DATE FILED: December 21, 2018 3:37 PM

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 14CA1800

Petitioner,

THE PEOPLE OF THE STATE OF COLORADO,

In the Interest of R.D.,

Respondent.

▲ **COURT USE ONLY** ▲

Case No. 2017SC116

CYNTHIA H. COFFMAN, Attorney General
JOSEPH G. MICHAELS, Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 9th Floor
Denver, CO 80203
Telephone: 720.508.6000
E-Mail: joseph.michaels@coag.gov
Registration Number: 40403
*Counsel of Record

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

Choose one:

☒It contains 2,874 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒**For each issue raised by the appellant,** the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Joseph G. Michaels

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

ISSUE ACCEPTED FOR REVIEW

Whether the court of appeals erred in determining that the defendant's comments, made on Twitter, were protected by the First Amendment.

INTRODUCTION

Social media has become an indispensable, and inescapable, part of daily life. RD invites this Court to ignore the realities of modern technology and public platforms for wide-ranging communication. He proposes that this Court hold that his comments unambiguously conveying threats, intending to convey threats, putting the victim in the defensive posture of having to respond to those threats, and triggering significant societal resources implicated by that threatened violence (including that implied in the form of a school shooting) should receive First Amendment protection, despite the scope and specificity of his true threats.

This Court should not accept that invitation. RD's arguments ignore both the realities of social media interaction and fundamental

principles of the true threat doctrine. On the contrary, RD's threats check every box necessary to convey a true threat.

STATEMENT OF THE FACTS

During the course of a student-initiated social media support group chat over Twitter, in the wake of the shooting death of a fellow high school student, RD issued the following statements directly to AC, another student-Twitter user. (TR 7/2/14, pp. 11-12, 17-18, 24-26.)

1) If he saw AC's "bitch ass outside of school[,] you catching a bullet bitch";

2) "[N]iggas will get your ass beat real shit";

3) "I'll come to Tgay [Thomas Jefferson, the victim's high school] and kill you nigga";

4) "[Y]ou think this shit a game, I'm not playing";

5) "Let me catch you away from school you is a dead man";

6) "You fuck with the wrong person leave you ass in a body bag"; and

7) "[T]rust me I'm not afraid to shoot."

(Exhibits, Ex. 2-4, D.) RD confirmed these threats by posting the picture of a handgun while threatening that:

8) "We don't want another incident like Arapahoe. My 9 never on vacation." (Exhibits, Ex. 5.)

Each of these eight statements was accompanied by a break in time, allowing RD to rethink his proposed threats, before he issued the next one. AC and another user both understood that RD was serious in conveying the threats. (TR 7/2/14, pp. 19:19-22, 39.)

RD contends his statements were not, in fact, true threats or actually conveyed threats.

SUMMARY OF THE ARGUMENT

Threats issued over Twitter that are intended as threats do not receive protection under the First Amendment. Simply because a threat is conveyed over Twitter, even to a user with a then-unknown identity but otherwise identifiable Twitter handle, does not insulate that threat or the threatener from criminal liability. There is no requirement that the offender actually intended to carry out the threat or even know the victim. The true threats doctrine requires that the ofender subjectively intended to convey a threat.

Here, RD's threats issued over social media satisfy this requirement. Indeed, there are even more compelling reasons to exempt such threats from First Amendment protection. These reasons include the impact on the victim, fear of violence, the necessity of police response—particularly in the context of a threatened shooting at school or of a student—and to protect targets of such threats from the fear of violence.

RD's eight repeated, specific, and direct threats each falls far afield from First Amendment protection. Collectively, they unambiguously convey RD's intent to issue a threat, to put his victim in fear, and to inspire fear of bodily harm. Consistent with long-established true threats jurisprudence, this Court should find that threats such as RD's, even issued over Twitter, are undeserving of First Amendment protection given the unquestionable substance the threats conveyed.

ARGUMENT

I. RD's statements, regardless of forum, unambiguously conveyed and were intended to convey true threats.

In order for a threat to amount to a true threat exempt from First Amendment protection, the person issuing the threat must intend it as a threat. *See Virginia v. Black*, 538 U.S. 343, 348, 354, 357, 363, 367 (2003); *accord Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015); *United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017) (recognizing that *Elonis* required evaluation of speaker's subjective intent). A true threat requires a serious expression of the intent to commit an unlawful act of violence against a particular individual or group. *Black*, 538 U.S. at 359.

Here, RD's multiple, repeated, and specific threats unambiguously expressed such a serious intent to commit an unlawful act of violence, were directed at a particular individual, and were intended as threats. Indeed, his repetition of the threats underscored that he was not merely bantering, but rather was issuing specific threats to the victim.

RD concedes that the existing true threat framework applies to threatening posts made on Twitter. He argues instead, however, that his posts simply did not satisfy the governing true threat criteria. But because his expressions of violence were specific, direct, and repeated against a particular individual, they conveyed his intent to express a threat and thus this argument must fail. This is particularly so because it ignores the very essence of social media interaction.

A. Standard of Review

This Court's review is de novo. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000); *People v. Lovato*, 2014 COA 113, ¶¶ 12, 41. "[D]eclaring a statute unconstitutional is one of the gravest duties impressed upon the courts," and this Court must presume that the General Assembly comports with constitutional standards in enacting a statute. *City of Greenwood Village*, 3 P.3d at 440.

Because statutes are presumed to be constitutional, RD has the burden of establishing its unconstitutionality beyond a reasonable doubt, particularly as applied to him. *Id.*; *Lovato*, ¶¶ 12, 42 (defendant

has the burden of establishing statute's unconstitutionality as applied to him beyond a reasonable doubt). Given the substance and content of RD's threats, this he cannot do.

B. Social media has transformed how this Court must assess free speech and true threats.

Social media is the "modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). But the internet can "substantially amplify the fear an individual can install via threats." *United States v. Wheeler*, 776 F.3d 736, 745 n.4 (10th Cir. 2015). In today's social media age, threats issued across the internet and directed at targets carry serious consequences both to the victim at whom the threat is directed and to a larger swath of individuals required to respond to such threats.

These individuals typically include police, emergency responders, school officials, and parents, to say nothing of the targeted victims themselves. *See, e.g.*, Elizabeth Hernandez, *Snapchat, social media threats toward Colorado schools increasingly causing panic, headaches for students, staff*[,] *and police*, THE DENVER POST (Dec. 1, 2018),

available at https://www.denverpost.com/2018/12/01/colorado-school-threat-social-media-snapchat/ (detailing bomb threats, threats of violence, and resulting panic among students and parents from threats that can spread uncontrolled over social-media platforms) (last visited Dec. 2, 2018); Noelle Phillips, *Aurora police investigating threat made via Snapchat toward Cherokee Trail High School student*, THE DENVER POST (Nov. 27, 2018), *available at* https://www.denverpost.com/2018/11/27/cherry-creek-schools-snapchat-threat/ (reporting on threat made via Snapchat that forced police officers to secure high school campus and noting how many students directly interacted with and were affected by the person issuing the threat, even though that person's identity was not known) (last visited Dec. 20, 2018); *see also United States v. Bradbury*, 848 F.3d 799, 802-03 (7th Cir. 2017) (finding that online threats will "almost assuredly ... cause substantial harm by diverting law enforcement resources").

In this respect, "[s]tudent use of social media has radically changed the public school landscape." Kevin C. McDowell, *When Social Media Becomes an Oxymoron Part II: Student Free Speech and*

Substantial Disruption, NAGTRI JOURNAL, Vol. 3 Issue 3 (Oct. 2018), *available at* https://www.naag.org/publications/nagtri-journal/volume-3-number-3/when-social-media-becomes-an-oxymoron-free-speech-true-threats-just-kidding.php. Indeed, "[s]tudent social media use has resulted in school concerns regarding harassment (particularly cyberbullying), a form of impingement on the rights of other students, which the Supreme Court cited in *Tinker* as a justification for a school to sanction student speech." *Id.* (citing *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 509 (1969)[1]).

Yet, the First Amendment and true threat framework is well-suited for application to the social media internet age and to Twitter posts particularly. The true threat doctrine does not require the immediacy of the fighting words doctrine. Rather, it solely requires that the offender intended that his or her words convey a threat—i.e., that he or she knowingly issued the expression of the intent of

[1] *Tinker* held that schools can ban speech if it may cause a substantial disruption or material interference with school function or could reasonably forecast a substantial disruption or interfere with the rights of others. 393 U.S. at 507-08, 514. A school's ability to regulate student speech is not at issue here.

violence—against a particular group or individual. *Elonis*, 135 S. Ct. at 2012; *Black*, 538 U.S. at 359. This easily can be done online, and the true threat framework equally governs threats issued over this new public square.

This Court must not ignore the practical consequences of its decision in this case or the implications it would carry to threats issued over Twitter or the internet and social media generally. Threats issued as threats and intended as threats should not receive First Amendment protections.

C. RD's threats conveyed, and were intended to convey, direct threats.

The true threats doctrine provides that when an offender issues threats that he intends as threats, those statements do not receive First Amendment protection. *See Black*, 538 U.S. at 348, 354, 357, 363, 367; *see also Elonis*, 135 S. Ct. at 2012; *Dutcher*, 851 F.3d at 761; *cf. Bradbury*, 848 F.3d at 802-03 (online threats "inspire fear," intentionally provoke a response, and by definition are "intentional and malicious"). In short, it cannot seriously be disputed that the

government can criminalize speech that intends to threaten bodily harm. *See United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012); *see also Black*, 538 U.S. at 348, 354, 357, 363, 367; *accord Elonis*, 135 S. Ct. at 2012; *Dutcher*, 851 F.3d at 761; *Bradbury*, 848 F.3d at 802-03. RD's threats—by their plain terms—not only unambiguously threatened bodily harm, but they did so repeatedly and pointedly.

More specifically, where a speaker means to convey a serious express of threatening intent to commit an unlawful act of violence, that speech does not receive First Amendment protection. *See Black*, 538 U.S. at 359. Here, RD's threats expressly conveyed an intent to commit an unlawful act. More damningly, RD was not issuing a generalized threat; rather, he threatened to shoot a specific individual—including at a specific place, on school grounds. *Cf. id.* at 348, 354, 357, 363, 367 (noting that threatening behavior generally, without the intent to intimidate or threaten, could remain protected). Rather, RD intended his missives to "inspire fear of bodily harm." *Id.* at 363.

Finally, this Court long ago recognized that such threatening speech as RD's here goes well "beyond a mere expression of criticism."

People v. Janousek, 871 P.2d 1189, 1193 (Colo. 1994). Rather, RD's "numerous expressions of violent thought and contemplated action," specifically punctuated by repeat and specific exhortations to violence, do not receive First Amendment protections. *Id.* at 1195. Like *Janousek*, RD's posts "evince[d] a threatening manner" in language and tone—to say nothing of content, too. *Compare id.*; *accord People v. Hickman*, 988 P.2d 628, 638 (Colo. 1999). In short, repeated, threatening, explicit communications—precisely those such as RD's here—are not constitutionally protected. *People v. Baer*, 873 P.2d 1225, 1231-32 (Colo. 1999). There is no reason for this Court to depart from its own precedent in this respect.

D. Although there is no requirement that the victim actually be put in fear by the threats, the victim here confirmed he had perceived them as threats and was put in fear because of them.

The true threats doctrine is premised, partly, on the goal of protecting "individuals from the fear of violence," from the "disruption that fear engenders," and from the "possibility that the threatened violence" will occur. *Black*, 538 U.S. at 360 (citing *R.A.V. v. City of St.*

Paul, 505 U.S. 377, 388 (1992)). But it does not require analysis of, nor is it contingent on, the victim's response; rather, as above, the focus is on RD's intent when issuing the statements. The victim's subjective reaction simply is not relevant. *See id.*

Nevertheless, here, *not only* did the victim testify that he believed RD's threats were true, but another user confirmed that he, too, believed RD intended the statements as threats and that he perceived them as such. The victim's defensive response was understandable, if not required, given the intensity and specificity of the threats RD directed at him. *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969) (observing that nobody surrounding Watts understood Watts' statements as threats and that "sharp attacks on government and public officials" were permissible).

The victim's reaction confirmed that he subjectively perceived RD's posts as direct threats to his person and safety. Regardless, RD's posts rendered AC the subject of threats of violence, which in turn triggers the "disruption that fear engenders" and the "possibility that the threatened violence" could occur. *See Black*, 538 U.S. at 360. This

is precisely the type of threat the Supreme Court has emphasized deserves no First Amendment protection.

E. The determination of whether a threat issued by an offender was intended to convey a threat ultimately is a question for the factfinder.

To the extent that this Court may wish to interpret the otherwise-unambiguous nature of RD's threats, this Court should confirm the Tenth Circuit's recognition that the core question of whether a statement is actually a true threat is a question best left to the factfinder. *Wheeler*, 776 F.3d at 742. This is particularly appropriate when assessing an offender's subjective intent in making such a threat. *See id.* at 740. In this respect, the question then is one of sufficiency.[2] And here, the factfinder unambiguously credited the victim, reviewed

---

[2] As this Court well knows, the sufficiency test considers "both direct and circumstantial" evidence equally, *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973), the prosecution receives the benefit of every reasonable inference, and determinations of witness credibility, as well as the weight given to evidence, lie with the factfinder, *People v. McIntier*, 134 P.3d 467, 471 (Colo. App. 2005); *cf. People v. Perez*, 2016 CO 12, ¶ 31 ("The question is not whether it is possible to disagree with the inferences, but rather, whether the inferences are reasonable when the evidence is viewed as a whole in the light most favorable to the prosecution.").

the statements, heard all the testimony, and determined—as a factual matter—that RD intended his statements as threats.

RD argues, in essence, that the victim was never really threatened. But this argument has three fatal flaws.

First, that question, at heart, is a question of sufficiency, and in the light most favorable to the prosecution the testimony—and the victim's behavior—was unambiguous that the victim perceived a threat. Second, and dispositively, such an analysis is irrelevant: the question is not *the victim's* perception, but rather *the offender's* intent. And here, RD's intent was manifest in his words, message, and repetition.

Third, it was clear enough from the context of the conversation where the victim could be located: at Thomas Jefferson High School. Social media, and Twitter particularly, lend themselves to easily reconciling a user's handle (online identifier) with their actual identity. Regardless, the threat was intended as a threat when it was issued. Had RD shown up with a gun at the school seeking the victim, the situation rapidly would have become dire. But the true threats doctrine does not require that intent to act; it requires that the offender intend

the threats as threats meant to place the victim in fear of bodily harm or death. *See Black*, 538 U.S. at 359-60; *Hickman*, 988 P.2d at 638. RD's threats fit that bill.

Finally, it bears emphasizing that the statute itself is narrowly drawn and expressly disclaims any intrusion on First Amendment protections. *See* § 18-9-111(1)(e), C.R.S. (2018) (articulating limiting construction to ensure constitutional parameters in that the speech must "*intend*[] to either harass or threaten" (emphasis added)); *accord Hickman*, 988 P.2d at 638; *People v. Cross*, 114 P.3d 1, 6 (Colo. App. 2004) (holding statute not unconstitutionally overbroad where it contains limiting construction).

CONCLUSION

There is no fundamental constitutional rationale that RD's speech *should* receive First Amendment protection unless—contrary even to RD's position—this Court finds that internet free speech issues somehow dictate a different test and result. But even RD does not advocate for so extreme a position. He simply argues that his

statements do not bear out the threatening nature they conveyed. But RD's threats speak for themselves, and they voice loud, clear, aggressive, and specific threats.

Threats made over social media can, and should, be prohibited under the true threats doctrine. This Court should hold that statements intended as threats issued over Twitter and social media do not receive protection under the First Amendment. It should recognize that RD's repeated, intentional, and unambiguous threats here do not constitute protected free speech.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

/s/ Joseph G. Michaels
JOSEPH G. MICHAELS, 40403*
Senior Assistant Attorney General
Criminal Appeals Section
Attorneys for the People of the State of Colorado
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY BRIEF** upon **ELIZABETH PORTER-MERRILL** and all parties herein via Colorado Courts E-filing System (CCES) on December 21, 2018.

/s/ Tiffiny Kallina

MATTER ID: 4698