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SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

INDICTMENT NO. 15-08-1454
CASE NO. 15001722

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	ON APPEAL AS OF RIGHT
v.	:	PURSUANT TO RULE 2:2-1(A)(1) FROM A FINAL JUDGMENT OF
CALVIN FAIR,	:	THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
Defendant-Respondent.	:	

SAT BELOW: The Honorable Clarkson S. Fisher, Jr., P.J.A.D.
The Honorable Heidi Willis Currier, J.A.D.
The Honorable Patrick DeAlmeida, J.A.D.

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State relies upon the Statement of Procedural History and Statement of Facts in its initial brief to this Court, submitted March 18, 2022 and filed May 20, 2022, with the following additions:

On November 1, 2023, this Court denied defendant's Motion to Dismiss the State's Notice of Appeal as of Right.

Oral argument before this Court was scheduled for January 30, 2023, but on January 24, 2023, after the United States Supreme Court granted certiorari in Colorado v. Counterman, Docket Number 22-138, this Court postponed oral argument until further notice. On June 27, 2023, the United States Supreme Court issued its decision in Colorado v. Counterman, 600 U.S. ___ (2023).

On June 30, 2023, this Court requested that the parties, including the amici curiae, submit supplemental briefs addressing Colorado v. Counterman. The Court asked the parties to simultaneously serve and file supplemental briefs no longer than 20 pages on or before July 24, 2023. In compliance with the Court's request, the State now submits this supplemental brief.

[1] For purposes of this supplemental brief, and to avoid unnecessary repetition, the State has combined its Statement of Procedural History with its Statement of Facts.

LEGAL ARGUMENT

POINT I

THE UNITED STATES SUPREME COURT'S DECISION IN COLORADO v. COUNTERMAN DEFINITIVELY RESOLVES THE FIRST-AMENDMENT ISSUES IN THIS CASE.

The key question in this appeal is whether the First Amendment grants constitutional protection to actual threats to commit crimes of violence when those threats are conveyed to victims in reckless disregard of the risk of terrorizing them. The Appellate Division erroneously answered this question in the affirmative, after misinterpreting United States Supreme Court precedent to require proof that the defendant acted with the intent to terrorize another under the First Amendment. The Appellate Division thus mistakenly held that N.J.S.A. 2C:12-3(a), which permits a conviction for terroristic threats based on a mens rea of recklessness, violates the First Amendment.

We now know that the Appellate Division's decision is wrong. Last month, in Counterman v. Colorado, the United States Supreme Court clarified that true threats are not protected under the First Amendment if they are communicated with a mens rea of recklessness. That decision definitively resolves all First Amendment issues before this Court and makes clear that N.J.S.A. 2C:12-3(a) withstands First Amendment scrutiny.

In Counterman, the United States Supreme Court recognized that "[t]rue threats of violence are outside the bounds of First Amendment protection and punishable as crimes." Id. at ___ (slip op at 1). The Court also noted that a statement may qualify as a true threat "based solely on its objective content," without regard to the speaker's state of mind. Id. at ___ (slip op. at 4). The Court nonetheless considered whether, in prosecutions for communicating true threats of violence, the First Amendment "still requires proof that the defendant had some subjective understanding of his statements." Id. at ___ (slip op. at 4). In other words, the Court considered "whether the First Amendment . . . demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications." Id. at ___ (slip op. at 4).

Colorado argued that there is no such mens rea requirement, and that a defendant may be convicted for communicating a true threat under the First Amendment so long an objective reasonable person would view the communication as threatening. Id. at ___ (slip op. at 2 to 4). Counterman, by contrast, urged the Court to hold that the First Amendment required the prosecution prove he was at least aware of the threatening nature of his communication. Id. at ___ (slip op. at 3 to 4).

The United States Supreme Court ultimately held that the First

Amendment does require proof that the defendant acted with a subjective mental state, but the Court was satisfied that a mental state of recklessness was sufficient. Id. at ___, ___-___; (slip op. at 1, 4 to 14). Thus, under Counterman, the State need only "show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence," but "need not prove any more demanding form of subjective intent to threaten another." Id. at ___ (slip op. at 1).

The majority opinion in Counterman, which was authored by Justice Kagan and joined by Chief Justice Roberts and Justices Alito, Kavanaugh, and Jackson, contains a robust discussion of the various categories of speech that have long been recognized as unprotected by the First Amendment. Those historic and traditional categories of unprotected speech include: (1) incitement, i.e., "statements 'directed [at] producing imminent lawless action,' and likely to do so"; (2) defamation, i.e., "false statements of fact harming another's reputation"; and (3) obscenity, i.e., "valueless material 'appeal[ing] to the prurient interest' and describing 'sexual conduct' in 'a patently offensive way.'" Id. at ___ (slip op. at 5) (quotations omitted)

As noted in Counterman, true threats of violence, i.e., "serious expression[s] conveying that a speaker means to commit an act of violence," is "another historically unprotected category of communications." Id. at ___

(slip op. at 5 to 6) (quotations omitted). The Court explained that a statement may qualify as a true threat based solely on its objective content, whether or not the speaker is "aware of, and intends to convey, the threatening aspect of the message." Id. at ___ (slip op. at 6) (citing Elonis v. United States, 575 U.S. 723, 733 (2015)). That is because the "[t]he existence of a threat depends not on 'the mental state of the author,' but on 'what the statement conveys' to the person on the other end." Id. at ___ (slip op. at 6) (quoting Elonis, 575 U.S. at 733). When a true threat is conveyed to someone who understands it as a threat, "all the harms that have long made threats unprotected naturally follow." Id. at __ (slip op. at 6). For example, those targeted by a true threat will be subject to "'fear of violence' and to the many kinds of 'disruption that fear engenders,'" regardless of the speaker's mental state. Id. at ___ (slip op. at 6) (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)).

Although the Counterman majority stated that all true threats fall outside the protections of the First Amendment, regardless of the speaker's mental state, the Court nonetheless decided to require proof of a subjective mental state in true-threat cases in order to provide sufficient "breathing room" for protected, non-threatening speech. Id. at ___ (slip op. at 6 to 10). The Court explained that proof of a subjective mental state "helps to counteract the prospect of chilling non-threatening expression, given the ordinary citizen's

predictable tendency" to err on the side of caution and "steer 'wide[] of the unlawful zone.'" Id. at ___ (slip op. at 9) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). A purely objective standard, by contrast, "would make people give threats a wide berth," and, thus, "discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." Id. at __ (slip op. at 10) (quoting Rogers v. United States, 422 U.S. 35, 47-48 (1975)).

After deciding to impose a subjective mens rea requirement for true threats under the First Amendment, the next question for the Court was what mental state should be minimally required. On this question, the Counterman majority was convinced that a purposeful state of mind was inappropriate, and that recklessness was sufficient.

In deciding on recklessness as the baseline standard, the Court preliminarily observed that recklessly causing harm to another is "morally culpable conduct." Id. at ___ (slip op. at 11). The Court noted that "[a] person acts recklessly . . . when he consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." Ibid. (quoting Voisine v. United States, 579 U.S. 586, 691 (2016) (internal quotation marks omitted in Counterman). The Court thus observed that recklessness involves a 'deliberate decision to endanger another.'" Ibid. (quoting Voisine, 579 U.S. at

694). In other words, a person who threatens violence while acting with a reckless state of mind "is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" Ibid. (quoting Elonis, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

The Court also referenced the strong public interest in deterring, combatting, prosecuting, and punishing true threats, which far outweighed any incidental benefits in giving yet more "breathing room" for protected non-threatening speech through insistence on a showing of purposeful intent:

> [R]ecklessness offers the right path forward. We have so far mostly focused on the constitutional threshold in free expression, and on the correlative need to take into account threat prosecutions' chilling effects. But the precedent we have relied on has always recognized – and insisted on 'accommodat[ing]' – the 'competing value[]' in regulating historically unprotected expression. . . . Here, as we have noted, that value lies in protecting against the profound harms, to both individuals and society, that attend true threats of violence . . . . The injury associated with those statements caused history long ago to place them outside the First Amendment's bounds. When despite that judgment we require use of a subjective mental-state standard, we necessarily impede some true-threat prosecutions. And as we go up the subjective mens rea ladder, that imposition on States' capacity to counter true threats becomes still greater – and, presumably, with diminishing returns for protected expression. In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about mens rea (absent, as is usual, direct evidence). And of particular importance, we prevent

> States from convicting morally culpable defendants. See Elonis, 575 U.S. at 745 . . . (opinion of Alito, J.). For reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.
>
> [Id. at ____ (slip op. at 11 to 12).]

As additional justification for a recklessness standard, the Court referenced the overwhelming acceptance of its adoption of a recklessness standard for defamation cases. Id. at ___ (slip op. at 12). In fact, the Court noted that "[i]n the more than half-century in which that standard has governed in [defamation cases], few have suggested that it needs to be higher – in other words, that still more First Amendment 'breathing space' is required." Ibid. The Court then concluded that if recklessness was sufficient in defamation cases, it certainly should be sufficient in true-threats cases. Ibid.

The Court found "no reason to offer greater insulation to threats than to defamation." Ibid. In fact, the Court observed that "[t]he societal interests in countering" true threats are "at least as high" as the interests in countering defamation. Ibid. Also, the Court opined that "protected speech near the borderline of true threats (even though sometimes political) is, if anything, further from the First Amendment's central concern than the chilled speech" at issue in cases involving "truthful reputation-damaging statements about public officials and figures." Ibid. The Court concluded that a recklessness

standard struck the desired balance, by "offer[ing] 'enough breathing space for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats." Id. at ___ (slip op. at 14) (quoting Elonis, 575 U.S. at 748 (opinion of Alito, J.)).

Turning to the facts in Counterman, the Court reversed Counterman's conviction because he had been prosecuted in accordance with a Colorado law that permitted prosecution based on a purely objective standard. Under that law, "the State had to show only that a reasonable person would understand his statements as threats," but the State "did not have to show any awareness on [the defendant's] part that his statements could be understood that way." Ibid.

As noted above, the Counterman majority relied, in part, on Justice Alito's opinion in Elonis. In that opinion, Justice Alito first espoused the view that in order to convict a defendant of a true threat, a showing of recklessness should be sufficient. As Justice Alito explained, when a person conveys a true threat while recklessly disregarding the risk of causing serious harm, he is engaged a "morally culpable" behavior:

> There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable. . . . Indeed, this Court has held that "reckless regard for human life" may justify the death penalty. . . . Someone who acts recklessly with respect to conveying a threat

> necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but delivers them anyway.
>
> [Id. at 745-46 (Alito, J., concurring in part and dissenting in part) (citations and parentheticals omitted).]

Justice Alito also stated that requiring only recklessness for a true-threats prosecution would not violate the First Amendment, even if the threat included legitimate statements that were entitled to protection, and even if the speaker did not intend to cause harm:

> It is settled that the Constitution does not protect true threats. . . . And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that 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.
>
> . . . . .
>
> [W]hether or not the person making a threat intends to cause harm, the damage is the same. And the fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection. Some people may experience a therapeutic or cathartic benefit only if they know that their words will cause harm or only if they actually plan to carry out the threat, but surely

> the First Amendment does not protect them.
>
> [Id. at 746-47 (Alito, J., concurring part and dissenting in part) (citations omitted).]

Finally, Justice Alito did not believe that proscribing reckless threats would chill statements that do not qualify as true threats, e.g., statements that may be literally threatening but are plainly not meant to be taken seriously. Id. at 748 (Alito, J., concurring in part and dissenting in part). Analogizing to defamation, Justice Alito said that "the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity," and Justice Alito felt that a recklessness standard was "similarly sufficient" for true threats. Ibid.

Justice Kagan's majority opinion in Counterman, which essentially adopted Justice Alito's conclusions and reasons in Elonis, ends the long-standing debate as to whether the First Amendment requires proof of a culpable mental state on the part of the speaker, and if so, what kind of mental state is minimally required. Now, the law is finally settled. There is a mens rea requirement and recklessness is sufficient. Thus, a defendant may be prosecuted for communicating a true threat under the First Amendment if the State proves that the defendant conveyed the threat recklessly, i.e., if the defendant consciously disregarded a substantial and unjustifiable risk that

another person would view his words as a threat.

Because N.J.S.A. 2C:12-3(a) requires a purposeful or reckless state of mind for terroristic-threats prosecutions in New Jersey, it complies with the First Amendment as defined by Counterman. The Appellate Division's published decision in this case, which erroneously holds otherwise, conflicts with Counterman and cannot remain good law.

All New Jersey state courts, including this Court, are bound by United States Supreme Court precedent interpreting the United States Constitution and its amendments. See State v. Coleman, 46 N.J. 16, 34 (1965) (recognizing that "the United States Supreme Court is the final arbiter on all questions of federal constitutional law"); see also Battaglia v. Union Cnty. Welfare Bd., 88 N.J. 48, 60 (1981) (stating that the New Jersey Supreme Court is "bound by the [United States] Supreme Court's interpretation and application of the First Amendment and its impact upon the states under the Fourteenth Amendment"), cert. denied, 456 U.S. 965 (1982); accord State v. Vawter, 136 N.J. 56, 70-71 (1994); State v. S.J.C., 471 N.J. Super. 608 (App. Div. 2022). Thus, this Court cannot hold that specific intent is required for true threats under the First Amendment. Counterman holds otherwise and it is binding on this Court.

The only remaining question is whether this Court should afford greater protection to true threats under the New Jersey Constitution than that which is

afforded under the First Amendment. The Appellate Division did not even consider that question because the panel found that defendant did not properly raise the issue. See State v. Fair, 469 N.J. Super. 538, 554 n.7 (App. Div. 2021). If this Court believes that defendant did preserve a state-constitutional claim, this Court should adopt the United States Supreme Court's analysis in Counterman and grant no more protection to true threats under our State Constitution than the United States Supreme Court granted such threats under the First Amendment.

Article I, paragraph 6 of the New Jersey Constitution, which is virtually identical to the First Amendment, is "generally interpreted as co-extensive with the First Amendment." E & J Equities, LLC v. Bd. of Adjustment of Twp. of Franklin, 226 N.J. 549, 568 (2016) (quoting Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999) (citing Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998))). For that reason, this Court has long recognized that "federal constitutional principles guide the Court's analysis" of the free-speech protections of our State Constitution. E & J Equities, LLC, 226 N.J. at 568 (quoting Schad, 160 N.J. at 176) (citing Hamilton Amusement Ctr., 156 N.J. at 264-65)).

Consistent with that tradition, this Court frequently looks to United States Supreme Court opinions interpreting the First Amendment for guidance

when interpreting equivalent provisions under the New Jersey Constitution. Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 329 (2003) ("[W]hen cognate provisions of the Federal Constitution are implicated, we have turned to case law relating to those provisions for guidance."); Hamilton Amusement Ctr., 156 N.J. at 264 ("Because we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, '[w]e rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution.'") (quoting Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998)); State v. Schmid, 84 N.J. 535, 549 (1980) (discussing free speech protections in New Jersey within federal First Amendment framework), appeal dismissed sub nom. Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

This Court does have authority to interpret our State Constitution more broadly than the Federal Constitution if there are "sound policy reasons" for doing so. State v. Stever, 107 N.J. 543, 556 (1987) (quoting State v. Hunt, 91 N.J. 338, 345 (1982)). But this Court has always maintained that "caution is required" before extending the protections of our State Constitution beyond the limits set by the United States Supreme Court for parallel provisions in the Federal Constitution. State v. Townsend, 186 N.J. 473, 488 (2006) (quoting Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 620 (2000); see also

Right to Choose v. Byrne, 91 N.J. 287, 301 (1982) ("[W]e proceed cautiously before declaring rights under our state Constitution that differ significantly from those enumerated by the United States Supreme Court in its interpretation of the federal Constitution.").

This Court has repeatedly declared, "[w]hen appropriate, we 'endeavor to harmonize our interpretation of the State Constitution with federal law.'" Townsend, 186 N.J. at 488 (quoting State v. Tucker, 137 N.J. 259, 291 (1994), cert. denied, 513 U.S. 1090 (1995)). Such harmonization is consistent with this Court's long-standing recognition of the merits of "a federal system of uniform interpretation of identical constitutional provisions." Right to Choose, 91 N.J. at 301.

Justice O'Hern extolled the values of federalism in his oft-cited concurring and dissenting opinion in State v. Hempele, 120 N.J. 182 (1990). In that opinion, Justice O'Hern opined that mere disagreement with a decision of the United States Supreme Court is an inadequate basis to "invoke our State Constitution to achieve a contrary result." Id. at 226 (O'Hern, J., concurring in part and dissenting in part). Otherwise, we invite "an inevitable shadowing of the moral authority of the United States Supreme Court." Ibid. That is to be avoided because, "[t]hroughout our history, we have maintained a resolute trust in that Court as the guardian of our liberties." Ibid. Justice O'Hern urged

his fellow Justices not to "personalize constitutional doctrine," and to exercise restraint when evaluating constitutional questions already decided by our nation's highest court. Id. at 227 (O'Hern, J., concurring in part and dissenting in part). In commonsense terms, he reminded us that the Bill of Rights "ought not mean one thing in Trenton and another across the Delaware River in Morrisville, Pennsylvania." Ibid.

Justice Garibaldi echoed these sentiments in her dissent in Hempele, noting that "under principles of federalism," only "sound public policy" should justify a departure from established federal constitutional law. Id. at 229 (Garibaldi, J., dissenting). That is because "[d]ivergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same." Id. at 230 (Garibaldi, J., dissenting) (quoting State v. Hunt, 91 N.J. 338, 345 (1982)).

Both Justice O'Hern and Justice Garibaldi cited to Justice Handler's concurrence in State v. Hunt, supra, where Justice Handler discussed "the importance of federal sources of constitutional doctrine," emphasized the need for "standards or criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights," and identified the following considerations as "relevant and important in making that determination": (1) textual language of the state constitution, such as

distinctive provisions or phraseology in our State charter; (2) legislative history; (3) preexisting state law; (4) structural differences between the federal and state constitutions; (5) matters of particular state interest or local concern; (6) the State's history and traditions; and (7) any distinctive attitudes of our State's citizenry. Id. at 362-68 (Handler, J., concurring).

Our courts have regularly invoked the Hunt factors in deciding whether to afford greater constitutional rights under our State Constitution than those afforded under the Federal Constitution. See, e.g., Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568 (2003); State v. Muhammad, 145 N.J. 23 (1996); State v. Williams, 93 N.J. 39, 59 (1983), cert. denied, 484 U.S. 954 (1987). Here, an examination of those factors reveals no sound basis to diverge from federal law.

The textual language, phrasing, and structure of Article I, paragraph 6 is virtually identical to the First Amendment. There is no state statute addressing free-speech guarantees in this context and, thus, there is no legislative history that would support interpreting Article I, paragraph 6 independently from the First Amendment. Likewise, there is nothing about this State's history and traditions, and nothing about the attitudes of New Jersey citizens, that merits affording more protection to true threats in New Jersey than in other areas of the country. And, finally, there is no pre-existing state law supporting

divergence from federal law in this particular area.

This Court generally adheres to United States Supreme Court interpretations of the First Amendment when interpreting the free-speech guarantees of the New Jersey Constitution, and there is no reason to change course in this context. Although there have been a few limited circumstances in which this Court has interpreted the free-speech clause of the New Jersey Constitution more expansively than the First Amendment, those exceptions plainly do not apply here. See, e.g., W.J.A. v. D.A., 210 N.J. 229, 242 (2012) (requiring proof of malice for allegedly defamatory statements "regarding private citizens in matters of public concern"); State v. Schmid, 84 N.J. 535 (1984) (recognizing that the New Jersey Constitution protects rights of speech and assembly against interference or impairment by private individuals, whereas the First Amendment limits only state interference).

Most importantly, there are no "sound policy reasons" for granting greater protection to true threats under the New Jersey Constitution than that which the United States Supreme Court has accorded to true threats under the First Amendment. See Stever, 107 N.J. at 556 (quoting Hunt, 91 N.J. at 345), Whether someone acts with a purpose to terrorize, or while consciously disregarding the risk of causing such terror, the effect on the victim is the same. Indeed, in both contexts, the speaker is engaged in morally culpable

behavior, and in both contexts the victim is subject to "'fear of violence' and to the 'disruption that fear engenders.'" Counterman. 600 U.S. at ___ (slip op. at 6) (quoting Virginia v. Black, 538 U.S. at 360).

Likewise, the existence of a mens-rea requirement ensures ample breathing space for protected non-threatening speech. Indeed, the statute provides notice to all that if they threaten to commit an act of violence while consciously disregarding the risk of terrorizing another, they will be subject to prosecution. Those who are not even aware of such risks will neither be chilled from engaging in protected speech, nor will they be in violation of the statute.

Finally, proscribing true threats that are recklessly communicated does not prevent or limit people from engaging in the type of legitimate discourse that is the bedrock of both the federal and state constitutions. People can still engage in such discourse, even if their language is caustic, vituperative, hateful, acerbic, or objectionable, so long as they do not threaten to commit crimes of violence while consciously disregarding a risk of terrorizing others.

In sum, Counterman resolves all First Amendment issues in this case. There is no basis for this Court to reject this landmark precedent on state constitutional grounds. Accordingly, this Court should find that N.J.S.A. 2C:12-3(a) satisfies the free-speech clauses of both the federal and state constitutions.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in previously-filed briefs, the State respectfully submits this Court should reverse the judgment of the Appellate Division, declare N.J.S.A. 2C:12-3(a) to be constitutional, and reinstate defendant's conviction.

Respectfully submitted,

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