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SUPPLEMENTAL RESPONSE ON BEHALF OF DEFENDANT-RESPONDENT

SUPREME COURT OF NEW JERSEY
Docket No. 086617
Monmouth County Ind. No. 15-08-01454-I

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,	:	
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.

DEFENDANT IS CONFINED

Your Honors:

This letter-brief is respectfully submitted in lieu of a formal brief, pursuant to R. 2:6-2(b).

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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.

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

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

INDEX TO DEFENDANT'S RECORD CITATIONS (cont'd)

In this supplemental response, Fair cites the other July 24, 2023 filings as follows:

"ACLU2" – ACLU's supplemental brief;
"ACDL2" – ACDL's supplemental brief;
"Sb2" – State's supplemental brief; and
"AG2" – Attorney General's supplemental brief.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Fair continues to rely on the procedural history and facts in his three previous Supreme Court briefs and in his Appellate Division brief.

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.

In Counterman, the Supreme Court reaffirmed a longstanding principle: when a protestor engages in "dissenting political speech" that is a "hair's breadth away from political advocacy" — "particularly … strong protests against the government and prevailing social order," which are "so central to the theory of the First Amendment," yet also "so vulnerable to government prosecutions" that "bleed over" to protected speech — the government must prove specific intent before it may constitutionally imprison its critic. (Dss 4-5) But because Counterman's communications, made incident to a stalking offense, were so far afield from the dissenting political advocacy at "the First Amendment's core," the Court found that "the reason for that demand is not present here." (Dss 4)

Calvin Fair's oral and online advocacy against the government and prevailing social order was on the other side of that constitutional divide. Fair was silenced for protesting officers and their policies. Unlike in Counterman, "[t]he reason [to] demand" that the government prove specific intent is "present here." (Dss 4) New Jersey must not expand the application of a less-protective rule to the archetypal dissent in Fair, which is on the opposite side of the line in Counterman.

Indeed, Fair fits comfortably amongst other precedents in which the Supreme Court has either demanded a showing of specific intent, or strongly implied its necessity to avoid criminalizing dissenting political or ideological speech. (Dss 5-6; Dss 14-15) Conditioning criminalization on a showing of specific intent is necessary to avoid both the direct punishment of the expression of opinions, and self-censorship. (Dss 7-8) A reckless disregard standard fails to safeguard dissenting political or ideological speech at the core of the First Amendment from being prosecuted as a true threat. (Dss 8-11; Dss 13-14) It is also discriminatory (Dss 12-13), and is particularly ill-suited to protecting speech on social media in our diverse society. (Dss 15-16) At minimum, the more protective New Jersey Constitution requires the State to prove specific intent to threaten in order to proscribe dissenting political speech as a true threat. (Dss 16-20)

Fair would highlight areas where he agrees with amici. First, a showing of specific intent was required to prove guilt because Fair "was engaging in

quintessential protest against the government and policies he found objectionable." (ACLU2 at 5) That brings Fair's speech "within the ambit of Virginia v. Black, Hess v. Indiana, Brandenburg v. Ohio, and NAACP v. Claiborne Hardware Co." (ACLU2 at 6) Second, the "more expansive protections for free speech" in the New Jersey Constitution must be construed to require a showing of "intent to threaten," so as "[t]o ensure adequate breathing room" for "core political, artistic, and ideological speech." (ACLU2 at 9, 13-14) Third, as in Watts v. United States, 394 U.S. 705 (1969), an "independent appellate review" should conclude that this speech was at most hyperbolic "invective … against government or its officials," and was not a punishable true threat. (ACLU2 at 14, 19-20)

Monmouth County and the Attorney General dramatically overread Counterman in arguing that it "definitively" "disposes" of Fair's federal constitutional claims. (Sb2 at 2; AG2 at 1) The remedy fashioned in Counterman was a byproduct of a wildly distinguishable vehicle, namely nonpolitical speech in a stalking prosecution where defendant's counsel had no incentive to even oppose application of a recklessness standard. The Court acknowledged the line of cases requiring a specific intent standard for political and ideological dissent, but had no cause in Counterman to directly weigh whether to extend application of its less-protective standard to such speech. Far from "definitively" "dispos[ing]" of Fair's

federal constitutional claims, the line-drawing in Counterman suggests a more protective remedy where the government has sought to silence a political dissident.

The State's supplementals err by not addressing the recklessness standard's inadequate safeguards against the silencing of political dissent, in this very un-Counterman-like context. The expectation that protesters in the political arena can accurately assess whether every criticism will be perceived as too abusive — resembling a "people will know it when they see it" standard for political dissent — provides insufficient breathing room in context. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Many ideas in the political arena have both non-threatening and threatening meanings. When Justice Marshall expressed support, in the context of political advocacy, for "requir[ing] proof that the speaker intended his statement to be taken as a threat," Rogers v. United States, 422 U.S. 35, 48 (1975) (Marshall, J., concurring), he was "focused on the danger of deterring non-threatening speech" in support of civil rights. Counterman, 143 S.Ct. at 2116 (citing Marshall's concurrence favorably). To take a glaring example from American history, Martin Luther King, Jr., himself was "once considered by critics to be a dangerous radical who had to be locked up," Suzanne Nossel, Dare to Speak: Defending Free Speech For All at 50 (2020), and indeed, King was locked up "no less than twenty-nine times." Jacob Mchangama, Free Speech: A History from Socrates to Social Media at 298 (2022). The danger of deterring non-

threatening speech only grows when the speakers in the political arena are less high-minded than Dr. King: A congresswoman's post of herself directing a large rifle at an opponent, who responded that the speech was "dangerous," is interpretable as a threatening message of intimidation, but it is also interpretable as a non-threatening appeal for votes. Molly Olmstead, Marjorie Taylor Greene, the QAnon House Candidate, Posts Threatening Photo Directed at "the Squad," Slate (Sept. 4, 2020).

That speech in the political arena is prone to multiple interpretations also creates opportunities for officials in power to unduly restrict dissenting political speech, to their own political advantage. Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876, 1891 (2018) (need to limit "opportunity for abuse" from "indeterminate" prohibition). Given only a recklessness standard that turns principally on the nebulous issue of how other listeners might react, officials' "own politics may shape" a decision to silence invective challenging them and their policies. Ibid.

The "moral culpability" rationale cited in Counterman, 143 S.Ct. at 2117, for punishing non-political speech via a recklessness standard is also inapt in a prosecution for dissenting political speech. (Sb2 at 6; AG2 at 1) That is because there is a countervailing moral imperative to speak out forcefully against dreadful policies, notwithstanding awareness that some officials' worldviews may be

shaken. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the greatest menace to freedom is an inert people," and "public discussion is a political duty"); Theodore Roosevelt, Commencement Address (1893) ("The American citizen … who shrinks from the rough, hard work of politics because it jars on his nerves and is distasteful to him, and because he does not like to be jostled and knocked about … should be as much ashamed of himself as a soldier would be if he shrank from the toil and danger of a campaign …. [T]he good man … fights for the right[.]"); Frederick Douglass, "A Plea for Free Speech in Boston" ("[T]he right of speech … is the dread of tyrants …. Thrones … are sure to tremble, if men are allowed to reason[.]"). Far from being morally culpable, it is morally courageous to speak out against political injustices without backing down, notwithstanding awareness that those in power dread accountability.

The State's supplementals also err by downplaying the protectiveness of the New Jersey Constitution, which independently safeguards the important speech here from criminal conviction, at least unless our government can persuade a jury that the defendant-dissident intended his criticisms to threaten. (Sb2 at 13; AG2 at 1) After all, New Jersey's Constitution imposes an "affirmative obligation" to protect speech that is broader than its federal counterpart. State v. Schmid, 84 N.J. 535, 558-59 (1980). (Dsb 53-63)

The State's federalism arguments here would abrogate the right of all New Jerseyans to speak candidly about their government and about other matters of public affairs that are central to the freedom of speech. Even if the antithetical circumstances in Counterman and Fair are not distinguishable under federal law, the State's argument that we must not look to our independent state constitution to protect our rights, because we must "trust in that Court as the guardians of our liberties" (Sb2 at 15), goes against (1) the New Jersey Attorney General's recent warning not to trust the Supreme Court to protect our rights (Dsb 63), and (2) the Supreme Court's own acknowledgment that it historically cannot be trusted to protect our liberty of speech. Counterman, 143 S.Ct. at 2118 (acknowledging past "failure" to apply the specific intent requirement to protect political advocacy).

Regarding inter-state differences, the State argued the freedom of speech "should not mean one thing in Trenton and another" elsewhere. (Sb2 at 16) But New Jerseyans may wonder why our own government believes we should be less free to speak on matters of public affairs than our neighbors in states like Indiana, Brewington v. State, 7 N.E. 946, 955-56 (Ind. 2014) (state constitutional law independently requires specific intent test), or Kansas. State v. Boettger, 450 P.3d 805, 817-18 (Kan. 2019) (without directly addressing state constitutional law, pronouncing itself independently "persua[ded]" by compelling "illustrations" that a recklessness test merely focused on "aware[ness]" would "criminalize[]"

"protected political speech") (emphasis added). Looking around the world, New Jersey must strive to have nothing in common with authoritarian states that "conflat[e] … protected free expression and violent action," or "fudge the distinction between peaceful expression and violent crime," as a "justification" to "jail … dissenters." Nossel, Dare to Speak at 147. See, e.g., Mchangama, Free Speech at 338 (former President Trump "repeatedly labeled" Black Lives Matter protestors in May 2020 as "terrorists"). Rather, "the essential character of a political community is … revealed … by how it responds to the challenge of threatening ideas." Nossel, Dare to Speak at 254 (citing Columbia Law School Professor Vincent Blasi). No matter how other states respond, New Jersey should reveal itself to be a political community that "deals with disfavored viewpoints not with panic, but rather by engaging them in vigorous, reasoned debate." Ibid.

Moreover, New Jersey has a special concern for equality. As Justice Cardozo explained, free speech is "the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937). Free speech is the "engine of equality" for "all other rights," including "reproductive freedom" and "racial justice." Nossel, Dare to Speak at 167, 257. Regarding reproductive rights, consider a woman who, while only intending to speak candidly about her reproductive choices, contemplates telling her partner that she plans to obtain an abortion, notwithstanding her awareness that her partner will view that

communication as a plan to violently end the life of their child, a view widespread in their community, and will feel real terror and dread. But for a specific intent requirement, her choice to speak in reckless disregard of the anguish she is aware she will cause her partner may be morally culpable and criminally proscribable, and she faces a choice of whether to self-censor rather than risk speaking. Similarly, consider the arrests of at least 40 members of the National Woman's Party outside of the White House in 1919 for burning an effigy of President Wilson and making "violent speeches" denouncing him for holding "millions of women in political slavery." Mchangama, Free Speech at 245. Absent an intent requirement to protect speech, the march to equality can grind to a halt. As Justice Marshall believed, "the First Amendment … promoted equality and social justice because it afforded members of subordinated groups, whose voices are most likely to be suppressed, an opportunity to give voice to their concerns." Id. at 300. New Jersey's concern for equality demands that free speech not be circumscribed.

The State errs by not recognizing the presumption of unconstitutionality here. As Professor Stone explained, "[P]ublic officials … may sometimes be tempted … to suppress criticism in order to promote their policies and perpetuate their power. When this danger exists, there is good reason to suspend the usual presumption of constitutionality and insist upon a *compelling* justification for the government's action. The best example is when public officials attempt to punish

speech that challenges them or their policies. The First Amendment guards against such abuse by declaring such laws presumptively *unconstitutional.*" Geoffrey Stone, Perilous Times (2004), at 8 (emphasis in original). To prevent such abuse of power, the State Constitution must be construed to require proof of specific intent to threaten here.

The free, robust exchange of ideas is at the heart of American democracy. The government sent a Black man to prison because he dared to challenge them and their policies. To safeguard dissenting political speech from criminal punishment, this Court must affirm the Appellate Division's unanimous judgment that the government was required to prove Fair intended for his speech to terrorize.

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,

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BY: /s/ Daniel S. Rockoff_____
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Dated: August 3, 2023