No. 23-____

In the
Supreme Court of the United States

Brendan Hunt,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Yuanchung Lee
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
Yuanchung_lee@fd.org
Tel.: (212) 417–8742

Counsel for Petitioner

QUESTION PRESENTED

A jury's determination that a particular expression constitutes a "true threat" takes it outside the First Amendment. The consequence is that the state may imprison a speaker simply for uttering it.

The question presented is the appellate standard of review of that pivotal determination, an issue that has divided the Courts of Appeals. Is the factfinder's decision on the true-threat question reviewed deferentially, under the sufficiency-of-the-evidence standard of Jackson v. Virginia, 443 U.S. 307 (1979), as the Second Circuit held here (and as the First, Third, and Tenth Circuits have held elsewhere); or is it instead reviewed anew and upon an independent examination of the whole record by the appellate court, under the First Amendment "independent review" or "constitutional fact" doctrine, see Bose Corp. v. Consumers Union, 466 U.S. 485, 505-06 (1984), as the Fourth and Ninth Circuits have held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statues

Other Authorities

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 82 F.4th 129 (2d Cir. 2023) and appears at Pet. App. 01-14.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. It issued its decision on September 20, 2023. Ninety days from that date is December 19, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition, filed December 18, 2023, is timely under Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

The First Amendment to the Constitution states:

> 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.

18 U.S.C. § 115(a)(1)(B) states in relevant part:

> (1) Whoever—
> . . .
>
> > (B) threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer . . . , with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished . . . by a fine under this title or imprisonment for a term of not more than 10 years, or both . . . .

INTRODUCTION

The First Amendment generally protects a person's right to say whatever she chooses. Some narrow exceptions exist. Speech qualifying as defamation, obscenity, child pornography, or "fighting words," for instance, fall outside the Amendment. The explanation is that these injurious or harmful expressions are "'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest'" in silencing them. Counterman v. Colorado, 600 U.S. 66, 73-74 (2023) (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).

"[T]rue threats" – "'serious expression[s] conveying that a speaker means to commit an act of unlawful violence'" – are "another historically unprotected category of communications." Id. at 74-75 (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).[1]

A factfinder's determination that speech falls within an unprotected category is often decisive. Once speech has been so binned, a person may be fined or imprisoned, just for uttering it.

Because of the First Amendment implications, this Court has held repeatedly that an appellate court does not defer to the factfinder when the question is whether a particular expression falls within an unprotected bin. Instead, the court

[1] Compare Black, 538 U.S. at 359 ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

conducts "an independent examination of the whole record" to satisfy itself that, consistently with the First Amendment, even speech alone may warrant imprisonment. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964). Academics and the courts refer to this as the "constitutional fact" or "independent review" doctrine. E.g., Nathan S. Chapman, The Jury's Constitutional Judgment, 67 Ala. L. Rev. 189, 229 (2015).

Thus, this Court "exercise[s] independent judgment on the question whether particular remarks were so inherently inflammatory as to come within that small class of 'fighting words,'" as well as "on the analogous question whether advocacy is directed to inciting or producing imminent lawless action." Bose Corp. v. Consumers Union, 466 U.S. 485, 505-06 (1984) (quotations omitted). "Similarly, although . . . the questions of what appeals to 'prurient interest' and what is 'patently offensive' under the community standard for obscenity are essentially questions of fact, we expressly recognized the ultimate power of appellate court to conduct an independent review of constitutional claims when necessary." Id. at 506.

The Court takes the same approach when determining whether material constitutes child pornography. Id. at 507. And, of course, the Court "conduct[s] an independent review of the evidence" to determine whether the speaker acted with "actual malice," the "dispositive constitutional issue" in a defamation suit. Id. at 508.

***

The question presented in this case is whether independent appellate review governs a factfinder's determination that the speaker's utterance constitutes a true threat, and thus as unprotected by the First Amendment as obscenity, fighting words, child pornography, and libelous speech. Although independent appellate review governs the factfinder's placement of speech in these other categories, the Court has not decided, specifically, whether independent appellate review is also required of the "true threat" finding.

The Circuits are divided over this question. The Fourth and Ninth Circuits "review constitutional facts de novo, including whether speech constitutes a 'true threat' and is therefore unprotected by the First Amendment." Thunder Studios, Inc. v. Kazal, 13 F.4th 736, 742 (9th Cir. 2021) (citing Planned Parenthood of Columbia / Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1069-70 (9th Cir. 2002) (en banc)); see United States v. Bly, 510 F.3d 453, 457 (4th Cir. 2007). Other Circuits, including the First, Third, and Tenth Circuits, disagree. These courts defer to the factfinder's determination that speech qualifies as a true threat, because "whether a . . . [statement] constitutes a threat is an issue of fact for the trial jury, involving assessments of both credibility and of context." United States v. Clemens, 738 F.3d 1, 13 (1st Cir. 2013); accord United States v. Stock, 728 F.3d 287, 298 (3d Cir. 2013); United States v. Wheeler, 776 F.3d 736, (10th Cir. 2015) ("[T]he question whether statements amount to true threats is a question generally best left to a jury.").

The Second Circuit joined the deference side of the split in this case, in which a jury convicted Brendan Hunt after concluding that a short video he posted on the Internet constituted a true threat.

In affirming Hunt's conviction (and 19-month prison sentence), the Second Circuit rejected his request to review independently the jury's determination that the video constituted a true threat. In its view, "the true threat determination involves no legal principles warranting independent review of the jury's conclusion. . . [W]hether words used are a true threat is a question of fact for the jury to which we defer." United States v. Hunt, 82 F.4th 129, 136-37 (2d Cir. 2023), at Pet. App. 08. The court thus refused to consider anew Hunt's core, consistent defense – that his video is not a threat (much less a "true threat") but instead advocacy of unlawful activity protected by the First Amendment under Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) – because, in its view, the jury already rejected it.

***

The Court should resolve this decade-long split on an important question of constitutional law and appellate procedure. Federal courts must act uniformly when determining whether speech is protected or unprotected by the First Amendment. The differing standards of review employed by the Circuits means that speech uttered in one state may be protected by the First Amendment, but subject the speaker to imprisonment when uttered in another. That is intolerable.

Hunt's case is an excellent vehicle to resolve the split. The issue is cleanly preserved and the Second Circuit specifically took a side. Moreover, that court depended on the deferential standard to affirm Hunt's conviction – its error was outcome determinative. Independent appellate review of the whole record, as required by Bose Corp. and other cases, confirms that Hunt's video was not a true threat but advocacy protected by the First Amendment.

STATEMENT OF THE CASE

1. The BitChute video

Brendan Hunt was convicted after trial of threatening to murder members of Congress with the intent of interfering with or retaliating against them on account of their official acts, in violation of 18 U.S.C. § 115(a)(1)(B). The sole basis for the jury's verdict was a 1-minute, 28-second video Hunt posted to his account on BitChute.com, a little-known video-hosting site based in the United Kingdom.[2] Only 99 people subscribed to the account.[3]

The video, made on Hunt's phone, was entitled "Kill Your Senators." It bore the phrase "Slaughter them all" as a description; had "a thumbnail image of the

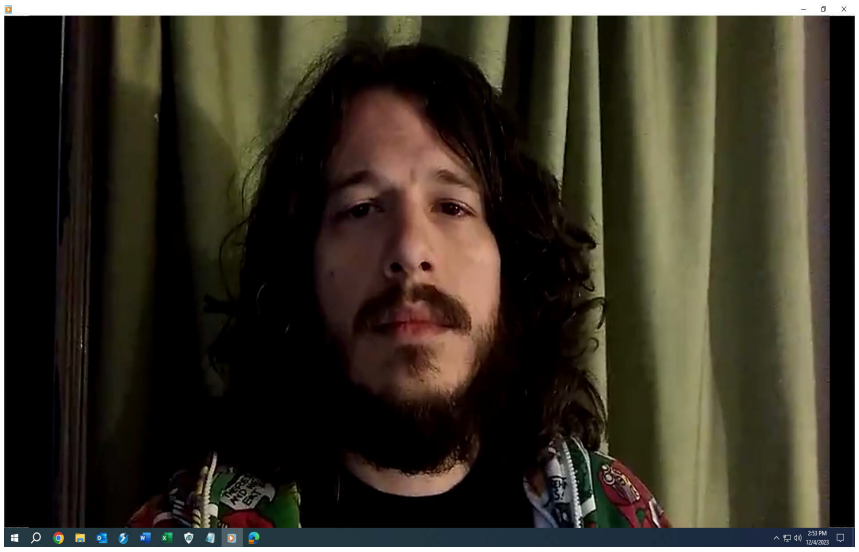
[2] See Pew Research Center, "Key Facts about BitChute," dated Feb. 17, 2023, at https://www.pewresearch.org/short-reads/2023/02/17/key-facts-about-bitchute/ (accessed Dec. 6, 2023) ("Overall, [only] 7% of U.S. adults say they have heard of BitChute . . . . Americans are less aware of BitChute than many of the other alternative social media sites studied by the Center. For example, 38% of U.S. adults have heard of Parler, 27% each have heard of Truth Social and Telegram, and 20% have heard of Rumble.").

[3] Hunt also had an account on YouTube, which had over 11,000 subscribers. But Hunt did not post this video there. It was the only video that he posted on BitChute that he did not cross post on YouTube.

'Don't tread on me' flag [also known as the Gadsden flag]"; and "added the hashtags [revolt, revolution, America,] MAGA, Second Amendment, ZOG." United States v. Hunt, 573 F. Supp. 3d 779, 784-85 (E.D.N.Y. 2021).

Hunt uploaded the video on January 8, 2021, two days after the January 6th incursion into the U.S. Capitol, which temporarily disrupted Congress's eventual certification of the Electoral College vote (and thus of Joseph Biden as the winner of the 2020 election).

In the video, Hunt looks into the camera and addresses people like himself – Americans who believe that the 2020 election was fraudulent and that Donald Trump was its true winner. Here is a screenshot:



And here is what he said:

> Hey guys, so we need to go back to the U.S. Capitol when all of the Senators and a lot of the Representatives are back there and this time we have to show up with our guns and we need to slaughter these motherfuckers.
>
> What I'm saying is that our government at this point is basically a handful of traitors, so what you need to do is take up arms, get to DC probably the inauguration -- so called inauguration -- of this uh motherfucking communist Joe Biden. That's probably the best time to do this.
>
> Get your guns show up to DC and literally just spray these motherfuckers. Like, you know, that's the only option. They're gonna come after us. They're gonna kill us. So we have to kill them first. So get your guns. Show up to DC; put some bullets in their fucking heads.
>
> If anybody has a gun, give me it. I will go there myself and shoot them and kill them. We have to take out these Senators and then replace them with actual patriots.
>
> Basically I would trust anybody over them at this point uh this is a ZOG[4] government um, you know, that that's basically all I have to say. Let's, uh, take up arms against them.

Government Exhibit 21T, at Pet. App. 15.[5]

Hunt regretted posting and removed the video the next day. It had received 502 "views" – or clicks – during its 36-hour lifespan.

No member of Congress, or their staff, families or friends, saw (or heard about) the video before Hunt deleted it. Hunt did not send it to anyone, directly or indirectly (by "tagging" someone, for instance).

Nothing untoward occurred. Hunt did not travel anywhere or conspire with anyone. Nor did anyone who saw the video.

---

[4] "ZOG" is short for "Zionist-Occupied Government."

[5] The video itself, GX 21, will be provided to the Court upon request.

2. Surveillance and arrest

But someone who saw the video called the FBI. The FBI had not heard of Hunt. He had no criminal record and wasn't on anyone's radar.

And as the FBI quickly learned, Hunt has a B.A. in theater from Fordham University. He lived in Queens and had been a waiter, actor, and musician. Until his arrest, Hunt worked full-time as an analyst for the New York State court system.

Hunt is a news junkie and has been politically active for more than a decade. In connection with those activities, Hunt produced content for and maintained accounts on various social-media sites, including Facebook, YouTube, and BitChute.

The FBI quickly learned all this – Hunt did not conceal himself on the Internet. Nonetheless, agents immediately began to survey him closely. But eleven days of physical and electronic scrutiny found no misbehavior.[6]

Early on January 19th, a platoon of FBI agents traveled to Hunt's home to arrest him and execute a search warrant. "During the search, agents did not find firearms, ammunition, bomb-making devices, or documents such as a map to the offices of the targeted members of Congress . . . ." Hunt, 573 F. Supp. 3d at 785. Instead, they "came across many books and comic books, action figures, empty beer bottles, coffee cups, a water pipe, and [several] electronic devices . . . ." Id. They also found the "Ninja Turtles" sweatshirt Hunt wore in the video.

[6] The FBI also told the Capitol Police about Hunt's video. That agency, responsible for protecting members of Congress, did nothing.

3. Trial

Hunt asserted his innocence and went to trial in Brooklyn before District Judge Pamela Chen. After six days, the jury found Hunt guilty on the single § 115(a)(1)(B) count, based solely on the BitChute video.[7]

A. The prosecution's case

The Government's chief evidence was undisputed -- the video itself and the fact that Hunt made and posted it. Apart from that, the Government focused on showing that Hunt was serious about what he said on the video – that the alleged threat was "true," in other words.

Thus, the Government offered evidence that Hunt was angry about the election and hated Biden; held antisemitic (and racist) beliefs; and approved of Hitler's anti-democratic maneuvers in 1930s Germany. The Government also argued that Hunt revealed his seriousness in his responses to comments to the video and in other material he uploaded around the same time.

The Government offered no evidence, however, that any member of Congress (or their staff, family, or friends) saw or heard about Hunt's video before he deleted it. Nor was there evidence that he wanted this to occur.

[7] The Government argued to the jury that Hunt made four separate threats -- three written posts on social-media sites (two on Facebook.com and one on Parler.com) in addition to the BitChute video. The jury acquitted Hunt on the posts.

B. Hunt's testimony

Hunt testified and denied that he intended to threaten anyone by making and posting the video on BitChute.

Hunt was drunk and stoned and at home most waking hours during that period (coinciding with the Covid-19 pandemic). He was just shouting "into the ether" – "letting off steam" and expressing his anger and frustration to fellow believers – when he made and uploaded the video.

Hunt knew that only a few people would see it. He did not intend, believe, or expect that the video "would somehow be seen by any members of Congress or their security details."

C. Instruction and verdict

The court told the jury that in order to convict Hunt of violating § 115(a)(1)(B), it had to find, among other things, that the BitChute video was a "true threat." The court explained that "the First Amendment does not protect 'true threats . . .'" And "[f]or a statement to be a true threat, it must have been made under such circumstances that an ordinary, reasonable person who heard or read the statement, and who is familiar with the context of the statement, would understand it as a serious expression of an intent to inflict bodily injury."

The jury returned a guilty verdict, specifying that the BitChute video was a true threat.

The court denied Hunt's pre- and post-verdict Rule 29 motions for judgment of acquittal.

4. Sentencing

The Guidelines range was 41 to 51 months. Judge Chen imposed a below-range sentence of 19 months' imprisonment, followed by three years of supervised release.[8]

The court offered two reasons for leniency.

First, Hunt "doesn't have violent tendencies and has never demonstrated that " he would "inflict[] physical harm on other people."

Second, Hunt's conduct was not as severe as a typical threatener's. To begin, the BitChute video was "posted [] only for 36 hours and [Hunt] took it down on his own." And he "post[ed] it on a platform not as far reaching as YouTube." That he "was never affiliated with any known white supremacist or anarchist groups and took no measures to make good on his threat also mitigates the seriousness of his offense."

Finally, the court found that Hunt "did not take any steps to ensure that the intended targets – the members of Congress – saw his video[.]" This "further mitigates the harm that he actually caused through his conduct."

[8] Hunt has completed prison and is at liberty in the community serving the term of supervision.

5. Appeal

Hunt timely appealed to the Second Circuit. He invoked the "constitutional fact" doctrine and asked the Second Circuit not to defer to the jury's "true threat" determination, but instead to review the whole record to determine, independently, whether the BitChute video fell into this unprotected category.[9]

Independent review, Hunt argued, confirms that the video was not a true threat – indeed, that it was not a "threat" at all, given that Hunt did not intend or attempt to communicate with its purported targets (members of Congress). Rather, the video constitutes speech advocating unlawful activity, whose legality is governed by the Brandenburg standard. See 395 U.S. at 447 (advocacy of unlawful activity is protected by First Amendment unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). And because the video did not seek "imminent" violence and was unlikely to result in such, the First Amendment entitled Hunt to post it.

6. The decision below

The Second Circuit rejected Hunt's arguments and affirmed. 82 F.4th 129 (2d Cir. Sep. 20, 2023), at Pet. App. 01-14.

Regarding the standard of review, the court acknowledged that it "ha[s] not definitively answered whether the constitutional fact doctrine applies to true threat determinations" and that "other circuits that have considered the issue have

[9] Hunt also argued that the district court erred in charging the jury on a statutory element and in sentencing him.

reached opposing conclusions." It then "h[e]ld that the constitutional fact doctrine does not apply to § 115 true threat determinations." 82 F.4th at 135.

"[L]etting the jury decide whether there was a true threat without any judicial second-guessing" is the correct approach, the court said. Id. at 136. Determining whether speech constitutes a true threat "requires only ordinary principles of logic and common experience rather than legal judgment." Thus, "the court is no better equipped than the jury – and is arguably less equipped – to answer whether a statement is a true threat." Id.

"We therefore conclude that the true threat determination involves no legal principles warranting independent review of the jury's conclusion." Id. at 136-37. Relying instead on Jackson v. Virginia's familiar standard of review, see 443 U.S. 307, 319 (1979) (court must affirm conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"), the court concluded that evidence sufficed to support the guilty verdict. 82 F.4th at 135 & 137. That is, "[a] reasonable person could conclude that Hunt was serious" and that he had a "violent intent" in making and posting the video. Id. at 137.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ and review Hunt's case for three reasons.

First, the Court should resolve the longstanding split among the Circuits on the applicable standard of review for a factfinder's determination that speech

constitutes a true threat. This is an important, constitutional issue in which the divide is intolerable.

Second, the Second Circuit got it wrong. This Court's cases compel independent appellate review of the decision to categorize speech as a true threat. A true threat is no different from obscenity, defamatory speech, fighting words, and child pornography in this regard. A finding that speech falls in an unprotected category – and thus outside the First Amendment – is a legal-constitutional question reviewed independently, without deference, and upon the whole record.

Finally, this case is an ideal vehicle to resolve the split and render justice. The issue is cleanly preserved – it was briefed and argued below and then specifically decided upon by the Second Circuit. No procedural or other impediment exists.

Moreover, the Second Circuit's error is outcome determinative – its refusal to second-guess the factfinder has resulted in the conviction and imprisonment of someone for exercising his rights under the First Amendment. Independent review of the whole record confirms that Hunt's video was not a true threat but protected advocacy under Brandenburg.

A. The Circuits are split on how to review a "true threat" finding

The Circuits were split on this question even before the Second Circuit widened the fray. The divide has existed for at least a decade.

In 2002 the en banc Ninth Circuit ruled that "we review the record independently in order to satisfy ourselves that the posters and the Files constitute a 'true threat' such that they lack First Amendment protection." Planned Parenthood, 290 F.3d 1058, 1070 (9th Cir. 2002). An appellate court does not defer to a jury's findings on "constitutional facts," defined as "facts – such as the existence of actual malice or whether a statement is a true threat – that determine the core issue of whether the challenged speech is protected by the First Amendment." United States v. Hanna, 293 F.3d 1080, 1088 (9th Cir. 2002). "We conduct an independent review of the record to determine whether the facts as found by the jury establish the core constitutional fact, in this case a 'true threat.'" Id.

The Fourth Circuit joined the Ninth a few years later. United States v. Bly, 510 F.3d 453, 457-58 (4th Cir. 2007) ("Whether a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law and fact that we review de novo.").

The split began in 2013, when the First and Third Circuits ruled that, generally, "whether a communication constitutes a threat or a true threat is a matter to be decided by the trier of fact." United States v. Stock, 728 F.3d 287, 298 (3d Cir. 2013); accord United States v. Clemens, 738 F.3d 1, 13 (1st Cir. 2013). The Tenth Circuit joined them two years later. United States v. Wheeler, 776 F.3d 736, (10th Cir. 2015) ("[T]he question whether statements amount to true threats is a question generally best left to a jury.").

And, of course, the Second Circuit deepened the divide here in "conclud[ing] that the true threat determination involves no legal principles warranting independent review of the jury's conclusion." 82 F.4th at 136-37.

This is not a trivial disagreement. There are hundreds, if not thousands of threat prosecutions each year. Disagreement among the Circuits in how they review the constitutional question at the heart of all these cases – whether a particular expression constitutes a "true threat" unprotected by the First Amendment – inevitably results in disharmony regarding the constitutional standard itself. "[V]aried results" on constitutional questions is "inconsistent with the idea of a unitary system of law." Ornelas v. United States, 517 U.S. 690, 697 (1996).

The split among the Circuits on this important and recurring constitutional question is longstanding and deep. This Court's intervention is required.[10]

[10] More generally, this Court has repeatedly mediated disputes regarding the correct standard of appellate review of mixed questions of law and fact, such as the one here, recognizing its essential role in ensuring nationwide uniformity. See, e.g., Google LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1199 (2021) (deciding appellate standard of review for whether something constitutes "fair use"); Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020) (deciding appellate standard for finding of child's "habitual residence" under the Hague Convention); U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC, 138 S. Ct. 960, 963 (2018) (deciding appellate standard for determination of "insider status" under 11 U.S.C. § 101(31)); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (deciding appellate standard for constitutionality of punitive damages award); Koon v. United States, 518 U.S. 81, 85 (1996) (deciding appellate standard for Guidelines departures).

B. Appellate courts should independently review a factfinder's determination that speech qualifies as an unprotected true threat

The Court should also grant the writ because the Second Circuit got it wrong. This Court's cases require an appellate court to review independently, after examining the whole record and without deference to the factfinder, whether the offending speech falls outside of the First Amendment as a true threat. See Note, Renee Griffin, Searching for Truth in the First Amendment's True Threat Doctrine, 120 Mich. L. Rev. 721, (2022) ("Given the near-routine application of the constitutional fact doctrine to other First Amendment cases, the argument in favor of extending it to true threat cases is fairly intuitive."); Jennifer E. Rothman, Freedom of Speech and True Threats, 25 Harv. J. L. & Pol. 283, 335 (2001) ("As in other areas of First Amendment law, independent appellate review should apply to the analysis of what constitutes a true threat.").

Independent appellate review in speech-based suits "is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" and silence speech. Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 686 (1989). Because the First Amendment shields even unpopular and distasteful expression, there is a "danger that decisions by triers of fact may inhibit the expression of protected ideas." Bose Corp., 466 U.S. at 505. An

independent judiciary must patrol – and maintain – the wide-ranging terrain for uninhibited expression required by that Amendment.[11]

Independent review of speech-entwined "constitutional facts" has a long lineage. In 1946 the Court explained why it would independently review a criminal contempt judgment against the Miami Herald for publishing editorials critical of the local courts. Pennekamp v. Florida, 328 U.S. 331 (1946). "The Constitutional has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues." "[T]hat responsibility . . compel[s] [us] to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not . . . they are of a character which the principles of the First Amendment . . . protect." Id. at 1031.

---

[11] Independent review is also warranted because the decision to designate a particular expression as unprotected, though involving issues of both fact and law, is principally a legal one given its decisive constitutional import: "[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of constitutional protection." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567 (1995); see Amanda Reid, Fructifying the First Amendment: An Asymmetric Approach to the Constitutional Fact Doctrine, 11 Fed. Cts. L. Rev. 109, (2019) ("[F]or cases involving First Amendment interests, findings of fact are often inextricably intertwined with constitutional rights. A factual error in the trial court – by the judge or jury – can improperly deny a constitutional liberty.").

What Justice Harlan said about obscenity applies to true threats as well: "[T]he question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind." Roth v. United States, 354 U.S. 476, 497-98 (1957) (concurring in part and dissenting in part) (emphasis in original).

The doctrine took hold in the 1960s. Vacating defendants' convictions for breach of the peace based on their participation in a march and protest against racism, the Court announced that it is "our duty in a case such as this to make an independent examination of the whole record." Edwards v. South Carolina, 372 U.S. 229, 35 (1963). "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects . . . ." Id. at 237. Courts must stand guard against governmental and populist efforts to suppress "unpopular views." Id. The judiciary bears a special responsibility to uphold the First Amendment and guard its wide expanse for free expression. Accord Cox v. Louisiana, 379 U.S. 536, 545 & n.8 (1965).

The Court then extended independent review to defamation suits and obscenity prosecutions. New York Times v. Sullivan established not only the substantive requirement of actual malice for defamation suits, for instance, but explained why "independent examination of the whole record" is necessary when "the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated'" – the same question presented on this petition. 376 U.S. at 285 (quoting Speiser v. Randall, 357 U. S. 513, 525 (1958)).

The Court's "duty" in such cases is "not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." "In cases where

th[e] line [between protected and unprotected speech] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." Id. at 285 (internal citations and quotations omitted).

Our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," requires the courts to assume this role. Id. at 270. The "breathing space" for speech demanded by the First Amendment can exist only if the independent judiciary vigilantly patrolled its far-reaching borders. Id. at 272. Cf. Harte-Hanks Communications, 491 U.S. at 686 ("Uncertainty as to the scope of the constitutional protection can only dissuade protected speech -- the more elusive the standard, the less protection it affords.").

Independent appellate review is thus required in obscenity prosecutions. It would be "an abnegation of judicial supervision" – "inconsistent with our duty to uphold the constitutional guarantee" – to defer to the factfinder. Jacobellis v. Ohio, 378 U.S. 528, (1964). An appellate court independently reviews even the determination that a work appeals to "prurient interests" or is "patently offensive," which are "essentially questions of fact." Jenkins v. Georgia, 417 U.S. 153, 160 (1974).

Bose Corp. is the seminal case, holding that an appellate court independently reviews the factfinder's "actual malice" determination in a defamation suit. Independence derives from "this Court's role in marking out the limits of the [Constitutional] standard through the process of case-by-case adjudication, . . . particularly in those cases in which it is contended that the communication in issue is within one of the few classes of 'unprotected' speech." 466 U.S. at 503.

"Libelous speech has been held to constitute one such category; others that have been to be outside the scope of the freedom of speech are fighting words, incitement to riot, obscenity, and child pornography." Id. at 504. And "[i]n each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance." Id. at 505.

The Court cannot simply defer to the factfinder's decision on the "sorting" question, as deference does not "sufficiently [] narrow the category" of unprotected expression. Deference, indeed, fails to "eliminate the danger that decisions by triers of fact may inhibit the expression of protected [but unpopular or provocative] ideas." Id.

***

Appellate courts therefore must independently review a factfinder's determination that speech qualifies as a true threat, just as they do when reviewing

a determination that speech is libelous or obscene or contemptuous. It's the same inquiry, propelled by the same rationale: When "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may be legitimately be regulated, . . . the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" Bose Corp., 466 U.S. at 508 (quoting Pennekamp, 328 U.S. at 335)). The Second Circuit thus erred in deferring to the jury's true-threat determination.

C. This case is an ideal vehicle to resolve the split

Finally, Hunt's case is an ideal vehicle for this Court to resolve the longstanding split and hold that appellate courts bear the responsibility of independently reviewing, upon an examination of the whole record, a factfinder's conclusion that speech falls outside the First Amendment as a true threat.

The applicable standard of review was raised below by Hunt (and opposed by the Government in its brief) and answered by the Second Circuit in its opinion. It is cleanly presented and preserved.

And the Second Circuit's erroneous deference to the jury's true-threat determination was outcome determinative. Independent review confirms that the

BitChute video was not an unprotected true threat but advocacy of unlawful activity protected by Brandenburg.[12]

1. Threatening speech versus inciting speech

A "threat" is "'a communicated intent to inflict harm or loss on another.'" Elonis v. United States, 575 U.S. 723, 733 (2015) (quoting Black's Law Dictionary 1519 (8th ed. 2004)). It is an "expression conveying that a speaker means to commit an act of unlawful violence." Counterman, 600 U.S. at 73-74. A threat is a "statement[] 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." Black, 538 U.S. at 359. Its goal is to cause the victim to fear violence from the threatener. Threats are usually communicated privately and directly to the target (via a phone call, letter, or email, for instance) – it's scarier that way (and enables the threatener to escape scrutiny).

Threats bear little First Amendment value because they do not contribute to public discussion or participate in the marketplace of ideas. A threat's goal is to cause fear or anxiety in its target -- not to advance debate. Thus, "threats of violence are outside the First Amendment." R.A.V. v. City of St. Paul, 505 U.S. 377,

[12] If the Court agreed with Hunt that the Second Circuit employed the wrong standard of review, it could simply remand and ask that court to determine in the first instance, independently and after reviewing the whole record, whether the video was a true threat. See, e.g., Ornelas, 517 U.S. at 700 (holding that lower court erred in applying clear-error review to the trial court's decision that a police officer had probable cause or reasonable suspicion, and then remanding "the case to the Court of Appeals to review de novo the District Court's determination that the officer had reasonable suspicion and probable cause.").

388 (1992); see also M. Redish & M. Fisher, Terrorizing Advocacy and the First Amendment: Free Expression and the Fallacy of Mutual Exclusivity, 86 Fordham L. Rev. 565, 574 (2017) ("[A] true threat is a coercive act, not speech. . . . [Such expressions] are excluded from First Amendment because they do not advance the democratic values the First Amendment exists to protect.").

Speech advocating violence – incitement – is different. Brandenburg, 395 U.S. at 447. To incite is to encourage or persuade others to act unlawfully. Speech seeking that goal is communicated to and directed at third parties – those whom the speaker wishes to incite – not the target of the speaker's ire. Such expression is almost always publicly communicated – you can't persuade someone who can't hear you.

Because inciting expression contributes to public debate and works through persuasion, it is robustly protected. The Government can prohibit a speaker from seeking to incite others only if her advocacy is both "directed to inciting or producing imminent" violence and "likely" to result in actual violence. Brandenburg, 395 U.S. at 447. This sets "a very high bar for censorship, allowing only the most egregious [inciting] speech to be silenced." John P. Cronan, The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard, 51 Catholic U. L. Rev. 425, 443 (2002); see M. Redish & M. Fisher, supra, at 573 ("Punishing unlawful advocacy invites speaker self-censorship and therefore undermines the democratic values [of] the First Amendment.").

"Put simply, the distinction between a threat and an incitement is as follows: a threat involves a speaker saying to a victim, 'I will do you harm,' and an incitement involves a speaker saying to third parties, 'You ought to harm someone (or something).'" Lyrissa Lidsky, Incendiary Speech and Social Media, 44 Texas Tech L. Rev. 147, 158 (2011). And "while advocating violence [(the latter)] is protected, threatening a person [(the former)] is not." Planned Parenthood, 290 F.3d at 1072.

"[I]ndividuals may attempt to persuade others to adopt a certain belief or take certain actions," even if unlawful or violent. M. Redish & M. Fisher, supra, at 575. This is advocacy. "But individuals may not rely on the First Amendment to protect efforts to force others to think or act a certain way. Coercive speech-acts [such as threats, blackmail, and extortion] do not contribute to the free and open exchange of ideas . . . ." Id.

2. The video is protected incitement, not a threat

Independent examination of the record confirms that the BitChute video is not a threat. Evaluated for its purpose, audience, harm caused, source of violence, and mode of communication, the video is classic inciting speech. Through a publicly posted video, Hunt was trying to persuade his audience – unknown fellow Trump supporters angry about the 2020 election – to violently disrupt the transfer of power.

The video was not a "coercive act" directed toward its target – Hunt was not trying to scare or intimidate members of Congress through the video. He was trying to convince others to share his election-denying views and act accordingly.

Hunt had no reason to think that any member of Congress would see the video. (And none did). He had fewer than a hundred followers; Bitchute was not well known and had far less traffic than similar platforms like YouTube; and he removed the video after only 36 hours.

Hunt did not send or otherwise direct the video to members of Congress. Nor did he try to contact them or do anything to increase the chance that they would see the video. Hunt simply shouted his thoughts out to the "ether," hoping to reach fellow election deniers lurking in his remote corner of the Internet.

To call this a "threat" is to distort the English language beyond recognition. Treating Hunt's video as a threat collapses the constitutional wall between true threats and protected speech, including advocacy falling within Brandenburg's parameters. Imprisoning him for making and posting it violates the First Amendment.[13]

---

[13] The Second Circuit concluded, on deferential review, that the jury "reasonably found that Hunt's BitChute video constituted a true threat to assault or murder," citing evidence supporting a finding that "Hunt had a violent intent" and "was serious" about what he said in the video. 82 F.4th at 137.

This misses the point, even taken on its own terms.

That Hunt was "serious" does not mean that he was making a threat as opposed to advocating violence. Threatening speech and inciting speech both can be serious, rather than humorous or hyperbolic. That Hunt "seriously" intended for

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Yuanchung Lee
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, NY 10007
Tel.: (212) 417–8742
yuanchung_lee@fd.org

December 15, 2023

---

members of Congress to be killed does not mean that he threatened them. One could be "serious" about inciting others as well – and nonetheless fall squarely within the First Amendment's protection.