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Via eCourts
Supreme Court of New Jersey
c/o Heather J. Baker, Clerk
Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625

Re: A-20-22 State v. Calvin Fair (Docket No. 086617)

Dear Honorable Court:

This firm represents amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ). Please accept this letter brief in response to the Court's June 30, 2023 letter requesting briefing regarding the recent U.S. Supreme Court decision in Counterman v. Colorado, 600 U.S. ___, 143 St. Ct. 2106 (2023).

As this Court well knows, Counterman overruled a Colorado man's conviction under a statute designed to punish repeated communications with another "in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . .serious emotional distress."

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Counterman, 143 St. Ct. at 2121, n. 1 (Sotomayor, J., concurring) (citing Colo. Rev. Stat. §18-3-602(1)(c)(2022). In Counterman, the defendant was alleged to have made harassing, intrusive and threatening Facebook posts. The Court ruled that to convict a person of making true threats, the First Amendment required that a defendant have some subjective understanding of his statement's threatening nature, although a showing of the mental state of recklessness would suffice. 143 St. Ct. at 2119. Counterman explains that this recklessness standard is a middle ground between a "strong intent requirement" in incitement cases that touch upon political speech, and "a deliberate decision to endanger another," which can define recklessness, although still allowing some "breathing space" to First Amendment interests. 143 St. Ct. at 2117.

Counterman's citation to cases defining recklessness seem to point to a far more difficult realm of proof, that does not appear to have been reached in this case. Initially, the Court cites "the most common formulation" as 'consciously disregard[ing] a substantial [and unjustifiable] risk that the conduct will cause harm to another." Counterman, 143 St. Ct. at 2117 (quoting from Voisine v. United States, 579 U.S. 686, 691 (2016)). The Court then goes on to add other definitions: "a deliberate decision to endanger another" so that the "speaker is aware 'that others could regard his statements as' threatening violence 'and

delivers them anyway.'" Counterman, 143 St. Ct. at 2117 (quoting Voisine, 579 U.S. at 694 and Elonis v. United States, 575 U.S. 723, 746 (Alito, concurring)).

In imposing a recklessness standard, the Court drew from defamation cases and the concept of actual malice, recognizing the accommodation of the competing interests of reputation and free speech to avoid a "chilling effect." Counterman, 143 St. Ct. at 2118. However, the "reckless disregard" standard contained in the New York Times v. Sullivan, 376 U.S. 254 (1964) and later reinterpreted in St. Amant v. Thompson, 390 U.S. 727 (1968) and its progeny, requires that the defendant must be shown to have actually "entertained serious doubts as to the truth of his publication." St. Amant, 390 U.S. at 731. This is an extremely difficult standard that, although provable with circumstantial or direct evidence, requires the subjective knowledge of the publisher, which this Court emphasized in Durando v. Nutley Sun, 209 N.J. 235 (2012):

> To act with reckless disregard of the truth, a defendant must "*actually* doubt[]" the veracity of the article. Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 468 (1982). Only "[i]f the recklessness approaches the level of publishing a knowing, calculated falsehood," based on the summary-judgment record, should the case go to the jury. Maressa v. N.J. Monthly, 89 N.J. 176, 200 (1982).
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> [Durando, 209 N.J. at 252.]

As the concurrence states in Counterman, "to the extent the civil defamation context is relevant, at very least, it points to a precise and demanding form of recklessness." Counterman, 143 St. Ct. at 2131 (Sotomayor, J., concurring).

One of the statutes that Defendant Fair was charged with violating is Terroristic Threats (2C:12-3(a)), which provides:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or **in reckless disregard of the risk of causing such terror or inconvenience**.
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> [N.J.S.A. 2C:12-3(a) (emphasis added).]

According to the Appellate Division's opinion, the State offered the following statements by Mr. Fair as directed towards Officer Healey that could be the basis for a terroristic threat conviction under either part of N.J.S.A. 2C:12- 3:

First, the court noted Mr. Fair's "head shot" comment on May 1, 2015, when he was arguing with Officers Healey and Hernandez from a second-story window in his Freehold home:

> DEFENDANT: Fucking thirsty ass nigga. You thirsty. Worry about a head shot, n*gga.

> HEALEY: And that there is a threat.
>
> HERNANDEZ: That is threats right there.
>
> With those last comments, **the officers departed**.
>
> [State v. Fair, 469 N.J. Super. 538, 541 (App. Div. 2021), appeal granted 252 N.J. 243 (2022) (emphasis added).]

Next, the court pointed to the first Facebook post after the May 1, 2015, in-person argument when Mr. Fair went on a diatribe about Freehold police, with comments like "YU WILL PAY WHOEVA HAD ANY INVOLVEMENT" in entering his home – likely referring to the raid on his home in February – with a parting comment that "WE WILL HAVE THA LAST LAUGH! #JUSTWAITONIT – [angry emoji] feeling angry." Fair, 469 N.J. Super. at 557.

And finally, two hours after that, Mr. Fair allegedly posted: THEN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FU$K OUTTA HERE!! I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT." Ibid.

Thus, as the Appellate Division opinion recounted, the threats were not only attenuated but dripping with sarcasm and spoken in the heat of the moment. While the officers verbally noted at Mr. Fair's home after a long back-and-forth

with him that Mr. Fair made "a threat," they clearly did not take it seriously enough to make an arrest or even question Mr. Fair; they simply left. It was only after another officer, Detective Richard Schwerthoffer, suggested after the incident that Officer Healey look into what might be on defendant's Facebook page that those statements became an issue. At that point, having seen the threats in writing, the police were suddenly sensitive to the same ludicrous spewing of name-calling and rhetorical hyperbole.

The Appellate Division realized both the political nature of this speech and Mr. Fair's right to be judged by a higher standard than the recklessness in the statute, in declaring N.J.S.A. 2C:12-3(a) unconstitutionally encompasses speech and expression that do not constitute a "true threat" and, therefore, prohibits the right of free speech guaranteed by the First Amendment. 469 N.J. Super. at 554. This conclusion may be problematic in light of Counterman, however, mindful of Circuit splits and disagreements in the U.S. Supreme Court on this issue, the Appellate Division also suggested strongly that if the U.S. Supreme Court will not protect this speech then our State Constitution should:

> We do not overlook the possibility that even if the views of some that there is no federal constitutional infirmity in a threat statute that turns on recklessness are eventually adopted, our state constitution might nevertheless require the result we reach here. Our state

> constitution contains a free speech clause that has been described as being "broader than practically all others in the nation," Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000), and is understood as offering "greater protection than the First Amendment," Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012). See N.J. Const. art. I, ¶ 6 (providing that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right [and] [n]o law shall be passed to restrain or abridge the liberty of speech or of the press"). Because defendant has not argued N.J.S.A. 2C:12-3(a) violates our state constitutional free speech guarantee, we need not address that potentiality here.
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> [Fair, 469 N.J. Super. at 555 n.7.]

ACDL-NJ believes that this Court should, in light of Counterman's diminishment of free speech rights, consider application of our State Constitution, Article 1, Paragraphs 6 and 18, and require a higher *mens rea* than recklessness be required for this statute, making it unconstitutional. As the concurrence in Counterman points out, there is a fine line between this type of speech and more protected speech and "the risk of overcriminalizing upsetting or frightening speech has only been increased by the internet." Counterman, 143 St. Ct. at 2122 (Sotomayor, J., concurring).

Moreover, the facts in this case speak to the reasons why such safeguards must be triggered and/or a finding that recklessness cannot be found:

Counterman deals with stalking of a private individual. This case involves a single personal public interaction with police and two subsequent posts on Facebook, not even sent to police, which begs the question of intent to threaten the police. The language used by Mr. Fair was hyperbolic and meant to express his unhappiness with police coming to his home and made in light of a previous uneventful home search, making him a target. This is demonstrated by temporal disconnection between the "head shot" comment emphasized at trial and the Facebook posts after the incident, which apparently triggered the charges.

Just as Counterman relied on defamation law to determine a proper standard of *mens rea* to safeguard speech, so can this Court look to its own defamation decisions in analyzing the contents of Mr. Fair's speech to determine whether a true threat has occurred. First, in Ward v. Zelikovsky, 136 N.J. 516, 529–30 (1994), this Court explained that in determining the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence a court must consider the "content, verifiability, and context of the challenged statements."

When looking at content, the Ward Court ruled that

> [t]he First Amendment "does not embrace the trite wallflower politeness of the cliche that 'if you can't say anything good about a person you should say nothing at

> all.'" Rodney A. Smolla, Law of Defamation, § 6.09[2], at 6–37 (1986). . . . "No matter how obnoxious, insulting or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy." Id. at § 4.03, at 4–11.
>
> [Ward, 136 N.J. at 529-30.]

Moreover, Ward cites § 566 comment e of the Restatement (Second) of Torts to put the statements in context:

> There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult.
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> [Ward, 136 N.J. at 530.]

Thus, Ward tells us that courts distinguish "between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse" and "defamatory statements and statements of rhetorical hyperbole." Ibid. (citations omitted). This is the context missing in the prosecution of Mr. Fair; it is the analysis of language, content and context that is required to reach whether a "true threat" has been made. As this Court

said in citing U.S. Supreme Court opinions, "The right to speak freely on matters of public concern … implicate[s] core values protected by our federal and state constitutions." G.D. v. Kenny, 205 N.J. 275, 303, (2011) (citing Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) and Mills v. Alabama, 384 N.J. 214, 218-19 (1966)). "The right to free speech allows for an 'uninhibited, robust, and wide-open' discussion of public issues that 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Ibid. (quoting Sullivan, 376 U.S. at 270).

For these reasons the ACDL-NJ would urge this Court to apply the State Constitution to the statute at hand to prevent diminishment of free speech protection for our citizens and at very least require courts to require a more exacting standard of recklessness though a detailed analysis of the content and context of alleged "true threats."

Respectfully submitted,

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/s/ Bruce S. Rosen
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