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August 3, 2023

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Honorable Chief Justice and Associate Justices
New Jersey Supreme Court
Richard J. Hughes Justice Complex
Post Office Box 970
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Re State of New Jersey (Plaintiff-Appellant)
v. Calvin Fair (Defendant-Respondent)
Supreme Court Docket No. 086617
Indictment No. 15-08-1454
Case No. 15001722
Criminal Action: On Appeal As Of Right Pursuant to Rule 2:2-1(a)(1) From a Final Judgment of the Superior Court of New Jersey, Appellate Division
Sat Below: Honorable Clarkson S. Fisher, Jr., P.J.A.D.
Honorable Heidi Willis Currier, J.A.D.
Honorable Patrick DeAlmeida, J.A.D.

Honorable Justices:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal supplemental reply brief submitted on behalf of the State of New Jersey.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies upon the Statements of Procedural History and Facts as set forth in its previously-filed briefs.

LEGAL ARGUMENT

POINT I

UNDER COUNTERMAN v. COLORADO, 600 U.S. ___ (2023), THE STATE MAY PROSCRIBE AND PUNISH TRUE THREATS COMMUNICATED WITH A RECKLESS STATE OF MIND BECAUSE COUNTERMAN DOES NOT EXEMPT TRUE THREATS MADE DURING THE COURSE OF POLITICAL DISCOURSE.

Throughout the entirety of this litigation – before the Law Division, the Appellate Division, and this Court – defendant has argued that N.J.S.A. 2C:12-3(a) is unconstitutional because it allows a prosecution for terroristic threats when the defendant acted recklessly, i.e., in reckless disregard of the risk of terrorizing another. Defendant has consistently maintained that the First Amendment precludes a prosecution for any kind of true threat unless the State proves that the defendant acted with actual purpose or intent to terrorize another. Last month the United States Supreme Court flatly rejected defendant's position in Counterman v. Colorado, 600 U.S. ___ (2023), making clear that the First Amendment affords no constitutional protection to a true threat if the speaker conveyed the threat with at least a reckless state of mind.

Realizing his original argument is no longer viable in light of Counterman, defendant has predictably shifted course. Four years after his

conviction, and about a year after initial briefing before this Court, defendant now argues for the first time that true threats should be divided into two different categories: those made within the context of "political advocacy" or "political dissent" and those that lack "serious value" because they do not relate to "public policy." Defendant appears to acknowledge that under Counterman, a reckless state of mind is sufficient for the latter category of true threats, but nonetheless suggests that proof of actual intent to threaten should be required for the former category of true threats.

As justification for this new position, defendant relies primarily on Justice Sotomayor's minority opinion in Counterman. Defendant repeatedly cites to that opinion as if it were the law, though it most assuredly is not, and often without even identifying Justice Sotomayor as his source. At the same time, defendant largely ignores Justice Kagan's majority opinion, though it definitively resolves all First Amendment issues in this case. Defendant essentially maintains that when a person engages in political advocacy or political dissent, the mens rea requirement applicable in incitement cases should control, even if the person communicates a true threat while espousing his political point of view.

This Court should not consider this new claim at this late stage of the litigation. Any argument about whether there should be different standards for different types of true threats was not properly preserved. Likewise not preserved was any argument that this case should be treated as an incitement case as opposed to a traditional true-threats case. Had defendant had properly raised these issues before trial, the parties could have created a full and robust record addressing all facts and circumstances relevant to whether this case

should be analyzed through the lens of incitement or true-threats law. Instead, from the very start, defendant conceded that this was a true-threats case and it was litigated accordingly.

Defendant should not be permitted to take a last-minute detour onto an alternate route now that his initial argument has encountered a giant roadblock in the form of an adverse United States Supreme Court opinion settling his issue. Defendant waived any argument that so-called political discourse provides additional protections for true threats, and similarly waived any argument that this case is akin to an incitement case for First Amendment purposes. See R. 3:10-2(d).

Even assuming arguendo defendant properly preserved this newly-raised issue, he still would not be entitled to relief. Counterman makes clear that although specific intent is required in incitement cases, recklessness is enough in true-threats cases, just as it is enough for most other forms of constitutionally-unprotected speech. Also, Counterman draws no distinction between true threats conveyed during the course of political discourse and true threats conveyed in other contexts.

Notably, Counterman does not state, or even suggest, that a different mental state could or should be required if someone is charged with conveying a true threat while expressing a political point of view. In fact, just the opposite is true. Counterman instructs that the same mens rea requirements apply to all true threats. Under Counterman, a person cannot shield himself from civil or criminal liability for communicating a true threat, especially a true threat to commit a crime of violence in conscious disregard of the risk of

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terrorizing the target of that crime of violence, simply by espousing "political" commentary while making the threat.

Nothing in Counterman indicates that its holding does not apply when someone communicates a true threat while simultaneously expressing a political point of view. In fact, the Court explicitly referenced political threats while explaining why the mens rea required for true threats need be no higher than that required for defamation. Among other reasons, the Court explained that "protected speech near the borderline of true threats (even though sometimes political, as in Rogers) is, if anything, further from the First Amendment's central concerns than the chilled speech" in defamation cases. Id. at ___, slip op. at 12 (citing Rogers v. United States, 422 U.S. 35 (1975)) (emphasis added).

Even more revealing is the Court's discussion of the reasons why recklessness was selected for true threats prosecutions, even though specific intent is required in incitement cases. The Court noted that in incitement cases, a specific-intent requirement "helps prevent a law from deterring 'mere advocacy' of illegal acts – a kind of speech falling within the First Amendment's core." Id. at ___, slip op. at 8 (quoting Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)). But for true threats, the Court found no need to insist on the same level of breathing space for constitutionally-protected speech, given the foundational differences between incitement and true threats, the closer connection between incitement and political advocacy, the historic treatment of incitement in light of that close connection, and the lower risk of chilling valuable protected speech in the true-threats context. Id. at ___, slip op. at 13.

Notably, the Court stated: "For the most part, speech on the other side of the true-threats boundary line – as compared with the advocacy addressed in our incitement decisions – is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions." Ibid. (emphasis added). The Court's inclusion of the phrase "for the most part" makes clear that the recklessness standard was intended to apply to true threats across the board, despite the Court's awareness that in certain situations, permissible speech that comes close to qualifying as an unprotected true threat might actually be at the "core" of the First Amendment.

None of this should be taken to mean that political speech is not entitled to constitutional protection. It most certainly is. Indeed, the United States Supreme Court has long recognized that even "political hyperbole" is protected by the First Amendment. Watts v. United States, 394 U.S. 705, 708 (1969). But when a person conveys a true threat, the threat itself is entitled to no constitutional protection, even if it is communicated during a constitutionally protected expression of political opinion. As Justice Alito cogently explained, "a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself." Elonis v. United States, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part, dissenting in part).

The First Amendment "do[es] not permit [the government] to forbid or proscribe 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." Brandenburg, 394 U.S. at 447. Even though advocating violence is constitutionally protected unless it satisfies the

Brandenburg test, speech that constitutes a "true threat" is never protected and may be prosecuted so long as the government establishes that defendant acted with a mental state of at least recklessness. The bottom line is this: if a defendant engages in political speech that does not qualify as a true threat or incitement, the speech is constitutionally protected, even if most people would disagree with the substance of the speech or find it offensive. But if a person communicates a true threat, even in the context of political advocacy, the true threat will be constitutionally unprotected and subject to punishment if the prosecution proves that the person acted at least recklessly. There is no middle ground for so-called "political threats."

The State also notes that true threats conveyed during political advocacy are just as serious as other true threats and cause just as much psychic harm to the victims they target. Such victims are just as deserving of protection from the "fear of violence," as well as the "disruption that fear engenders," and just as deserving of protection "from the possibility that the threatened violence will occur." Virginia v. Black, 538 U.S. 343. 360 (2003).

The supplemental briefs filed by defendant and ACLU-NJ blur the line between true threats and incitement, but longstanding case law firmly establishes that true threats and incitement are different forms of unprotected speech, with different legal definitions and different mens rea requirements. Although "the line between the two forms of speech may be difficult to draw in some instances, this is not one of them." See United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983), cert. denied, 467 U.S. 1228 (1984).

A person engages in incitement when he exhorts third parties, using language "directed [at] producing imminent lawless action" that is "likely to

incite or produce such action." Brandenburg, 395 U.S. at 447; see Hess v. Indiana, 414 U.S. 105, 109-10 (1973) (holding that defendant's words did not constitute incitement, "[s]ince . . . [his] statement was not directed to any person or group of persons" and he was not "advocating, in the normal sense, any action"). True threats, by contrast, are generally communicated directly to the victim, rather than to third parties, and cause the victim reasonably to believe that an act of violence will be "executed by the speaker himself (or the speaker's co-conspirators)." New York ex rel. Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001); see also Fogel v. Collins, 531 F.3d 824, 830 (9th Cir. 2008) ("In most cases where courts have found that speech constituted a true threat, the threatening speech was targeted against specific individuals or was communicated directly to the subject of the threat").

Here, defendant neither "incited" any third parties to commit acts of lawlessness when he shouted at Officer Healey, nor did he encourage or implore others to take such action. In fact, "[f]ar from attempting to influence others," see Howell, 719 F.2d at 1260-61, defendant threatened to personally commit a crime of violence when he told the officer, in graphic terms, "Worry about a head shot, n****!" This was not incitement; it was a true threat. The officers immediately, and correctly, identified it as such.

Defendant erroneously maintains that Counterman "did not directly answer" whether a recklessness standard suffices when the government prosecutes dissenting political speech at the First Amendment's core," and "left the door open" for a holding that a recklessness standard provides inadequate protection to "political dissent." See Db4-5. Defendant was not prosecuted for expressing any so-called political opinions. He was prosecuted

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for threatening to shoot Officer Healey in the head – a threat that was just as dangerous and no closer to the "core" of the First Amendment than the threats at issue in Counterman.

Counterman resolves the appropriate mens rea for all true threats, including political threats, under the First Amendment. "That standard, again, is recklessness," Counterman, 600 U.S. at ___, slip op. at 14, and no reasonable application of the Hunt factors supports divergence from Counterman under the New Jersey State Constitution. See State v. Hunt, 91 N.J. 338, 363-68 (1982) (Handler, J., concurring).

As for ACDL-NJ's argument that the State failed to prove defendant acted recklessly, the State urges this Court not to consider this issue because defendant never raised it on appeal, see Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 48-49 (1982) (noting that amici must accept the case as presented by the parties without raising new issues), and, in any event, there is more than enough evidence to support a reasonable inference that defendant threatened to commit a crime of violence while consciously disregarding a substantial and unjustifiable risk of causing terror.

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CONCLUSION

For the foregoing reasons, and for the reasons set forth in previously-filed briefs, the State respectfully requests this Court reverse the Appellate Division opinion, uphold the constitutionality of N.J.S.A. 2C:12-3(a), and reinstate defendant's conviction.

Respectfully submitted,

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