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July 18, 2023

Clerk's Office
Michigan Supreme Court
925 W Ottawa Street
Lansing, Michigan 48913

Re: Supplemental Authority in *People v Burkman, Wohl* (Nos. 164638, 164639)

To the Clerk:

In the final days of the U.S. Supreme Court's term, it released two decisions that are relevant for this Court's review in *Burkman* and *Wohl*.

On June 27, 2023, the U.S. Supreme Court issued a decision in which it reiterated that "[t]rue threats of violence are outside the bounds of First Amendment protection." *Counterman v Colorado,* 600 US ___; 143 S Ct 2106, 2111 (2023); see also *id* at 143 S Ct at 2114, citing *Virginia v Black*, 538 US 343, 359 (2003). For the criminal prosecution for these kinds of threats, the First Amendment requires proof that "the defendant had some subjective understanding of the threatening nature of his statements," and that "a mental state of recklessness is sufficient." *Counterman,* 143 S Ct at 2111. This mental state requirement is consistent with the arguments advanced by the People here: "the critical question is whether [Burkman and Wohl] intended that those assertions made in the call would deter minority members from voting. The testimony developed at the preliminary examination is more than sufficient to demonstrate this intent." AG's Brief, p 23.

On June 23, 2023, the U.S. Supreme Court issued a decision in which it rejected an overbreadth challenge to a federal statute, relying on the "speech integral to unlawful conduct" exception to the First Amendment. See *United States v Hansen*, 599 US ___, 143 S Ct 1932, 1947 (2023), citing *Giboney v Empire Storage & Ice Co*, 336 US 490, 502 (1949). The federal statute at issue in *Hansen* makes it unlawful to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." *Hansen,* 143 S Ct at 1940, citing 8 USC § 1324(a)(1)(A)(iv). Consistent with the People's arguments here, see AG's Brief, pp 27–39, the U.S. Supreme Court rejected a facial challenge there on overbreadth grounds, ruling that Hansen had failed to show that any overbreadth was "substantial relative to its plainly legitimate sweep." *Hansen,* 143 S Ct at 1948 (cleaned up).

The People present these cases for the Court's consideration. See MCR 7.312(I).

Sincerely yours,

/s/ B. Eric Restuccia

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUNTERMAN *v.* COLORADO

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 22–138. Argued April 19, 2023—Decided June 27, 2023

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. did not respond. In fact, she tried repeatedly to block him, but each time, Counterman created a new Facebook account and resumed contacting C. W. Several of his messages envisaged violent harm befalling her. Counterman's messages put C. W. in fear and upended her daily existence: C. W. stopped walking alone, declined social engagements, and canceled some of her performances. C. W. eventually contacted the authorities. The State charged Counterman under a Colorado statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c). Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. Following Colorado law, the trial court rejected that argument under an objective standard, finding that a reasonable person would consider the messages threatening. Counterman appealed, arguing that the First Amendment required the State to show not only that his statements were objectively threatening, but also that he was aware of their threatening character. The Colorado Court of Appeals disagreed and affirmed his conviction. The Colorado Supreme Court denied review.

Held: The State must prove in true-threats cases that the defendant had some subjective understanding of his statements' threatening nature, but the First Amendment requires no more demanding a showing than recklessness. Pp. 4–14.

(a) The First Amendment permits restrictions upon the content of

speech in a few limited areas. Among these historic and traditional categories of unprotected expression is true threats. True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Virginia* v. *Black*, 538 U. S. 343, 359. The existence of a threat depends not on "the mental state of the author," but on "what the statement conveys" to the person on the receiving end. *Elonis* v. *United States*, 575 U. S. 723, 733. Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. That is because bans on speech have the potential to chill, or deter, speech outside their boundaries. An important tool to prevent that outcome is to condition liability on the State's showing of a culpable mental state. *Speiser* v. *Randall*, 357 U. S. 513, 526. That kind of "strategic protection" features in this Court's precedent concerning the most prominent categories of unprotected speech. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 342. With regard to defamation, a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280. The same idea arises in the law respecting obscenity and incitement to unlawful conduct. See, *e.g., Hess* v. *Indiana,* 414 U. S. 105, 109; *Hamling* v. *United States*, 418 U. S. 87, 122–123. And that same reasoning counsels in favor of requiring a subjective element in a true-threats case. A speaker's fear of mistaking whether a statement is a threat, fear of the legal system getting that judgment wrong, and fear of incurring legal costs all may lead a speaker to swallow words that are in fact not true threats. Insistence on a subjective element in unprotected-speech cases, no doubt, has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. But a subjective standard is still required for true threats, lest prosecutions chill too much protected, non-threatening expression. Pp. 5–10.

(b) In this context, a recklessness standard—*i.e.,* a showing that a person "consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another," *Voisine* v. *United States*, 579 U. S. 686, 691—is the appropriate *mens rea.* Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression. Using a recklessness standard also fits with this Court's defamation decisions, which adopted a recklessness rule more than a half-century ago. The Court sees no reason to offer greater insulation to threats than to defamation. While this Court's incitement decisions demand more, the reason for that demand—the need to protect from legal sanction the

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Syllabus

political advocacy a hair's-breadth away from incitement—is not present here. For true threats, recklessness strikes the right balance, offering "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U. S., at 748. Pp. 10–14.

(c) The State prosecuted Counterman in accordance with an objective standard and did not have to show any awareness on Counterman's part of his statements' threatening character. That is a violation of the First Amendment. P. 14.

497 P. 3d 1039, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, KAVANAUGH, and JACKSON, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined as to Parts I, II, III–A, and III–B. THOMAS, J., filed a dissenting opinion. BARRETT, J., filed a dissenting opinion, in which THOMAS, J., joined.

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SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE KAGAN delivered the opinion of the Court.

True threats of violence are outside the bounds of First Amendment protection and punishable as crimes. Today we consider a criminal conviction for communications falling within that historically unprotected category. The question presented is whether the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. We hold that it does, but that a mental state of recklessness is sufficient. The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another.

I

From 2014 to 2016, petitioner Billy Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic

("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. 3 App. 465. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." 497 P. 3d 1039, 1044 (Colo. App. 2021). And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." *Ibid.* "Staying in cyber life is going to kill you." *Ibid.* "You're not being good for human relations. Die." *Ibid.*

The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "threat[ening her] life"; "was very fearful that he was following" her; and was "afraid [she] would get hurt." 2 App. 177, 181, 193. As a result, she had "a lot of trouble sleeping" and suffered from severe anxiety. *Id.*, at 200; see *id.*, at 194–198. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. See *id.*, at 182–183, 199, 201–206, 238–239. Eventually, C. W. decided that she had to contact the authorities. *Id.*, at 184.

Colorado charged Counterman under a statute making it unlawful to "[r]epeatedly . . . make[] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022). The only evidence the State proposed to introduce at trial were his Facebook messages.[1]

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[1] The statute Counterman was charged with violating is titled a "stalking" statute and also prohibits "[r]epeatedly follow[ing], approach[ing], contact[ing], [or] plac[ing] under surveillance" another person. §18–3–602(1)(c). But the State had no evidence, beyond what Counterman claimed, that he actually had followed or surveilled C. W. For example, C. W. had never noticed anything of that kind. So the prosecution based

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Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." *People* v. *Cross*, 127 P. 3d 71, 76 (Colo. 2006). Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of "subjective intent to threaten" C. W. *In re R. D.*, 464 P. 3d 717, 731, n. 21 (Colo. 2020). The court decided, after "consider[ing] the totality of the circumstances," that Counterman's statements "r[o]se to the level of a true threat." 497 P. 3d, at 1045. Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The court accordingly sent the case to the jury, which found Counterman guilty as charged.

The Colorado Court of Appeals affirmed. Counterman had urged the court to hold that the First Amendment required the State to show that he was aware of the threatening nature of his statements. Relying on its precedent, the court turned the request down: It "decline[d] today to say that a speaker's subjective intent to threaten is necessary" under the First Amendment to procure a conviction for threatening communications. *Id.*, at 1046 (quoting *R. D.*, 464 P. 3d, at 731, n. 21). Using the established objective standard, the court then approved the trial court's ruling that Counterman's messages were "true threats" and so were not protected by the First Amendment. 497 P. 3d, at 1050. The Colorado Supreme Court denied review.

Courts are divided about (1) whether the First Amendment requires proof of a defendant's subjective mindset in

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its case solely on Counterman's "[r]epeated[ ] . . . communication[s]" with C. W. *Ibid.*

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true-threats cases, and (2) if so, what *mens rea* standard is sufficient. We therefore granted certiorari. 598 U. S. ___ (2023).

II

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless 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.[2] Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman's view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the defendant had some understanding of his

[2]A preliminary clarification may be useful, concerning the difference between awareness of a communication's contents and awareness of its threatening nature. Everyone agrees, again, that the State must prove the former—and Colorado law appears to hold as much. See Colo. Rev. Stat. §18–3–602(1)(c); Brief for Respondent 18. So, for example, if a defendant delivers a sealed envelope without knowing that a threatening letter is inside, he cannot be liable for the communication. So too (though this common example seems fairly preposterous) if a "foreigner, ignorant of the English language, who would not know the meaning of the words," somehow manages to convey an English-language threat. *Elonis* v. *United States*, 575 U. S. 723, 738 (2015) (internal quotation marks omitted). The question in this case arises when the defendant (unlike in those hypotheticals) understands the content of the words, but may not grasp that others would find them threatening. Must he do so, under the First Amendment, for a true-threats prosecution to succeed?

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statements' threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent, we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim.

A

"From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas." *United States* v. *Stevens*, 559 U. S. 460, 468 (2010). These "historic and traditional categories" are "long familiar to the bar" and perhaps, too, the general public. *Ibid.* One is incitement—statements "directed [at] producing imminent lawless action," and likely to do so. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*). Another is defamation—false statements of fact harming another's reputation. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, 342 (1974). Still a third is obscenity—valueless material "appeal[ing] to the prurient interest" and describing "sexual conduct" in "a patently offensive way." *Miller* v. *California*, 413 U. S. 15, 24 (1973). This Court has "often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest" in their proscription. *Stevens*, 559 U. S., at 470 (internal quotation marks omitted; emphasis deleted).

"True threats" of violence is another historically unprotected category of communications. *Virginia* v. *Black*, 538 U. S. 343, 359 (2003); see *United States* v. *Alvarez*, 567 U. S. 709, 717–718 (2012) (plurality opinion). The "true" in that term distinguishes what is at issue from jests, "hyperbole,"

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or other statements that when taken in context do not convey a real possibility that violence will follow (say, "I am going to kill you for showing up late"). *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*). True threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Black*, 538 U. S., at 359. Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat, as this Court recently explained. See *Elonis* v. *United States*, 575 U. S. 723, 733 (2015). The 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. *Ibid.* When the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow. True threats subject individuals to "fear of violence" and to the many kinds of "disruption that fear engenders." *Black*, 538 U. S., at 360 (internal quotation marks omitted). The facts of this case well illustrate how.[3]

Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech

[3]The concurrence relies on *Virginia* v. *Black*, 538 U. S. 343 (2003), to argue that the category of true threats itself incorporates a *mens rea* element. See *post*, at 9–11, 14 (SOTOMAYOR, J., concurring in part and concurring in judgment). But that claim is based on a misreading. The statements the concurrence quotes merely reflect that the statute involved in the case required a showing of intent. *Black* did not address whether the First Amendment demands such a showing, or why it might do so. See *United States* v. *Jeffries*, 692 F. 3d 473, 479–480 (CA6 2012) (Sutton, J.); see also *post*, at 9–10, and n. 4 (BARRETT, J., dissenting) (explaining that *Black* concerned a different part of the statute, preventing consideration of contextual factors in assessing whether a statement was a threat).

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falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 777 (1986). Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms. *Gertz*, 418 U. S., at 340. 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. *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958). Such a requirement comes at a cost: It will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought. But the added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens "the hazard of self-censorship" by "compensat[ing]" for the law's uncertainties. *Mishkin* v. *New York*, 383 U. S. 502, 511 (1966). Or said a bit differently: "[B]y reducing an honest speaker's fear that he may accidentally [or erroneously] incur liability," a *mens rea* requirement "provide[s] 'breathing room' for more valuable speech." *Alvarez*, 567 U. S., at 733 (Breyer, J., concurring in judgment).

That kind of "strategic protection" features in our precedent concerning the most prominent categories of historically unprotected speech. *Gertz*, 418 U. S., at 342. Defamation is the best known and best theorized example. False and defamatory statements of fact, we have held, have "no constitutional value." *Id.*, at 340; see *Alvarez*, 567 U. S., at 718–719 (plurality opinion). Yet a public figure cannot recover for the injury such a statement causes unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964); see *Garrison* v. *Louisiana*, 379 U. S. 64, 74 (1964) (using the same

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standard for criminal libel). That rule is based on fear of "self-censorship"—the worry that without such a subjective mental-state requirement, the uncertainties and expense of litigation will deter speakers from making even truthful statements. *Sullivan*, 376 U. S., at 279. The First Amendment, we have concluded, "requires that we protect some falsehood in order to protect speech that matters." *Gertz*, 418 U. S., at 341.

The same idea arises in the law respecting obscenity and incitement to unlawful conduct. Like threats, incitement inheres in particular words used in particular contexts: Its harm can arise even when a clueless speaker fails to grasp his expression's nature and consequence. But still, the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. *Hess* v. *Indiana*, 414 U. S. 105, 109 (1973) (*per curiam*); see *Brandenburg*, 395 U. S., at 447; *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 927–929 (1982). That rule helps prevent a law from deterring "mere advocacy" of illegal acts—a kind of speech falling within the First Amendment's core. *Brandenburg*, 395 U. S., at 449. And for a similar reason, the First Amendment demands proof of a defendant's mindset to make out an obscenity case. Obscenity is obscenity, whatever the purveyor's mental state. But we have repeatedly recognized that punishment depends on a "vital element of scienter"—often described as the defendant's awareness of "the character and nature" of the materials he distributed. *Hamling* v. *United States*, 418 U. S. 87, 122–123 (1974); see *Elonis*, 575 U. S., at 739 (reiterating *Hamling*). The rationale should by now be familiar. Yes, "obscene speech and writings are not protected." *Smith* v. *California*, 361 U. S. 147, 152 (1959). But punishing their distribution without regard to scienter would "have the collateral effect of inhibiting" protected expression. *Id.*, at 151.

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Given "the ambiguities inherent in the definition of obscenity," the First Amendment "requires proof of scienter to avoid the hazard of self-censorship." *Mishkin*, 383 U. S., at 511.[4]

The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer "wide[] of the unlawful zone." *Speiser*, 357 U. S., at 526. The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably

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[4] The dissent, in urging an objective standard here, reads the obscenity decisions as requiring merely that the defendant know "what the material depicts" (as a speaker must know a communication's contents). *Post*, at 5–6 (opinion of BARRETT, J.) (relying on *Hamling*, 418 U. S., at 120–123). But see the statements quoted above: That is not what they say. And indeed, this Court recently rejected the dissent's revisionist reading, explaining in detail—and in response to a near-identical argument—that the obscenity decisions demand awareness of "the *character* of [the materials,] not simply [their] contents." *Elonis*, 575 U. S., at 739–740 (discussing *Hamling*, 418 U. S., at 120–123, and *Mishkin*, 383 U. S., at 510).

The dissent's use of two other First Amendment categories—fighting words and false commercial speech—to support an objective test also falls flat. See *post*, at 3–4 (opinion of BARRETT, J.). This Court has not upheld a conviction under the fighting-words doctrine in 80 years. At the least, that doctrine is today a poor candidate for spinning off other First Amendment rules. False commercial speech is also a poor analog, though for different reasons. Put aside that the line of cases the dissent invokes has never been listed among the historically unprotected categories of speech. See, *e.g.*, *United States* v. *Stevens*, 559 U. S. 460, 468 (2010); see *supra*, at 5. Yet more relevant, the Court has often noted that commercial speech is less vulnerable to chill than most other speech is. See, *e.g.*, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 481 (1989). And it is the fear of chill that has led to state-of-mind requirements in the context of unprotected speech.

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involving only political hyperbole. See *Rogers* v. *United States*, 422 U. S. 35 (1975). The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats "a wide berth." *Id.*, at 47 (concurring opinion). And so use of that standard would discourage the "uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.*, at 48 (quoting *Sullivan*, 376 U. S., at 270).

The reasoning—and indeed some of the words—came straight from this Court's decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

B

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices. Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he "consciously desires" a result—so here, when he wants his words to be received as threats. *United States* v. *Bailey*, 444 U. S. 394, 404 (1980). Next down, though not often distinguished from purpose, is knowledge. *Ibid.* A person acts knowingly when "he is aware that [a] result is practically certain to follow"—so here, when he knows to a practical

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certainty that others will take his words as threats. *Ibid.* (internal quotation marks omitted). A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Voisine* v. *United States*, 579 U. S. 686, 691 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden* v. *United States*, 593 U. S. ___, ___ (2021) (plurality opinion) (slip op., at 5). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *Voisine*, 579 U. S., at 694. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." *Elonis*, 575 U. S., at 746 (ALITO, J., concurring in part and dissenting in part).[5]

Among those standards, recklessness offers the right path forward. We have so far mostly focused on the constitutional interest 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. *Gertz*, 418 U. S., at 348. Here, as we have noted, that value lies in protecting against the profound

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[5]Just to complete the *mens rea* hierarchy, the last level is negligence—but that is an objective standard, of the kind we have just rejected. A person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. See *Borden*, 593 U. S., at ___ (plurality opinion) (slip op., at 5). That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature. See *Elonis*, 575 U. S., at 738 ("Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability . . . to negligence" (internal quotation marks omitted)).

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harms, to both individuals and society, that attend true threats of violence—as evidenced in this case. See *supra*, at 2, 6. 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.

Using a recklessness standard also fits with the analysis in our defamation decisions. As noted earlier, the Court there adopted a recklessness rule, applicable in both civil and criminal contexts, as a way of accommodating competing interests. See *supra*, at 7–8. In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment "breathing space" is required. *Gertz*, 418 U. S., at 342. And we see no reason to offer greater insulation to threats than to defamation. See *Elonis*, 575 U. S., at 748 (opinion of ALITO, J.). The societal interests in countering the former are at least as high. And the 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 *Sullivan*-type cases (*i.e.*, truthful reputation-damaging statements about public officials and figures).

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It is true that our incitement decisions demand more—but the reason for that demand is not present here. When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge. See *Hess*, 414 U. S., at 109; *supra*, at 8. In doing so, we recognized that incitement to disorder is commonly a hair's-breadth away from political "advocacy"—and particularly from strong protests against the government and prevailing social order. *Brandenburg*, 395 U. S., at 447. Such protests gave rise to all the cases in which the Court demanded a showing of intent. See *ibid.*; *Hess*, 414 U. S., at 106; *Claiborne Hardware Co.*, 458 U. S., at 888, 928. And the Court decided those cases against a resonant historical backdrop: the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction. See, *e.g.*, *Whitney* v. *California*, 274 U. S. 357 (1927); *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Abrams* v. *United States*, 250 U. S. 616 (1919). A strong intent requirement was, and remains, one way to guarantee history was not repeated. It was a way to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech at the First Amendment's core. But the potency of that protection is not needed here. For the most part, the 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. It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here.[6]

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[6] Our obscenity decisions are of no help in this inquiry, because the Court has never determined the precise *mens rea* needed to impose punishment. In arguing to the contrary, the concurrence relies mainly on *Hamling*. *Post*, at 18–19 (opinion of SOTOMAYOR, J.). But if the dissent is wrong in saying that *Hamling* (and other obscenity decisions) allowed an objective inquiry, see *supra*, at 9, n. 4, the concurrence is wrong in

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That standard, again, is recklessness. It offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats. *Elonis*, 575 U. S., at 748 (opinion of ALITO, J.). As with any balance, something is lost on both sides: The rule we adopt today is neither the most speech-protective nor the most sensitive to the dangers of true threats. But in declining one of those two alternative paths, something more important is gained: Not "having it all"—because that is impossible—but having much of what is important on both sides of the scale.[7]

III

It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See *supra*, at 3. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment.

We accordingly vacate the judgment of the Colorado Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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suggesting that it required use of a purpose or knowledge standard. As to the concurrence's claim, *Hamling* held only that a statute with that standard was "constitutionally sufficient." 418 U. S., at 123. The decision said nothing about whether it was constitutionally necessary, or instead whether a recklessness standard would suffice as well.

[7]The dissent accuses the Court of making a "Goldilocks judgment" in favoring a recklessness standard. *Post*, at 13 (opinion of BARRETT, J.). But in law, as in life, there are worse things than being "just right."

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SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE SOTOMAYOR, with whom JUSTICE GORSUCH joins as to Parts I, II, III–A, and III–B, concurring in part and concurring in the judgment.

When the government seeks to punish speech based on its content, the First Amendment typically imposes stringent requirements. This ensures that the government, even when pursuing compelling objectives, does not unduly burden our Nation's commitment to free expression. "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas." *United States* v. *Stevens*, 559 U. S. 460, 468 (2010) (internal quotation marks omitted). These categories must be "well-defined and narrowly limited" in light of the serious consequences that flow from carving out speech from ordinary First Amendment protections. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571 (1942).

"True threats" are one such category, and there is a tradition of criminalizing threats stretching back centuries. This includes punishing single utterances based on the message conveyed. One paradigmatic example of this would be writing and mailing a letter threatening to assassinate the President. Such laws are plainly important. There is no longstanding tradition, however, of punishing speech merely because it is unintentionally threatening.

Instead, this Court's precedent, along with historical statutes and cases, reflect a commonsense understanding that threatening someone is an intentional act. As to what intent is needed, "[t]raditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts." *Tison* v. *Arizona*, 481 U. S. 137, 150 (1987) (internal quotation marks omitted). This does not require showing that an individual intends to carry through with the threat. But it does require showing that an individual desires to threaten or is substantially certain that her statements will be understood as threatening.

Today, unfortunately, the Court unnecessarily departs from this traditional understanding. That is not to say that I disagree with the Court on everything. Far from it. I join the Court's conclusion that some subjective *mens rea* is required in true-threats cases. I also agree that in this particular case, where petitioner was prosecuted for stalking that involved threatening statements, a *mens rea* of recklessness is amply sufficient. Where I part ways with the Court is that I would not reach the distinct and more complex question whether a *mens rea* of recklessness is sufficient for true-threats prosecutions generally. Further, requiring nothing more than a *mens rea* of recklessness is inconsistent with precedent, history, and the commitment to even harmful speech that the First Amendment enshrines. I therefore respectfully concur only in part and in the judgment.

I

As an initial matter, I do not believe that this Court should reach the question whether recklessness is sufficient for true-threats prosecutions. A key conceptual distinction is helpful for explaining why. On the one hand, there are statements that are objectively threatening. In some cases, such statements can be punished because they fall into the

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unprotected category of "true threats." Yet such statements can also be punished if they fall into another category of unprotected speech, such as speech integral to criminal conduct. Or they might warrant less First Amendment protection for other reasons. On the other hand, there is the question of what constitutes the well-defined and longstanding category of unprotected true threats. It is with this latter question that I do not see the need to address whether a *mens rea* of recklessness is sufficient across the board.

First, the courts below did not address whether recklessness was sufficient to prosecute true threats and neither of the actual parties have advocated a recklessness standard. Colorado disclaimed the idea that recklessness was required, and petitioner asserted, correctly, that recklessness had not been raised under traditional principles of party presentation. The briefing on recklessness consists almost entirely of a few pages of an argument in the alternative at the tail end of an *amicus* brief filed by the United States.

Second, because petitioner was prosecuted for stalking involving threatening speech, this case does not require resort to the true-threats exemption to the First Amendment.

True-threats doctrine covers content-based prosecutions for single utterances of "pure speech," which need not even be communicated to the subject of the threat. *Watts* v. *United States*, 394 U. S. 705, 707 (1969) (*per curiam*). The First Amendment would normally place strict limits on such prosecutions. So there is typically a need to determine whether the speech in question falls within the traditionally unprotected category of true threats.

This is not such a case, however. Petitioner was convicted for "stalking [causing] serious emotional distress" for a combination of threatening statements and repeated, unwanted, direct contact with C. W. 497 P. 3d 1039, 1043

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(Colo. App. 2021).[1] This kind of prosecution raises fewer First Amendment concerns for a variety of reasons. Stalking can be carried out through speech but need not be, which requires less First Amendment scrutiny when speech is swept in. See, *e.g.*, *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 62 (2006). The content of the repeated communications can sometimes be irrelevant, such as persistently calling someone and hanging up, or a stream of "utterly prosaic" communications. *Ante*, at 1. Repeatedly forcing intrusive communications directly into the personal life of "an unwilling recipient" also enjoys less protection. *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 738 (1970). Finally, while there is considerable risk with a single intemperate utterance that a speaker will "accidentally or erroneously incur liability," *ante*, at 7 (internal quotation marks and alterations omitted), that risk is far reduced with a course of repeated unwanted contact. Take, for example, petitioner continuously contacting C. W. despite her blocking him.

Given this, prosecuting threatening statements made as part of a course of stalking does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content.[2] True-threats doctrine came up below only because of the lower courts' doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception. I do not think that is accurate, given the lessened

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[1] The statute of conviction applies to someone who "[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . serious emotional distress." Colo. Rev. Stat. §18–3–602(1)(c) (2022).

[2] For these reasons, stalking prosecutions that do not rely on the content of communications would raise even fewer First Amendment concerns.

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First Amendment concerns at issue. In such cases, recklessness is amply sufficient. And I would stop there. There is simply no need to reach out in this stalking case to determine whether anything more than recklessness is needed for punishing true threats generally.

II

Lest there be any doubt, the First Amendment stakes around the definition of "true threats" are high indeed. The First Amendment's mantle covers speech that is "vituperative, abusive and inexact." *Watts*, 394 U. S., at 708. "It might be tempting to dismiss" seemingly low-value speech "as unworthy of . . . robust First Amendment protections." *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ___, ___ (2021) (slip op., at 11). Yet "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." *Stevens*, 559 U. S., at 479 (emphasis deleted). First Amendment vigilance is especially important when speech is disturbing, frightening, or painful, because the undesirability of such speech will place a heavy thumb in favor of silencing it. In response, the Court has upheld First Amendment rights in the context of gruesome animal cruelty videos, *id.*, at 472; cross burning, *Virginia* v. *Black*, 538 U. S. 343, 347–348 (2003); hateful rhetoric in protests of the funerals of fallen soldiers, *Snyder* v. *Phelps*, 562 U. S. 443, 448–449, 458 (2011); and computer-generated images of child pornography, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 239–240, 258 (2002).

The risk of overcriminalizing upsetting or frightening speech has only been increased by the internet. Our society's discourse occurs more and more in "the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham* v. *North Carolina*, 582 U. S. 98,

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104 (2017) (citation omitted). "Rapid changes in the dynamics of communication and information transmission" have led to equally rapid and ever-evolving changes "in what society accepts as proper behavior." *Ontario* v. *Quon*, 560 U. S. 746, 759 (2010). Different corners of the internet have considerably different norms around appropriate speech. Online communication can also lack many normal contextual clues, such as who is speaking, tone of voice, and expression. Moreover, it is easy for speech made in a one context to inadvertently reach a larger audience.

Without sufficient protection for unintentionally threatening speech, a high school student who is still learning norms around appropriate language could easily go to prison for sending another student violent music lyrics, or for unreflectingly using language he read in an online forum. "[A] drunken joke" in bad taste can lead to criminal prosecution. *Perez* v. *Florida*, 580 U. S. 1187 (2016) (SOTOMAYOR, J., concurring in denial of certiorari). In the heat of the moment, someone may post an enraged comment under a news story about a controversial topic. Another person might reply equally heatedly. In a Nation that has never been timid about its opinions, political or otherwise, this is commonplace.

Many of this Court's true-threats cases involve such charged political speech. See *Black*, 538 U. S., at 348–349 (Ku Klux Klan rally); *Watts*, 394 U. S., at 707 (antiwar protest); *Rogers* v. *United States*, 422 U. S. 35, 41–42, 47–48 (1975) (Marshall, J., concurring) (opposition to Nixon's policies toward China). *Amici* give further contemporary examples of such speech from across the political spectrum. See, *e.g.*, Brief for American Civil Liberties Union et al. as *Amici Curiae* 24–29. Much of this speech exists in a gray area where it will be quite hard to predict whether a jury would find it threatening. And the ubiquity of such speech raises the possibility of highly discretionary enforcement.

The burdens of overcriminalization will fall hardest on

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certain groups. A jury's determination of when angry hyperbole crosses the line will depend on amorphous norms around language, which will vary greatly from one discursive community to another. Juries' decisions will reflect their "background knowledge and media consumption." *Minnesota Voters Alliance* v. *Mansky*, 585 U. S. ___, ___ (2018) (slip op., at 17). "[S]peakers 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." *United States* v. *White*, 670 F. 3d 498, 525 (CA4 2012) (Floyd, J., concurring in part and dissenting in part). Members of certain groups, including religious and cultural minorities, can also 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. See, *e.g.*, A. Dunbar, C. Kubrin, & N. Scurich, The Threatening Nature of "Rap" Music, 22 J. Psychol. Pub. Pol'y & L. 281, 281–282, 288–290 (2016).

On the other hand, the internet has also made stalking and harassment even easier. Stalking can be devastating and dangerous. See Brief for First Amendment Scholars as *Amici Curiae* 7–8. Lives can be ruined, and in the most tragic instances, lives are lost. *Ibid.* Harassers can hide behind online anonymity while tormenting others. This happens in the context of intimate relationships and it happens with strangers. Overly constraining our society's ability to respond to stalking would come at a real cost. For the reasons given, however, a *mens rea* standard for true threats would not hinder stalking prosecutions. See *supra,* at 3–5.

Even isolated threatening speech can do real harm. Such speech not only disrupts lives, it can silence the speech of others who become afraid to speak out. A *mens rea* require-

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ment would not, however, present an uncommon or insurmountable barrier to true-threats prosecutions.[3] Nonetheless, under such a standard, there will be some speech that some find threatening that will not and should not land anyone in prison.

III

These high First Amendment stakes are further reason for caution when delineating the boundaries of what constitutes a true threat. In undertaking that analysis, the Court and I part ways on the order of operations. The Court begins by defining true threats as all objectively threatening speech, entirely independent of whether the speaker intended to be threatening, *ante*, at 6, and the lead dissent agrees, *post*, at 2–3 (opinion of BARRETT, J.). The Court gets there by relying on this Court's interpretation of the word "threat" in a federal statute. *Ante*, at 6 (citing *Elonis* v. *United States*, 575 U. S. 723, 733 (2015)). The Court declares all such speech categorically unprotected, and then asks what "buffer zone" is needed in order to protect other, unthreatening speech. See *ante*, at 4–7.

Respectfully, I see the analysis differently. The first step in the analysis should instead be to ask about the scope of the well-defined and narrow category of "true threats" as a constitutional matter. This Court has already warned about the danger of creating new categories of "unprotected speech" exempt from the ordinary First Amendment framework for balancing our society's commitment to free expression with other interests. *Stevens*, 559 U. S., at 470. If courts were at liberty to redefine what counts as a "threat"

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[3] Intent requirements are common, including for incitement that results in actual violence, not just the threat of it. See *infra*, at 15–17. For that reason there are longstanding frameworks for determining when someone is not guilty by reason of insanity, and when delusions do (and do not) defeat a showing of intent. See, *e.g.*, 1 W. LaFave, Substantive Criminal Law §§7.1(a), (b) (3d ed. 2018); 2 *id.*, §9.2.

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or "defamation" at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing inadvertent threats as "true threats." This Court's prior definition of the word "threat" in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U. S., at 733, does not tell us the scope of "true threats" for First Amendment purposes. *Elonis* itself made clear that it did "not . . . consider any First Amendment issues." *Id.*, at 740. Instead, a careful examination of this Court's true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

A

A natural place to begin, one might think, would be with this Court's most recent decision involving the First Amendment, *mens rea*, and true threats. Yet to read the Court's decision, one would have little idea that in a seminal 2003 decision, this Court held that a threat conviction could not stand because of an insufficient *mens rea* requirement. See *Black*, 538 U. S. 343. *Black* plainly sets out a conception of true threats as including a *mens rea* requirement.

In *Black*, the Court confronted the constitutionality of a Virginia statute that prohibited burning a cross with intent to intimidate. Only part of the decision in *Black* is contained in a five-Justice majority opinion. The other relevant parts of the decision were written by the Members of that majority, who split into a four-Justice plurality and Justice Scalia's partial concurrence in judgment.

The majority explained why a prohibition on cross burning with intent to threaten was constitutional, beginning by defining the category of true threats. "'True threats,'" the majority explained "encompass those statements where the speaker *means to* communicate a serious expression of an

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intent to commit an act of unlawful violence." *Id.*, at 359 (emphasis added). However, "[t]he speaker need not actually intend to carry out the threat," as true threats also include intimidation alone. *Id.*, at 359–360. And "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of* placing the victim in fear of bodily harm or death." *Id.*, at 360 (emphasis added).

To the extent the Virginia statute covered intentionally threatening cross burning, it was thus tailored to cover only true threats. Critically, however, the statute also provided that "'[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate.'" *Id.*, at 348. In other words, the all-important intent requirement could be satisfied by the mere conduct itself.

Consistent with the majority's definition of true threats, both the plurality and Justice Scalia agreed that the lack of a sufficient intent requirement meant that a conviction under the statute could not stand. *Id.*, at 367, 379. For the plurality, the intent requirement was "the very reason why a State may ban cross burning" because it "distinguish[ed]" between the constitutionally unprotected true threat of burning a cross with intent to intimidate and "cross burning [as] a statement of ideology." *Id.*, at 365–366.[4] For Justice Scalia, the "plurality [was] correct in all of this." *Id.*, at 372 (opinion concurring in part, concurring in judgment in part,

[4] The lead dissent asserts that the *Black* plurality's decision was based on how the statute "'ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning' was covered by the statute." *Post*, at 9 (opinion of BARRETT, J.) (quoting 538 U. S., at 367 (plurality opinion)). But some context is missing from this reading itself. The full sentence is "all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*." *Id.*, at 367 (emphasis added). The plurality was thus concerned with context to the extent it was relevant to the *mens rea* requirement needed to render the statute constitutional. *Id.*, at 365–366.

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and dissenting in part). There was a constitutional need for a distinction between cross burning "'intended to intimidate'" and cross burning as "'a statement of ideology.'" *Ibid.* The plurality and Justice Scalia only parted ways as to whether to hold that the statute was "facially invalid," *id.*, at 367 (plurality opinion), or just that the jury instructions made it unclear "whether the jury has rendered its verdict (*as it must*)" with sufficient consideration of "intent to intimidate," *id.*, at 380 (opinion of Scalia, J.) (emphasis added).

The through-line is not hard to discern. First, unprotected true threats include a subjective *mens rea* requirement. *Id.*, at 360 (majority opinion). Second, as a result, "Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.*, at 362 (majority opinion). Third, a conviction could not stand if it had categorically dispensed with that intent requirement, *id.*, at 365–366 (plurality opinion), or if the jury had insufficiently considered "intent to intimidate," *id.*, at 380 (opinion of Scalia, J.).

In sum, all five Justices in the *Black* majority agreed that a true-threats prosecution could not stand under the First Amendment without a sufficient subjective *mens rea* requirement.[5]

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[5] According to the Court today and the lead dissent, however, *Black* somehow managed not to say anything about the First Amendment *mens rea* requirement for true-threats prosecutions—while striking down a true-threat conviction under the First Amendment for an insufficient *mens rea* requirement. On this reading, *Black* only discussed intent because "the statute involved in the case required a showing of intent." *Ante*, at 6, n. 3; *post*, at 9, n. 4 (discussion of intent was "a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements"). This puzzling interpretation does not explain why an illusory *mens rea* requirement in a Virginia law would pose any First Amendment problems if the Amendment did not impose a *mens rea* requirement of this kind. After all, "[w]hy would the First Amendment care how a jury goes about finding an [intent] element that is a matter

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B

In defining true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id.*, at 359, the Court in *Black* echoed the traditional understanding of threats. Historically, threat crimes covered the same kind of subjectively threatening speech *Black* invoked.

In reviewing this history, it is also vital to keep in mind the nature of the inquiry. Removing speech from normal First Amendment scrutiny is a major shift in the balance of expression and public interest that our Constitution generally strikes. The inquiry is therefore whether there is a "long-settled tradition" of prohibiting inadvertently threatening speech. *Stevens*, 559 U. S., at 469. None of the other opinions, however, identify a historical case that expressly raised the question whether a subjective *mens rea* is required and held that it is not. That is a remarkable thing when one considers that the sample size consists of decisions from both sides of the Atlantic across centuries.

There was a long tradition of crimes for threatening another person in order to extort them. See, *e.g.*, 1796 N. J. Laws §57, p. 108. Colorado and the United States admit that this core category of threat crimes required intent.

Even beyond that, a subjective *mens rea* remained a key component of threat offenses. An 18th-century English statute made it a capital offense to "knowingly send any letter . . . threatening to kill or murder any of his Majesty's subject or subjects" or to threaten arson. 27 Geo. II, c. 15, in 21 Eng. Stat. at Large 184 (1754). A leading treatise explained that the statute was "levelled against such whose *intention* it was [to] obtain their object by creating terror in

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of indifference to the Amendment?" *United States* v. *Heineman*, 767 F. 3d 970, 980 (CA10 2014). The obvious answer, from *Black*'s reasoning to its holding, is that such a *mens rea* requirement was necessary for the statute to target true threats.

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[the victim's] mind." 2 W. Russell & D. Davis, Crimes & Misdemeanors *1845 (emphasis added).

Consistent with this, defendants were convicted of "knowingly, wilfully, and feloniously" sending threatening letters. *Rex* v. *Tyler*, 1 Mood. 428, 168 Eng. Rep. 1330 (1835); *Rex* v. *Paddle*, Russ. & Ry. 484, 168 Eng. Rep. 910 (1822) (indictment for "knowingly, unlawfully, wickedly, and feloniously" sending a threatening letter); see also *King* v. *Girdwood*, 1 Leach 142, 168 Eng. Rep. 173 (1776) (indictment for "feloniously" sending a threatening letter). "'[K]nowingly and wilfully' effecting any result applies to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." 12 American and English Encyclopaedia of Law 522–524 (J. Merrill ed. 1890); see also J. Boag, Imperial Lexicon of the English Language 530 (1850) (defining "felonious" as "with the deliberate purpose to commit a crime").

The necessary *mens rea* could sometimes be inferred from the content of the letter, but could be rebutted by other evidence. See *King* v. *Philipps*, 6 East 464, 475, 102 Eng. Rep. 1365, 1369 (1805). Courts thus considered "the threat intended to be made by the prisoner" and "what he meant by what he had written" in determining whether he had violated the statute. *Regina* v. *Hill*, 5 Cox 233, 235 (Crim. Cas. 1851); see also *King* v. *John and Mary Hammond*, 1 Leach 444, 446, 168 Eng. Rep. 324, 325 (1787) (describing the offense of sending a threatening letter "to the party whose fears the threat it contains was calculated to alarm").

Threat laws in the United States were of a piece. Some state laws about threats expressly required maliciousness. See Me. Rev. Stat., Tit. 12, ch. 154, §26 (1840); 1884 La. Acts No. 64, §1, p. 86. Courts more generally emphasized the importance of a *mens rea* requirement. See, *e.g.*, *State* v. *Benedict*, 11 Vt. 236, 239 (1839). The North Carolina Su-

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preme Court, for example, singled out threats as quintessential examples of offenses where it is "necessary" to prove the "*intent* of the particular letter." *State* v. *Murphy*, 84 N. C. 742, 743–744 (1881). And where state statutes may have been silent on intent to threaten, courts read such requirements in. See *Commonwealth* v. *Morton*, 140 Ky. 628, 631, 131 S. W. 506, 507–508 (1910) (letter must be "calculated to alarm, disturb, intimidate, or injure"); see also *State* v. *Stewart*, 90 Mo. 507, 512, 2 S. W. 790, 792 (1887) (jury instruction requiring that "'defendant intended to threaten'").

Leading treatises also explained the importance of *mens rea*. See 25 American and English Encyclopaedia of Law 1071 (C. Williams ed. 1894) (when there is a question as to "whether or not the letter contains the threat alleged, the intent is a question for the jury"); see also 2 R. Anderson, Wharton's Criminal Law and Procedure §803, pp. 659–660 (1957) (threats must be "intended to put the person threatened in fear of bodily harm"); 2 J. Bishop, Commentaries on the Criminal Law §1201, p. 664 (6th ed. 1877) ("The intent, both under the unwritten law and under the statutes, must be evil").

Against that backdrop, I return to the inquiry at hand: whether there is a "long-settled" or "well-established" history of prosecuting inadvertently threatening speech. There is no line of cases or pattern of statutes affirmatively stating that an objective standard is sufficient.

C

Put together, *Black* and the history point to an intent requirement. When *Black* defined and analyzed true threats in terms of intent, there is no reason to think the Court used intent to mean anything less than its traditional definition of purpose or knowledge. See, *e.g.*, *Tison*, 481 U. S., at 150. Nor would a recklessness standard play the necessary role of distinguishing between cross burning that is "'intended

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to intimidate' . . . and nonintimidating cross burning [that] cannot be prohibited." 538 U. S., at 372 (opinion of Scalia, J.). Given the violent history of the symbol, it is hard to imagine that any politically motivated cross burning done within view of the public could be carried out without awareness of some risk a reasonable spectator would feel threatened. See *id.*, at 388–391 (THOMAS, J., dissenting). Recklessness, which turns so heavily on an objective person standard, would not have been enough.

As to the history, it is true that over time courts have often used a wide variety of terms to describe mental states. See, *e.g.*, *Morissette* v. *United States*, 342 U. S. 246, 252 (1952). Yet "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 445 (1978); see also *Tison*, 481 U. S., at 150; *Carter* v. *United States*, 530 U. S. 255, 270 (2000) (describing "feloniously" as equivalent to "'intent'"). And at the very least, there is no well-settled history showing that it is enough for a defendant to be merely aware of some risk that their statements could be threatening. See, *e.g.*, *Borden* v. *United States*, 593 U. S. ___, ___ (2021) (plurality opinion) (slip op., at 5) (recklessness requires awareness of a level of risk that "need not come anywhere close to a likelihood"). The history is, instead, replete with the enduring and commonsense pairing of threats and intent.

D

The Court, eschewing *Black* and history, instead reaches its result based on the need for a "buffer zone" drawn by analogy to other categories of unprotected speech. *Ante*, at 4. For the reasons above, I do not think we can leap ahead to this question. With that caveat, I agree with the Court that precedent in other areas of unprotected speech and

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concerns about chilling support a subjective *mens rea* requirement for true threats. Yet these same chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech. Indeed, in the concurrence by Justice Marshall that the Court invokes, *ante*, at 9–10, he advocated "requir[ing] proof that the speaker intended his statement to be taken as a threat," based on concerns about punishing "pure speech." *Rogers*, 422 U. S., at 47–48. In determining the appropriate *mens rea*, the Court analogizes to three categories of traditionally unprotected speech: incitement, obscenity, and defamation. None of these warrants expanding the narrow boundaries of true threats.

1

Speech inciting harm is the closest cousin to speech threatening harm. Both incitement and threats put other people at risk, and both "sprin[g] from [Justice] Holmes's 'clear and present danger' test." G. Blakey & B. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B. Y. U. L. Rev. 829, 1069 (2002). Like true threats, incitement's scope is defined in terms of both intention and effect, covering speech "[1] intended to produce, and [2] likely to produce, *imminent* disorder." *Hess* v. *Indiana*, 414 U. S. 105, 109 (1973) (*per curiam*).

Despite their similar nature and source, the Court today draws a hard line between the two. Incitement requires "'inten[t].'" *Ante*, at 8. While for threats, the speaker need only be "aware that others could regard his statements as threatening violence and delive[r] them anyway." *Ante*, at 11 (internal quotation marks omitted). The Court justifies this asymmetry by the idea "that incitement to disorder is commonly a hair's-breadth away from political 'advocacy,'" *ante*, at 13, and the lead dissent says much the same, *post*, at 7 (opinion of BARRETT, J.). These opinions offer little basis for distinguishing threats on this ground, as this Court's

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own cases show time and again how true-threats prosecutions sweep in political speech. See *Black*, 538 U. S., at 348–349; *Watts*, 394 U. S., at 707 (antiwar protest); *Rogers*, 422 U. S., at 41–42 (Marshall, J., concurring) (opposition to Nixon's policies toward China).[6] Not only that, but incitement itself is often only a hair's-breadth away from threats.

Take the seminal incitement case *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886 (1982). During a civil rights boycott, NAACP leader Charles Evers, brother of the murdered civil rights hero Medgar Evers, gave a series of heated speeches. See *id.*, at 898–902. He intoned that "boycott violators would be 'disciplined'" and that "'[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.*, at 902. The Court acknowledged that in this charged context, these speeches "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id.*, at 927. Yet inflammatory and threatening as these speeches were, they did not constitute incitement. That was because "there [was] no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence." *Id.*, at 929. His speeches were thus not "'directed to inciting or producing imminent lawless action'" and he had not "specifically intended to further an unlawful goal." *Id.*, at 925, n. 68, 928.

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 re-

[6] Nor is this limited to decisions by this Court. Threats cases sweep in political speech. See, *e.g.*, *State* v. *Taylor*, 379 N. C. 589, 590, 866 S. E. 2d 740, 744 (2021). Incitement cases can sweep in nonpolitical speech. See, *e.g.*, *Rice* v. *Paladin Enterprises, Inc.*, 128 F. 3d 233, 264, n. 11, 267 (CA4 1997). And still other cases show how incitement and threats can often go hand in hand. See, *e.g.*, *State* v. *Caroll*, 456 N. J. Super. 520, 544–545, 196 A. 3d 106, 120–121 (App. Div. 2018).

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gard 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. Nor is *Claiborne* the only example. The foundational incitement case, *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (*per curiam*), extended First Amendment protections to armed Klan members uttering racial slurs, a warning that "there might have to be some revengeance taken," and plans for a "'four hundred thousand strong'" march in two cities. *Id.*, at 446. Then, as now, there would be at least some risk that a reasonable resident of those cities could feel threatened.

These concrete examples illustrate a more general principle. Speech inciting imminent and dangerous unlawful activity will reasonably be threatening to those who would be harmed by that illegality. In all such cases, whether seminal decisions by this Court or guilty pleas that barely see the inside of a courtroom, the Court's decision effectively downgrades to recklessness the *mens rea* required for incitement of unlawful force; prosecutors could now simply charge such offenses as true threats. This is particularly worrisome because the standard for recklessness decreases the lower the "social utility" of the conduct. 1 W. LaFave, Substantive Criminal Law §5.4(f) (3d ed. 2018). That is a troubling standard for juries in a polarized nation to apply in cases involving heated political speech. This collateral damage can be avoided, however, if intent to threaten is understood as part of a true threat, just like intent to incite is part of incitement.

2

While obscenity is a step further afield of true threats and incitement, examination of this Court's obscenity case law further supports an intent requirement for prosecutions of true threats.

The Constitution "'requires proof of scienter'" in part "'to

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compensate for the ambiguities inherent in the definition of obscenity.'" *Hamling* v. *United States*, 418 U. S. 87, 123 (1974). This is in line with this Court's more general observation that "vagueness" of "content-based regulation of speech" is of "special concern" when it comes to "criminal statute[s]." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 871–872 (1997).[7]

Specifically, the Court has held that a "knowledge" *mens rea* is sufficient for obscenity: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." *Hamling*, 418 U. S., at 123. This ensures that "not innocent but *calculated purveyance* of filth . . . is exorcised." *Id.*, at 122 (internal quotation marks omitted). While the Court today asserts that this Court has "never determined the precise *mens rea*" for obscenity, *ante*, at 13, n. 6, the Court has cited a knowledge standard approvingly for half a century, see *Hamling*, 418 U. S., at 123; *Elonis*, 575 U. S., at 739.[8] Applying that standard to threats, the "'calculated

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[7]Analogously, the Court's civil defamation case law recognizes that heightened liability can require a heightened *mens rea*; even as to nonpublic figures, a higher standard must be met for punitive damages in certain cases. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349–350 (1974).

[8]The Court has held, however, that recklessness is sufficient for child pornography. See *Osborne* v. *Ohio*, 495 U. S. 103, 115 (1990). This Court has emphasized time and again how child pornography is "a special case" because "[t]he market for child pornography [is] 'intrinsically related' to the underlying abuse" and thus "'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *United States* v. *Stevens,* 559 U. S. 460, 471 (2010) (quoting *New York* v. *Ferber*, 458 U. S. 747, 759, 761 (1982)); see also *Osborne*, 495 U. S., at 110–111. Child pornography, with its integral ties to separate criminal conduct, is not a strong analogue for threats, which can be fleeting statements in total isolation from any other criminality (though it is a stronger analogy to threats as part of an unlawful course of stalking). Yet the Court's decision today puts child pornography on a First Amendment par with

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purveyance' of a threat would require that [a defendant] know the threatening nature of his communication." *Id.*, at 739.

The considerations that drove this Court to approve a higher *mens rea* for obscenity apply here as well. With obscenity, the ambiguity comes partly from the reliance on "'contemporary community standards'" to define what is obscene. *Hamling*, 418 U. S., at 129. Such a standard is notoriously amorphous, and will change a great deal between communities and over time. The same chilling concerns apply to true threats. A recklessness standard based on what a reasonable person could find threatening will depend on ever-shifting community norms around language and when heated speech crosses the line from overly aggressive to criminal. See *supra*, at 5–7.[9]

3

Finally, the Court relies heavily upon this Court's framework for defamation. Specifically, the Court analogizes to the "reckless disregard" standard for defamation of public figures or punitive damages for certain claims involving private figures. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964).

Yet while civil defamation may be "the best known and best theorized example" of unprotected speech, *ante*, at 8, the same does not go for criminal prosecution of defamation. It is true that this Court in 1964 invalidated a prosecution

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overheated political speech or violent song lyrics.

[9]There is a further safeguard in obscenity cases. Something is obscene if "taken as a whole, [it] lacks serious literary, artistic, political, or scientific value." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 574 (2002) (internal quotation marks omitted). An intent requirement can provide a similar safeguard for threats. As *Virginia* v. *Black*, 538 U. S. 343 (2003), explained, requiring intent distinguishes between speech intended to intimidate and speech intended to express a political statement. *Id.*, at 365–366 (plurality opinion); *id.*, at 372 (opinion of Scalia, J.).

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for criminal libel for failing to apply the *Sullivan* standard, which covers "only those false statements made with a high degree of awareness of their probable falsity." *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964). Yet the Court expressed strong skepticism of the very concept of criminal prosecutions for libel and noted the salutary trend of its "virtual disappearance." *Id.*, at 69–70. The Court approvingly cited the Model Penal Code's recommendation that criminal libel be limited to speech likely to cause a breach of the peace and "calculated" to do so. *Id.*, at 70. This is not a promising theoretical springboard for determining the *mens rea* required to criminalize other speech.

If the Court were correct that the *Sullivan* standard is the appropriate analogy, however, then this standard should guide how to analyze recklessness in true-threats prosecutions. The generic formulation of recklessness requires that an individual disregard a relatively unspecified level of risk that the harm in question will occur. See *Borden*, 593 U. S., at ___ (plurality opinion) (slip op., at 5). Within that potentially broad range, *Sullivan* provides a more definite and demanding level of risk, reflecting the First Amendment concerns at stake. The Court has "made clear that the defendant must have made the false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 667 (1989) (internal quotation marks and ellipsis omitted). This makes sense. Allowing liability for awareness of a small chance that a story may be false would undermine the very shield *Sullivan* erects.

For similar reasons, after today's ruling, future courts grappling with how to articulate the appropriate level of recklessness in true-threats cases would be well served to consult the *Sullivan* standard. The equivalent to *Sullivan* for true threats would require a high degree of awareness that a statement was probably threatening or serious

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doubts as to the threatening nature of the statement. This could avoid the chilling that would arise from a more amorphous and easily satisfied standard.

4

This Court's various frameworks for unprotected speech do not speak with one voice, as perhaps befits the First Amendment. The above survey does not, however, give reason to depart from the traditional understanding of true threats. To the contrary, this case law supports keeping true threats within their traditional bounds. Incitement similarly requires intent. The same chilling concerns that have led this Court to approve a knowledge requirement for obscenity are present with true threats. And to the extent the civil defamation context is relevant, at the very least, it points to a precise and demanding form of recklessness.[10]

IV

Maintaining true threats doctrine within its traditional boundaries will guard against the overcriminalization of a wide range of political, artistic, and everyday speech based

[10]The lead dissent headlines its analysis by pointing to this Court's case law on "fighting words." *Post*, at 3–4 (opinion of BARRETT, J.). This is an unlikely candidate for a broader theory of the First Amendment. For "nearly three-quarters of a century . . . the Court has never . . . upheld a fighting words conviction" and "[t]he cumulative impact of [the Court's] decisions is to make it unlikely that a fighting words law could survive." E. Chemerinsky, The First Amendment 1094 (6th ed. 2019). It is not hard to see why such convictions would be unlikely to pass First Amendment muster; the leading case involved a Jehovah's Witness distributing literature who was arrested for breach of the peace for calling a public official a "'damned Fascist.'" *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 569, 573–574 (1942). Drawing upon a conviction like the one in *Chaplinksy* as the proper model for criminalizing political speech is proof itself of the serious risks with the lead dissent's approach. In any event, as to the question at hand, when such breach of the peace offenses involved threats, intent to threaten was required. See 2 R. Anderson, Wharton's Criminal Law and Procedure §803, pp. 659–660 (1957).

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on its content alone. This does not mean that unintentionally threatening communications are exempt from regulation, far from it. As explained above, there are far fewer First Amendment concerns with stalking laws that punish repeated, targeted, unwanted conduct and accompanying speech. For that reason, recklessness is quite sufficient. As to true threats, intent is neither an unusual nor an insurmountable bar. "[C]ourts and juries every day pass upon knowledge, belief and intent . . . having before them no more than evidence of . . . words and conduct, from which, in ordinary human experience, mental condition can be inferred." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 411 (1950).

* * *

I agree with the Court's conclusion that the First Amendment requires a subjective *mens rea* in true-threats cases, and I also agree that recklessness is amply sufficient for this case. Yet I would stop there, leaving for another day the question of the specific *mens rea* required to prosecute true threats generally. If that question is reached, however, the answer is that true threats encompass a narrow band of intentional threats. Especially in a climate of intense polarization, it is dangerous to allow criminal prosecutions for heated words based solely on an amorphous recklessness standard. Our society has often concluded that an intent standard sets a proper balance between safety and the need for a guilty mind, even in cases that do not involve the First Amendment. Surely when the power of the State is called upon to imprison someone based on the content of their words alone, this standard cannot be considered excessive. Because I part ways with the Court on this score, I respectfully concur only in part and in the judgment.

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SUPREME COURT OF THE UNITED STATES

No. 22–138

BILLY RAYMOND COUNTERMAN, PETITIONER *v.* COLORADO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE THOMAS, dissenting.

I join JUSTICE BARRETT's dissent in full. I write separately to address the majority's surprising and misplaced reliance on *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). In *New York Times*, this Court held that the First Amendment bars public figures from recovering damages for defamation unless they can show that the statement at issue was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 280. Like the majority's decision today, "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." *McKee* v. *Cosby*, 586 U. S. ___, ___ (2019) (THOMAS, J., concurring in denial of certiorari) (slip op., at 2). Instead of simply applying the First Amendment as it was understood at the time of the Founding, "the Court fashioned its own '"federal rule[s]"' by balancing the 'competing values at stake in defamation suits.'" *Ibid.* (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 334, 348 (1974)); see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501–502 (1984) (acknowledging that "the rule enunciated in the *New York Times* case" is "largely a judge-made rule of law," the "content" of which is "given meaning through the evolutionary process of common-law adjudication"). "The constitutional libel rules adopted by

this Court in *New York Times* and its progeny broke sharply from the common law of libel, and there are sound reasons to question whether the First and Fourteenth Amendments displaced this body of common law." *McKee*, 586 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 6). Thus, as I have previously noted, "[w]e should reconsider our jurisprudence in this area." *Id.*, at ___ (slip op., at 14); see also *Berisha* v. *Lawson*, 594 U. S. ___ (2021) (THOMAS, J., dissenting from denial of certiorari).

I am far from alone. Many Members of this Court have questioned the soundness of *New York Times* and its numerous extensions. See, *e.g.*, *Berisha*, 594 U. S., at ___–___ (GORSUCH, J., dissenting from denial of certiorari) (slip op., at 5–8); *Coughlin* v. *Westinghouse Broadcasting & Cable, Inc.*, 476 U. S. 1187 (1986) (Burger, C. J., joined by Rehnquist, J., dissenting from denial of certiorari); *Gertz*, 418 U. S., at 370 (White, J., dissenting); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 62 (1971) (Harlan, J., dissenting); *id.*, at 78 (Marshall, J., dissenting); *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring); see also E. Kagan, A Libel Story: *Sullivan* Then and Now, 18 L. & Soc. Inquiry 197, 207 (1993); J. Lewis & B. Ottley, *New York Times v. Sullivan* at 50, 64 DePaul L. Rev. 1, 35–36 (2014) (collecting statements from Justice Scalia); cf. *Tah* v. *Global Witness Publishing, Inc.*, 991 F. 3d 231, 251–256 (CADC 2021) (Silberman, J., dissenting in part) (questioning the doctrine). It is thus unfortunate that the majority chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

[June 27, 2023]

JUSTICE BARRETT, with whom JUSTICE THOMAS joins, dissenting.

Billy Counterman was convicted under a Colorado law that prohibits true threats. As everyone agrees, the statute requires that the speaker understand the meaning of his words. *Ante*, at 4, n. 1. The question is what more the First Amendment requires. Colorado maintains that an *objective* standard is enough—that is, the government must show that a reasonable person would regard the statement as a threat of violence. Counterman, however, argues that the First Amendment requires a *subjective* test—that is, the speaker himself must intend or know the threatening nature of the statement.

It should be easy to choose between these positions. True threats do not enjoy First Amendment protection, and nearly every other category of unprotected speech may be restricted using an objective standard. Nonetheless, the Court adopts a subjective standard, though not quite the one advanced by Counterman. The Court holds that speakers must recklessly disregard the threatening nature of their speech to lose constitutional protection. Because this unjustifiably grants true threats preferential treatment, I respectfully dissent.

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I

Since the founding, the First Amendment has allowed the government to regulate certain "areas of speech" "because of their constitutionally proscribable content." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382–383 (1992) (emphasis deleted). This includes true threats, which are "serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U. S. 343, 359 (2003); see also *R. A. V.*, 505 U. S., at 388 ("[T]hreats of violence are outside the First Amendment"). True threats carry little value and impose great cost. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942) ("[A]ny benefit that may be derived from [true threats] is clearly outweighed by the social interest in order and morality"). "[B]y their very utterance," true threats "inflict injury." *Ibid.* They provoke "the fear of violence," create "disruption," give rise to "the possibility that the threatened violence will occur"—and the list goes on. *Black*, 538 U. S., at 360 (internal quotation marks omitted).[1]

The nature of a true threat points to an objective test for determining the scope of First Amendment protection: Neither its "social value" nor its potential for "injury" depends on the speaker's subjective intent. *Chaplinsky*, 315 U. S., at 572. They can relate, of course—a speaker who does not intend to threaten is less likely to utter a statement that could be taken that way. But the Constitution ultimately declines to protect true threats for objective reasons, not

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[1] Indeed, the Colorado Legislature considered these very harms when it enacted the statute at issue here. The statutory findings explain that stalking, harassment, and threats have "an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim." Colo. Rev. Stat. §§18–3–601(1)(f), 18–3–602(1) (2022). So the legislature passed the statute to "encourag[e] and authoriz[e] effective intervention" before the covered conduct could "escalate into behavior that has even more serious consequences." §18–3–601(2).

subjective ones. So an objective test "complements the explanation for excluding threats of violence from First Amendment protection in the first place." *United States* v. *Jeffries*, 692 F. 3d 473, 480 (CA6 2012).

II

The Court agrees that "[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." *Ante*, at 6. And it acknowledges that "[w]hen the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow." *Ibid.* Nonetheless, the Court holds Colorado's statute unconstitutional. Why? Because the Court installs a prophylactic buffer zone to avoid chilling protected speech—a buffer zone that protects true threats unless the speaker "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." *Ante*, at 1, 4–5. That reasoning is flawed.

A

The Court's first error is awarding true threats "pride of place among unprotected speech." *Elonis* v. *United States*, 575 U. S. 723, 767 (2015) (THOMAS, J., dissenting). We have held that nearly every category of unprotected speech may be regulated using an objective test. In concluding otherwise, the Court neglects certain cases and misreads others.

Start with fighting words—a category of unprotected speech that the Court skips past. Fighting words are "personally abusive epithets" that are "inherently likely to provoke violent reaction." *Cohen* v. *California*, 403 U. S. 15, 20 (1971). Under our precedent, legislatures may regulate fighting words even when the speaker does not intend to provoke the listener (or does not recklessly disregard that possibility). *Chaplinsky*, 315 U. S., at 572–573 (rejecting First Amendment challenge to a state law punishing

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"fighting words" according to a reasonable-person standard); *Cantwell* v. *Connecticut*, 310 U. S. 296, 309–310 (1940) (statements unprotected when they are "likely to provoke violence and disturbance of good order, even though no such eventuality be intended"). Instead, we ask only whether "the ordinary citizen," using her "common knowledge," would reasonably understand the statement as a "direct personal insult." *Cohen*, 403 U. S., at 20; see also *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989).

The Court similarly overlooks the category of "false, deceptive, or misleading" commercial speech. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 638 (1985); *In re R. M. J.*, 455 U. S. 191, 203 (1982) ("Truthful advertising . . . is entitled to the protections of the First Amendment," but "[m]isleading advertising may be prohibited entirely"); *Ibanez* v. *Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U. S. 136, 142 (1994) ("[F]alse, deceptive, or misleading commercial speech may be banned"). Here, too, our cases suggest that First Amendment protection depends on objective falsity rather than the speaker's intention. See *In re R. M. J.*, 455 U. S., at 202 ("[R]egulation—and imposition of discipline—are permissible where the particular advertising is *inherently likely to deceive* or where the record indicates that a particular form or method of advertising has *in fact been deceptive*" (emphasis added)); see also *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 250–253 (2010). Thus, the government is "free to prevent the dissemination of commercial speech that is false, deceptive, or misleading," without regard to whether the speaker knew that the recipient would be deceived or misled. *Zauderer*, 471 U. S., at 638.

Or take obscenity, which we have long held is "not protected by the freedoms of speech and press." *Roth* v. *United States*, 354 U. S. 476, 481 (1957). Speech qualifies as ob-

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scene if the "'average person, applying contemporary community standards,'" would conclude that "the work, taken as a whole, appeals to the prurient interest." *Miller* v. *California*, 413 U. S. 15, 24 (1973). The jury must also make an objective judgment about whether the speech "depicts or describes" sexual conduct "in a patently offensive way," and whether it "lacks serious literary, artistic, political, or scientific value." *Ibid.* The speaker's "'belief as to the obscenity or non-obscenity of the material is irrelevant.'" *Hamling* v. *United States*, 418 U. S. 87, 120–121 (1974). So long as the defendant has "knowledge of the contents of the materials," her speech may be constitutionally regulated. *Id.*, at 123. An objective, reasonable-person standard applies.

In an effort to bolster its position, the Court floats a different standard for obscenity laws, asserting that "the First Amendment demands proof of a defendant's mindset to make out an obscenity case." *Ante*, at 8. By "mindset," the Court apparently means that the defendant must have some awareness that an average person would consider the materials obscene. But the Court draws this conclusion from cases rejecting a *strict liability* standard—for example, we have held that the proprietor of a bookstore cannot be liable for possessing an obscene book unless he knew what was in it. *Smith* v. *California*, 361 U. S. 147, 149, 155 (1959); *Mishkin* v. *New York*, 383 U. S. 502, 510–512 (1966); see also *Ginsberg* v. *New York*, 390 U. S. 629, 643–644 (1968).[2] Knowing what the material depicts is not the same as knowing how the average person would react to it—just

[2]The Court also cites *Elonis* v. *United States*, *ante*, at 8, 9, n. 4, which Counterman argues puts a "gloss" on obscenity doctrine, Tr. of Oral Arg. 6–7. While *Elonis* briefly discusses the necessary *mens rea* for a conviction under a federal obscenity statute, it does so only in dicta. 575 U. S. 723, 739–740 (2015). *Elonis* does not alter the doctrinal framework for assessing the constitutionality of obscenity laws: That case involves true threats, not obscenity, and it interprets a federal statute, not the Constitution.

as there is an important difference between Counterman's knowledge of what his words meant and his knowledge of how they would be perceived. Though the Court conflates the two, our obscenity cases have repeatedly refused to require the latter as a matter of constitutional law. *Hamling*, 418 U. S., at 120–123; *Rosen* v. *United States*, 161 U. S. 29, 41–42 (1896). So obscenity doctrine does not help Counterman.

The Court leans hardest on defamation law, but its argument depends on a single, cherry-picked strand of the doctrine. Yes, *New York Times Co.* v. *Sullivan* requires public figures and public officials to show "actual malice" on a defamation claim, and we have defined "actual malice" as "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." 376 U. S. 254, 279–280 (1964). But that is not the full story. A private person need only satisfy an objective standard to recover actual damages for defamation. *Gertz* v. *Robert Welch*, *Inc.*, 418 U. S. 323, 347–350 (1974). And if the defamatory speech does not involve a matter of public concern, she may recover punitive damages with the same showing. *Dun & Bradstreet*, *Inc.* v. *Greenmoss Builders*, *Inc.*, 472 U. S. 749, 760–761 (1985) (plurality opinion). We have justified that distinction on the ground that public-figure defamation claims may deter "would-be critics of official conduct . . . from voicing their criticism," which would "dampe[n] the vigor and limit the variety of public debate." *Sullivan*, 376 U. S., at 279. Not only that, but "the state interest in protecting" public figures is weaker, since they tend to "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." *Gertz*, 418 U. S., at 344. So, despite what the Court says, *Sullivan* does not stand for the broad proposition that the First Amendment "demand[s] a subjective mental-state requirement." *Ante*, at 6. Instead, it simply raises the bar for borderline unprotected speech

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with high social value (because of its proximity to public discourse) and low potential for injury (because public figures can engage in counterspeech).

Sullivan's rationale does not justify a heightened *mens rea* for true threats. Because true threats are not typically proximate to debate on matters of public concern, the Court's newly erected buffer zone does not serve the end of protecting heated political commentary. Nor can public figures use counterspeech in the public square to protect themselves from serious threats of physical violence. And perversely, private individuals now have less protection from true threats than from defamation—even though they presumably value their lives more than their reputations. See *Gertz*, 418 U. S., at 347–350. The Court has therefore extended *Sullivan* in a way that makes no sense on *Sullivan*'s own terms.

I will give the Court this much: Speakers must specifically intend to incite violence before they lose First Amendment protection. *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*) (defining incitement as "advocacy . . . directed to inciting or producing imminent lawless action and likely to incite or produce such action"); see also *Hess* v. *Indiana*, 414 U. S. 105, 108–109 (1973) (*per curiam*). Once more, however, our precedent itself explains the difference. Incitement, as a form of "advocacy," often arises in the political arena. See *Brandenburg*, 395 U. S., at 447 (Ku Klux Klan rally held to plan a "'marc[h] on Congress'"); *Hess*, 414 U. S., at 106 (antiwar demonstration); *Abrams* v. *United States*, 250 U. S. 616, 620 (1919) (pamphlets about the President's "'shameful, cowardly silence about the intervention in Russia'"). A specific intent requirement helps draw the line between incitement and "political rhetoric lying at the core of the First Amendment." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 926–927 (1982). The Court does not contend that targeted threats and political commentary share a similarly close relationship.

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In sum, our First Amendment precedent does not set a "baseline ban on an objective standard." *Ante*, at 10. Precedent does more than allow an objective test for true threats; on balance, it affirmatively supports one.

B

The Court's analysis also gives short shrift to how an objective test works in practice. Two key features of true threats already guard against the risk of silencing protected speech. Thus, there is no need to go further and adopt the Court's heightened standard.

First, only a very narrow class of statements satisfies the definition of a true threat. To make a true threat, the speaker must express "an intent to commit *an act of unlawful violence*." *Black*, 538 U. S., at 359 (emphasis added). Speech that is merely "offensive," "'poorly chosen,'" or "unpopular" does not qualify. Brief for Petitioner 31, 36, 42. The statement must also threaten violence "to a particular individual or group of individuals"—not just in general. *Black*, 538 U. S., at 359. These tight guardrails distinguish true threats from public-figure defamation, the model for the Court's rule. While defamatory statements can cover an infinite number of topics, true threats target one: unlawful violence.

Second, the statement must be deemed threatening by a reasonable listener who is familiar with the "entire factual context" in which the statement occurs. *State* v. *Taveras*, 342 Conn. 563, 572, 271 A. 3d 123, 129 (2022). This inquiry captures (among other things) the speaker's tone, the audience, the medium for the communication, and the broader exchange in which the statement occurs.[3] Each consideration helps weed out protected speech from true threats.

[3] Colorado's test provides a good example. Juries must apply the following nonexhaustive factors to determine whether a statement is a true threat: "(1) the statement's role in a broader exchange, if any, including

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Our decision in *Black* illustrates the point. There, the Court considered a Virginia law that prohibited cross burning "'with the intent of intimidating any person or group of persons.'" 538 U. S., at 348. Notably, the statute included a presumption: "'Any such burning of a cross shall be prima facie evidence of an intent to intimidate.'" *Ibid.* After three men were convicted under the statute, they challenged it as facially unconstitutional. We upheld the general prohibition on cross burning, concluding that the First Amendment allows the government to ban "a particular type of threat." *Id.*, at 362–363. A plurality then went on to address the statutory presumption. While cross burning "may mean that a person is engaging in constitutionally proscribable intimidation," the plurality reasoned, the act is not monolithic. *Id.*, at 365. Cross burning could be directed "at an individual" or "at a group of like-minded believers"; it could be done "on a neighbor's lawn" or "at a public rally"; it could be done with the property owner's "permission" or without it. *Id.*, at 366. The presumption "blur[red] the line" between these different situations and "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning" was covered by the statute or not.[4]

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surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (*e.g.*, anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient(s); and (5) the subjective reaction of the statement's intended or foreseeable recipient(s)." *People in the Interest of R. D.*, 464 P. 3d 717, 721–722 (Colo. 2020).

[4]As JUSTICE SOTOMAYOR emphasizes, *ante*, at 10, n. 4, the plurality said that context informs "whether a particular cross burning is *intended to intimidate*," 538 U. S., at 367 (emphasis added). But this was a reference to the *statutory* requirements for a conviction, not the *constitutional* requirements—the Virginia statute covered only threats made "'with the intent of intimidating any person or group of persons.'" *Id.*, at 348. At no point did the Court hold that the First Amendment demands specific intent; on the contrary, it recognized that a statement made "with the intent of placing the victim in fear of bodily harm or death" is "*a* type of

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Id., at 365, 367. Thus, the presumption was unconstitutionally overbroad.

The *Black* plurality's reasoning can be boiled down to the following insight: When context is ignored, true threats cannot be reliably distinguished from protected speech. The reverse also holds: When context is properly considered, constitutional concerns abate. See, *e.g.*, *Watts* v. *United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (concluding that a statement was "political hyperbole" instead of a true threat based on "context," "the expressly conditional nature of the statement," and the "reaction of the listeners").

One more point: Many States have long had statutes like Colorado's on the books. See Brief for Illinois et al. as *Amici Curiae* 16–17. Before we took this case, the vast majority of Courts of Appeals and state high courts had upheld these statutes as constitutional. So objective tests are effectively the status quo today, yet Counterman still struggles to identify past prosecutions that came close to infringing on protected speech. Tr. of Oral Arg. 28–30. The silence is telling.

C

So is the silence in the historical record. Since 1791, true threats have been excluded from the "speech" protected by the First Amendment. *R. A. V.*, 505 U. S., at 382–383, 388. If Counterman could show that a subjective requirement has been inherent in the definition of "true threat" since the founding, he would have a compelling case. But Counterman cannot make that showing.

For starters, he produces no evidence directly addressing the meaning of the First Amendment—nothing from state ratifying conventions, political commentary, or even early debates about efforts to regulate threats in ways that might

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true threat." *Id.*, at 360 (emphasis added).

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threaten speech. That is not surprising at the federal level, because the Federal Government did not prohibit threats until the early 20th century. *Elonis*, 575 U. S., at 760 (THOMAS, J., dissenting). Some States, however, both regulated threats and guaranteed the right to free speech in their own constitutions. *Id.*, at 760–761. Yet even at the state level, there was apparently no discussion about the implications of these statutes for the constitutional right.

That void notwithstanding, the state threat statutes are the evidence on which Counterman seizes. He argues that they imposed a subjective *mens rea*, demonstrating that the founding generation thought that threats could be punished on no less. But as JUSTICE THOMAS has already discussed in detail, this is incorrect. See *id.*, at 760–765. Rather than a subjective *mens rea*, these statutes used an objective standard resembling Colorado's.

Even if they did require a heightened *mens rea*, though, these statutes would not carry the day for Counterman. The enactment of a statute against the backdrop of a free speech guarantee tends to show that the legislature thought the statute consistent with that guarantee. Thus, if the question were whether such statutes *violated* the First Amendment, their existence would be evidence to the contrary. But the question here is whether a subjective intent requirement is the constitutional floor. And because the legislature is always free to exceed the floor, the enactment of legislation does not necessarily reflect the legislature's view of the constitutional minimum.

At the end of the day, then, the best historical case for Counterman does not add up to much. He is plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one.

D

Even if a subjective test had a historical pedigree, the Court's chosen standard of recklessness certainly does not.

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Where does recklessness come from? It was not raised by the parties. Only the Solicitor General noted this possibility—and briefly at that. Brief for United States as *Amicus Curiae* 28–31. Nor did the courts below address recklessness; indeed, very few courts (of the many that have taken up the question) have settled on recklessness as the constitutional floor for true threats. See, *e.g.*, *State* v. *Mrozinski*, 971 N. W. 2d 233, 243–245 (Minn. 2022); *In re J. J. M.*, 265 A. 3d 246, 269–270 (Pa. 2021). Still, the Court adopts recklessness as "the right path forward." *Ante*, at 11. Its rationale is, at best, unclear.

The Court begins by acknowledging the "'competing value[s]'" of "free expression" on one hand, and "profound harms . . . to both individuals and society" on the other. *Ante*, at 11–12. But why do these considerations point to recklessness? A knowledge or purpose standard would allow more free expression, so maybe we should go higher. See *ante*, at 16 (SOTOMAYOR, J., concurring in part and concurring in judgment) ("chilling concerns only further buttress the conclusion that true threats should be limited to intentionally threatening speech"). An objective standard would cause less harm to victims, so perhaps lower is better. The optimal balance strikes me as a question best left to the legislature, which could calibrate the *mens rea* to the circumstance—for example, higher for the criminal context and lower for the civil. See Brief for Illinois et al. as *Amici Curiae* 28–30 (States "have a range of policy reasons for using subjective standards for penalizing threats of violence" and many "choose to require proof of a speaker's subjective mental state" in some situations but not others).

Nor does our First Amendment precedent buttress the Court's preferred standard. A recklessness requirement currently applies only to public-figure defamation claims. Incitement to violence calls for more. Fighting words, private-figure defamation, false commercial speech, and obscenity require less. I fail to see why, of all these categories

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of unprotected speech, public-figure defamation is the best analog for true threats. The reality is that recklessness is not grounded in law, but in a Goldilocks judgment: Recklessness is not too much, not too little, but instead "just right."

III

Some may find Colorado's statute harsh, and the Court's decision seems driven in no small part by the heavy hammer of criminal punishment. See *ante*, at 12; *ante*, at 14–15, 20–21 (opinion of SOTOMAYOR, J.). While an objective test is "a familiar feature of civil liability in tort law," the "'conventional requirement for criminal conduct'" is "'*awareness* of some wrongdoing.'" *Elonis*, 575 U. S., at 737–738. In keeping with this convention, we generally presume that "federal criminal statutes that are silent on the required mental state" nonetheless impose the "*mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Id.*, at 736 (internal quotation marks omitted). That is why we rejected an objective standard for the federal threat prohibition, 18 U. S. C. §875(c). 575 U. S., at 737–739. It is "the threatening nature of the communication" that "makes the conduct 'wrongful'"; thus, the statute is best interpreted to require that the defendant be aware of the impact of his speech. *Id.*, at 737.

But this case is about the scope of the First Amendment, not the interpretation of a criminal statute. Accordingly, the Court's holding affects the *civil* consequences for true threats just as much as it restricts criminal liability. And the civil context underscores the danger of adopting a *Sullivan*-style buffer zone for true threats.

Consider, for example, threat victims who seek restraining orders to protect themselves from their harassers. See, *e.g.*, *United States* v. *Elonis*, 841 F. 3d 589, 593 (CA3 2016) (defendant's wife sought a restraining order after he wrote on Facebook, "I'm not going to rest until your body is a mess,

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soaked in blood and dying from all the little cuts"). Civil orders can also keep individuals away from particular geographic areas. Imagine someone who threatens to bomb an airport, *State* v. *Johnston*, 156 Wash. 2d 355, 358–359, 127 P. 3d 707, 708–709 (2006), or "shoot up [a] courthous[e]," *State* v. *Draskovich*, 2017 S. D. 76, ¶3, 904 N. W. 2d 759, 761. The speaker might well end up barred from the location in question—for good reason. Yet after today, such orders cannot be obtained without proof—not necessarily easy to secure—that the person who issued the threat anticipated that it would elicit fear. See Tr. of Oral Arg. 92–93.

The government can also opt to counteract true threats by means of civil enforcement actions. For instance, 18 U. S. C. §248 prohibits "threat[s] of force" against any person "obtaining or providing reproductive health services" or "seeking to exercise the First Amendment right of religious freedom at a place of religious worship." The statute imposes a range of civil penalties, and it allows enforcement suits by both private persons and government officials. See, *e.g.*, *United States* v. *Dillard*, 795 F. 3d 1191, 1196–1197 (CA10 2015) (Government brought §248 action after defendant warned a health provider, "[y]ou will be checking under your car everyday—because maybe today is the day someone places an explosive under it"); *McCullen* v. *Coakley*, 573 U. S. 464, 491 (2014) (noting that several States have similar laws). After today, these civil enforcement actions face a higher constitutional hurdle.

In addition, employers and school administrators often discipline individuals who make true threats. Consider the student who was expelled after "draft[ing] two violent, misogynic, and obscenity-laden rants expressing a desire to molest, rape, and murder" his ex-girlfriend. *Doe* v. *Pulaski Cty. Special School Dist.*, 306 F. 3d 616, 619 (CA8 2002) (en banc). Or the one who was suspended after "'talking about taking a gun to school' to 'shoot everyone he hates.'"

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D. J. M. v. *Hannibal Public School Dist. No. 60*, 647 F. 3d 754, 758 (CA8 2011); *Lovell* v. *Poway Unified School District*, 90 F. 3d 367, 369, 372–373 (CA9 1996) (similar); *Haughwout* v. *Tordenti*, 332 Conn. 559, 561–562, 211 A. 3d 1, 3–4 (2019) (similar). True threats can also be expressed by a parent, a teacher, or an employee in another context altogether. See, *e.g.*, *Taveras*, 342 Conn., at 567–569, 578, 271 A. 3d, at 126–128, 133 (parent); *Smith* v. *New York City Dept. of Ed.*, 109 App. Div. 3d 701, 702–703, 972 N. Y. S. 2d 221, 222 (2013) (teacher); *Diggs* v. *St. Louis*, 613 S. W. 3d 858, 862, 864 (Mo. App. 2020) (correctional officer).

Barring some reason why the speech receives lesser constitutional protection, *e.g.*, *Mahanoy Area School Dist.* v. *B. L.*, 594 U. S. ___, ___–___ (2021) (slip op., at 4–5), the Court's new rule applies to all of these situations. That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on.

* * *

The bottom line is this: Counterman communicated true threats, which, "everyone agrees, lie outside the bounds of the First Amendment's protection." *Ante*, at 4. He knew what the words meant. Those threats caused the victim to fear for her life, and they "upended her daily existence." *Ante*, at 2. Nonetheless, the Court concludes that Counterman can prevail on a First Amendment defense. Nothing in the Constitution compels that result. I respectfully dissent.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* HANSEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 22–179. Argued March 27, 2023—Decided June 23, 2023

Respondent Helaman Hansen promised hundreds of noncitizens a path to U. S. citizenship through "adult adoption." But that was a scam. Though there is no path to citizenship through "adult adoption," Hansen earned nearly $2 million from his scheme. The United States charged Hansen with, *inter alia*, violating 8 U. S. C. §1324(a)(1)(A)(iv), which forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [activity] is or will be in violation of law." Hansen was convicted and moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument, but the Ninth Circuit concluded that clause (iv) was unconstitutionally overbroad.

Held: Because §1324(a)(1)(A)(iv) forbids only the purposeful solicitation and facilitation of specific acts known to violate federal law, the clause is not unconstitutionally overbroad. Pp. 4–20.

(a) Hansen's First Amendment overbreadth challenge rests on the claim that clause (iv) punishes so much protected speech that it cannot be applied to anyone, including him. A court will hold a statute facially invalid under the overbreadth doctrine if the law "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep." *United States* v. *Williams*, 553 U. S. 285, 292. In such a circumstance, society's interest in free expression outweighs its interest in the statute's lawful applications. Otherwise, courts must handle unconstitutional applications as they usually do—case-by-case. Pp. 4–5.

(b) The issue here is whether Congress used "encourage" and "induce" in clause (iv) as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead

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Syllabus

as those terms are used in ordinary conversation (thus encompassing a broader swath). Pp. 5–9.

(1) Criminal solicitation is the intentional encouragement of an unlawful act, and facilitation—*i.e.,* aiding and abetting—is the provision of assistance to a wrongdoer with the intent to further an offense's commission. Neither requires lending physical aid; for both, words may be enough. And both require an intent to bring about a particular unlawful act. The terms "encourage" and "induce," found in clause (iv), are among the "most common" verbs used to denote solicitation and facilitation. 2 W. LaFave, Substantive Criminal Law §13.2(a). Their specialized usage is displayed in the federal criminal code as well as the criminal laws of every State. If the challenged statute uses those terms as they are typically understood in the criminal law, an overbreadth challenge would be hard to sustain. Pp. 6–8.

(2) Hansen, like the Ninth Circuit, insists that clause (iv) uses "encourages" and "induces" in their ordinary rather than specialized sense. In ordinary parlance, "induce" means "[to] lead on; to influence; to prevail on; to move by persuasion or influence," Webster's New International Dictionary 1269, and "encourage" means to "inspire with courage, spirit, or hope," Webster's Third New International Dictionary 747. If clause (iv) conveys these ordinary meanings, it arguably reaches abstract advocacy or general encouragement, and its applications to protected speech might render it vulnerable to an overbreadth challenge. P. 9.

(c) The Court holds that clause (iv) uses "encourages or induces" in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation. Pp. 9–13.

(1) Context indicates that Congress used those words as terms of art. "Encourage" and "induce" have well-established legal meanings—and when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette* v. *United States*, 342 U. S. 246, 263. That inference is even stronger here, because clause (iv) prohibits "encouraging" and "inducing" *a violation of law*, which is the object of solicitation and facilitation too. The Ninth Circuit stacked the deck in favor of ordinary meaning, but it should have given specialized meaning a fair shake. When words have several plausible definitions, context differentiates among them. Here, the context of these words indicates that Congress used them as terms of art. Pp. 9–11.

(2) Statutory history is an important part of the relevant context. When Congress enacted in 1885 what would become the template for clause (iv), it criminalized "knowingly assisting, encouraging or soliciting" immigration under a contract to perform labor. 23 Stat. 333.

Then, as now, "encourage" had a specialized meaning that channeled accomplice liability. And the words "assisting" and "soliciting," which appeared alongside "encouraging," reinforce the narrower criminal-law meaning. When Congress amended that provision in 1917, it added "induce," which also carried solicitation and facilitation overtones. 39 Stat. 879. In 1952, Congress enacted the immediate predecessor for clause (iv) and also simplified the language from the 1917 Act, dropping the words "assist" and "solicit," and making it a crime to "willfully or knowingly encourag[e] or induc[e], or attemp[t] to encourage or induce, either directly or indirectly, the entry into the United States of . . . any alien . . . not lawfully entitled to enter or reside within the United States." 66 Stat. 229. Hansen believes these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement, but accepting that argument would require the Court to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. The better understanding is that Congress simply streamlined the previous statutory language. Critically, the terms Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). Clause (iv) is thus best understood as a continuation of the past. Pp. 11–13.

(d) Hansen argues that the absence of an express *mens rea* requirement in clause (iv) means that the statute is not limited to solicitation and facilitation. But when Congress placed "encourages" and "induces" in clause (iv), the traditional intent associated with solicitation and facilitation was part of the package. The federal aiding and abetting statute works the same way: It contains no express *mens rea* requirement but implicitly incorporates the traditional state of mind required for aiding and abetting. *Rosemond* v. *United States*, 572 U. S. 65, 70–71. Clause (iv) is situated among other provisions that function in the same manner. See, *e.g.,* §§1324(a)(1)(A)(v)(I), (II). Since "encourages or induces" draws on the same common-law principles, clause (iv) also incorporates a *mens rea* requirement implicitly. Pp. 13–16.

(e) Finally, it bears emphasis that the canon of constitutional avoidance counsels the Court to adopt the Government's reading if it is at least "'fairly possible.'" *Jennings* v. *Rodriguez*, 583 U. S. ___, ___. Pp. 16–17.

(f) Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, it does not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U. S., at 292. It is undisputed that clause (iv) encompasses a great deal of nonexpressive conduct, which does not implicate the First

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Amendment at all, *e.g.,* smuggling noncitizens into the country. Because these types of cases are heartland clause (iv) prosecutions, the "plainly legitimate sweep" of the provision is extensive. To the extent clause (iv) reaches any speech, it stretches no further than speech integral to unlawful conduct, which is unprotected. See, *e.g.*, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502. Hansen, on the other hand, fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on the expansive ordinary meanings of "encourage" and "induce." None of these examples are filtered through the traditional elements of solicitation and facilitation—most importantly, the requirement that a defendant *intend* to bring about a specific result. Because clause (iv) does not have the scope Hansen claims, it does not produce the horribles he parades. Hansen also resists the idea that Congress can criminalize speech that solicits or facilitates a civil violation, and some immigration violations are only civil. But even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify facial invalidation for overbreadth. Pp. 17–20.

25 F. 4th 1103, reversed and remanded.

BARRETT, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. THOMAS, J., filed a concurring opinion. JACKSON, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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SUPREME COURT OF THE UNITED STATES

No. 22–179

UNITED STATES, PETITIONER *v.*
HELAMAN HANSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2023]

JUSTICE BARRETT delivered the opinion of the Court.

A federal law prohibits "encourag[ing] or induc[ing]" illegal immigration. 8 U. S. C. §1324(a)(1)(A)(iv). After concluding that this statute criminalizes immigration advocacy and other protected speech, the Ninth Circuit held it unconstitutionally overbroad under the First Amendment. That was error. Properly interpreted, this provision forbids only the intentional solicitation or facilitation of certain unlawful acts. It does not "prohibi[t] a substantial amount of protected speech"—let alone enough to justify throwing out the law's "plainly legitimate sweep." *United States* v. *Williams*, 553 U. S. 285, 292 (2008). We reverse.

I

In 2014, Mana Nailati, a citizen of Fiji, heard that he could become a U. S. citizen through an "adult adoption" program run by Helaman Hansen. Eager for citizenship, Nailati flew to California to pursue the program. Hansen's wife told Nailati that adult adoption was the "quickest and easiest way to get citizenship here in America." App. 88. For $4,500, Hansen's organization would arrange Nailati's adoption, and he could then inherit U. S. citizenship from

his new parent. Nailati signed up.

It was too good to be true. There is no path to citizenship through "adult adoption," so Nailati waited for months with nothing to show for it. Faced with the expiration of his visa, he asked Hansen what to do. Hansen advised him to stay: "[O]nce you're in the program," Hansen explained, "you're safe. Immigration cannot touch you." *Id.*, at 92. Believing that citizenship was around the corner, Nailati took Hansen's advice and remained in the country unlawfully.

Hansen peddled his scam to other noncitizens too. After hearing about the program from their pastor, one husband and wife met with Hansen and wrote him a check for $9,000—initially saved for a payment on a house in Mexico—so that they could participate. Another noncitizen paid Hansen out of savings he had accumulated over 21 years as a housepainter. Still others borrowed from relatives and friends. All told, Hansen lured over 450 noncitizens into his program, and he raked in nearly $2 million as a result.

The United States charged Hansen with (among other crimes) violations of §1324(a)(1)(A)(iv). That clause forbids "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." In addition to convicting him under clause (iv), the jury found that Hansen had acted "for the purpose of private financial gain," triggering a higher maximum penalty. App. 116; see §1324(a)(1)(B)(i).

After the verdict came in, Hansen saw a potential way out. Another case involving §1324(a)(1)(A)(iv), *United States* v. *Sineneng-Smith*, was pending before the Ninth Circuit, which had *sua sponte* raised the question whether the clause was an unconstitutionally overbroad restriction of speech. 910 F. 3d 461, 469 (2018). Taking his cue from *Sineneng-Smith*, Hansen moved to dismiss the clause (iv) charges on First Amendment overbreadth grounds. The District Court rejected Hansen's argument and sentenced

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him.

While Hansen's appeal was pending, the Ninth Circuit held in *Sineneng-Smith* that clause (iv) is unconstitutionally overbroad. *Id.*, at 467–468. That holding was short-lived: We vacated the judgment, explaining that the panel's choice to inject the overbreadth issue into the appeal and appoint *amici* to argue it "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." 590 U. S. ___, ___ (2020) (slip op., at 3). On remand, limited to the arguments that Sineneng-Smith had actually made, the Ninth Circuit affirmed her convictions. 982 F. 3d 766, 770 (2020). But Hansen's appeal was waiting in the wings, giving the Ninth Circuit a second chance to address the overbreadth question. It reprised its original holding in *Sineneng-Smith*.

As in *Sineneng-Smith*, the Ninth Circuit focused on whether clause (iv) is a narrow prohibition covering solicitation and facilitation of illegal conduct, or a sweeping ban that would pull in "statements or conduct that are likely repeated countless times across the country every day." 25 F. 4th 1103, 1110 (2022). It adopted the latter interpretation, asserting that clause (iv) criminalizes speech such as "encouraging an undocumented immigrant to take shelter during a natural disaster, advising an undocumented immigrant about available social services, telling a tourist that she is unlikely to face serious consequences if she overstays her tourist visa, or providing certain legal advice to undocumented immigrants." *Ibid.* Concluding that clause (iv) covers an "'alarming'" amount of protected speech relative to its narrow legitimate sweep, the Ninth Circuit held the provision facially overbroad. *Ibid.*

The Ninth Circuit denied the Government's petition for rehearing en banc over the dissent of nine judges. Judge Bumatay, who wrote the principal dissent, attributed the panel's overbreadth concern to a misreading of the statute.

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See 40 F. 4th 1049, 1057–1058 (2022). Correctly interpreted, he explained, clause (iv) reaches only criminal solicitation and aiding and abetting. *Ibid.* On that reading, the provision raises no overbreadth problem because, "[e]ven if §1324(a)(1)(A)(iv) somehow reaches protected speech, that reach is far outweighed by the provision's broad legitimate sweep." *Id.*, at 1072.

We granted certiorari. 598 U. S. ___ (2022).

II

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." Wisely, Hansen does not claim that the First Amendment protects the communications for which he was prosecuted. Cf. *Illinois ex rel. Madigan* v. *Telemarketing Associates, Inc.*, 538 U. S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud"). Instead, he raises an overbreadth challenge: He argues that clause (iv) punishes so much protected speech that it cannot be applied to *anyone*, including him. Brief for Respondent 9–10.

An overbreadth challenge is unusual. For one thing, litigants typically lack standing to assert the constitutional rights of third parties. See, *e.g.*, *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). For another, litigants mounting a facial challenge to a statute normally "must establish that *no set of circumstances* exists under which the [statute] would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (emphasis added). Breaking from both of these rules, the overbreadth doctrine instructs a court to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute can be lawfully applied.

We have justified this doctrine on the ground that it provides breathing room for free expression. Overbroad laws "may deter or 'chill' constitutionally protected speech," and if would-be speakers remain silent, society will lose their

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contributions to the "marketplace of ideas." *Virginia* v. *Hicks*, 539 U. S. 113, 119 (2003). To guard against those harms, the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak. *Williams*, 553 U. S., at 292. If the challenger demonstrates that the statute "prohibits a substantial amount of protected speech" relative to its "plainly legitimate sweep," then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid. *Ibid.*; see *Hicks*, 539 U. S., at 118–119.

Because it destroys some good along with the bad, "[i]nvalidation for overbreadth is '"strong medicine"' that is not to be 'casually employed.'" *Williams*, 553 U. S., at 293. To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 14 (1988); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 800–801 (1984). In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case.

III

A

To judge whether a statute is overbroad, we must first determine what it covers. Recall that §1324(a)(1)(A)(iv) makes it unlawful to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law."[1] The issue is

[1] Although the statutory terms are not coextensive, we use "alien" and "noncitizen" as rough equivalents here. See 8 U. S. C. §1101(a)(3); *Barton* v. *Barr*, 590 U. S. ___, ___, n. 2 (2020) (slip op., at 3, n. 2).

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whether Congress used "encourage" and "induce" as terms of art referring to criminal solicitation and facilitation (thus capturing only a narrow band of speech) or instead as those terms are used in everyday conversation (thus encompassing a broader swath). An overbreadth challenge obviously has better odds on the latter view.

1

We start with some background on solicitation and facilitation. Criminal solicitation is the intentional encouragement of an unlawful act. ALI, Model Penal Code §5.02(1), p. 364 (1985) (MPC); 2 W. LaFave, Substantive Criminal Law §11.1 (3d ed. 2022) (LaFave). Facilitation—also called aiding and abetting—is the provision of assistance to a wrongdoer with the intent to further an offense's commission. See, *e.g.*, *Twitter, Inc.* v. *Taamneh*, 598 U. S. ___, ___–___ (2023) (slip op., at 13–14). While the crime of solicitation is complete as soon as the encouragement occurs, see LaFave §11.1, liability for aiding and abetting requires that a wrongful act be carried out, see *id.*, §13.2(a). Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough. *Reves* v. *Ernst & Young*, 507 U. S. 170, 178 (1993) (one may aid and abet by providing "'assistance rendered by words, acts, encouragement, support, or presence'"); MPC §5.02(2), at 365 (solicitation may take place through words or conduct); LaFave §11.1(c) (same). Both require an intent to bring about a particular unlawful act. See, *e.g.*, *Hicks* v. *United States*, 150 U. S. 442, 449 (1893) ("[W]ords of encouragement and abetting must" be used with "the intention as respects the effect to be produced"). And both are longstanding criminal theories targeting those who support the crimes of a principal wrongdoer. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 181 (1994); LaFave §11.1(a).

The terms "encourage" and "induce" are among the "most

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common" verbs used to denote solicitation and facilitation. *Id.*, §13.2(a); see also 1 J. Ohlin, Wharton's Criminal Law §10:1, p. 298 (16th ed. 2021) (Wharton) ("[A]dditional language—such as *encourage*, counsel, and command—usually accompanies 'aid' or 'abet'" (emphasis added)). In fact, their criminal-law usage dates back hundreds of years. See 40 F. 4th, at 1062–1064 (opinion of Bumatay, J.). A prominent early American legal dictionary, for instance, defines "abet" as "[t]o *encourage* or set another on to commit a crime." 1 J. Bouvier, Law Dictionary 30 (1839) (emphasis added). Other sources agree. See, *e.g.*, Wharton §10:1, at 298 ("'abet,'" at common law, meant "to *encourage*, advise, or instigate the commission of a crime" (emphasis added)); Black's Law Dictionary 6 (1st ed. 1891) (to "abet" "[i]n criminal law" was "[t]o *encourage*, incite, or set another on to commit a crime" (emphasis added)); cf. *id.*, at 667 (11th ed. 2019) (defining "encourage" with, in part, a cross-reference to "aid and abet").

This pattern is on display in the federal criminal code, which, for over a century, has punished one who "induces" a crime as a principal. See Act of Mar. 4, 1909, §332, 35 Stat. 1152 ("Whoever . . . aids, abets, counsels, commands, *induces*, or procures [the commission of an offense] is a principal" (emphasis added)); 18 U. S. C. §2(a) (listing the same verbs today). The Government offers other examples as well: The ban on soliciting a crime of violence penalizes those who "solici[t], comman[d], *induc[e]*, or otherwise endeavo[r] to persuade" another person "to engage in [the unlawful] conduct." §373(a) (emphasis added). Federal law also criminalizes "persuad[ing], *induc[ing]*, entic[ing], or coerc[ing]" one "to engage in prostitution" or other unlawful sexual activity involving interstate commerce. §§2422(a), (b) (emphasis added). The Model Penal Code echoes these formulations, defining solicitation as, in relevant part, "command[ing], *encourag[ing]* or request[ing] another person to engage in specific [unlawful] conduct." MPC §5.02(1),

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at 364 (emphasis added). And the commentary to the Model Penal Code notes that similar prohibitions may employ other verbs, such as "induce." See *id.*, Comment 3, at 372–373, n. 25 (collecting examples).

The use of both verbs to describe solicitation and facilitation is widespread in the States too. Nevada considers "[e]very person" who "aided, abetted, counseled, *encouraged*, hired, commanded, *induced*, or procured" an offense to be a principal. Nev. Rev. Stat. §195.020 (2021) (emphasis added). Arizona provides that one who "commands, *encourages*, requests, or solicits another person to engage in specific conduct" commits the offense of solicitation. Ariz. Rev. Stat. Ann. §13–1002(A) (2020) (emphasis added). And New Mexico imposes criminal liability on one who "with the intent" for another to commit a crime "solicits, commands, requests, *induces* . . . or otherwise attempts to promote or facilitate" the offense. N. M. Stat. Ann. §30–28–3(A) (2018) (emphasis added). These States are by no means outliers—"induce" or "encourage" describe similar offenses in the criminal codes of *every* State. App. to Brief for State of Montana et al. as *Amici Curiae* 1–44; see, *e.g.*, Ala. Code §13A–2–23(1) (2015) ("induces"); Colo. Rev. Stat. §18–1–603 (2022) ("encourages"); Fla. Stat. §777.04(2) (2022) ("encourages"); Haw. Rev. Stat. §705–510(1) (2014) ("encourages"); Ind. Code §35–41–2–4 (2022) ("induces"); Kan. Stat. Ann. §21–5303(a) (2020) ("encouraging"); N. D. Cent. Code Ann. §12.1–06–03(1) (2021) ("induces"); Tex. Penal Code Ann. §7.02(a)(2) (West 2021) ("encourages"); W. Va. Code Ann. §61–11–8a(b)(1) (Lexis 2020) ("inducement"); Wyo. Stat. Ann. §6–1–302(a) (2021) ("encourages").

In sum, the use of "encourage" and "induce" to describe solicitation and facilitation is both longstanding and pervasive. And if 8 U. S. C. §1324(a)(1)(A)(iv) refers to solicitation and facilitation as they are typically understood, an overbreadth challenge would be hard to sustain.

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2

Hansen, like the Ninth Circuit, insists that clause (iv) uses "encourages" and "induces" in their ordinary rather than their specialized sense. While he offers definitions from multiple dictionaries, the terms are so familiar that two samples suffice. In ordinary parlance, "induce" means "[t]o lead on; to influence; to prevail on; to move by persuasion or influence." Webster's New International Dictionary 1269 (2d ed. 1953). And "encourage" means to "inspire with courage, spirit, or hope." Webster's Third New International Dictionary 747 (1966).

In Hansen's view, clause (iv)'s use of the bare words "encourages" or "induces" conveys these ordinary meanings. See Brief for Respondent 14. "[T]hat encouragement can *include* aiding and abetting," he says, "does not mean it is *restricted* to aiding and abetting." *Id.*, at 25. And because clause (iv) "proscribes encouragement, full stop," *id.*, at 14, it prohibits even an "op-ed or public speech criticizing the immigration system and supporting the rights of long-term undocumented noncitizens to remain, at least where the author or speaker knows that, or recklessly disregards whether, any of her readers or listeners are undocumented." *Id.*, at 17–18. If the statute reaches the many examples that Hansen posits, its applications to protected speech might swamp its lawful applications, rendering it vulnerable to an overbreadth challenge.

B

We hold that clause (iv) uses "encourages or induces" in its specialized, criminal-law sense—that is, as incorporating common-law liability for solicitation and facilitation. In truth, the clash between definitions is not much of a contest. "Encourage" and "induce" have well-established legal meanings—and when Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the

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cluster of ideas that were attached to each borrowed word." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952); see also, *e.g.*, *United States* v. *Shabani*, 513 U. S. 10, 13–14 (1994).

To see how this works, consider the word "attempts," which appears in clause (iv)'s next-door neighbors. See §§1324(a)(1)(A)(i)–(iii). In a criminal prohibition, we would not understand "attempt" in its ordinary sense of "try." Webster's New Universal Unabridged Dictionary 133 (2d ed. 2001). We would instead understand it to mean taking "a substantial step" toward the completion of a crime with the requisite *mens rea*. *United States* v. *Resendiz-Ponce*, 549 U. S. 102, 107 (2007). "Encourages or induces" likewise carries a specialized meaning. After all, when a criminal-law term is used in a criminal-law statute, that—in and of itself—is a good clue that it takes its criminal-law meaning. And the inference is even stronger here, because clause (iv) prohibits "encouraging" and "inducing" *a violation of law*. See §1324(a)(1)(A)(iv). That is the focus of criminal solicitation and facilitation too.

In concluding otherwise, the Ninth Circuit stacked the deck in favor of ordinary meaning. See 25 F. 4th, at 1109–1110; see also *United States* v. *Hernandez-Calvillo*, 39 F. 4th 1297, 1304 (CA10 2022) ("Our construction of [the verbs in clause (iv)] begins with their ordinary meaning, not their specialized meaning in criminal law"). But it should have given specialized meaning a fair shake. When words have several plausible definitions, context differentiates among them. That is just as true when the choice is between ordinary and specialized meanings, see, *e.g.*, *Corning Glass Works* v. *Brennan*, 417 U. S. 188, 202 (1974) ("While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations"), as it is when a court must choose among multiple ordinary meanings, see, *e.g.*, *Muscarello* v.

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United States, 524 U. S. 125, 127–128 (1998) (choosing between ordinary meanings of "carry"). Here, the context of these words—the water in which they swim—indicates that Congress used them as terms of art.

Statutory history is an important part of this context. In 1885, Congress enacted a law that would become the template for clause (iv). That law prohibited "knowingly assisting, *encouraging* or soliciting" immigration under a contract to perform labor. Act of Feb. 26, 1885, ch. 164, §3, 23 Stat. 333 (1885 Act) (emphasis added). Then, as now, "encourage" had a specialized meaning that channeled accomplice liability. See 1 Bouvier, Law Dictionary 30 ("abet" means "[t]o encourage or set another on to commit a crime"); Black's Law Dictionary 6 (1891) (to "abet" is "[t]o encourage, incite, or set another on to commit a crime"). And the words "assisting" and "soliciting," which appeared alongside "encouraging" in the 1885 Act, reinforce that Congress gave the word "encouraging" its narrower criminal-law meaning. See *Dubin* v. *United States*, 599 U. S. ___, ___ (2023) (slip op., at 12) (a word capable of many meanings is refined by its neighbors, which often " 'avoid[s] the giving of unintended breadth to the Acts of Congress' "). Unsurprisingly, then, when this Court upheld the 1885 Act against a constitutional challenge, it explained that Congress "has the power to punish any who *assist*" in introducing noncitizens into the country—without suggesting that the term "encouraging" altered the scope of the prohibition. *Lees* v. *United States*, 150 U. S. 476, 480 (1893) (emphasis added).

In the ensuing decades, Congress both added to and subtracted from the "encouraging" prohibition in the 1885 Act. Throughout, it continued to place "encouraging" alongside "assisting" and "soliciting." See Act of Mar. 3, 1903, §5, 32 Stat. 1214–1215; Act of Feb. 20, 1907, §5, 34 Stat. 900. Then, in 1917, Congress added "induce" to the string of verbs. Act of Feb. 5, 1917, §5, 39 Stat. 879 (1917 Act) (mak-

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ing it a crime "to induce, assist, encourage, or solicit, or attempt to induce, assist, encourage, or solicit the importation or migration of any contract laborer . . . into the United States"). Like "encourage," the word "induce" carried solicitation and facilitation overtones at the time of this enactment. See Black's Law Dictionary 617 (1891) (defining "inducement" to mean "that which leads or tempts to the commission of crime"). In fact, Congress had just recently used the term in a catchall prohibition on criminal facilitation. See Act of Mar. 4, 1909, §332, 35 Stat. 1152 ("Whoever . . . aids, abets, counsels, commands, *induces*, or procures [the commission of an offense], is a principal" (emphasis added)). And as with "encourage," the meaning of "induce" was clarified and narrowed by its statutory neighbors in the 1917 Act—"assist" and "solicit."

Congress enacted the immediate forerunner of the modern clause (iv) in 1952 and, in doing so, simplified the language from the 1917 Act. Most notably, the 1952 version dropped the words "assist" and "solicit," instead making it a crime to "willfully or knowingly encourag[e] or induc[e], or attemp[t] to encourage or induce, either directly or indirectly, the entry into the United States of . . . any alien . . . not lawfully entitled to enter or reside within the United States." Immigration and Nationality Act, §274(a)(4), 66 Stat. 229. Three decades later, Congress brought 8 U. S. C. §1324(a)(1)(A)(iv) into its current form—still without the words "assist" or "solicit." Immigration Reform and Control Act of 1986, §112(a), 100 Stat. 3382 (making it a crime to "encourag[e] or induc[e] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law").

On Hansen's view, these changes dramatically broadened the scope of clause (iv)'s prohibition on encouragement. Before 1952, he says, the words "assist" and "solicit" may have cabined "encourage" and "induce," but eliminating them

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severed any connection the prohibition had to solicitation and facilitation. Brief for Respondent 25–26. In other words, Hansen claims, the 1952 and 1986 revisions show that Congress opted to make "protected speech, not conduct, a crime." *Id.*, at 27.

We do not agree that the mere removal of the words "assist" and "solicit" turned an ordinary solicitation and facilitation offense into a novel and boundless restriction on speech. Hansen's argument would require us to assume that Congress took a circuitous route to convey a sweeping—and constitutionally dubious—message. The better understanding is that Congress simply "streamlined" the pre-1952 statutory language—which, as any nonlawyer who has picked up the U. S. Code can tell you, is a commendable effort. 40 F. 4th, at 1066 (opinion of Bumatay, J.). In fact, the streamlined formulation mirrors this Court's own description of the 1917 Act, which is further evidence that Congress was engaged in a cleanup project, not a renovation. See *United States* v. *Lem Hoy*, 330 U. S. 724, 727 (1947) (explaining that the 1917 Act barred "contract laborers, defined as persons *induced or encouraged* to come to this country by offers or promises of employment" (emphasis added)); *id.*, at 731 (describing the 1917 Act as a "prohibition against employers *inducing* laborers to enter the country" (emphasis added)). And critically, the terms that Congress retained ("encourage" and "induce") substantially overlap in meaning with the terms it omitted ("assist" and "solicit"). LaFave §13.2(a). Clause (iv) is best understood as a continuation of the past, not a sharp break from it.

C

Hansen's primary counterargument is that clause (iv) is missing the necessary *mens rea* for solicitation and facilitation. Brief for Respondent 28–31. Both, as traditionally understood, require that the defendant specifically intend

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that a particular act be carried out. *Supra*, at 6. "Encourages or induces," however, is not modified by any express intent requirement. Because the text of clause (iv) lacks that essential element, Hansen protests, it cannot possibly be limited to either solicitation or facilitation.

Once again, Hansen ignores the longstanding history of these words. When Congress transplants a common-law term, the "'old soil'" comes with it. *Taggart* v. *Lorenzen*, 587 U. S. ___, ___–___ (2019) (slip op., at 5–6). So when Congress placed "encourages" and "induces" in clause (iv), the traditional intent associated with solicitation and facilitation was part of the package. That, in fact, is precisely how the federal aiding-and-abetting statute works. It contains no express *mens rea* requirement, providing only that a person who "aids, abets, counsels, commands, induces or procures" a federal offense is "punishable as a principal." 18 U. S. C. §2(a). Yet, consistent with "a centuries-old view of culpability," we have held that the statute implicitly incorporates the traditional state of mind required for aiding and abetting. *Rosemond* v. *United States*, 572 U. S. 65, 70–71 (2014).

Clause (iv) is situated among other provisions that work the same way. Consider those that immediately follow it: The first makes it a crime to "engag[e] in any conspiracy to commit any of the preceding acts," 8 U. S. C. §1324(a)(1)(A)(v)(I), and the second makes it a crime to "ai[d] or abe[t] the commission of any of the preceding acts," §1324(a)(1)(A)(v)(II). Neither of these clauses explicitly states an intent requirement. Yet both conspiracy and aiding and abetting are familiar common-law offenses that contain a particular *mens rea*. See *Rosemond*, 572 U. S., at 76 (aiding and abetting); *Ocasio* v. *United States*, 578 U. S. 282, 287–288 (2016) (conspiracy). Take an obvious example: If the words "aids or abets" in clause (v)(II) were considered in a vacuum, they could be read to cover a person who inadvertently helps another commit a §1324(a)(1)(A)

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offense. But a prosecutor who tried to bring such a case would not succeed. Why? Because aiding and abetting implicitly carries a *mens rea* requirement—the defendant generally must *intend* to facilitate the commission of a crime. LaFave §13.2(b). Since "encourages or induces" in clause (iv) draws on the same common-law principles, it too incorporates them implicitly.[2]

Still, Hansen reiterates that if Congress had wanted to require intent, it could easily have said so—as it did elsewhere in clause (iv). The provision requires that the defendant encourage or induce an unlawful act *and* that the defendant "kno[w]" or "reckless[ly] disregard" the fact that the act encouraged "is or will be in violation of law." §1324(a)(1)(A)(iv). Yet while Congress spelled out this requirement, it included no express *mens rea* element for "encourages or induces." Indeed, Hansen continues, the statute used to require that the encouragement or inducement be committed "willfully or knowingly," but Congress deleted those words in 1986. Brief for Respondent 30. Taken together, Hansen says, this evidence reflects that Congress aimed to make a defendant liable for "encouraging or inducing" without respect to her state of mind.

But there is a simple explanation for why "encourages or induces" is not modified by an express *mens rea* requirement: There is no need for it. At the risk of sounding like a broken record, "encourage" and "induce," as terms of art, carry the usual attributes of solicitation and facilitation—including, once again, the traditional *mens rea*. Congress

[2]The Ninth Circuit believed that the Government's "solicitation and facilitation" reading of clause (iv) would create impermissible surplusage with the aiding-and-abetting provision in clause (v)(II). 25 F. 4th 1103, 1108–1109 (2022). Hansen does not press that argument before this Court—for good reason. Clause (iv) criminalizes the aiding and abetting of an immigration violation, whereas clause (v)(II) prohibits the aiding and abetting of "any of the preceding acts." In other words, clause (v)(II) applies to aiding and abetting a first-line *facilitator*. Another difference: Clause (iv) criminalizes not only facilitation, but solicitation too.

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might have rightfully seen the express *mens rea* requirement as unnecessary and cut it in a further effort to streamline clause (iv). And in any event, the omission of the unnecessary modifier is certainly not enough to overcome the "presumption of scienter" that typically separates wrongful acts "from 'otherwise innocent conduct.'" *Xiulu Ruan* v. *United States*, 597 U. S. ___, ___ (2022) (slip op., at 5); see also *Elonis* v. *United States*, 575 U. S. 723, 736–737 (2015).

Nor does the scienter applicable to a distinct element within clause (iv)—that the defendant "kno[w]" or "reckless[ly] disregard . . . the fact that" the noncitizen's "coming to, entry, or residence is or will be in violation of law"—tell us anything about the *mens rea* for "encourages or induces." Many criminal statutes do not require knowledge of illegality, but rather only "'factual knowledge as distinguished from knowledge of the law.'" *Bryan* v. *United States*, 524 U. S. 184, 192 (1998). So Congress's choice to specify a mental state for this element tells us something that we might not normally infer, whereas the inclusion of a *mens rea* requirement for "encourages or induces" would add nothing.

It bears emphasis that even if the Government's reading were not the best one, the interpretation is at least "'fairly possible'"—so the canon of constitutional avoidance would still counsel us to adopt it. *Jennings* v. *Rodriguez*, 583 U. S. ___, ___ (2018) (slip op., at 12). This canon is normally a valuable ally for criminal defendants, who raise the prospect of unconstitutional applications to urge a narrower construction. But Hansen presses the clause toward the most expansive reading possible, effectively asking us to apply a canon of "'constitutional collision.'" 40 F. 4th, at 1059 (opinion of Bumatay, J.). This tactic is understandable in light of the odd incentives created by the overbreadth doctrine, but it is also wrong. When legislation and the Constitution brush up against each other, our task is to seek

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harmony, not to manufacture conflict.[3]

IV

Section 1324(a)(1)(A)(iv) reaches no further than the purposeful solicitation and facilitation of specific acts known to violate federal law. So understood, the statute does not "prohibi[t] a substantial amount of protected speech" relative to its "plainly legitimate sweep." *Williams*, 553 U. S., at 292.

Start with clause (iv)'s valid reach. Hansen does not dispute that the provision encompasses a great deal of nonexpressive conduct—which does not implicate the First Amendment at all. Brief for Respondent 22–23. Consider just a few examples: smuggling noncitizens into the country, see *United States* v. *Okatan*, 728 F. 3d 111, 113–114 (CA2 2013); *United States* v. *Yoshida*, 303 F. 3d 1145, 1148–1151 (CA9 2002), providing counterfeit immigration documents, see *United States* v. *Tracy*, 456 Fed. Appx. 267, 269–270 (CA4 2011) (*per curiam*); *United States* v. *Castillo-Felix*, 539 F. 2d 9, 11 (CA9 1976), and issuing fraudulent Social Security numbers to noncitizens, see *Edwards* v. *Prime, Inc.*, 602 F. 3d 1276, 1295–1297 (CA11 2010). A brief survey of the Federal Reporter confirms that these are heartland clause (iv) prosecutions. See 40 F. 4th, at 1072 (opinion of Bumatay, J.) (listing additional examples, including arranging fraudulent marriages and transporting noncitizens on boats). So the "plainly legitimate sweep" of the provision is extensive.

When we turn to the other side of the ledger, we find it pretty much blank. Hansen fails to identify a single prosecution for ostensibly protected expression in the 70 years

[3]The canon of constitutional avoidance is a problem for the dissent. Attempting to overcome it, JUSTICE JACKSON suggests that the canon has less force in the context of an overbreadth challenge. *Post*, at 17. Our cases offer no support for that proposition. In this context, as in others, ordinary principles of interpretation apply.

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since Congress enacted clause (iv)'s immediate predecessor. Instead, he offers a string of hypotheticals, all premised on the expansive ordinary meanings of "encourage" and "induce." In his view, clause (iv) would punish the author of an op-ed criticizing the immigration system, "[a] minister who welcomes undocumented people into the congregation and expresses the community's love and support," and a government official who instructs "undocumented members of the community to shelter in place during a natural disaster." Brief for Respondent 16–19. Yet none of Hansen's examples are filtered through the elements of solicitation or facilitation—most importantly, the requirement (which we again repeat) that a defendant *intend* to bring about a specific result. See, *e.g.*, *Rosemond*, 572 U. S., at 76. Clause (iv) does not have the scope Hansen claims, so it does not produce the horribles he parades.

To the extent that clause (iv) reaches *any* speech, it stretches no further than speech integral to unlawful conduct.[4] "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected. *Williams*, 553 U. S., at 298. We have applied this principle many times, including to the promotion

[4] We also note that a number of clause (iv) prosecutions (like Hansen's) are predicated on fraudulent representations through speech for personal gain. See, *e.g.*, *United States* v. *Sineneng-Smith*, 982 F. 3d 766, 776 (CA9 2020); *United States* v. *Kalu*, 791 F. 3d 1194, 1198–1199 (CA10 2015). "[F]alse claims [that] are made to effect a fraud or secure moneys or other valuable considerations" are not protected by the First Amendment. *United States* v. *Alvarez*, 567 U. S. 709, 723 (2012) (plurality opinion). These examples increase the list of lawful applications.

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of a particular piece of contraband, *id.*, at 299, solicitation of unlawful employment, *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 388 (1973), and picketing with the "sole, unlawful [and] immediate objective" of "induc[ing]" a target to violate the law, *Giboney*, 336 U. S., at 502. It applies to clause (iv) too.[5]

Hansen has no quibble with that conclusion to the extent that clause (iv) criminalizes speech that solicits or facilitates a *criminal* violation, like crossing the border unlawfully or remaining in the country while subject to a removal order. See §§1253(a), 1325(a), 1326(a). He agrees that these applications of §1324(a)(1)(A)(iv) are permissible—in fact, he concedes that he would lose if clause (iv) covered only solicitation and facilitation of criminal conduct. Tr. of Oral Arg. 61–62. But he resists the idea that the First Amendment permits Congress to *criminalize* speech that solicits or facilitates a *civil* violation—and some immigration violations are only civil. Brief for Respondent 38. For instance, residing in the United States without lawful status is subject to the hefty penalty of removal, but it generally does not carry a criminal sentence. See *Arizona* v. *United States*, 567 U. S. 387, 407 (2012).

Call this the "mismatch" theory: Congress can impose criminal penalties on speech that solicits or facilitates a criminal violation and civil penalties on speech that solicits or facilitates a civil violation—but it cannot impose criminal penalties on speech that solicits or facilitates a civil violation. See Tr. of Oral Arg. 62–63; Brief for Eugene Volokh as *Amicus Curiae* 5–7. If this theory is sound, then clause

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[5] Overbreadth doctrine trafficks in hypotheticals, so we do not (and cannot) hold that *all* future applications of clause (iv) will be lawful, nor do we suggest that they will necessarily fall into the speech-integral-to-conduct category. That would require a crystal ball. Nothing in our opinion today precludes a litigant from bringing an as-applied challenge to clause (iv) in the future—whether based on the First Amendment or another constitutional constraint.

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(iv) reaches some expression that is outside the speech-integral-to-unlawful-conduct exception. Of course, "that speech is not categorically unprotected does not mean it is immune from regulation, but only that ordinary First Amendment scrutiny would apply." Brief for Respondent 44.

We need not address this novel theory, because even if Hansen is right, his overbreadth challenge fails. To succeed, he has to show that clause (iv)'s overbreadth is "*substantial* . . . relative to [its] plainly legitimate sweep." *Williams*, 553 U. S., at 292. As we have discussed, the provision has a wide legitimate reach insofar as it applies to nonexpressive conduct and speech soliciting or facilitating criminal violations of immigration law. Even assuming that clause (iv) reaches some protected speech, and even assuming that its application to all of that speech is unconstitutional, the ratio of unlawful-to-lawful applications is not lopsided enough to justify the "strong medicine" of facial invalidation for overbreadth. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). In other words, Hansen asks us to throw out too much of the good based on a speculative shot at the bad. This is not the stuff of overbreadth—as-applied challenges can take it from here.

* * *

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 22–179

UNITED STATES, PETITIONER *v.*
HELAMAN HANSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2023]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to emphasize how far afield the facial overbreadth doctrine has carried the Judiciary from its constitutional role. The facial overbreadth doctrine "purports to grant federal courts the power to invalidate a law" that is constitutional as applied to the party before it "'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. ___, ___ (2021) (THOMAS, J., concurring in part and concurring in judgment) (slip op., at 2) (quoting *United States* v. *Sineneng-Smith*, 590 U. S. ___, ___ (2020) (THOMAS, J., concurring) (slip op., at 1)). As I have explained, this doctrine "lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges," and distorts the judicial role. *Id.*, at ___ (slip op., at 9).

There is no question that the First Amendment does not shield respondent's scheme from prosecution under 8 U. S. C. §1324(a)(1)(A)(iv), which prohibits "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." Respondent defrauded nearly 500 aliens by telling them that they could become U. S. citizens through

adult adoption; he charged them up to $10,000 apiece, knowing full well that his scheme would not lead to citizenship. The Ninth Circuit even acknowledged below that "it is clear," both "from previous convictions under the statute . . . and likely from [respondent's] conduct here, that [§1324(a)(1)(A)(iv)] has at least some 'plainly legitimate sweep.'" 25 F. 4th 1103, 1106–1107 (2022).

Yet, instead of applying Congress' duly enacted law to respondent, the Ninth Circuit held the statute unconstitutional under this Court's facial overbreadth doctrine. Specifically, it took the doctrine as license to "speculate about imaginary cases and sift through an endless stream of fanciful hypotheticals," from which it concluded that the statute may be unconstitutional as applied to other (hypothetical) individuals in other (hypothetical) situations. 40 F. 4th 1049, 1071 (2022) (Bumatay, J., dissenting from denial of rehearing en banc) (internal quotation marks omitted). It then tallied up those hypothetical constitutional violations and determined that they were "substantial" enough to warrant holding the law unconstitutional *in toto*. 25 F. 4th, at 1109–1111. That line of reasoning starkly demonstrates that this Court's facial overbreadth doctrine offers a license for federal courts to act as "roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610–611 (1973) (majority opinion of White, J.).

Such "roving commissions" are hardly a new idea. When they met in 1787, the Constitution's Framers were well aware of a body that wielded such power: the New York Council of Revision (Council). Created by the New York Constitution of 1777, the Council consisted of the Governor, the Chancellor, and the judges of the New York Supreme Court. 2 B. Poore, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 1328, 1332 (2d ed. 1878). Noting that "laws inconsistent with the spirit of this constitution, or with the public

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good, may be hastily and unadvisedly passed," section III of the New York Constitution required the two Houses of the New York Legislature to present "all bills which have passed the senate and assembly" to the "council for their revisal and consideration." *Ibid.* The Council's power "to revise legislation" meant that, if it "objected to any measure of a bill, it would return a detailed list of its objections to the legislature," which "could change the bill to conform to those objections, override" them by a two-thirds vote of both Houses, "or simply let the bill die." J. Barry, Comment: The Council of Revision and the Limits of Judicial Power, 56 U. Chi. L. Rev. 235, 245 (1989) (Barry) (emphasis deleted).[1] The grounds for the Council's vetoes "ranged from an act being 'inconsistent with the spirit of the Constitution' to an act being passed without 'the persons affected thereby having an opportunity of being heard'" to an act being "'inconsistent with the public good.'" *Id.*, at 245–246 (alteration and footnote omitted).

At first, the Council was a well-respected institution, and several prominent delegates to the Philadelphia Convention sought to replicate it in the Federal Constitution. Resolution 8 of the Virginia Plan proposed a federal council of revision composed of "the Executive and a convenient number of the National Judiciary" that would have "authority to examine [and veto] every act of the National Legislature before it shall operate." 1 Records of the Federal Convention of 1787, §8, p. 21 (M. Farrand ed. 1911) (Farrand). The Council's veto would "be final . . . unless the Act of the National Legislature be again passed." *Ibid.*; see also J. Malcolm, Whatever the Judges Say It Is? The Founders and Judicial Review, 26 J. L. & Politics 1, 30–33 (2010).

The proponents of a council were clear that they sought

[1] The term "revise" was understood to mean "[t]o review." 2 S. Johnson, A Dictionary of the English Language (4th ed. 1773); N. Bailey, A Universal Etymological English Dictionary (22 ed. 1770) ("to review, to look over again").

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to empower judges to pass upon not only the constitutionality of laws, but also their policy. One of the council's main supporters, James Wilson, stated that the council would share the New York Council's power of reviewing laws, not only on constitutional grounds, but also to determine if they were "unjust," "unwise," "dangerous," or "destructive." 2 Farrand 73. Such a power was needed, according to Wilson, because the ordinary judicial power of refusing to apply unconstitutional laws in cases or controversies did not include the authority to decline to give effect to a law on policy grounds. *Ibid.* The other leading proponent of a council, James Madison, similarly argued that the council would veto "laws unwise in their principle, or incorrect in their form." 1 *id.*, at 139. For Madison, the council was necessary to remedy the defect caused by the limits of judicial power: Judges could not prevent the "pursuit of . . . unwise & unjust measures." 2 *id.*, at 74. In that vein, George Mason similarly argued that a council was needed to prevent "unjust oppressive or pernicious" laws from taking effect. *Id.*, at 78.

Significantly, proponents of a council rejected the premise that judicial power included a power to refuse to apply a law for policy reasons. In fact, "[n]either side thought judges would or should be authorized to make policy—whether couched in the language of justice or rights—through their exercise of the judicial power. . . . [T]he debate over a council of revision was made necessary . . . because . . . not a single delegate on either side of the debate proposed or supported having judges perform a policymaking role from the bench." J. Anderson, Learning From the Great Council of Revision Debate, 68 Rev. Politics 79, 99–100 (2006). From that shared premise, the council's proponents argued that such an institution was needed precisely because it would be incompatible with judicial duty to take policy concerns into account in adjudicating cases. See J. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933,

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963 (2018).[2]

Despite the support of respected delegates like Wilson and Madison, the Convention voted against creating a federal council of revision on four different occasions. P. Hamburger, Law and Judicial Duty 511 (2008). No other proposal was considered and rejected so many times. *Ibid.* Like the council's supporters, opponents of the proposal understood that the judicial power is only the authority to "resolve private disputes between particular parties," rather than "matters affecting the general public." Barry 255. Working from that shared premise, they reasoned that it was "'quite foreign from the nature of [the judicial] office to make them judges of the policy of public measures,'" as "'no maxim was better established' than that 'the power of making ought to be kept distinct from that of expounding, the law.'" *Ibid.* (quoting 1 Farrand 97–98 (E. Gerry); 2 *id.*, at 75 (C. Strong)); see also 1 *id.*, at 140 (J. Dickinson). Indeed, opponents observed that "the Judges" were "of all men the most unfit to" have a veto on laws before their enactment. 2 *id.*, at 80 (J. Rutledge). This was so not only because judges could not be "presumed to possess any peculiar knowledge of the mere policy of public measures," *id.*, at 73 (N. Ghorum), but also because, to preserve judicial integrity, they "ought never to give their opinion on a law till it comes before them" as an issue for decision in a concrete case or controversy, *id.*, at 80 (J. Rutledge); see also *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 121 (2015) (THOMAS, J., concurring in judgment) ("[J]udicial involve-

[2] Later statements of the proposed council's supporters confirm their understanding that the judicial station is incompatible with making policy judgments. See *Moodie* v. *Ship Phoebe Anne*, 3 Dall. 319 (1796) (Elsworth, C. J.) ("Suggestions of policy and conveniency cannot be considered in the judicial determination of a question of right"); 8 Writings of James Madison 387 (G. Hunt ed. 1908) ("[Q]uestions of policy and expediency, are unsusceptible of judicial cognizance and decision").

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ment in such a council would foster internal biases"). Opponents thus concluded that to include judges in the policy decisions inherent in the legislative process would be a "dangerous innovation," one that would erode public confidence in their ability to perform their "proper official character." 2 Farrand 75–76 (L. Martin); see also *id.*, at 77 ("[T]he Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating ag[ainst] popular measures of the Legislature").

The later history of the New York Council of Revision demonstrates the wisdom of the Framers' decision. The Council naturally became politicized through its intrusive involvement in the legislative process. Over the course of its existence, it returned 169 bills to the legislature; the legislature, in turn, overrode only 51 of those vetoes and reenacted at least 26 bills with modifications. Barry 245. Moreover, "[t]he Council did not shrink from tough stands on controversial or politically charged issues." *Id.*, at 246. For example, early in its existence, it vetoed a bill barring those convicted of adultery from remarrying and one that declared Loyalists aliens. *Ibid.* Decades later, it very nearly blocked the bill authorizing the Erie Canal's construction for policy reasons. P. Bernstein, Wedding of the Waters: The Erie Canal and the Making of a Great Nation 197–199 (2005). Some members of the Council opposed the bill due to "concern[s] about committing the state to this huge project before public opinion was more clearly and more emphatically in favor." *Id.*, at 198. Others were concerned that the legislation gave the canal commission arbitrary powers. *Ibid.* The canal legislation—one of the most important measures in the Nation's history—survived the Council's review only because Chancellor James Kent changed his deciding vote at the last minute, seemingly on a whim. *Id.*, at 199.

The Council contributed to its own abolition in 1820,

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when it vetoed a bill passed by the legislature that called for a convention to revise New York's Constitution. 1 C. Lincoln, The Constitutional History of New York 623–626 (1906) (Lincoln). The State Assembly then issued a report lambasting "the Council for usurping the legislature's role as the democratic representative of the people"; the legislature subsequently enacted a new bill that succeeded in calling for a constitutional convention. Barry 247; Lincoln 626–629. The same sentiment arose at the convention when, echoing arguments that had also been made in Philadelphia against a federal council of revision, opponents of the Council argued that it had "'usurped the power of judging the *expediency* as well as the constitutionality of bills passed by the legislature'" and that it had "'in fact become a third branch of the legislature.'" Barry 247 (quoting N. Carter & W. Stone, Reports of the Proceedings and Debates of the Convention of 1821, pp. 55, 79 (1821)). Unsurprisingly, the Council was abolished, and New York's 1821 Constitution placed the veto power solely in the Governor. Barry 248.

When courts apply the facial overbreadth doctrine, they function in a manner strikingly similar to the federal council of revision that the Framers rejected. The doctrine contemplates that courts can declare laws unconstitutional in the abstract without the law ever being applied against any individual in an unconstitutional manner. Along the way, courts must examine the sum total of the law's application to people who are not parties to any proceeding; courts then weigh the law's various applications to determine if any unconstitutional applications outweigh the law's constitutional sweep or might "chill" protected speech. That is nothing short of a society-wide policy determination of the sort that legislatures perform. Yet, the Court has never even attempted to ground this doctrine "in the text or history of the First Amendment." *Sineneng-Smith*, 590 U. S., at ___–___ (concurring opinion) (slip op., at 2–3). Instead, it has

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justified it "solely by reference to" yet another layer of "policy considerations and value judgments" about "what serves the public good." *Id.*, at ___–___ (slip op., at 3–4). As the debate over the federal council of revision demonstrates, this approach is fundamentally inconsistent with judicial duty.

This case demonstrates just how far courts have drifted from their original station of adjudicating the rights of the parties before them in accordance with law.[3] In an appropriate case, we should carefully reconsider the facial overbreadth doctrine.

[3]The facial overbreadth doctrine is but one manifestation of the Court's larger drift away from the limited judicial station envisioned by the Constitution. See J. Malcolm, Whatever the Judges Say It Is? The Founders and Judicial Review, 26 J. L. & Politics 1, 36–37 (2010). Justices have long noted that doctrines tasking judges with passing upon the policy of laws in the abstract resemble the council of revision the Framers rejected. See, *e.g.*, *Lewis* v. *New Orleans*, 415 U. S. 130, 136 (1974) (Blackmun, J., joined by Burger, C. J., and Rehnquist, J., dissenting) (overbreadth and vagueness doctrines); see also *Trimble* v. *Gordon*, 430 U. S. 762, 778 (1977) (Rehnquist, J., dissenting) (suspect classifications under the Fourteenth Amendment); *Griswold* v. *Connecticut*, 381 U. S. 479, 513–515 (1965) (Black, J., joined by Stewart, J., dissenting) (substantive due process); *Goldberg* v. *Kelly*, 397 U. S. 254, 273–274 (1970) (Black, J., dissenting) (due process for welfare benefits); *Saia* v. *New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting) (review of time, place, and manner speech regulations).

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SUPREME COURT OF THE UNITED STATES

No. 22–179

UNITED STATES, PETITIONER *v.*
HELAMAN HANSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2023]

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR joins, dissenting.

At bottom, this case is about how to interpret a statute that prohibits "encourag[ing] or induc[ing]" a noncitizen "to come to, enter, or reside in the United States" unlawfully. 8 U. S. C. §1324(a)(1)(A)(iv). The Court reads that broad language as a narrow prohibition on the intentional solicitation or facilitation of a specific act of unlawful immigration—and it thereby avoids having to invalidate this statute under our well-established First Amendment overbreadth doctrine. But the majority departs from ordinary principles of statutory interpretation to reach that result. Specifically, it rewrites the provision's text to include elements that Congress once adopted but later removed as part of its incremental expansion of this particular criminal law over the last century.

It is neither our job nor our prerogative to retrofit federal statutes in a manner patently inconsistent with Congress's choices. Moreover, by acquiescing to the Government's newly minted pitch to narrow this statute in order to save it,[1] the majority undermines the goal of the overbreadth doctrine, which aims to keep overly broad statutes off the

[1] Previously, even the Government rejected the majority's view of the statute's scope at trial, when it was seeking to convict the defendant. See Part III, *infra*.

books in order to avoid chilling constitutionally protected speech. See *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965). Because the majority's interpretation of §1324(a)(1)(A)(iv) diverges from the text and history of the provision, and simultaneously subverts the speech-protective goals of the constitutional doctrine plainly implicated here, I respectfully dissent.

I

Section 1324(a)(1)(A)(iv) makes it a federal crime to "encourag[e] or induc[e]" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." For ease of reference, I will refer to this as the "encouragement provision."

Respondent Hansen argues that the encouragement provision is unconstitutional under our First Amendment overbreadth doctrine, and the Ninth Circuit below agreed. Neither the Government nor the majority disputes that conclusion if the statute is read according to its plain terms. And, indeed, when read literally, the encouragement provision prohibits so much protected speech that it appears to qualify as overbroad under our precedents.

A

A statute is overbroad—and thus facially invalid—if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010) (internal quotation marks omitted). The overbreadth inquiry thus generally requires comparing the First Amendment-protected expression that a statute impermissibly punishes, on the one hand (let's call that "category one"), with the unprotected speech and conduct that the statute validly prohibits, on the other ("category two").

Starting with category one: With respect to the sweep of

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the plain text of the encouragement provision, there is no dispute that, "[i]n ordinary parlance, 'induce' means '[to] lead on; to influence; to prevail on; to move by persuasion or influence,'" and "'encourage' means to 'inspire with courage, spirit, or hope.'" *Ante*, at 9. Thus, on its face, the encouragement provision's use of the terms "encourage" and "induce" seems to encompass any and all speech that merely persuades, influences, or inspires a noncitizen to come to, enter, or reside in this country in violation of law.

If speech of this nature is, in fact, sufficient to trigger potential prosecution under this statute, the provision would put all manner of protected speech in the Government's prosecutorial crosshairs. It would reach, for example, the grandmother who says she misses her noncitizen grandchild, leading the grandchild to move illegally to the United States. It would also apply to the doctor who informs a noncitizen patient that a necessary medical treatment is more readily available in the United States, influencing the patient to stay beyond the expiration of his visa to await treatment. The college counselor who advises an undocumented student that she can obtain a private scholarship to attend college in the United States, inspiring the student to reside here, would also fall within the scope of the statute.

The encouragement provision, on this broad reading, would also punish abstract advocacy of illegal conduct, even though such speech is plainly permissible under the First Amendment. For instance, the plain text of the statute appears to prohibit a person from saying to a noncitizen who has no authorization to reside here, "I encourage you to live in the United States." But that speech is plainly protected. See *United States* v. *Williams*, 553 U. S. 285, 298–300 (2008). In *Williams*, this Court explained that "abstract advocacy" of child pornography—including the phrase "I encourage you to obtain child pornography"—qualifies as protected speech, even though the "recommendation of a

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particular piece of purported child pornography with the intent of initiating a transfer" is properly proscribed by federal statute. *Ibid.* (internal quotation marks omitted); see also, *e.g.*, *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it").

B

The Government does not dispute that the encouragement provision is unconstitutional as overbroad if it is read according to its plain text, thereby reaching these various fact patterns. This point is worth repeating: Under the broad interpretation of the statute, the Government does not even attempt to argue that the unconstitutional applications in category one are not "substantial," *Stevens*, 559 U. S., at 473, in relation to the constitutional applications that fall in category two.[2] Rather, the Government argues that the statute can be saved from falling victim to today's overbreadth challenge by construing the broad terms of the encouragement provision narrowly—and, in particular, reading them as authorizing prosecution only for solicitation or facilitation.

Citing this Court's general duty "to seek harmony, not to manufacture conflict," when "legislation and the Constitution brush up against each other," *ante*, at 16–17, the majority obliges. But this Court also has a duty to refrain from taking the legislative reins and revising the text of a statute. It is well established that "[w]e will not *rewrite* a law to conform it to constitutional requirements." *Stevens*, 559 U. S., at 481 (emphasis added; alterations and internal quotation marks omitted). Accordingly, and in the overbreadth

[2] There is accordingly no need to dwell on the contents of category two here. The majority discusses several examples, like "issuing fraudulent Social Security numbers to noncitizens." *Ante*, at 17 (citing *Edwards* v. *Prime, Inc.*, 602 F. 3d 1276, 1295–1297 (CA11 2010)).

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context in particular, the Court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Ibid.* (some internal quotation marks omitted).

Application of our ordinary principles of statutory interpretation here reveals that the encouragement provision is *not* susceptible to the narrow solicitation or facilitation construction that the majority adopts, as explained below. Thus, this statute is overbroad and facially invalid under the First Amendment.

II

The majority contends that the encouragement provision uses "'encourage'" and "'induce'" in a "specialized, criminal-law sense," under which those words are essentially synonymous with solicitation and facilitation and carry certain narrowing features of those crimes. *Ante*, at 9. But that construction of the statute is untenable for the reasons that follow.

A

The majority starts its interpretation of the encouragement provision "with some background on solicitation and facilitation," *ante*, at 6, instead of addressing any of the terms in the encouragement provision itself. This is the first clue that the majority's statutory analysis is unusual. Ordinarily, we start with the text of the statute being interpreted. Yet the words "solicitation" and "facilitation" appear nowhere in the encouragement provision. (As the majority notes, facilitation is "also called aiding and abetting," *ibid.*—another term that is absent from the encouragement provision.)

The majority goes on to explain that the terms that *do* appear in the encouragement provision—"encourage" and "induce"—are also often used (with other words) to define "solicitation" and "facilitation." *Ante*, at 6–8. For example,

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the majority notes that one legal dictionary "defines 'abet' as '[t]o *encourage* or set another on to commit a crime,'" and it cites other legal dictionaries that also use "encourage" to define "abet." *Ante*, at 7. Similarly, the majority observes that the federal "ban on soliciting a crime of violence . . . penalizes those who 'solici[t], comman[d], *induc[e]*, or otherwise endeavo[r] to persuade' another person 'to engage in [the unlawful] conduct.'" *Ibid.* Because the terms "encourage" and "induce" are used to define the crimes of solicitation and facilitation, the majority concludes that the statutory terms "'[e]ncourage' and 'induce' have well-established legal meanings" that "incorporat[e] common-law liability for solicitation or facilitation." *Ante*, at 9.

This contention—that, because the broad terms that Congress actually used are sometimes spotted in the definition of other, narrower words, the statute's broad terms are limited by the meaning of those narrower words and those words' characteristics—is puzzling. The majority cites no precedent for this novel approach to interpreting words in a statute. And its logic falls apart in light of the English lexicon and how dictionary definitions tend to work.

Broad words are often used to define narrower ones. So the fact that a word is used to help define another word does not necessarily mean that the former is synonymous with the latter or incorporates all of its connotations. For instance, the word "furniture" might be used in the definition of a "chair," but not all pieces of furniture are chairs, nor do all pieces of furniture have four legs or other common chair-like characteristics. Similarly, "to move" is used to define "to walk," "to run," and "to fly." But that does not make these four terms interchangeable.

So, too, here. The phrase "encourages or induces" is not synonymous with "solicits" or "facilitates" (or "aids and abets"). For example, among the other characteristics of solicitation and facilitation (discussed further in Part II–C, *infra*) is the fact that they require "an *intent* to bring about

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a particular unlawful act," *ante*, at 6 (emphasis added). But the encouragement provision hints at no such thing. It simply prohibits "encourag[ing] or induc[ing]" a noncitizen "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." §1324(a)(1)(A)(iv). Nor does the ordinary meaning of "encourages or induces" carry the intent requirement that solicitation and facilitation do: By describing the attractions of my hometown, for instance, I might end up inducing a listener to move there, even if that was not my intent.

It is also telling that the *very next* subdivision of §1324(a)(1)(A) expressly prohibits "aid[ing] or abet[ting] the commission of any of the preceding acts." §1324(a)(1)(A)(v)(II). That provision indicates that Congress knows how to create an aiding-and-abetting prohibition when it wants to—and that it did not do so in §1324(a)(1)(A)(iv).[3]

The majority's mere observation that the encouragement provision's terms are used to define solicitation and facilitation is thus insufficient to establish that the terms mean the same thing or incorporate the same features.

B

The majority next turns to "[s]tatutory history" to support its transformation of the broad encouragement provision that Congress wrote into a narrow solicitation or aiding-and-abetting prohibition. *Ante*, at 11. I agree that the history of a statute can reveal Congress's intent to use terms in a narrower or specialized manner. But, here

[3] This is not a surplusage argument. Cf. *ante*, at 15, n. 2. I agree with the majority that clause (iv) and clause (v)(II) have different aims. My point, instead, is that Congress's failure to use the classic "aids or abets" language in clause (iv), which it deploys just next door in clause (v)(II), should give us pause before concluding that we can read clause (iv) as if it included the same terms.

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again, the particulars matter. And the history of this particular statute only underscores that it cannot be read as the majority wishes. At every turn, Congress has sought to expand the reach of this criminal law, including by deleting the terms and *mens rea* requirement that the majority attempts to read back into the statute.

1

The history of the encouragement provision is a tale of expansion. Up first was an 1885 law focused specifically on contract labor. Ch. 164, 23 Stat. 332. It made "knowingly assisting, encouraging or soliciting the migration or importation of" a noncitizen into the United States "to perform labor or service of any kind under contract or agreement" unlawful. §3, *id.*, at 333. Congress revised this prohibition in 1917, to add "induce." §5, 39 Stat. 879. Thus, as of the early 20th century, it was a misdemeanor "to induce, assist, encourage, or solicit . . . the importation or migration of any contract laborer," or to attempt to do the same. *Ibid.*

Significantly for present purposes, in 1952, Congress *deleted* the statute's references to solicitation and assistance—leaving "encourages" and "induces" to stand alone. 66 Stat. 229. What is more, Congress expanded the prohibition to *all* unlawful entry, not merely contract labor. *Ibid.* And it also ratcheted up the punishment. *Ibid.* So amended, the statute made it a felony to "willfully or knowingly encourag[e] or induc[e], or attemp[t] to encourage or induce, either directly or indirectly, the entry into the United States" of any noncitizen who had not been "duly admitted" or who was not "lawfully entitled to enter or reside within the United States." *Ibid.*

Congress enacted the current version of the encouragement provision in 1986. It removed the *mens rea* requirement relating to the encouragement or inducement element—excising from the statute that a violator must "willfully or knowingly" encourage or induce a noncitizen to

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violate the immigration laws—while inserting a *mens rea* requirement for knowledge or reckless disregard of the noncitizen's immigration status. See Immigration Reform and Control Act of 1986, §112(a), 100 Stat. 3381–3382. Simultaneously, and for the first time, Congress made it a crime to encourage or induce an unauthorized noncitizen not merely to *enter* the United States, but also to encourage or induce such a person to "reside" here unlawfully. *Ibid.*

Finally, in 1996, Congress crafted a separate penalty enhancement for certain kinds of violations. It raised the maximum punishment from 5 years to 10 years of imprisonment if the offender violates the encouragement provision "for the purpose of commercial advantage or private financial gain." §1324(a)(1)(B)(i); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §203(a), 110 Stat. 3009–565.

As these developments illustrate, Congress has repeatedly revisited the scope of the encouragement provision. And, in so doing, it has consistently expanded the reach and severity of this criminal law from its modest 1885 origins. Most notably, the particular amendments that Congress has made to the encouragement provision demonstrate its intent to specifically reject the pillars of the majority's holding.

To reiterate: The terms "solicit" and "assist" appeared in the text of the statute between 1885 and 1952, at which point Congress removed them. Likewise, between 1952 and 1986, violating this statute required that the speaker "willfully or knowingly" encourage or induce a noncitizen to transgress the immigration laws. But in 1986, Congress deleted this primary *mens rea* requirement.

2

The majority's efforts to spin the encouragement provision's enlightening enactment history in favor of the majority's narrow interpretation are unavailing.

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The majority first points out that the 1885 version of the encouragement provision criminalized "knowingly *assisting*, encouraging or *soliciting*" certain immigration. §3, 23 Stat. 333 (emphasis added); see *ante*, at 11. Because the term "encouraging" was placed alongside "assisting" and "soliciting" in this precursor provision, the majority maintains that the term "encouraging" is narrowed by the canon of *noscitur a sociis*, "which counsels that a word is given more precise content by the neighboring words with which it is associated." *Williams*, 553 U. S., at 294; see *ante*, at 11. In *Williams*, the Court (in an opinion by Justice Scalia) reasoned that, "[w]hen taken in isolation," the broad term "'promotes'" is "susceptible of multiple and wide-ranging meanings," but that, "in a list that includes 'solicits,' 'distributes,' and 'advertises,' [it] is most sensibly read to mean the act of recommending purported child pornography to another person for his acquisition." 553 U. S., at 294–295.

But, as the majority here ultimately goes on to acknowledge, *ante*, at 12, the statutory word "encouraging" was not actually accompanied by the narrower terms "soliciting" and "assisting" throughout the course of this statute's history. And for the history to be meaningfully referenced, the state of the statute must be considered over time, not just at particular points in which words that seem to support a particular reading might have appeared. The delta between the purportedly narrow version of the statute that the majority points to, and what later happened to the statutory text, is important—and there is no dispute that Congress later removed the terms "soliciting" and "assisting" from the encouragement provision, leaving "encouraging" and "inducing" to stand "in isolation," 553 U. S., at 294. See *ante*, at 13. Tracing the history over time clearly establishes that Congress deleted the very narrowing terms that

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the majority now reads back into the statute.[4]

The majority brushes off Congress's revision by speculating that Congress was merely "engaged in a cleanup project" and was just "streamlin[ing]" the statutory language. *Ibid.* This contention, however, gets our ordinary presumption in statutory interpretation cases precisely backwards. We "usually presume differences in language . . . convey differences in meaning," absent some indication from Congress to the contrary. *BNSF R. Co.* v. *Loos*, 586 U. S. ___, ___ (2019) (slip op., at 10) (internal quotation marks omitted). Thus, we have found the presumption overcome where, for example, Congress has expressly "billed" the changes as "effect[ing] only '[t]echnical [a]mendments.'" *Id.*, at ___ (slip op., at 9).

Here, the majority points to no signal from Congress that it sought to change the encouragement provision's language without changing its meaning. It seems that the only support the majority can muster for its "cleanup project" theory is a 1947 Supreme Court case that at several points refers to the statute as a prohibition on "encourag[ing]" or "induc[ing]" certain unlawful immigration. *Ante*, at 13 (citing *United States* v. *Lem Hoy*, 330 U. S. 724 (1947)). From this, the majority infers that, when Congress amended the encouragement provision five years later to remove the words "solicit" and "assist," it must have been adopting *Lem Hoy*'s shorthand characterization of the statute. But the majority

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[4] This revealing revision also sets apart the encouragement provision's unadorned use of "encourages" and "induces" from the majority's long list of state solicitation and facilitation laws. *Ante*, at 8. The majority includes that list in its effort to demonstrate that "encourages" and "induces" in the encouragement provision actually mean "solicits" or "aids and abets." But in the vast majority of the cited statutes, classic narrowing terms—like "aided," "abetted," "solicits," "commands," "hires," "coerces," or "compels"—appear alongside "encourages" or "induces." *Ibid.*; see App. to Brief for State of Montana et al. as *Amici Curiae* 1–44. Thus, unlike the one before us, such statutes might well be susceptible of a narrower reading.

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fails to support this connection—tenuous on its face—with any evidence that Congress actually consulted our 1947 decision when it drafted the 1952 amendments, or anything else that might establish the primary significance that the majority ascribes to our decision's phrasing.

The majority similarly characterizes Congress's decision to remove the intent requirement from the statute in 1986 as "a further effort to streamline" the encouragement provision. *Ante*, at 16. In other words, the Court today holds that Congress's removal of "willfully or knowingly" in the 1986 amendments did not change the *mens rea* required to violate this statute. But the majority offers no support at all for its view that Congress didn't *really* mean for the amendment to effect any substantive change. Instead, it conjures up its own "simple explanation": There was "no need" for an explicit *mens rea* because "encourage" and "induce" carry the *mens rea* associated with solicitation and facilitation. *Ante*, at 15; see also *ante*, at 14 (reasoning that Congress's use of "encourages" and "induces" brought along the "old soil" of "the traditional intent associated with solicitation and facilitation" (internal quotation marks omitted)). Of course, this argument merely assumes that Congress intended for "encourage" and "induce" as they appear in the encouragement provision to mean "solicit" and "facilitate"; it is a repackaging of the majority's unwarranted conflation of those terms. See Part II–A, *supra*.

The majority also invokes the presumption that a criminal law contains an intent requirement even where Congress does not explicitly include one. *Ante*, at 15–16. But, here, the statutory history undermines that presumption. Congress most certainly focused on the *mens rea* question because it not only decided to remove "willfully or knowingly" from the statute, it did so while inserting a separate *mens rea* requirement for the knowledge of the noncitizen's immigration status. The confluence of these choices implies

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that Congress's removal of the primary *mens rea* requirement was deliberate. And, when this deliberate choice is considered alongside the history of the provision's significant expansions, there is ample cause to think that Congress intended a substantive change in meaning.

C

Other features of the encouragement provision (beyond its plain text and historical development) also suggest that Congress did not mean for the statute to be construed in accordance with established characteristics of solicitation or aiding and abetting. These features further highlight the poor fit between this statute and the narrow solicitation/aiding-and-abetting box into which the majority tries to squeeze Congress's broad language.

Recall that, in 1986, Congress made it a crime to encourage or induce a noncitizen not just to "come to" or "enter" the United States, but also to "reside" in this country. 100 Stat. 3382; *supra*, at 8–9.[5] As the majority notes, while it is a crime for a noncitizen to *enter* the United States illegally, it is generally not a crime—just a civil violation—to *remain* in the United States without lawful status, such as when a noncitizen overstays a visitor or student visa. See *Arizona* v. *United States*, 567 U. S. 387, 407 (2012); see *ante*, at 19. Thus, the encouragement provision on its face

[5] As a side note: Congress's addition of "reside" might seem to sweep in speakers who encouraged or induced noncitizens "who were *already* unlawfully present in the U. S. to *continue* that unlawful presence." 40 F. 4th 1049, 1073, n. 1 (CA9 2022) (Collins, J., dissenting from denial of reh'g en banc). But as Judge Collins explained, the provision is "most naturally read" to reach only "those who encourage or induce particular [noncitizens] to *acquire* an unlawful presence or residence that they do not already have." *Ibid.* After all, "[o]ne does not normally speak of 'inducing' another to do what he or she is already doing." *Ibid.* And the principle of *noscitur a sociis* counsels in favor of such an understanding, given that "the first two listed verbs ('come to' and 'enter') plainly refer to such an acquisition." *Ibid.*

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appears to *criminally* punish someone who merely encourages or induces a *civil* violation.[6]

That feature of the provision does not sit easily with its categorization as a solicitation or facilitation statute, because, ordinarily, a person may only be held criminally liable for aiding and abetting or solicitation when the underlying offense *is itself a crime*. Aiding-and-abetting liability is "a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond* v. *United States*, 572 U. S. 65, 70 (2014) (citing J. Hawley & M. McGregor, Criminal Law 81 (1899)); see also 18 U. S. C. §2(a) (the general federal aiding-and-abetting statute, providing that someone who "aids, abets, counsels, commands, induces or procures" the commission of a federal crime "is punishable as a principal"). As for solicitation, at common law, the solicited offense had to be a felony or a serious misdemeanor; otherwise, "the solicitor [was] guilty of no offense." 1 J. Ohlin, Wharton's Criminal Law §9:2 (16th ed. 2021) (Wharton's). Today, "in some jurisdictions, the offense solicited may be a felony or a misdemeanor; but in others, it can only be a felony"—either way, though, the underlying offense must be criminal. *Ibid.* (footnotes omitted); see also 18 U. S. C. §373 (the general federal solicitation statute, which is limited to the solicitation of violent felonies).

Here, by contrast, the encouragement provision on its face appears to permit a person to be punished as a felon for merely encouraging a civil violation. Thus, the statute

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[6] Hansen takes issue with this feature of the statute, arguing that the "'speech integral to criminal conduct' exception" to the First Amendment's protection of free speech "does not permit the *criminal* punishment of speech encouraging only a *civil* law violation." Brief for Respondent 39. The majority declines to address this argument, leaving it available in future as-applied challenges to this and other statutes. *Ante*, at 19, n. 5, 20.

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is not an easy fit for the solicitation and facilitation role in which the majority has cast it.

This statute is fundamentally different from aiding-and-abetting liability and solicitation in other ways as well. As noted, aiding-and-abetting liability is a form of vicarious liability—*i.e.*, a way in which a person becomes liable for the crimes of the principal. Likewise, for solicitation, "the punishment . . . is usually geared to . . . the punishment provided for the offense solicited." Wharton's §9:11; see, *e.g.*, 18 U. S. C. §373(a) (providing, for example, punishment of "not more than one-half the maximum term of imprisonment . . . of the crime solicited"). But, notably, a person who violates the encouragement provision is not punished as if he were a principal of the underlying offense, nor does the prescribed punishment depend on the penalty for the underlying offense. So, for example, even if the underlying immigration offense is a civil violation, the person who encourages or induces that infraction could be punished by up to 10 years' imprisonment for violating the encouragement provision. Unlike solicitation and facilitation, then, punishment for violation of the encouragement provision is not tied in any way to the punishment prescribed for the underlying offense.

It is also telling that aiding-and-abetting liability (but not solicitation) requires that the principal *actually* commit the underlying offense. 2 W. LaFave, Substantive Criminal Law §13.3(c) (3d ed. 2018) ("[T]he guilt of the principal must be established at the trial of the accomplice as a part of the proof on the charge against the accomplice"). Yet, the encouragement provision on its face does not require that a noncitizen actually enter or reside in the United States.

* * *

For these reasons, none of the traditional tools of statutory interpretation makes the encouragement provision

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readily susceptible to the majority's narrowing construction.

III

The majority nevertheless revises the statute, leaning on the canon of constitutional avoidance. *Ante*, at 16–17.[7] But that canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Jennings* v. *Rodriguez*, 583 U. S. ___, ___ (2018) (slip op., at 12) (internal quotation marks omitted). It does not give the Court license "to rewrite a statute as it pleases." *Id.*, at ___ (slip op., at 14). And, here, for the reasons explained above, it is clear that the majority has mounted "a serious invasion of the legislative domain." *Stevens*, 559 U. S., at 481 (internal quotation marks omitted). The majority's rescue mission is especially problematic because it is taking place in the context of a First Amendment challenge to a statute on overbreadth grounds, as explained below.

A

Overbreadth challenges are an "exception to the usual rules governing standing," a variation the Court has long permitted in recognition of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Dombrowski*, 380 U. S., at 486–487 (internal quotation marks omitted). Absent overbreadth doctrine, "the contours of regulation[s]" that impinge on the freedom of speech "would have to be hammered out case by case—and

[7] The majority implies that constitutional avoidance is a backup argument. *Ante*, at 16 (suggesting that its reading of the statute is the "best one"). But, in my view, the text and history of the encouragement provision make it hard to get even close to the majority's narrow reading without substantial reliance on the constitutional-avoidance principle.

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tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Id.*, at 487. We thus allow defendants whose speech is constitutionally proscribed by a statute (like Hansen) to argue that the statute is nevertheless facially invalid under the First Amendment on the grounds that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U. S., at 473 (internal quotation marks omitted). By permitting this kind of challenge, the Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski*, 380 U. S., at 487.

If this Court is willing to redline Congress's work to save it from unconstitutionality, it "sharply diminish[es] Congress's incentive to draft a narrowly tailored law in the first place," *Stevens*, 559 U. S., at 481 (internal quotation marks omitted), which runs directly counter to overbreadth's goal of limiting criminal laws that chill constitutionally protected speech. Thus, in the particular context of an overbreadth challenge, countervailing constitutional concerns—namely, that constitutionally protected speech will be chilled—must be considered alongside the values that underpin our ordinary canon of constitutional avoidance.

Heavy reliance on constitutional avoidance where statutes would otherwise be facially overbroad also means that the broad language in the particular statute remains on the books—as compared to the alternative world, in which the Court holds the statute unconstitutional as facially overbroad and thereby prompts the enactment of a narrower replacement. Ordinary people confronted with the encouragement provision, for instance, will see only its broad, speech-chilling language. Even if they do consult this Court's decision, and do recognize that it substantially narrows the statute's scope, the Court's decision leaves many things about future potential prosecutions up in the air.

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For example, one does not know from today's determination whether a noncitizen must actually complete the underlying offense of coming to, entering, or residing in the United States (à la aiding and abetting) or whether completion is not a prerequisite for prosecution (à la solicitation). This sort of uncertainty—the clarification of which, by the way, should be Congress's policy prerogative—may itself dissuade people from engaging in protected speech.[8] Thus, regardless of whether a potential speaker has the ability, means, and time to track down and interpret this decision (or hire a lawyer to do so) to understand what the law requires, the known unknowns of the majority's course portend further chill.

B

The majority attempts to downplay the encouragement provision's threat to free expression by highlighting that Hansen "fails to identify a single prosecution for ostensibly protected expression in the 70 years since Congress enacted clause (iv)'s immediate predecessor." *Ante*, at 17–18. But the purported lack of past prosecutions provides no comfort for several reasons.

The first is that we have already said as much—this Court squarely rejected that kind of argument when the Government raised it in a prior overbreadth challenge. In *Stevens*, the Government vigorously asserted that it had never brought a prosecution implicating the kind of protected expression that the plain text of the statute in question swept in, and that it did not intend to do so. 559 U. S., at 480. The Government "hi[t] this theme hard, invoking

[8] The Government also struggled at oral argument before this Court to articulate what scenarios the statute would (and would not) reach under its theory. But it notably represented that it did not believe it could validly prosecute a son who reassures his noncitizen mother (who lives unlawfully in the United States with him and his family) that she is not a burden on them and that his children love having their grandmother around. See Tr. of Oral Arg. 35.

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its prosecutorial discretion several times." *Ibid.* But we were not moved: Such a prosecution was permitted by the statute, we noted, and that was enough to make it a serious threat. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Ibid.*

Second, just as in *Stevens*, "[t]his prosecution is itself evidence of the danger in putting faith in Government representations of prosecutorial restraint." *Ibid.* At trial in this very case, the Government objected to Hansen's proposed jury instructions, which would have required, among other things, that the Government prove that Hansen intended the noncitizen in question to reside in the United States illegally. The Government's objection was telling. It was based on the argument that the proposed instructions added elements not found in the text of the statute itself. And the District Court was persuaded; it sided with the Government in that regard.[9] But now that the statute's validity hangs in the balance, the Government has reversed course entirely—it now implores us to read into the statute the very element that it earlier opposed as atextual. See Brief for United States 23–28.

This debacle exemplifies the real and ever-present risk of continuing to have facially overbroad criminal statutes on the books. In its role as prosecutor, the Government often stakes out a maximalist position, only later to concede limits when the statute upon which it relies might be struck down entirely and the Government finds itself on its back foot.[10] I am not suggesting bad faith on anyone's part; these

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[9] As the Government conceded during oral argument before this Court, given that its elements argument prevailed below, the instructions that the District Court gave to the jury in this case were legally erroneous. See Tr. of Oral Arg. 11; see also *id.*, at 39–40 (acknowledging that the Court "should send the case back to the Ninth Circuit and let the Ninth Circuit decide what's appropriate in light of" the flawed instructions).

[10] The Court has seen similar moves in multiple cases just this Term.

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kinds of turnabouts might well be chalked up to institutional incentives and coordination challenges in a massive prosecutorial system. But given these dynamics, the answer to whether the Government has, as of today, prosecuted Hansen's hypothetical scenarios may understandably provide cold comfort to those living and working with immigrants.

In any event, it makes little sense for the number of unconstitutional prosecutions to be the litmus test for whether speech is being chilled by a facially overbroad statute. The number of people who have not exercised their right to speak out of fear of prosecution is, quite frankly, unknowable.

Moreover, criminal prosecutions are not the only method by which statutes can be wielded to chill free speech. Hansen's *amici* detail how Customs and Border Protection (CBP) relied on the encouragement provision to justify its creation of a "watchlist" of potential speakers that CBP had compiled in connection with its monitoring of a large group of migrants—a list that included journalists simply reporting factual information about the group's progress. Brief for Reporters Committee for Freedom of the Press as *Amicus Curiae* 5–6. CBP allegedly compiled dossiers on those reporters and singled them out as targets for special screenings. *Ibid.* There can be no doubt that this kind of Government surveillance—targeted at journalists reporting on an important topic of public concern, no less—tends to chill speech, even though it falls short of an actual prosecution.

Hansen's *amici* also describe how a group of Members of Congress recently sent a letter to three religious organizations that help undocumented immigrants, directing the or-

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See *Ciminelli* v. *United States*, 598 U. S. 306, 316–317 (2023); *Percoco* v. *United States*, 598 U. S. 319, 332–333 (2023); *Dubin* v. *United States*, 599 U. S. ___, ___–___ (2023) (slip op., at 2–3).

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ganizations to preserve documents and communications related to their work in advance of a potential congressional investigation into whether such organizations are "'harbor[ing], transport[ing], and *encourag[ing]*'" noncitizens to settle unlawfully in this country. Brief for Religious Organizations as *Amici Curiae* 34 (emphasis added). Again, this kind of letter invoking the language of the encouragement provision can plainly chill speech, even though it is not a prosecution (and, for that matter, even if a formal investigation never materializes).

The majority nevertheless derides the fears of Hansen and his *amici* as an overimaginative "parad[e]" of "horribles." *Ante*, at 18. But what may seem "fanciful" to this Court at great remove, *ante*, at 5, might well prove to be a significant obstacle for those on the ground who operate daily in the shadow of the law. The "gravity" of the encouragement provision's chilling effect is "underscored by the filings of . . . *amici curiae* in support of" Hansen—including briefs from lawyers, immigration advocacy organizations, religious and other charitable organizations, journalists, local governments, and nonprofit policy institutions from across the ideological spectrum. *Americans for Prosperity Foundation* v. *Bonta*, 594 U. S. ___, ___ (2021) (slip op., at 17).

The substantial concerns that *amici* from such diverse walks of life raise illustrate that the "deterrent effect feared by" Hansen and his *amici* "is real and pervasive." *Id.*, at ___ (slip op., at 18). Moreover, at the end of the day, those fears reflect a determination to view enacted statutes as serious business, and, essentially, to take Congress at its word. This Court should have done the same.

As written, the encouragement provision is overbroad. Therefore, it should have been deemed facially unconstitutional and invalid under the First Amendment, as the Ninth Circuit held.

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