOOD: I agree. Judge Floyd on
13 the Fourth Circuit has a very good separate
14 opinion on this in United States versus White,
15 where he talks about how, essentially, minority
16 viewpoints, minority religions, fringe speech,
17 fringe art tends to be viewed as threatening,
18 you know, to people who are unfamiliar with it,
19 which is, I think, the reason why Jehovah's
20 Witnesses are petitioners in about 30 percent of
21 free speech cases, because it's a minority
22 religion which is unfamiliar and seems weird and
23 threatening to, you know, the -- the residents
24 of New Haven, Connecticut.

25 JUSTICE SOTOMAYOR: So more of a

1 reason that you have to let in people to explain
2 the basis of their intent, correct, or their
3 knowledge?

4 MR. ELWOOD: I would agree, yes.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE KAGAN: Mr. Elwood, the --
7 the -- the two areas where we've insisted that
8 states have buffer zones or breathing room,
9 which are, you know, libel cases, public figure
10 libel cases, and incitement cases, I mean, in
11 both those cases, there's a very thin line
12 between the no value speech and speech that is
13 of great value, so the advocacy/incitement line
14 is a very thin one.

15 And so too, when it comes to
16 defamation of public figures, it's just a --
17 it's just a step from extremely valuable
18 commentary about public figures.

19 And so, in those two areas, we've
20 insisted on this breathing room. But I wonder
21 looking at this case whether we can really say
22 that. And this goes a -- a little bit to
23 Justice Kavanaugh's question as well.

24 Like, what's the area of speech that
25 we think is really going to be chilled by

1 drawing the line in the place where this state
2 and many other states want to draw it?

3 I mean, there's nothing that's sort of
4 close to true threats but is super valuable that
5 we ought to be worried about, is there?

6 MR. ELWOOD: I disagree. I mean, one
7 of the reasons why we analogize to incitement is
8 the language is frequently exactly the same,
9 "we're going to break their damn necks" or, you
10 know, "we might need to take some revengeance."

11 It's -- a lot of it, it sounds an
12 awful lot like a threat, it's just going to be
13 delivered by somebody else, and so too here.

14 A lot of the examples you can come up
15 with from the Bible Believers case, which was an
16 incitement case, but Turn or Burn, imagine a
17 protester speaking to a doctor going to an
18 abortion clinic, Turn or Burn might be warning
19 about damnation, might be, you know, "we're
20 going to bomb your clinic."

21 There's a lot of speech on the
22 internet that walks the line, you know, "burn it
23 all down," you know, "come and take it," Second
24 Amendment -- or Second Amendment remedies.

25 There's a lot of speech online that --

1 that kind of comes close to the line, and it's
2 not a matter of absolute clarity which way it
3 would fall, and I think it protects that kind of
4 speech, which, again, is virtually identical to
5 the stuff that comes up in incitement cases.
6 The only question is who's going to make good on
7 the threat.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Along those lines,
11 the Solicitor General had -- one of its headings
12 says that a statement that based on its content
13 and context is threatening to a reasonable
14 person has minimal expressive value and is
15 inherently harmful.

16 I guess my question for you is, if --
17 if we were to rule the other way, what's at
18 stake in terms of what's left? How do we know
19 when a reasonable person is going to find
20 something of minimal value and inherently
21 harmful?

22 MR. ELWOOD: I would recommend the
23 amicus briefs filed by the Alliance Defending
24 Freedom, Reporters Committee, FIRE -- I hope I'm
25 not leaving anybody out there -- and ACLU,

1 because they do a very good job of talking about
2 how, when you tell speakers it doesn't matter
3 what you think, what matters is the audience
4 reaction, then instead of thinking about just
5 what do I view as the truth, what do I want to
6 communicate, they have to think about, well,
7 what's not going -- what's going to get me in
8 trouble. And it automatically causes people to
9 kind of -- to chill, to -- to go back to the
10 area where they have safety.

11 And I think that is what you would
12 lose. You would lose some of the rough and
13 tumble of speech, which is especially important
14 on the internet, because, again, as I say, it
15 brings together strangers in an area where you
16 don't have a lot of context, and with strangers,
17 you know even less of that context.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: A couple things.
21 I think the State and the SG say there are
22 certain kinds of threats that they're concerned
23 about, in particular, presidential threats,
24 threats against the President, stalking, school
25 threats, domestic violence, and that it's a

1 defense like the one that would be present with
2 your mens rea would make it too easy for someone
3 to say, oh, I was just joking, I was just
4 kidding, and, therefore, threats that would be
5 really quite dangerous in terms of leading to
6 the next step of actually carrying through with
7 the threat will not be addressed.

8 How do you respond to that concern?

9 MR. ELWOOD: To begin with, I think
10 that presidential threats after Elonis are
11 already subject to an intent standard. But I --
12 I will give you an answer similar to the one I
13 gave earlier, which is that this is not going to
14 make a difference in the run of cases because,
15 ordinarily, the way a reasonable person would
16 view remarks is the way that the defendant
17 probably viewed the remarks, unless they can
18 present some sort of persuasive reason why it
19 meant something different to them.

20 JUSTICE KAVANAUGH: And what about the
21 "I was just joking," "I was kidding"?

22 MR. ELWOOD: Well, the question is
23 not --

24 JUSTICE KAVANAUGH: Isn't that a --
25 isn't that a constant concern?

1 MR. ELWOOD: -- a lot of times --

2 JUSTICE KAVANAUGH: You go to the
3 house and the -- and the guy says, I was just
4 joking around?

5 MR. ELWOOD: Well --

6 JUSTICE KAVANAUGH: And then the
7 police officer is really stuck.

8 MR. ELWOOD: Well, you go beyond that
9 and say -- because, to some people, the joke is
10 causing people to scurry around. And if the --
11 if you're like, well, did you know there was
12 going to cause -- you were going to -- was it
13 going to alarm them, did you think that the
14 police might respond, and if the answer to that
15 is, you know, yes, that's very easy.

16 If the answer to that is no, it may
17 just not seem credible if the -- the -- the
18 threat was, "I'm going to kill you," or "I'm
19 going to come cut your throat."

20 So, I mean, I -- there -- there's
21 been -- you know, we've -- we've had many states
22 that have a mens rea statute. I -- there's over
23 20 that for the -- the general threat statute
24 require a showing of purpose or intent. You
25 know, there's more that -- you know, that

1 require something less. And, you know, there
2 just hasn't been showing that there's a big
3 problem or that it's -- it can't be solved
4 whether these people will be granted a license
5 to get away with things.

6 Again, you have to have some sort of
7 persuasive reason why the words meant something
8 different to you. It's not enough to say it's a
9 joke. You have to put together a persuasive
10 reason why you didn't know it would cause fear.

11 And if you adopt the -- the
12 government's recollection, it's even lower
13 because, under recklessness, you know, you --
14 you can't say, you know, I had no idea that
15 people would view that as a threat.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Everything you're
20 saying, I'm -- I'm comfortable with as a matter
21 of criminal liability, but I guess I'm still
22 stuck on the civil/criminal point.

23 And, you know, I think Virginia versus
24 Black is your best case because there is some
25 language in there sprinkled about intent, but I

1 also think the case can be understood as one in
2 which there was no context. The context was
3 stripped away. And so a reasonable person --
4 there was no way to judge, as that law was
5 written, whether a reasonable person in context
6 would have understood it as a threat. So I -- I
7 don't think it gets you all the way there.

8 I guess, to Justice Kagan's point
9 about the thin line between them, won't context
10 protect most often? And -- and a true threat
11 has to be one of physical harm, right?

12 MR. ELWOOD: Yes, a true threat has to
13 be one of physical harm.

14 JUSTICE BARRETT: So, I mean, a lot of
15 the examples, it seems to me, that were in some
16 of the amicus briefs and in your brief are ones
17 in which either context or a requirement that
18 something actually be for bodily harm wouldn't
19 be present. I mean, are we talking about a
20 narrow slice of cases in which someone is
21 mentally ill or, you know, for some reason, they
22 may be autistic, and just doesn't appreciate the
23 context? Is that the narrow band we're really
24 talking about?

25 MR. ELWOOD: There's a lot baked in

1 there. If I could first talk about Virginia
2 versus Black, I think it's important to remember
3 the default rule, which is whether there's a
4 clearly established tradition of allowing
5 regulation of this speech. And, at minimum,
6 they can -- the best they can get out of
7 Virginia versus Black is ambiguity, not an
8 embracement of negligent free speech.

9 In addition, in all of the mentions of
10 context there, I say context is important
11 because it helps you determine intent. So,
12 again, there's nothing in there to suggest you
13 can have just a context-sensitive objective
14 test.

15 With respect to, you know, context and
16 whether context will sort all of this out,
17 it's -- it's -- you know, context makes a big
18 difference in a lot of cases, but part of the
19 problem is the foreseeability of that. We
20 already had a little discussion of the many ways
21 "I will kill you" could be meant. And when
22 you're talking about speech -- this is again why
23 I refer to the amici -- speakers have to have
24 some sort of confidence in advance about whether
25 they -- what they're saying is going to wind

1 them up in trouble.

2 In the past, intent has been a bulwark
3 because speakers know their intent, and so, if
4 their intent matters, that gives them some
5 comfort in -- that they can say what they were
6 going to say without criminal punishment.

7 But, when the standard is what a
8 reasonable person would think, then you're
9 thinking, well, what does that mean? And,
10 frequently, you don't know what the answer to
11 that is. We could have a conversation -- the
12 conversation about "I will kill you" could have
13 gone on another five minutes and we might not
14 have, you know, gone to ground.

15 JUSTICE BARRETT: Maybe you should be
16 careful if you're going to say something like "I
17 will kill you" or "I'm going to burn it all
18 down" or "I'm going to shoot up a school."

19 MR. ELWOOD: Well, again, you know, my
20 mother said to me virtually every day of my
21 childhood --

22 JUSTICE BARRETT: "I'm going to kill
23 you"?

24 MR. ELWOOD: -- "Drop dead." Yeah.

25 (Laughter.)

1 MR. ELWOOD: And yet, you know, I was
2 never in fear because of that, and so, you know,
3 context meant a lot.

4 JUSTICE BARRETT: Hopefully, context
5 gave you some reassurance.

6 (Laughter.)

7 MR. ELWOOD: It was about the only
8 thing that did, but, yes.

9 (Laughter.)

10 JUSTICE BARRETT: Thank you, Mr.
11 Elwood.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: Yes. So let me just
15 be clear, Mr. Elwood. I'm trying to understand
16 whether you're saying that in every other
17 category of unprotected speech we require some
18 subjective intent, with perhaps the exception of
19 fighting words. Is that right?

20 MR. ELWOOD: I think that that's
21 right, that it generally requires a recklessness
22 or sometimes knowledge in the case of obscenity.

23 JUSTICE JACKSON: Okay. And then just
24 to follow up on Justice Barrett and Justice
25 Kagan's questions about civil versus criminal,

1 I'm wondering -- you say that you -- your
2 argument relies on the chilling effect, and I'm
3 wondering whether you're perceiving some
4 distinction in a criminal versus civil penalty
5 scheme with respect to the way in which or the
6 amount of chilling that would occur.

7 MR. ELWOOD: I think that there is a
8 difference in the amount that would occur. The
9 Gertz -- I'm sorry -- Gertz versus Robert Welch
10 suggests that the difference is constitutionally
11 significant. I do think there is, you know,
12 some chilling effect. I think that some of that
13 is baked into the -- the Gottshall decision,
14 which is this Court's case, and the negligent
15 infliction of emotional distress because, you
16 know, you can't generally get emotional damages
17 for negligent speech harms.

18 So I think that there is --you know,
19 perhaps that reflects some sort of reflection
20 that there is a chilling effect to imposition of
21 penalties.

22 But, again, in the -- in the
23 defamation context, the Court has said that
24 states have a compelling enough interest in
25 making people whole that they would let those

1 cases proceed in the civil context.

2 JUSTICE SOTOMAYOR: Chief, I'm sorry,
3 may I ask just one question?

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE SOTOMAYOR: Are you saying
6 that you have to always prove somebody intended
7 to commit the act, or do you have to just say
8 that they knew they were going to put someone
9 else in fear?

10 MR. ELWOOD: We are only arguing for a
11 knowledge standard, that they knew that the
12 words would cause fear.

13 JUSTICE SOTOMAYOR: Okay.

14 CHIEF JUSTICE ROBERTS: I don't know
15 if you were finished or not, Justice Jackson.

16 JUSTICE JACKSON: Yes, that's fine.
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Okay. Thank
19 you, Mr. Elwood.

20 MR. ELWOOD: Thank you.

21 Mr. Weiser.

22 ORAL ARGUMENT OF PHILIP J. WEISER

23 ON BEHALF OF THE RESPONDENT

24 MR. WEISER: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 True threats have always been
2 prosecuted without protection by the First
3 Amendment. Petitioner now seeks to impose a
4 specific intent element onto this inquiry that's
5 required neither by history nor precedent.

6 Doing so would enable more harm and
7 less valuable discourse. That's because a
8 serious expression of an intent to cause
9 unlawful physical violence directly causes
10 life-changing harms and does not contribute to
11 the marketplace of ideas, regardless of what the
12 perpetrator was thinking.

13 Requiring specific intent in cases of
14 threatening stalkers would immunize stalkers who
15 are untethered from reality. It would also
16 allow devious stalkers to escape accountability
17 by insisting that they meant nothing by their
18 harmful statements.

19 This matters because threats made by
20 stalkers terrorize victims and for good reason.
21 Ninety percent of actual or attempted domestic
22 violence murder cases begin with stalking. The
23 court below followed this Court's teachings from
24 Watts and Black that context is critical in
25 evaluating what constitutes a true threat.

1 The robustness of an objective,
2 context-driven inquiry means that this test
3 won't criminalize a joke taken the wrong way,
4 political advocacy, or hyperbole. It thus
5 protects statements that contribute to the
6 marketplace of ideas.

7 In this case, C.W. reasonably
8 perceived that Counterman's threatening stalking
9 conveyed a serious expression of an intent to
10 cause unlawful physical violence. The First
11 Amendment does not protect threats like these in
12 either the criminal or the civil context. And
13 the standard is, indeed, the same by this
14 Court's precedents in both.

15 Imposing a specific intent requirement
16 would thwart the goals of the First Amendment,
17 enabling more harm and leading to less valuable
18 discourse.

19 I welcome your questions.

20 JUSTICE THOMAS: But Petitioner is
21 arguing, I think, a little -- I think a bit
22 more. Petitioner is also arguing that it has
23 the spillover effect of chilling protected
24 speech, not just that this is protected speech.

25 Now how would you respond to that?

1 MR. WEISER: Since Watts, the majority
2 rule in the overwhelming jurisdictions, 50
3 years, has been an objective standard. And
4 during that time, the only prosecutions they
5 point to, the case he mentions, "silver bullets
6 are coming," was actually a case that was under
7 a specific intent standard. We haven't seen in
8 the last 50 years with this objective rule the
9 types of harms. And, moreover, we point to the
10 time of the founding that threats were
11 prosecuted without regard to intent.

12 JUSTICE THOMAS: But he -- he also --
13 he also argues that you wouldn't see necessarily
14 the chilling effect because those cases would
15 not be before you. That's what I'd like you to
16 respond to.

17 MR. WEISER: Thank you, Justice
18 Thomas. Justice Kagan got to a critical point.
19 The type of the speech that remains after the
20 objective, context-driven inquiry is speech that
21 doesn't come close to contributing to the
22 marketplace of ideas. As was said by Justice
23 Barrett, when you're talking about a serious
24 expression of an intent to cause physical
25 violence and harm someone, that's a high

1 standard. Coming very close to that standard
2 isn't the sort of speech that this Court has
3 protected under the First Amendment.

4 CHIEF JUSTICE ROBERTS: Well, saying
5 doesn't come close to protected speech, here's
6 one of the statements for which he was
7 convicted: "Staying in cyber life is going to
8 kill you. Come out for coffee. You have my
9 number."

10 In what -- in what way is that
11 threatening, almost regardless of the tone?

12 MR. WEISER: When it's put into the
13 context, Mr. Chief Justice, what is being said
14 here is, if you don't come out for coffee with
15 me, bad things are going to happen to you.
16 There's others --

17 CHIEF JUSTICE ROBERTS: Well, this is
18 -- I'm sorry. This isn't remotely like that.
19 It says, "Staying in cyber life is going to kill
20 you." I can't promise I haven't said that.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: "Come out --
23 come -- come out -- come out for coffee. You
24 have my number."

25 MR. WEISER: The content --

1 CHIEF JUSTICE ROBERTS: I think that
2 might sound solicitous of the person's
3 development. I mean, if we're talking just
4 about what the statements are, how is that --
5 what tone would you use in saying that that
6 would make it threatening?

7 MR. WEISER: The threat in that is, if
8 you don't come out and meet me, your life's in
9 danger. And the stalking context here, like
10 many stalking situations, has someone who
11 believes they're entitled to the attention and
12 the affection of a victim.

13 Victims of stalking routinely face
14 scores and scores, hear hundreds and hundreds of
15 unwanted, invasive engagements from somebody,
16 and the consequence in stalking cases is, if you
17 don't give me what I want, I can turn violent,
18 and that indeed does happen a significant amount
19 of the time.

20 CHIEF JUSTICE ROBERTS: Okay. Say
21 this in a threatening way. One of the things he
22 was convicted of, it was an image of liquor
23 bottles, and there was a caption, "A guy's
24 version of edible arrangements."

25 (Laughter.)

1 MR. WEISER: So, again --

2 CHIEF JUSTICE ROBERTS: Say -- say
3 that in a threatening way.

4 MR. WEISER: So the threat here is
5 when you put them all together. When you take
6 one of these out of context or put it into a
7 different context, it means something different.

8 But, here, she cut him off on Facebook
9 Messenger four to eight times. She got
10 literally up to a thousand messages over a
11 couple of years. She was subject to this
12 torrent of activity that was objectively
13 terrifying to her and would be to any reasonable
14 person in that position, and she was helpless,
15 and she could have seen him at a concert and he
16 could have harmed her, and she was then afraid
17 to pursue her craft.

18 CHIEF JUSTICE ROBERTS: And under your
19 theory, the defendant couldn't say, right, the
20 first thing anybody would say, a child, an
21 adult, when someone is offended or even feels
22 threatened by their speech is, that's not what I
23 meant. What I meant was, if you stay on the
24 computer, you know, all -- all day long, it's --
25 it's -- well, I don't know if it's going to kill

1 you, but it's going to -- you know, it's not
2 good for you, and "come out for coffee" is an
3 invitation to get off the computer.

4 MR. WEISER: The Colorado standard
5 looks at the context, and the context here was
6 she had four to eight times cut off access. He
7 kept coming back, kept sending messages in the
8 face of what, again, was a clear sign, I don't
9 want to hear from you. She said at trial that's
10 the clearest sign you can offer on Facebook.

11 CHIEF JUSTICE ROBERTS: Okay. This
12 will be the last -- the last question.

13 Because you're putting it so much in
14 context, he had been doing this, this, and this,
15 could he be convicted for anything, saying
16 anything? "Good morning"? And, you know,
17 that's after however many months of doing this.

18 So, in other words, does the content
19 of the speech actually matter in the -- in the
20 way you're looking at it?

21 MR. WEISER: Yes. The content of the
22 speech that crossed the line was when it
23 escalated to a tone and to statements about her
24 life being at stake, "Die. Don't need you,"
25 "You're not good for anybody."

1 CHIEF JUSTICE ROBERTS: Okay. I said
2 that was the last question, but I was wrong.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: Well, you said
5 when it escalates in tone?

6 MR. WEISER: His messages over time
7 got more aggressive and started using language
8 that got to her physical safety.

9 CHIEF JUSTICE ROBERTS: But tone, to
10 me, that means how it's enunciated. We don't
11 have any of that here, right? It's cold emails.

12 MR. WEISER: The tone of the
13 statements were taken on by the language that
14 was used. When the language got scary and
15 violent and talking about her life, it was a
16 different matter.

17 Also, it's important to note there
18 were statements, "Nice display with your
19 partner, seeing you out and about," that also
20 gets to I'm being watched. For a victim in this
21 situation, it is entirely reasonable,
22 appropriate, to see this as terrifying, because
23 we know these stalking cases can and often do
24 turn violent.

25 JUSTICE ALITO: The statute talks

1 about the manner of the communication. So do
2 you say that the statute -- you interpret the
3 statute to mean that a person cannot be
4 convicted based on the manner of making
5 communications, the content of which is not in
6 themselves threatening?

7 Suppose someone follows a person like
8 C.W. around and is constantly popping up and has
9 a threatening look to the person and is
10 constantly saying, "Good morning, C.W.," "Good
11 afternoon, C.W.," "How are you now?"

12 The -- the content is benign, but the
13 manner is one that would cause a person to be
14 disturbed. Is that not prosecutable under the
15 statute?

16 MR. WEISER: There are two different
17 standards. There's the criminal statute, and
18 then there's the true threat First Amendment
19 requirement.

20 Under the statute, the individual has
21 to have intent in the general sense knowing what
22 the words mean, and there has to be significant
23 emotional distress to the individual, and a
24 reasonable person would have to experience
25 significant or serious emotional distress.

1 So, if the statements, as they were
2 said, would cause an individual to suffer
3 serious emotional distress and someone did
4 suffer that, that would be the standard under
5 the statute.

6 The First Amendment then says it has
7 to be a serious expression of an intent to cause
8 unlawful physical violence. It does strain my
9 imagination to plausibly imagine any
10 circumstance where "good morning" is enough to
11 constitute a serious expression of an intent to
12 cause physical violence.

13 JUSTICE ALITO: So a person could not
14 be -- is that an interpretation of the statute,
15 or is that a constitutional requirement?

16 A person cannot be cannot convicted of
17 stalking based on communicating statements that
18 are not in themselves threatening in a manner
19 that is likely to be interpreted to be
20 threatening. That -- the First Amendment
21 doesn't allow that?

22 MR. WEISER: The First Amendment
23 requires, in order to prosecute a true threat,
24 that it be a serious expression of an intent to
25 cause harm.

1 JUSTICE SOTOMAYOR: I -- I'm sorry.
2 This -- this goes to the protective order issue.
3 You can engage in conduct, a
4 persistent following of someone, that would
5 violate a protective order. It wouldn't matter
6 what the person was saying or what they intended
7 to do when they were following them. They --
8 the conduct being proscribed is just the
9 stalking, the following that person.

10 And I think what Justice Alito is
11 saying, if there is a statute that says, if you
12 repeatedly follow someone or repeatedly reach
13 out to someone in a manner that causes them
14 fear, that that might be enough.

15 You're now putting a different overlay
16 on this, which is what the Virginia court did,
17 which is, you -- your speech has to be
18 threatening. That's what Virginia is saying.

19 So I think we're dealing with a
20 different case when we're talking about pure
21 stalking from what Virginia is doing. And the
22 way it charged it was -- was to say it wasn't
23 just her serious emotional distress. She felt
24 in fear for her life, and so they took it as a
25 -- they said it was a true threat case, correct?

1 MR. WEISER: Correct, Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: So, if all we say
4 is this is a true threat case, because that's
5 the way it was tried and that's the gloss that
6 Virginia -- that -- not Virginia, I'm sorry,
7 what state is this?

8 JUSTICE GORSUCH: Colorado.

9 JUSTICE SOTOMAYOR: Colorado. I'm
10 thinking of --

11 MR. WEISER: We like Virginia.

12 JUSTICE SOTOMAYOR: No, I -- I was
13 just thinking of the flag-burning case. It --
14 it controlled the place in my mind.

15 We don't have to opine on what a true
16 stalking statute is about that is not concerned
17 with speech, correct?

18 MR. WEISER: Yes. If I could explain
19 one minute here. There's three types of
20 stalking cases. There's the pure conduct ones
21 that Justice Gorsuch referred to earlier;
22 there's ones where there are threats, and I
23 thought that was the nature of the discussion;
24 there's also a third category, stalking, which
25 is dealt with very ably in the Duick, Lakier,

1 and Volick brief. That is a different analysis.

2 If I could get back to the civil
3 protective order and just --

4 JUSTICE GORSUCH: Well -- well, I just
5 want to follow up on this before we leave it.

6 So Colorado could have pursued the
7 defendant here for stalking and secured a
8 conviction for that. Conduct wouldn't involve
9 any expressive activity at all, and you'd be out
10 -- out of -- out of the woods, right?

11 MR. WEISER: Had the conduct been
12 being following somebody around, that would have
13 been a different form of stalking case.

14 Here, the conduct were the statements
15 sent over Facebook Messenger. Sometimes you
16 hear the phrase "cyber stalking." The Colorado
17 statute reaches such activity if it meets the
18 relevant criminal statute and First Amendment
19 requirements.

20 JUSTICE GORSUCH: And then, second,
21 kind of back to the Chief Justice's questions,
22 you emphasized that context is really important
23 here. Content and context will do the work.

24 Why isn't the defendant's intentions
25 part of the context? How could it not be part

1 of the context?

2 We've had so many examples here how
3 words mean different things in different
4 contexts, and part of it is how they're
5 received, surely, but part of it has to be how
6 they were intended. Isn't -- isn't that part of
7 the context?

8 MR. WEISER: The defendant's approach
9 and, indeed, even their testimony, is relevant
10 to who the intended and foreseeable audience
11 was. If it offended the --

12 JUSTICE GORSUCH: I'm talking about
13 the message, not -- not to whom it was directed.
14 We -- forget about that. Put that aside.

15 The words, "I'm going to kill you," or
16 -- I've forgotten what Mr. Elwood's mother said
17 to him --

18 (Laughter.)

19 JUSTICE BARRETT: "Drop dead." Thank
20 you.

21 (Laughter.)

22 JUSTICE GORSUCH: Those words have
23 very different contexts among friends, among
24 colleagues, among family members, even among
25 strangers sometimes. I'm sure, if we went

1 through the comments section of any daily
2 newspaper today, we'd find some of those words.

3 Are they -- I mean, I'm just a little
4 concerned that by ignoring one aspect -- you're
5 asking us to really ignore one aspect of context
6 while you're resting on context. How does that
7 work?

8 MR. WEISER: The defendant's
9 statements, the defendant's experience, if you
10 look at the test, the relationship, the
11 statements in a prior -- in a previous exchange,
12 that all comes in. That is all relevant for the
13 reasons you said.

14 JUSTICE GORSUCH: But not his -- his
15 subjective beliefs?

16 MR. WEISER: The subjective belief
17 gets to something else. Someone can be under --

18 JUSTICE GORSUCH: That's not part of
19 the context in your world, right? We have to
20 say that's not relevant context? That's not
21 context?

22 MR. WEISER: Because it doesn't get to
23 the nature of the harm. Statements can be
24 objectively terrorizing to somebody. Someone
25 can say, I had no idea, I thought we were in a

1 relationship --

2 JUSTICE GORSUCH: But I'm correct in
3 understanding that, in your view, context cuts
4 off there?

5 MR. WEISER: Yes.

6 JUSTICE GORSUCH: Okay. And then last
7 question, I hope. We live in a world in which
8 people are sensitive and -- and maybe
9 increasingly sensitive. As a professor, you
10 might have issued a trigger warning from time to
11 time when you had to discuss a bit of history
12 that's difficult or a case that's difficult.

13 What do we do in -- in -- in a world
14 in which reasonable people may deem things
15 harmful, hurtful, threatening? And we're going
16 to hold people liable willy-nilly for that? I
17 mean, again, the Solicitor General says a
18 statement that's based on its content and
19 context, putting aside its intentions, I
20 suppose, that's threatening to a reasonable
21 person is inherently harmful.

22 What do we -- how do we talk about
23 history?

24 MR. WEISER: The first point I would
25 emphasize -- Justice Barrett made the point

1 well -- it has to be a serious expression of an
2 intent to cause unlawful physical violence. So
3 someone feeling uncomfortable --

4 JUSTICE GORSUCH: But we have to put
5 intentions aside? You tell me.

6 MR. WEISER: Correct.

7 JUSTICE GORSUCH: So I'll put that
8 aside?

9 MR. WEISER: Yes.

10 JUSTICE GORSUCH: All right. But just
11 in its content and context, not looking at
12 intentions --

13 MR. WEISER: Right.

14 JUSTICE GORSUCH: -- is harmful, that
15 has no First Amendment protection under the test
16 that's being purveyed here. And I would just,
17 again, put to you, aren't -- aren't a lot of
18 things harmful that we talk about and have to
19 talk about difficult, offensive to reasonable
20 people? Some of our history could count as
21 that. Some of the Court's cases might even
22 count as that.

23 MR. WEISER: Offensive is not the
24 standard.

25 JUSTICE KAVANAUGH: You're saying

1 physically harmful, right?

2 MR. WEISER: It has to be physically
3 harmful.

4 JUSTICE GORSUCH: Okay.

5 MR. WEISER: And this is a crucial
6 point. It gets to the -- a lot of the points
7 made in that FIRE brief aren't talking about
8 points --

9 JUSTICE GORSUCH: So I say -- so I say
10 they're physically --

11 MR. WEISER: -- where someone fears
12 physical violence.

13 JUSTICE GORSUCH: -- they're
14 physically harmful to me. They put me in fear.
15 And there are people, reasonable people, who
16 will say that about difficult subjects. So I
17 take the friendly amendment from my friend
18 across the bench and still ask you the question.

19 MR. WEISER: The question is, would a
20 reasonable person in that position, not the
21 eggshell defendant, if you will, would a
22 reasonable person experience statements as a
23 serious expression of an intent to cause
24 unlawful physical violence? That's a high
25 standard, and we would say it doesn't allow for

1 the sorts of concerns that you just articulated.

2 JUSTICE KAGAN: So, General, I want to
3 take it as a given that this is a high standard,
4 and two-and-a-half years of sending somebody
5 unwanted emails, when that person has
6 consistently tried to block them and tried to
7 stop them, some of those emails being pretty
8 violent, "Die. Don't need you. F off
9 permanently"; others of those emails suggesting
10 pretty strongly that he is watching the person,
11 "Only a couple of physical sightings," "Was that
12 you in the white Jeep?"

13 So I want to take it as a given that
14 this can be objectively terrifying. Here's my
15 question for you, though. Why -- what would you
16 lose -- I mean, I think that there's a question
17 for both of you. Like, to Mr. Elwood, it's,
18 like, you know, tell me about the -- the cases
19 that I should be concerned about.

20 But I think I have a flip side
21 question to you. Like, how could you not be
22 able to prove -- at least if it was a
23 recklessness standard, how could you not be able
24 to prove this case with a recklessness standard?

25 MR. WEISER: Three points. First, as

1 you picked up, whatever First Amendment standard
2 governs here governs in the civil context, which
3 includes the school threats that Justice Barrett
4 talked about; it includes domestic violence
5 cases, where a victim is afraid. And so the
6 loss here is not only in the criminal context.
7 The loss is in the civil context.

8 Second, as to what the loss is, it's
9 both delusional individuals and devious
10 individuals. A delusional individual who is a
11 stalker will often say, I believed we were in a
12 relationship, I thought what I was saying was
13 benign. And it's possible they could believe
14 that, and yet, once they're really rebuffed,
15 they can then turn violent, which means the
16 following: Do you have to wait until the person
17 actually engages in violence before you do
18 something about what is an objectively
19 terrorizing threat? And this is crucial for the
20 law to be able to protect.

21 JUSTICE BARRETT: Are you saying -- I
22 want to follow up on Justice Gorsuch's questions
23 to you about stalking. He was asking you about
24 physically following people, and you said
25 Colorado has such a statute -- can I finish,

1 Chief?

2 CHIEF JUSTICE ROBERTS: Yes.

3 JUSTICE BARRETT: Are you saying that
4 you could not have prosecuted this under any but
5 this statute because it was solely verbal?

6 MR. WEISER: The evidence of physical
7 stalking here are the statements. There were no
8 independent sightings. She didn't know what he
9 looked like, so she didn't have evidence that he
10 actually was following her around, other than
11 his statements suggesting that he was.

12 JUSTICE BARRETT: So there was no way
13 that you could prosecute this without provoking
14 this First Amendment question --

15 MR. WEISER: The --

16 JUSTICE BARRETT: -- posed by this
17 statute?

18 MR. WEISER: -- the prosecution was
19 under the stalking law. They invoked the First
20 Amendment, saying these were statements. The
21 defense was these were true threats, and that's
22 how it was decided by the court of appeals.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: One brief question.
2 The -- you rely on the reasonable recipient
3 standard, reasonable person standard. How would
4 you -- and you did mention that the sender could
5 have been delusional.

6 How would you monitor the distance
7 between a reasonable recipient and a delusional
8 recipient in -- in establishing your context?

9 MR. WEISER: The reasonable recipient
10 ensures -- I referenced earlier to Justice
11 Gorsuch -- it not be an eggshell defendant
12 having essentially idiosyncratic
13 characteristics. So it's in the position that
14 someone was in, what would a reasonable person
15 perceive vis-à-vis it being an expression of
16 physical violence?

17 JUSTICE THOMAS: You're putting a lot
18 of weight on that, and I think that's why you're
19 getting so many questions about intent. Your --
20 it's as though that demonstrates the -- how the
21 recipient feels, whether or not it is to be
22 considered a threat.

23 And you said that you -- you -- the
24 recipient is not eggshell, but how would you
25 determine that?

1 MR. WEISER: The way you determine
2 that is, if someone said, I specifically, as the
3 person, have these particular characteristics
4 that are more idiosyncratic, they wouldn't
5 count. As to the use of the standard, this is
6 what this Court uses in the Fifth Amendment
7 case, is someone in custody? It is also what is
8 required in a self-defense case, what would a
9 reasonable person in that situation view as a
10 serious cause to use self-defense?

11 So the law uses these standards all
12 the time and generally doesn't allow the
13 eggshell defendant to define the category.

14 JUSTICE THOMAS: I mean, I think
15 you're -- the problem you're going to run into
16 is the same one that Justice Gorsuch mentioned,
17 and that is it doesn't have to be eggshell, that
18 we're more hypersensitive about different things
19 now, and people could feel threatened in
20 different ways.

21 So I don't know how you're monitoring
22 that as -- what if it's now that people are more
23 sensitive, that that is now considered the
24 reasonable person?

25 MR. WEISER: The sensitivity has to be

1 towards unlawful physical violence, and that is
2 something outside what might make someone
3 uncomfortable or even hurt their feelings. It's
4 a -- it's a --

5 JUSTICE THOMAS: I know, but some of
6 these statements the Chief Justice read to you
7 are not threatening in and of themselves, and
8 yet someone could be triggered by those
9 statements or hypersensitive about those
10 statements and feel threatened.

11 And I'm -- what we're trying -- what
12 I'm trying to figure out is, if we accept your
13 argument about context, how do we monitor that
14 reasonableness that seems to now be on a sliding
15 scale?

16 MR. WEISER: There is both the
17 requirement of a jury making determinations of
18 factfinder and independent plenary review, which
19 happened here, at the trial court and the court
20 of appeals. And I also would give you the lived
21 history we have of the last 50 years. Almost
22 every circuit uses an objective standard.

23 Now one could make a move, Justice
24 Thomas, don't judge it by the reasonable
25 listener; judge it by a reasonable speaker.

1 That would be an alternative objective standard
2 that would avoid the harms that I noted to
3 Justice Kagan.

4 CHIEF JUSTICE ROBERTS: Justice Alito?
5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: I -- I'm still a
7 bit confused by Justice Kagan's question and
8 your answer to her.

9 You accept that this man was
10 delusional. You said to her, I couldn't go
11 under recklessness. You couldn't prove -- the
12 prosecutor couldn't prove the case.

13 MR. WEISER: Let me respond to that.

14 I didn't get to that point. If you
15 wanted to apply a reckless standard, I think the
16 proper thing would be to remand it. To allow
17 the court of appeals that judgment and that
18 analysis wasn't under our standard. It wasn't
19 used. If that were the position to prevail, we
20 think remand to be appropriate.

21 JUSTICE SOTOMAYOR: I'm assuming he
22 was convicted and this -- one of the reasons for
23 his sentence for threatening his wife.

24 Obviously the conviction was more than
25 enough to stop him from doing any more

1 threatening of his wife, and I'm assuming this
2 arrest was more than enough to stop him from
3 sending any more unwanted texts to this woman,
4 correct?

5 MR. WEISER: She -- she left the state
6 and --

7 JUSTICE SOTOMAYOR: I appreciate --

8 MR. WEISER: Yeah, so she's --

9 JUSTICE SOTOMAYOR: -- that. No, no,
10 no, I know her emotional distress was great, and
11 whether there's a civil cause of action, I don't
12 know, but that's not my point.

13 My point is: At what point -- and I
14 think that's what Justice Thomas was saying --
15 do we, in not protecting the First Amendment,
16 say an objective standard alone is okay with
17 speech that relies always on context?

18 And, yes, I -- and I know, there are
19 delusional people who kill individuals and we
20 want to protect people from that, but at what
21 point do we do it by defining crimes without
22 some sort of knowledge element by the person?

23 MR. WEISER: In Justice Thomas'
24 separate statement alone is he said it would be
25 an odd result to put true threats in the most

1 protected First Amendment area.

2 Right now private defamation cases can
3 proceed without any heightened scienter
4 requirement. The limitation on punitive damages
5 only applies on matters of public concern.

6 The fighting words context, those
7 prosecutions can proceed without a heightened
8 scienter requirement. Both of those situations
9 involve direct harm on individuals that happen,
10 and can be life changing.

11 JUSTICE SOTOMAYOR: But incitement
12 always required knowledge. Anyway, thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: No.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: His sentence here,
20 how much did his sentence here rest on or maybe
21 not how much -- was it relevant at sentencing,
22 his prior convictions for making threatening
23 communications in 2003 and then in 2011 as
24 activity of statements that would be threatening
25 to anyone?

1 I won't read them here.

2 MR. WEISER: The stalking statute
3 prescribes a one- to three-year sentence that
4 was enhanced up to six years because of the
5 prior convictions. Other evidence was
6 presented, including his mental health. The
7 judge went for four and a half years.

8 JUSTICE KAVANAUGH: Okay. And then at
9 the beginning of your brief, you start quite
10 helpfully by saying, a too broad definition here
11 will limit protected speech, too narrow approach
12 will harm the individuals and communities
13 terrorized and silenced by threats.

14 Certainly agree with that and I think
15 the questions have explored that. I just want
16 to get you again on a recklessness standard,
17 what's the problems with a recklessness standard
18 from your perspective?

19 That seems to capture some of the
20 concerns you've heard while leaving plenty of
21 room, one would hope, to make sure threats are
22 captured before someone is killed or -- or
23 physically hurt.

24 MR. WEISER: Two answers. The first
25 answer is, recklessness does require some proof

1 of what a defendant knew. He then or she then
2 would disregard it. But proving knowledge in a
3 case of someone who can say, because they are
4 untethered from reality, I didn't mean it, could
5 still allow them to escape accountability. And,
6 again, this would apply in both the civil and
7 the criminal context. So it has broad
8 applicability.

9 A second point I would note is,
10 recklessness is the standard for public figures
11 in defamation cases, but that's about the
12 reputation of a public figure. Here it's about
13 safety.

14 And the problem that I would note
15 vis-à-vis that standard is counterspeech was one
16 of the justifications. We're going to raise the
17 standard for public figures for recklessness
18 because they can defend themselves in the
19 marketplace of ideas.

20 Now the problem here, if you try to
21 use counterspeech to a threatening stalker, you
22 make it more likely that it will escalate
23 ultimately into life-threatening violence.

24 So we don't believe the case, if you
25 compare it on all fours, to public figures in

1 the recklessness for defamation. It isn't of
2 the same kind of harm. Counterspeech isn't a
3 justification.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Who is the
8 reasonable person? I mean, would it be just --
9 as we might say in the Fifth Amendment context
10 for custody, is it kind of a general reasonable
11 person or say if something happens on a college
12 campus, is it the reasonable college student,
13 which might be different?

14 MR. WEISER: Or as in Elonis, the
15 reasonable teenager on the internet in a
16 Facebook gamer group, one of the cases that was
17 cited then and now, it is in the context that
18 the person is in, and it's important because the
19 norms may be different.

20 People may talk differently on a sub
21 gamer Facebook group.

22 JUSTICE BARRETT: Well, that's not
23 quite what I'm asking because I can look at a
24 college classroom, say, or a law school
25 classroom. And I can say, if Justice Gorsuch or

1 I were sitting in that context, let's imagine a
2 professor who wants people to understand just
3 how vicious it was to be in a Jim Crow south and
4 puts up behind them on a screen a picture of a
5 burning cross and reads aloud some threats of
6 lynching that were made at the time.

7 Purely educational purpose in the
8 teacher's mind, but students feel physically
9 threatened, they fear for their safety because
10 they don't understand it. Whereas as Justice
11 Gorsuch and I are looking at that situation,
12 we'd say, well, a reasonable person would
13 understand the educational context of that so
14 how could the student think of it.

15 So I -- I -- I think context doesn't
16 get you all the way there. I think it's who is
17 the reasonable person. So who is it?

18 MR. WEISER: It's a reasonable person
19 in the situation, but in that situation, an
20 educational setting where there really is no
21 threat of direct physical violence to a person,
22 it would be objectively unreasonable for anyone
23 to see --

24 JUSTICE BARRETT: Black students
25 sitting in the classroom.

1 MR. WEISER: If it's not a -- a threat
2 of violence that the person is worried about
3 their safety --

4 JUSTICE BARRETT: But the person is
5 reading in the first person an account of what
6 was said and threats of lynching, so they're
7 using the first person and saying it.

8 MR. WEISER: I understand how it makes
9 them uncomfortable, but unless that person can,
10 again, reasonably perceive it as a threat to
11 their safety in that situation, it wouldn't be a
12 true threat.

13 JUSTICE BARRETT: So I guess what I'm
14 getting at is there's no protection built in.
15 We might have differences about who we think are
16 the eggshell audience or not, and I -- I was
17 just trying to get you to -- to answer in a way,
18 apart from context, whether there's any way to
19 take account of who the reasonable person is.

20 I mean, you know, maybe it's the case
21 that Justice -- Justice Gorsuch and I or Justice
22 Sotomayor and I could sit in that classroom and
23 think that we're reasonable people understanding
24 everything you say.

25 But maybe it's the case Justice Thomas

1 talked about changing attitudes. Maybe it's the
2 case that nowadays people would be more
3 sensitive to that and -- and people would say a
4 reasonable, you know, black college student
5 sitting in that classroom would interpret that
6 as threats, you know, that might materialize
7 into actual physical harm.

8 MR. WEISER: The context of a college
9 classroom or, to get back to rap music, a
10 concert makes it unreasonable to view yourself
11 as being threatened given what is going on, and
12 that, I do believe, would control.

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: Yes. Can I just --
17 I just want to clarify just so that I can be
18 sure I understand.

19 So you were talking about the
20 reasonable person with Justice Barrett, and
21 if -- if your standard, the reasonable person in
22 that situation would have perceived the
23 statements as a threat, is that what you're
24 saying about the reasonable person?

25 MR. WEISER: I would say a reasonable

1 person in a classroom could not and would not
2 perceive general teaching of -- as a true
3 threat.

4 JUSTICE JACKSON: All right. But
5 there's no -- no element of this or no thought
6 about how the statement was meant. Your view is
7 that the subjective intent of the speaker is
8 irrelevant.

9 MR. WEISER: That's correct.

10 JUSTICE JACKSON: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Feigin?

14 ORAL ARGUMENT OF ERIC J. FEIGIN
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE RESPONDENT

17 MR. FEIGIN: Thank you, Mr. Chief
18 Justice and may it please the Court:

19 Just to make clear what's on the
20 table, the question presented as framed by
21 Petitioner invokes only a specific intent and
22 knowledge question. The answer to the question
23 presented is, no, because at a bare minimum
24 recklessness suffices.

25 Everyone agrees there is a category of

1 unprotected speech known as true threats, and
2 everyone agrees that in order to fall in that
3 category, it has to be a statement that a
4 reasonable person not just could but would
5 interpret as a serious threat to do unlawful
6 violence.

7 And then we're basically just having a
8 policy debate about how much breathing room is
9 necessary. And I would urge this Court to allow
10 legislatures, many of which do adopt heightened
11 mens rea requirements because of precisely the
12 concerns that have been articulated, to have
13 that shake out on their own because there are a
14 number of interests on the other side. I could
15 take questions, or -- or do you know what those
16 are?

17 JUSTICE THOMAS: Just one quick
18 question, Mr. Feigin. Where does this
19 recklessness standard come from?

20 MR. FEIGIN: Well, to be clear,
21 Your Honor, our frontline position is that there
22 shouldn't be a recklessness standard at all.
23 It's not historical. It would just be a gloss
24 in the way that this Court, I think, has put a
25 gloss on obscenity and other doctrines because

1 of the essentially judicial policy assessment
2 that the First Amendment requires additional
3 breathing room.

4 But, here, we'd urge you that this
5 kind of inherently --

6 JUSTICE SOTOMAYOR: But you're saying
7 that the historical record supports, clearly
8 supports, that no mens rea is required?

9 MR. FEIGIN: Well --

10 JUSTICE SOTOMAYOR: That it's
11 negligence, an objective standard? What do I do
12 with the legion of English cases, American
13 cases, true threat cases, all of whom require
14 mens rea? Your --

15 MR. FEIGIN: Respectfully --

16 JUSTICE SOTOMAYOR: -- opposing
17 counsel was quite right that you take a few
18 stray statements from a few cases, but every
19 other case talks about a mens rea.

20 MR. FEIGIN: Well, respectfully,
21 Your Honor, we disagree about the history. He
22 basically relies on three buckets of history.

23 Number one are libel cases. Even
24 libel cases under modern doctrine don't have a
25 specific intent or knowledge requirement.

1 Number two are a breach of --

2 JUSTICE SOTOMAYOR: You -- you hit --
3 you hit the nail on the head, modern cases. Go
4 on.

5 MR. FEIGIN: Well, the Court has not
6 deemed those to be controlling. I could address
7 the cases individually --

8 JUSTICE SOTOMAYOR: I don't think it's
9 worth it, Mr. Feigin.

10 MR. FEIGIN: -- but we'd be here a
11 while.

12 JUSTICE SOTOMAYOR: You're making --
13 you're making quite a broad statement that the
14 historical record supports your position --

15 MR. FEIGIN: Well, Your Honor --

16 JUSTICE SOTOMAYOR: -- when you
17 haven't pointed --

18 MR. FEIGIN: -- let me jump right to
19 it. The -- the only way in which he engages
20 in -- you know, putting aside breach-of-peace
21 cases that inform the objective fighting words
22 doctrine and the statutes that expressly
23 required intent to extort, if we just look at
24 the pure threatening letters, I'd commend to the
25 Court King against Girdwood, a 1776 case that's

1 about jury instructions that includes no jury
2 requirement of intent. Or let's take counsel's
3 --

4 JUSTICE SOTOMAYOR: Intent is
5 different than knowledge, and he's saying -- I
6 look a lot of the indictments on the cases that
7 you cited to, and all of them talked about a
8 willful purpose or a knowing purpose.

9 MR. FEIGIN: Your Honor, the only
10 things that were submitted to the jury in
11 Girdwood were knowledge of the contents of the
12 letter and whether those contents in themselves
13 conveyed a threat.

14 But let's look at another case, their
15 favorite case, the only case they really have on
16 threatening letters, Regina against Hill, which
17 is a later English case. In that case, there
18 was some dispute as to what the defendant
19 intended. Did he intend to burn standing corn,
20 corn in the field, or stacked corn, corn that
21 had already been cut and put in the barn and was
22 personal property?

23 And as to that question, the
24 defendant's intent was not -- the defendant
25 stated what he intended, which we do think can

1 relevantly inform the context, and -- but the
2 Court didn't treat it as dispositive. The Court
3 said, we'll see if we can --

4 JUSTICE SOTOMAYOR: Intent is never --
5 what a defendant --

6 MR. FEIGIN: -- interpret the letter
7 that way.

8 JUSTICE SOTOMAYOR: -- says is never
9 dispositive. It's always contextual. The issue
10 is that an objective standard keeps out, as it
11 happened in the trial here, the defendant's
12 understanding.

13 MR. FEIGIN: Well, Your Honor, we
14 don't think that a defendant's intent in sending
15 a communication --

16 JUSTICE SOTOMAYOR: Not intent.

17 MR. FEIGIN: -- is categorically
18 irrelevant.

19 JUSTICE SOTOMAYOR: Knowledge.
20 Knowledge.

21 MR. FEIGIN: We don't think that the
22 defendant's intent or knowledge is necessarily
23 irrelevant. Elonis got on the stand and
24 testified as to what he was thinking.

25 JUSTICE GORSUCH: Hold on.

1 MR. FEIGIN: What he said was --

2 JUSTICE GORSUCH: You just said it's
3 not necessarily irrelevant?

4 MR. FEIGIN: Well, Your Honor, I want
5 to distinguish between a couple of things.

6 JUSTICE GORSUCH: Well, so it's not
7 necessarily irrelevant, is that fair?

8 MR. FEIGIN: If I could expand on that
9 point, I would like to --

10 JUSTICE GORSUCH: Briefly.

11 MR. FEIGIN: -- just sort of not leave
12 it abstractly hanging.

13 JUSTICE GORSUCH: Yeah.

14 MR. FEIGIN: Let me -- let me just
15 talk about two different things. One is what a
16 speaker is thinking at the time the speaker
17 makes the statement is relevant in the same way
18 an objective inquiry into, like, reasonable
19 suspicion or probable cause, you might take into
20 account what the officer was thinking when he
21 stopped the car because that would just inform
22 what a reasonable person might think.

23 Then we've got the --

24 JUSTICE GORSUCH: Okay. I -- I -- I
25 take that point.

1 MR. FEIGIN: Okay.

2 JUSTICE GORSUCH: But even that wasn't
3 permitted here, right? I mean, no evidence of
4 his knowledge was permitted.

5 MR. FEIGIN: Well, Your Honor, what I
6 think he wanted to introduce was evidence that
7 might go to something like mental delusions he
8 was suffering, that he was having a
9 conversation --

10 JUSTICE GORSUCH: Whatever. He wasn't
11 allowed to produce any evidence about his mens
12 rea. And I think you just admitted that, even
13 under your version of the objective standard,
14 that's relevant contextual evidence, I think.

15 MR. FEIGIN: It can be, and to the
16 extent he was forbidden from raising the
17 statement by --

18 JUSTICE GORSUCH: That -- that was
19 error.

20 MR. FEIGIN: The -- I -- Your Honor,
21 I'm not going to defend a particular evidentiary
22 ruling --

23 JUSTICE GORSUCH: All right.

24 MR. FEIGIN: -- in this particular
25 prosecution.

1 JUSTICE GORSUCH: Okay. All right.
2 Let me -- let me back up and just ask you
3 another question about the history, because I
4 read it a little bit differently than you do, I
5 think.

6 I look at -- you said Girdwood, but,
7 even there, the jury was asked whether he knew
8 the contents of what he wrote and whether the
9 terms of the letter conveyed an actual threat.
10 So there is knowledge there, I think.

11 Boucher was heavily relied on by you
12 and your friends. But the next sentence you
13 don't quote is: "No one who received the letter
14 could have any doubt as to what the writer meant
15 to threaten."

16 And I guess I just put the question to
17 you this way: Criminal law, vicious will has
18 been an essential part of it. This Court's made
19 that clear since Morissette. And I'm just not
20 aware of many circumstances in which someone can
21 be sent to jail for four years, found guilty of
22 a felony, without any evidence of mens rea
23 coming before the jury.

24 MR. FEIGIN: So, Your Honor, I think
25 that the Morissette presumption is a presumption

1 about legislative intent. And legislatures, to
2 be clear, don't have to adopt an objective
3 standard. This Court's opinion in *Elonis*
4 suggests that the --

5 JUSTICE GORSUCH: I understand that.

6 MR. FEIGIN: -- that Congress could
7 embrace that.

8 JUSTICE GORSUCH: I appreciate that.
9 But you'd -- you'd agree it would be a very
10 unusual law in -- in -- in -- in this country
11 for a felony not to involve any question of mens
12 rea, highly unusual?

13 MR. FEIGIN: It's -- it's not unknown
14 to the law. It is uncommon. But let me list a
15 few reasons if I could of why legislatures might
16 have the calculus in favor of criminalizing the
17 speech under an objective standard.

18 Number one, you know, just -- number
19 one is that it enables very devious defendants
20 -- again, when *Elonis* did get in on the -- did
21 get on the stand, he said, I didn't care what
22 other people thought. And his actual posts
23 invoked the First Amendment and true threats
24 doctrine.

25 Number two -- and this applies to any

1 standard, Justice Kavanaugh, including
2 recklessness, but it's obviously much worse with
3 specific intent. It impedes law enforcement
4 from actually arresting and bringing charges at
5 an early stage. They have to wait a lot longer
6 for the objective evidence to build up.

7 Elonis isn't uncommon in his fact
8 pattern. We're currently sitting on matters
9 that we do not feel comfortable charging at the
10 moment, where you have things framed in wish and
11 hypothetical and I -- "I wish someone would kill
12 you." "Oh, if only I could come do it, I -- I
13 would walk right up to 19 Elm Street." You
14 know, that -- that sort of thing is -- is a kind
15 of thing that a clever threatener is going to
16 use. And we simply cannot intervene because we
17 need to be very, very, very sure we're going to
18 get a conviction. And the reason --

19 CHIEF JUSTICE ROBERTS: Just to make
20 sure --

21 MR. FEIGIN: Yeah.

22 CHIEF JUSTICE ROBERTS: -- I
23 understand, you think someone can be convicted
24 for saying, "I wish someone would kill you"?

25 MR. FEIGIN: Your Honor, repeated

1 statements of that sort -- for example, the
2 Court might look at Elonis, who was reconvicted
3 on -- who was just recently reconvicted for
4 convict -- for threatening a --

5 CHIEF JUSTICE ROBERTS: Okay. But --

6 MR. FEIGIN: -- Assistant U.S.
7 Attorney, his ex-wife, and his ex-girlfriend.

8 CHIEF JUSTICE ROBERTS: Okay. So, if
9 it's, "I wish someone would kill you," and the
10 person who said that doesn't get to testify and
11 say what he meant, he can say, well, of course,
12 I didn't mean it, and here's why I didn't mean
13 it, or something like that.

14 MR. FEIGIN: Oh, he -- he can testify
15 to that, and a jury can see what -- what they
16 think of it. I -- I assume it's okay if I
17 answer your question.

18 CHIEF JUSTICE ROBERTS: I think I'll
19 let myself go on.

20 (Laughter.)

21 MR. FEIGIN: Yeah, of course he can --
22 of course he can, Your Honor, but my point is
23 they have to -- the -- first of all, we're never
24 doing these things in isolation. Context always
25 matters. And the prosecution needs to build up

1 enough circumstantial evidence because if we
2 don't actually manage to convict, we have put
3 the victim, not only through the riggers of a
4 trial, the lesson the victim draws is even the
5 law can't protect me.

6 And in these cases, that is very
7 important and should at least allow legislatures
8 to have a mens rea of recklessness, which is
9 something that, if you answered the question
10 presented yes, which would be the only basis for
11 reversing the judgment below, legislatures would
12 no longer be empowered to do.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 Justice Sotomayor?

18 Justice Kagan?

19 JUSTICE KAGAN: Would I be right,
20 Mr. Feigin, that there's a large difference in
21 saying that in most cases, a person should be
22 allowed to take the stand and testify as to his
23 state of mind and, on the other hand, saying
24 that a prosecutor has to prove something about
25 his state of mind, in other words, the first

1 just going to a general sense of context about
2 what a reasonable observer might think about
3 the -- the conduct or the speech, and the second
4 being an element of the offense. There's a big
5 difference between those two.

6 MR. FEIGIN: That's absolutely right,
7 Justice Kagan, and that, I think, informs the
8 discussion I was having with Justice Gorsuch,
9 which is, I mean, the speakers there, the
10 speaker intends to convey something but may not
11 only say something about how a reasonable
12 observer would perceive it, but may give you
13 some additional context as to, for example, if
14 it's a spoken threat, tone, or whatever.

15 JUSTICE KAGAN: I'm -- I'm wondering
16 what you think of this criminal/civil dichotomy
17 in this context. Because I think, although you
18 say -- there's no independent constitutional
19 rule that there can't be a -- a crime without
20 knowledge or even recklessness, yet we are
21 uncomfortable with the thought, uncomfortable
22 enough that when we say, you know, we have to be
23 really convinced that the legislature wanted
24 that, that's a separate issue, it seems to me,
25 from this First Amendment issue, or is it?

1 I mean, is there something to the fact
2 that these two things are coming at us at the
3 same time and we can kind of connect them in the
4 way that Mr. Elwood suggests and come up with a
5 rule of the kind he wants?

6 MR. FEIGIN: Well, I -- I agree that
7 they're separate inquiries, Your Honor. For a
8 category of unprotected speech, it's just
9 unprotected, and the legislature can either
10 provide for civil or criminal liability.

11 The instinct that I think you're
12 channeling that we're uncomfortable with and in
13 criminal law finds its way into other doctrines,
14 number one, would be the presumption of mens rea
15 that I was discussing a little bit earlier, that
16 the Court applied in *Elonis* and made clear in
17 *Elonis* was not deciding the separate
18 constitutional issues.

19 And another one would be, and you can
20 really see this if you look back at the old
21 cases like -- older cases like *New York Times*
22 against *Sullivan*, that the criminal law comes
23 with additional constitutional protections.

24 In the Fifth and Sixth Amendment, you
25 need a unanimous jury, you need proof beyond a

1 reasonable doubt. And precisely for that reason
2 is why New York Times against Sullivan was
3 actually more concerned about civil liability
4 than criminal liability.

5 As far as the broader distinction
6 where I think counsel for the other side is
7 suggesting this isn't going to affect civil
8 protection orders, I don't really understand
9 why.

10 I mean, I suppose the Court could just
11 say that in its opinion and that would be
12 helpful, but there's no logical basis for
13 distinguishing between a civil protection order
14 that depends for its definition on some modicum
15 of proof that somebody committed an actual
16 criminal offense which must be defined by
17 specific intent or knowledge, and -- and the --
18 the actual criminal law question that we're
19 debating here.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: It seems like in
25 figuring out the mens rea issue, we're making

1 quasi policy judgments about where to draw the
2 line, and, in thinking about that, you alluded
3 to this, but I'd be interested in you just
4 telling us, from the federal government's
5 perspective, what are the problems that you see
6 that would be caused by adopting Petitioner's
7 rule? Like real concrete kinds of cases that
8 would go unarrested, unprosecuted.

9 MR. FEIGIN: Well, I tried to jam this
10 in a little bit earlier --

11 JUSTICE KAVANAUGH: Yeah, we'll take
12 --

13 MR. FEIGIN: -- Your Honor, but to --

14 JUSTICE KAVANAUGH: Take a minute or
15 two.

16 MR. FEIGIN: -- expand on it a bit
17 more.

18 You know, number one, we -- there are
19 delusional stalkers or -- not just stalkers like
20 delusional threateners and we have to accept
21 their harms, there are also devious ones, like
22 Elonis.

23 I'd commend to the Court looking back
24 at some of the statements he made that are
25 recounted in the Court's opinion in that case.

1 We clearly see someone trying to toe the line
2 and that's exactly what these people do.

3 And we're not prosecuting them on the
4 basis of one statement in isolation, like "I'm
5 going" -- you know, I -- "I hope that someone
6 kills you."

7 It's that combined with knowledge of
8 someone's address, et cetera, that just walk
9 right up to the line and then they hope that
10 they can get off scot-free because of some
11 heightened intent requirement.

12 Number two is that, as I was
13 suggesting earlier, and this is true of both
14 recklessness and knowledge and specific intent,
15 but obviously more true the higher you get up
16 the mens rea chain, because we're going to have
17 to prove subjective mindset through
18 circumstantial evidence, which we're allowed to
19 do, but that's really all we're going to have.

20 We're going to have the statements
21 themselves, and if we're talking about an online
22 threats case, then that's going to be about it.

23 So we have to wait quite a while
24 before the statements rise to the level where we
25 are comfortable bringing the prosecution and

1 sure that we're going to get a guilty verdict.
2 And we need to be more sure in this context than
3 we feel like we need to be necessarily in other
4 contexts, because --

5 JUSTICE KAVANAUGH: Do you consult
6 with the victims on that?

7 MR. FEIGIN: Your Honor --

8 JUSTICE KAVANAUGH: You said you were
9 worried about the victims. Do you consult with
10 the victims like, no, go ahead?

11 MR. FEIGIN: Your Honor, in some cases
12 we might, and in other cases we might have a
13 reluctant victim, but I think the -- the
14 critical point is, no matter what, we're going
15 to need the victim to testify, and that's going
16 to be an or deal.

17 We're going to need the victim -- you
18 know, the victim will be aware that the trial is
19 ongoing. There -- there's a brief from the
20 victim in this case that details some of these
21 harms. And if we're unable to get a conviction,
22 that's going to send a message to the victim
23 that I'm on my own, the law can't protect me,
24 notwithstanding whatever Band-Aid they want to
25 put on civil protection orders, which themselves

1 aren't going to last forever, and raise
2 substantial due process concerns and would be
3 called into question by the rule that Petitioner
4 is urging unless we're going to draw some kind
5 of illogical line that's inconsistent with this
6 Court's precedent, as Justice Kagan has -- I
7 think, her questions have -- have gotten at
8 today.

9 JUSTICE KAVANAUGH: One -- one last
10 question which is, are you aware of statistics
11 or studies, and this would be hard, but of
12 murders, school shootings, domestic violence
13 incidents that perhaps could have been prevented
14 if threats had been taken more seriously
15 beforehand?

16 MR. FEIGIN: I'm not sure, Your Honor.
17 I mean, I -- I don't have any numbers for you.
18 I can tell you, and I -- I think this probably
19 reflects the experience from which your question
20 draws, is that there is frequently after one of
21 these horrific incidents some question of why
22 didn't you -- you know, why didn't you
23 intervene, why didn't you respond earlier?

24 And I imagine Petitioner's counsel is
25 about to get up and say, well, you can

1 intervene. You can send an agent over to check
2 out what's going on.

3 And we did exactly that in Elonis.
4 And what happened? He sent another threat, the
5 threat against little agent lady and we had to
6 charge that -- that threat too. It did not
7 deter him. It did not stop him. We recently
8 reconvicted him for another series of threats,
9 including threats to an Assistant U.S. Attorney.

10 So these -- it is very important that
11 the prosecution have some ability to intervene
12 at an earlier stage. And legislatures shouldn't
13 be precluded from making the judgment that those
14 kinds of harms are more important, particularly
15 in the case of reckless defendants who decide
16 that they will inspire fear in others to further
17 their own selfish ends.

18 We successfully ran the Boston
19 Marathon on Monday, thankfully. If someone had
20 called up to the police station and said, you
21 know, I am -- on the tenth anniversary, I am
22 Tsarnaev Part II, I don't think that the person
23 should be able to get off for making a threat
24 simply by saying that he thought the Boston
25 police department had a better sense of humor.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: Yes, but let me just
6 ask you, I perceive a difference between your
7 position and the government's -- excuse me --
8 and Colorado's position as to whether or not the
9 defendant can bring in that evidence. So I just
10 want to be clear on that. This is a point that
11 Justice Gorsuch made and Justice Kagan made.

12 In your very last hypothetical would
13 that defendant be allowed to at least testify to
14 his state of mind in making those threats?

15 MR. FEIGIN: Yes, Your Honor, but I do
16 want to clearly differentiate between two forms
17 of subjective mens rea that, the type things
18 that might come in.

19 One is just evidence of what the
20 defendant was thinking when the defendant sent
21 the statement. That sort of thing could come
22 in.

23 But evidence about delusions and
24 illnesses and just the statement that I have
25 some sort of mental deficiency that impairs me

1 from understanding what a reasonable person --
2 how a reasonable person would interpret my
3 statements, the Court made clear in Clark
4 against Arizona that a defense of mental illness
5 or mental incapacity doesn't have to negate
6 criminal liability in the first instance. It
7 could be channeled into some kind of insanity
8 defense.

9 And what the Defendants in -- the
10 Defendant in this case and defendants generally
11 are trying to do is have their cake and eat it
12 too. They don't want to claim that they are
13 insane, so -- and then they claim that they
14 should be able to defend against mens rea based
15 on asserted mental infirmities --

16 JUSTICE JACKSON: But your --

17 MR. FEIGIN: -- of the sort I just
18 described.

19 JUSTICE JACKSON: -- your view, you
20 stand with Colorado in -- insofar as you're
21 saying the government would only have to prove
22 the objective reasonableness --
23 reasonable-person standard and that the
24 government would not have to show anything about
25 subjective intent even if evidence related to

1 subjective intent was admitted.

2 MR. FEIGIN: As a constitutional
3 matter, we think that, you know, back to what I
4 was saying to Justice Kagan, the element -- as a
5 constitutional matter, under the First
6 Amendment, we think the only thing that the
7 elements would require is that a reasonable
8 person would, not just that some person could,
9 but a reasonable person necessarily would
10 interpret the statement -- a reasonable person
11 would, beyond a reasonable doubt is what I mean
12 by "necessarily" -- interpret the statements as
13 a threat of unlawful violence.

14 That's the constitutional floor. Many
15 legislatures go above it, but they don't
16 absolutely have to, for all of the reasons I was
17 expanding on with Justice Kavanaugh. Society
18 doesn't need to accept that these harms are
19 necessarily going to occur and allow people to
20 inflict them --

21 JUSTICE JACKSON: Thank you.

22 MR. FEIGIN: -- and they can cause --

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Elwood?

1 REBUTTAL ARGUMENT OF JOHN P. ELWOOD

2 ON BEHALF OF THE PETITIONER

3 MR. ELWOOD: Just a few points. The
4 burden is on the proponents of restrictions on
5 speech to justify it, both as a legal matter, as
6 a constitutional matter, and as a -- as the
7 practicalities of bringing it. I think the
8 burden is on them to show that it would cause a
9 problem.

10 On the constitutional end, I would say
11 that, you know, to the extent that you think
12 that the sides are in equipoise about tradition
13 and history and doctrine, the tie goes to
14 speech. And I think that they aren't.

15 I think that, when you have on one
16 hand, Virginia versus Black, and when you have
17 in other cases, like Virginia versus Hill
18 where the government admitted that they
19 considered the subjective intent, they didn't
20 just look at the reasonable meaning of the
21 words, they looked to see what he meant by them,
22 in order to determine whether it was a threat.
23 And if I remember correctly, they directed --
24 directed verdict of acquittal as a result.

25 In terms of practical implementations,

1 when Colorado argues that the majority rule is
2 an objective one, that's talking about the
3 federal constitutional rule. If you look at the
4 majority of courts of appeals, they say that's
5 the constitutional rule. But the most common
6 mens rea for threat statutes is purpose or
7 intent.

8 More than 20 states, their main threat
9 statute uses purpose or intent. I'm sure more
10 have recklessness. And, again, they haven't
11 shown it's a problem in any -- in any of those
12 states.

13 The federal government has been living
14 under this rule since *Elonis*, and the examples
15 that the government gives are devious
16 defendants, you know, people couching things as
17 wishes and so forth.

18 I would say that the difference should
19 not be that difference between an objective
20 standard and a subjective intent, because, after
21 all, you have to prove under an objective
22 standard when somebody says, I wish you would
23 die, that they -- that, you know, you would have
24 to say, well, he means that to mean I'm going to
25 kill you.

1 And the only difference, ordinarily,
2 when you were talking about how you prove to the
3 jury, you prove it the same way either way. The
4 only difference is whether or not the defendant
5 gets to put forward their explanation of what
6 those words mean.

7 And Justice Scalia, writing for the
8 Court in United States v. Williams, said, in a
9 speech case, child pornography, courts and
10 juries every day pass upon knowledge, belief and
11 intent having before them no more than evidence
12 of the defendant's words and conduct from which
13 an ordinary human experience mental condition
14 may be inferred.

15 And, again, for somebody saying, I
16 wish you would die, he might get up there and
17 say, oh, you know, I -- I thought it in the most
18 benign way as possible, but the question is, did
19 you think that that would cause that person
20 fear.

21 And if they -- if they can say, oh,
22 well, I emailed this person 20 times saying I
23 wish that they would die but I didn't mean for
24 them to feel fear about it, the jury can draw
25 the conclusion that most people would conclude

1 -- that most people would draw that the guy is
2 guilty as sin.

3 Similarly, the favorite excuse of
4 regulators is that people could just get up and
5 say, it's a joke, but if you emailed the Boston
6 Marathon and say, I'm going to be Tsarnaev Part
7 II, and then you don't get to just say, it was a
8 joke, the question is, did he think you would
9 cause harm or, in the government's standard, you
10 know, did they disregard, consciously disregard
11 the risk that it would -- that it would put
12 people in fear.

13 There's only one way to answer that
14 question. So, again, this is a rule that isn't
15 going to affect a lot of convictions -- I think
16 most convictions will come out the same way --
17 but it will affect speech beneficially in much
18 more ways. It will have an outsize impact
19 because, again, the focus is on the thing that
20 matters, it has been a bulwark in speech cases,
21 the thing that speakers know, their intent.
22 They don't know, you know, what a reasonable
23 person standard is.

24 We can talk about it for another hour
25 and still not know who a reasonable person is in

1 this case or how a reasonable person would
2 interpret that; whereas, the subjective intent,
3 as the Williams opinion put it, that's a
4 true-or-false matter that something juries
5 decide every day.

6 If there are no further questions?

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 12:06 p.m. the case was
11 submitted.)

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