No. 20-1459

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

—v.—

JUSTIN EUGENE TAYLOR,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* FIRST AMENDMENT CLINIC IN SUPPORT OF RESPONDENT

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I. Amicus Interest[1]

The First Amendment Clinic at Duke Law School engages in research, scholarship, and *pro bono* legal representation in matters that implicate the First Amendment. Amicus has authored numerous briefs concerning the intersection of criminal statutes and free speech and draws on a wealth of expertise and knowledge relating to matters relevant to this case.

Amicus writes in response to arguments raised by the Government that attempted Hobbs Act robbery is a "crime of violence," as defined in 18 U.S.C. § 924(c)(3)(A). The Government's position entails an extreme view about the law of "true threats" that raises First Amendment concerns independent of the statutory issues raised in the parties' briefs. In this brief, Amicus details the First Amendment implications of the Government's position, which would classify "attempted threats" as crimes of violence even when the alleged threat is not communicated to any audience.

II. Introduction and Summary of Argument

The Government argues that an *attempted threat*—including an uncommunicated threat—is a "threatened use of physical force," subject to the punishment enhancements of 18 U.S.C. § 924(c)(3)(A).

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[1] Pursuant to Rule 37.3 (a), counsel for Amicus Curiae provided notice of Amicus's intention to file this brief to counsel of record for all parties. Counsel of record for Petitioner and Respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, Amicus affirms that no counsel for a party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution to this brief's preparation or submission.

Uncommunicated threats are, however, little more than private thoughts that have been uttered aloud or reduced to writing. Such speech, even if it contains threatening words, is protected by the First Amendment unless it amounts to a true threat. The true threats doctrine requires, at a minimum, that a threat be communicated under circumstances indicating a serious intent to harm and causing fear and social disruption. *See Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). To punish uncommunicated threats defies this doctrine and ignores its rationale of avoiding fear and social disruption. To the extent that the Government's interpretation of § 924(c)(3)(A) criminalizes protected speech, this Court should construe the statute narrowly to avoid constitutional difficulty.

III. Argument

The First Amendment protects speech unless it falls into certain circumscribed categories. U.S. Const. amend. I; *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (listing categories of expression traditionally beyond the aegis of the First Amendment). These categories of speech are exempt from protection because the harms they impose "so overwhelmingly outweigh[]" any First Amendment concerns that the "balance of competing interests is clearly struck." *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

True threats are unprotected because of the grave social harms associated with serious threats of violence, especially the fear and disruption that such threats engender. *See R.A.V.*, 505 U.S. at 388

(describing the social harms underlying the true threat exemption). Significantly, the harms associated with true threats arise only when the threat has been communicated to an audience; an uncommunicated threat, by definition, cannot engender fear and disruption. The Government's interpretation of 18 U.S.C. § 924(c)(3)(A), which would punish *attempted* threats, ignores the fundamental requirement that a threat must be communicated to an audience to qualify as a true threat. This overbroad reading of 18 U.S.C. § 924(c)(3)(A) would enable the Government to punish people for uncommunicated threats—essentially, their private thoughts—and violates the First Amendment.

A. The Government can criminalize only those threats that fall under the First Amendment true threats exception.

This Court has recognized a narrow category of speech, true threats, as beyond First Amendment protection. *See Black*, 538 U.S. at 358–59 ("the First Amendment permits a State to ban a 'true threat'"). True threats encompass "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence *to a particular individual or group of individuals*." *Id.* at 359 (emphasis added); *see also Threat*, BLACK'S LAW DICTIONARY 1519 (8th ed. 2004) ("A *communicated* intent to inflict harm or loss on another . . . .") (emphasis added). Any statute that "makes criminal a form of pure speech," including threats, "must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 U.S. at 707. Thus, true threats "must be distinguished from what is constitutionally protected speech." *Id.*

Under current Supreme Court precedent, true threats are distinguished from protected speech based on a fact-intensive contextual analysis that requires consideration of the audience. In every circuit that has examined the issue, the fact of communication, the circumstances in which it took place, and the effect on the audience are crucial in distinguishing true threats from protected speech.[2] It is therefore a foundational principle that only communicated threats are true threats.

1. Only communicated threats are true threats.

The difference between a protected threat and an unprotected true threat depends on a nuanced analysis of the context in which the speech was communicated. For example, in *Watts v. United States,* Robert Watts was convicted under a 1917 statute that prohibited a person from "making any threat to take the life of or inflict bodily harm upon the President of the United States." *Id.* at 705. Watts remarked to a small gathering of political protesters discussing police brutality, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Watts, who was eighteen years old at the time, laughed after making

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[2] Two federal circuits have interpreted *Black* as additionally holding that a true threat requires a *mens rea*—that the speaker intend to put his victim in fear of harm. *United States v. Bagdasarian*, 652 F.3d 1113, 1117–18 (9th Cir. 2011); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005); *see also Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (denial of certiorari) (Sotomayor, J., concurring) (opining that "[t]ogether, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required").

his remark, as did his interlocutors. *Id.* at 707. This Court held that the statement was not a true threat, but political hyperbole, which "is often vituperative, abusive, and inexact." *Id.* at 708.

In deciding *Watts*, this Court analyzed the characteristics of the speech and the context in which it was delivered. For example, this Court considered where the statement was made (in public, during a group discussion about police brutality); the nature of the statement (the threat was expressly conditioned on Watts's conscription into the military, which he vowed would never occur); and the demeanor of the speaker and "the reaction of listeners" (Watts and his audience "laughed after the statement was made"). *Id.* at 707–08; *see also United States v. Martinez*, 736 F.3d 981, 985 (11th Cir. 2013) (emphasizing the contextual factors on which the Court in *Watts* relied), *vacated on other grounds*, 135 S. Ct. 2798 (2015).

Since *Watts*, the constitutional test of a true threat has consistently included an objective component focusing on the circumstances surrounding the threat's communication. *See, e.g.*, *United States v. Bagdasarian*, 652 F.3d 1113, 1120 (9th Cir. 2011) ("When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance . . . ."). This Court's decision in *Virginia v. Black* illustrates that the context of the communicated threat is determinative. The Virginia statute at issue in the case treated the mere act of cross burning as prima facie evidence of the requisite intent to intimidate. 538 U.S. at 348. A plurality of this Court struck down the evidentiary provision because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended

to intimidate." *Id.* at 367. These contextual factors included whether the cross was burned at a public rally or on a neighbor's lawn and whether it was directed at a group of "like-minded believers" or at an individual. *Id.* at 366. In both circumstances, this Court considered the threat's audience—one who witnessed the Klan cross burning versus one who discovered the charred remains of a burnt cross in his yard. *Id.* at 348–50. This Court's conclusion that the Klan cross burning was protected speech, while the cross burned in an individual's yard might be a true threat, indicates that the context surrounding the communication of the threat and the audience that perceives the threat are integral to evaluating whether the threat forfeits First Amendment protection. If there is no communication and no audience, there is no context to analyze and no true threat.

The communication of a threat, through whatever medium, is the *actus reus* of a criminal threat and knowing or intentional communication is a threshold requirement for a criminal conviction. *See Elonis v. United States*, 575 U.S. 723, 737 (2015) (noting that no parties disputed that under 18 U.S.C. § 875(c) a defendant "must know that he is transmitting a communication"). For example, a conviction for violating 18 U.S.C. § 875(c), regarding interstate communications, requires (1) that the defendant *knowingly transmitted a communication* in interstate or foreign commerce; (2) that the defendant subjectively intended the communication as a threat; and (3) that the content of the communication contained a true threat to kidnap or injure. *United States v. White*, 810 F.3d 212, 220–21 (4th Cir. 2016); *see also Elonis*, 575 U.S. at 737–38 (2015) (same); *United States v. Clemens*, 738 F.3d 1, 8–9 (1st Cir.

2013) (approving jury instructions defining a threat in 18 U.S.C. § 875(c) as "a communicated intent to inflict harm or loss on another").

Moreover, at least two circuits have directly rejected the assertion that an unwittingly communicated threat qualifies as a true threat and further explained that the intentional communication requirement protects the privacy of an individual's thoughts. In *Porter v. Ascencion Parish School Board*, Adam Porter drew a sketch portraying a violent attack on his high school and then stored the sketch pad in his closet. 393 F.3d 608, 611 (5th Cir. 2004). Two years later, his younger brother brought the sketch pad to school where the drawing was discovered, resulting in Adam's expulsion. *Id.* at 611–12. In finding that the sketch was protected speech, the Fifth Circuit noted that "to lose the protection of the First Amendment . . . , the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person." *Id.* at 617. The sketch did not qualify as a true threat to the school because "[p]rivate writings made and kept in one's home enjoy the protection of the First Amendment." *Id.*

Similarly, in *Doe v. Pulaski County Special School District*, the Eighth Circuit ruled that a "speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it." 306 F.3d 616 (8th Cir. 2002) (en banc). In *Doe*, J.M., a seventh grader, wrote two "violent, misogynistic, and obscenity-laden" letters expressing, among other things, his desire to kill the young woman who had just broken up with him. *Id.* at 619. J.M. kept the letters in his bedroom, where they were later discovered by a friend who eventually delivered one

of the letters to the young woman, resulting in J.M.'s expulsion from school. *Id.* at 619–20. After examining the circumstances of the letter's conveyance—J.M. had also repeatedly discussed the letter with the young woman and her best friend—and finding that its delivery to the victim was not accidental, the Eighth Circuit explained that the threshold requirement of a knowing or intentional communication of a threat protects the right of individuals to be free from governmental interference in the sanctity of one's home and personal thoughts. *Id.* at 624. "'Our whole constitutional heritage rebels at the thought of giving government the power to control' the moral contents of our minds. . . . It is only when a threatening idea or thought is communicated that the government's interest in alleviating the fear of violence and disruption associated with a threat engages." *Id.* (quoting *Stanley v. Georgia,* 394 U.S. 557, 565 (1969)).

If the First Amendment protects the unwitting communication of a threat, surely it protects a threat that was never communicated in the first place.

2. True threats forfeit First Amendment protection because they instill fear, disrupt society, and foment violence.

The social ills perpetrated by true threats justify their exemption from First Amendment protections. The First Amendment exempts true threats 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. In *Black*, two crosses were burned, and both caused fear to observers. 538 U.S. at 367. However only the cross burning targeting a particular individual—the most virulent and

disruptive form of threat—potentially fell outside the protection of the First Amendment. *Id.* at 363.

The true threats exception thus addresses the social ills that come from victimization and fear, but uncommunicated speech reaches no victim and instills no fear. As reasoned by the Eighth Circuit in *Doe*, "[i]t is only when a threatening idea or thought is communicated that the government's interest in alleviating the fear of violence and disruption associated with a threat engages." 306 F.3d at 624. Without someone to receive and respond to the speech, the rationales for excluding true threats from First Amendment protections evaporate.

B. The Government's interpretation of "threatened use of physical force" flouts the First Amendment's true threats exception and ignores the exception's purpose to avoid social disruption.

The Government interprets "threatened use of physical force" under 18 U.S.C. § 924(c)(3)(A) to include uncommunicated threats, which is speech the First Amendment protects. The Government argues that a person's "actions or words constitute a 'threat' so long as they objectively 'convey[] the notion of an intent to inflict harm' as it 'would be understood by a reasonable person.'" U.S. Br. 16, 23 (quoting *Elonis*, 575 U.S. at 731, 737).[3] The Government observes

[3] The Brief for the United States filed in this case and submitted to this Court on September 7,2021 is cited as "U.S. Br." The Government defines threats to include actions and words, but it fails to distinguish those actions and words that are never relayed. The First Amendment protects conduct in addition to words, but only *expressive* conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct is expressive only if "the likelihood [is] great that [its] message would be understood by those who

that Hobbs Act robbery "does not require that a threat actually reach the intended victim," U.S. Br. 24–25, and that neither § 924(c)(3)(A) nor its associated case law requires a "threatened use of physical force" to be communicated to a particular person, Pet'r Reply Br. 4.[4] According to this logic, words alone—whether communicated or not—can constitute a true threat. Indeed, the Government proposes that a scribbled note "threatens" another person, even if the note is never delivered. *Id.*

The Fourth Circuit rejected that interpretation of § 924(c)(3)(A) to avoid criminalizing uncommunicated threats and other lawful behavior that is not, in and of itself, violent: "Where a defendant takes a nonviolent substantial step toward threating to use physical force . . . the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely *attempted to threaten* to use physical force." *United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021). For instance, a person does not threaten the use of physical force by "cas[ing] the store that he intends to rob, discuss[ing] plans with a coconspirator, and buy[ing] weapons to complete the job." *Id.* at 209. Instead, he has only attempted to threaten to use physical force. *Id.* By

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viewed it." *Id.* Whether conduct is expressive thus depends on context. Specific types of conduct—such as brandishing a weapon at a prospective victim—may, depending on the circumstances, express a true threat. But the same conduct taken in another context—brandishing a weapon at one's reflection in the mirror—expresses nothing at all, let alone a true threat. Just as speech must be heard to intimidate, expressive conduct must be seen to threaten.

[4] The Reply Brief for the Petitioner filed June 7, 2021, will be referred to as "Pet'r Reply Br."

extension, a scribbled threat that is never delivered to a store clerk may be an attempted threat to use physical force, but it is not a true threat.

The Fourth Circuit's distinction between attempted threats and punishable threats hews more closely to the true threats doctrine than the Government's capacious definition. The Government's position would criminalize Adam Porter's sketch as an attempted threat to use physical force based only on the content of the drawing, even though Adam never intended to display it. *See Porter*, 393 F.3d at 617. No longer could people rest securely, knowing that the accidental disclosure of a private diary, note, or drawing expressing violent fantasies could become evidence of an attempted threat to use physical force under § 924(c)(3)(A).

The Government's sweeping theory of threats flies in the face of the First Amendment's true threats doctrine and ignores the doctrine's animating policies. This Court exempts true threats from First Amendment protections to safeguard society from three grave harms: (1) the "fear of violence," (2) the "disruption that fear engenders," and (3) the "possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. The first two of these harms are absent when a threat remains uncommunicated. Uncommunicated threats neither strike fear in victims nor disrupt society through those fearful victims, because they never reach their audience. Without communication, there are no individuals to terrify and no fear of imminent violence. And without fearful individuals, there is no societal disruption.

The Government's only remaining justification for punishing attempted threats is to prevent violence.

Standing alone, this justification buckles under its own weight. The First Amendment does not permit the Government to punish pure speech to strangle violence in its cradle. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that the government may not suppress speech advocating violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). Rather, the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [accepting] that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Criminalizing ideas that have been reduced to language but never communicated, in order to prevent violence, would mock our national commitment to uninhibited expression. It would punish private writings and thoughts and invite government suppression at levels seen only in autocracies and fiction. It conjures up images of officers policing "precrime"—scenarios reserved for dystopian fictions like *Minority Report*. MINORITY REPORT (Twentieth Century Fox 2002). Yet the Government's position opens the door to that dystopia.

C. Criminalizing uncommunicated threats imperils freedom of thought.

By classifying uncommunicated threats as crimes of violence, the Government jeopardizes a substantial amount of private speech, from angry diary entries to frustrated tirades overheard only by smart devices. The Government downplays this risk as pure

imagination, not borne out in case law.[5] But absence of evidence is not evidence of absence, and it is entirely predictable that uncommunicated threats remain out of court. Without an audience, and if contained in traditional forms of expression like letters or sketches, such threats are likely to remain

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[5] The Government dismisses as a mere "mental exercise" the Fourth Circuit's concern that some attempted threats do not involve the threatened use of force. U.S. Br. 13, 36–37. But this category of attempted threats—including uncommunicated messages protected by the First Amendment—is "a realistic probability, not a theoretical possibility." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). For instance, "it is not difficult to imagine" such a scenario, when considering whether witness tampering amounts to a § 924(c) crime of violence:

> Suppose a defendant says to an undercover agent, "I'm going to call Fred and tell him he better not testify against Joe at that trial on Monday or I'll beat him up. He'll believe me. I beat up people all the time. And he knows I always carry a gun, too." The defendant then picks up his phone, taps Fred's number, and hisses, "Fred! Listen up!" Before he says anything more, the agent snatches the phone out of his hand and terminates the call. This defendant would have taken a "substantial step" toward witness tampering—a step that is "planned to culminate in the commission" of witness tampering and that is "strongly corroborative" of the defendant's criminal intent. But he would not have expressed an intent to use physical force against Fred. He would only have attempted to express an intent to use physical force against Fred.

United States v. Stuker, No. CR 11-096-BLG-DLC, 2021 WL 2354568, at *7–8, *8 n.7 (D. Mont. June 9, 2021) (citations omitted) (distinguishing *United States v. McCoy*, 995 F.3d 32, 57 (2d Cir. 2021) (claiming without empirical support that "[i]t is difficult even to imagine a scenario in which a defendant could be engaged in conduct that would 'culminate' in a robbery and that would be 'strongly corroborative of' his intent to commit that robbery, but where it would also be clear that he only 'attempt[ed]' to 'threaten[],' and neither used nor even actually 'threatened' the use of force" (alterations in original))).

undetected and unprosecuted.[6] The historically low probability of prosecution, however, will increase as technology proliferates. Considering the prevalence of personalized technology—in our homes, in our cars, in our pockets, on our very bodies—we stand on the brink of an Orwellian police state if the law permits the Government to punish people for the thoughts that our devices record. Far from pure conjecture, the perils of the Government's position not only are manifest today but will only worsen in the future.

Our devices are listening and storing data. Modern "smart" devices, even cellphones, collect data by which "[t]he sum of an individual's private life can be reconstructed." *Riley v. California*, 573 U.S. 373, 394 (2014) (requiring police to obtain a warrant before searching cellphones). Americans continue to install internet-connected devices, like Amazon's "Alexa," in their homes. These devices are designed to listen to

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[6] President Abraham Lincoln famously wrote "hot letters" in which he expressed his anger about colleagues, for example, then set the letters aside without sending them. *See* Doris Kearns-Goodwin, *Lincoln and the Art of Transformative Leadership*, Harv. Bus. Rev., Sep.–Oct. 2018, https://hbr.org/2018/09/lincoln-and-the-art-of-transformative-leadership (explaining that "[w]hen his papers were opened at the beginning of the 20th century, historians discovered a raft of such letters, with Lincoln's notation underneath: 'never sent and never signed'"). Still, unsent letters have been brought into prosecutions, from 1844 until present day. S*ee* RANDOLPH PAUL RUNYON, DELIA WEBSTER AND THE UNDERGROUND RAILROAD 48 (UNIV. PRESS KY., ed. 1996) (describing the attempt to use an unsent letter found in a co-defendant's pocket describing a plan for an Underground Railroad escape); Joseph Goldstein, *Trial of Veteran Accused of Trying to Join ISIS May Hinge on Unsent Letter*, N.Y. Times (Mar. 6, 2016) (describing the prosecutor's reliance on a "draft letter" to convince jurors that the defendant's fantasies had become plans and his planning had crossed over into concrete action).

users' commands, and they listen constantly, monitoring for "wake words," like "Alexa" or "Siri," that trigger the technology to serve its user. Brian Heater, *Can Your Smart Home Be Used Against You in Court?*, TechCrunch (Mar. 12, 2017), https://tcrn.ch/3nCFk1R. "Even with the best of intentions, such devices leave open the possibility of collecting unintended information, courtesy of advanced recording technologies capable of firing up from across the room." *Id.* These listening devices store what they hear, creating a permanent record of musings and outbursts that would have once dissipated unheard into the ether. Grant Clauser, *Amazon's Alexa Never Stops Listening to You. Should You Worry?*, N.Y. Times (Aug. 8, 2019).

Furthermore, governments already use the information collected by smart devices in criminal prosecutions. In a 2015 Arkansas murder investigation, law enforcement served Amazon with a warrant to obtain voice recordings from the defendant's smart home assistant. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant at 6, *Arkansas v. Bates*, No. CR-2016-370-2 (Ark. Cir. Ct. Feb. 17, 2017). Amazon opposed the police's warrant, arguing that the First Amendment protects such recordings. *Id.* at 9–12. Ultimately, the state court never resolved the issue because the defendant consented to Amazon's release of the recordings. Heater, *supra.* Nevertheless, "[t]his story should serve as a giant wakeup call about the potential surveillance devices that many people are starting to allow into their own homes." Jay Stanley, *The Privacy Threat from Always-On Microphones Like the Amazon Echo,* ACLU (Jan. 13, 2017) https://bit.ly/3pLDKxj. The dragnet formed by our devices, which listen and record private conversations

taking place in homes across the country, is no remote possibility.[7] It has already caught unwitting users in its tendrils.

Given the prevalence of home surveillance technology and the government's willingness to deploy it to prosecute crimes, it is worth considering the implications of the Government's broad interpretation of "threat to use physical force" in light of contemporary means of sharing and storing private information. Suppose that a twenty-first century Robert Watts activated Siri on his smart phone stating, "Siri, if I ever get my hands on a rifle the first man I want to get in my sights is Joe Biden." Later, Watts lawfully purchases a rifle. Watts' message, communicated only to Siri, memorializes his private thought. Yet if exhumed by law enforcement, this thought falls under the Government's sweeping definition of an attempted threat to use physical force, even though it lacks the fundamental element of communication to an audience.

Technology will inexorably evolve and could further externalize private thoughts and speech. For example, advances in neuroscience technology might make thoughts, emotions, and other personal information stored in an individual's brain available for viewing through a phone application or an

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[7] Additionally, in 2017, the CIA and a British intelligence agency allegedly developed a tool to turn certain smart TVs into "remote listening and monitoring devices." Matt Burns, *Alleged CIA Leak Re-Demonstrates the Dangers of Smart TVs*, TechCrunch (Mar. 7, 2017), https://techcrunch.com/2017/03/07/recent-cia-leak-demonstrates-again-the-dangers-of-smart-tvs/.

employer database.[8] The Government's position has the potential to multiply the ways that words spoken in the privacy of own's own home can be transformed into fodder for prosecutors. If approved, it invites the Government to weaponize future technology to invade the thoughts once confined to the privacy of one's own mind.[9] In other words, it is not just the unsent letter or scribbled note that is at risk in this case.

IV. Conclusion

The Government's interpretation of § 924(c)(3)(A) threatens protected speech by sweeping uncommunicated threats into its ambit. The Fourth Circuit's interpretation of § 924(c)(3)(A) avoids this danger by clarifying that attempted threats are not "crimes of violence" under the statute. Courts should construe statutes to avoid constitutional doubts *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (stating that courts should avoid confronting serious constitutional doubts about a statute if there is a plausible construction of the statute by which the

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[8] *See, e.g.*, Cathy Hackl, *Meet 10 Companies Working On Reading Your Thoughts (And Even Those Of Your Pets)*, Forbes (June 21, 2020) (discussing devices intended to externalize thoughts from the brain). Neuroscientists are also learning to decode imagery from the human mind, which could reveal violent images such as the one that served as the basis for Adam Porter's expulsion. *See Porter*, 393 F.3d at 611; Joseph G. Makin, David A. Moses & Edward F. Chang, *Machine translation of cortical activity to text with an encoder–decoder framework*, 23 Nature Neuroscience 575 (2020).

[9] For a discussion of the dangers of government access to private thoughts, see Nita A. Farahany, *When technology can read minds, how will we protect our privacy?*, TED (Nov. 2018), https://www.ted.com/talks/nita_farahany_when_technology_can_read_minds_how_will_we_protect_our_privacy?language=en.

question may be avoided). This Court should affirm the opinion below and construe the statute narrowly to avoid the serious constitutional threat to Free Speech posed by the Government's interpretation.

Dated: October 29, 2021

Respectfully submitted,

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