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 PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION II

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would understand the statement as a serious expression of intent to commit an act of unlawful violence, that the defendant knowingly made the statement, that the statement would cause a reasonable person to suffer serious emotional distress, and that the victim, in fact, suffered serious emotional distress.

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INTRODUCTION

This Court should deny certiorari because (1) this case is not a good vehicle for deciding the question presented, (2) Petitioner overstates the circuit split, and (3) the case below was properly decided because Colorado's "true threats" analysis follows this Court's precedent.

First, Petitioner admitted to stalking the victim through conduct that by itself violates Colorado's stalking statute. A stalking conviction based on a combination of conduct and statements does not cleanly present the question of the constitutional standard for true threats. In addition, the elements of Colorado's stalking statute along with those of the context-driven objective test recently set forth by the Colorado Supreme Court in *People in Interest of R.D.*, 464 P.3d 717 (Colo. 2020), address the concerns raised by members of this Court in recent statements related to the denial of certiorari in cases involving alleged true threats.

Second, Petitioner overstates the conflict between circuits and states. Most cases Petitioner relies on were decided before this Court's decision in *Elonis v. United States*, 575 U.S. 723 (2015), when the Court last had the opportunity to address this very question. The circuit split is also extremely lopsided with only two circuits in favor of a subjective standard. Colorado aligns with most circuit courts and states.

Finally, Colorado's true threat analysis and the decision here conform to this Court's prior decisions and First Amendment jurisprudence. And stalking—the crime at issue here—presents particular reasons for relying on a context-driven objective standard for evaluating the effect of the defendant's behavior.

STATEMENT OF THE CASE

This is a case about stalking and the steps taken by Colorado's General Assembly necessary to protect victims from the intrusive, threatening, and escalating course of conduct characteristic of stalking. Stalkers "often maintain strong, unshakeable, and irrational emotional feelings" frequently untethered from reality. *People v. Cross*, 127 P.3d 71, 75 (Colo. 2006) (citation omitted). Stalking victims, predominantly women, have been followed, spied upon, or contacted at their homes, places of business, or places of recreation by their stalkers—predominantly by men. *Id*. (citing Patricia Tjaden & Nancy Theonnes, *Stalking in America: Findings from the National Institute Violence Against Women Survey*, RES. IN BRIEF, at 1–2, 7–8 (Nat'l Inst. of Just. & Ctrs. For Disease Control & Prevention), Apr. 1998, *available at* https://www.ojp.gov/pdffiles/169592.pdf). The internet has provided a particularly effective tool for complete strangers to gain previously unavailable access to their victims.

Stalkers often engage in a course of conduct that, taken in context, causes reasonable persons to fear for their physical safety, which in turn often causes those victims to change what they choose to do and say. Tjaden & Theonnes, p. 8. And online stalking can enable "unusually disinhibited communication" by a stalker to their victim, which magnifies both the danger to and the impact on victims. *R.D.*, 464 P.3d at 731.

In this way, stalking, particularly when the stalker directly contacts their victim, involves ongoing conduct that, taken in context, puts the victim in fear

for their health and safety. Colorado's stalking statute, combined with its context-driven objective test for assessing true threats, ensures that constitutionally protected speech remains unimpeded while protecting victims, such as the woman here, who become targets of stalkers.

In 2014, the victim, a local singer-songwriter, received a Facebook "friend" request from Petitioner, a complete stranger to her. App. 3a, 18a. As was her common practice as an aspiring artist trying to grow her business, she accepted the request. App. 17a. Over the next two years, Petitioner directly sent her "clusters" of messages. App. 3a. The messages were "weird" and "creepy" to her, so she never responded and repeatedly blocked Petitioner's accounts. App. 3a, 17a. In doing so, she conveyed that she did not want to be contacted by Petitioner. App. 17a. But Petitioner continued to create new accounts and would resume directly messaging her. App. 3a, 18a. When she did not respond to him, Petitioner expressed animosity to her, including by asking her "What do you fear?," telling her to "Fuck off permanently," asking whether she was "a solution or a problem?," asserting that she had had "[his] phone hacked," and telling her to "Die" because she was not "good for human relations." App. 6a–7a, 17a.

Two years of Petitioner's behavior made his target sufficiently fearful that she sought family members' advice for her safety. App. 4a, 18a. In particular, she was "extremely scared" of being hurt or killed after receiving a message from Petitioner saying that he wanted her to die. *Id.* Also alarming to her were Petitioner's messages referencing his physical sightings of

her as she went about her normal activities. *Id.* After discovering that Petitioner was on probation for a federal offense, she contacted law enforcement and got a protection order. *Id.* Fearful that Petitioner would show up at the venue, she also cancelled public performances. App. 4a, 18a.

Proceedings at Trial. Relevant here, in charging Petitioner with stalking, the prosecution relied on seventeen statements, three of which acknowledged physical surveillance of the victim—all of which were directly sent to the victim without encouragement or response (indeed, many after she blocked his accounts):

- "Was that you in the white Jeep?"
- "Five years on Facebook. Only a couple physical sightings."
- "A fine display with your partner."
- "Seems like I'm being talked about more than I'm being talked to. This isn't healthy."
- "I've had tapped phone lines before. What do you fear?"
- An image of stylized text that stated, "I'm currently unsupervised. I know, it freaks me out too, but the possibilities are endless."
- An image of liquor bottles that was captioned "[a] guy's version of edible arrangements."

- "How can I take your interest in me seriously if you keep going back to my rejected existence?"
- "Fuck off permanently."
- "Your arrogance offends anyone in my position."
- "You're not being good for human relations. Die. Don't need you."
- "Talking to others about me isn't prolife sustaining for my benefit. Cut me a break already.... Are you a solution or a problem?"
- "Your chase. Bet. You do not talk and you have my phone hacked."
- In a message sent the next day from the "[y]our chase" message, an apology that stated, "I didn't choose this life."
- "Staying in cyber life is going to kill you. Come out for coffee. You have my number."
- "Okay, then please stop the phone calls."
- "Your response is nothing attractive. Tell your friend to get lost."

App. 3a, 6a–7a.

Before trial, the district court reviewed whether the statements were protected by the First Amendment. App. 7a–9a. The district court held that a jury could find them to be true threats. *Id.* The case proceeded to trial, and a jury convicted Petitioner of

"stalking – serious emotional distress" under C.R.S. § 18-3-602(1)(c). App. 5a.

Proceedings on Appeal. In affirming Petitioner's conviction, the Colorado Court of Appeals reviewed this Court's precedent and applied the context-driven objective test recently set forth by the Colorado Supreme Court to determine whether Petitioner had engaged in unprotected true threats. *See R.D.*, 464 P.3d 717. App. 10a–13a. In *R.D.*, the Colorado Supreme Court revisited Colorado law to separate constitutionally protected speech from unprotected true threats to "strike[] a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict." 464 P.3d at 731. It held that "a true threat is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence." *Id.* Under this test, courts must consider at least five factors:

(1) the statement's role in a broader exchange, if any;

(2) the medium or platform through which the statement was communicated, including any distinctive conventions;

(3) how the statement was conveyed (e.g., anonymously, publicly, or privately, etc.);

(4) the relationship between the speaker and recipient, if any;

(5) and the subjective reaction of the statement's intended or foreseeable recipients.

Id.

The court of appeals here rigorously applied *R.D.*'s context-driven objective analysis to Petitioner's statements, including his admissions of surveillance activities. App. 14a–21a. The court began with the statements' "plain language" before carefully assessing the statements' context. App. 14a & 16a (citing *R.D.*, 464 P.3d at 731). It found that the messages telling the victim to die were "[m]ost troubling"; that other messages conveyed the Petitioner's sense of possession of or entitlement to the victim; that still others expressed hostility to her; and that many showed troubling escalation, referring to his physical surveillance of and jealousy over other people being with the victim. App. 14a–15a.

The court of appeals determined that the detailed context heightened the credibility of the threats, including the references to surveilling the victim, while nothing mitigated the threatening nature of the messages. App. 15a–16a. It emphasized that the victim did not invite Petitioner's messages, did not respond to them, and actively blocked them. App. 16a–17a. The court found that this blocking of accounts repeatedly conveyed to Petitioner that his messages were unwanted and likely caused an emotional response in the victim. App. 17a.

The court also found that Petitioner's direct messages to the victim proved his specific pursuit of the victim and his specific intent to have an emotional effect on the victim alone. App. 18a. Finally, because Petitioner had no relationship with the victim, apart from that of a stranger fixating on her, the Petitioner's messages caused escalating alarm and fear. App. 18a.

The court of appeals also rejected Petitioner's suggestion that the statements could not be true threats because they did not expressly state a purpose of inflicting injury or harm. App. 19a–20a. In rejecting this argument, the court of appeals recognized the importance of assessing the statements in context, and it specifically highlighted the problem of online stalking of public figures, particularly women, where the internet allowed strangers like Petitioner previously unavailable access to their targets. App. 21a (citations omitted).

The Colorado Supreme Court denied certiorari. App. 40a.

REASONS FOR DENYING THE PETITION

I. This is a poor vehicle for deciding the question presented.

Petitioner was convicted of stalking – serious emotional distress under Colo. Rev. Stat. § 18-3-602(1)(c), one of several stalking offenses prohibited by Colorado law. That statute provides that a person commits stalking if the person "*knowingly*: . . . [r]epeatedly follows, approaches, contacts, *places under surveillance*, or makes any form of communication with another person . . . *in a manner that would cause* a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." (Emphases added.) Here, evidence showed that Petitioner both placed the victim under surveillance and communicated with the victim, causing serious emotional distress.

For two reasons, this case is not a good vehicle for addressing whether the First Amendment requires that true threat prosecutions prove that the defendant knew or intended the threatening nature of their statement.

First, the evidence at Petitioner's trial for stalking – serious emotional distress included his admissions that he engaged in multiple acts of physical surveillance that by themselves could support his conviction without ever reaching the First Amendment question. The jury did not identify which of the seventeen statements (three of which admitted surveillance) sustained its conviction. A stalking conviction based on a combination of conduct and statements does not cleanly present the question of the constitutional standard for true threats.

Second, Colorado's context-driven objective test recently established in *R.D.* addresses the concerns raised by members of this Court in the denial of certiorari in *Perez* and *Boettger*. Before a statement qualifies as a "true threat," Colorado specifically requires courts to consider the statement "in context and under the totality of the circumstances"—an examination different from that applied in *Perez* and *Boettger*. *R.D.*, 464 P.3d at 721.

A. Petitioner admitted that he engaged in multiple acts of surveillance that separately could support his conviction.

Stalking – serious emotional distress prohibits several types of conduct that cause serious emotional distress, including following, approaching, contacting, placing under surveillance, or making any form of communication with the victim. *See* § 18-3-602(1)(c). It is only this last type of conduct—making any form of communication—that potentially implicates the First Amendment.

Petitioner's conduct included at least three discrete acts of surveillance—acts Petitioner admitted—when two could sustain Petitioner's conviction. *See People v. Herron*, 251 P.3d 1190, 1194 (Colo. App. 2010) (stalking occurs where there is conduct "comprising two or more occurrences"). In Colorado, "surveillance" carries its common meaning to "keep a watch over someone or something." *People v. Sullivan*, 53 P.3d 1181, 1184 (Colo. App. 2002) (citing *Webster's Third New International Dictionary* 2302 (1968)). Acts of surveillance are not expression protected by the First Amendment.

Evidence that Petitioner placed the victim under surveillance includes Petitioner's own admissions informing her that:

- Petitioner had observed the victim in her white Jeep, App. 6a;
- Petitioner had seen the victim out with her partner, App. 7a; and
- Petitioner had had an additional "couple [of] physical sightings" of the victim, App. 6a.

Thus, Petitioner was convicted after a trial that included evidence of both conduct and communication. And particularly because the victim did not know Petitioner and blocked him more than once when he sent her messages on Facebook, the knowledge that she had been surveilled several times would likely cause serious emotional distress. A stalking conviction based on a combination of conduct and statements does not cleanly present the question of the constitutional standard for true threats.

The Court should decline further review on this ground alone.

B. Colorado's approach addresses the concerns identified in statements respecting the denial of certiorari in *Perez* and *Boettger*.

To determine whether a statement is an unprotected true threat, Colorado's standard requires that the "reviewing court must . . . consider the context in which the statement was made." *R.D.*, 464 P.3d at 731. Under this test, courts must consider at least five factors:

(1) the statement's role in a broader exchange, if any, including surrounding events;

(2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features;

(3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly);

(4) the relationship between the speaker and recipient(s); and

(5) the subjective reaction of the statement's intended or foreseeable recipient(s).

Id. R.D. adopted this context-driven objective test to "strike[] a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict." *Id.*

These factors address the concerns raised in separate statements by Justices Sotomayor and Thomas respecting the denial of certiorari in earlier cases presented to this Court.

For example, Mr. Perez sought this Court's review of his conviction for threatening a store employee. *Perez v. Florida*, 137 S. Ct. 853, 853 (2017) (Sotomayor, J., concurring in the denial of certiorari). Under Florida law, the state needed only to prove that (1) he made a statement that, on its face, was a threat and (2) "he intended to make the threat." *Id.* at 854. His conviction would likely not stand in Colorado. Colo-

rado law would require consideration of whether a reasonable person, knowing the context, would believe that Perez's statements "represented a joke" or "were the ramblings of an intoxicated individual." *Id.* And Colorado courts would have had to consider not just what Perez "stated" but also the larger context—the "broader exchange," "surrounding events," and "the manner in which the statement was conveyed." *R.D.*, 464 P.3d at 731.

Colorado law is also distinguishable from the standards at issue in *Kansas v. Boettger*, 140 S. Ct. 1956 (2020). There, the Kansas Supreme Court overturned two separate convictions. *See State v. Boettger*, 450 P.3d 805 (Kan. 2019); *State v. Johnson*, 450 P.3d 790 (Kan. 2019). In each case, the juries were instructed that they needed to only determine whether a communication was made with reckless disregard for whether the statements would cause the target to fear for their physical safety, while the state supreme court ruled that they should have been instructed to find the defendant's specific intent to threaten. *Boettger*, 450 P.3d at 807; *Johnson*, 450 P.3d at 791. In Colorado, by contrast, the trial court and reviewing court must consider the overall context—including the "broader exchange," "surrounding events," "the relationship between the speaker and the recipient(s)," and the "subjective reaction" of the recipient. *R.D.*, 464 P.3d at 731. For example, while Kansas law did not require consideration of the facts in *Boettger* about the long relationship between the speaker and recipients (including the recipients' knowledge of the speaker's intense speaking style), those facts would have been part of Colorado's context-driven objective analysis. 450 P.3d at 807.

Before a statement qualifies as a "true threat," Colorado specifically requires considering the statement "in context and under the totality of the circumstances," an examination different from those applied in *Perez* and *Boettger*. Thus, the concerns raised by members of this Court in these cases do not apply in Colorado, and this case is not a good vehicle to resolve any First Amendment issue on these grounds.

II. Petitioner overstates the circuit split.

Petitioner overstates the circuit split by relying on cases decided before *Elonis* and exaggerating different standards among the states to suggest that courts are more divided than they are. The circuit split is extremely lopsided, and Colorado's standard remains the overwhelming majority approach.

In *Elonis*, the Court considered 18 U.S.C. § 875(c), which criminalizes transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another." 575 U.S. at 726, 732. There, the Court relied on principles of statutory interpretation to hold that Elonis's conviction could not stand. *Id*. at 732, 740. But some circuit courts assessing First Amendment true threats questions after the Court's opinion in *Elonis* have reflected on that opinion in determining how to analyze a true threat. *See United States v. Ivers*, 967 F.3d 709, 720–21 (8th Cir. 2020). In this vein, *Elonis* led some courts to revisit their approaches to the true threat analysis, even though it did not explicitly address the First Amendment question.

Before the Court's decision in *Elonis*, only two circuit courts had determined that for speech to qualify as a true threat, the defendant needed to *subjectively*

intend that the recipient feel threatened. *See United States v. Bagdasarian*, 652 F.3d 1113, 1118 (9th Cir. 2011); *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). By contrast, nine circuit courts used an objective standard before *Elonis*.

Since *Elonis*, no additional circuit court has concluded that subjective intent is required for a defendant's speech to qualify as a true threat. (The Ninth Circuit reaffirmed its prior decision in *Bagdasarian*. *See United States v. Bachmeier*, 8 F.4th 1059, 1064 (9th Cir. 2021)). Any circuit split has neither worsened nor deepened since the Court's decision in *Elonis*, when the Court did not rule on the constitutional standard for true threats.

In asserting a split, Petitioner largely relies on cases decided before *Elonis* to suggest the alleged split is more significant than it is. Since *Elonis*, only four circuit courts have addressed how a court should determine whether an individual has made a true threat, and only one applied a subjective test—but, again, that circuit was one of the two circuits that already applied a subjective test pre-*Elonis*. *See Bachmeier*, 8 F.4th at 1059. The other circuits to have considered the question since *Elonis* have maintained their pre-*Elonis* objective test: both before and since *Elonis,* the Second, Fourth, and Eighth Circuits have all applied an objective test assessing whether a recipient familiar with the context of the statement would conclude that it expresses a serious expression of an intent to cause harm. *See Heller v. Bedford Cent. Sch. Dist.*, 665 F. App'x 49, 51 n.1 (2d Cir. 2016) (reaffirming *United States v. Francis*, 164 F.3d 120, 123 n.4 (2d Cir. 1999)); *United States v. White*, 670 F.3d 498, 509

(4th Cir. 2016) (reaffirming *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009)); *Ivers*, 967 F.3d at 718 (reaffirming *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002)).

And those circuits that addressed the true threat standard before *Elonis* and have not revisited the question have determined that courts should apply an objective standard in determining whether an individual issued a true threat. *See United States v. Nishnianidze*, 342 F.3d 6, 15 (1st Cir. 2003); *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Jeffries*, 692 F.3d 473, 477 (6th Cir. 2012); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), *vacated on other grounds by Martinez v. United States*, 135 S. Ct. 2798 (2015) (mem); *see also United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015) (overruling its prior decision on statutory grounds).

Any circuit split leans overwhelmingly in favor of an objective standard: Nine out of eleven circuit courts to have considered the issue have settled on an objective standard. Since *Elonis*, when the Court declined to address the constitutional standard for true threats, this split has neither worsened nor deepened. Moreover, Colorado's standard is consistent with the majority of the circuit courts.

While states are more divided on the issue than the circuit courts, most states to have considered the issue—both before and after *Elonis*—have concluded that their state courts should apply a wholly objective standard. *See Citizen Publ'g Co. v. Miller*, 115 P.3d

107, 115 (Ariz. 2005); *Jones v. State*, 64 S.W.3d 728, 736 (Ark. 2002); *People v. Lowery*, 257 P.3d 72, 74 (Cal. 2011); *R.D.*, 464 P.3d at 721; *State v. Taupier*, 193 A.3d 1, 19 (Conn. 2018); *In re S.W.*, 45 A.3d 151, 156 (D.C. 2012); *State v. Valdivia*, 24 P.3d 661, 672 (Haw. 2001); *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1246 (La. 2001); *Hearn v. State*, 3 So. 3d 722, 739 n.22 (Miss. 2008); *State v. Lance*, 721 P.2d 1258, 1267 (Mont. 1986); *State v. Johnson*, 964 N.W.2d 500, 503 (N.D. 2021); *State v. Moyle*, 705 P.2d 740, 749 (Or. 1985); *Austad v. Bd. of Pardons & Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State v. Trey M.*, 383 P.3d 474, 478 (Wash. 2016); *State v. Perkins*, 626 N.W.2d 762, 770 (Wis. 2001). The other states to have considered the issue have required some level of subjective intent analysis either in addition to or instead of an objective analysis. *See Major v. State*, 800 S.E.2d 348, 351–52 (Ga. 2017); *People v. Ashley*, 162 N.E.3d 200, 215–16 (Ill. 2020); *Boettger*, 450 P.3d at 813–14; *O'Brien v. Borowski*, 961 N.E.2d 547, 555 (Mass. 2012); *State v. Taylor*, 866 S.E.2d 740, 753 (N.C. 2021); *Int. of: J.M.*, 265 A.3d 246, 271 (Pa. 2021); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004); *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011).

Put simply, most courts that have considered the applicable standard for true threats have determined that an objective standard should apply. But several circuit courts and many states have yet to consider the issue, particularly post-*Elonis*.

Particularly given that stalking statutes target both speech and conduct, this Court should allow more courts to consider the constitutional standard for a

true threat under stalking statutes. This is especially true since only one of the circuit and state court decisions cited above addressed the First Amendment standard for true threats in the context of a stalking offense. And that case involved a state statute that required subjective intent. *See Ashley*, 162 N.E.3d at 209 (interpreting statute providing that defendant must "know[] or should know" that their conduct would cause the victim to fear for their safety). Here, Petitioner's stalking of the victim, including both contact and conduct, bore heavily on whether his stalking satisfied the multi-factor objective inquiry identified by the Colorado Supreme Court for assessing true threats. *See R.D.*, 464 P.3d at 731. But other courts might choose to address or emphasize different factors in stalking cases involving mixed speech and conduct. By allowing this issue to keep percolating in the lower courts, this Court will be better positioned to assess what, if any, other factors should apply to true threats in stalking cases.

Because this lopsided split has not become any less lopsided since *Elonis*, when the Court chose not to address the constitutional standard for true threats, there is no urgency for this Court to intervene. The Court recently denied certiorari on a related issue in *Kansas v. Boettger*, 140 S. Ct. 1956 (2020), and nothing has happened since then that warrants a different result here.

III. Colorado's standard follows this Court's precedent.

Colorado's standard and the decision below comply with this Court's precedent on "true threats" specifically, as well as with this Court's precedent that

delimits categories of unprotected speech more generally.

A. This Court applied a context-driven objective standard for identifying true threats in *Watts*, and neither *Elonis* nor *Black* casts doubt on the *Watts* approach.

The decision below tracks this Court's decision in *Watts v. United States*, where the Court focused on the contested expression's overall context, including the listeners' reactions, when holding that the petitioner engaged in protected political dissent rather than in true threats. 394 U.S. 705 (1969). There, the petitioner joined a small group of young people assigned to discuss police brutality at a public rally on the grounds of the Washington Monument. *Id.* at 706. The 18-year-old petitioner responded to a call for more education by saying:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.

Id. Based on these remarks, the petitioner was convicted of violating a federal law that prohibited any person from "knowingly and willfully" making "any threat to take the life of or to inflict bodily harm on the President of the United States." *Id.* at 705.

This Court held that the speech was protected political hyperbole rather than an unprotected threat:

"Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners [who laughed in response to the petitioner's statement], we do not see how it could be interpreted otherwise." *Id.* at 708, 707. So too does Colorado consider the contested expression's context, including the listeners' reaction per this Court's guidance from *Watts*, when determining whether contested speech is or is not an unprotected true threat.

Elonis casts no doubt on this approach, as there this Court did not address the First Amendment standard for unprotected true threats. 575 U.S. at 740. Nor is Colorado's rule inconsistent with this Court's decision in *Virginia v. Black*, involving a state statute that expressly criminalized cross burning "with the intent to intimidate a person or group." 538 U.S. 343 (2003). There the Court held that the First Amendment did not permit the state to treat cross-burning, without more, as prima facie evidence of the statute's requisite intent to intimidate. *Id.* at 347–48. Colorado does no such thing; indeed, Colorado's context-driven analysis ensures that speech cannot be treated as an unprotected true threat based on the content of the expression alone.

Petitioner suggests that *Black* imposed a subjective intent requirement. But *Black* instead explained that true threats "*encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence, that such a statement is a "*type* of true threat." 538 U.S. at 359–60 (emphases added). What *Black* did not do, however, is state that true threats were limited to such statements. On the contrary, the language in

Black suggests that such statements are but a subset of a greater body of true threats. Indeed, the First Amendment problem this Court recognized in *Black* was the state's treatment of cross-burning, without more, as prima facie evidence of the statutorily required specific intent to intimidate. *Id.* at 367 (plurality opinion).

On the contrary, Colorado's rule is consistent with understanding the phrase a "speaker means to communicate" to refer to a speaker who knowingly says the words that a context-driven objective inquiry concludes to be threatening. Indeed, when elaborating on its dictum, the *Black* majority focused on listeners' perspective by emphasizing the need to "'protect individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Id.* at 360 (quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 388 (1992)).

B. A context-driven objective inquiry recognizes that true threats are unprotected by the First Amendment because of the substantial harm they create, harm that does not turn on the defendant's mental state.

The decision below also follows this Court's decisions identifying and defining the categories of unprotected speech that are among the "few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V.,* 505 U.S. at 382–83 (quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942)); *see also United States v. Alvarez,* 567 U.S. 709, 717

(2012) (plurality opinion) (identifying "true threats" as among the categories of unprotected speech).

1. True threats cause harm independent of the defendant's mental state.

An objective inquiry appropriately defines the category of unprotected true threats as speech that is reasonably understood by its listener to be threatening their physical safety because such threats by their very utterance harm their targets by causing fear and attendant emotional distress. This often also harms those targets' autonomy by causing them to alter what they choose to do and say. The government has long regulated true threats because of the grave harm they inflict on their targets—harm that does not turn on the speaker's state of mind. *See Elonis,* 575 U.S. at 760–63 (Thomas, J., dissenting) (detailing the longstanding history and tradition of regulating speech that listeners reasonably understand to be threatening).

A statement that expresses a serious intent to cause harm or injury is not a statement that invites further discourse; nor is it a statement either to which a listener can meaningfully respond or one that can result in an exchange of ideas. On the contrary, that it causes its target to fear violence *stymie*s any exchange of ideas or further conversation. These harms occur irrespective of the speaker's subjective intent. It is this harm that Colorado's stalking statute prohibits—precisely to protect victims from the fear of violence and the disruption that fear produces. *See Black*, 538 U.S. at 360 (citing *R.A.V.*, 505 U.S. at 388).

Colorado's context-driven objective approach set forth in *R.D.* fits well within this framework. *R.D.* held that the "various objective tests previously articulated [by Colorado courts w]ere insufficient" for assessing whether a statement was an unprotected "true threat," and it sought to "strike[] a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict." 464 P.3d at 731–32. It thus articulated an enhanced context-driven objective test, specifically requiring assessment of the context, manner, medium, the parties' relationship (if any), and the recipient's subjective reaction, while simultaneously cautioning against reading too much into a recipient's subjective reaction. *Id.* at 733.

2. Stalking cases illustrate the importance of context-driven objective standards.

There is good reason for this kind of framework for stalking offenses. As the Colorado Supreme Court explained in *Cross,* stalkers "may be oblivious to objective reality" and a subjective standard would not protect victims from "severe intrusions on the victim's personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim." *See* 127 P.3d at 75–77 (discussing Tjaden & Theonnes).

The court explained that such detachment from reality was precisely why a speaker's specific intent of a statement's threatening nature should not be required—because the stalker's threat may resonate clearly to the target and to other reasonable persons. *Id.* at 77. Requiring the prosecution to prove that a

stalker specifically intended to threaten their target fails to address or deter the harm inflicted by stalking.

Colorado's stalking statute requires both that the defendant *knowingly* make the communication or engage in threatening conduct *and* that they do so in a manner that both *would cause* serious emotional distress in a reasonable person *and does cause* emotional distress in the particular victim. And Colorado's true threats analysis requires a context-driven objective analysis as to whether the statements would cause a reasonable person to fear for their safety. These multiple safeguards prevent an over-sensitive victim from creating criminal jeopardy.

3. Colorado's context-driven objective inquiry safeguards victims from the harms of true threats while protecting free expression.

Amici in support of Petitioner argue that a subjective-intent standard is indispensable to protect freedom of speech, suggesting that no citizen will be able to speak without fear of prosecution without such a standard. But Colorado's context-driven objective test accounts for precisely that concern. *See R.D.*, 464 P.3d at 731 (revising objective test to "strike[] a better balance between giving breathing room to free expression and protecting against the harms that true threats inflict").

For related reasons, some other categories of unprotected speech are delimited not by the speaker's culpable mental state but by the expression's harm to its target or to the public. Consider, for instance, the Court's objective assessment of "fighting words,"

where the First Amendment poses no bar to the punishment of "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California,* 403 U.S. 15, 20 (1971); *see also Chaplinsky,* 315 U.S. at 571–72 (describing the categories of unprotected speech to include "'fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

The contextual inquiry required by Colorado's objective standard not only protects targets from the harm that accompanies reasonable fear for their physical safety, but also protects speakers from the unfair punishment that can occur absent consideration of context. *See Watts,* 394 U.S. at 708 (emphasizing the importance of contextual inquiry in parsing protected from unprotected speech). Colorado's context-driven objective inquiry would, for instance, address the Court's concerns in *Black* about the need to "distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn"; to distinguish "cross burning directed at an individual" from "cross burning directed at a group of like-minded believers"; and to protect the depiction of cross burning in movies and plays. *See* 538 U.S. at 366.

The Colorado Supreme Court carefully heeded this Court's precedent when it explained that "words matter. But so does context." *R.D.*, 464 P.3d at 732. And the Colorado Court of Appeals here scrupulously applied this "context matters" directive. This Court, in *Watts* and *Black*, underscored the importance of protecting public discourse, political speech, and political

hyperbole; of recognizing when speech is conditional; and of ensuring that even generally offensive speech is protected. *See generally Black*, 538 U.S. at 359–60; *Watts*, 394 U.S. at 708. But Petitioner's statements to the victim here made the victim afraid, and reasonably so. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) ("Clearly, threats to [victims] or their families, however communicated, are proscribable under the First Amendment."). Unlike the expressions in *Watts* or *Black*, Petitioner's statements were:

- Not made in public discourse or in furtherance of public discourse (unlike *Watts*);
- Not political speech or political hyperbole (unlike *Watts*);
- Not conditional in any way (unlike the statements in *Watts*);
- Not treated by statute as prima facie evidence of illegal threats without regard to context (unlike *Black*);
- Not generally offensive statements, but rather direct messages to a victim who became so concerned about the statements that she repeatedly blocked Petitioner's account (unlike the expression in *Watts*, where bystanders laughed);
- Not publicly posted or disseminated (unlike the expression in *Watts*), but privately communicated; and

- Not jocular or responsive in any way (unlike the statements in *Watts*).

In short, Petitioner's statements exhibit none of the characteristics this Court has identified as deserving of First Amendment protection. *See Black*, 538 U.S. at 359–60; *Watts*, 394 U.S. at 708; *cf. Chaplinsky*, 315 U.S. at 572 (recognizing that "punishment as a criminal act would raise no question" given the such-slight social value of that speech) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)).

For all these reasons, the Colorado rule and the decision below reflect this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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