No. _____

In The
Supreme Court of the United States

RODRIC DAVID,

Petitioner,

v.

TONY KAZAL; ADAM KAZAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit impermissibly disregard this Court's holding in *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) ("*Open Society*") ("First, it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution."), when it held that two foreign nationals with no connections to the United States, located and acting overseas, had a First Amendment right to direct harassing speech into the United States at unwilling recipients, rendering them immune from liability under California's anti-stalking law?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the Court of Appeals. (At trial in the District Court, there was an additional plaintiff, Thunder Studios, Inc., and an additional defendant, Charif Kazal. Thunder Studios, Inc. obtained a verdict and judgment against Charif Kazal, and Charif Kazal did not appeal.)

STATEMENT OF RELATED CASES

The related cases are *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736 (9th Cir. 2021); *Thunder Studios, Inc., et al. v. Charif Kazal, et al.*, 2:17-cv-00871 (C.D. Cal.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodric David respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals, which reversed and remanded the judgment of the United States District Court for the Central District of California, which had entered judgment for Petitioner and against Respondents, upon a jury verdict finding that Respondents stalked and harassed Petitioner in violation of California's anti-stalking statute, Cal. Civ. Code § 1708.7. In reversing the judgment of the United States District Court for the Central District of California, the Ninth Circuit held that Respondents Adam and Tony Kazal, foreign nationals with no connections to the United States, located and acting overseas, had a First Amendment right to direct speech into the United States, from the United Arab Emirates and Australia, at unwilling American targets, and therefore were not liable under California's anti-stalking statute, because their conduct, which the jury found was a pattern of conduct intended to harass, follow, and alarm the David family, and which caused the David family to fear for their safety, was "constitutionally protected."

OPINION BELOW

The opinion of the Ninth Circuit is reported in the Federal Reporter, *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736 (9th Cir. 2021), and is included in the Appendix to this Petition. App. 1–34.

JURISDICTION

The judgment of the Ninth Circuit was entered on September 15, 2021. App. 1. On December 10, 2021, the Ninth Circuit entered an order denying Petitioner's Petition for Rehearing per Rule 13 and Rehearing En Banc. App. 51. As a result, the Petition is timely if filed on or before March 10, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The Petitioner, Rodric David, is an American businessman. App. 5. The Respondents, the Kazal brothers, are foreign nationals, citizens of the United Arab Emirates ("UAE") and Australia, with no connections to the United States other than sending Mr. David hundreds of harassing emails, and hiring men to follow, stalk, and harass Mr. David and his family in Los Angeles. App. 5–8. The Kazals have never set foot in the United States and have no legal right to do so. App. 30, 32.

Mr. David partnered with the Kazals on a development project in the UAE in 2008. App. 5. When the project didn't make the Kazals as much profit as they had wanted, the Kazals began a years-long harassment campaign against Mr. David and his family, first in the UAE, then in Australia, and then in Los Angeles. App. 4–8.

The Kazals' harassment turned violent. Adam Kazal assaulted Mr. David's father in Australia, and the Davids obtained a restraining order against him. App. 5. The Kazals hired men to follow Mr. David's wife to their children's school (just as they later did in Los Angeles). App. 53–54. One of these men tore Mr. David's phone from his hand as Mr. David attempted to photograph him. As Mr. David reached for the phone, the man drove away, knocking Mr. David onto the hood of the car and driving 100 meters with Mr. David clinging to the windshield wiper. App. 4, 19–20. When Mr. David and his family moved to Los Angeles, the Kazals sent Mr. David hundreds of harassing messages,

demanding money and threatening revenge. The messages including, e.g., a picture of a Guy Fawkes mask with the statement "Revenge is sweet," App. 58, and the following statement: "You made it personal and I will show you that I am not going to put up with the crap you tried to dish out to my brothers . . . Getting your hyena [Ms. David] to scream at the LA Police . . . is not going to stop me and my crew . . . You start a fight with me, I will show you how Adam Kazal is different to the rest of the family." App. 7–8, 56–57. Mr. David testified that he understood the message to mean that "the next action was not going to be in words." App. 60.

He was right. The Kazals' next action was to hire groups of men to follow Mr. David and his family in Los Angeles in vans and on foot; to "picket" outside the David's house, their children's school, and his company office; to drive slowly around Mr. David's neighborhood in vans festooned with his picture with signs labelling him "Fraudster" and "Thief"; and to hang banners on trees and signs in his neighborhood with the same picture and words. App. 6, 15, 62–64. The men blocked the entrance to Mr. David's business, yelled profanities at employees, and banged on an employee's car as she tried to enter. App. 6. The Kazals told Mr. David that their "teams" could "find him anywhere," that calling the police would not save him, and that they would "show" him what an angry Kazal brother was really like. App. 6–8.

The Kazals, acting from the UAE and Sydney, hired private investigator Mark Woodward to

coordinate the harassment campaign. App. 6. Woodward admitted he knew it was not investigation work and testified that he was hired specifically to "provoke" and "screw with" Mr. David. App. 69–70. This "investigator" gave the Kazals a discount because the assignment did not include any investigatory work. App. 65. It was purely to "screw with" Mr. David. App. 69.

Mr. David sued under California's anti-stalking law. Cal. Civ. Code § 1708.7. The jury found, and that finding was undisturbed on appeal, that the Kazals' conduct met the elements of the tort; rather, the basis for the Ninth Circuit's reversal was the statute's carve-out for conduct that is "protected by the First Amendment," Cal. Civ. Code section 1708.7, subdivision (b)(1). App. 8, 11. The question was whether the Kazals, who are foreign nationals with no ties to the United States, located outside the United States and acting outside the United States, could assert First Amendment rights at all, where their only connection to the United States was directing unwanted harassing speech into the United States at unwilling Americans (the David family) who sued them to try to get them to stop.

The Ninth Circuit held that Respondents did in fact have a constitutional right to harass Mr. David. The Ninth Circuit held, first, that the First Amendment protected the Kazals solely because they "directed their speech" into the United States. App. 11–14. The cases cited by the Ninth Circuit were "right to receive" cases, in which an American sued to vindicate his, her or its right to receive communications which had been solicited and asked to receive. App. 11–12.

These same cases also affirmed that a foreign speaker has no correlative right himself. *See Kleindienst v. Mandel*, 408 U.S. 753, 764 (1972) (explaining that the concern of the First Amendment is not with a foreign national's individual and personal interest in entering the United States to be heard, but with the rights of Americans to have him enter and to hear him.).

Judge Lee dissented. Judge Lee explained that it has been well understood since the founding of the Nation that foreign nationals acting on foreign soil have no First Amendment rights. App. 23–31. Judge Lee enumerated the historical, doctrinal, and policy reasons why the assertion of First Amendment rights for foreign nationals acting on foreign soil is inconsistent with our constitutional principles and traditions. App. 23–32.

Mr. David timely filed a request for en banc review, and on December 10, 2021, the Ninth Circuit denied en banc review. App. 51.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit Declined to Apply the Rule of *Open Society*, and Instead Announced a Holding Directly Contrary to *Open Society*

This Court held in *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 that "it is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution." As set forth

herein, there is no dispute among courts or commentators that that is what this Court held in *Open Society*. Every court that has cited *Open Society* has recited its holding as just that: foreign nationals acting outside of the United States do not have First Amendment rights. Indeed, one of the leading constitutional treatises has added a subsection titled: "Foreign speakers outside the United States have no First Amendment rights." Simolla & Ninner on Freedom of Speech, § 4:30.

The Ninth Circuit decision directly conflicts with this Court's decision in *Open Society*, 140 S. Ct. 2082. In *Open Society*, this Court held:

> [I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution. . . . [T]he Court has not allowed foreign citizens outside the United States or such U.S. territory to assert rights under the U.S. Constitution.

Open Society, 140 S. Ct. at 2086.

This statement was the core holding of the decision, and was necessary to the decision. The plaintiffs were United States organizations who sued to enjoin enforcement of a regulation that would have restricted the speech of their foreign affiliates. The Court rejected the plaintiffs' arguments, because plaintiffs' own speech rights were not affected, and "plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights." *Id.* at 2088. The Court reiterated this

"bedrock principle of American law," *id.* at 2086, seven times in its decision:

- "[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution." *Id.*
- "The Court has not allowed foreign citizens outside the United States or such U.S. territory to assert rights under the U.S. Constitution." *Id.*
- "As foreign organizations operating abroad, plaintiffs' foreign affiliates possess no rights under the First Amendment." *Id.* at 2087.
- "In short, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad have no First Amendment rights." *Id.* at 2088.
- "Foreign organizations operating abroad do not possess rights under the U.S. Constitution." *Id.* at 2089.
- [F]oreign organizations operating abroad do not possess constitutional rights." *Id.*
- "In sum, plaintiffs' foreign affiliates are foreign organizations, and foreign organizations operating abroad possess no rights under the U.S. Constitution." *Id.*

The Ninth Circuit's decision grants First Amendment rights to foreign nationals operating abroad. The Ninth Circuit's decision directly, squarely, and unequivocally conflicts with this Court's ruling in *Open*

Society. The Kazal brothers are foreign nationals with no connections to the United States, acting from foreign soil. Per the unambiguous holding of *Open Society*, they have no First Amendment rights. Yet the Ninth Circuit held, despite the clear and directly contrary holding of *Open Society*, that Respondents had a First Amendment right that extended to the UAE and Australia, protecting them as they targeted American citizens on American soil with unwanted speech, giving them a complete defense to a suit for stalking and harassment.

The Ninth Circuit majority devoted one sentence to *Open Society*, stating that *Open Society* does not apply, because Respondents "directed" their speech into the United States. App. 14. This holding was error, because a "right to receive" claim may only be made by a United States listener, asserting that United States person's First Amendment rights to receive the speech at issue. *Kleindienst*, 408 U.S. at 759–60. In this case, there was no United States "willing listener" asserting the right to receive Respondents' speech. There was no United States person or entity claiming a right or interest or willingness to receive Respondents' unsolicited, unwanted, and harassing speech. Respondents targeted their speech at Petitioner and his family, who were not willing listeners, and who *sued* in order to stop Respondents from harassing them.

B. The Ninth Circuit Created a Novel "First Amendment Right" for Foreign Nationals Outside the United States to Subject Americans to Harassing and Unwanted Speech

The Ninth Circuit, without analysis, refused to apply this Court's clear and express holding in O*pen Society*, that foreign nationals acting outside the United States do not have First Amendment rights. The Ninth Circuit instead created a novel right that apparently applies to everyone in the entire world, regardless of where they are located and acting from, and regardless of whether they have any connection at all to the United States, to direct speech into the United States—*including unwanted, unsolicited, and harassing speech expressly intended to "screw with" its American victims*.

As support for this new and unprecedented "right," the Ninth Circuit invoked this Court's caselaw on the "right to receive" doctrine. The Ninth Circuit held that the "right to receive" doctrine provides a right to every foreign national, located on and acting from foreign soil anywhere in the world, to subject unwilling Americans to harassing speech that they do not want to receive. Such a "right" has no basis in this Court's law or the 230-year history of the Bill of Rights. As *this* Court has articulated the "right to receive speech," it is a right which protects the rights *of Americans* to receive speech that *they wish to receive*. This Court has held, in numerous cases, that foreign nationals located overseas do not have First Amendment rights. No authority of any kind supports the

proposition—now endorsed by the Ninth Circuit, App. 12–14—that foreign nationals outside the United States, with no connections or allegiance to the United States, have a constitutional right to direct unwanted, harassing speech at unwilling American victims, simply because that harassing speech was directed into the United States.

The "right to receive" doctrine protects U.S. persons, and may be invoked by U.S. persons, to protect their right to receive speech and communications they want to receive. This Court's precedents hold that the right to receive speech is a right held by American listeners, and that foreign speakers outside the United States—just like Respondents—have no First Amendment rights of their own at all. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (right to receive is held by listener); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 753–57 (1976) (same); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086 (2020) ("*Open Society*") ("It is long settled as a matter of American constitutional law that foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.").

The Ninth Circuit held that Respondents (foreign nationals with no connection to the United States—who refused to appear at trial, and who asserted through their counsel that U.S. courts had no jurisdiction over them) had a First Amendment right that protected them in Abu Dhabi and Sydney, shielding them from liability for their actions there—organizing a harassment and stalking campaign directed at an

American family in Los Angeles. App. 14. The Ninth Circuit gave no doctrinal explanation for its creation of this radical new right. It simply stated that there were prior cases that had involved foreign speakers and American audiences. App. 11–14. The Ninth Circuit, in citing these cases, *id.*, did not acknowledge that every single "right to receive" case includes a United States party asserting the right to receive the speech at issue. For example, the Ninth Circuit cited *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933) ("*Ulysses*"), noting that "[i]n one of the most famous obscenity cases in our history, the district court declared James Joyce's *Ulysses* not obscene and allowed its importation into the United States without any inquiry as to Joyce's contacts with the United States." The Ninth Circuit failed to mention that Joyce was not a party, and his rights were not at issue: the plaintiff and claimant was Random House, a United States publishing company, which filed a claim asserting its right to import the book. 5 F. Supp. at 182. The *Ulysses* case proves the dissent's point: the "right to receive" is a right held by United States persons, that must be asserted by United States persons. Mr. Joyce was not a party, and did not assert any First Amendment rights, nor did the court suggest that he had any. The case was about whether a United States company that wanted to import the book had a right to do so. So too in the other cases the Ninth Circuit's panel majority cites—*Lamont v. Postmaster General*, 381 U.S. 301 (1965), and *Kleindienst v. Mandel*, 408 U.S. 753 (1972)—an American plaintiff sued to assert his, her, or its right to receive foreign speech.

In this case, by contrast, *there is no American person asserting a right to receive the Kazals' harassing speech*. No American person requested it or asked to hear it. The unwilling American family who were subjected to it sued to put a stop to it. The Ninth Circuit has now held that a foreign national with no connections to the United States has "right" to force unwilling American victims to "receive" harassing speech sent, directed, and paid for from abroad. In the history of American law, no court has ever recognized a claim by a foreign speaker to *force* Americans to "receive" speech.

Not, at least, until the Ninth Circuit did so in this case.

C. The Ninth Circuit's Decision Conflicts with Established Precedent

The Ninth Circuit decision conflicts with established precedent in two ways. First, the Ninth Circuit decision holds that Respondents, foreign nationals acting outside the United States and with no connections to the United States, nonetheless have personal First Amendment rights. App. 11–14. This Court has clearly and unambiguously held directly the opposite. *Open Society*, 140 S. Ct. at 2088.

Second, the Ninth Circuit held that Respondents had personal First Amendment rights simply because their conduct was "directed at and received by" United States persons. App. 14. This holding conflicts with "right to receive" precedent, which holds that the "right

to receive" speech is a right held by a *willing listener*, and that only a *willing* United States listener may assert a "right to receive" foreign speech. This Court expressly held that the foreign speaker does not hold the right; the right may only be asserted by a United States person who wishes to receive the speech. *Kleindienst*, 408 U.S. at 759–60.

In this case, there is no willing listener. No party claimed a desire, interest, or willingness to "receive" Respondents' unwanted and harassing speech. Petitioner sued to stop Respondents from harassing him and his family. The Ninth Circuit's attempt to bootstrap a new right for foreign nationals onto "right to receive" caselaw, in a case where no willing United States recipient exists, conflicts with precedent of this Court, the Ninth Circuit, and other Circuits.

The Ninth Circuit created a new constitutional right, held by and assertable by foreign nationals located and acting outside the United States and with no connections to the United States, to target Americans inside the United States with unwanted communications. No court has ever recognized, or even hinted at, such a right. The Ninth Circuit's decision creates significant policy, security, and constitutional concerns, which should be considered by this Court.

The Ninth Circuit's creation of an unprecedented right for foreign speakers with no connections to the United States to direct unwanted speech at unwilling United States listeners conflicts with all prior "right to receive" caselaw, which expressly defines the right as

that of a willing United States listener, and expressly holds that the foreign speaker has no First Amendment rights of his or her or its own. The Ninth Circuit created a brand-new right for foreign speakers that applies even with no willing United States listener, and no United States party asserting the right to receive the speech. App. 14. The Ninth Circuit's ruling directly contravenes the clear and express holding of this Court on the meaning and scope of the First Amendment.

This Court's "right to receive" caselaw on foreign speech expressly holds that a foreign speaker outside the United States does not have First Amendment rights, and that "right to receive" claims as to foreign speech must be asserted by United States persons asserting their own First Amendment rights. *Kleindienst*, 408 U.S. at 759–60. *Kleindienst* emphasized that "it is clear" that the foreign speaker himself, Mandel, had no cognizable constitutional rights because he was an "unadmitted and nonresident alien," *id.* at 762; rather, "[t]he rights asserted here, in some contrast, are those of American academics who have invited Mandel to participate with them in colloquia debates, and discussion in the United States" and were asserting their own "right to receive information." *Id.*

Kleindienst held that only a willing United States listener may assert a "right to receive" foreign speech. *Kleindienst*, 408 U.S. at 759–60. In this case there was no willing United States listener, and the unwilling, involuntary audience—Petitioner and his family—sued to make Respondents' harassment stop. The Ninth Circuit's decision that Respondents' conduct

was protected under "right to receive" caselaw contradicts, and lacks any support in, long-established First Amendment law.

The Ninth Circuit has created a right held by foreign nationals with no connections to the United States to target Americans with unwanted harassing speech that no United States person has invited or wants to hear. There is no such right. The right to receive is a First Amendment claim held by and assertable by United States persons. It may not be asserted by foreign speakers seeking to impose harassing speech on unwilling Americans.

There are significant parallels between the "Policy Requirement" at issue in *Open Society* and the California stalking statute at issue in this case. In each case, the law creates a particular requirement imposing a facial burden on speech. The scope of that burden is then limited by the First Amendment. In *Open Society*, this Court explained that while the First Amendment permits U.S. persons to "disregard" the Policy Requirement, foreign nationals have no First Amendment rights, and so its burden properly is borne by them. Hence, unlike U.S. persons, foreign nationals located overseas are not free "to disregard the Policy Requirement" when seeking U.S.A.I.D. grants.

The same result should obtain for the California stalking statute. The clear right answer in this case under *Open Society* is a straightforward holding that while U.S. persons may engage in conduct that meets the elements of the statute, but avoid the burden of tort

liability because the relevant conduct is speech protected by the First Amendment, foreign nationals located overseas, who do not have First Amendment rights, are *not* free to engage in a "pattern of conduct intended to harass" that satisfies the elements of the stalking statute, but avoid liability because their speech was "constitutionally protected activity." The speech acts of foreign nationals located overseas, are—definitionally—not constitutionally protected activity. That is what the Ninth Circuit should have held, but did not.

The Ninth Circuit, confronted with this Court's clear and straightforward rule that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution," *Open Society* at 2086, simply refused to apply the rule. Instead it reached out to create novel, sweeping and un-cabined First Amendment rights for foreign nationals outside the United States and with no connections to the United States.

1. The Ninth Circuit's Decision Conflicts with Other Courts

The panel's decision conflicts with decisions of other Circuits. As this Court stated in *Open Society*, the proposition that foreign nationals acting abroad do not have First Amendment rights is a "longstanding" one. The Ninth Circuit's decision in this case thus not only is a refusal to apply the straightforward rule announced by this Court, but also creates a split with multiple other Courts of Appeals. *See*, *e.g.*, *Vancouver*

Women's Health Collective Soc. v. A.H. Robins Co., 820 F.2d 1359, 1363 (4th Cir. 1987) ("[N]on-citizens' constitutional rights do not attach until such non-citizens are within the territorial jurisdiction of the United States."); *Baaghil v. Miller*, 1 F.4th 427, 433 (6th Cir. 2021) ("Noncitizens living abroad do not have any American constitutional rights."); *United States v. Huitron-Guizar*, 678 F.3d 1164, 1166–67 (10th Cir. 2012) (First Amendment rights are limited to United States citizens and resident aliens); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) ("Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert . . . "); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 283 (D.C. Cir. 1989) ("[N]onresident aliens acting beyond the borders and control of the United States government were not within the zone of interests protected by our First Amendment and therefore personally lacked standing. . . . [F]oreign nationals outside the United States under neither the 'control nor supervision' of the United States have not shown sufficient ties to the United States [to] justify protection by our first amendment.").

District Courts have likewise recognized that this Court meant what it said in *Open Society*, and that the rule is clear. For example, the District Court for the Western District of North Carolina, citing *Open Society* in a civil case with parallels to the instant case, found that a defendant could not invoke the First Amendment rights to assert because it was a foreign corporation that did business exclusively outside of the United

States. *Dmarcian, Inc. v. Dmarcian Eur. BV*, 1:21-cv-00067-MR (W.D.N.C. Aug. 11, 2021). And the District Court for the Northern District of California similarly cited *Open Society* in holding that a defendant who was not a U.S. person and who was located outside the United States could not invoke the First Amendment to contest a subpoena. *In re Rule 45 Subpoenas Issued to Google LLC & Linkedin Corp. dated July 23, 2020*, 337 F.R.D. 639, 649 (N.D. Cal. 2020).

The Ninth Circuit's novel bootstrapped "right to receive" doctrine (under which a foreign speaker may assert a right to subject unwilling Americans to foreign-originating speech that no American wants to receive) also conflicts with, inter alia: *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 155 (3d Cir. 2015) (holding there can be no right to receive speech which the speaker lacks a prior First Amendment right to communicate); *Pennsylvania Fam. Inst., Inc. v. Black*, 489 F.3d 156, 166 (3d Cir. 2007) ("[T]he right to listen depends entirely on the infringement on the rights of a willing speaker"); *ACLU v. Holder*, 673 F.3d 245, 255 (4th Cir. 2011) (describing "right to receive" rule as a "standing doctrine unique to the First Amendment, which provides standing to persons who are 'willing listeners' to a willing speaker who, but for the restriction, would convey information"); *Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 370 (5th Cir. 1989) (holding that the right to receive "presupposes both a willing speaker and a willing listener"); *Kansas Jud. Rev. v. Stout*, 562 F.3d 1240 (10th Cir. 2009) (holding

that the First Amendment "right to receive" is a right held by a putative listener).

The Federal government, under multiple administrations, has repeatedly taken the position that foreign nationals lacking sufficient connection to the United States cannot assert First Amendment rights. *See Marland v. Trump*, No. 20-3322 (3d Cir. Jan. 29, 2021) (Government's reply brief arguing that the Chinese government has no First Amendment rights, citing to *Open Society*); *Pineda-Cruz v. Thompson*, No. SA-15-CV-326-XR (W.D. Tex. May 7, 2015) (Federal Defendants' Opposition stating that as Plaintiffs were non-resident aliens who had not established sufficient connections to the United States, they were "not entitled to prevail in a lawsuit seeking relief for alleged violations of the First Amendment"); Matthew Rosenberg, *C.I.A. Director, Once Fan of WikiLeaks, Attacks It as 'Hostile Intelligence Service'*, N.Y. TIMES, April 14, 2017, at A13 (quoting then-C.I.A. Director Mike Pompeo, asserting that Julian Assange, a foreign national acting overseas, lacked First Amendment rights).

D. Judge Lee's Originalist Interpretation of the First Amendment's Application to this Issue Is Correct

Judge Lee's dissent explained that the Founders did not envision a First Amendment that embraced every citizen of the globe, no matter how remote and unconnected to the United States. "An individual, at the very least, had to have some connection to the

United States—whether it be presence on our soil or some form of implicit allegiance to this nation—to benefit from our constitutional rights." App. 27.

This Court has long shared Judge Lee's reading of the original meaning of the constitutional bounds of the First Amendment. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). It is also affirmed by academics across the doctrinal spectrum. *See, e.g.*, David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 381–382 (2003) ("The Supreme Court has historically treated foreign nationals outside our border very differently from those within our jurisdiction."); Timothy Zick, *Territoriality and the First Amendment: Free Speech At—And Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1549 (2010) ("[A]liens abroad are presumed not to enjoy First Amendment rights.").

The Ninth Circuit majority's decision, by contrast, diverges significantly from this widely-shared and long-settled understanding of the original meaning of the First Amendment. As Judge Lee explained, this Court, in cases including *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264–65 (1990) has considered the original public meaning of the term "the people" and affirmed that the term does not include foreign nationals, on foreign soil, who have no significant voluntary connection to the United States. As Cole writes,

"both the First Amendment's protections of political and religious freedoms and the Fourth Amendment's protection of privacy and liberty apply to 'the people.'" Cole, supra at 370. And in *Verdugo-Urquidez*, this Court defined "the people" as a term of art referring to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. 259 at 265.

The noted constitutional scholar Akhil Amar concurs, writing that when the Constitution speaks of "the people," it refers to those who are part of our political community, insofar as they are committed to and acting as members of that community. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 892 (2001). Indeed, when crafting the initial language of the First Amendment, James Madison chose the language of the speech and press clauses of the Pennsylvania Constitution: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 536–37 (2019). As the final language of the First Amendment evolved over the course of congressional debate, the words "the people" remained in the text of the Amendment.

As Judge Lee noted, *however* we circumscribe or define the "U.S. political community," the Kazals are emphatically not part of it. The Kazals have never had

any connection to the United States whatsoever, other than sending harassing emails to an American, and paying men to follow and harass—in their own words, to "screw with"—an American family. There was not a scintilla of evidence, nor could there be any argument, suggesting that the Kazals are members of the national community or part of American social contract. App. 30–32.

Judge Lee was correct: our Constitution does not provide rights to foreign nationals outside our borders who have no voluntary connection to the United States. App. 30–33. The Ninth Circuit's ruling contravenes centuries of precedent, and the original meaning of the First Amendment. The Founders wrote the Bill of Rights for the members of the American political community. Over the centuries we've expanded that community and it now encompasses all those on our soil as well as Americans abroad. But it did not then, and it does not now, extend to every person on earth—and certainly not to foreign nationals acting abroad whose only connection to the United States is sitting in Abu Dhabi and Sydney coordinating a harassment campaign targeting an American family.

Judge Lee's account of the scope of the First Amendment is persuasive both historically and as a matter of pragmatic constitutional interpretation. It is well-settled that when a person is legally on U.S. soil, that person has First Amendment protections for his conduct here; and that if a person is taken into custody and brought to a U.S. facility such as Guantanamo, that person acquires constitutional rights appurtenant

to the custody and proceedings brought against him. *See Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008)

But how can the First Amendment be thought to reach overseas to provide a constitutional shield for the conduct the Kazals engaged in—acting from overseas to direct a harassment campaign against an American family? On what basis could the actions on foreign soil of foreign nationals with no connection to the U.S. possibly be "constitutionally protected"? Solely on the grounds that their harassment campaign was "directed into" the U.S.? If so, then every human being on the planet with an email account now has First Amendment rights—at least in the nine states of the Ninth Circuit.

If asked whether a random person in Abu Dhabi, a citizen thereof, with no ties, connections or allegiance to the United States, has "First Amendment rights," presumably the unanimous answer of American lawyers and judges would be "no." The actions of that person simply are outside the scope of the First Amendment.

What if that person begins directing communications into the United States? Does that person now have "First Amendment rights"? Again, the unanimous

answer would presumably be "no." The American *recipient* of such communications could assert a First Amendment right to receive them, if the Government tried to prevent him from receiving them. But no case has ever suggested the foreign sender has a separate right to *send* them, still less so to *force* an unwilling American recipient to receive them.

And yet the Ninth Circuit held that the Kazals—foreign nationals who have no connections or allegiance to the United States, acted outside the United States, and who went so far as to deny jurisdiction of U.S. courts over them when they were sued—somehow had First Amendment rights to sit in Abu Dhabi and Sydney and direct a targeted harassment campaign against an American family in Los Angeles.

The idea of such a holding would have seemed absurd to the Founders.

E. This Issue Is of Extraordinary Importance

Whether foreign nationals located and acting abroad, with no ties to the United States other than directing unwanted harassing speech at Americans, have a First Amendment right to do so, is a question of exceptional importance. Whether our Constitutional protections should be applied to protect foreign nationals with no connections to or allegiance to the United States is a question of exceptional importance. Unwanted speech sent into the U.S. by foreign nationals acting abroad is an increasingly urgent problem with widespread ramifications. Do Russian hackers with no

ties to the United States, spreading election disinformation on social media from a bunker in Moscow, have a First Amendment right to do so? The answer should clearly be "no," and the answer *is* "no" under clearly controlling precedent of this Court. The Ninth Circuit, however, said "yes."

The Ninth Circuit held that foreign nationals with no ties to the United States, located on and acting from foreign soil, gain full First Amendment rights simply by directing speech into the United States. That is a radical and unprecedented holding. It conflicts with precedent and two centuries of settled constitutional understanding, and it offers protection and immunity to foreign actors seeking to "direct speech" into the United States for nefarious purposes such as undermining confidence in our democracy or stoking racial tensions. This is not a hypothetical; it's happening as we speak.[1] Judge Lee's concerns, App. 33–34, are prescient and timely.

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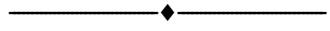
[1] U.S. Sen. Rep. No. 116-XX, at 3 (2019) ("[I]n 2016, Russian operatives . . . used social media to conduct an information warfare campaign designed to spread disinformation and societal division in the United States"); *Government Agencies and Private Companies Undertake Actions to Limit the Impact of Foreign Influence and Interference in the 2020 U.S. Election*, 115 AM. J. INT'L L. 310, 310 (2021) (China, Russia, and Iran carried out online influence operations to affect the 2020 presidential election); Julian E. Barnes & Adam Goldman, *Russia Trying to Stoke U.S. Racial Tensions Before Election, Officials Say*, N.Y. TIMES (Mar. 16, 2020) ("The Russian government has stepped up efforts to inflame racial tensions in the United States as part of its bid to influence November's presidential election, including trying to incite violence by white supremacist groups and to stoke anger

In sum, the law has long been clear that foreign actors with no U.S. ties, acting from abroad to send unwanted speech into the United States, cannot claim the protections of the First Amendment. Yet the Ninth Circuit held foreign nationals anywhere, with no citizenship, residence, allegiance, or connection to the U.S., have a First Amendment rights to "direct" communications into the United States from abroad, up to and including subjecting an American family to a vicious harassment campaign. The Ninth Circuit's ruling threatens to wreak havoc on decades of settled law.

This Court should take up this case to firmly reassert the original and common-sense line that demarcates the scope of the First Amendment's reach: the First Amendment does not provide protections to foreign nationals with no connections to the United States, located and acting overseas.



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among African-Americans"); *Nigerian Letter or "419" Fraud*, FBI (last visited Sept. 22, 2021), https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/nigerian-letter-or-419-fraud (Nigerian scammers send American citizens "opportunities" to make money, and such scams result in millions of dollars lost yearly); Zachary Cohen, *Pro-China Misinformation Operation Attempting to Exploit US Covid Divisions, Report Says*, CNN (Sept. 8, 2021, 11:23 AM) (China uses social media to target Americans "to exploit divisions over the Covid-19 pandemic"); Elizabeth Culliford, *Facebook and Fake News: U.S. Tops List of Targets of Foreign Influence Operations*, GLOBAL NEWS (May 26, 2021) ("The United States topped a list of the countries most frequently targeted by deceptive foreign influence operations using Facebook between 2017 and 2020").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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