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Supreme Court of New Jersey

No. A-20-22 (086617)

STATE OF NEW JERSEY, *Plaintiff-Appellant*, v. **CALVIN FAIR,** *Defendant-Respondent*.	**CRIMINAL ACTION** ON APPEAL AS OF RIGHT FROM THE APPELLATE DIVISION, SUPERIOR COURT, DOCKET NO. A-0913-19 *Before:* Clarkson Fisher, Jr., P.J.A.D. Heidi Willis Currier, J.A.D. *and* Patrick DeAlmeida, J.A.D. ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY, INDICTMENT NO 15-08-1454. *Before:* Lisa P. Thornton, A.J.S.C. Vincent J. Falcetano, Jr., J.S.C. *and* Dennis R. O'Brien, J.S.C. and a jury

SUPPLEMENTAL BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

The American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this supplemental brief, pursuant to this Court's request conveyed by Letter of Clerk dated June 30, 2023, addressing the United States Supreme Court's decision in *Counterman v. Colorado*, 600 U.S. ___, 216 L. Ed. 2d 775 (2023).

ARGUMENT

I. BECAUSE CALVIN FAIR'S SPEECH CONSTITUTED POLITICAL ADVOCACY AND PROTEST AGAINST THE GOVERNMENT, *COUNTERMAN*'S RATIONALE SUPPORTS THE CONSTITUTIONAL REQUIREMENT THAT HE MUST BE SHOWN TO HAVE ACTED WITH SPECIFIC INTENT TO PLACE THE VICTIM IN FEAR OF BODILY HARM OR DEATH.

In *Counterman v. Colorado*, 600 U.S. ___, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), the United States Supreme Court clearly established that for a criminal prosecution of an allegedly threatening communication to be constitutional, "the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements." *Id.*, slip op. at 1. "That rule is based on fear of 'self-censorship'—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements." *Id.*, slip op. at 8 (quoting *New York Times v. Sullivan*, 376 U. S. 254, 279 (1964)).

Although the constitutional requirement of a heightened *mens rea* in threat prosecutions had certainly been implied in prior cases, *Counterman* restated it in unambiguous terms.

The Court held that as a default matter, however, that it is usually sufficient under the First Amendment that the prosecution establish recklessness — a conscious disregard of a significant risk that the communication would be viewed as threatening violence — but did not require either of the higher subjective levels of *mens rea*: purpose or knowledge. *Counterman*, slip op at 5. If that were the totality of Court's teaching in this area, then one could certainly anticipate the State's argument that Calvin Fair's conviction should be sustained, since the part of the jury charge under N.J.S.A. 2C:12-3(a) that the Appellate Division found unconstitutionally overbroad, whether he made that threat "in reckless disregard of the risk of causing such terror," would appear to comply with the requisite level of *mens rea*.

The Court said more, however. The Court in *Counterman* expressly noted and reaffirmed the many cases in which it had, in other contexts, "spoken in terms of specific intent, presumably equivalent to purpose or knowledge" and "demanded a showing of intent" before permitting criminal prosecution of communication. *Id.*, slip op. at 13. *See Hess* v. *Indiana*, 414 U.S. 105 (1973) (*per curiam*) (reversing conviction where there was no evidence, or rational

inference from the import of the language, that words were intended to produce, and likely to produce, imminent disorder); *see also Brandenburg*, v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*) (First Amendment protects advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (in economic boycott, for liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims).

In *Virginia v. Black*, 538 U.S. 343 (2003), the Court upheld a statute proscribing cross burning against First Amendment challenge only because the statute required an intent to intimidate, "where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." 538 U.S. at 360 (emphasis added), thus distinguishing the case from *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), in which a statute that also proscribed cross burning but did not require an intent requirement was struck down. As Justice Sotomayor, joined by Justice Gorsuch, more fully explained in her concurrence in *Counterman*, the *Black* plurality, joined on this point by Justice Scalia to constitute a majority, found that "the intent requirement was 'the very reason why a State may ban cross burning' because it 'distinguish[ed]'

between the constitutionally unprotected true threat of burning a cross with intent to intimidate and 'cross burning [as] a statement of ideology.'" *Counterman*, slip op. at 10 (Sotomayor, J., concurring) (quoting *Virginia v. Black*, 538 U.S. at 365-66).

The Court has therefore defined two requisite states of mind—recklessness and the qualitatively higher level of intentionality—that are required by the First Amendment in different contexts before a communication can subject a person to criminal liability. The key issue therefore is how to identify and distinguish those different contexts. The Court explained in *Counterman* that the higher level of intentionality is required in "incitement" cases. The Court justified that distinction thus:

> When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. Such protests gave rise to all the cases in which the Court demanded a showing of intent. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core.

Counterman, slip op. at 13 (internal citations omitted).

In *Counterman* itself, political advocacy was clearly not at issue. Rather, the case involved digital "stalking" through hundreds of unwelcome private messages sent by the defendant to his victim over a period of two years on social media, which put her "in fear and upended her daily existence" to the point that she finally contacted law enforcement. Because "the reason for that demand [for specific intent] is not present here," the Court held that a showing of recklessness was constitutionally sufficient.

In stark contrast, Calvin Fair was engaging in quintessential protest against the government and policies that he found objectionable. In particular, he directed his criticisms not at a private citizen but at police officers, and denounced their practice of intruding upon the privacy of his own home without justification. There can be no clearer example of political protest and advocacy than words directed at changing the behavior of law enforcement and the methods by which the police interact with the public. Mr. Fair's words may have been brutish and uncouth by conventional notions of propriety, but nevertheless unmistakable in their character as protest against government overreaching.

The facts of this case therefore bear no resemblance to those in *Counterman* through which the Court justified the lower *mens rea* element of recklessness. The only thing the two cases arguably share in common is a label:

"threat" in contrast to "incitement" in the underlying state criminal statute. That commonality is utterly superficial, however, and while it may have been serviceable as a rough and shorthand method for the *Counterman* Court to explain its prior cases, it is not usable as a doctrinal tool to apply First Amendment standards.

Whether a criminal prosecution is brought under a terroristic threats statute or an incitement or rioting statute will often be the serendipitous result of the peculiar elements of different state laws or pure prosecutorial discretion in how to charge an alleged crime. The fact that Calvin Fair was clearly engaging in acts of political advocacy and protests of government action brings his case within the ambit of *Virginia v. Black*, *Hess* v. *Indiana*, *Brandenburg v. Ohio*, and *NAACP* v. *Claiborne Hardware Co.*, all of which require a showing of specific intent to cause fear of imminent harm or death for a communication to be trigger criminal liability. *Counterman* and its adoption of the lesser recklessness standard is distinguishable by its own terms.

II. THIS COURT, PURSUANT TO THE NEW JERSEY CONSTITUTION, SHOULD ESTABLISH A UNIFORM REQUIREMENT OF SPECIFIC INTENT TO PLACE THE VICTIM IN FEAR OF BODILY HARM IN CRIMINAL PROSECUTIONS AGAINST SPEECH.

In candor, while *Counterman*'s emphasis on the transcendent importance of protecting political advocacy is helpful in understanding its reasoning from a perspective of normative jurisprudence, it is not very workable at an operational level when a trial judge must decide how to charge a jury. A court cannot choose between recklessness and intentionality based upon its own unilateral determination of whether the communication at issue constituted bona fide political advocacy, as opposed to non-political artistic expression, social gossip or locker room banter. Such subjective characterization of the content and value of speech would itself raise new constitutional infirmities.

Nor, as discussed above, can the definition of the requisite *mens rea* element depend merely upon the technical words by which the criminal charge is categorized. As the facts of this case show, a prosecution for speech that constitutes political advocacy and protest against government policy can occur regardless of whether the underlying charge is identified as threat, incitement, or any of the other traditional labels attached to crimes related to communicative acts. Very often, the specific crime charged falls within the broad discretion of the prosecutor.

The theoretical distinction is that a threat "conveys the speaker's own intent either to perpetrate violence or to use his authority to direct others to do so," while "inciting words exhort others to do violence without signaling the speaker's intent to act." *State v. Carroll*, 456 N.J. Super. 520, 542 (App. Div. 2018) (noting that the line between threats and incitement, especially in cyberspace may be blurred); *see United States v. Wheeler*, 776 F.3d 736, 745 (10th Cir. 2015) ("the line between threats and incitement, especially in cyberspace, is not as clear as Mr. Wheeler contends, and no court has suggested that the categories of unprotected speech are completely distinct from one another"). But these terms are malleable and overlapping. The critical decision whether to charge the jury based on the less demanding recklessness standard, or rather whether the more robust constitutional protections of specific intent are required, cannot be made to depend on these vagaries of judicial taxonomy.

Amicus therefore respectfully suggests that the Court adopt a consistent requirement that all prosecutions for communicative acts must establish as an element of the crime that the defendant acted with specific intent—either knowledge or purpose—to instill in the victim a fear of bodily harm or death. This Court has ample authority to adopt this rule either pursuant to its supervisory power under N.J. Const. art. VI, § 2, para. 3, or based on the more expansive substantive protections granted under the New Jersey Constitution to

"freely speak, write and publish his sentiments on all subjects," N.J. Const. art. I, para. 6, and to "make known their opinions to their representatives, and to petition for redress of grievances," N.J. Const. art. I, para. 18.

It is well-established that the New Jersey Constitution provides more expansive protections for free speech than does its federal counterpart. *State v. Schmid*, 84 N.J. 535, 560 (1980). The State Constitution recognizes an affirmative right of the people, not merely a limitation on government action as is contained in the First Amendment to the Federal Constitution. *Id.* (extending right to expression to private property); *State v. Hunt*, 91 N.J. 338, 365 & n.2 (1982). This Court's cases are replete with examples where, either as a matter of state constitutional doctrine or complementary common law, it has found the federal First Amendment insufficiently protective of free expression and therefore has expanded it.

Thus, in *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482 (2012), this Court relied expressly on the New Jersey Constitution in holding that a private homeowner association's policy banning all political signs was unreasonable and unconstitutional, and the covenant memorializing it was unenforceable, even though the federal First Amendment would have been unavailing since there was no governmental action. And in *Dairy Stores, Inc. v. Sentinel Pub. Co.*, this Court found that although the United States Supreme

Court had withdrawn constitutional protection from statements on matters of public interest, the "public figure" device by which it did so was "*an awkward and uncertain method* of determining whether statements about corporations or their products are actionable." 104 N.J. 125, 140 (1986) (emphasis added). *Dairy Stores,* therefore, as a matter of common law although informed by the state constitution, maintained the actual malice and "reckless disregard" requirement in defamation cases in matters of public interest, even though the plaintiff was not a "public figure" as required under the federal Constitution.

The "threat versus incitement" device suggested in *Counterman* for determining whether recklessness or specific intent is required would be an equally "awkward and uncertain method," especially in defining criminal liability, and this Court should similarly feel free to reject it by applying our State Constitution. Exclusions from the protections of free speech must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). Amicus respectfully suggests that, equipped with the tools provided under the New Jersey Constitution, this Court can do better than *Counterman* in providing that definition.

In adopting the recklessness standard for "true threats" cases, *Counterman* found it persuasive that "using a recklessness standard also fits with the analysis in our defamation decisions." *Counterman*, slip op. at 12. "In the more than half-century in which that [reckless disregard] standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment 'breathing space' is required. And we see no reason to offer greater insulation to threats than to defamation." *Id,* at 12.

But there exists at least one obvious reason why the level of constitutional protection must be at a heightened level for Calvin Fair when compared to a defamation defendant. Liability for defamation is, in modern times, almost exclusively civil, whereas here Mr. Fair is facing criminal sanctions and the loss of his liberty pursuant to a three year sentence. Requiring a more exacting standard of proof when the consequences are imprisonment, rather than a mere award of money damages, is hardly a novel constitutional principle.

It is true that *Counterman* did note that the reckless disregard standard had at least theoretically been upheld in the context of criminal libel, citing *Garrison* v. *Louisiana*, 379 U.S. 64 (1964). *Counterman*, slip op. at 7, 12. But as Justice Sotomayor noted in her concurrence, the U.S. Supreme Court had "expressed strong skepticism of the very concept of criminal prosecutions for libel and noted the salutary trend of its 'virtual disappearance.'" *Id.* at 21 (Sotomayor,

concurring) (citing *Garrison*, 379 U.S. at 69-70). In *Garrison*, it was unnecessary to determine whether the reckless disregard standard was compatible with criminal liability since the prosecution failed under any standard. Thus, even under federal constitutional doctrine, the notion that the relaxed reckless disregard standard had been reconciled with criminal liability lacks substantial empirical support.

In New Jersey, the rejection of criminal libel is even more explicit. The Legislature repealed the last criminal libel statute in 1979, with the adoption of the current Code of Criminal Justice. *See State v. Burkert*, 231 N.J. 257, 274 (2017). As this Court noted in *Burkert*, "[i]n doing so, the Legislature signaled that the criminal law would not be used as a weapon against defamatory remarks, thereby aligning our new criminal code with the Model Penal Code" and "framed the New Jersey Code of Criminal Justice with a conscious deference to the right of free expression." *Id.* at 274-75 (quoting Model Penal Code Commentary that "penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit.").[1]

[1] The fact that now well-established existing state law has rejected the concept of criminal libel is a persuasive indication that our state constitution would do

The *Counterman* majority's reasoning that the reckless disregard standard had been upheld under the First Amendment in both civil and criminal contexts in defamation law, and therefore its application to criminal threats statutes was also constitutional, was cogently undermined by Justice Sotomayor in her concurrence. But regardless of its validity under federal constitutional principles, it has no anchorage under state constitutional law, given New Jersey's explicit rejection of criminal libel. To hold someone criminally liable and subject to imprisonment for expressive activity on anything less than a showing that they specifically intended to instill a fear of bodily harm in the victim, runs the palpable risk that speakers will engage in self-censorship out of fear and to avoid the potentially serious consequences of misjudging how his words will be received. Statutes criminalizing threats without requiring the government to demonstrate specific intent are thus likely to sweep in protected speech, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that

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so as well. *See State v. Hunt*, 91 N.J. 338, 365 (Handler, J. concurring) (existing state law is a factor in interpreting state constitution as an independent source for protecting individual rights). "State law is often responsive to concerns long before they are addressed by constitutional claims. Such preexisting law can help to define the scope of the constitutional right later established." *Id.* (internal citations omitted).

subjective intent to threaten is an essential element of any constitutionally proscribable true threat.

III. THE REASONING OF *COUNTERMAN* REQUIRES THAT COURTS ENGAGE IN INDEPENDENT APPELLATE REVIEW OF THE FACTUAL DETERMINATIONS OF EITHER SPECIFIC INTENT OR RECKLESSNESS.

Because the *Counterman* Court placed such weight on the comparability and thus compatibility of its defamation jurisprudence with its constitutional analysis of "true threats," it is necessary to recall *all* of the panoply of constitutional safeguards that have been erected to protect against punishing free expression in the defamation context. These protections must be regarded as part of a comprehensive scheme whose efficacy can be determined only when viewed together.

In particular, in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court explained "that in cases raising First Amendment issues [it has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284–86). *Accord Ward v. Zelikovsky*, 136 N.J. 516, 536-37 (1994). Thus "Appellate judges in such a case must exercise independent judgment and

determine whether the record establishes actual malice with convincing clarity." *Bose*, 466 U.S. at 526.

This rule is "is necessary 'because the reaches of the First Amendment are ultimately defined by facts it is held to embrace' and an appellate court must decide 'whether a given course of conduct falls on the near or far side of the line of constitutional protection.'" *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 567 (1995) (quoting *Bose*, 466 U.S. at 503). Moreover, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Id.* at 501.

Although independent appellate review is not the same as *de novo* review, and an appellate court would still accept any credibility determinations by the jury on any disputes of fact, there are no genuine disputes about the particular course of events that took place in this case. The 20 minute encounter on May 1, 2015, between Mr. Fair and Freehold PD Patrolmen Healey and Hernandez was recorded by a dash-mounted motor vehicle recording device. The authenticity of Fair's social media postings on Facebook that also formed the basis of the terroristic threats charge were also undisputed.

The primary, if indeed not exclusive factual finding that the jury was required to make in this case is the ultimate element about which *Counterman* pronounced at great length: Did Mr. Fair make his statements in conscious disregard of the substantial risk that they would instill in the police officers a fear of impending harm? *See Counterman*, slip op. at 10-12. It is in this context that *Bose* demands: "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose,* 466 U.S. at 511. In engaging in this review, appellate judges must also take into account the burden of proof, which for a civil case of defamation is "clear and convincing evidence," but in a criminal case is "beyond a reasonable doubt."[2]

Moreover, the defamation cases make clear that even under the "reckless disregard" standard, it was "essential" that the defendant act with a "high degree

[2] Although Amicus ACLU-NJ argues for the higher specific intent standard rather than recklessness in Part II of this brief, for purposes of the current discussion, we use the reckless disregard standard. If the Court adopts the specific intent standard, Amicus believes that the required independent appellate review would, *a fortiori*, lead to the conclusion that the record does not sustain a finding of such intent.

of awareness," *i.e.*, "awareness of probable falsity" his statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 731 (emphasis added).

Translated to the factual setting of this case, in order to establish reckless disregard, the prosecution would have had to establish beyond a reasonable doubt that Mr. Fair subjectively entertained in his mind the serious possibility that his words would actually instill in the police officers the fear of that he was going to inflict impending harm. The undisputed facts of this case make that contention somewhat implausible. On the evening of May 1, Mr. Fair was addressing the police officers from the second floor window of his apartment while they were standing in the public sidewalk. He knew he was clearly not at a distance at which they thought he could do them any harm unless he had a gun or other projectile weapon, which he did not. (Of course, it is the police officers who would have been armed with their service weapons.) Unless he believed he could cause the police officers to think that he was capable of the type of superpower acrobatics usually seen in Marvel™ movies, it is implausible that

he actually entertained the serious possibility that he would cause them to fear for their safety.

Perhaps the most convincing evidence that Mr. Fair did not act with reckless disregard is the reaction of the police officers themselves. Having found that there was no justification for entering his house or conducting further investigation, but after listening to his extended diatribe, they simply left. The attitude they displayed in their colloquy with Mr. Fair was perhaps dismissive, but not fearful. In determining whether the defendant acted with reckless disregard, the subject of reactions of the intended audience are a relevant consideration. *See Watts* v. *United States*, 394 U.S. 705, 708 (1969) (*per curiam*) (concluding that a statement was "political hyperbole" instead of a true threat based on "context," "the expressly conditional nature of the statement," and the "reaction of the listeners").

Similarly, when he posted to Facebook later that evening or the next morning, it stretches credulity to contend that a jury could have been convinced beyond a reasonable doubt that Mr. Fair subjectively entertained the significant risk that he would instill in the police officers' minds the actual fear of impending harm. He would have had no idea whether they would even see the posting. And shorn of all its invective and insult, the only statement made by Mr. Fair that could colorably be construed as threatening is "I KNO WHT YU

DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT." It is doubtful that Mr. Fair actually possessed information about the personal vehicles and home addresses of whichever police officers happened to see his Facebook posting. It is even more implausible that he would think that they genuinely thought he did, and thereby believed he was threatening to use that information to do them harm. The assertion that the speaker has private information such as "I know where your children go to school" has become stylized hyperbole and bravado to express the depth of animosity toward the recipient, but expressions of animosity, especially when expressed to an unknown audience in a public forum, cannot constitute the conscious disregard for the risk of instilling fear of harm that the reckless disregard standard requires.

That Mr. Fair is a truculent, undiscerning and possibly unfair critic of the Freehold Police Department can be conceded. But was he aware of either the reality or even the risk that he was instilling in individual police officers the actual fear of impending harm when he made his statements? Independent review of the record does not sustain that conclusion. Indeed, it is difficult to completely rid oneself of the suspicion that it is the perhaps understandable dismay at the virulence of his criticism that has led to his conviction and sentence of three years confinement. The First Amendment, however, does not,

and the New Jersey Constitution certainly does not, countenance criminalization of invective, however hateful, against government or its officials.

CONCLUSION

For the reasons expressed herein and in its initial brief, Amicus ACLU-NJ respectfully urges this Court to affirm the judgment of the Appellate Division which reversed the conviction of defendant Calvin Fair based on N.J.S.A. 2C:12-3a and/or b.

July 24, 2023.

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