

No. 22-138

IN THE
Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO
COURT OF APPEALS, DIVISION II

**BRIEF OF *AMICI CURIAE* ELECTRONIC
FRONTIER FOUNDATION AND STUDENT
PRESS LAW CENTER IN SUPPORT
OF PETITIONER**

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STATEMENT OF INTERESTS OF *AMICI CURIAE*¹

Amici curiae believe that a sound understanding of the integral importance of social media in the daily lives of Americans, and the manner in which people across the country constantly interact through online networks, will confirm that speakers should not face prison time based solely on misjudgments about the scope of their audience or how a potentially unintended recipient would react to a message.

Electronic Frontier Foundation (EFF) is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online.

The Student Press Law Center (SPLC) is a non-profit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational material for student journalists, and its legal staff jointly authors the widely used media-law reference

1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission.

textbook, Law of the Student Press. SPLC has a special interest in making sure that the category of true threats is appropriately narrowly defined to protect student speakers since threats against teachers and students are one of the categories of speech specifically excluded from protection in this Court’s decision in *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment requires that true threats are only those in which a speaker subjectively intends to threaten, in order to prevent the exception from capturing constitutionally protected speech—humor, art, misunderstandings, satire, misinterpretations, and even, as this Court recognized in *Virginia v. Black*,² non-threatening speech intended to induce anger or resentment, but not fear. An objective standard offers very little protection, if any, for such speech. In this regard, amici concur with the constitutional analysis set forth in the Petitioner’s opening brief.

A speaker’s subjective intent standard is also a practical necessity when dealing with social media and other online communications because a purely objective standard, negligence or otherwise, does not account for the ways in which communication on the Internet can strip speech of vital context, necessary to understand

2. 538 U.S. 343, 366 (2003) (striking down a prima facie intent provision that did not “distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim.”).

the words' full meaning, or how quickly speech can be recontextualized from the time it is first posted online until it ultimately reaches a person who interprets the speech as threatening. Indeed, the original speaker may have never intended for the that recipient to see the speech that caused them fear.

While a mens rea standard that examines the speaker's subjective intent focuses on the context in which a statement was initially made, an objective standard typically focuses on the context in which the threatened person received it—would the reasonable person in that same situation interpret the statement as a threat? For online speech these may be very, very different contexts. An objective standard would thus incorrectly capture a staggering amount of humor, hyperbole, sarcasm, art, and even malicious speech that was never supposed to reach a particular person, and/or never intended to be read as threatening.

For example, consider the contextual analysis this Court performed in *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). In *Watts*, this Court found that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," when made while discussing the draft at a political rally on the Washington Mall was not, as a matter of law, a threat, because of its context. *Id.* at 706-08. The context included the location of the speech, the nature of the gathering, the identity of the speaker (an 18-year-old protester), the demeanor of the speaker (he was unarmed and laughing when he made the statement), and the reaction of the crowd (laughter). *See id.* Given the context, the decision was not a difficult one for the Court to make: the statement was not a threat

under either a subjective test (did the speaker specifically intend the statement to be interpreted as a threat?) or an objective test (would a reasonable person interpret the statement as a threat?). *See id.* at 707-08.

With social media posts, much of this context is missing, or at least not obvious—the recipient may not know where the post was originally published, the nature of the interaction in which the post was published, who the speaker is, their demeanor when they posted the statement, nor the reaction of those who were its intended recipients.

Even an objective, reasonable-speaker standard would be unworkable since every internet user knows, or should know, that there is a possibility that what they post online, despite even their best efforts to limit distribution, may be distributed beyond its original audience to those who were never intended recipients and/or who are unaware of the original context. A reasonable-speaker analysis does not help sort true threats from protected speech.

This Court should make clear that the definition of a true threat necessarily includes a subjective speaker's intent to threaten. The Colorado Court of Appeals' approach, which adopted a mere objective standard, is constitutionally insufficient and, if approved, would result in increasing and excessive censorship of constitutionally permissible speech.

ARGUMENT**I. Speech on Social Media Can Spread to Diverse and Undefined Audiences, Creating Benefits but Also More Opportunities for Misunderstandings by Outsiders Who Lack Context**

As this Court has recognized, the internet and new communications mediums like online social networks have fundamentally changed the way people interact with one another. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). “[T]he ‘vast democratic forums of the Internet’ in general . . . and social media in particular” are the most important places to exchange ideas. *Id.* at 1735 (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). The internet is where people “debate religion and politics”; “share vacation photos”; “look for work”; and “petition their elected representatives.” *Id.* at 1735 (citing Brief of Electronic Frontier Foundation et al.).

Social media and similar online communications platforms vary in size. Some are large, composed of billions of diverse people across many different sites. But for even the smallest platforms, the nature of social media ensures that speech is now more persistent, visible, spreadable, and searchable. To many, that is the draw of these platforms. Today, practically every internet user in the world is a potential—or foreseeable—recipient of another user’s speech.

As with all communications media, these platforms have given us both beneficial and problematic speech. People can easily stay connected with friends and colleagues. Advocates and activists can easily spread

their messages across the world. Writers and artists have new media in which to create and draw attention to their work. At the same time, there are substantially greater opportunities for careless or ill-considered messages, to be reviewed by and misunderstood by both intended and unintended recipients. There are more opportunities for disinformation, harassment, and surveillance. And there are more opportunities for people to intentionally threaten others in a manner unprotected by the First Amendment.

But any effort to address the harms associated with such speech must not overreach into protected expression. Speech that a reasonable person may interpret as a violent threat includes much protected and valuable speech. As this Court has recognized, there is no historical First Amendment exception for violent language in general. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 792-93 (2011) (distinguishing violent speech from obscenity).

Violent speech and imagery is common in literature, for both children and adults, and comic books, television, and music lyrics. *Id.* at 796-98. *See also Elonis v. United States*, 575 U.S. 723, 726-27 (2015) (analyzing whether song lyrics posted on Facebook were a punishable threat). The California Supreme Court, in analyzing whether a poem passed from one student to two others was a punishable threat under California law, discussed the prevalence of violent themes in poetry, among them “images of darkness, violence, discontentment, envy, and alienation.” *In re George T.*, 33 Cal. 4th 620, 638 (2004).

In everyday speech, outside of artistic expression, the First Amendment also broadly protects “vigorous

epithet[s],” rhetorical hyperbole, and “lustly and imaginative expression[s] of contempt.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (summarizing several cases). Public figures, in particular, will be subject to “vehement, caustic, and sometimes unpleasantly sharp attacks.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Even pre-internet, political speech had a long history of sometimes violent imagery. Legislative proposals are “killed,” “shot down,” and declared “dead on arrival.” See, e.g., *Reagan Says Democrats are Stalling Crime Bill*, Philadelphia Inquirer, Feb. 19, 1984, at A3 (quoting House subcommittee chairman who declared President’s crime legislation “dead on arrival”).

This Court must clarify that misunderstood or recontextualized speech online does not become a true threat, unprotected by the First Amendment, simply because some recipient, potentially far removed from the context of the initial utterance, imposes their own interpretation onto the meaning of the speech. Imposing a subjective standard ensures that online speech will have the “breathing room” the constitution requires.

A. Social Media is Widely Used, Firmly Embedded in Our Current Culture, and Broadly Diverse in Users, Subject Matter, and Focus

Billions of people around the world use social media, creating an endless amount of content tailored to diverse audiences. The large services are well-known:

Facebook³, Instagram, Twitter⁴, TikTok⁵, LinkedIn⁶, Snapchat,⁷ and Pinterest,⁸ among others. And there are

3. In 2022, Meta reported that Facebook and Messenger combined have 199 million daily active users in the United States and Canada, and 2 billion daily active users worldwide. When combining Facebook, Messenger, Instagram, and WhatsApp, the count of daily active people rises to 2.96 billion. Meta Platforms, Inc., Form 10-K, p. 56, 61 (Feb. 1, 2023), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/e574646c-c642-42d9-9229-3892b13aabfb.pdf>.

4. In 2021, Twitter reported its average monetizable daily active user in the United States was 38 million and 217 million worldwide. Twitter, Inc., Form 10-K, p. 43 (February 16, 2023), https://s22.q4cdn.com/826641620/files/doc_financials/2021/ar/FiscalYR2021_Twitter_Annual_Report.pdf.

5. TikTok's adult audience as of January 2023 was reported as 113 million in the United States. DataPortal, TikTok Statistics and Trends (Feb. 19, 2023), <https://datareportal.com/essential-tiktok-stats>. TikTok needed only five years to surpass 1 billion active monthly users. TikTok, *Thanks a billion!* (Sep. 27, 2021), <https://newsroom.tiktok.com/en-us/1-billion-people-on-tiktok>.

6. In 2021, Microsoft reported that LinkedIn had over 750 million members. Microsoft Corporation, Form 10-K, p. 20, (July 29, 2021), https://view.officeapps.live.com/op/view.aspx?src=https://c.s-microsoft.com/en-us/CMSFiles/2021_Annual_Report.docx?version=5290c17d-8858-c9ef-d16f-60e02f42214e.

7. In 2022, Snap reported its average daily active users on Snapchat as 100 million in North America and 375 million worldwide. Snap Inc., Form 10-K, p. 56 (January 31, 2023), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001564408/c22ae9bd-7418-456e-82d4-48129de1df54.pdf>.

8. In 2022, Pinterest reported its monthly active users as 95 million in the U.S. and Canada and 450 million worldwide. Pinterest, Inc., Form 10-K, p. 45 (January 31, 2023), <https://>

many other smaller and highly specialized networks as well: Strava, a social media platform for athletes;⁹ RallyPoint, a social media platform for members of the armed services;¹⁰ Ravelry, a social media site focused on knitting;¹¹ and HealthUnlocked, a social media site for the discussion of health information,¹² are just a few examples. Social networks span the ideological range, from ProAmericaOnly, which promotes itself as “Social Media for Conservatives” and promises “No Censorship | No Shadow Bans | No BS | NO LIBERALS”¹³ and the Democratic Hub, an “online community ... for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion of Democrats and/or liberal political views or is critical of Republican ideology,”¹⁴ and everything else on the political spectrum. Social media users can choose between Vegan Forum, a site designed

d18rn0p25nwr6d.cloudfront.net/CIK-0001506293/54d139a9-71d2-481e-98c4-85f9e643ab8e.pdf.

9. *Strava Terms of Service*, Strava, <https://www.strava.com/legal/terms#conduct> (updated December 15, 2020).

10. RallyPoint, <https://www.rallypoint.com/> (last visited February 22, 2023).

11. Ravelry, <https://www.ravelry.com/about> (last visited February 22, 2023).

12. HealthUnlocked, <https://healthunlocked.com> (last visited February 22, 2023).

13. <https://proamericaonly.org> (last visited February 22, 2023).

14. <https://www.democratichub.com> (last visited February 22, 2023).

to promote a vegan lifestyle,¹⁵ and SmokingMeatsForums.com, a “community of food lovers dedicated to smoking meat.”¹⁶ *See Netchoice, LLC v. Attorney General*, 34 F. 4th 1196, 1213-14 (11th Cir. 2022).

A stable majority of people of all age groups regularly and extensively communicate through online social networks. *Packingham*, 137 S. Ct. at 1735. As of 2021, 72 percent of U.S. adults surveyed said they use at least one social media site.¹⁷ For Facebook alone, 69 percent of U.S. adults say they have used the platform as of 2021—a number that has been relatively stable since 2016. *Id.* Surveys show popularity in other social media sites for adults as well: Instagram (40 percent); Pinterest (31 percent); LinkedIn (28 percent); Snapchat (25 percent); Twitter (23 percent); WhatsApp (23 percent); TikTok (21 percent – which does not account for its more recent rise in popularity); Reddit (18 percent); Nextdoor (13 percent). *Id.*

Social media users comprise large majorities of nearly every age, race, gender, income level, education level, and community.¹⁸ For example, those demographics include 84 percent of people aged 18-29; 78 percent of women; 77

15. *Membership Rules*, Vegan Forum, <https://www.veganforum.org/help/terms/> (last visited February 22, 2023).

16. *The Rules*, SmokingMeatForums.com, <https://www.smokingmeatforums.com/help/rules/> (last visited February 22, 2023).

17. Pew Research Center, *Social Media Fact Sheet* (April 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/#which-social-media-platforms-are-most-common>.

18. Pew Research Center, *Social Media Fact Sheet*.

percent of Black adults; 66 percent of adults who live in rural areas; and 45 percent of people who are 65 or older. *Id.*

Nevertheless, there may be marked differences in age and other demographics for each platform, and among groups in the same platform. Teen Facebook use, for example, has dropped steeply in the past decade, while their use of other social media sites like TikTok, Instagram, and Snapchat has increased.¹⁹

Each social media site has its own individual speech conventions.²⁰ The diversity of users and the differing lexicons among sites can create insiders to a conversation with a shared understanding that is less readily apparent to those not attuned to the group's linguistic conventions.²¹

Americans' use of social networking technologies is related to core values like community and political engagement. *Packingham*, 137 S. Ct. at 1735-36 (noting social media is used “to engage in a wide array of protected First Amendment activity”). Social media has aided numerous social and political movements²², and

19. Pew Research Center, *Teens, Social Media and Technology 2022* (August 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/>.

20. Lyrissa Lidsky, *#I U: Considering the Context of Online Threats*, 106 CALIF. L REV. 1885, 1909 (2018).

21. Lidsky, *#I U: Considering the Context of Online Threats* at 1909.

22. See Pew Research Center, *Social Media Continue to be Important Political Outlets for Black Americans* (Dec. 11, 2020),

during every election cycle, Facebook and Twitter ignite with users supporting (or deriding) candidates, parties, and positions, forwarding links to long-form analysis, or simply joining in the latest chat. A 2020 survey found that about one in three social media users had posted a picture to show their support for a cause (36 percent); looked for information about rallies or protests (35 percent); or encouraged others to take action on an issue (32 percent).²³

Politicians, too, have recognized the power of social media. As far back as 2016, “all 100 Senators and almost all Representatives [had] adopted Twitter, Facebook, and other social media tools.”²⁴ Social media has become so integral that the House of Representatives Press Gallery keeps an updated list of the Twitter handles of members and committees.²⁵

<https://www.pewresearch.org/fact-tank/2020/12/11/social-media-continue-to-be-important-political-outlets-for-black-americans/>.

23. Pew Research Center, *Activism on social media varies by race and ethnicity, age, political party* (July 13, 2020), <https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/>.

24. Congressional Research Service, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, R44509 at 7 (Updated May 26, 2016), <https://crsreports.congress.gov/product/pdf/R/R44509/3>.

25. U.S. House of Representatives Press Gallery (Accessed February 7, 2022), <https://pressgallery.house.gov/member-data/members-official-twitter-handles>.

B. Social Media is Persistent, Visible, Spreadable, and Searchable

As social media plays a more central role in the daily lives of many Americans, it has altered communication norms in many respects. Prior to the digital age, “individuals lacked the technological megaphone to broadcast their story to the world.” Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1333 (2009). Because of these platforms’ unique characteristics, a person publishing on social media has less control over their audience. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668 (1998). Practically every internet user in the world is a potential—or foreseeable—recipient.

Indeed, this Court has recognized one of the internet’s chief democratizing features: its ability to spread information rapidly and to wide audiences. *Reno v. ACLU*, 521 U.S. at 850 (observing that “[i]ndividuals can obtain access to the Internet from many different sources”; that “[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods”; and, that “Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”).

Speech occurring on social networks has been described as having four key characteristics: (1) “persistence: the durability of online expressions and content;” (2) “visibility: the potential audience who can bear witness;” (3) “spreadability: the ease with which content can be shared;” and (4) “searchability: the ability

to find content.” danah boyd, *It’s Complicated: The Social Lives of Networked Teens* 11 (2014) (hereafter referenced as “*It’s Complicated*”).

The “persistence” characteristic of online networks means that “conversations conducted through social media are far from ephemeral; they endure.” *Id.* Consequently, “those using social media are often ‘on the record’ to an unprecedented degree.” *Id.* This remains true even for networks designed for impermanence, such as Snapchat, where users posts disappear from the site after a period. Through screenshots and other methods of capturing images, the posts may endure in a shareable and thus spreadable form.²⁶ For example, this Court decided a case a few years ago that involved the content of a high school student’s message on Snapchat which was then photographed and eventually redistributed to parents and administrators. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2043 (2021).

The visibility characteristic highlights the vast audiences accessible on social media sites, because most such platforms are “designed such that sharing with a broader or more public audience is the default.” *It’s Complicated* at 12. This has also been described as the “unboundedness” of digital information. See Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. Rev. at 1667-68 (1998). Digital information transcends geographic boundaries and cannot be confined

26. Snapchat Support, *How do screenshots work on Snapchat for Web?*, <https://help.snapchat.com/hc/en-us/articles/7121497973140-How-do-screenshots-work-on-Snapchat-for-Web->.

to “any . . . spatially bounded audience definition to which other media might be limited.” *Id.* at 1668. And because many popular systems require users to take active steps to limit the visibility of any particular piece of shared content, social media interactions are typically “public by default, private through effort.” boyd, *It’s Complicated* 12. The high school student in *Mahanoy* did not expect that her Snapchat post would be seen by parents and school officials, and ultimately read by this Court.

The “spreadability” and “searchability” characteristics describe how the actions of the intended recipients of social media messages, as well as others perusing the web, can substantially expand the audience for any particular communication. By design, social media platforms facilitate the spread of information by encouraging link-sharing, providing reposting or favoriting tools that further spread images or texts, and by making it easy to copy and paste content from one place to another. *Id.* These tools can either directly amplify content to other users (for example, the retweet on Twitter²⁷) or are used as datapoints in the social media companies’ own algorithm to amplify content to other users (for example, the like button on TikTok).²⁸

At the outer edge of “spreadability” is “virality,” the especially rapid and far-reaching dissemination of

27. Twitter Help Center, *How to Retweet*, <https://help.twitter.com/en/using-twitter/how-to-retweet>.

28. Ben Smith, *How TikTok Reads Your Mind*, *The New York Times* (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html> (noting that factors that amplify content include likes, comments, and playtime, among other things).

a speaker’s social media post.²⁹ Virality is commonly facilitated by other users, allowing a person’s speech to reach a potentially limitless audience of strangers, sometimes devoid of context.³⁰

Speech does not only spread among users on a given platform; it also can jump from platform to platform. A recent concrete example comes from TikTok, where users regularly share and repurpose audio to use in their own videos—stripping the audio from the original visual context.³¹ In 2022, a short audio clip went viral of a young child saying “I wanna kill my mom. I wanna kill my dad. I wanna kill my grandma.”³² The video and audio originated on YouTube, then migrated to TikTok where the audio was repurposed numerous times in other people’s videos. *Id.* Eventually, the popular musician Lizzo sampled the audio in her own message on Twitter, where she joked it could be misunderstood.³³

29. Jonah Berger and Katherine L. Milkman, *What Makes Online Content Viral?*, 49 *J. of Mktg. Rsch.* 192, 192 (2012).

30. See, e.g., Mike Isaac, *Facebook Wrestles With the Feature It Used to Define Social Networking*, *The New York Times* (Oct. 29, 2021), <https://www.nytimes.com/2021/10/25/technology/facebook-like-share-buttons.html>.

31. See Charlotte Shane, *Why Do We Love TikTok Audio Memes? Call It ‘Brainfeel,’* *The New York Times Magazine* (Aug. 17, 2022), <https://www.nytimes.com/interactive/2022/08/17/magazine/tiktok-sounds-memes.html>.

32. Know Your Meme, *Emo Woo Wop’s “I Wanna Kill My Mom”*, <https://knowyourmeme.com/memes/emo-woo-wops-i-wanna-kill-my-mom>.

33. Jon Blistein, *From Marge to Miss Piggy, Lizzo Served Four Wild Halloween Looks This Weekend*, *Rolling Stone* (Nov.

Finally, whether through networks' internal tools or internet search engines, people's online communications are searchable. Thus, "any inquisitive onlooker can query databases and uncover countless messages written by and about others." boyd, *It's Complicated* 12. With search engines, this is true even if the person searching for the information is not otherwise a user of the social network. Thus, the interactivity of the internet allows receivers to use their own volition to "pull" speech, rather than having it "pushed" at them. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. Rev. at 1668.

C. Art, Jokes, and Ramblings are More Likely to be Misunderstood as True Threats Online

The speed-of-light spreadability of information and online messages exacerbates the risk that a post will be misunderstood when read beyond its original context and/or intended audience. Even when people say what they mean online, their words can be misunderstood. "The intended audience matters, regardless of the actual audience." boyd, *It's Complicated* 30.

This is not unique to online communications: Justice Sotomayor highlighted the potential to be misunderstood during face-to-face interaction. *Perez v. Fla.*, 137 S. Ct. 853, 854 (2017) (Sotomayor, J., concurring in denial of cert.) (noting that the objective jury instruction in the case allowed a conviction "irrespective of whether [the petitioner's] words represented a joke, the ramblings of

1, 2022), <https://www.rollingstone.com/music/music-news/lizzo-halloween-costume-2022-1234621285/>.

an intoxicated individual, or a credible threat”). *See also In re George T.*, 33 Cal. 4th 620, 637 (2004) (noting the ambiguity in an allegedly threatening poem that one high school student handed to two other students).

But the potential for misunderstanding is amplified online.

For example, in 2014, a middle-aged art professor at a New Jersey college was suspended without pay for eight days after he posted on Google+ a picture of his smiling seven-year-old daughter wearing an oversized t-shirt with a quote from the television show “Game of Thrones.”³⁴ School administrators interpreted the quote, “I will take what is mine with fire and blood,” as uttered by one of the show’s best-known characters, as threatening a school shooting. Even after the misunderstanding was revealed and the teacher reinstated with back pay, the school required him to remain off campus for more than a week and to visit a psychiatrist before returning to work.³⁵

Young people may commonly complain that adults don’t understand them; in the context of true threats,

34. Sasha Goldstein, *N.J. College Suspends Professor Over ‘Game of Thrones’ Shirt Perceived as ‘Threat’*, New York Daily News, (Apr. 18, 2014), <http://www.nydailynews.com/news/national/n-college-suspends-professor-threatening-game-thrones-shirt-article-1.1761354>. “Game of Thrones” is a hugely popular HBO show whose season finale that year drew more than 7 million viewers. Rick Kissell, *HBO’s ‘Game of Thrones’ Finale Draws 7.1 Million Viewers Sunday*, Variety (June 16, 2014), <http://variety.com/2014/tv/ratings/hbos-game-of-thrones-closes-with-7-1-million-viewers-sunday-1201221238/#>.

35. Goldstein, *N.J. College Suspends Professor Over ‘Game of Thrones’ Shirt Perceived as ‘Threat’*.

this is especially true of their online speech. Comments, conversations, and other content created by and intended for young audiences are being read by older audiences who may not understand the vocabulary, social and cultural references, and context. *See* boyd, *It's Complicated* 30 (“Unfortunately, adults sometimes believe that they understand what they see online without considering how teens imagined the context when they originally posted a particular photograph or comment.”). For example, teens may post information on social media “that they think is funny or intended to give a particular impression to a narrow audience” of their peers. boyd, *It's Complicated* 44. *See also* *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015) (noting that a student made comments about his teacher “to elicit a response from [his] friends.”). But, for example, a hypothetical adult not familiar with the “I wanna kill my mom” meme may, however, interpret it as a threat.³⁶

Students like the respondent high schooler in the *Mahanoy* matter may lack awareness as to the spreadability and perpetuity of their online activities: giving an objective standard to assess true threats to the school administrations across the country will chill speech among youth.

Consider the case of a young Texan, Justin Carter, who was jailed for months after making a sarcastic Facebook comment during an argument with a fellow gamer about a video game. *See* Pet. Br. at 34. While

36. Know Your Meme, Emo Woo Wop’s “I Wanna Kill My Mom” <https://knowyourmeme.com/memes/emo-woo-wops-i-wanna-kill-my-mom>

perhaps foreseeable, the Texas teen likely did not intend for his words to be read by a third party in Canada, who apparently reported the comments as threatening.³⁷

Similarly, a middle school in Oregon suspended a 14-year-old student for venting his frustrations on Facebook about his teacher after receiving a “C” grade. *Burge*, 100 F. Supp. 3d at 1060. On Facebook, the student suggested starting a petition to get the teacher fired and said, “She’s just a bitch haha.” *Id.* In response to laughter from a Facebook friend, the student then wrote “Ya haha she needs to be shot” before deleting the post at the request of his mother. *Id.* The parent of another student eventually reported the comments to the school. *Id.* at 1061. The court in that civil lawsuit found that it was not a true threat under either a subjective or objective intent standard, but the objective test made for a closer question. *Id.* at 1068 (disposing of subjective analysis in two paragraphs, while spending six paragraphs on objective analysis). And while no criminal charges were brought in that case, a subjective intent requirement would help guard against overzealous prosecutions under similar facts.

During oral arguments in *Elonis* in 2014, Chief Justice Roberts read the lyrics from a song written by the rapper Eminem, entitled “‘97 Bonnie and Clyde.” The song vividly depicts the rapper as he disposes of the body of his ex-partner in front of his young daughter. The song does not

37. Doug Gross, *Teen in Jail for Months Over ‘Sarcastic’ Facebook Threat*, CNN TECH (July 3, 2013), <https://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/index.html>. See also Lidsky, *#I U: Considering the Context of Online Threats* at 1886-88.

depict actual events, but under an objective standard, its violent and explicit content could be taken seriously.

Under a purely objective standard, the types of misunderstandings described herein could result in prosecution and years of imprisonment. The mere possibility of such life-ruining consequences—however remote the likelihood of prosecution in reality—invariably will chill constitutionally protected speech. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (stating, in invalidating a criminal statute on First Amendment overbreadth grounds, that “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

II. An Objective-Only Standard Will Reach Constitutionally Protected Speech

An objective standard, even when accompanied by a fulsome contextual analysis, is not sufficient to distinguish constitutionally proscribable true threats from misunderstood, colorful, figurative, or careless speech that nevertheless should be protected.

While crucially important, a contextual analysis does not provide the predictability that speakers need in order to avoid a chilling of protected speech. To uphold the principles of the First Amendment, the speaker must also have a subjective intent to threaten, which provides the necessary predictability since it is based on the speaker’s own intentions, not the impressions of a hypothetical audience.

This case illustrates the insufficiency of omitting a subjective intent analysis. Despite analyzing the full context of the messages, the Colorado Court of Appeals used an objective standard to evaluate whether the defendant's words were a true threat unprotected by the First Amendment. *People v. Counterman*, 2021 COA 97, ¶ 29, 497 P.3d 1039, 1046, *cert. denied*, No. 21SC650, 2022 WL 1086644 (Colo., Apr. 11, 2022). *See also* Colo. Rev. Stat. Ann. § 18-3-602(1)(c). The court defined a true threat as 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.” *Counterman*, 497 P.3d at 1046 (citing *People In Int. of R.D.*, 2020 CO 44, ¶ 4, 464 P.3d 717, 721 (Colo. 2020)). A speaker may be convicted, and sentenced to a lengthy prison sentence, regardless of whether the speaker had any subjective intent to threaten or cause fear, or, as in *Counterman*'s case whether the speaker understood that a recipient found his words threatening. Moreover, the analysis invites speculation to determine who is a “foreseeable recipient.”

Colorado's objective test is all the more concerning because it contradicts this Court's repeated statements regarding the need to draw criminal speech restrictions narrowly and the insufficiency of a negligence standard when criminalizing speech. This Court has held that “negligence . . . is [a] constitutionally insufficient” standard for imposing liability for speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). As Justice Marshall explained, “[i]n essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his

statements on his listeners.” *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). And while not reaching the First Amendment question, the Court in *Elonis v. U.S.* was right to acknowledge that an objective negligence standard will inevitably punish “otherwise innocent conduct.” 575 U.S. 723, 737 (2015) (quoting *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). Even as courts rightly consider the full context of a communication, the ultimate question of criminality must rest on the speaker’s own subjective intent. Megan R. Murphy, Comment, *Context, Content, Intent: Social Media’s Role in True Threat Prosecutions* 168 U. Pa. L. Rev. 733, 756-763 (2020). This Court has further identified criminal prohibitions on pure speech as “matter[s] of special concern” under the First Amendment because “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno v. ACLU*, 521 U.S. at 871-72.

Omitting a subjective intent to threaten will result in the chilling of constitutionally protected speech on the internet, rather than it being given the necessary “breathing space to survive.” *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). Speakers will be compelled to tailor their messages to the sensibilities of the most delicate-eared and easily frightened listener in the world. This Court’s frequent admonition—that “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox”—can be equally applied to the digital “in-box” as well. *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

An objective-only approach will thus result in increasing and excessive censorship of constitutionally permissible speech online, both by way of self-censorship and court decree. Courts applying an objective-only standard to alleged threats transmitted online will more often find the presence of reasonable fear and thus the existence of a true threat.

The First Amendment demands a different result. In assessing the value of speech for First Amendment purposes, the potential value to the public at large must be considered. *See, e.g.,* Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 420 (2009) (“Any regulation of speech must strike a livable balance among the differing claims of harm, value, culpability, and administrative clarity.”). The emergence of social networking has brought tremendous benefits to American society, exponentially enhancing our ability to connect with others. The Court should ensure that an overbroad and unduly harsh interpretation of a criminal statute does not remain in place, unnecessarily diminishing what has become a cherished public resource.

To be clear, amici do not challenge the need to have a true threats exception to the First Amendment. Amici acknowledge the seriousness of true threats and the speech-inhibiting effects they can have.

But the requirement of a subjective intent to threaten remains necessary to distinguish these true threats from the misunderstandings and artistic expression discussed above, striking the proper balance between protected and unprotected speech.

The subjective intent requirement still permits prosecution of true threats in the appropriate cases. All laws that criminalize pure speech must be drawn with “narrow specificity.” *Button*, 371 U.S. at 433. In many cases, legislatures have already built subjective intent requirements into state and federal statutes criminalizing speech. *See Elonis*, 575 U.S. at 135 (noting that the general rule is that a “guilty mind” is a necessary element of a crime) (citation omitted); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL’Y 51, 51-52 (2003) (noting that the mental state element “is crucial to culpability and central to our value as moral beings”). Those laws would be untouched by this ruling. Additionally, many civil harassment statutes already “have some variation of an intent requirement, whether it be a specific intent to harass, intentional or knowing conduct, or absence of legitimate purpose.” Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 796 (2013). *See also* Corpus Juris Secundum, *Threats and Unlawful Communications*, § 51. *Civil action for harassment*, 86 C.J.S. Threats § 51 (Feb. 2023 Update); Cal. Civ. Proc. Code § 527.6 (requiring “no legitimate purpose”).

Moreover, a subjective intent to threaten standard is in line with other speech excluded from First Amendment protection, such as incitement. *See Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (requiring that the speaker subjectively intend to incite serious unlawful conduct).

CONCLUSION

The judgment of the Colorado Court of Appeals should be reversed. The Court should clarify that a true threat that lacks First Amendment protection should require the government to prove that the speaker subjectively intended to threaten or cause fear in the recipient.

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