No. 19-1051

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER,

v.

TIMOTHY C. BOETTGER AND RYAN R. JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF AMICI CURIAE OF VIRGINIA, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAI'I, INDIANA, LOUISIANA, MINNESOTA, NEBRASKA, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, AND WISCONSIN IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

States have "regulat[ed] threats . . . since the late 18th and early 19th centuries." *Elonis* v. *United States*, 135 S. Ct. 2001, 2024 (2015) (Thomas, J., dissenting). Their ability to do so, this Court has explained, reflects a balance between the free-speech protections enshrined in the First Amendment and society's compelling interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992).

According to the Supreme Court of Kansas, the First Amendment forbids a prosecution for even the most violent, upsetting, and disruptive of threats unless the State can establish beyond a reasonable doubt that the speaker *specifically intended* to instill fear or generate panic. Pet. App. 27. But nothing in this Court's precedents requires such a rule and adopting it would be profoundly unwise. Amici States thus support this Court's intervention to preserve their authority to prosecute criminal threats and protect their citizens.

SUMMARY OF ARGUMENT

In *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), this Court specifically declined to address whether a *mens rea* of recklessness could suffice to establish a criminal threat. Lacking this Court's guidance on the

[1] The parties' counsel of record received timely notice of the intent to file this brief.

issue, the Supreme Court of Kansas held here that the First Amendment entirely forecloses States' ability to prosecute threats made in reckless disregard of placing another in fear. According to the court below, States may prosecute only those threats made with the specific intent of instilling fear.

That understanding of the First Amendment is wrong. It also would jeopardize States' efforts to ensure school safety and combat domestic violence in an era when threats are often communicated over the Internet and proof of perpetrators' specific intent becomes even more difficult to come by. But that is not all. Indeed, a constitutionally mandated specific-intent requirement would invalidate scores of state laws, covering all manner of threats. Amici States urge this Court to grant the petition for a writ of certiorari and clarify that the federal Constitution does not so hobble States' authority to protect their citizens.

ARGUMENT

As petitioner explains (at 10–16), the Supreme Court of Kansas's decision deepens a split on a straightforward constitutional question of great practical import: Does the First Amendment prohibit criminalization of threats made with reckless disregard of the possibility of placing another in fear?

The Supreme Court of Kansas concluded that this Court has already answered that question, relying on an unduly expansive reading of this Court's opinion in *Virginia* v. *Black*, 538 U.S. 343 (2003). See Pet. App. 15–27. But "the Court's fractured opinion in *Black* . . .

sa[id] little about whether an intent-to-threaten requirement is constitutionally mandated." *Elonis* v. *United States*, 135 S. Ct. 2001, 2027 (2015) (Thomas, J., dissenting). And if the Court had already resolved whether a recklessness standard satisfies the First Amendment in 2003 in *Black*, it is difficult to understand why the Court specifically reserved that very question 12 years later in *Elonis*. *Id.* at 2012.

In truth, this Court has yet to decide "precisely what level of intent suffices under the First Amendment" to permit prosecution. *Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari). But it should do so here and it should do so now.

I. The discretion to prosecute reckless threats is vital to States' ability to protect their citizens

Two examples highlight the dangers of the Supreme Court of Kansas's holding and the urgency of the need for this Court's review: school safety and domestic violence. In those contexts (and others), the Internet and social media have complicated efforts to prevent and redress threats of violence.

1. a. "[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis." *LaVine* v. *Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). Horrific examples of school shootings are all too familiar, devastating communities across the Nation and victimizing everyone from university students in Blacksburg, Virginia, to

first-graders in Newtown, Connecticut, to high-schoolers in Parkland, Florida.[2]

In the wake of past tragedies, Virginia and other States have made crucial progress in identifying and responding to threats of school violence.[3] But the problem remains grave—Virginia public schools reported a total of 5,586 threat cases during the 2014-15 school year alone[4]—and school officials are often forced to make difficult decisions based on imperfect

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[2] See Christine Hauser and Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. Times (Apr. 16, 2007), https://www.nytimes.com/2007/04/16/us/16cnd-shooting.html; James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, N.Y. Times (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html; Audra Burch and Patricia Mazzei, *Death Toll Is at 17 and Could Rise in Florida School Shooting*, N.Y. Times (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/parkland-school-shooting.html.

[3] See, *e.g.*, Dewey Cornell & Jennifer Maeng, *Statewide Implementation of Threat Assessment in Virginia K-12 Schools*, Contemp. School Psychol. 22, 116–24 (2018), https://doi.org/10.1007/s40688-017-0146-x (noting that in 2013 Virginia became the first State to mandate the use of threat assessments in its K-12 schools).

[4] Dewey Cornell et al., *Threat Assessment in Virginia Schools: Technical Report of the Threat Assessment Survey for 2014-2015*, at 4–5, Curry School of Educ., U. Va. (2016); see also Mike Connors, *School Threats Are Becoming More Common. And Their Impact Can Be Lasting.*, Va. Pilot (Jan. 13 2019), https://www.pilotonline.com/news/crime/article_8348fdb8-14f6-11e9-af5b-030e37773f74.html (in one three-month period, local police in Virginia Beach investigated 20 school threats, double the total from the previous year).

information.[5] This is all the more so because research suggests that those who make online threats are more likely to make preparations to execute on those threats than those who make their threats in person.[6]

Given that reality, "[s]chool administrators must be vigilant and take seriously any statements by students resembling threats of violence, as well as harassment and intimidation posted online and made away from campus." *Bell* v. *Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (en banc) (internal citation omitted). And that need for vigilance, in turn, "increases the importance of clarifying the school's authority to react to potential threats *before* violence erupts." *Id.* (emphasis added); accord *Wynar* v. *Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) (noting the "daunting task" that "school administrators face" in "keeping their students safe without impinging on their constitutional rights").

b. The Supreme Court of Kansas's approach would jeopardize efforts to respond to threats of violence at schools. Under a specific "intent-to-threaten

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[5] Mike Carter-Conneen, *Authorities Investigating Social Media Shooting Threat at 2 Virginia Middle Schools*, WJLA/ABC7 (Feb. 18, 2018), https://wjla.com/news/local/social-media-threat-to-2-va-middle-schools-under-investigation-officials-say (describing social media post threatening shootings at local middle schools and noting that "[e]ven if the threat is a hoax, the timing of such a threat—just days after the shooting that left 17 dead at a high school in Florida—is upsetting to many parents").

[6] See Desmond Patton et al., *Social media as a vector for youth violence: A review of the literature*, 35 Computers in Hum. Behav. 548–53 (2014).

requirement," *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting), neither knowledge nor recklessness suffices. So long as there is any reasonable doubt that a person did not make the statement specifically *because* it will be perceived as a threat, a conviction would be constitutionally barred. As a result, States would be unable to prosecute a defendant who "consciously disregard[ed] a substantial and unjustifiable risk" that his words would instill fear in another, Model Penal Code § 2.02(c) (Am. Law Inst. 2018), or one who threatened harm fully "aware that it [was] *practically certain* that his" words would instill fear, *id.* § 2.02(b) (emphasis added).

Such a high bar would have real consequences in the context of school safety. For example, imagine a student who calls his school to threaten a mass shooting—but only because he hopes to cancel class and avoid an exam scheduled for that day. Despite the terror and chaos that threat undoubtedly would unleash on the school community, such a person would (at most) be guilty of acting with knowledge—and thus enjoy categorical immunity under the Supreme Court of Kansas's interpretation of the First Amendment. See Pet. App. 27 (holding that "an intent to intimidate was constitutionally . . . required"). And even if the requisite intent actually existed, prosecutors would often be hard-pressed to prove that intent in the context of threats made online—threats that state officials cannot afford to ignore. See *supra* note 6.[7] As petitioner

[7] Indeed, one would expect any criminal defendant to argue he or she did not specifically intend to make a threat.

notes, the bind this rule places on prosecutions is not limited to hypotheticals: A Kansas state court has *already* dismissed a school-threat prosecution because prosecutors could not meet their burden of showing a specific intent. See Pet. 26 & n.7.

Beyond inhibiting criminal prosecutions of school threats, a specific intent-to-intimidate rule would cast doubt on school officials' ability to impose non-criminal discipline as well. See *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"). Such a result would ignore the reality that, because of "the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence." *Morse* v. *Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring). Nothing in this Court's precedents supports that paradoxical outcome, and this Court should clarify that the First Amendment does not so hinder States' efforts to protect their schools and the students they teach.

2. A specific intent-to-threaten requirement would likewise hinder States' ability to combat domestic violence, particularly in the Internet age.

a. "Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace." *Elonis*, 135 S. Ct. at 2017 (Alito,

J., concurring in part and dissenting in part).[8] In addition, such threats often serve as a reliable predictor of physical violence,[9] making prompt and effective responses to threats of domestic violence a central component in any effort to prevent future physical abuse.[10] And it is not just those issuing threats who may make good on their contents, because online threats create the *added* danger that a third party will be incited to action.[11]

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[8] Accord Brief for the Nat'l Network to End Domestic Violence, et al. as Amici Curiae Supporting Respondents at 4, *Elonis* v. *United States*, 135 S. Ct. 2001 (2015) (No. 13-983) (noting that abusers are turning "more and more often [to] social media" to deliver threats of violence, which are "a key part of the in-person abuse to which the victims have been subjected").

[9] Joanne Belknap et al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J. Gender L. & Pol'y 373, 378 (2012) ("Indeed, threats of violence by former partners who are currently stalking are an even better predictor of future violence than the prior violence used by these ex-partners."); see also Katie Zezima et al., *Domestic Slayings: Brutal and Foreseeable*, Wash. Post (Dec. 9, 2018), https://www.washingtonpost.com/graphics/2018/investigations/domestic-violence-murders/ ("Unlike other types of homicide, domestic slayings often involve killers who leave a long trail of warning signs or signal their intent, in some cases threatening to kill their victims.").

[10] See Zezima et al., *supra* note 9 (describing intimate-partner homicide in which the victim reported "threatening text messages" from her partner to the police, but—according to the victim's mother—those "threats didn't rise to the level of a crime," the partner remained at large, and he eventually made good on his threats by murdering her).

[11] See Naomi Harlin Goodno, *Cyberstalking, a New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 Mo. L. Rev. 125, 132 (2007).

The specter of physical violence is only one aspect of the problem. "[T]rue threats 'by their very utterance inflict injury' on the recipient." *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012) (Sutton, J.) (quoting *United States* v. *Chaplinsky*, 315 U.S. 568, 572 (1942)). And "[a] threat may cause serious emotional stress for the person threatened and those who care about that person," regardless of whether actual violence follows. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

b. The interpretation of the First Amendment adopted by the court below would pose serious challenges for prosecuting threats of domestic violence. Allowing prosecution for threats of domestic violence goes to the very reason this Court has blessed the prosecution of "true threats" in the first place: the ability of States to "protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 at 388. Yet, in this case, the court below did not deny that the recipient of one of the threats "was genuinely fearful when she called for law enforcement assistance" but held that respondent's conviction could not stand because a jury may have "believed that [the defendant] did not intend [his] threats to be taken literally." Pet. App. 81.

Even where a threat is not carried out, the ability to terrify remains. It is no solace to a battered partner that an abuser did not intend for a threat to instill terror, even though the abuser was "practically certain" that those words would do just that. Model Penal Code

§ 2.02(b) (defining knowing conduct). Nor does the "fear of violence," or the "disruption that fear engenders," *R.A.V.*, 505 at 388, lessen where the abuser, aware of the "substantial and unjustifiable risk" that threatening words will instill fear, "consciously disregards" that risk, Model Penal Code § 2.02(c) (defining recklessness). This is particularly so given the formidable showing required to prove criminal recklessness: "The risk" that the threat will provoke fear in another "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* (emphasis added).

To be sure, there are difficult distinctions to be made between speech that is merely vulgar and speech that rises to the level of a criminal threat. And States may decide to strike that balance by requiring a showing of an intent to instill fear in another in some or even all cases.[12] But, contrary to the holding of the Supreme Court of Kansas, see Pet. App. 27, the First Amendment does not *require* that all States strike exactly that balance. And foreclosing prosecutions based on threats made knowingly or recklessly risks crippling States' ability to combat domestic violence in an age when the prevalence of threats made over the Internet makes proving intent more difficult than ever.

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[12] Indeed, dozens of States appear to have done just that. See *infra* notes 13 & 14 (identifying the 24 States that permit a criminal-threat conviction based on a lesser *mens rea*).

II. The Supreme Court of Kansas's reasoning would require invalidating criminal statutes in nearly half of the States

The impact of a constitutionally based, specific intent-to-threaten requirement would extend far beyond school threats and domestic violence. Under the Supreme Court of Kansas's reasoning, the First Amendment would invalidate whole swaths of the criminal codes of the various States. These include the laws of 16 States with a criminal provision that—like the Kansas statute at issue here—tracks the Model Penal Code and criminalizes threats made in reckless disregard of their potential to instill fear. See Model Penal Code § 211.3 (Am. Law Ins. 2018) ("A person is guilty of a felony in the third degree if he threatens to commit any crime of violence . . . in reckless disregard of the risk of causing such terror or inconvenience.").[13] Also at risk are the laws of eight more States—including Virginia—that criminalize threats made "knowingly,"

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[13] See also Alaska Stat. Ann. § 11.56.810(a)(1)(A) (terroristic threatening); Ariz. Rev. Stat. Ann. § 13-1202(A)(2) (threatening or intimidating); Conn. Gen. Stat. Ann. § 53a-62(a)(2)(B) (second degree threatening); Del. Code Ann. tit. 11, § 621(a)(2)(c) (terroristic threatening); Ga. Code Ann. § 16-11-37(b)(2)(D) (terroristic threat); Haw. Rev. Stat. Ann. § 707-715(2) (terroristic threatening); Kan. Stat. Ann § 21-5415; Minn. Stat. Ann. § 609.713 (threats of violence); Mo. Rev. Ann. Stat. § 574.120 (second degree making a terrorist threat); N.D. Cent. Code Ann. § 12.1-17-04 (terrorizing); N.H. Rev. Stat. Ann. § 631:4(I)(e), (f) (criminal threatening); N.J. Stat. Ann. § 2C:12-3(a) (terroristic threats); Neb. Rev. Stat. Ann. § 28-311.01(1)(c) (terroristic threats); 18 Pa. Cons. Stat. § 2706(a)(3) (terroristic threats); Wisc. Stat. Ann. § 947.019(1)(e) (terroristic threats); Wyo. Stat. Ann. § 6-2-505(a) (terroristic threats).

because such a *mens rea* permits conviction even in the absence of a specific intent to threaten. See Va. Code Ann. § 18.2-60(A)(1) ("Any person who knowingly communicates . . . a threat to kill or do bodily injury to a person, regarding that person or any member of his family, and the threat places such person in reasonable apprehension of death or bodily injury to himself or his family member, is guilty of a Class 6 felony.").[14]

All told, fully 24 States would find themselves potentially unable to pursue the kinds of prosecutions they currently deem necessary to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.[15] Neither the First Amendment nor this Court's precedents support such a result. See Pet. 16–21. Accordingly, Amici States urge this Court to grant certiorari and clarify that States may prosecute threats

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[14] See also Colo. Rev. Stat. Ann. § 18-3-206 (menacing); Colo. Rev. Stat. Ann. § 18-3-602(1)(a) (stalking); Md. Code Ann., Crim. Law § 3-1001(b) (threats of crimes of violence); Me. Rev. Stat. tit. 17-A, § 209(1) (criminal threatening); Tex. Penal Code Ann. § 22.01(a)(2) (assault); Vt. Stat. Ann. tit. 13, § 1702(a)(1)-(2) (criminal threatening); W. Va. Code Ann. § 61-6-24(b) (threats of terrorist acts); Wash. Rev. Code Ann. § 9A.46.020(1)(a) (harassment).

[15] Although this case involves the scope of the "true threat" doctrine, a defendant may attempt to use this same intent-to-threaten requirement to render constitutionally suspect other criminal statutes that implicate speech-related conduct. Such statutes include state and federal laws criminalizing online solicitation or sexual exploitation of minors based on a *mens rea* short of specific intent. See, *e.g.*, Va. Code Ann. § 18.2-374.3; 18 U.S.C. § 2251.

made either knowingly or in reckless disregard of the potential to instill fear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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