No. 22-138

IN THE

Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS,
DIVISION II

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF COLORADO, ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL COALITION AGAINST CENSORSHIP IN SUPPORT OF PETITIONER

Mark Silverstein
Sara R. Neel
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
303 East 17th Avenue, Suite 350
Denver, CO 80203

Jack M. Balkin
David A. Schulz
Kelsey Eberly
Rachel Davidson
ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Brian M. Hauss
Counsel of Record
Laura Moraff
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

(*Counsel continued on inside cover*)

Barbara E. Bergman
National Association of
Criminal Defense Lawyers
1201 Speedway Blvd.
Tucson, AZ 85721

Eric M. Freedman
National Coalition
Against Censorship
19 Fulton Street, Suite 407
New York, NY 10038

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Colorado is a state affiliate of the national ACLU. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as amicus curiae, including cases outlining the scope of the true threat doctrine. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Virginia v. Black*, 538 U.S. 343 (2003); *Elonis v. United States*, 575 U.S. 723 (2015). This Court's opinion in this case will dictate whether subjective intent to threaten marks an essential distinction between unprotected true threats and protected speech, including speech on matters of public concern. The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

The Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. It does not purport to speak for Yale University. The Institute's activities are both practical and scholarly, supporting litigation and law reform efforts as well as academic scholarship, conferences, and other events on First Amendment, new media, and related issues. The Institute is

[1] No party has authored this brief in whole or in part, and no one other than Amici, their members, and their counsel have paid for the preparation or submission of this brief.

committed to robust protections for speech, including hostile, challenging, or unpopular speech, and is particularly concerned with maintaining and expanding protections for speech online.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the enforcement of rigorous mens rea requirements for criminal prosecutions.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups that are united in their commitment to freedom of expression. (The positions advocated in this brief do not necessarily reflect the views of all of its member organizations.)

Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation.

STATEMENT OF THE CASE

Petitioner Billy Raymond Counterman was convicted of stalking under Colorado Revised Statute § 18-3-602(1)(c), which prohibits "knowingly . . . [and] [r]epeatedly . . . mak[ing] any form of communication with another person, . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress."

Counterman's conviction was based on a series of Facebook messages that he sent directly to C.W., a Colorado musician, over a two-year period. The familiar tone of some messages—such as, "I am going to the store would you like anything," J.A. 465—made it seem as if Counterman was "trying to continue a conversation with [C.W.] . . . which [she was] not engaging in." J.A. 137. Others—such as, "Was that you in the whiteJeep? Sophisticated…but vanished. I d like to talk directly to U , I feel neglected" and "five years on FB. I miss you, only a couple physical sightings, you've been a picker upper for me more times then I can count…." J.A. 455–56—made C.W.

wonder whether Counterman was following her. J.A. 144. C.W. deleted many "string[s]" of messages without responding and blocked Counterman multiple times; however, each time C.W. blocked him, Counterman would create a new account and message her again. Pet. App. 3a. C.W. testified that she found the messages became "more aggressive" over time. J.A. 127. In February 2016, Counterman wrote: "Your arrogance offends existence of anyone in my position" and "Friend are you? You have my number.. Say. I am not avoiding you. That was opt. Your not being good for human relations. Die, don't need you." J.A. 472–73.[2] Growing more apprehensive, C.W. obtained a protective order and cancelled some of her performances out of fear that Counterman might show up. Pet. App. 4a, 18a.

Counterman was charged with one count of stalking under section 18-3-602(1)(c), as well as two other counts that the prosecution dismissed. Pet. App. 4a. Prior to trial, Counterman moved to dismiss the indictment on the ground that his messages were protected under the First Amendment. The trial court rejected his motion, holding that Counterman's statements were objectively threatening and therefore fell under the "true threats" exception to the First Amendment. Pet. App. 45a–49a. The trial court also granted the State's motion to exclude evidence related to Counterman's mental state for lack of relevance. J.A. 33–35, 88. In closing arguments, the prosecution emphasized that Counterman "did not need to know that a reasonable person would suffer serious

[2] The statements that led to the charges and conviction are spelled out at length in Petitioner's brief, Pet. 5–9, and the opinions below. Pet. App. 6a–7a; 45a–48a.

emotional distress, and he did not need to know that [C.W.] suffered serious emotional distress. . . . All he had to know was that he was sending these messages and that these messages were practically certain to be sent." Pet. App. 60a–61a (alteration in original). The jury returned a guilty verdict. Pet. App. 5a.

On appeal, Counterman argued that the court should adopt a subjective intent requirement for true threats. Pet. 8. But the Colorado Court of Appeals rejected this argument and affirmed the conviction under a purely objective true threats analysis. In other words, the court held that Counterman's messages were true threats unprotected by the First Amendment—even though the jury was not required to find that he intended his messages to communicate a threat. Pet. App 22a. In so holding, the court of appeals followed the Colorado Supreme Court, which, "[i]n the absence of additional guidance from the U.S. Supreme Court . . . decline[d] . . . to say that a speaker's subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes." Pet. App. 12a (quoting *People ex rel. R.D.*, 464 P.3d 717, 731 n.21 (Colo. 2020)). The Colorado Supreme Court denied Counterman's certiorari petition. Pet. App. 40a.

SUMMARY OF ARGUMENT

This case involves a series of disturbing messages that Counterman sent to C.W. over a two-year period. Counterman transmitted these messages directly to C.W., evading her attempts to block him and conveying the impression that he was watching her. The messages were indisputably distressing to C.W. But the court of appeals upheld Counterman's

conviction on the ground that his speech constituted a true threat, even though the state obtained the conviction without any finding that Counterman intended to threaten C.W. *See* Pet. App. 2a, 56a. This Court should clarify that, in order for speech to fall within the category of unprotected "true threats," the state must establish *both* that the offending statements were objectively threatening in context *and* that the defendant subjectively intended to threaten the recipient. Because the Colorado statute and the conviction below dispense with any inquiry into subjective intent, and therefore punish speech that is not intended to threaten at all, the conviction cannot stand.

To ensure that public discussion remains "uninhibited, robust, and wide-open," the First Amendment protects speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). That protection does not extend to a speaker who intentionally threatens another with death or serious bodily harm. But it is critical that the distinction between protected speech and an unprotected true threat be clear. An objective "reasonable person" test, standing alone, does not draw a sufficiently bright line, because many statements are capable of both innocuous and threatening meanings. For example, a public Facebook comment—responding to a prominent local activist's post about being choked by a sheriff's deputy—that says "Wow, brother they wanna hit our general. It's time to strike back. Let's burn this motherfucker's house down," could be a figurative or hyperbolic expression of outrage over injustice, and therefore protected speech on a matter of public concern, or an unprotected threat to set fire to a

deputy's home. *See* Sam Levin, *Jailed for A Facebook Post: How US Police Target Critics with Arrest and Prosecution*, Guardian (May 18, 2017).[3] Likewise, an individual's statement at a school board meeting that he is "gonna turn that m*****f***ing school upside down" and "knock out three of [his school district's] principals" could be "an attempt to get a principal fired through protest, public activism, and political activity," or it could be "a legitimate threat to murder a school principal." *Monroe v. Hous. Indep. Sch. Dist.*, 794 F. App'x 381, 382, 385 (5th Cir. 2019).

As these examples illustrate, one person's opprobrium may be another's threat. A statute that proscribes speech even where the speaker does not intend to threaten, as does the Colorado statute at issue here, runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed. And where the line between protected and unprotected speech is unclear, a speaker may engage in self-censorship to avoid the potentially serious consequences of miscalculating how his words will be received. Laws criminalizing threats without requiring the government to demonstrate a culpable mens rea, as well as objectively threatening words, inevitably deter speech made for lawful purposes and speech that is not actually threatening. To prevent speech from being unduly chilled, this Court should make clear that both subjective intent to threaten and objectively

[3] https://www.theguardian.com/us-news/2017/may/18/facebook-comments-arrest-prosecution.

threatening speech are essential elements of any constitutionally proscribable true threat.[4]

Requiring subjective intent to threaten as a constitutional mens rea requirement for true threats is fully consistent with this Court's precedents. In various contexts, the Court has consistently cited unlawful intent as an essential element of prosecutions for pure speech. And in *Virginia v. Black*, the Court stated that "[t]rue 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." 538 U.S. 343, 360 (2003) (internal quotation marks omitted). Although lower courts have divided over how to interpret *Black*, this Court's reasoning strongly supports the conclusion that *Black* defined true threats as limited to statements made with the intent to threaten. And for analogous reasons—a concern that absent intent the criminalization of speech will sweep too broadly—the Court has required proof of subjective intent before a speaker can be held liable for inciting unlawful activity. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). In both settings, a subjective intent requirement ensures that speakers can be prosecuted only where they purposely communicate an unlawful message, not just where they misjudge their words.

With threats as well as incitement, a subjective intent requirement is critical to ensure breathing

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[4] Because the statute below required an objectively threatening message, this brief focuses on the subjective intent element. In Amici's view, however, both objective and subjective elements are required to constitute a constitutionally unprotected true threat.

room for robust public debate. Otherwise, the broad sweep of the negligence standard and the strong deterrent of criminal penalties will combine to chill a great deal of speech on matters of public concern. As this Court stated the last time it considered a true threats case, "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—'reduces culpability on the all-important element of the crime to negligence,' . . . and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'" *United States v. Elonis*, 575 U.S. 723, 738 (2015) (quoting *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*)). And as Justice Marshall recognized decades ago in considering a conviction for threatening the president, "[s]tatements deemed threatening in nature only upon 'objective' consideration will be deterred only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers v. United States*, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Finally, the fact that the speech at issue in this case (and in many threats prosecutions) occurred online underscores the need for a subjective intent requirement. A vast amount of speech on political, social, and other issues occurs online, and is often abbreviated, idiosyncratic, decontextualized, and ambiguous. Much of this online speech—such as

public posts on major social media platforms like Twitter and Facebook—is accessible by anyone with an Internet connection, meaning the foreseeable audience is broad, diverse, and likely to interpret the speech in myriad ways the speaker never intended. Without a subjective intent requirement for true threats, people who wish to broadcast messages on matters of public concern might find themselves staring down criminal prosecutions for unintended reactions to their speech that a jury later deems "reasonable." And as more and more speech takes place on the Internet, the constitutional protections afforded to online speech will increasingly determine the actual scope of First Amendment freedoms enjoyed by our society. To protect those freedoms, this Court made clear in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), that the Internet enjoys the highest level of First Amendment protection. *See also Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). The Court should reaffirm that principle here by holding that subjective intent to threaten is an essential element of any true threat prosecution, whether the challenged statement occurred online or off.

Amici express no view on whether Counterman could be convicted under a constitutionally appropriate standard requiring proof of subjective intent. But he is entitled to have a jury undertake that inquiry.[5]

[5] Amici also do not express any view as to the appropriate First Amendment standard for evaluating speech integral to criminal conduct, such as may be raised by stalking prosecutions that involve unprotected conduct.

ARGUMENT

I. THIS COURT'S PRECEDENTS ARE CONSISTENT WITH REQUIRING PROOF OF SUBJECTIVE INTENT TO THREATEN AS AN ESSENTIAL ELEMENT OF A TRUE THREAT.

This Court has recognized that there are certain "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," but it has always cautioned that these categories must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). In *Watts*, the Court added "true threats" to the catalogue of constitutionally proscribable speech. 394 U.S. at 707–08. *Watts* concerned a prosecution under 18 U.S.C. § 871(a), which prohibits knowing and willful threats against the President, for a draft protester's statement at a rally against the Vietnam War that "[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. Observing that the defendant was engaged in "a kind of very crude offensive method of stating a political opposition to the President," and construing § 871(a) in light of First Amendment principles, the Court concluded that the statute's use of the term "threat" excluded the defendant's political hyperbole. *Id.* at 707–08 (1969).[6]

[6] Although *Watts* did not provide occasion for the Court to resolve whether intent to threaten is an essential element of a constitutionally proscribable true threat, it expressed "grave

The Court next addressed the true threat exception in *Virginia v. Black*. *Black* is best read as clarifying the true threat exception by requiring the government to demonstrate subjective intent to threaten as an essential mens rea element of the crime. Absent such a requirement, anti-threat statutes are neither "well-defined" nor "narrowly limited." *Black*, 538 U.S. at 358 (parenthetically quoting *Chaplinsky*, 315 U.S. at 571–72).

Black considered whether a state statute criminalizing cross burning with intent to intimidate violated the First Amendment, where the statute included a provision stating that the act of burning a cross was "prima facie evidence of an intent to intimidate." 538 U.S. at 348. The Court reiterated its holding in *Watts* that the First Amendment "permits a state to ban a true threat," which it defined as "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 (internal quotation marks omitted) (emphasis added). Thus, the Court defined true threats as requiring a subjective intent to threaten. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat," the Court wrote, "where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." *Id.* at 360 (emphasis added). The Virginia cross burning statute,

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doubts" about the lower court's conclusion that the statute's mens rea component required only general intent to utter the charged words. *Id.* (internal quotation marks omitted) (citing *Watts v. United States*, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Skelly Wright, J., dissenting)).

the Court held, "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* at 362.[7]

The majority then fractured, however, over the constitutionality of the statute's prima facie evidence provision, which allowed the jury to infer intent to intimidate *solely* from the act of cross burning. A plurality of Justices, in an opinion written by Justice O'Connor, viewed the prima facie evidence provision as facially unconstitutional because, in removing the State's burden to prove the defendant's intent to intimidate, it "strip[ped] away the very reason why a State may ban cross burning with the intent to intimidate" and chilled First Amendment speech by allowing the State to convict someone who burned a cross for political or artistic reasons, with no intent to intimidate. *Id.* at 365.

Justice Scalia agreed that an as-applied challenge to the prima facie evidence provision could lie where a defendant was convicted for burning a cross without the requisite intent to intimidate, but would not have deemed the provision unconstitutional on its face. *Id.* at 379–80. And Justice Souter, joined by Justices Kennedy and Ginsburg, argued that the entire statute should be struck down as impermissible content discrimination. *Id.* at 385–86. Only Justice

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[7] While the Court thus made clear that a true threat requires subjective intent to threaten, it elaborated that it does *not* require intent to carry out the violence threatened, because "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Black*, 538 U.S. at 359–60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

Thomas dissented, maintaining that burning a cross was conduct, not speech, and on those grounds undeserving of First Amendment protection. *Id.* at 388.

Thus, while there were disagreements around the edges among the eight justices who voted to reverse, the "clear import" of *Black* "is that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005); *see also United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" (quoting *Black*, 538 U.S. at 360)); *cf. United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (acknowledging that "an entirely objective definition" of true threats may "no longer [be] tenable" after *Black*). As Justice Sotomayor has explained:

> Together, *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. . . . [A] jury must find that the speaker actually intended to convey a threat.

Perez v. Florida, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of petition for writ of certiorari); *but cf. Jeffries*, 692 F.3d at 479 (holding that *Black* did not abrogate prior circuit precedent dispensing with a subjective intent requirement for true threats).

In *Elonis v. United States*, this Court reversed a defendant's conviction under 18 U.S.C. § 875(c), which criminalizes the transmission in interstate commerce of "any communication containing any threat . . . to injure the person of another." 575 U.S. at 726 (alteration in original). But the Court rested its decision on statutory grounds, and therefore did not reach the question of the mens rea constitutionally required for a true threats prosecution. *Id.* at 740.[8]

The best reading of the Court's precedents is that subjective intent to threaten is constitutionally required for speech to constitute a true threat. *Black* defined true threats as "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." 538 U.S. at 359 (emphasis added). "A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Cassel*, 408 F.3d at 631.

Some courts have maintained that *Black*'s discussion of specific intent was merely descriptive, because the Court was "addressing a *specific intent statute* that requires, as an element of the offense, a specific intent to intimidate." *United States v. White*, 670 F.3d 498, 517 (4th Cir. 2012) (Duncan, J., concurring). But this interpretation of *Black* is

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[8] In his partial concurrence, Justice Alito suggested that requiring the government to demonstrate recklessness is sufficient to address any First Amendment concerns. *Elonis*, 575 U.S. at 748. Dissenting, Justice Thomas argued that only proof of general intent to utter the offending statement is necessary. *Id.* at 750.

difficult to square with the decision's language and structure. The relevant passage in *Black* defining what constitutes a true threat makes no reference to a particular statute or set of facts; rather, it comes as part of a general explanation of what the concept of a true threat entails (specific intent to threaten) and does not entail (specific intent to carry out the threat). Consistent with this reading, the definition of a true threat appears in Part III.A of the majority opinion, which outlines the general contours of the First Amendment analysis, rather than in Part III.B, which applies that analysis to the statute under consideration.[9]

More fundamentally, the *Black* Court's invalidation of the statute's presumption of intent for cross burning is premised on the notion that actual subjective intent is required. "The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Cassel*, 408 F.3d at 631.

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[9] Moreover, references to specific intent echo throughout the majority and plurality opinions. The majority, for example, described "intimidation" as "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. It makes little sense to impose this intent to threaten requirement for one type of true threat but not others. *See White*, 670 F.3d at 522 (Floyd, J., concurring in part and dissenting in part).

The Court struck down the prima facie evidence provision as facially unconstitutional. Referencing "movies such as Mississippi Burning," which dramatizes the FBI investigation into the murder of civil rights activists James Chaney, Andrew Goodman, and Michael Schwerner, the plurality explained that the cross-burning provision violated the First Amendment because it did "not distinguish between a cross burning done with the *purpose* of creating anger or resentment[,] a cross burning done with the *purpose* of threatening or intimidating a victim," and a cross burning "[that] does not intend to express either a statement of ideology or intimidation." *Black*, 538 U.S. at 366 (emphases added). *See also id.* at 367 ("The provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*. The First Amendment does not permit such a shortcut." (emphasis added)). "If the First Amendment did not impose a specific intent requirement, 'Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it.'" *White*, 670 F.3d at 523 (Floyd, J., concurring in part and dissenting in part) (quoting Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217).

The concurrences in *Black* similarly treat intent to threaten as an essential element of any true threat. In his partial concurrence, Justice Scalia agreed that the jury instructions in Black's case, which stated that "[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent," were constitutionally deficient because they obscured the

jury's findings on subjective intent. 538 U.S. at 377. They made it "impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross." *Id.* at 380.

And Justice Souter, in his partial concurrence, argued that the prima facie evidence provision rendered the entire statute facially unconstitutional because "its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Id.* at 385. *See also id.* at 386 ("What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one.").

Justice Thomas was the only outlier, and he disagreed because he did not deem cross burning to be expression at all. Thus, eight of the Justices in *Black*—and all of those who deemed expression to be involved—"agreed that intent to intimidate is necessary [for true threats] and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 & n.7.

II. FIRST AMENDMENT PRINCIPLES REQUIRE A SUBJECTIVE INTENT TO THREATEN ELEMENT FOR TRUE THREATS.

First Amendment principles compel the conclusion that subjective intent to threaten is an essential element of any true threat. As with the category of "incitement," so with true threats, the requirement of subjective intent is necessary to ensure that this First Amendment exception is narrowly tied to its purposes, and that it does not unduly constrain public debate. *Cf. Brandenburg*, 395 U.S. at 447 (holding that speech advocating criminal conduct is protected unless *intended* and likely to produce imminent unlawful action).

Under a purely objective standard, a speaker may be "subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention." *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). It is essentially a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Id.* Where First Amendment freedoms are at stake, such an imprecise standard is insufficiently protective. As Judge Sutton noted, the objective analysis "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way." *Jeffries*, 692 F.3d at 484–85 (Sutton, J., concurring *dubitante*).

Courts applying a purely objective standard have split over whether to apply a reasonable speaker test or a reasonable listener test, *see United States v. Saunders*, 166 F.3d 907, 913 & n.6 (7th Cir. 1999) (collecting cases), but both approaches fail to safeguard protected speech. Under the reasonable speaker test, a statement is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (internal quotation marks omitted) (quoting *Roy v. United States*, 416 F.2d 874, 877–78 (9th Cir. 1969)). This is effectively a negligence standard, allowing convictions when speakers fail to reasonably anticipate listeners' perceptions.

The reasonable listener test fares no better. It asks "whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (internal quotation marks omitted) (quoting *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982)). It is effectively a strict liability standard because it would allow a jury to convict a speaker "for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). *See also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1246 (2006) ("In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made."). Because both tests

allow speakers to be punished where they do not intend to threaten at all, they both unduly chill protected expression.

The state court of appeals below followed the Colorado Supreme Court's objective test, defining a "true threat" as a "statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence." Pet. App. 12a (quoting *People ex rel. R.D.*, 464 P.3d at 721). The Colorado Supreme Court crafted this test because it believed that both the "reasonable speaker" and the "reasonable listener" tests "inadequately account[] for potentially vast differences in speakers,' listeners,' and disinterested fact-finders' frames of reference." *People ex rel. R.D.*, 464 P.3d at 731. But the court's test still essentially holds speakers to a negligence standard; it criminalizes mistakes, and therefore chills protected speech.

Even outside the First Amendment context, "[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 251 (1952).[10] This Court in *Elonis* recognized that

[10] This is a longstanding principle. *See* 4 William Blackstone, *Commentaries on the Laws of England* 21 (1769) ("And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."); Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881)

"[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state," 575 U.S. at 740, and held that Elonis's conviction could not stand because it "was premised solely on how his posts would be understood by a reasonable person"—a standard "inconsistent with 'the conventional requirement for criminal conduct—*awareness* of some wrongdoing,'" *id.* at 737–38.

In many contexts where speech is made criminal, such as conspiracy, solicitation, and incitement, unlawful intent marks an essential distinction between protected and unprotected speech. *See United States v. Williams*, 553 U.S. 285, 298–99 (2008). This principle applies equally to true threats. As Justice Marshall explained, the Court "should be particularly wary of adopting . . . a [negligence] standard for a statute that regulates pure speech," because a purely "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized." *Rogers*, 422 U.S. at 44, 47 (Marshall, J., concurring). A subjective intent requirement prevents speakers from being held liable for messages they did not intend to express, and thereby ensures that the unprotected category is narrowly tied to its purpose.

Whether we like it or not, Americans frequently employ strong and even offensive language. "The language of the political arena," especially, "is often vituperative, abusive, and inexact," and "may well include vehement, caustic, and sometimes

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("Even a dog distinguishes between being stumbled over and being kicked.").

unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (internal quotation marks omitted) (quoting *N.Y. Times*, 376 U.S. at 270). Sometimes there may be sufficient contextual detail to make it objectively clear whether a speaker is issuing a true threat or is engaged in some form of protected First Amendment expression. But many times—and particularly in the case of online speech, where the context surrounding a particular statement may be difficult to ascertain—whether a given statement qualifies as a threat will be in the eye or ear of the beholder. And a "people will know it when they see it" standard provides insufficient breathing room for First Amendment freedoms. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Moreover, because the jury in a true threat case is likely to hold the common prejudices of its place and time, the threat of prosecution under the purely objective standard hangs especially heavily over the heads of those advocating unpopular or unconventional ideas. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). The risk of conviction is particularly great for those holding unpopular views whose "violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *White*, 670 F.3d at 525 (Floyd, J., concurring in part and dissenting in part); *cf. Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners'

reaction to speech is not a content-neutral basis for regulation.").

In the face of that risk, many speakers will self-censor. "The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech." *White*, 670 F.3d at 524 (Floyd, J., concurring in part and dissenting in part) *See also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech."). "Put simply, an objective standard chills speech." Crane, 92 Va. L. Rev. at 1273.

As noted above, this Court has addressed similar First Amendment problems in the incitement context by requiring subjective intent as an essential element of criminal liability. *Brandenburg*, 395 U.S.at 448; *see also Hess v. Indiana*, 414 U.S. 105, 109 (1973) (concluding that the defendant's speech was not incitement, in part because "there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder").[11] And, in *Claiborne*

[11] In *United States v. Alvarez,* two Justices recognized that statutes criminalizing false speech should be interpreted as requiring the government to demonstrate that the speaker made the false statements "with knowledge of their falsity and with the intent that they be taken as true," so as to "provide 'breathing room' for more valuable speech by reducing an honest speaker's

Hardware, the Court held that although a boycott organizer's impassioned statements urging Black citizens to support the boycott "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence," the "emotionally charged rhetoric of [his] speech did not transcend the bounds of protected speech set forth in *Brandenburg*," because there was "no evidence—apart from the speeches themselves—that [he] authorized, ratified, or directly threatened acts of violence." 458 U.S. at 927–29.[12]

The same principle extends to the closely related doctrine of true threats. A great deal of speech that explicitly or implicitly references violence might reasonably be interpreted as either incitement or a threat, depending on one's perspective. If the government is free to prosecute threats without evidence of subjective intent to threaten, then prosecutors who cannot satisfy *Brandenburg*'s stringent requirements will simply characterize the offending speech as a threat. Many threats prosecutions would really be incitement prosecutions in sheep's clothing, negating *Brandenburg*'s critical protections. For example, a Facebook post exhorting readers to "[k]ill all white cops!!!" plainly does not

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fear that he may accidentally incur liability for speaking." 567 U.S. 709, 732–33 (2012) (Breyer, J., concurring in the judgment).

[12] So, too, in the context of an aiding and abetting prosecution, Judge Luttig noted that "the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled." *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 247 (4th Cir. 1997) (citations omitted).

meet *Brandenburg*'s imminence requirement, but that did not stop the Michigan Attorney General from prosecuting the statement as a terroristic threat. Ryan Felton, *Alleged Facebook Threats Against Police Lead to Terrorist Charges for Detroit Man*, Guardian (Oct. 5, 2016).[13]

Conversely, requiring the government to demonstrate culpable mens rea in true threat cases would not substantially hinder its ability to prosecute actually intended threats; indeed, this standard already governs in federal prosecutions since *Elonis*. As in most criminal prosecutions, where wrongful intent is an essential element of the crime, the jury may infer the defendant's mens rea from the totality of the evidence, including the statement itself.[14]

The subjective intent requirement is not an insurmountable obstacle; it "simply permit[s] the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat." Crane, 92 Va. L. Rev. at 1275. In some cases, the defendant might have a perfectly plausible explanation for the choice of words. *See Fulmer*, 108 F.3d at 1490 & n.5 (defendant argued

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[13] https://www.theguardian.com/us-news/2016/oct/05/facebook-threats-white-police-officers-terrorist-charges.

[14] In considering whether Counterman's messages were objectively threatening, the court of appeals below noted that his "direct targeting of C.W. [was] indicative of a specific pursuit of one person and Counterman's specific intent to have an emotional effect on C.W. alone." Pet. App. 18a. It did not, however, find subjective intent to threaten because it deemed no such finding necessary under Colorado law—and more importantly, neither did the jury.

that his allegedly threatening statement to an FBI agent—"[t]he silver bullets are coming"—was code for incontrovertible evidence of wrongdoing). In others, the defendant might argue that he lacked the requisite mental capacity to subjectively intend a threat. *See United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988) (conditioning the viability of the defendant's diminished capacity defense on the court's conclusion that 18 U.S.C. §§ 875(c) and 876 are specific intent statutes); *see generally* Crane, 92 Va. L. Rev. at 1236 & nn. 44–47. Here, the State precluded Counterman from presenting evidence related to his mental health, on the ground that his mental state was irrelevant. J.A. 33–35, 88. Had the Court recognized that true threats require subjective intent to threaten, the jury would have been allowed to consider this evidence.

Critics of the subjective intent requirement have argued that it gives insufficient weight to the harm caused by threatening statements. Undoubtedly, the government has a legitimate interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders," as well as "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. In particular, stalking and violence against women represent serious societal problems. *See United States v. Morrison*, 529 U.S. 598, 629–30 (2000) (Souter, J., dissenting) (citing statistics regarding violence against women in the U.S.). But it does not follow that the government may dispense with an intent requirement. The government has an equally strong interest in preventing the serious harms often caused by speech that solicits or incites unlawful activity, yet the Court requires subjective intent in those settings. As with solicitation and

incitement, the First Amendment allows the government to criminalize threats—so long as it incorporates a specific intent element.

The First Amendment constrains the government's ability to advance its interests through means that punish or unduly chill protected expression. An objective standard, without more, imposes "substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect," because speakers will be "careful to give a wide berth to any comment that might be construed as threatening in nature." *Rogers*, 422 U.S. at 47–48 (Marshall, J., concurring) (quoting *N.Y. Times*, 376 U.S. at 270).

The multi-factor objective test relied on by the court of appeals below does not obviate these costs. No matter how many factors are considered, a person could be convicted under the objective standard for speech that was not intended to threaten. Political protest, artistic endeavor, and satire are all fair game under this standard. Requiring the government to demonstrate subjective intent to threaten strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and this country's constitutional tradition of encouraging the free and uninhibited exchange of ideas.

III. A SUBJECTIVE INTENT REQUIREMENT IS CRITICAL TO PROTECTING ONLINE SPEECH.

The above principles are all the more essential in light of developments in the forums for public debate and dialogue. For many people, the Internet has

become the predominant means for communication and public discourse. Social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S. Ct. at 1737. "They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* (quoting *Reno*, 521 U.S. at 870). When this Court decided *Reno* in 1997, the government estimated that "[a]s many as 40 million people use the Internet." *Reno*, 521 U.S. at 870 (alteration in original). When this Court decided *Packingham* in 2017, Facebook alone had 1.79 billion users. 137 S. Ct. at 1735. By 2021, 93 percent of American adults reported using the Internet. *Internet/Broadband Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021).[15]

"Social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S. Ct. at 1735–6 (quoting *Reno*, 521 U.S. at 870). Individuals can communicate with each other and the broader public through all manner of Internet-based media, including email, chat rooms, direct messaging services, newsgroups, videos, blogs, websites, games, social networks such as Facebook, and remote hosting services for shared files. If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online. There is "no basis for qualifying the level of First Amendment

[15] https://www.pewresearch.org/internet/fact-sheet/internet-broadband.

scrutiny that should be applied" to speech conducted on the Internet. *Reno*, 521 U.S. at 870.

The reasons for imposing a subjective intent requirement to true threat prosecutions apply with at least as much—if not more—force to online speech as to offline speech. *See e.g.*, John Villasenor, *Technology and the Role of Intent in Constitutionally Protected Expression*, 39 Harv. J. L. & Pub. Pol'y 631, 673–74 (2016) ("[T]he greater potential for decontextualization given all the technological changes since 1997 creates even *more* of a need to consider intent when prosecuting allegedly unlawful expression."). Online speakers often have less information about, and less control over, the composition of the audience who will see a communication. A message posted to a publicly accessible social media website or mailing list is potentially viewable by anyone with an Internet connection anywhere in the world. A speaker might post a statement online intending it to reach a relatively small number of people, even though it could be read—and understood very differently—by a much broader audience.[16] As the size of a speaker's

[16] *See, e.g.*, danah boyd, *It's Complicated: The Social Lives of Networked Teens* 31–32 (2014) ("In speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations [of a statement]. Instead, public speakers consistently imagine a specific subset of potential readers or viewers and focus on how those intended viewers are likely to respond to a particular statement. As a result, the imagined audience defines the social context. In choosing how to present themselves before disconnected and invisible audiences, people must attempt to resolve context collapses or actively define the context in which they're operating.").

audience grows, the risk that *some* member of that audience would reasonably perceive a statement as a threat increases. *See* Pet. App. 13a (identifying "the subjective reaction of the [speech's] intended or foreseeable recipient(s)" as a factor in objective true threats analysis). *Cf. also Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720 (9th Cir. 2022) ("Given the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that [a student's] posts would ultimately hit their targets," despite the student's intent to reach only a small group of friends).

Imposing liability for such speech even where the speaker has no intent to threaten forces speakers to choose between self-censorship and risking liability for speech that might be misinterpreted by others. Consider, for example, a racial justice activist organizing a boycott who declares on Twitter: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Claiborne Hardware*, 458 U.S. at 902 (quoting NAACP activist Charles Evers). Some might reasonably construe that statement as a threat of violence, even if the organizer merely meant it as a call to solidarity. *See id*. at 927–29. Or a politician might post on Facebook that if her opponent is elected, people might have to resort to "Second Amendment remedies." *See* Anjeanette Damon & David McGrath Schwartz, *Armed Revolt Part of Sharron Angle's Rhetoric*, Las Vegas Sun (Jun. 17, 2010).[17] Again, some might reasonably interpret the comment as a threat to the opponent's life, even if the candidate intended it only as a hyperbolic, but

[17] https://lasvegassun.com/news/2010/jun/17/senate-race-armed-revolt-angles-rhetoric-candidate.

constitutionally protected, appeal for votes. *Cf. also* Molly Olmstead, *Marjorie Taylor Greene, the QAnon House Candidate, Posts Threatening Photo Directed at "the Squad,"* Slate (Sept. 4, 2020) (candidate's post of herself with a gun next to three political opponents captioned "squad's worst nightmare" removed by Facebook and called "incitement" and "dangerous" by one of the pictured opponents).[18]

Use of an objective test for online communication inevitably chills constitutionally protected speech, including speech on matters of public concern, as speakers would bear the burden of catering to the potential reaction of unfamiliar listeners or readers. A subjective intent requirement addresses this problem by allowing a jury to consider more evidence about the speaker's state of mind than could be considered under a purely objective standard, including (for example) the defendant's intended message, the defendant's motive for making the statement, the defendant's awareness—or lack thereof—that similar statements he had made in the past were perceived as threatening, and so on. *See United States v. Twitty*, 641 F. App'x 801, 805 (10th Cir. 2016) ("[D]etermining the defendant's subjective intent requires a jury to address considerations not directly relevant to an objective reasonable-person standard.").

As with offline speech, a requirement that the government demonstrate a speaker's subjective intent to threaten would not set the bar for conviction insurmountably high. While a speaker cannot control what happens to her statement after she posts it,

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[18] https://slate.com/news-and-politics/2020/09/marjorie-taylor-greene-threat-squad-facebook.html.

there are certainly a number of judgments speakers make each time they engage in online communication. These choices are often relevant to both the objective import of the speaker's words *and* the speaker's subjective intent in posting them. For example, a speaker may decide to send an email or a one-to-one chat message directly to another individual with whom she has a preexisting relationship. Or she may decide to post a message to a personal social media account, access to which is restricted to an audience of her choosing. A speaker may include his message on an issue-specific message board, and the message may be on- or off-topic for that forum. A speaker may also decide to publish her message on a platform that is publicly visible, and may take steps to increase the chances that the message is viewed by a particular individual or group (for example, posting publicly on Twitter and including a hashtag that is relevant to the topic or including another person's username in the post). Each of these scenarios presents different, situation-specific information about a speaker's choices regarding the scope, reach, and intended audience for a statement—precisely the sort of evidence that could be relevant to a jury's assessment of the speaker's subjective intent.

To be clear, Amici are not suggesting a different or heightened burden of proof for online threats; in our view, subjective intent is an essential element of the category no matter where the speech takes place. But the fact that the Internet has become "the modern public square," *Packingham*, 137 S. Ct. at 1737, emphasizes the need to ensure that only speech intended to threaten falls within the "true threat" exception to the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should hold that both an objectively threatening message and a subjective intent to threaten are essential elements of any true threat. Accordingly, the judgment below should be reversed.

Respectfully submitted,

Brian M. Hauss
Counsel of Record
Laura Moraff
Ben Wizner
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad Street,
18th Floor
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

David D. Cole
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Mark Silverstein
Sara R. Neel
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
COLORADO
303 East 17th Avenue,
Suite 350
Denver, Colorado 80203

Jack M. Balkin
David A. Schulz
Kelsey Eberly
Rachel Davidson
ABRAMS INSTITUTE FOR
FREEDOM OF EXPRESSION
Yale Law School
P.O. Box 208215
New Haven, CT 06520

Barbara E. Bergman
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1201 Speedway Blvd.
Tucson, AZ 85721

Eric M. Freedman
NATIONAL COALITION
AGAINST CENSORSHIP
19 Fulton Street,
Suite 407
New York, NY 10038

Counsel for Amici Curiae

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