

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BILLY RAYMOND COUNTERMAN,)
 Petitioner,)
 v.) No. 22-138
COLORADO,)
 Respondent.)

Pages: 1 through 111
Place: Washington, D.C.
Date: April 19, 2023

HERITAGE REPORTING CORPORATION
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3 BILLY RAYMOND COUNTERMAN,)
4 Petitioner,)
5 v.) No. 22-138
6 COLORADO,)
7 Respondent.)
8 - - - - -
9 Washington, D.C.
10 Wednesday, April 19, 2023

11
12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 10:20 a.m.

15
16 APPEARANCES:
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18 of the Petitioner.
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20 on behalf of the Respondent.
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22 of Justice, Washington, D.C.; for the United
23 States, as amicus curiae, supporting the
24 Respondent.

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P R O C E E D I N G S

(10:20 a.m.)

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

Mr. Elwood.

ORAL ARGUMENT OF JOHN P. ELWOOD

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE KAGAN: What about fighting
9 words?

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: You say --

17 JUSTICE SOTOMAYOR: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 together up to that point?

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

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

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

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

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

23 JUSTICE ALITO: All right.

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

1 make the conduct wrongful.

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

7 Why isn't that sufficient?

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

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

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

1 case, which is a -- a -- a breach of the peace
2 but through threats of -- God -- Benedict versus
3 -- State versus Benedict spoke in terms of
4 specific intent, and I -- I think that that is,
5 you know, harder to square with recklessness,
6 because the statements at issue there were at
7 least reckless, that it would cause somebody
8 fear.

9 JUSTICE SOTOMAYOR: Counsel --

10 JUSTICE ALITO: I -- I had --

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

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

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

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

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

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

24 JUSTICE ALITO: Yeah. Well, this
25 isn't meant to be a hostile question for you.

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

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

18 (Laughter.)

19 JUSTICE ALITO: -- in the -- I mean,
20 maybe some people would. I don't know.

21 (Laughter.)

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

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

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

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

20 MR. ELWOOD: That is exactly right.

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

24 MR. ELWOOD: That is precisely
25 correct. They said it doesn't matter what he

1 thinks.

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

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

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

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

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

1 what's at issue here, is it?

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

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

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

14 JUSTICE SOTOMAYOR: All right.

15 JUSTICE BARRETT: Mr. Elwood --

16 JUSTICE SOTOMAYOR: Thank you.

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

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

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

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

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

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

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

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

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

11 MR. ELWOOD: Specific -- but --

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

14 MR. ELWOOD: Well --

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

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

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

23 MR. ELWOOD: I think --

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

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

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

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

1 get to the bottom of it --

2 JUSTICE BARRETT: I know, but I guess
3 --

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

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

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

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

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

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

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

22 JUSTICE KAGAN: Do we have any place
23 in our First Amendment law where we've made that
24 distinction? Because I understand you're
25 saying, look, this is a criminal case, this was

1 a very heavy sentence, and -- and -- and really
2 forcing us to say we have this discomfort with
3 crimes that don't have mens rea.

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

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

22 And the place where this would
23 normally arise is in the civil protective order
24 context, which I think is reduced because, of
25 course, the person who is the -- the recipient

1 of the threats or the statements has a First
2 Amendment interest in not associating.

3 And this sorts itself out in other
4 areas because, like, in the -- in the tort of
5 negligent infliction of emotional distress, you
6 typically can't get that based on -- unless you
7 were physically injured, on a negligent -- on a
8 negligence standard. It requires at most kind
9 of an intentional statement.

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

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

24 MR. ELWOOD: Certainly. But I think,
25 you know, the -- the -- the just versus unjust

1 prosecutions or just versus unjust convictions
2 is a very small part of the argument we're
3 making, because the chilling effect comes from
4 being told it doesn't matter -- a speaker being
5 told it doesn't matter what you think, you have
6 to think about the reaction of your audience.

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

10 JUSTICE KAVANAUGH: Was that -- I'll
11 wait.

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

1 But one example is Glenn Schumacher in
2 Illinois, who is a 58-year-old married man who,
3 on the comments page of a local newspaper, The
4 Elmhurst Patch, responded to an article about,
5 you know, littering and crowds and so forth at
6 an annual event by saying perhaps a few placed
7 -- well -- pressure cooker pots. And the very
8 next commenter said, you know, we all appreciate
9 some cleverness and humor, but that's pretty
10 crass. So, clearly, the first person who saw it
11 immediately knew it was a joke. He was arrested
12 at 2 a.m. the next day and held for six weeks on
13 a bond that he could not afford until he pleaded
14 guilty to essentially disorderly conduct.

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

20 CHIEF JUSTICE ROBERTS: Counsel --

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Elwood.

1 To what extent does your case -- or is
2 it affected by the fact that we're dealing with
3 text messages, where, you know, it seems to me
4 the most threatening message we've got is,
5 "You're not being good for human relations.
6 Die. Don't need you."

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

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

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

19 CHIEF JUSTICE ROBERTS: By whose
20 testimony?

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

22 CHIEF JUSTICE ROBERTS: Okay.
23 Justice Thomas?

24 JUSTICE THOMAS: Yes, just briefly,
25 Mr. Elwood. The -- Justice Alito asked you

1 whether or not intent could be baked into some
2 statements, and that was my problem, by the way,
3 with Virginia v. Black. The burning of a cross
4 in the middle of a field doesn't leave much room
5 to imagination.

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: Suppose someone writes
23 a story and posts it on the internet or
24 publishes it, and it's a story about -- it's a
25 mystery story about one spouse killing the other

1 spouse. Most people are going to read it and
2 think, okay, this is an interesting story or
3 it's not an interesting story.

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

8 How do you analyze that?

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

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

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

25 If you have doubts, if you think maybe

1 he's doing this to instill fear, well, then, as
2 they used to say in the old '40s movies, tell it
3 to the judge. You know, you -- you treat it
4 just like you would under an objective standard.
5 You indict the guy, go to trial, and then he has
6 an opportunity to tell the jury. And if it's
7 a persuasive explanation, it's enough to
8 introduce reasonable doubt, then he might get
9 acquitted.

10 JUSTICE ALITO: Well, what about --

11 MR. ELWOOD: But, if not --

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

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

24 What about that? I mean, this -- this
25 is a problem in -- with internet communications,

1 because they go out to sometimes a vast and
2 unknown audience.

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

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

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

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

1 MR. ELWOOD: Yes, Eminem, as we may
2 remember, from 2014.

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

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

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

1 unfamiliar and seems weird and threatening to,
2 you know, the -- the residents of New Haven,
3 Connecticut.

4 JUSTICE SOTOMAYOR: So more of a
5 reason that you have to let in people to explain
6 the basis of their intent, correct, or their
7 knowledge?

8 MR. ELWOOD: I would agree, yes.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

19 And so too, when it comes to
20 defamation of public figures, it's just a --
21 it's just a step from extremely valuable
22 commentary about public figures.

23 And so, in those two areas, we've
24 insisted on this breathing room. But I wonder
25 looking at this case whether we can really say

1 that. And this goes a -- a little bit to
2 Justice Kavanaugh's question as well.

3 Like, what's the area of speech that
4 we think is really going to be chilled by
5 drawing the line in the place where this state
6 and many other states want to draw it?

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

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

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

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

25 There's a lot of speech on the

1 internet that walks the line, you know, "burn it
2 all down," you know, "come and take it," Second
3 Amendment -- or Second Amendment remedies.

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

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

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

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

1 MR. ELWOOD: I would recommend the
2 amicus briefs filed by the Alliance Defending
3 Freedom, Reporters Committee, FIRE -- I hope I'm
4 not leaving anybody out there -- and ACLU,
5 because they do a very good job of talking about
6 how, when you tell speakers it doesn't matter
7 what you think, what matters is the audience
8 reaction, then instead of thinking about just
9 what do I view as the truth, what do I want to
10 communicate, they have to think about, well,
11 what's not going to -- what's going to get me in
12 trouble. And it automatically causes people to
13 kind of -- to chill, to -- to go back to the
14 area where they have safety.

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: A couple things.
25 I think the State and the SG say there are

1 certain kinds of threats that they're concerned
2 about, in particular, presidential threats,
3 threats against the President, stalking, school
4 threats, domestic violence, and that it's a
5 defense like the one that would be present with
6 your mens rea would make it too easy for someone
7 to say, oh, I was just joking, I was just
8 kidding, and, therefore, threats that would be
9 really quite dangerous in terms of leading to
10 the next step of actually carrying through with
11 the threat will not be addressed.

12 How do you respond to that concern?

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

24 JUSTICE KAVANAUGH: And what about the
25 "I was just joking," "I was kidding"?

1 MR. ELWOOD: Well, the question is
2 not --

3 JUSTICE KAVANAUGH: Isn't that a --
4 isn't that a constant concern?

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

6 JUSTICE KAVANAUGH: You go to the
7 house and the -- and the guy says, I was just
8 joking around?

9 MR. ELWOOD: Well --

10 JUSTICE KAVANAUGH: And then the
11 police officer is really stuck.

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

20 If the answer to that is no, it may
21 not -- just not seem credible if the -- the --
22 the threat was, "I'm going to kill you," or "I'm
23 going to come cut your throat."

24 So, I mean, I -- there -- there's
25 been -- you know, we've -- we've had many states

1 that have a mens rea statute. I -- there's over
2 20 that for the -- the general threat statute
3 require a showing of purpose or intent. You
4 know, there's more that -- you know, that
5 require something less. And, you know, there
6 just hasn't been showing that there's a big
7 problem or that it's -- it can't be solved
8 whether these people will be granted a license
9 to get away with things.

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

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

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: Everything you're
24 saying I'm -- I'm comfortable with as a matter
25 of criminal liability, but I guess I'm still

1 stuck on the civil/criminal point.

2 And, you know, I think Virginia versus
3 Black is your best case because there is some
4 language in there sprinkled about intent, but I
5 also think the case can be understood as one in
6 which there was no context. The context was
7 stripped away. And so a reasonable person --
8 there was no way to judge, as that law was
9 written, whether a reasonable person in context
10 would have understood it as a threat. So I -- I
11 don't think it gets you all the way there.

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

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

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

1 may be autistic, and just doesn't appreciate the
2 context? Is that the narrow band we're really
3 talking about?

4 MR. ELWOOD: There's a lot baked in
5 there. If I could first talk about Virginia
6 versus Black, I think it's important to remember
7 the default rule, which is whether there's a
8 clearly established tradition of allowing the
9 regulation of this speech. And, at minimum,
10 they can -- the best they can get out of
11 Virginia versus Black is ambiguity, not an
12 embracement of negligent free speech.

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

19 With respect to, you know, context and
20 whether context will sort all of this out,
21 it's -- it's -- you know, context makes a big
22 difference in a lot of cases, but part of the
23 problem is the foreseeability of that. We
24 already had a little discussion of the many ways
25 "I will kill you" could be meant. And when

1 you're talking about speech -- this is again why
2 I refer to the amici -- speakers have to have
3 some sort of confidence in advance about whether
4 they -- what they're saying is going to wind
5 them up in trouble.

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

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

19 JUSTICE BARRETT: Maybe you should be
20 careful if you're going to say something like "I
21 will kill you" or "I'm going to burn it all
22 down" or "I'm going to shoot up a school."

23 MR. ELWOOD: Well, again, you know, my
24 mother said to me virtually every day of my
25 childhood --

1 JUSTICE BARRETT: "I'm going to kill
2 you"?

3 MR. ELWOOD: -- "Drop dead." Yeah.
4 (Laughter.)

5 MR. ELWOOD: And yet, you know, I was
6 never in fear because of that, and so, you know,
7 context meant a lot.

8 JUSTICE BARRETT: Hopefully, context
9 gave you some reassurance.

10 (Laughter.)

11 MR. ELWOOD: It was about the only
12 thing that did, but, yes.

13 (Laughter.)

14 JUSTICE BARRETT: Thank you, Mr.
15 Elwood.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

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

24 MR. ELWOOD: I think that that's
25 right, that it generally requires a recklessness

1 or sometimes knowledge in the case of obscenity.

2 JUSTICE JACKSON: Okay. And then just
3 to follow up on Justice Barrett and Justice
4 Kagan's questions about civil versus criminal,
5 I'm wondering -- you -- you say that you -- your
6 argument relies on the chilling effect, and I'm
7 wondering whether you're perceiving some
8 distinction in a criminal versus civil penalty
9 scheme with respect to the way in which or the
10 amount of chilling that would occur.

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

23 So I think that there is -- you know,
24 perhaps that reflects some sort of reflection
25 that there is a chilling effect to imposition of

1 penalties.

2 But, again, in the -- in the
3 defamation context, the Court has said that
4 states have a compelling enough interest in
5 making people whole that they would let those
6 cases proceed in the civil context.

7 JUSTICE SOTOMAYOR: Chief, I'm sorry,
8 may I ask just one question?

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE SOTOMAYOR: Are you saying
11 that you have to always prove somebody intended
12 to commit the act, or do you have to just say
13 that they knew they were going to put someone
14 else in fear?

15 MR. ELWOOD: We are only arguing for a
16 knowledge standard, that they knew that the
17 words would cause fear.

18 JUSTICE SOTOMAYOR: Okay.

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

21 JUSTICE JACKSON: Yes, that's fine.
22 Thank you.

23 CHIEF JUSTICE ROBERTS: Okay. Thank
24 you, Mr. Elwood.

25 MR. ELWOOD: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Weiser.

2 ORAL ARGUMENT OF PHILIP J. WEISER

3 ON BEHALF OF THE RESPONDENT

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

6 True threats have always been
7 prosecuted without protection by the First
8 Amendment. Petitioner now seeks to impose a
9 specific intent element onto this inquiry that's
10 required neither by history nor precedent.

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

18 Requiring specific intent in cases of
19 threatening stalkers would immunize stalkers who
20 are untethered from reality. It would also
21 allow devious stalkers to escape accountability
22 by insisting that they meant nothing by their
23 harmful statements.

24 This matters because threats made by
25 stalkers terrorize victims and for good reason.

1 Ninety percent of actual or attempted domestic
2 violence murder cases begin with stalking. The
3 court below followed this Court's teachings from
4 Watts and Black that context is critical in
5 evaluating what constitutes a true threat.

6 The robustness of an objective,
7 context-driven inquiry means that this test
8 won't criminalize a joke taken the wrong way,
9 political advocacy, or hyperbole. It thus
10 protects statements that contribute to the
11 marketplace of ideas.

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

20 Imposing a specific intent requirement
21 would thwart the goals of the First Amendment,
22 enabling more harm and leading to less valuable
23 discourse.

24 I welcome your questions.

25 JUSTICE THOMAS: But Petitioner is

1 arguing, I think, a little -- I think a bit
2 more. Petitioner is also arguing that it has a
3 spillover effect of chilling protected speech,
4 not just that this is protected speech.

5 Now how would you respond to that?

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

17 JUSTICE THOMAS: But he -- he also --
18 he also argues that you wouldn't see necessarily
19 the chilling effect because those cases would
20 not be before you. That's what I'd like you to
21 respond to.

22 MR. WEISER: Thank you, Justice
23 Thomas. Justice Kagan got to a critical point.
24 The type of the speech that remains after the
25 objective, context-driven inquiry is speech that

1 doesn't come close to contributing to the
2 marketplace of ideas. As was said by Justice
3 Barrett, when you're talking about a serious
4 expression of an intent to cause physical
5 violence and harm someone, that's a high
6 standard. Coming very close to that standard
7 isn't the sort of speech that this Court has
8 protected under the First Amendment.

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

15 In what -- in what way is that
16 threatening, almost regardless of the tone?

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

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

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: "Come out --
3 come -- come out -- come out for coffee. You
4 have my number."

5 MR. WEISER: The content --

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

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

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

25 CHIEF JUSTICE ROBERTS: Okay. Say

1 this in a threatening way. One of the things he
2 was convicted of, it was an image of liquor
3 bottles, and there was a caption, "A guy's
4 version of edible arrangements."

5 (Laughter.)

6 MR. WEISER: So, again --

7 CHIEF JUSTICE ROBERTS: Say -- say
8 that in a threatening way.

9 MR. WEISER: So the threat here is
10 when you put them all together. When you take
11 one of these out of context or put it into a
12 different context, it means something different.

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

23 CHIEF JUSTICE ROBERTS: And under your
24 theory, the defendant couldn't say, right, the
25 first thing anybody would say, a child, an

1 adult, when someone is offended or even feels
2 threatened by their speech is, that's not what I
3 meant. What I meant was, if you stay on the
4 computer, you know, all -- all day long, it's --
5 it's -- well, I don't know if it's going to kill
6 you, but it's going to -- you know, it's not
7 good for you, and "come out for coffee" is an
8 invitation to get off the computer.

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

16 CHIEF JUSTICE ROBERTS: Okay. This
17 will be the last -- the last question.

18 Because you're putting it so much in
19 context, he had been doing this, this, and this,
20 could he be convicted for anything, saying
21 anything? "Good morning"? And, you know,
22 that's after however many months of doing this.

23 So, in other words, does the content
24 of the speech actually matter in the -- in the
25 way you're looking at it?

1 MR. WEISER: Yes. The content of the
2 speech that crossed the line was when it
3 escalated to a tone and to statements about her
4 life being at stake --

5 CHIEF JUSTICE ROBERTS: But --

6 MR. WEISER: -- "Die. Don't need
7 you," "You're not good for anybody."

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

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Well, you said
12 when it escalates in tone?

13 MR. WEISER: His messages over time
14 got more aggressive and started using language
15 that got to her physical safety.

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

19 MR. WEISER: The tone of the
20 statements were taken on by the language that
21 was used. When the language got scary and
22 violent and talking about her life, it was a
23 different matter.

24 Also, it's important to note there
25 were statements, "Nice display with your

1 partner, seeing you out and about," that also
2 gets to I'm being watched. For a victim in this
3 situation, it is entirely reasonable,
4 appropriate, to see this as terrifying, because
5 we know these stalking cases can and often do
6 turn violent.

7 JUSTICE ALITO: The statute talks
8 about the manner of the communication. So do
9 you say that the statute -- you interpret the
10 statute to mean that a person cannot be
11 convicted based on the manner of making
12 communications, the content of which is not in
13 themselves threatening?

14 Suppose someone follows a person like
15 C.W. around and is constantly popping up and has
16 a threatening look to the person and is
17 constantly saying, "Good morning, C.W.," "Good
18 afternoon, C.W.," "How are you now?"

19 The -- the content is benign, but the
20 manner is one that would cause a person to be
21 disturbed. Is that not prosecutable under this
22 statute?

23 MR. WEISER: There are two different
24 standards. There's the criminal statute, and
25 then there's the true threat First Amendment

1 requirement.

2 Under the statute, the individual has
3 to have intent in the general sense knowing what
4 the words mean, and there has to be significant
5 emotional distress to the individual, and a
6 reasonable person would have to experience
7 significant or serious emotional distress.

8 So, if the statements, as they were
9 said, would cause an individual to suffer
10 serious emotional distress and someone did
11 suffer that, that would be the standard under
12 the statute.

13 The First Amendment then says it has
14 to be a serious expression of an intent to cause
15 unlawful physical violence. It does strain my
16 imagination to plausibly imagine any
17 circumstance where "good morning" is enough to
18 constitute a serious expression of an intent to
19 cause physical violence.

20 JUSTICE ALITO: So a person could not
21 be -- is that an interpretation of the statute,
22 or is that a constitutional requirement?

23 A person cannot be convicted of
24 stalking based on communicating statements that
25 are not in themselves threatening in a manner

1 that is likely to be interpreted to be
2 threatening. That -- the First Amendment
3 doesn't allow that?

4 MR. WEISER: The First Amendment
5 requires, in order to prosecute a true threat,
6 that it be a serious expression of an intent to
7 cause harm.

8 JUSTICE SOTOMAYOR: I -- I'm sorry.
9 This -- this goes to the protective order issue.

10 You can engage in conduct, a
11 persistent following of someone, that would
12 violate a protective order. It wouldn't matter
13 what the person was saying or what they intended
14 to do when they were following them. They --
15 the conduct being proscribed is just the
16 stalking, the following that person.

17 And I think what Justice Alito is
18 saying, if there is a statute that says, if you
19 repeatedly follow someone or repeatedly reach
20 out to someone in a manner that causes them
21 fear, that that might be enough.

22 You're now putting a different overlay
23 on this, which is what the Virginia court did,
24 which is you -- your speech has to be
25 threatening. That's what Virginia is saying.

1 So I think we're dealing with a
2 different case when we're talking about pure
3 stalking from what Virginia is doing. And the
4 way it charged it was -- was to say it wasn't
5 just her serious emotional distress. She felt
6 in fear for her life, and so they took it as a
7 -- they said it was a true threat case, correct?

8 MR. WEISER: Correct, Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: So, if all we say
11 is this is a true threat case, because that's
12 the way it was tried and that's the gloss that
13 Virginia -- that -- not Virginia, I'm sorry,
14 what state is this?

15 MR. WEISER: Colorado.

16 JUSTICE SOTOMAYOR: Colorado. I'm
17 thinking of --

18 MR. WEISER: We like Virginia.

19 JUSTICE SOTOMAYOR: No, I -- I was
20 just thinking of the flag-burning case. It --
21 it controlled the place in my mind.

22 We don't have to opine on what a true
23 stalking statute is about that is not concerned
24 with speech, correct?

25 MR. WEISER: Yes. If I could explain

1 one minute here. There are three types of
2 stalking cases. There's the pure conduct ones
3 that Justice Gorsuch referred to earlier.
4 There's ones where there are threats, and I
5 thought that was the nature discussion. There's
6 also a third category, stalking, which is dealt
7 with very ably in the Duick, Lakier, and Volick
8 brief. That is a different analysis.

9 If I could get back to the civil
10 protective order and just for two --

11 JUSTICE GORSUCH: Well, I just want to
12 follow up on this before we leave it.

13 So Colorado could have pursued the
14 defendant here for stalking and secured a
15 conviction for that. Conduct wouldn't involve
16 any expressive activity at all, and you'd be out
17 -- out of -- out of the woods, right?

18 MR. WEISER: Had the conduct been
19 being following somebody around, that would have
20 been a different form of stalking case.

21 Here, the conduct were the statements
22 sent over Facebook Messenger. Sometimes you
23 hear the phrase "cyber stalking." The Colorado
24 statute reaches such activity if it meets the
25 relevant criminal statute and First Amendment

1 requirements.

2 JUSTICE GORSUCH: And then, second,
3 kind of back to the Chief Justice's questions,
4 you emphasized that context is really important
5 here. Content and context will do the work.

6 Why isn't the defendant's intentions
7 part of the context? How could it not be part
8 of the context?

9 We've had so many examples here how
10 words mean different things in different
11 contexts, and part of it is how they're
12 received, surely, but part of it has to be how
13 they were intended. Isn't -- isn't that part of
14 the context?

15 MR. WEISER: The defendant's approach
16 and, indeed, even their testimony, is relevant
17 to who the intended and foreseeable audience
18 was. If it offended the --

19 JUSTICE GORSUCH: No, I'm talking
20 about the message, not -- not to whom it was
21 directed. We -- forget about that. Put that
22 aside.

23 The words, "I'm going to kill you," or
24 -- I've forgotten what Mr. Elwood's mother said
25 to him --

1 (Laughter.)

2 JUSTICE BARRETT: "Drop dead."

3 JUSTICE GORSUCH: "Drop dead." Thank
4 you.

5 (Laughter.)

6 JUSTICE GORSUCH: Those words have
7 very different contexts among friends, among
8 colleagues, among family members, even among
9 strangers sometimes. I'm sure, if we went
10 through the comments section of any daily
11 newspaper today, we'd find some of those words.

12 Are they -- I mean, I'm just a little
13 concerned that by ignoring one aspect -- you're
14 asking us to really ignore one aspect of context
15 while you're resting on context. How does that
16 work?

17 MR. WEISER: The defendant's
18 statements, the defendant's experience, if you
19 look at the test, the relationship, the
20 statements in a prior -- in a previous exchange,
21 that all comes in. That is all relevant for the
22 reasons you said.

23 JUSTICE GORSUCH: But not his -- his
24 subjective beliefs?

25 MR. WEISER: The subjective belief

1 gets to something else. Someone can be under --

2 JUSTICE GORSUCH: That's not part of
3 the context in your world, right? We have to
4 say that's not relevant context? That's not
5 context?

6 MR. WEISER: Because it doesn't get to
7 the nature of the harm. Statements can be
8 objectively terrorizing to somebody. Someone
9 can say, I had no idea, I thought we were in a
10 relationship --

11 JUSTICE GORSUCH: But I'm correct in
12 understanding that, in your view, context cuts
13 off there?

14 MR. WEISER: Yes.

15 JUSTICE GORSUCH: Okay. And then last
16 question, I hope. We live in a world in which
17 people are sensitive and -- and maybe
18 increasingly sensitive. As a professor, you
19 might have issued a trigger warning from time to
20 time when you had to discuss a bit of history
21 that's difficult or a case that's difficult.

22 What do we do in -- in -- in a world
23 in which reasonable people may deem things
24 harmful, hurtful, threatening? And we're going
25 to hold people liable willy-nilly for that? I

1 mean, again, the Solicitor General says a
2 statement that's based on its content and
3 context, putting aside its intentions, I
4 suppose, that's threatening to a reasonable
5 person is inherently harmful.

6 What do we -- how do we talk about
7 history?

8 MR. WEISER: The first point I would
9 emphasize -- Justice Barrett made the point
10 well -- it has to be a serious expression of an
11 intent to cause unlawful physical violence. So
12 someone feeling uncomfortable --

13 JUSTICE GORSUCH: But we have to put
14 intentions aside? You tell me.

15 MR. WEISER: Correct.

16 JUSTICE GORSUCH: So I'll put that
17 aside?

18 MR. WEISER: Yes.

19 JUSTICE GORSUCH: All right. But just
20 in its content and context, not looking at
21 intentions --

22 MR. WEISER: Right.

23 JUSTICE GORSUCH: -- is harmful, that
24 has no First Amendment protection under the test
25 that's being purveyed here. And I would just,

1 again, put to you, aren't -- aren't a lot of
2 things harmful that we talk about and have to
3 talk about difficult, offensive to reasonable
4 people? Some of our history could count as
5 that. Some of the Court's cases might even
6 count as that.

7 MR. WEISER: Offensive is not the
8 standard.

9 JUSTICE KAVANAUGH: You're saying
10 physically harmful, right?

11 MR. WEISER: It has to be physically
12 harmful.

13 JUSTICE GORSUCH: Okay.

14 MR. WEISER: And this is a crucial
15 point. It gets to the -- a lot of the points
16 made in that FIRE brief aren't talking about
17 points --

18 JUSTICE GORSUCH: So I say -- so I say
19 they're physically --

20 MR. WEISER: -- where someone fears
21 physical violence.

22 JUSTICE GORSUCH: -- they're
23 physically harmful to me. They put me in fear.
24 And there are people, reasonable people, who
25 will say that about difficult subjects. So I

1 take the friendly amendment from my friend
2 across the bench and still ask you the question.

3 MR. WEISER: The question is, would a
4 reasonable person in that position, not the
5 eggshell defendant, if you will, would a
6 reasonable person experience statements as a
7 serious expression of an intent to cause
8 unlawful physical violence? That's a high
9 standard, and we would say it doesn't allow for
10 the sorts of concerns that you just articulated.

11 JUSTICE KAGAN: So, General, I want to
12 take it as a given that this is a high standard,
13 and two and a half years of sending somebody
14 unwanted emails, when that person has
15 consistently tried to block them and tried to
16 stop them, some of those emails being pretty
17 violent, "Die. Don't need you. F off
18 permanently"; others of those emails suggesting
19 pretty strongly that he is watching the person,
20 "Only a couple of physical sightings," "Was that
21 you in the white Jeep?"

22 So I want to take it as a given that
23 this can be objectively terrifying. Here's my
24 question for you, though. Why -- what would you
25 lose -- I mean, I think that there's a question

1 for both of you. Like, to Mr. Elwood, it's,
2 like, you know, tell me about the -- the -- the
3 cases that I should be concerned about.

4 But I think I have a flip side
5 question to you. Like, how could you not be
6 able to prove -- at least if it was a
7 recklessness standard, how could you not be able
8 to prove this case with a recklessness standard?

9 MR. WEISER: Three points. First, as
10 you picked up, whatever First Amendment standard
11 governs here governs in the civil context, which
12 includes the school threats that Justice Barrett
13 talked about; it includes domestic violence
14 cases, where a victim is afraid. And so the
15 loss here is not only in the criminal context.
16 The loss is in the civil context.

17 Second, as to what the loss is, it's
18 both delusional individuals and devious
19 individuals. A delusional individual who is a
20 stalker will often say, I believed we were in a
21 relationship, I thought what I was saying was
22 benign. And it's possible they could believe
23 that, and yet, once they're really rebuffed,
24 they can then turn violent, which means the
25 following: Do you have to wait until the person

1 actually engages in violence before you do
2 something about what is an objectively
3 terrorizing threat? And this is crucial for the
4 law to be able to protect.

5 JUSTICE BARRETT: Are you saying -- I
6 want to follow up on Justice Gorsuch's questions
7 to you about stalking. He was asking you about
8 physically following people, and -- and you said
9 Colorado has such a statute -- can I finish,
10 Chief?

11 CHIEF JUSTICE ROBERTS: Yes.

12 JUSTICE BARRETT: Are you saying that
13 you could not have prosecuted this under any but
14 this statute because it was solely verbal?

15 MR. WEISER: The evidence of physical
16 stalking here are the statements. There were no
17 independent sightings. She didn't know what he
18 looked like, so she didn't have evidence that he
19 actually was following her around, other than
20 his statements suggesting that he was.

21 JUSTICE BARRETT: So there was no way
22 that you could prosecute this without provoking
23 this First Amendment question --

24 MR. WEISER: The --

25 JUSTICE BARRETT: -- posed by this

1 statute?

2 MR. WEISER: -- the prosecution was
3 under the stalking law. They invoked the First
4 Amendment, saying these were statements. The
5 defense was these were true threats, and that's
6 how it was decided by the court of appeals.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: One brief question.
11 The -- you rely on the reasonable recipient
12 standard, reasonable person standard. How would
13 you -- and you did mention that the sender could
14 have been delusional.

15 How would you monitor the distance
16 between a reasonable recipient and a delusional
17 recipient in -- in establishing your context?

18 MR. WEISER: The reasonable recipient
19 ensures -- I referenced earlier to Justice
20 Gorsuch -- it not be an eggshell defendant
21 having essentially idiosyncratic
22 characteristics. So it's, in the position that
23 someone was in, what would a reasonable person
24 perceive vis-à-vis it being an expression of
25 physical violence?

1 JUSTICE THOMAS: You're putting a lot
2 of weight on that, and I think that's why you're
3 getting so many questions about intent. Your --
4 it's as though that demonstrates the -- how the
5 recipient feels, whether or not it is to be
6 considered a threat.

7 And you said that you -- you -- the
8 recipient is not eggshell, but how would you
9 determine that?

10 MR. WEISER: The way you determine
11 that is, if someone said, I specifically, as the
12 person, have these particular characteristics
13 that are more idiosyncratic, they wouldn't
14 count. As to the use of the standard, this is
15 what this Court uses in the Fifth Amendment
16 case, is someone in custody? It is also what is
17 required in a self-defense case, what would a
18 reasonable person in that situation view as a
19 serious cause to use self-defense?

20 So the law uses these standards all
21 the time and generally doesn't allow the
22 eggshell defendant to define the category.

23 JUSTICE THOMAS: I mean, I think
24 you're -- the problem you're going to run into
25 is the same one that Justice Gorsuch mentioned,

1 and that is it doesn't have to be eggshell, that
2 we're more hypersensitive about different things
3 now, and people could feel threatened in
4 different ways.

5 So I -- I don't know how you're
6 monitoring that as -- what if it's now that
7 people are more sensitive, that that is now
8 considered the reasonable person?

9 MR. WEISER: The sensitivity has to be
10 towards unlawful physical violence, and that is
11 something outside what might make someone
12 uncomfortable or even hurt their feelings. It's
13 a -- it's a --

14 JUSTICE THOMAS: I know, but some of
15 these statements the Chief Justice read to you
16 are not threatening in and of themselves, and
17 yet someone could be triggered by those
18 statements or hypersensitive about those
19 statements and feel threatened.

20 And I'm -- what we're trying -- what
21 I'm trying to figure out is, if we accept your
22 argument about context, how do we monitor that
23 reasonableness that seems to now be on a sliding
24 scale?

25 MR. WEISER: There is both the

1 requirement of a jury making determinations of
2 factfinder and independent plenary review, which
3 happened here, at the trial court and the court
4 of appeals. And I also would give you the lived
5 history we have of the last 50 years. Almost
6 every circuit uses an objective standard.

7 Now one could make a move, Justice
8 Thomas, don't judge it by the reasonable
9 listener; judge it by a reasonable speaker.
10 That would be an alternative objective standard
11 that would avoid the harms that I noted to
12 Justice Kagan.

13 CHIEF JUSTICE ROBERTS: Justice Alito?
14 Justice Sotomayor?

15 JUSTICE SOTOMAYOR: I -- I'm still a
16 bit confused by Justice Kagan's question and
17 your answer to her.

18 You accept that this man was
19 delusional. You said to her, I couldn't go
20 under recklessness. You couldn't prove -- the
21 prosecutor couldn't prove the case.

22 MR. WEISER: Let me respond to that.

23 I didn't get to that point. If you
24 wanted to apply a reckless standard, I think the
25 proper thing would be to remand it. To allow

1 the court of appeals that judgment and that
2 analysis wasn't under our standard. It wasn't
3 used. If that were the position to prevail, we
4 think remand to be appropriate.

5 JUSTICE SOTOMAYOR: I'm assuming he
6 was convicted and this -- one of the reasons for
7 his sentence for threatening his wife.

8 Obviously, the conviction was more
9 than enough to stop him from doing any more
10 threatening of his wife, and I'm assuming this
11 arrest was more than enough to stop him from
12 sending any more unwanted texts to this woman,
13 correct?

14 MR. WEISER: She -- she left the state
15 and --

16 JUSTICE SOTOMAYOR: No, I appreciate
17 --

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

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

23 My point is, at what point -- and I
24 think that's what Justice Thomas was saying --
25 do we, in not protecting the First Amendment,

1 say an objective standard alone is okay with
2 speech that relies always on context?

3 And, yes, I -- and I know there are
4 delusional people who kill individuals and we
5 want to protect people from that, but at what
6 point do we do it by defining crimes without
7 some sort of knowledge element by the person?

8 MR. WEISER: In Justice Thomas's
9 separate statement in *Elonis*, he said it would
10 be an odd result to put true threats in the most
11 protected First Amendment area.

12 Right now, private defamation cases
13 can proceed without any heightened scienter
14 requirement. The limitation on punitive damages
15 only applies on matters of public concern.

16 The fighting words context, those
17 prosecutions can proceed without a heightened
18 scienter requirement. Both of those situations
19 involve direct harm on individuals that happen
20 and can be life-changing.

21 JUSTICE SOTOMAYOR: But incitement
22 always required knowledge. Anyway, thank you,
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: No.

1 CHIEF JUSTICE ROBERTS: No?

2 Justice Gorsuch?

3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: His sentence here,
5 how much did his sentence here rest on -- or
6 maybe not how much -- was it relevant at
7 sentencing, his prior convictions for making
8 threatening communications in 2003 and then in
9 2011 as activity of statements that would be
10 threatening to anyone? I won't read them here.

11 MR. WEISER: The stalking statute
12 prescribes a one- to three-year sentence that
13 was enhanced up to six years because of the
14 prior convictions. Other evidence was
15 presented, including his mental health. The
16 judge went for four and a half years.

17 JUSTICE KAVANAUGH: Okay. And then,
18 at the beginning of your brief, you start quite
19 helpfully by saying, a too broad definition here
20 will limit protected speech, a too narrow
21 approach will harm the individuals and
22 communities terrorized and silenced by threats.

23 I certainly agree with that, and I
24 think the questions have explored that. I just
25 want to get you again on a recklessness

1 standard, what's the problems with a
2 recklessness standard from your perspective?

3 That seems to capture some of the
4 concerns you've heard while leaving plenty of
5 room, one would hope, to make sure threats are
6 captured before someone's killed or -- or
7 physically hurt.

8 MR. WEISER: Two answers. The first
9 answer is recklessness does require some proof
10 of what a defendant knew. He then or she then
11 would disregard it. But proving knowledge in a
12 case of someone who can say, because they're
13 untethered from reality, I didn't mean it, could
14 still allow them to escape accountability. And,
15 again, this would apply in both the civil and
16 the criminal contexts, so it has broad
17 applicability.

18 A second point I would note is
19 recklessness is the standard for public figures
20 in defamation cases, but that's about the
21 reputation of a public figure. Here, it's about
22 safety.

23 And the problem that I would note
24 vis-à-vis that standard is counterspeech was one
25 of the justifications. We're going to raise the

1 standard for public figures to recklessness
2 because they can defend themselves in the
3 marketplace of ideas.

4 Now the problem here, if you try to
5 use counterspeech to a threatening stalker, you
6 make it more likely that it will escalate
7 ultimately into life-threatening violence.

8 So we don't believe the case, if you
9 compare it on all fours to public figures in the
10 recklessness for defamation, it isn't of the
11 same kind of harm. Counterspeech isn't a
12 justification.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: Who is the
17 reasonable person? I mean, would it be just,
18 you know, as we might say in the Fifth Amendment
19 context for custody? Is it kind of a general
20 reasonable person? Or say, if something happens
21 on a college campus, is it the reasonable
22 college student, which might be different?

23 MR. WEISER: Or, as in Elonis, the
24 reasonable teenager on the internet in a
25 Facebook gamer group, one of the cases that was

1 cited then and now, it is in the context that
2 the person is in, and it's important because the
3 norms may be different. People may talk
4 differently on a sub gamer Facebook group.

5 JUSTICE BARRETT: Well, that's not
6 quite what I'm asking because I can look at a
7 college classroom, say, or a law school
8 classroom and I can say, if Justice Gorsuch or I
9 were sitting in that context, let's imagine a
10 professor who wants people to understand just
11 how vicious it was to be in the Jim Crow South
12 and puts up behind them on a screen a picture of
13 a burning cross and reads aloud some threats of
14 lynching that were made at the time.

15 A purely educational purpose in the
16 teacher's mind, but students feel physically
17 threatened. They fear for their safety because
18 they don't understand it. Whereas, if Justice
19 Gorsuch and I are looking at that situation,
20 we'd say, well, a reasonable person would
21 understand the educational context of that, so
22 how could the student think of it.

23 So I -- I -- I think context doesn't
24 get you all the way there. I think it's who is
25 the reasonable person. So who is it?

1 MR. WEISER: It's a reasonable person
2 in the situation, but, in that situation, an
3 educational setting, where there really is no
4 threat of direct physical violence to a person,
5 it would be objectively unreasonable for anyone
6 to see that as a true threat.

7 JUSTICE BARRETT: Black students
8 sitting in the classroom.

9 MR. WEISER: If it's not a -- a threat
10 of violence that the person is worried about
11 their safety --

12 JUSTICE BARRETT: But the person is
13 reading in the first person an account of what
14 was said and threats of lynching, so they're
15 using the first person and saying it.

16 MR. WEISER: I understand how it makes
17 them uncomfortable, but unless that person can,
18 again, reasonably perceive it as a threat to
19 their safety in that situation, it wouldn't be a
20 true threat.

21 JUSTICE BARRETT: So I guess what I'm
22 getting at is there's no protection built in.
23 We might have differences about who we think are
24 the eggshell audience or not, and I -- I was
25 just trying to get you to -- to answer in a way,

1 apart from context, whether there's any way to
2 take account of who the reasonable person is.

3 I mean, you know, maybe it's the case
4 that Justice -- Justice Gorsuch and I or Justice
5 Sotomayor and I could sit in that classroom and
6 think that we're reasonable people understanding
7 everything you say.

8 But maybe it's the case -- Justice
9 Thomas talked about changing attitudes. Maybe
10 it's the case that nowadays people would be more
11 sensitive to that and -- and people would say a
12 reasonable, you know, black college student
13 sitting in that classroom would interpret that
14 as threats, you know, that might materialize
15 into actual physical harm.

16 MR. WEISER: The context of a college
17 classroom or, to get back to rap music, a
18 concert makes it unreasonable to view yourself
19 as being threatened given what is going on, and
20 that, I do believe, would control.

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Yes. Can I just --
25 I just want to clarify just so that I can be

1 sure I understand.

2 So you were talking about the
3 reasonable person with Justice Barrett, and is
4 -- is your standard the reasonable person in
5 that situation would have perceived the
6 statements as a threat? Is that what you're
7 saying about the reasonable person?

8 MR. WEISER: I would say a reasonable
9 person in a classroom could not and would not
10 perceive general teaching as a true threat.

11 JUSTICE JACKSON: All right. But
12 there's no -- no element of this or no thought
13 about how the statement was meant. Your view is
14 that the subjective intent of the speaker is
15 irrelevant.

16 MR. WEISER: That's correct.

17 JUSTICE JACKSON: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Feigin?

21 ORAL ARGUMENT OF ERIC J. FEIGIN
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE RESPONDENT

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

1 Just to make clear what's on the
2 table, the question presented as framed by
3 Petitioner invokes only a specific intent and
4 knowledge question. The answer to the question
5 presented is, no, because, at a bare minimum,
6 recklessness suffices.

7 Everyone agrees there is a category of
8 unprotected speech known as true threats, and
9 everyone agrees that in order to fall in that
10 category, it has to be a statement that a
11 reasonable person not just could but would
12 interpret as a serious threat to do unlawful
13 violence.

14 And then we're basically just having a
15 policy debate about how much breathing room is
16 necessary. And I would urge this Court to allow
17 legislatures, many of which do adopt heightened
18 mens rea requirements because of precisely the
19 concerns that have been articulated, to have
20 that shake out on their own because there are a
21 number of interests on the other side.

22 I could take questions, or -- or do
23 you know what those are?

24 JUSTICE THOMAS: Just one quick
25 question, Mr. Feigin. Where does this

1 recklessness standard come from?

2 MR. FEIGIN: Well, to be clear, Your
3 Honor, our frontline position is that there
4 shouldn't be a recklessness standard at all.
5 It's not historical. It would just be a gloss
6 in the way that this Court, I think, has put a
7 gloss on obscenity and other doctrines because
8 of the essentially judicial policy assessment
9 that the First Amendment requires additional
10 breathing room.

11 But, here, we'd urge you that this
12 kind of inherently --

13 JUSTICE SOTOMAYOR: But you're saying
14 that the historical record supports, clearly
15 supports, that no mens rea is required?

16 MR. FEIGIN: Well, there --

17 JUSTICE SOTOMAYOR: That it's
18 negligence, an objective standard? What do I do
19 with the legion of English cases, American
20 cases, true threat cases, all of whom require
21 mens rea? Your --

22 MR. FEIGIN: Respectfully --

23 JUSTICE SOTOMAYOR: -- opposing
24 counsel was quite right that you take a few
25 stray statements from a few cases, but every

1 other case talks about a mens rea.

2 MR. FEIGIN: Well, respectfully, Your
3 Honor, we disagree about the history. He
4 basically relies on three buckets of history.

5 Number one are libel cases. Even
6 libel cases under modern doctrine don't have a
7 specific intent or knowledge requirement.

8 Number two are breach of --

9 JUSTICE SOTOMAYOR: You -- you hit --
10 you hit the nail on the head, modern cases. Go
11 on.

12 MR. FEIGIN: Well, the Court has not
13 deemed those to be controlling. I could address
14 the cases individually --

15 JUSTICE SOTOMAYOR: I don't think it's
16 worth it, Mr. Feigin.

17 MR. FEIGIN: -- but we'd be here a
18 while.

19 JUSTICE SOTOMAYOR: You're making --
20 you're making quite a broad statement that the
21 historical record supports your position --

22 MR. FEIGIN: Well, Your Honor --

23 JUSTICE SOTOMAYOR: -- when you
24 haven't pointed --

25 MR. FEIGIN: -- let me jump right to

1 it. The -- the only way in which he engages
2 in -- you know, putting aside breach-of-peace
3 cases that inform the objective fighting words
4 doctrine and the statutes that expressly
5 required intent to extort, if we just look at
6 the pure threatening letters, I'd commend to the
7 Court King against Girdwood, a 1776 case that's
8 about jury instructions that includes no jury
9 requirement of intent. Or let's take counsel's
10 --

11 JUSTICE SOTOMAYOR: Intent is
12 different than knowledge, and he's saying -- I
13 look a lot at the indictments on the cases that
14 you cited to, and all of them talked about a
15 willful purpose or a knowing purpose.

16 MR. FEIGIN: Your Honor, the only
17 things that were submitted to the jury in
18 Girdwood were knowledge of the contents of the
19 letter and whether those contents in themselves
20 conveyed a threat.

21 But let's look at another case, their
22 favorite case, the only case they really have on
23 threatening letters, Regina against Hill, which
24 is a later English case. In that case, there
25 was some dispute as to what the defendant

1 intended. Did he intend to burn standing corn,
2 corn in the field, or stacked corn, corn that
3 had already been cut and put in the barn and was
4 personal property?

5 And as to that question, the
6 defendant's intent was not -- the defendant
7 stated what he intended, which we do think can
8 relevantly inform the context, and -- but the
9 Court didn't treat it as dispositive. The Court
10 said, we'll see if we can --

11 JUSTICE SOTOMAYOR: Intent is never --
12 what a defendant --

13 MR. FEIGIN: -- interpret the letter
14 that way.

15 JUSTICE SOTOMAYOR: -- says is never
16 dispositive. It's always contextual. The issue
17 is that an objective standard keeps out, as it
18 happened in the trial here, the defendant's
19 understanding.

20 MR. FEIGIN: Well, Your Honor, we
21 don't think that a defendant's intent in sending
22 a communication --

23 JUSTICE SOTOMAYOR: Not intent.

24 MR. FEIGIN: -- is categorically
25 irrelevant.

1 JUSTICE SOTOMAYOR: Knowledge.

2 Knowledge.

3 MR. FEIGIN: We don't think that the
4 defendant's intent or knowledge is necessarily
5 irrelevant. Elonis got on the stand and
6 testified as to what he was thinking.

7 JUSTICE GORSUCH: Hold on.

8 MR. FEIGIN: What he said was --

9 JUSTICE GORSUCH: You just said it's
10 not necessarily irrelevant?

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

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

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

17 JUSTICE GORSUCH: Briefly.

18 MR. FEIGIN: -- just sort of not leave
19 it abstractly hanging.

20 JUSTICE GORSUCH: Yeah.

21 MR. FEIGIN: Let me -- let me just
22 talk about two different things. One is what a
23 speaker is thinking at the time the speaker
24 makes the statement is relevant in the same way
25 an objective inquiry into, like, reasonable

1 suspicion or probable cause, you might take into
2 account what the officer was thinking when he
3 stopped the car because that would just inform
4 what a reasonable person might think.

5 Then we've got the, I think --

6 JUSTICE GORSUCH: Okay. I -- I -- I
7 take that point.

8 MR. FEIGIN: Okay.

9 JUSTICE GORSUCH: But even that wasn't
10 permitted here, right? I mean, no evidence of
11 his knowledge was permitted.

12 MR. FEIGIN: Well, Your Honor, what I
13 think he wanted to introduce was evidence that
14 might go to something like mental delusions he
15 was suffering that he was having a
16 conversation --

17 JUSTICE GORSUCH: Whatever. He wasn't
18 allowed to produce any evidence about his mens
19 rea. And I think you've just admitted that,
20 even under your version of the objective
21 standard, that's relevant contextual evidence, I
22 think.

23 MR. FEIGIN: It can be, and to the
24 extent he was forbidden from raising the
25 statement by --

1 JUSTICE GORSUCH: That -- that was
2 error.

3 MR. FEIGIN: The -- I -- Your Honor,
4 I'm not going to defend a particular evidentiary
5 ruling --

6 JUSTICE GORSUCH: All right.

7 MR. FEIGIN: -- in this particular
8 prosecution.

9 JUSTICE GORSUCH: Okay. All right.
10 Let me -- let me back up and just ask you
11 another question about the -- the history,
12 because I read it a little bit differently than
13 you do, I -- I think.

14 I -- I look at -- you said Girdwood,
15 but, even there, the jury was asked whether he
16 knew the contents of what he wrote and whether
17 the terms of the letter conveyed an actual
18 threat. So there is knowledge there, I think.

19 Boucher was heavily relied on by you
20 and your friends. But the next sentence you
21 don't quote is: "No one who received the letter
22 could have any doubt as to what the writer meant
23 to threaten."

24 And I guess I just put the question to
25 you this way: Criminal law, vicious will has

1 been an essential part of it. This Court's made
2 that clear since *Morrisette*. And I'm just not
3 aware of many circumstances in which someone can
4 be sent to jail for four years, found guilty of
5 a felony, without any evidence of *mens rea*
6 coming before the jury.

7 MR. FEIGIN: So, Your Honor, I think
8 that the *Morrisette* presumption is a presumption
9 about legislative intent. And legislatures, to
10 be clear, don't have to adopt an objective
11 standard. This Court's opinion in *Elonis*
12 suggests that the --

13 JUSTICE GORSUCH: I understand that.

14 MR. FEIGIN: -- that Congress could do
15 so.

16 JUSTICE GORSUCH: I appreciate that.
17 But you'd -- you'd agree it would be a very
18 unusual law in -- in -- in -- in this country
19 for a felony not to involve any question of *mens*
20 *rea*, highly unusual?

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

1 Number one, you know, just -- number
2 one is that it enables very devious defendants
3 -- again, when Elonis did get in on the -- did
4 get on the stand, he said, I didn't care what
5 other people thought. And his actual posts
6 invoked the First Amendment and true threats
7 doctrine.

8 Number two -- and this applies to any
9 standard, Justice Kavanaugh, including
10 recklessness, but it's obviously much worse with
11 specific intent. It impedes law enforcement
12 from actually arresting and bringing charges at
13 an early stage. They have to wait a lot longer
14 for the objective evidence to build up.

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

1 get a conviction. And the reason --

2 CHIEF JUSTICE ROBERTS: Just to make
3 sure --

4 MR. FEIGIN: Yeah.

5 CHIEF JUSTICE ROBERTS: -- I
6 understand, you think someone can be convicted
7 for saying, "I wish someone would kill you"?

8 MR. FEIGIN: Your Honor, repeated
9 statements of that sort -- for example, the
10 Court might look at Elonis, who was reconvicted
11 on -- who was just recently reconvicted for
12 convict -- for --

13 CHIEF JUSTICE ROBERTS: Okay. But --

14 MR. FEIGIN: -- threatening a
15 Assistant U.S. Attorney, his ex-wife, and his
16 ex-girlfriend.

17 CHIEF JUSTICE ROBERTS: Okay. So, if
18 it's, "I wish someone would kill you," and the
19 person who said that doesn't get to testify and
20 say what he meant, he can say, well, of course,
21 I didn't mean it, and here's why I didn't mean
22 it, or something like that.

23 MR. FEIGIN: Oh, he -- he can testify
24 to that, and the jury can see what -- what they
25 think of it. I -- I assume it's okay if I

1 answer your question.

2 CHIEF JUSTICE ROBERTS: Well, I think
3 I'll let myself go on.

4 (Laughter.)

5 MR. FEIGIN: Of -- of course, he
6 can -- of course, he can, Your Honor, but my
7 point is they have to -- the -- first of all,
8 we're never doing these things in isolation.
9 Context always matters. And the prosecution
10 needs to build up enough circumstantial evidence
11 because, if we don't actually manage to convict,
12 we have put the victim not only through the
13 rigors of a trial, the lesson the victim draws
14 is even the law can't protect me.

15 And in these cases, that is very
16 important and should at least allow legislatures
17 to have a mens rea of recklessness, which is
18 something that, if you answer the question
19 presented yes, which would be the only basis for
20 reversing the judgment below, legislatures would
21 no longer be empowered to do.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 Justice Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: Would I be right, Mr.
4 Feigin, that there's a large difference between
5 saying that in most cases, a person should be
6 allowed to take the stand and testify as to his
7 state of mind and, on the other hand, saying
8 that a prosecutor has to prove something about
9 his state of mind, in other words, the first
10 just going to a general sense of context about
11 what a reasonable observer might think about
12 the -- the conduct or the speech and the second
13 being an element of the offense? There's a big
14 difference between those two?

15 MR. FEIGIN: That's absolutely right,
16 Justice Kagan, and that, I think, informs the
17 discussion I was having with Justice Gorsuch,
18 which is, I mean, the speakers there, the
19 speaker intends to convey something that may not
20 only say something about how a reasonable
21 observer would perceive it but may give you some
22 additional context as to, for example, if it's a
23 spoken threat, tone, or whatever.

24 JUSTICE KAGAN: I'm -- I'm wondering
25 what you think of this criminal/civil dichotomy

1 in this context because I think, all -- all --
2 although you say -- there's no independent
3 constitutional rule that there can't be a -- a
4 crime without knowledge or even recklessness,
5 yet we are uncomfortable with the thought,
6 uncomfortable enough that when -- we say, you
7 know, we have to be really convinced that the
8 legislature wanted that. That's a separate
9 issue, it seems to me, from this First Amendment
10 issue, or is it?

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

16 MR. FEIGIN: Well, I -- I agree that
17 they're separate inquiries, Your Honor. For a
18 category of unprotected speech, it's just
19 unprotected, and the legislature can either
20 provide for civil or criminal liability.

21 The instinct that I think you're
22 channeling that we're uncomfortable with in
23 criminal law finds its way into other doctrines.
24 Number one would be the presumption of mens rea
25 that I was discussing a little bit earlier that

1 the Court applied in *Elonis* and made clear in
2 *Elonis* was not deciding the separate
3 constitutional issues.

4 And another one would be -- and you
5 can really see this if you look back at the old
6 cases like -- older cases like *New York Times*
7 against *Sullivan*, that the criminal law comes
8 with additional constitutional protections.

9 In the Fifth and Sixth Amendment, you
10 need a unanimous jury, you need proof beyond a
11 reasonable doubt. And precisely for that reason
12 is why *New York Times* against *Sullivan* was
13 actually more concerned about civil liability
14 than criminal liability.

15 As far as the broader distinction
16 where I think counsel for the other side is
17 suggesting this isn't going to affect civil
18 protection orders, I don't really understand
19 why.

20 I mean, I suppose the Court could just
21 say that in its opinion and that would be
22 helpful. But there's no logical basis for
23 distinguishing between a civil protection order
24 that depends for its definition on some modicum
25 of proof that somebody committed an actual

1 criminal offense which must be defined by
2 specific intent or knowledge and -- and the --
3 the actual criminal law question that we're
4 debating here.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: It seems like, in
10 figuring out the mens rea issue, we're making
11 quasi-policy judgments about where to draw the
12 line, and, in thinking about that, you alluded
13 to this, but I'd be interested in you just
14 telling us, from the federal government's
15 perspective, what are the problems that you see
16 that would be caused by adopting Petitioner's
17 rule? Like real concrete kinds of cases that
18 would go unarrested, unprosecuted.

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

21 JUSTICE KAVANAUGH: Yeah. Well, take
22 --

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

24 JUSTICE KAVANAUGH: -- take a minute
25 or two.

1 MR. FEIGIN: -- to expand on it a bit
2 more, you know, number one, we -- there are
3 delusional stalkers -- or not just stalkers,
4 like delusional threateners, and we have to
5 accept their harms. There are also devious
6 ones, like Elonis. I'd commend to the Court
7 looking back at some of the statements he made
8 that are recounted in the Court's opinion in
9 that case. We clearly see someone trying to toe
10 the line, and that's exactly what these people
11 do, and we're not prosecuting them on the basis
12 of one statement in isolation, like "I'm
13 going" -- you know, "I" -- "I hope that someone
14 kills you."

15 It's that combined with knowledge of
16 someone's address, et cetera, that just walk
17 right up to the line and then they hope that
18 they can get off scot-free because of some
19 heightened intent requirement.

20 Number two is that, as I was
21 suggesting earlier -- and this is true of both
22 recklessness and knowledge and specific intent
23 but obviously more true the higher you get up
24 the mens rea chain -- because we're going to
25 have to prove subjective mindset through

1 circumstantial evidence, which we're allowed to
2 do, but that's really all we're going to have.
3 We're going to have the statements themselves,
4 and if we're talking about an online threats
5 case, then that's going to be about it.

6 So we have to wait quite a while
7 before the statements rise to the level where we
8 are comfortable bringing the prosecution and
9 sure that we're going to get a guilty verdict.
10 And we need to be more sure in this context than
11 we feel like we need to be necessarily in other
12 contexts because --

13 JUSTICE KAVANAUGH: Do you consult
14 with the victims on that?

15 MR. FEIGIN: Your Honor --

16 JUSTICE KAVANAUGH: You said you were
17 worried about the victims. Do you consult with
18 the victims, like, no, go ahead?

19 MR. FEIGIN: Your Honor, in some
20 cases, we might, and in other cases, we might
21 have a reluctant victim, but I think the -- the
22 critical point is, no matter what, we're going
23 to need the victim to testify, and that's going
24 to be an ordeal.

25 We're going to need the victim -- you

1 know, the victim will be aware that the trial is
2 ongoing. There -- there's a brief from the
3 victim in this case that details some of these
4 harms. And if we're unable to get a conviction,
5 that's going to send a message to the victim
6 that I'm on my own, the law can't protect me,
7 notwithstanding whatever Band-Aid they want to
8 put on civil protection orders, which themselves
9 aren't going to last forever and raise
10 substantial due process concerns and would be
11 called into question by the rule that Petitioner
12 is urging, unless we're going to draw some kind
13 of illogical line that's inconsistent with this
14 Court's precedent, as Justice Kagan has -- I --
15 I think her questions have -- have gotten at
16 today.

17 JUSTICE KAVANAUGH: Okay. One -- one
18 last question, which is, are you aware of
19 statistics or studies -- and this would be hard
20 -- but of murders, school shootings, domestic
21 violence incidents that perhaps could have been
22 prevented if threats had been taken more
23 seriously beforehand?

24 MR. FEIGIN: I'm not sure, Your Honor.
25 I mean, I -- I don't have any numbers for you.

1 I can tell you -- and I -- I think this probably
2 reflects the experience from which your question
3 draws -- is that there is frequently after one
4 of these horrific incidents some question of,
5 why didn't you -- you know, why didn't you
6 intervene, why didn't you respond earlier?

7 And I imagine Petitioner's counsel is
8 about to get up and say, well, you can
9 intervene. You can send an agent over to check
10 out what's going on.

11 And we did exactly that in Elonis.
12 And what happened? He sent another threat, the
13 threat against little agent lady, and we had to
14 charge that -- that threat too. It did not
15 deter him. It did not stop him. We recently
16 reconvicted him for another series of threats,
17 including threats to an Assistant U.S. Attorney.

18 So these -- it is very important that
19 the prosecution have some ability to intervene
20 at an earlier stage. And legislatures shouldn't
21 be precluded from making the judgment that those
22 kinds of harms are more important, particularly
23 in the case of reckless defendants who decide
24 that they will inspire fear in others to further
25 their own selfish ends.

1 We successfully ran the Boston
2 Marathon on Monday, thankfully. If someone had
3 called up to the police station and said, you
4 know, I am -- on the tenth anniversary, I am
5 Tsarnaev Part II, I don't think that the person
6 should be able to get off for making a threat
7 simply by saying that he thought the Boston
8 police department had a better sense of humor.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 Justice Jackson?

13 JUSTICE JACKSON: Yes, but let me just
14 ask you, I -- I perceive a difference between
15 your position and the government's -- excuse
16 me -- and Colorado's position as to whether or
17 not the defendant can bring in that evidence, so
18 I just want to be clear on that. This is a
19 point that Justice Gorsuch made and Justice
20 Kagan made.

21 In your very last hypothetical, would
22 that defendant be allowed to at least testify to
23 his state of mind in making those threats?

24 MR. FEIGIN: Yes, Your Honor, but I do
25 want to clearly differentiate between two forms

1 of subjective mens rea the -- the type things
2 that might come in.

3 One is just evidence of what the
4 defendant was thinking when the defendant sent
5 the statement. That sort of thing could come
6 in.

7 But evidence about delusions and
8 illnesses and just the statement that "I have
9 some sort of mental deficiency that impairs me
10 from understanding what a reasonable person" --
11 "how a reasonable person would interpret my
12 statements," the Court made clear in Clark
13 against Arizona that a defense of mental illness
14 or mental incapacity doesn't have to negate
15 criminal liability in the first instance. It
16 could be channeled into some kind of insanity
17 defense.

18 And what the defendants in -- the
19 defendant in this case and defendants generally
20 are trying to do is have their cake and eat it
21 too. They don't want to claim that they're
22 insane, so -- and then they claim that they
23 should be able to defend against mens rea based
24 on asserted mental infirmities --

25 JUSTICE JACKSON: But your --

1 MR. FEIGIN: -- of the sort I just
2 described.

3 JUSTICE JACKSON: -- your -- your
4 view, you stand with Colorado in -- insofar as
5 you're saying the government would only have to
6 prove the objective reasonableness -- reasonable
7 person standard and that the government would
8 not have to show anything about subjective
9 intent even if evidence related to subjective
10 intent was admitted.

11 MR. FEIGIN: As a constitutional
12 matter, we think that, you know, back to what I
13 was saying to Justice Kagan, the -- as a
14 constitutional matter, under the First
15 Amendment, we think the only thing that the
16 elements would require is that a reasonable
17 person would, not just that some person could,
18 but a -- a reasonable person necessarily would
19 interpret the statement -- a reasonable person
20 would -- beyond a reasonable doubt is what I
21 mean by "necessarily" -- interpret the
22 statements as a threat of unlawful violence.

23 That's the constitutional floor. Many
24 legislatures go above it, but they don't
25 absolutely have to for all of the reasons I was

1 expanding on with Justice Kavanaugh. Society
2 doesn't need to accept that these harms are
3 necessarily going to occur and allow people to
4 in -- inflict them --

5 JUSTICE JACKSON: Thank you.

6 MR. FEIGIN: -- and they can cause --
7 yeah.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Mr. Elwood?

11 REBUTTAL ARGUMENT OF JOHN P. ELWOOD

12 ON BEHALF OF THE PETITIONER

13 MR. ELWOOD: Just a few points. The
14 burden is on the proponents of restrictions on
15 speech to justify it both as a legal matter, as
16 a constitutional matter, and as a -- as the
17 practicalities of bringing it. I think the
18 burden is on them to show that it would cause a
19 problem.

20 On the constitutional end, I would say
21 that, you know, to the extent that you think
22 that the sides are in equipoise about tradition
23 and history and doctrine, the tie goes to
24 speech. And I think that they aren't.

25 I think that when you have on one hand

1 Virginia versus Black and when you have in other
2 cases, like Regina versus Hill, where the
3 government admitted that they considered the
4 subjective intent, they didn't just look at the
5 reasonable meaning of the words, they looked to
6 see what he meant by them in order to determine
7 whether it was a threat, and if I remember
8 correctly, they directed a directed verdict of
9 acquittal as a result.

10 In terms of practical implementations,
11 when Colorado argues that the majority rule is
12 an objective one, that's talking about the
13 federal constitutional rule. If you look at the
14 majority of courts of appeals, they say that's
15 the constitutional rule.

16 But the most common mens rea for
17 threat statutes is purpose or intent. More than
18 20 states, their main threat statute uses
19 purpose or intent. I'm sure more have
20 recklessness. And, again, they haven't shown
21 it's a problem in any -- in any of those states.

22 The federal government has been living
23 under this rule since *Elonis*, and the examples
24 that the government gives are devious
25 defendants, you know, people couching things as

1 wishes and so forth.

2 I would say that the difference should
3 not be that difference between an objective
4 standard and a subjective intent because, after
5 all, you have to prove under an objective
6 standard when somebody says, I wish you would
7 die, that they -- that, you know, you would have
8 to say, well, he means that to mean I'm going to
9 kill you.

10 And the only difference, ordinarily,
11 when you were talking about how you prove to the
12 jury, you prove it the same way either way. The
13 only difference is whether or not the defendant
14 gets to put forward their explanation of what
15 those words mean.

16 And Justice Scalia, writing for the
17 Court in United States versus Williams, said, in
18 a speech case, child pornography, courts and
19 juries every day pass upon knowledge, belief,
20 and intent having before them no more than
21 evidence of the defendant's words and conduct
22 from which an ordinary human experience mental
23 condition may be inferred.

24 And, again, for somebody saying, I
25 wish you would die, he might get up there and

1 say, oh, you know, I -- I thought it in the most
2 benign way possible, but the question is, did
3 you think that that would cause that person
4 fear.

5 And if they -- if they can say, oh,
6 well, I emailed this person 20 times saying I
7 wish that they would die, but I didn't mean for
8 them to feel fear about it, the jury can draw
9 the conclusion that most people would conclude
10 -- that most people would draw that the guy is
11 guilty as sin.

12 Similarly, the favorite excuse of --
13 of regulators is that people could just get up
14 and say, it's a joke, but if you emailed the
15 Boston Marathon and say, I'm going to be
16 Tsarnaev Part II, and then you don't get to just
17 say, it was a joke, the question is, did he
18 think you would cause harm or, in the
19 government's standard, you know, did they
20 disregard, consciously disregard, the risk that
21 it would -- it would put people in fear.

22 There's only one way to answer that
23 question. So, again, this is a rule that isn't
24 going to affect a lot of convictions -- I think
25 most convictions will come out the same way --

1 but it will affect speech beneficially in much
2 more ways. It will have an outsize impact
3 because, again, the focus is on the thing that
4 matters, it has been a bulwark in speech cases,
5 the thing that speakers know, their intent.
6 They don't know, you know, what a reasonable
7 person standard means.

8 We could talk about it for another
9 hour and still not know who a reasonable person
10 is in this case or how a reasonable person would
11 interpret that, whereas the subjective intent,
12 as the Williams opinion put it, that's a
13 true-or-false matter. That's something juries
14 decide every day.

15 If there are no further questions?

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 12:06 p.m. the case was
19 submitted.)

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1	91:17 93:5 98:25 99:3 actually ^[10] 18:15 41:10 44:22 52:11 56:24 70:1,19 93:12 95:11 98:13 addition ^[3] 6:6 7:20 45:13 additional ^[3] 85:9 96:22 98:8 address ^[3] 7:18 86:13 100:16 addressed ^[1] 41:11 admitted ^[3] 90:19 106:10 108:3 adopt ^[3] 43:15 84:17 92: 10 adopting ^[1] 99:16 adult ^[1] 56:1 advance ^[1] 46:3 advocacy ^[1] 51:9 advocacy/incitement ^[1] 37:17 affect ^[3] 98:17 110:24 111: 1 affected ^[1] 31:2 affection ^[1] 54:17 affirm ^[1] 21:5 afford ^[1] 30:13 afraid ^[2] 55:21 69:14 afternoon ^[1] 58:18 age ^[1] 5:5 agent ^[2] 103:9,13 aggressive ^[1] 57:14 agree ^[7] 13:19 21:10 36: 15 37:8 77:23 92:17 97:16 agrees ^[2] 84:7,9 ahead ^[2] 16:12 101:18 alarm ^[1] 42:17 ALITO ^[24] 13:10 14:4,18, 23 15:2 16:10,13 17:1,24 18:19,22 19:8 31:25 32:21, 22 34:10,12 35:20,25 58:7 59:20 60:17 74:13 95:25 Alliance ^[1] 40:2 allow ^[9] 50:21 60:3 68:9 72:21 74:25 78:14 84:16 95:16 107:3 allowed ^[4] 90:18 96:6 101: 1 104:22 allowing ^[1] 45:8 allows ^[1] 9:2 alluded ^[1] 99:12 almost ^[2] 53:16 74:5 alone ^[1] 76:1 aloud ^[1] 80:13 already ^[4] 4:23 41:15 45: 24 88:3 alternative ^[1] 74:10 although ^[2] 25:14 97:2 ambiguities ^[1] 17:9 ambiguity ^[1] 45:11 ambiguous ^[1] 17:10 Amendment ^[40] 5:24 6:2 11:18,19,24 12:10 14:9 19: 11 21:23 26:14,23 27:8,13 28:2,11 39:3,3 50:8 51:16,	21 53:8 58:25 59:13 60:2, 4 62:25 66:24 68:1 69:10 70:23 71:4 72:15 75:25 76: 11 79:18 85:9 93:6 97:9 98:9 106:15 Amendment's ^[1] 3:13 American ^[2] 15:25 85:19 amici ^[1] 46:2 amicus ^[6] 1:23 2:11 20:20 40:2 44:20 83:22 among ^[5] 24:2 64:7,7,8,8 amount ^[3] 48:10,12 54:24 analogize ^[1] 38:11 analogue ^[1] 4:10 analogy ^[1] 4:7 analysis ^[3] 7:13 62:8 75:2 analyze ^[1] 33:8 anniversary ^[1] 104:4 annual ^[1] 30:6 another ^[8] 29:16 46:17 87: 21 91:11 98:4 103:12,16 111:8 answer ^[12] 22:7 41:16 42: 18,20 46:14 74:17 78:9 81: 25 84:4 95:1,18 110:22 answering ^[1] 25:18 answers ^[1] 78:8 anybody ^[3] 40:4 55:25 57: 7 Anyway ^[2] 18:23 76:22 apart ^[2] 29:8 82:1 appeals ^[4] 71:6 74:4 75:1 108:14 APPEARANCES ^[1] 1:16 applicability ^[1] 78:17 application ^[1] 33:11 applied ^[3] 13:20 18:5 98:1 applies ^[2] 76:15 93:8 apply ^[5] 8:22 35:7,16 74: 24 78:15 applying ^[1] 33:18 appreciate ^[4] 30:8 45:1 75:16 92:16 approach ^[2] 63:15 77:21 appropriate ^[2] 58:4 75:4 approve ^[1] 20:10 April ^[1] 1:10 area ^[4] 38:3 40:14,19 76: 11 areas ^[3] 28:4 37:11,23 aren't ^[5] 67:1,1,16 102:9 107:24 argued ^[1] 19:17 argues ^[2] 52:18 108:11 arguing ^[3] 49:15 52:1,2 13 3:4,7 10:22 11:4,5,24 14:24 17:21 27:7,8 29:2 30:22 35:4 48:6 50:2 73: 22 83:21 107:11 arise ^[1] 27:23 Arizona ^[1] 105:13 around ^[8] 25:9,12 32:20 42:8,14 58:15 62:19 70:19	arrangements ^[1] 55:4 arrest ^[3] 9:14,14 75:11 arrested ^[1] 30:11 arresting ^[1] 93:12 arrests ^[1] 29:19 art ^[1] 36:20 article ^[1] 30:4 articulated ^[2] 68:10 84:19 aside ^[5] 63:22 66:3,14,17 87:2 aspect ^[2] 64:13,14 asserted ^[1] 105:24 assess ^[1] 23:1 assessment ^[1] 85:8 Assistant ^[2] 94:15 103:17 associating ^[1] 28:2 assume ^[1] 94:25 assuming ^[3] 25:17 75:5, 10 ate ^[1] 32:11 attempted ^[2] 21:5 51:1 attention ^[1] 54:16 attitudes ^[1] 82:9 Attorney ^[3] 1:19 94:15 103:17 auctioneer ^[1] 18:8 audience ^[7] 5:11 29:6 35: 2,9 40:7 63:17 81:24 author ^[2] 34:15,19 author's ^[1] 33:5 autistic ^[1] 45:1 automatically ^[1] 40:12 availability ^[1] 4:22 avoid ^[1] 74:11 aware ^[4] 28:10 92:3 102:1, 18 away ^[4] 5:22 6:4 43:9 44:7 awful ^[1] 38:16	2 105:23 basic ^[1] 11:23 basically ^[4] 8:5 12:22 84: 14 86:4 basis ^[8] 16:23 20:23 21:6 28:15 37:6 95:19 98:22 100:11 beforehand ^[1] 102:23 begin ^[4] 8:25 17:8 41:13 51:2 beginning ^[1] 77:18 behalf ^[8] 1:17,20 2:5,8,15 3:8 50:3 107:12 behind ^[2] 25:20 80:12 belief ^[2] 64:25 109:19 beliefs ^[1] 64:24 believe ^[5] 16:19 23:6 69: 22 79:8 82:20 believed ^[1] 69:20 Believers ^[1] 38:19 believes ^[1] 54:16 below ^[4] 9:12 21:3 51:3 95:20 bench ^[1] 68:2 Benedict ^[2] 16:2,3 beneficially ^[1] 111:1 benign ^[3] 58:19 69:22 110: 2 best ^[5] 4:3 24:6 29:23 44: 3 45:10 better ^[2] 24:14 104:8 between ^[14] 24:22 27:11, 16 32:10 37:16 44:13 71: 16 89:12 96:4,14 98:23 104:14,25 109:3 beyond ^[3] 42:12 98:10 106:20 bias ^[1] 36:9 Bible ^[1] 38:19 big ^[6] 15:9 17:12 28:18 43: 6 45:21 96:13 BILLY ^[1] 1:3 bit ^[9] 22:3 38:1 52:1 65:20 74:16 91:12 97:25 99:20 100:1 Black ^[13] 4:14 5:15,16 15: 16 22:19 32:3 44:3 45:6, 11 51:4 81:7 82:12 108:1 block ^[1] 68:15 bodily ^[1] 44:22 body ^[1] 28:11 bomb ^[1] 38:24 bond ^[1] 30:13 Boston ^[3] 104:1,7 110:15 both ^[10] 35:5 37:15 51:19 69:1,18 73:25 76:18 78:15 100:21 107:15 bottles ^[1] 55:3 bottom ^[4] 4:12 20:14,16 25:1 Boucher ^[1] 91:19 breach ^[4] 7:22 8:6 16:1 86:8 breach-of-peace ^[1] 87:2
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