No. 22-138

In the Supreme Court of the United States

Billy Raymond Counterman,
Petitioner,

v.

The People of the State of Colorado,
Respondent.

On Writ of Certiorari to the Colorado Court of Appeals, Division II

BRIEF OF THE CATO INSTITUTE AND RUTHERFORD INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

Amici are interested in this case because it touches on core questions of individual liberty that the First Amendment was created to protect and preserve.

SUMMARY OF ARGUMENT

"Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU,* 542 U.S. 656, 660 (2004). The Constitution's protection of free speech is accordingly at its highest when government attempts to prosecute someone for his or her words. Although this Court has recognized exceptions to that bedrock rule, it has equally recognized that such exceptions must be clearly delineated and narrowly circumscribed to avoid chilling protected speech. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 399 (1992). Nonetheless, the state of the law with respect to the exception at issue—which allows the state to impose criminal liability for "true threats"—fails to adequately guard against that concern.

The decision below is a regrettable consequence of that confusion. Petitioner was tried and convicted for sending a series of admittedly abrasive online messages to a musician. Lower courts have been divided on whether such behavior can be criminalized without evidence that the speaker actually intended to convey any threat. This lack of consistent protection for free speech urgently requires this Court's attention.

Amici write to offer two primary points. *First*, in clarifying the law, this Court should emphasize that the "true threats" exception, just like obscenity, defamation, incitement, and other exceptional categories of unprotected speech, is an exceedingly narrow carveout

from the constitutional norm. The First Amendment favors more speech, not less, and the government bears a heavy burden when it seeks to proscribe categories of speech. To keep the "true threats" exception narrow, the Court should confirm what its decisions already suggest: For the exception to apply, the targeted speech must be both objectively threatening *and* subjectively intended as a threat.

Second, requiring that "true threats" be both objectively threatening and subjectively intended as threats is essential to prevent chilling a wide swath of protected speech. This concern is especially heightened in this case, which involves online speech. The nation is undergoing a communications revolution, driven by unprecedented new forms of online expression—and unprecedented new attempts by government to monitor and restrict such expression.

ARGUMENT

I. THE COURT SHOULD EMPHASIZE THAT THE "TRUE THREATS" EXCEPTION IS NARROW.

"'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft*, 535 U.S. at 573) (brackets in original). This Court has identified a few very narrow exceptions—"certain well-defined and narrowly limited classes of speech," such as obscenity and defamation—that may be punished without offending the First Amendment. *E.g.*, *R.A.V.*, 505 U.S. at 399 (internal quotation marks omitted); *accord United States v. Alvarez*, 567 U.S. 709, 716–17 (2012)

(listing the "few 'historic and traditional categories'" of expression that may be subject to content-based regulations (quoting *Stevens*, 559 U.S. at 468)).

In *Watts v. United States*, the Court postulated that one of those narrowly limited classes of speech might be so-called "true threats." 394 U.S. 705, 708 (1969) (per curiam). But the Court did not find the speech at issue in *Watts*—a statement made at a Vietnam War protest that the petitioner, if drafted, would aim his rifle at President Lyndon Johnson—was a true threat. *Id.* at 706. Rather, it concluded that the petitioner's commentary, even if "a kind of very crude offensive method of stating a political opposition to the President," could not reasonably be interpreted as a threat. *Id.* at 707–08. A "'vehement, caustic, and . . . unpleasantly sharp attack[] on government,'" the Court held, is still not a true threat. *Id.* at 708 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, the Court reversed the petitioner's conviction. *Id.*

Decades passed before this Court revisited the "true threats" exception in *Virginia* v. *Black*, 538 U.S. 343 (2003). In a fractured decision, the Court held unconstitutional a Virginia statute treating the public burning of a cross as "'prima facie evidence of an intent to intimidate.'" *Id.* at 348 (internal quotation marks omitted). The Court explained that cross-burning *could* fall within the category of "true threats" unprotected by the First Amendment, *id.* at 360, but, as Justice O'Connor's plurality opinion explained, the statute went too far by presuming that cross-burning is "always intended to intimidate." *Id.* at 365.

In deciding this case, the Court should explicitly affirm what *Watts* and *Black* already suggest—that (at a minimum) a "true threat" must be *both* objectively

threating to a reasonable listener *and* subjectively intended as such by the speaker. Such an interpretation would appropriately ensure that the "true threats" exception remains a narrow carveout to the broad protections of the First Amendment. By contrast, the test employed by the Colorado Court of Appeals creates an unwarranted and dangerous expansion of the "true threats" exception.

A. The "true threats" exception is narrow.

The constitutional right to free speech is an essential aspect of American liberty. Accordingly, content-based restrictions on speech are "presumed invalid," and the burden is *always* on the government to show that a speech regulation falls within the confined set of categories that may be subject to content-based prosecution. *E.g.*, *Alvarez*, 567 U.S. at 716–17 (internal quotation marks omitted). Close questions, moreover, must be resolved in favor of more expression, not less; this Court "give[s] the benefit of the doubt to speech, not censorship." *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 482 (2007) ("*WRTL*"); *see also, e.g.*, *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

Under those principles, this Court has struck down content-based speech restrictions in numerous contexts, even in cases involving repulsive, distasteful, or terrifying speech. *See, e.g.*, *Alvarez,* 567 U.S. at 729–30 (false statements about receiving military honors); *Snyder v. Phelps*, 562 U.S. 443, 460 (2011) (picketing of military funerals, which was "certainly hurtful"); *Stevens*, 559 U.S. at 465–66 (depictions of animal cruelty, including "crush videos" that showed "women

slowly crushing animals to death"); *Texas v. Johnson*, 491 U.S. 397, 419–21 (1989) (flag desecration, despite the "flag's deservedly cherished place in our community"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (Ku Klux Klan rally).

The Court has been similarly skeptical of efforts to prosecute supposedly threatening speech. In *Watts*, the Court reversed the petitioner's conviction, holding that the government may theoretically prohibit "true threats," but only after a thorough consideration of context, set against the presumption that crude, offensive, abusive, inexact, or unpleasant rhetoric is still protected. 394 U.S. at 707–08. The Court reaffirmed the narrowness of the "true threats" exception in *Black*, noting that even speech that is overwhelmingly viewed as discomfiting or offensive may be protected. 538 U.S. at 358–59; *see also id.* at 367 (plurality opinion) ("The First Amendment does not permit . . . shortcut[s]" in determining whether speech is a true threat). Even in the case of cross burning, the Court explained, to fall within the "true threats" exception, the speaker also needed to act with the intent to intimidate. *See id.* at 359–60 (majority opinion); *id.* at 366–67 (plurality opinion). Both *Watts* and *Black* demand a searching, detailed inquiry before declaring that speech is unprotected by the First Amendment and subject to criminal sanction.

B. Requiring both objective and subjective analyses will keep the "true threats" exception narrow and safeguard liberty.

Together, *Watts* and *Black* provide a strong foundation for holding that (at a minimum) a true threat must be both objectively threatening to a reasonable listener and subjectively intended as such by the

speaker. *Accord United States v. Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012) (Sutton, J., dubitante). The Court in *Watts* looked to objective factors—the context in which the statement was made, its conditional nature, and the reaction of the audience—to hold that the speech at issue was not a threat. 394 U.S. at 708; *see also Elonis v. United States*, 135 S. Ct. 2001, 2027 (2015) (Thomas, J., dissenting) ("*Watts* continued the long tradition of focusing on objective criteria[.]"). And the Court in *Black* repeatedly stressed that a true threat requires threatening intent on the part of the speaker. 538 U.S. at 359 (majority opinion) (true threats "encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit" violence (emphasis added)).

Embracing that reasoning would help ensure that the "true threats" exception remains narrow. Neither *Watts* nor *Black* considered objective or subjective analysis to the exclusion of the other. And requiring both analyses—considering the subjective intent of the defendant and also the objective seriousness of the purported "threat"—would set an appropriately high bar for the prosecution and imprisonment of people solely for the content of their speech. *See Alvarez*, 567 U.S. at 726 (noting government's "heavy burden" in seeking to regulate protected speech). There are numerous "legal standard[s] that contain[] objective and subjective components" across the law, from the Eighth Amendment to the immigration law's "well-founded fear" requirement. *Jeffries*, 692 F.3d at 485–86 (Sutton, J., dubitante) (collecting examples). Requiring both objective and subjective components is especially appropriate before someone is locked up for speaking. *E.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("A law imposing criminal penalties on

protected speech is a stark example of speech suppression.").

By contrast, the decision of the Colorado Court of Appeals will, if allowed to stand, lower the bar that the government must meet before criminalizing free expression. It allows for a criminal conviction without any evidence that speaker intended to convey a threat, effectively creating a negligence standard for "true threats." Lowering the bar in this manner would vitiate the law's longstanding preference for more speech, not less. *See, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'"); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas[.]"); *accord WRTL*, 551 U.S. at 482. Lowering the bar for invoking the "true threats" exception would endanger free expression at a time of heightened uncertainty regarding online speech in particular, and it would contravene the reasoning of *Watts* and *Black* as well as fundamental First Amendment principles.

A purely objective standard for the "true threats" exception would also create tension with the standards this Court has required for a statement to count as incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Under *Brandenburg*, speech must be "directed to inciting or producing imminent lawless action" as well as "likely to incite or produce such action" for the government to proscribe it. 395 U.S. at 447. *Hess v. Indiana*, 414 U.S. 105 (1973) makes explicit that without evidence that one's words were "intended to produce,

and likely to produce, *imminent* disorder, those words could not be punished by the State." *Id.* at 109.

It would be particularly helpful for this Court's precedents on incitement to align with the standards it sets for true threats because, as lower courts have recognized, statements that give rise to prosecution or suit are sometimes made in such a way that they could plausibly fit into either category of unprotected speech. In *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), the Second Circuit split over whether a blog post in which the defendant expressed his wish that several judges be killed should properly be analyzed as potential incitement or a potential true threat. The majority held that the true threats category was the right fit, concluding, under the circuit's purely objective standard, that Turner's post was unprotected by the First Amendment. *Turner*, 720 F.3d at 420-23. The dissent argued that Turner's post should rather be understood as "advocacy of the use of force and not a threat," and suggested it might be punishable as incitement, though not under the statute under which Turner was convicted. *Id.* at 434–35 (Pooler, J., dissenting).

Notably, the dissenting judge did not challenge the Second Circuit's use of a purely objective standard for determining whether a statement is a true threat. *Id.* at 430. Rather, she expressed her concern that in light of this easily met standard, "in determining whether speech is a purported threat, we must make sure that the speech is not instead advocacy protected by *Brandenburg*. *Brandenburg* (incitement) and *Watts* (true threats), and their respective progeny, offer different Constitutional protections, and those afforded to advocacy would have less force if we analyzed all speech under the 'true threats' test." *Id.* at 431.

The *Turner* dissent identifies a serious problem with relying on a purely objective standard for true threats. In cases where an ambiguous statement could potentially be treated as part of either a broadly drawn (true threats) or narrowly drawn (incitement) category of unprotected speech, it may wrongly be put in the former, leading to the punishment of what, when correctly evaluated under more rigorous standards, may very well be protected speech. *Id.* ("Political advocacy must be a form of speech that stands outside the true threats analysis."). *See also Planned Parenthood v. Am. Coal. of Life*, 290 F.3d 1058, 1108 (9th Cir. 2002) (Berzon, J., dissenting) ("[A] purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability.")

Borderline cases of this sort are not unusual. *Compare, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 925–29 (1982) (threat-like statement in a speech, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," evaluated primarily as incitement under *Brandenburg* and found to be protected speech), *with Planned Parenthood,* 290 F.3d at 1070–77, 1085–86 ("GUILTY" posters of abortionists, which defendants contended were best understood as "protected speech under *Brandenburg* and *Claiborne*," in fact better evaluated as possible true threats and found to be unprotected under a purely objective standard). If the Court were to harmonize its standards for incitement and true

threats by clarifying that the latter category, under *Watts* and *Black*, requires subjective intent just as the former does under *Brandenburg* and *Hess*, it would do away with a great deal of confusion as well as the possibility that courts will punish constitutionally protected speech by evaluating it under standards that are wrong for the speech in question and make it easier to impose punishment than the right standards would.

Moreover, at least one lower court has expressed its concern that bad actors will exploit the ambiguity surrounding whether certain statements are better understood as incitement or true threats by trying to pass true threats off as incitement. *See United States v. Wheeler*, 776 F.3d 736, 744–45 (10th Cir. 2015). In an environment where incitement is harder to prove, they have an obvious and strong incentive to do so; but in an environment with consistent standards, that incentive is greatly reduced. The Court should prevent any such effort to game the system by making it clear that incitement is not, in fact, arbitrarily harder to prove under relevant precedent than are true threats.

II. THE COURT'S GUIDANCE IS REQUIRED TO PREVENT THE CHILLING OF PROTECTED SPEECH.

The presence or absence of First Amendment protection has real-world effects. Ill-defined categories of criminally proscribed speech are likely to chill otherwise protected expression, as speakers who cannot discern any limiting principle attempt to steer clear of the criminal law. And the error by the court below—the adoption of an objective-analysis-only test—exacerbates those chilling effects.

A. This case implicates the growing concerns over the chilling of protected online speech.

Government action that chills free expression is in "direct contravention of the First Amendment's dictates." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988); *see also N.Y. Times*, 376 U.S. at 279 (a rule that "dampens the vigor and limits the variety of public debate . . . is inconsistent with the First and Fourteenth Amendments."). This is especially true when the regulation at issue chills speech and expression through "'fear of criminal sanctions.'" *E.g.*, *New York v. Ferber*, 458 U.S. 747, 768–69 (1982); *see also Black*, 538 U.S. at 365 (plurality opinion) (challenged statute "chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech[.]"). Concerns about chilling effects are at their zenith when there is a possibility that government action might stifle artistic or political expression. *See, e.g.*, *Miller v. California*, 413 U.S. 15, 22–23 (1973) ("[T]he courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.").

Criminalizing petitioner's speech unquestionably raises the significant risk of chilling other types of online expression. *E.g.*, *Watts*, 394 U.S. at 708 (even "vituperative" language must be interpreted "'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (quoting *N.Y. Times*, 376 U.S. at 270)). Online speech is particularly vulnerable to the risk of chilling effects. Users of social

media sites such as YouTube and Facebook "employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). And the "language of the political arena . . . is often vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708.

The Internet—and in particular social media—is the largest and most important public forum on the planet. *See Packingham*, 137 S. Ct. at 1735 ("[I]n identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . and social media in particular."). And it is also the most easily surveilled. Just as in *Watts*, where a federal investigator infiltrated a public political rally and made an arrest based on offensive political statements, 394 U.S. at 708, law enforcement now infiltrate and monitor political fora on the Internet. *See Packingham*, 137 S. Ct. at 1734; *Elonis*, 135 S. Ct. at 2006. The ease with which government agents may monitor speech online greatly magnifies the potential chilling effects caused by confusion over the scope of the "true threats" exception. *Cf. Ferber*, 458 U.S. at 768-769 (statutes permitting punishment of speech must be narrowly drawn to avoid chill); *Gooding v. Wilson*, 405 U.S. 518, 521-522 (1972) (same).

The confused state of the law further intensifies those risks. For example, the Ninth and the Third Circuit have adopted *opposing* views of what is required to establish a "true threat." *Compare United States v. Cassel*, 408 F.3d 622, 632–33 (9th Cir. 2005) (requiring proof that the speaker subjectively intended the

speech as a threat, and noting that "eight Justices agreed [in *Black*] that intent to intimidate is necessary and that the government must prove it"), *with United States v. Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013) ("[O]ur test asks whether a reasonable speaker would foresee the statement would be understood as a threat."), *rev'd on other grounds*, 135 S. Ct. 2001 (2015). The lack of clarity over how the First Amendment applies makes it likely that the specter of "criminal threats" liability will chill protected expression.

B. Neither the objective standard or the subjective standard alone satisfies due process.

The government violates due process when it enacts a criminal law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). A criminal statute, therefore, must give "persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Furthermore, the statute must provide sufficiently clear standards of enforcement such that "those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

The Colorado statute here, Colo. Rev. Stat. § 18-3-602(1)(c) (2020), in requiring only an objective analysis of the perceived threatening nature of a defendant's statements, violates these fundamental due process protections. The statute fails to provide sufficient notice of when one's speech crosses over from permissible expression protected by the First Amendment to impermissible true threats. But requiring analysis and

proof of the speaker's subjective intent would reduce the risk of misinterpreting statements *post hoc*.

Even an objective-only analysis approach invites courts to engage in conjecture and speculation in violation of due process when interpreting the meaning of the statements, as the Colorado court did here. Under that approach, the statute does not provide sufficiently clear standards of enforcement to avoid arbitrary or discriminatory enforcement.

None of Counterman's messages expressed any plan or intent to harm the recipient, *Colorado v. Counterman*, 497 P.3d 1039, 1044 (Colo. App. 2021), and it cannot be assumed that Counterman knew the recipient was fearful or distressed by his online messages rather than just uninterested or annoyed. However, the Colorado Court of Appeals stretched to extract threatening implications from ambiguous and "somewhat suggestive" statements, such as "You're not being good for human relations. Die. Don't need you," and "F[**]k off permanently." *Id.* Although acknowledging that the recipient is a "local public figure" and that Counterman's messages "don't explicitly threaten [the recipient's] life," the Colorado Court of Appeals proceeded to engage in a speculative analysis of what it thought each of Counterman's statements really meant while indicating the uncertainty of its own interpretations by repeatedly using terms like "imply," "somewhat suggestive," "reflect a feeling of," "indicate," and "contributed to an impression that." *Id.* at 1047–48. Even though this Court explained in *Black* that "'[t]rue threats' encompass those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of *unlawful violence*," and "[i]ntimidation . . . is a type of true threat,

where a speaker directs a *threat . . . with the intent* of placing the victim in fear of *bodily harm or death*," 538 U.S. at 359–60 (emphasis added), the Colorado court concluded that Counterman's messages "imply a disregard for [the recipient's] life and a desire to see her dead," and were thus true threats rather than mere expressions of frustration. *Counterman*, 497 P.3d at 1047–48.

While the government clearly has a valid interest in protecting people from stalking, Colorado has created and applied a statute so broad and vague in its scope that it can criminalize a wide range of protected speech and activity. For example, someone could write these two very same phrases to their congressional representative out of frustration from the representative's lack of effort ("Die. Don't need you"—i.e., you're not serving any purpose or doing your job) or support of an unfavorable bill ("F[**]k off permanently") without subjectively intending any threat of bodily harm or unlawful activity. But if that representative was emotionally distressed by those messages, then the sender could be found in violation of Colorado's statute and sentenced to years in prison because their representative was disturbed by receiving harsh criticism.[2] Given the severe nature of criminal sanctions and the

[2] A person was convicted of cyberstalking for sending emails to a political candidate, which was then reversed for insufficient evidence "when the statute is interpreted in a way that is consonant with the First Amendment." *United States v. Sryniawski*, No. 21-3487, slip op. at 5 (8th Cir. Sept. 2, 2022).

chilling effect they have on protected speech, constitutional safeguards should be put in place to at least require an inquiry into a defendant's subjective intent.[3]

C. Both objective and subjective analyses are needed to protect free expression.

This Court has explained that "no reasonable speaker" would engage in expression that could be punished by the state when the "only defense to a criminal prosecution would be that [the speaker's] motives were pure." *WRTL*, 551 U.S. at 468. The error committed by courts which adopt a purely subjective intent test for whether speech is an unprotected "true threat"—is likely to chill free expression for that reason as well as several others.

First, a subjective-intent-only test makes it harder for courts of appeals to reject criminal liability for speech that, while controversial or offensive, is objectively non-threatening. A defendant's subjective intent is classically a question of fact for a jury. For subjective-analysis-only courts, like the Ninth Circuit, whether speech is a "true threat" thus reduces to a factual issue. *See, e.g.*, *Melugin v. Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994). And factfinding typically is (and should be) exceedingly difficult to overturn on appeal. Thus, when courts adopt a subjective-intent-only standard, they effectively insulate the "true threats" determination from appellate review. *See, e.g., Pennsylvania v. Knox*, 190 A.3d 1146 (Pa. 2018) (treating

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[3] Even if Counterman's statements could not be criminally punished as true threats, he could still possibly be subject to a protective order, *see Counterman*, 497 P.3d at 1043, presumably prohibiting any further communications to the complainant.

the subjective intent question as a finding of fact, and asking only whether competent evidence supported it).

Such insulation is dangerous. Courts are the appropriate final arbiters of the scope of the First Amendment, especially for speakers who are unpopular or lack political power or social capital. Hampering appellate courts' ability to intercede on behalf of unpopular or controversial speakers undercuts free expression and undermines one of the most important functions of judges in a free society: upholding the Bill of Rights against majoritarian encroachment. *See, e.g.*, *Arizona Free Enter. Club's*, 564 U.S. at 754 ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *see also W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts."). The deferential standard of review applicable to findings of fact does not sufficiently protect someone who faces imprisonment for his speech.

Second, even where a defendant *might* have some intent to intimidate, that alone cannot be enough. *Cf. WRTL*, 551 U.S. at 468 (subjective-intent-only test "could lead to the bizarre result that identical [speech] could be protected speech for one speaker, while lead-

ing to criminal penalties for another"). Objective analysis is much better at distinguishing between a genuine threat and protected expression motivated by real pain or anger. *Cf. Snyder*, 562 U.S. at 460–61 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain . . . . [W]e cannot react to that pain by punishing the speaker."). Objective analysis thus helps ensure "sufficient breathing room for protected speech." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). By contrast, critical context is rendered largely irrelevant under a subjective-intent-only standard. And all of this is doubly true online, where background facts may be hard to ascertain, where content is often designed to titillate and provoke, where hyperbole is common, and where context is all the more important to grasp the meaning of disembodied words, images, and media.[4]

A combined objectivity and subjectivity requirement ensures that only real threats of violence are subject to criminal sanctions. *See Jeffries*, 692 F.3d at 480. It ensures that the "true threats" exception remains anchored to its ultimate purpose—protecting listeners from genuine "fear of violence," *R.A.V.*, 505 U.S. at 388, while permitting sufficient "breathing space" for the type of speech the First Amendment intends to protect, *Elonis*, 575 U.S. at 748. Requiring speech to

[4] Moreover, the gap between a speaker's intentions and their objective capacity to commit real-world harm becomes a chasm in the context of online speech. Ugly and offensive forms of provocation—"trolling," in common parlance—are rampant online. Only by objectively considering the full context could a court fairly determine whether speech in fact conveys to a reasonable observer "a serious expression of an intent to commit" violence. *Black*, 538 U.S. at 359.

be *both* objectively threatening to a reasonable listener *and* subjectively intended as such will help ensure that the "true threats" exception does not chill protected expression.

CONCLUSION

For the foregoing reasons and those described by the Petitioner, this Court should reverse the judgment of the Colorado Court of Appeals.

Respectfully submitted,

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