NO. 18-949

In the
# Supreme Court of the United States

JAMAL KNOX

*Petitioner*,

v.

COMMONWEALTH OF PENNSYLVANIA

*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania**

## MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* ART SCHOLARS AND HISTORIANS IN SUPPORT OF PETITIONER

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March 6, 2019

## MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE IN SUPPORT OF PETITIONER

Art Scholars and Historians Sonya Bonneau, Andrew Gilden, Stacey Lantange, Sergio Muñoz Sarmiento, Drew Sawyer, and Xiyin Tang (collectively, *amici*) respectfully move for leave of Court to file the accompanying brief in support of the petition for a writ of certiorari in the above-captioned case. Counsel for petitioner consented to the filing of this brief. Counsel for respondent took no position on *amici*'s request for consent.

This case involves the First Amendment's "true threats" doctrine. *See generally Virginia v. Black*, 538 U.S. 343, 359 (2003); *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (per curiam). Petitioner was convicted of making a "terroristic threat" based on a rap song he posted online. In affirming that conviction, the decision below deepens the long-standing division among the lower courts on the scope of the "true threats" doctrine. *Amici* seek leave to submit the accompanying brief to underscore the importance of the question presented. Violent expression is as old as expression itself, and the protection of such expression has been a core constitutional commitment of this country since the Founding. To punish depictions or expressions of violence in art without a proper understanding of the context of that art is fundamentally antithetical to our nation's commitment to the freedom of expression. It also poses a grave threat to artists and speakers of all stripes, who may simply decide not to express themselves at all rather than face the potentially

carceral consequences for creating art that the government deems "too dangerous."

In light of their concern that the division among the lower courts on the question presented threatens basic expressive freedoms, *amici* respectfully move this Court for leave to file the accompanying brief.

Respectfully submitted,

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## STATEMENT OF INTEREST[1]

*Amici* are law professors, curators, practitioners, and art historians. Sonya Bonneau is a Professor of Law and Legal Practice at Georgetown University Law Center, and has written extensively on the First Amendment's protection of nonrepresentational art. Andrew Gilden is an Assistant Professor of Law at Willamette University College of Law whose research focuses on intellectual property and internet law, with an emphasis on free speech and civil rights. Stacey Lantange is an Assistant Professor of Law at the University of Mississippi School of Law, and is nationally renowned as a scholar of creativity on the Internet. Sergio Muñoz Sarmiento is an arts lawyer and scholar interested in the relationship between art and law, with a focus on tangible and intangible property, copyright and appropriation, contractual agreements, moral rights, freedom of expression, and artists' legacies. Drew Sawyer is an art historian and the Phillip Leonian and Edith Rosenbaum Leonian Curator of Photography at the Brooklyn Museum. Xiyin Tang is a Lecturer in Computer Science at Yale University and a Visiting Fellow at the Yale Law School Information Society Project.

*Amici* share not only an abiding commitment to protecting the First Amendment rights of speakers and artists of all stripes, but the concern that prosecutions like the one upheld below pose a grave

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person aside from *amici curiae* and their counsel made any monetary contribution toward the preparation or submission of this brief.

threat to those fundamental freedoms. *Amici* thus respectfully submit that the Court should grant the petition for certiorari and hold that a context-sensitive inquiry into whether speech constitutes a punishable "true threat" is necessary to safeguard the freedom of expression.

## ARGUMENT

All agree that true threats of violence fall outside the ambit of First Amendment protection. Courts disagree, however, on what is required to prove that a particular utterance constitutes such a threat. That sort of division among state and federal courts would warrant plenary review in any context. But the need for this Court's intervention is particularly palpable here. So long as the line between protected expression and punishable "threats" remains unclear, some will decide simply not to speak at all, rather than face jail time if they misjudge how their speech will be perceived.

That chilling effect is particularly pronounced when it comes to artists. The expression and depiction of violence in art is nothing new. And the meaning of a given work of art is often (if not always) up to interpretation; indeed, that is often the point. But while art today may not be so different from the art of yesteryear, the reach of art surely is. The advent of the Internet has dramatically expanded art's sphere. What once would have been confined to the gallery, theater, or library now can be accessed in an instant almost anywhere on the planet. And art's capacity for provocation—and its not-unrelated capacity for misinterpretation—have increased apace. Ensuring that our national commitment to freedom of

expression remains just as robust in the modern age thus requires a clear instruction from this Court that, when it comes to deciding whether expression is either protected or punishable, context matters.

## I. The Current Division Among Lower Courts Leaves Artists With Little Guidance On When They May Be Prosecuted For Their Expression.

This Court has long held that true threats of violence "must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (words "which by their very utterance inflict injury" may be "prevent[ed] and punish[ed]" without "rais[ing] any Constitutional problem"). But defining "true threats" has proven difficult. Four years ago, this Court took a step toward clearing up the confusion, "grant[ing] certiorari" in *Elonis v. United States* "to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions." 135 S. Ct. 2001, 2018 (2015) (Thomas, J., dissenting). Unfortunately, *Elonis* did little to clarify the law. Rather than address the constitutional issue head on, the Court "avoided" deciding "precisely what level of intent suffices under the First Amendment." *Perez v. Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in the denial of certiorari); *see, e.g.*, *People v. Murillo*, 190 Cal. Rptr. 3d 119, 124 (Cal. Ct. App. 2015) ("not discuss[ing] *Elonis*" in a true threats case because it did not resolve the federal constitutional issue). As a result, courts remain divided over what the government must show to punish someone for a

"threat" consistent with the First Amendment—and artists remain in a state of limbo over the degree of protection the Constitution affords their work.

At one end of the spectrum, a majority of circuits require proof that at an objective, reasonable person would regard expression as genuinely threatening before it may form the basis of a criminal conviction. *See, e.g.*, *United States v. Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006); *United States v. Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013); *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013). A number of state courts of last resort hold the same. *See* Pet. for a Writ of Certiorari, *Sibley v. State of Arizona*, No. 18-1001, 2019 WL 424688, at *17-18 (U.S. Jan. 28, 2019) (citing cases).

The courts in this first cohort do not agree on everything. Most notably, these circuits "are split over whether the test should be from the perspective of the speaker or the listener." Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001); *see United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997) (citing cases showing "disagree[ment] regarding the appropriate vantage point—what a person making the statement should have reasonably foreseen or what a reasonable person receiving the statement would believe").

At the other end of the spectrum, the Ninth and Tenth Circuits apply a subjective standard. Under

that rubric, speech made with the subjective "intent of placing the victim in fear of bodily harm or death" receives no First Amendment protection even if an objectively reasonable person would not perceive the speech as threatening. *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005); *see United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). The Seventh Circuit likewise has concluded that after this Court's fractured decision in *Virginia v. Black*, 538 U.S. 343 (2003), "an entirely objective definition [of 'true threat']" may "no longer [be] tenable." *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008). Those circuits are joined by the supreme courts of Massachusetts, Vermont, and Rhode Island, and now Pennsylvania as well. *See, e.g.*, *O'Brien v. Borowski*, 961 N.E.2d 547, 557 (Mass. 2012); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011); *State v. Grayhurst*, 852 A.2d 491, 515 (R.I. 2004); Pet.App.22a.

This division among the lower courts poses enormous practical problems for artists. An artist's work is often exhibited or performed in multiple venues, so under the current state of affairs, artists who produce works that evoke violent themes are subject to varying degrees of First Amendment protection depending on where their art is viewed. Making matters worse, a number of states have adopted tests that conflict with the tests applied by the federal circuit in which they reside. *See* Pet.13-14. In practical terms, then, whether the First Amendment protects a particular work of art may depend on whether charges are brought in state court or federal court. The chilling effect on artistic expression that such uncertainty produces cannot be

overstated. Nor is the concern hypothetical or abstract, as discussed below.

## II. Robust First Amendment Protection Is Necessary To Avoid Chilling Artists' Free Expression In The Twenty-First Century.

What constitutes an unprotected "true threat" is a question of ever-increasing importance to the preservation of free speech and artistic expression. While the art of the twenty-first century certainly is different from the art of the past in myriad ways, art has long had the capacity to capture and convey central components of the human condition—sex and violence chiefly among them. Indeed, expressions and depictions of violence have permeated art for literally millennia. But though violence in art may be nothing new, modern technology has given art a vastly greater reach. And with that dramatic expansion of art's domain has come a concomitant expansion of art's capacity for provocation and offense. Now more than ever, then, it is critical for robust First Amendment protections to guard against even subtle forms of censorship that inevitably will serve to chill artistic expression and free speech.

1. "[V]iolence is not [just] something that is typical of contemporary art. It's something that has been part of art since the beginning." Otto M. Urban, *as quoted by* Ian Willoughby, *in* Radio Praha (Oct. 15, 2010), available at https://bit.ly/2HbZeNN. Take, for instance, the famous Lascaux cave paintings in southwestern France. One pictograph, estimated to be 20,000 years old, depicts a confrontation between a bison and a man. The bison has been stabbed by a spear, and is either dead or dying; the man, whose

head is bird-like, lies prone, as if he too is dead. The scene is primitive, little more than a sketch, but raw with violence and fraught with emotion.

Unsurprisingly, given that Stone Age paintings almost never depict complex narratives, there remains intense controversy over the painting's meaning. One explanation is that it was therapeutic—drawn to help the artist process a traumatic encounter that ended in a friend's tragic death. According to that theory, the painting is the physical embodiment of a psychic scar, etched into rock. But there are numerous other theories. Is it a warning to others—a threat?

The world obviously has changed in myriad ways since the Lascaux cave paintings, but one thing that has not changed is art's capacity to depict and evoke violence. As a number of courts and commentators have recognized, "throughout our history," "depictions of violence … have been used in literature, art, and the media to convey important messages" about the human condition and the world at large. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004). From eighteenth-century depictions of beheadings of state officials, or traditional satire that imagined figures of authority such as kings or rulers dying and damned, to Norman Mailer's romanticization of the psychopath, violent art has long served as an outlet for the powerless, at once a safe space for experimentation and hyperbole as well as an agent for social change.

Yet there has never been any serious dispute that the First Amendment protects the expression and depiction of violence in art, even if the exact intentions of a given work are difficult to discern. *Id.* And

rightfully so, as a work of art is not the same thing as the messages it conveys or the feelings it arouses. A painting, poem, sculpture, or song may be consistent with reality, but that does not mean that it *is* reality. *See* Roland Barthes, "The Reality Effect," in *The Rustle of Language* 146-48 (Richard Howard trans. 1986). Art does not manifest in the real; the thought-message of an artwork is *experienced*—sensed, felt, processed—not stated. *See* Archibald MacLeish, "Ars Poetica" (1926), available at https://bit.ly/2AMhuJr ("A poem should not mean/But be.").

Moreover, it has long been understood that expressions or depictions of violence in art are not intended to bring about the violence they depict. Millennia after Lascaux but still millennia ago (and thus long before the rise of the art-therapy industry dedicated to allowing for free reign and creativity, even if depictions are violent or obscene), Aristotle not only "saw the purpose of art as catharsis," Neil C. Patten, *The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in* National Endowment for the Arts v. Finley, 37 Hous. L. Rev. 559, 602 n.7 (2000), but recognized violent art's particular capacity to evoke and release, *see* S.H. Butcher, *Aristotle's Theory of Poetry and Fine Art* 236-68 (2d ed. 1898).

Today, that capacity for release and catharsis is perhaps nowhere more evident than in rap music. "Rap music started around 1973 in the Bronx," and it quickly caught on in predominantly black inner cities across the country. Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 Rutgers L.J.

479, 483 (2009). At the time, "police protection in the inner-city was sporadic, if not non-existent," and "gang violence ran rampant in the streets." Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA Ent. L. Rev. 345, 347 (2005). That sociocultural context—and a culture in which people "believed that the violence [in their community] had to be stemmed," and that "in order to do that, their voices needed to be heard"—directly informed the development of the art form now known as rap. *Id.*; *see* Henry A. Rhodes, *The Evolution of Rap Music in the United States*, Yale Teacher's Inst. (1993), available at https://bit.ly/2XtwTIm (rap "did not evolve or exist in isolation from … other major components" of culture).

Much like the violent depictions that have permeated art since the days of Aristotle, rap music "serves to validate the existence of the performer" by creating a "contextual space for an *affective individuality*, or a variety of forms of behavior and speech … which in turn then inform identity construction." Christopher J. Schneider, *Culture, Rap Music, "Bitch," and the Development of the Censorship Frame*, 55 Am. Behavioral Scientist 36 (2010). Given the context in which rap developed, it is therefore unsurprising that personalized violence is at the core of the genre, which is typified by a notably aggressive form of lyrical expression. *See* Powell, *supra*, at 484-86 (discussing rap's history of articulating "displeasure with the law"). Rap also relies on hyperbole far more heavily than most other comparable forms of expression. *See* Jennifer C. Lena, *Social Context and Musical Content of Rap Music,*

*1979-1995*, 85 Soc. Forces 479, 489 (2006) (noting "the surface-level tension that exaggerated violence in hardcore rap provokes between reality and art"); *see also, e.g.*, *Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 170 (6th Cir. 2005) (referring to rap as "rhetorical hyperbole").

In sum, however distasteful some may find petitioner's lyrics, there is no denying that they are of a piece with a long tradition of violent imagery both in art and in rap. *See, e.g.*, Body Count, *Cop Killer*, *on* Body Count (Sire 1992) ("Cop killer, better you than me/cop killer, f**k police brutality/cop killer, I know your momma's grieving/cop killer, but tonight we get even"). And what this Court said nearly 50 years ago remains just as true today: "[O]ne man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971).

2. While violence in art may be nothing new, modern technology has fundamentally changed the way it is consumed. In the past, most expression was delivered face-to-face, and if not in person, in print, on stage, or over the airwaves. That was largely true of art too. Until recently, most artistic expression was confined to the gallery, the theater, or the page—spaces where artistic expression is widely expected and (relatively) easily placed in proper context, and thus can be experienced as such. But times have changed. "The Internet makes it possible with unprecedented ease to achieve world-wide distribution of material … posted to its public areas." *United States v. Baker*, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995). As a result, most expression today is generated and/or consumed online. Again, art is no different.

Artistic expression of all sorts now may be accessed from the comfort of one's home at the blink of an eye or the swipe of a finger.

With that dramatic expansion of art's domain has come a concomitant expansion of art's capacity for provocation and offense. When artwork is encountered on a museum wall with a staid plaque affixed gently beneath it, one may question its taste, but no one seriously questions its entitlement to First Amendment protection. The halls of the Museum of Modern Art are filled with lurid depictions of grotesque violence, yet few have ever suggested that the artists who created them should be prosecuted for making terroristic threats. Reactions are sometimes quite different, however, when people encounter expressions or depictions of violence online in the privacy of their own homes.

That dichotomy may be understandable at a superficial level—it is easier to attribute artistry to expressions of violence that seem, either through their setting in a gallery or the medium of their expression, somehow removed from the everyday. But that subjective reaction should not change the constitutional analysis. To the contrary, maintaining 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," *Watts*, 394 U.S. at 708 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), requires a renewed commitment to understanding expression in context

before imposing carceral consequences for "threatening" speech.

That is perhaps nowhere more important than in the context of rap. Combined with the increased (and, perhaps, increasingly intrusive) scope of art's domain in the digital world, the twin pillars of the genre of rap—personalized violence and hyperbole—make it an easy target for censorship. Indeed, as this case vividly illustrates, "using rap lyrics as evidence" of violent intent—*i.e.*, "as literal statements of fact rather than artistic expression"—has become "an increasingly popular law enforcement tactic." Erik Nielson, *'Rap on Trial': Why Lyrics Should Be Off-Limits*, Rolling Stone (May 3, 2017), available at https://bit.ly/2UdklCQ. But the fact that rap roots itself firmly in the real does not make it any less representational (or any more real) than other forms of violent artistic expression that are entitled to First Amendment protection. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (striking down California statute placing content-based regulations on video games produced with particularly life-like violence).

Now more than ever, then, it is particularly critical to give lower courts meaningful tools for distinguishing the expression or depiction of violence in art from the rare, unprotected "true threat." After all, not only are "esthetic and moral judgments about art and literature" matters "for the individual to make, not for the Government to decree," *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000), but "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor."

*Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007) (Roberts, C.J.).

* * *

Fifty years ago, this Court invalidated the conviction of a young draftee who, caught up in the fervor of an antiwar rally, proclaimed that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." *Watts*, 394 U.S. at 706-08. Shortly thereafter, the Court held that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Cohen*, 403 U.S. at 25. This Court should grant certiorari and confirm that those principles continue to apply with full force today.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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