FILED, Clerk of the Supreme Court, 24 Jul 2023, **086617**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal As of Right from a Unanimous Final Judgment of the
v.	:	Superior Court of New Jersey, Appellate Division.
CALVIN FAIR,	:	
		Indictment No. 15-08-01454-I
Defendant-Respondent.	:	
		Sat Below:
	:	
		Hon. Clarkson S. Fisher, Jr.,
	:	P.J.A.D.,
		Hon. Heidi Willis Currier, J.A.D.,
	:	and
		Hon. Patrick DeAlmeida, J.A.D.
	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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DEFENDANT IS NOT CONFINED

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INDEX TO DEFENDANT'S RECORD CITATIONS

Fair's Appellate Division brief cited the record as follows:

"Da" – defendant's Appellate Division appendix;
"1T" – pre-trial transcript dated December 16, 2016;
"2T" – pre-trial transcript dated September 29, 2017;
"3T" – trial transcript dated June 19, 2019;
"4T" – trial transcript dated June 20, 2019;
"5T" – trial transcript dated June 25, 2019;
"6T" – trial transcript dated June 26, 2019; and
"7T" – sentencing transcript dated August 30, 2019.

Fair's initial Supreme Court brief added the following citations:

"Db" – defendant's Appellate Division brief;
"Dm" – defendant's motion to dismiss the State's proposed notice of appeal as of right;
"Dma" – defendant's appendix to the motion to dismiss;
"Dsa" – defendant's Supreme Court appendix;
"Sb" – State's Appellate Division brief; and
"Ss" – State's Supreme Court brief.

Fair's Supreme Court reply to amici added the following citations:

"Dsb" – defendant's initial Supreme Court brief (Oct. 7, 2022);
"ACLU" – amicus brief filed by the American Civil Liberties Union of New Jersey;
"ACDL" – amicus brief filed by the Association of Criminal Defense Lawyers of New Jersey;
"AG" – amicus brief filed by the Attorney General of New Jersey; and
"Dsa2" — defendant's supplemental appendix to the reply to amici.

In this supplemental Supreme Court brief, Fair adds the following citations:

"Dsr" — defendant's Supreme Court reply to amici. (Jan. 18, 2023)
"Dss" — defendant's supplemental Supreme Court brief (July 24, 2023)

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Fair continues to rely on the procedural history and facts in his two previous Supreme Court briefs and Appellate Division brief. (Dsb 1-8; Dsr 1-2; Db 1-9)

On June 30, 2023, this Court requested supplemental briefing addressing the United States Supreme Court's decision in Counterman v. Colorado, 143 S.Ct. 2106 (2023).

LEGAL ARGUMENT

POINT I

The prosecution of political dissent under a true threat theory, without requiring the State to prove that the speaker intended to terrorize the audience via speech instilling a reasonable fear of attack, violated both the federal constitution and New Jersey's more protective state constitution. U.S. Const., Amends. I, XIV; N.J. Const., Art. I, Pars. 6, 18.[1]

Fair and Counterman are radically dissimilar cases. Calvin Fair is a Black man who engaged in a heated debate with an officer at his home, and then spoke critically to his Facebook followers, about his government's criminal justice policies. The government responded to the oral and online discourse by punishing the speaker, who had challenged its officers' policies and called for reform. By contrast, Billy Counterman stalked a stranger for years. There was no political

[1] This brief is only a supplemental. Fair continues to rely on all arguments in his initial Supreme Court brief (filed October 7, 2022), Supreme Court reply to amici (filed January 18, 2023), and Appellate Division brief (filed September 8, 2020).

advocacy or political dissent communicated whatsoever. The communications incident to his stalking lacked serious value. The distinguishing features of the speech in these cases compel different constitutional rules. Where, as in Fair, the State prosecutes protests against the government and the prevailing social order under a true threat theory, it is not too much to require the government to prove that a protesting speaker intended to make a threat before it can imprison its critic.

Fair's dissenting speech was protected by the values "central to the theory of the First Amendment." Counterman, 143 S.Ct. at 2118. Fair criticized overenforcement, excessive bail, excessive force, unreasonable searches, and the police force's disrespect and lack of accountability. (Dsb 3-8) In other words, he took part in a "robust discussion" on a "broad spectrum of ideas"; practiced "character traits that are essential to a well-functioning democracy," such as "distrust of authority, and independence of mind"; and sought a "fair hearing" for his "dissenting and nonconforming views." Geoffrey R. Stone, Perilous Times (2005) at 7-8. (Dsb 18-20) However, Fair's dissenting ideas were also "vulnerable to government prosecutions." Counterman, 143 S.Ct. at 2118. Indeed, the First Amendment was enacted especially to guard against the "great threat[] to democracy" of "abus[ive]" officials "preserv[ing] their authority" by "punish[ing] speech that challenges them or their policies." Stone at 7-8.

Unlike the speech in Fair, the speech in Counterman was deemed to be "speech not independently entitled to protection." Id. at 2113. Most relevantly, Counterman's speech was not "dissenting political speech at the First Amendment's core." Id. at 2118. To illustrate the differences, over a two-year period Counterman sent "hundreds of messages" to a stranger whom he had "never met," who "never responded," and who "repeatedly blocked" him. Id. at 2112. The repeated unwanted communications were not related to public policy and were of little "value as a step to truth." Id. at 2114.

Even under circumstances where the communications were unrelated to public policy, low-value, and akin to stalking, the Supreme Court in Counterman still held that it would be "a violation of the First Amendment" for a state to "not have to show any awareness on [a defendant's] part that the statements could be understood" as threats. Id. at 2119. That is, the First Amendment "demand[s] a subjective mental-state requirement" in prosecutions of speech as a true threat. Id. at 2114. Because Counterman was convicted solely based on an "objective standard," the Supreme Court vacated his conviction. Ibid. at 2119.

The Supreme Court deliberated upon "what precise mens rea standard suffices for the First Amendment purpose at issue" in Counterman. Id. at 2113. It ultimately ordered Colorado to prove that Counterman's statements were at least

reckless. Ibid. It did "not require that the State prove the defendant had any more specific intent to threaten the victim." Ibid.

Critically, the Supreme Court left the door open to hold, in a case like Fair, that a recklessness standard does not "suffice[] for the First Amendment purpose" of protecting political dissent from a true threat prosecution — an issue not at stake in Counterman. In search of distinguishing principles for identifying the required mental state in a prosecution of speech, the Court looked to speech-protective incitement decisions, where it had "demand[ed]" the government prove "specific intent, … equivalent to purpose or knowledge." Id. at 2118. The Court held that in Counterman, "the reason for that demand is not present here." Ibid. In the most relevant passage on page 13 of the slip opinion, the Court articulated that it was "compel[led]" to "demand" the government prove specific intent in those decisions because the prosecuted speech was:

> • "a hair's breadth away from political advocacy — and particularly from strong protests against the government and prevailing social order";
>
> • "dissenting political speech at the First Amendment's core"; and
>
> • "so central to the theory of the First Amendment," yet "so vulnerable to government prosecutions."

Id. at 2118 (emphasis added). These distinguishing features were glaringly absent from Counterman's very nonideological speech: His speech was not "political advocacy," nor a "protest[] against the government" or "prevailing social order,"

nor otherwise "central" to First Amendment concerns. Ibid. Accordingly, the Court ordered that "a strong intent requirement" was not necessary in his case to prevent "legal sanction" from "bleed[ing] over" to protected speech. Ibid.

Counterman did not directly answer the distinct issue of whether, when the government prosecutes dissenting political speech at the First Amendment's core as a threat — as in Fair — a recklessness standard would still suffice. However, the opinion singled out "dissenting political speech" that is "at the First Amendment's core" yet "vulnerable to government prosecution" — particularly "strong protests against the government and prevailing social order" — as the distinguishing feature of prosecutions of speech where a "strong intent requirement" is demanded. Ibid. Because, in a prosecution of dissenting political speech as a true threat, "the reason for that demand" is as present as it was in "all the cases in which the Court demanded a showing of intent," the opinion strongly suggests the government "need[s]" to make a "showing of intent" under such circumstances. Ibid.

Like Counterman, Virginia v. Black, 538 U.S. 343 (2003) singled out dissenting political or ideological speech as the distinguishing feature of speech where a strong intent requirement is demanded in a prosecution of speech as a true threat. (Dsb 9-16; Dsr 5-8) Eight justices in Black corroborated this aspect of Counterman in the context of cross-burning, a form of symbolic speech sometimes used as a "strong protest[] against the … prevailing social order." Counterman, 143

S.Ct. at 2118. "For the plurality [in Black], the intent requirement," which "'distinguish[ed]' between the constitutionally unprotected true threat of burning a cross with intent to intimidate and 'cross burning [as] a statement of ideology,'" was "'the very reason why a State may ban cross burning.'" Counterman, 143 S.Ct. at 2124 (Sotomayor, J., concurring) (quoting Black, 538 U.S. at 365-66) (relieving the government of its burden to prove specific intent "create[s] an unacceptable risk of the suppression of ideas" because it "blurs the line" between "lawful political speech at the core of what the First Amendment is designed to protect," and "constitutionally proscribable intimidation"). "For Justice Scalia, the 'plurality [was] correct in all of this.'" Counterman, 143 S.Ct. at 2124-25 (Sotomayor, J., concurring) (quoting Black, 538 U.S. at 372) (because "cross burning may serve as 'a statement of ideology,'" relieving the government of its burden to prove specific intent "means that some individuals who engage in protected speech … may be subject to conviction"). Similarly, Justice Souter's three-justice coalition in Black found that because "the symbolic act of burning a cross … is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten," relieving the government of its burden to prove specific intent "tend[s] to draw nonthreatening ideological expression within the ambit of intimidating expression, as Justice O'Connor notes." Black, 538 U.S. at 385-86. Read in harmony, both Counterman and Black strongly suggest that, at least if the

government is prosecuting dissenting political protest speech at the core of the First Amendment, a specific intent standard is required to distinguish constitutionally proscribable threats from protected ideological speech.

Moreover, at least when dissenting political speech is at issue, a specific intent standard is necessary to guard against unwarranted prosecutions of protected speech, and also to combat the chilling effect, where ideological messengers self-censor out of fear of being punished for expressing abrasive viewpoints. (Dsb 34-39; Dsr 8-9) Regarding "efforts to prosecute … dissenting political speech," Counterman, 143 S.Ct. at 2118, it is not unusual for the government to unlawfully attempt to criminalize the expression of "disturbing, frightening, or painful" protest speech which it finds distasteful. Id. at 2121-22 (Sotomayor, J., concurring). (Dsb 20-21) See, e.g., Texas v. Johnson, 491 U.S. 397, 414 (1989) (prosecution for burning the American flag); Houston v. Hill, 482 U.S. 451, 458-49, 472 (1987) (prosecution for challenging police officers); Cohen v. California, 403 U.S. 15, 26 (1971) (prosecution for cursing the selective service system). The courts must be "eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Even absent direct efforts to prosecute, speech may be "chill[ed]" by statutory prohibitions alone. Counterman, 143 S.Ct. at 2114-15. "A speaker may be unsure about the side of a line on which his speech

falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not …. The result is self-censorship of speech that could not be proscribed …. And an important tool to prevent that outcome— to stop people from steering wide of the unlawful zone— is to condition liability on the State's showing of a culpable mental state." Ibid.

At least when dissenting political speech is at issue, a recklessness standard is insufficient to guard against unwarranted prosecutions or to combat the chilling effect. As Fair previously argued, "everyone knows that lighting a massive cross on fire in view of a public highway is highly likely to cause fear." (Dsb 42) Yet the Supreme Court still emphasized in Black that cross-burning would be protected ideological expression if solely intended for a non-terrorizing purpose, such as to express support for a political candidate like former President Richard Nixon. Black, 538 U.S. at 357. (Dsb 12) The concurring opinion in Counterman similarly pressed the point that, in light of Black, the recklessness standard applied to Counterman's non-political speech would be out of place and inapplicable in a political speech prosecution: "it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without some risk a reasonable spectator would feel threatened …. Recklessness, which turns so heavily on an objective person standard, would not have been enough." Counterman, 143 S.Ct. at 2127 (Sotomayor, J., concurring). See also State v.

Boettger, 450 P.3d 805, 818 (Kan. 2019), cert. den., 140 S.Ct. 1956 (2020) ("burning a cross on private property within the view of a public roadway and other houses, where locals had stopped to watch[,] as part of a political rally" is a "persuasive illustration[]" of how a recklessness standard in a true threat prosecution "criminalizes speech protected under the First Amendment"). (Dsb 35) Likewise, the conviction for the dissenting political speech in Watts itself would have been affirmed had a recklessness standard been applied. See Counterman, 143 S.Ct. at 2128 (Sotomayor, J., concurring) (recklessness standard would not be sufficient if applied in a future true threats prosecution for political speech, "as this Court's own cases show time and again how true-threats prosecutions sweep in political speech") (citing Watts v. United States, 394 U.S. 705, 707 (1969) ("antiwar protest")). See also Boettger, 450 P.3d at 818 (as Watts was "aware of the risk of causing fear but continued anyway" when he "communicated he would shoot the president," Watts itself is another "persuasive illustration[]" of how a recklessness standard in a true threat prosecution "criminalizes speech protected under the First Amendment").

Branching out from those examples, a specific intent standard is necessary in at least three areas to adequately protect dissenting political speech that "some will find threatening" but nevertheless "should not land anyone in prison." Counterman, 143 S.Ct. at 2123. First, a recklessness standard can fall short in

prosecutions for abrasively criticizing officials in positions of power, who are often stand-ins for displeasure at the government, as in Watts. See also, e.g., United States v. Bagdasarian, 652 F.3d 1113, 1119, 1123 (9th Cir. 2011) (prediction or exhortation about the death of the President an "alarming" message, but was still "protected speech under the First Amendment" if "intended" only as "an expression of rage or frustration"). (Dsb 23, 48) Second, a recklessness standard can fall short in prosecutions for speech associated with the "thought that we hate," as in Black. See also, e.g., Collin v. Smith, 447 F.Supp. 676, 681 (N.D. Ill. 1977) (although the rhetoric of National Socialist speakers, intended to draw attention, may cause some in the community to "panic[]," American society should not embark on the "dangerous course" of rejecting our "commitment to freedom of speech and assembly" for even ""the thought that we hate," as that very freedom is our "best protection" against their "venom"), aff'd 578 F.2d 1197 (7th Cir.), cert. denied 439 U.S. 916 (1978). (Dsb 42-44) Third, a recklessness standard can fall short in prosecutions for civil rights advocacy, especially when such rallying for social change involves interactions with law enforcement officers, who are historically suspicious about the alleged threats posed by reform movement sympathizers. See, e.g., Boettger, 450 P.3d at 818 (a protester chanting to "take out a cop or two" at a Black Lives Matter rally, in the presence of officers, is another "persuasive illustration[]" of how a recklessness standard in a true threat

prosecution "criminalizes speech protected under the First Amendment"). (Dsb 35) In short, recklessness would be a "troubling standard for juries in a polarized nation to apply in cases involving heated political speech." Counterman, 143 S.Ct. at 2129 (Sotomayor, J., concurring).

At least for prosecuting dissenting political speech, a recklessness standard — which turns on an amorphous risk that others would believe "heated speech" has "crosse[d] the line" — is overbroad. Counterman, 143 S.Ct. at 2130. Initially, our democratic values require protecting ideas outside of the comfort zone of narrow political worldviews. See, e.g., Whitney v. California, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of speech and assembly …. It is the function of speech to free men from the bondage of irrational fears"); Black, 538 U.S. at 358 ("First Amendment ordinarily denies a State the power to prohibit dissemination of … political doctrine" even if "a vast majority of its citizens believes [it] to be … fraught with evil consequence."). Indeed, being able to learn from exposure to even appalling outside ideas is a basic responsibility for citizens in a diverse society. See Stone at 7 ("[F]ree speech [i]s indispensable to … a political and intellectual environment in which individuals can develop the capacity to deal with sharp differences of opinion, perspective, and understanding").

Moreover, a standard for criminalizing dissenting political speech that turns on how ordinary people might react is discriminatory, because ingrained prejudices taint listeners' perceptions of whether communications seem threatening. "The burdens of overcriminalization will fall hardest on certain groups[,] … including religious and cultural minorities," who "use language that is more susceptible to being misinterpreted by outsiders. And unfortunately yet predictably, racial and cultural stereotypes can also influence whether speech is perceived as dangerous." Counterman, 143 S.Ct. at 2122-23 (Sotomayor, J., concurring) (citing The Threatening Nature of 'Rap' Music, 22 J. Psychol. Pub. Pol'y & L. 281 (2016)) (also citing United States v. White, 670 F.3d 498, 525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part) ("speakers whose ideas or views occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening")). Scientific studies, polling data, and historical precedents all corroborate the concurrence's point that a test vulnerable to stereotypes will "disproportionately proscribe[] and chill[] speech from minority communities[,]" as Fair previously argued, making the recklessness standard unsuitable in a prosecution for dissenting political speech. (Dsb 39-42) See, e.g., Rap on Trial at 87-88 (2019) (listeners rated the same lyrics as more "dangerous" when they believed that the artist was Black, or when they were told that it was a

rap song); Attending to Threat: Race-Based Patterns of Selective Attention, J Exp. Soc. Psychol. 1322-1237 (Sept. 2008) ("cognitive neuroscience" study showed a "pervasive connection" between "Black men and threat" in perceivers' brains); Free Expression in America Post-2020: A Landmark Survey of Americans' Views on Speech Rights, Knight Foundation-Ipsos (2022) (Black respondents self-report the most difficulty using their free speech rights "without consequence," and all respondents agree that wealthy and White speakers have an easier time speaking "without consequence" than working-class speakers or racial minority speakers); Stone at 304, 393 (the Second World War-era's U.S. Attorney General belatedly acknowledged that stereotypes of Japanese-Americans caused the majority to perceive their speech as dangerous, leading the government to "shut up" their community); Adam Hochschild, American Midnight (2022) at 6, 132, 271 (reporting on similar nativist hysteria against the foreign ideas of eastern European immigrants who arrived in the early twentieth century).

There is no basis to relieve the State of the "strong intent requirement" demanded in incitement cases to prosecute "dissenting political speech at the First Amendment's core." Counterman, 143 S.Ct. at 2118. As in the incitement context, there is a "resonant historical … failure … to protect" merely dissenting political speech from being unjustly prosecuted as true threats. Ibid. As Justice Douglas explained in Watts, although "suppression of speech as an effective police measure

is an old, old device, outlawed by our Constitution," 394 U.S. at 712, the historical failure to protect such speech "is of an ancient vintage. [It] traces its ancestry to the Statute of Treasons … which made it a crime to 'compass or imagine the Death of the King.'" Id. at 709 (recounting prosecutions for dissenting political speech, including for "predict[ing] that the king would 'soon die,'" and for "'wish[ing] all the gentry in the land would kill one another'"). Justice Douglas further noted that America in the twentieth century had carried on failing to protect political speech that expressed "a spirit of disloyalty to the nation bordering upon treason." Id. at 711-12. As in the incitement context, a "strong intent requirement" is "one way to guarantee history is [not] repeated." Counterman, 143 S.Ct. at 2118.

Moreover, the language of dissenting political speech in incitement cases — where the government must prove the speaker's specific intent — often appears indistinguishable from threat cases. (Dsb 32-33) In Claiborne, NAACP leader Charles Evers in Mississippi "called for a discharge of the police force and for a total boycott of all white-owned business"; intoned that "boycott violators would be 'disciplined'"; and said that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982). In Brandenburg, the defendant, wearing "Klan regalia" and surrounded by firearms, denigrated Black and Jewish Americans with racial slurs, warned that the Klan would march "four hundred thousand strong,"

and promised "revengeance." Brandenburg v. Ohio, 395 U.S. 444, 445-46 (1969). As the concurrence in Counterman noted, these cases were just "a hair's breadth away from threats." 143 S.Ct. at 2128 (Sotomayor, J., concurring). Indeed, when the Court applied a specific intent standard in Claiborne, it found that the NAACP leader's speech did not constitute incitement because there was no evidence he had "directly threatened acts of violence." Claiborne Hardware, 458 U.S. at 929. "Under a recklessness rule, Claiborne would have come out the other way. So long as Evers had some subjective awareness of some risk that a reasonable person could regard his statements as threatening, that would be sufficient. It would be quite troubling indeed to adopt a rule rendering this Court's admirable defense of the First Amendment wrongly decided." Counterman, 143 S.Ct. at 2129 (Sotomayor, J., concurring). Similarly, in Brandenburg, "there would be at least some risk that a reasonable resident of those cities could feel threatened." Ibid. But letting the government shirk or "downgrade[]" its constitutional burden in prosecutions of political speech, just by "charg[ing] such offenses as true threats," would "effectively" abrogate even Brandenburg, perhaps the most consequential decision for the freedom of speech in the history of the United States. Ibid.

The intent requirement for criminalizing dissenting political speech is even more important in cases like Fair, where the defendant was prosecuted for online statements posted on social media. (Dsr 11-13) "The risk of overcriminalizing

upsetting or frightening speech has only been increased by the internet …. Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as … tone of voice, and expression. Moreover, it is easy for speech made in [] one context to inadvertently reach a larger audience." Counterman, 143 S.Ct. at 2122 (Sotomayor, J., concurring).

Additionally, the more protective New Jersey Constitution must also be construed to require the State to prove specific intent to threaten in order to proscribe dissenting political speech as a true threat. (Dsb 53-63; Dsr 19-23; Db 21, 39-40) The six Appellate Division judges in State v. Carroll, 456 N.J. Super. 528 (App. Div. 2018) and Fair stood on solid doctrinal ground when they drew conclusions similar to sister jurisdictions about the central importance of the intent requirement. (Dsb 21-29) See, e.g., State v. Boettger, 450 P.3d 805 (Kan. 2019); State v. Taylor, 866 S.E.2d 740 (N.C. 2021); O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); Brewington v. State, 7 N.E. 946, 955-56 (Ind. 2014); United States v. Cassel, 408 F.3d 622 (9th Cir. 2005); United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011); United States v. Heineman, 767 F.3d 970 (10th Cir. 2014). Black distinguished true threats from protected ideological speech by the intent of the speaker; Counterman acknowledged that it is a distinguishing feature if the prosecuted speech is dissenting political speech at the

First Amendment's core; and our history shows that a recklessness standard is frequently inadequate to protect people who are protesting against the government and prevailing social order from being silenced and imprisoned.

But even if, in the future, shifting coalitions on the United States Supreme Court were to expand Counterman's application of the recklessness standard to dissenting political speech — which has not yet happened — the burden on the State to prove intent to threaten, as articulated in Carroll and Fair, is consistent with Article I, Paragraphs 6 and 18 of our New Jersey Constitution. To hold that the speaker's intent does not matter would abrogate the right of New Jerseyans to participate fully in our democracy's free exchange of ideas.

The Supreme Court in Counterman did not directly address whether to extend the application of the recklessness standard in Counterman, where the speech was low-value, to a true threat prosecution for dissenting political speech. To the extent Counterman even speculates about the sufficiency of applying a recklessness standard to dissenting protest speech in a dissimilar case like Fair, it was "not necessary to the Court's holding" and should therefore not be found to be "controlling." Byrd v. Shannon, 715 F.3d 117, 123-24 (3d Circ. 2013). Tellingly, because the Colorado statute had a negligence standard, the constitutional sufficiency of recklessness itself was not briefed in Counterman, let alone specifically as to its applicability to cases like Fair. Counterman, 143 S.Ct. at 2139

(Barrett, J., dissenting) ("Where does recklessness come from? It was not raised by the parties. Only the Solicitor General noted this possibility — and briefly at that. Nor did the courts below address recklessness."). Indeed, Counterman was so light on whether recklessness would suffice elsewhere that the opinion does not mention Boettger or Fair. New Jersey is free to continue on its own more speech-protective course.

There are a few additional New Jersey-specific considerations. First, this Court has not been shy about requiring the State to prove specific intent for speech offenses, where criminal statutes would otherwise not give fair notice of what is prohibited, and would be unconstitutionally vague, in violation of the Fourteenth Amendment's Due Process Clause. See State v. Burkert, 231 N.J. 257 (2017); State v. Pomianek, 221 N.J. 66 (2015). (Dsb 58-62) These decisions are inconsistent with a recklessness standard that is focused on the expectations of amorphous communities. See Counterman, 143 S.Ct. at 2130 (Sotomayor, J., concurring) (reliance on "contemporary community standards" creates "ambiguity," as such standards "will change a great deal between communities and over time"). Second, New Jersey is a state "that has never been timid about its opinions, political or otherwise." Id. at 2122. See, e.g., Sweeney unleashes his fury as N.J. budget battle turns personal, The Star-Ledger (July 3, 2011) (reporting that New Jersey State Senate President Steve Sweeney expressed that he wanted "'to punch [Governor

Chris Christie] in the head'"); Democrats Pounce on Chris Christie's Blunt Words, The New York Times (April 15, 2011) (reporting that Chris Christie expressed that he wanted to "'take the bat out'" on State Senator Loretta Weinberg). It is difficult to grasp why, in a free society, ordinary New Jerseyans should risk prison time merely to exchange abrasive views about our own government, when the same rough-and-tumble rhetoric is "commonplace" in the government's own political discussions. Counterman, 143 S.Ct. at 2122 (Sotomayor, J., concurring). Third, an N.J.S.A. 2C:12-3a conviction allows the possibility that the speaker did not intend to threaten, and no actual listener perceived a threat. That is very different from the Colorado threat statute, which also required the government to prove that the communications actually "cause[d] that person … to suffer serious emotional distress." Counterman, 143 S.Ct. at 2112. Where the State is not required to prove actual terror, it should also not be relieved of the constitutional burden to prove intent to threaten, lest a speaker be imprisoned for expression where harm was neither intended nor actually perceived.

Our state and federal constitutions promise all of us a commitment to a free exchange of ideas. The government broke that promise when it imprisoned Fair for excoriating law enforcement over perceived injustices, without proving that he intended to terrorize. The Supreme Court's remedy in Counterman — which superimposed a recklessness requirement on a stalking statute, in a prosecution for

low-value, non-political speech — is not transferrable to Fair, who was silenced for protesting officers and their policies. Rather, our nation's history of suppressing dissenting political speech at the First Amendment's core — from Abrams to Watts to Brandenburg to Black — demands a strong intent requirement here.

CONCLUSION

This Court should affirm as modified the Appellate Division's reversal of Fair's conviction, hold that N.J.S.A. 2C:12-3a violates the state and federal constitutions, both on its face and as applied, and dismiss the indictment. As to the unanimity issue, this Court should affirm on the opinion below.

Respectfully submitted,

JOSEPH E. KRAKORA
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BY: /s/ Daniel S. Rockoff_____
Assistant Deputy Public Defender
Attorney ID No. 103522014

Dated: July 24, 2023