No. 18-949

IN THE

Supreme Court of the United States

JAMAL KNOX,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE CATO INSTITUTE AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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

Amici curiae Cato Institute and the Rutherford Institute respectfully move for leave to file a brief explaining why this Court should grant certiorari to review the judgment of the Supreme Court of Pennsylvania. *Amici* timely notified counsel of record for both parties more than 10 days prior to filing that they intended to submit the attached brief. Petitioner Jamal Knox has consented to the filing of the brief. Counsel for respondent took "no position," and clarified that respondent "does not expressly consent to the filing of an amicus brief," but is "not expressly objecting to the filing of one either." Out of an abundance of caution, *amici* submit this motion for leave to file pursuant to this Court's Rule 37.2(b).

The Supreme Court of Pennsylvania upheld petitioner's conviction for making "terroristic threats" based on rap lyrics posted on YouTube. *See* Pet. App. 2a-8a. It held that petitioner's speech was an unprotected "true threat" based on a finding of subjective intent to threaten, but it never considered whether the online rap lyrics, in context, were objectively threatening. *Id.* 19a-28a. State high courts and federal courts of appeals are now deeply divided over application of the "true threats" exception, which allows government to criminally prosecute a person for his or her speech. *See* Pet. 8-14. And this Court's opinions regarding the "true threats" exception are few and far between.

Amici are nonprofit organizations devoted to the defense of constitutional liberties, including the First Amendment. *Amici* have a longstanding and shared interest in preserving the widest possible space for free speech and expression, consistent with First Amend-

ment principles, and in identifying those cases that provide the best vehicles for the Court to provide guidance to lower courts on the application of those principles. This Court has relied on *amici*'s arguments in several First Amendment cases. *See, e.g.*, *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1736-1737 (2017) (citing Cato Institute brief); *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 797 (2011) (citing Cato Institute brief); *Snyder* v. *Phelps*, 562 U.S. 443, 448 (2011) (citing Rutherford Institute brief).

Amici respectfully submit that their brief should be accepted in connection with this Court's consideration of the petition for certiorari. This case presents an issue of considerable practical and constitutional importance—whether and when individuals may be criminally prosecuted and incarcerated based on the content of their speech. The Court should resolve the ambiguity in the law regarding the "true threats" exception and take this opportunity to ensure that, consistent with long-held First Amendment principles, the exception remains an exceedingly narrow one.

For the foregoing reasons, the motion to file the brief of *amici curiae* should be granted.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, Rutherford specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Amici are interested in this case because it touches on core questions of individual liberty that the First Amendment was created to protect and preserve. Because the Bill of Rights serves as a safeguard against government excess, *amici* respectfully submit that the Court should grant the petition and reverse the judgment of the Supreme Court of Pennsylvania.

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[1] Counsel of record for both parties received timely notice of *amici*'s intention to file this brief. Petitioner's counsel consented, while Respondent's counsel took "no position" and clarified that respondent "does not expressly consent to the filing of an amicus brief," but is "not expressly objecting to the filing of one either." *Amici* have thus moved for leave to file this brief. No person other than *amici* and their counsel authored any part of this brief or made any monetary contribution to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004). The Constitution's protection of free speech is accordingly at its highest when government attempts to prosecute someone for his or her words. Although this Court has recognized exceptions to that bedrock rule, it has equally recognized that such exceptions must be clearly delineated and narrowly circumscribed to avoid chilling protected speech. *E.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 399 (1992). Nonetheless, the state of the law with respect to the exception at issue—which allows the state to impose criminal liability for "true threats"—is hopelessly muddled.

The decision below is a regrettable consequence of that confusion. Petitioner was tried and convicted for a musical performance, uploaded to social media, that expressed anger at local police. Lower courts are divided on whether such behavior can be criminalized without evidence that an objective listener would consider the speech to be an actual threat. This lack of clarity urgently requires this Court's attention.

Amici write to offer three basic points.

First, divisions among the lower courts over the "true threats" doctrine are particularly dangerous to liberty and cry out for this Court's review. Courts have adopted divergent standards for determining when speech is an unprotected "true threat." And this Court has issued only two opinions on the issue, the last one over 15 years ago (and a fractured one at that). The very existence of ambiguity over whether and when the government may criminally prosecute people for

the content of their speech is a serious threat to liberty. The situation is more alarming given that the Nation is undergoing a communications revolution, driven by unprecedented new forms of online expression—and unprecedented new attempts by government to monitor and restrict such expression. This case is the right vehicle to set clear, badly-needed boundaries for government authority to limit online expression through the harsh cudgel of criminal prosecution.

Second, in clarifying the law, this Court should emphasize that the "true threats" exception, just like obscenity, defamation, and other exceptional categories of unprotected speech, is an exceedingly narrow carveout from the constitutional norm. The First Amendment favors more speech, not less, and the government bears a heavy burden when it seeks to proscribe categories of speech. To keep the "true threats" exception narrow, the Court should confirm what its decisions already suggest: For the exception to apply, the targeted speech must be both objectively threatening *and* subjectively intended as a threat.

Third, the Court's guidance is necessary to avoid chilling protected expression. This Court's longstanding concern with government action that might chill protected artistic or political expression is fully implicated here, where the petitioner was prosecuted for a musical performance that was posted online. And the particular error here further exacerbates that risk: By adopting a subjective-intent-only test, the Supreme Court of Pennsylvania embraced a rule that fails to protect defendants who are prosecuted for their speech, insulates "true threats" convictions from appellate review, and leaves some controversial speakers unprotected even with respect to political or artistic expression.

Accordingly, the Court should grant the petition for certiorari and revisit its "true threats" jurisprudence.

ARGUMENT

I. THE COURT SHOULD ADDRESS PERVASIVE CONFUSION OVER THE "TRUE THREATS" EXCEPTION TO THE FIRST AMENDMENT

"Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. At its fundamental level, the First Amendment prohibits the state from imprisoning people for the content of their speech. Yet courts are deeply divided over the scope of the judicially-recognized exception permitting prosecution for "true threats." Such confusion would be intolerable in any circumstance, but it is especially intolerable at this moment, as governments seeks to control and regulate new forms of online expression. Fresh guidance from this Court on the "true threats" exception is urgently required—and this case presents the perfect vehicle for providing it.

A. The Law Governing The "True Threats" Exception Is In Disarray, Threatening Liberty

"'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002)) (brackets in original). This Court has identified a few very narrow exceptions—"certain well-defined and narrowly limited classes of speech," such as obscenity and defamation—that may be punished without offending the First Amendment. *E.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 399 (1992) (internal quotation marks

omitted); *accord United States* v. *Alvarez*, 567 U.S. 709, 716-717 (2012) (listing the "few 'historic and traditional categories'" of expression that may be subject to content-based regulations (quoting *Stevens*, 559 U.S. at 468)).

In *Watts* v. *United States*, the Court postulated that one of those narrowly limited classes of speech might be so-called "true threats." 394 U.S. 705, 708 (1969) (per curiam). But the Court did not find the speech at issue in *Watts*—a statement made at a Vietnam War protest that the petitioner, if drafted, would aim his rifle at President Johnson—was a true threat. *Id.* at 706. Rather, it concluded that the petitioner's commentary, even if "a kind of very crude offensive method of stating a political opposition to the President," could not reasonably be interpreted as a threat. *Id.* at 707-708. A "'vehement, caustic, and … unpleasantly sharp attack[] on government,'" the Court held, is still not a true threat. *Id.* at 708 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, the Court reversed the petitioner's conviction. *Id.*

Decades passed before this Court revisited the "true threats" exception in *Virginia* v. *Black*, 538 U.S. 343 (2003). In a fractured decision, the Court held unconstitutional a Virginia statute treating the public burning of a cross as "'prima facie evidence of an intent to intimidate.'" *Id.* at 348 (internal quotation marks omitted). The Court explained that cross-burning *could* fall within the category of "true threats" unprotected by the First Amendment, *id.* at 360, but, as Justice O'Connor's plurality opinion explained, the statute went too far by presuming that cross-burning is "always intended to intimidate," *id.* at 365.

Most recently, the Court had the opportunity to clarify some aspects of the "true threats" exception in *Elonis* v. *United States*, 135 S. Ct. 2001 (2015), which considered whether the petitioner's Facebook posts, including posts involving imagined violence against his ex-wife, violated the federal threats statute, 18 U.S.C. § 875(c). 135 S. Ct. at 2004. But the Court resolved that case entirely on statutory grounds, *id.* at 2010, providing no further guidance as to what constitutes a constitutionally-unprotected "true threat."[2]

Together, *Watts* and *Black* indicate that (at a minimum) a "true threat" must be *both* objectively threatening to a reasonable listener and subjectively intended as such by the speaker. *See infra* Part II; *see also United States* v. *Jeffries*, 692 F.3d 473, 485 (6th Cir. 2012) (Sutton, J., dubitante) (suggesting that interpretation with respect to the federal threat statute); *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (suggesting speech "must objectively *be* a threat and subjectively be *intended* as such" but that, post-*Black*, the rule is "unclear"). Yet with virtually no guidance from this Court on the nature of the "true threats" exception for over a decade, state high courts and federal courts of appeals have become deeply divided on even the most basic questions regarding the exception's scope. Most courts apply some objective reasonable listener standard. *See, e.g.*, *Jeffries*, 692 F.3d at 478

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[2] The Court in *Elonis* held only that § 875(c) requires a *mens rea* greater than negligence, declining to consider whether recklessness is sufficient. 135 S. Ct. at 2012-2013. In that way, too, the Court refrained from clarifying the laws criminalizing threatening speech. *See id.* at 2014 (Alito, J., concurring in part and dissenting in part) (failure to articulate clear *mens rea* standard "will have regrettable consequences"); *id.* at 2028 (Thomas, J., dissenting) (criticizing failure "to announce a clear rule").

(majority opinion). A minority (including the Supreme Court of Pennsylvania here) employs a purely subjective test. *E.g.*, *United States* v. *Heineman*, 767 F.3d 970, 978 (10th Cir. 2014). Further divisions exist on either side of the objective/subjective divide.[3]

There is thus significant confusion over when government may prosecute individuals for their speech. Such ambiguity in the criminal law is dangerous to liberty, as it requires ordinary citizens to decipher "riddles that even … top lawyers struggle to solve." *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1891 (2018). Indeed, such ambiguity contravenes the definitional requirement that, for a category of speech to fall outside of the First Amendment's broad ambit, it must be "'well-defined'" and "'narrowly limited.'" *R.A.V.*, 505 U.S. at 399 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942)); *see also Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) ("government [must] not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored").

The "true threats" exception stands in contrast to other categories of unprotected speech that have benefited from this Court's sustained attention. The Court worked hard to define the limits of the obscenity exception, recognizing the "strain" placed "on both state and federal courts" by confusion in the law. *Miller* v. *California*, 413 U.S. 15, 20-23, 24, 29 (1973); *see also Hamling* v. *United States*, 418 U.S. 87, 123 (1974) (setting

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[3] *Compare United States* v. *Clemens*, 738 F.3d 1, 11 (1st Cir. 2013) (some courts apply a subjective intent standard only to communication of the threat, but not the threat itself), *with United States* v. *Cassel*, 408 F.3d 622, 632-633 (9th Cir. 2005) (requiring "that the speaker subjectively intended the speech as a threat").

forth scienter requirement for obscenity exception). As new questions about the obscenity exception arose in the context of early online speech, the Court took those up, too. *E.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 868-869 (1997) (full First Amendment protection accorded to "the vast democratic forums of the Internet").

Similarly, this Court's cases evince a long "struggle[] … to define the proper accommodation between the law of defamation and the … First Amendment," *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). After the "actual malice" standard announced in *New York Times Co.* v. *Sullivan* divided the Court, *see Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), the Court revisited the issue just three years later, *Gertz*, 418 U.S. at 333-339, 347. And because confusion over the scope of the defamation exception persisted, the Court repeatedly returned to the issue. *See, e.g.*, *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 50 (1988) (parody protected and not subject to defamation exception).[4]

Confusion over the "true threats" exception presents the same significant dangers to liberty as confusion over those other exceptions to the First Amendment—and the same imperative to remedy such confusion and reaffirm First Amendment rights. Defining the scope of First Amendment exceptions with precision "may not be an easy road," but it is part of the Court's "'duty to uphold … constitutional guarantees.'" *Miller*, 413 U.S. at 29 (quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 187-188 (1964) (opinion of Brennan, J.)).

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[4] Likewise, with respect to the amorphous "fighting words" exception, *see Chaplinsky*, 315 U.S. at 572, the Court limited that exception's scope, *see, e.g.*, *Cohen* v. *California*, 403 U.S. 15, 19-20 (1971), and ultimately reduced it to near non-existence, *e.g.*, *R.A.V.*, 505 U.S. at 383-384.

B. This Is The Right Vehicle For Clarifying The "True Threats" Exception

This case is an excellent vehicle for the Court to consider the scope of the "true threats" exception and to provide badly needed guidance for the lower courts regarding when government may prosecute people based on the substance of their expression.

First, this case squarely raises the central question dividing state and federal circuit courts, namely the nature of the "true threats" test and its objective and subjective components. *See* Pet. 1, 8-14. One aspect of that question is the level of *mens rea* required to render allegedly threatening speech unprotected, which this Court has flagged as worthy of consideration but not yet addressed by applying First Amendment principles, *see Elonis*, 135 S. Ct. at 2004; *see also Perez* v. *Florida*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring) (urging the Court to decide the constitutional "question [it] avoided … in *Elonis*"). Another aspect is whether the speech at issue must be objectively threatening, subjectively intended as such, or both. *Compare, e.g.*, *Jeffries*, 692 F.3d at 478, *with, e.g.*, *Heineman*, 767 F.3d at 978, *and Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante). The Supreme Court of Pennsylvania's decision implicates both issues. Granting certiorari would allow the Court to resolve fundamental, unsettled, and urgent questions about the "true threats" exception.

Second, this case is an especially good vehicle because it arises in the context of online speech. As the Court recently recognized, "the 'vast democratic forums of the Internet'" are now "the most important places … for the exchange of views." *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1735 (2017). And social media sites like Facebook and YouTube are the most

important and broadly used channels of online communication and expression today, used to "debate religion and politics," "look for work," and "petition … elected representatives." *Id.* at 1735-1736; *Elonis*, 135 S. Ct. at 2004-2005 (discussing use of Facebook); *see also* Harawa, *Social Media Thoughtcrimes*, 35 Pace L. Rev. 366, 366 (2014) ("Social media is a necessary part of modern interaction.").[5]

The Internet provides a medium for communication, expression, and commentary to flourish at a historically unprecedented scale; anyone with a computer or smartphone can be a publisher or a performer. But as the Internet changes the fabric of American life, government has tried and will keep trying to monitor, restrict, and prosecute expression on the Internet in myriad new ways. *See, e.g.*, *Packingham*, 137 S. Ct. at 1737 (state law forbidding certain people from speaking through social media). And the Internet provides those who would police speech with a target-rich environment; indeed, in *Packingham*, in *Elonis*, and in this case, law enforcement officials actively surveilled social media for speech to target. *Id.* at 1734; *Elonis*, 135 S. Ct. at 2006; Pet. App. 6a.

As the Internet enhances our ability to communicate and express our views, it also enhances the government's ability to police our communication and expression. Affirming that the First Amendment's protections apply fully to online expression is an independent reason to take up this case.

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[5] This case involves rap lyrics posted on YouTube, the second-most trafficked website in America. *See* https://www.alexa.com/topsites/countries/US (visited Mar. 6, 2019).

II. THE COURT SHOULD EMPHASIZE THAT THE "TRUE THREATS" EXCEPTION IS NARROW

The Court should grant the petition to answer urgent questions regarding the "true threats" exception in a manner that expands, rather than contracts, individual liberty. The "true threats" exception must remain an exceedingly narrow carveout to the broad protections of the First Amendment. Requiring courts to consider targeted speech both objectively *and* subjectively is one important way to ensure that result. By contrast, the test employed by the Supreme Court of Pennsylvania works an unwarranted and dangerous expansion of the "true threats" exception.

A. The "True Threats" Exception Is Narrow

The constitutional right to free speech is an essential aspect of American liberty. Accordingly, content-based restrictions on speech are "presumed invalid," and the burden is *always* on the government to show that a speech regulation falls within the confined set of categories that may be subject to content-based prosecution. *E.g.*, *Alvarez*, 567 U.S. at 716-717 (internal quotation marks omitted). Close questions, moreover, must be resolved in favor of more expression, not less; this Court "give[s] the benefit of the doubt to speech, not censorship." *FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 482 (2007) ("*WRTL*"); *see also, e.g.*, *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

Under those principles, this Court has struck down content-based speech restrictions in numerous contexts, even in cases involving repulsive, distasteful, or terrifying speech. *See, e.g.*, *Alvarez*, 567 U.S. at 729-730 (false statements about receiving military honors); *Snyder* v.

Phelps, 562 U.S. 443, 460 (2011) (picketing of military funerals, which was "certainly hurtful"); *Stevens*, 559 U.S. at 465-466 (depictions of animal cruelty, including "crush videos" that showed "women slowly crushing animals to death"); *Texas* v. *Johnson*, 491 U.S. 397, 419-421 (1989) (flag desecration, despite the "flag's deservedly cherished place in our community"); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (Ku Klux Klan rally).

The Court has been similarly skeptical of efforts to prosecute supposedly threatening speech. In *Watts*, the Court reversed the petitioner's conviction, holding that the government may theoretically prohibit "true threats," but only after a thorough consideration of context, set against the presumption that crude, offensive, abusive, inexact, or unpleasant rhetoric is still protected. 394 U.S. at 707-708. The Court reaffirmed the narrowness of the "true threats" exception in *Black*, noting that even speech that is overwhelmingly viewed as discomfiting or offensive may be protected. 538 U.S. at 358-359; *see also id.* at 367 (plurality opinion) ("The First Amendment does not permit … shortcut[s]" in determining whether speech is a true threat). Even in the case of cross burning, the Court explained, to fall within the "true threats" exception, the speaker also needed to act with the intent to intimidate. *See id.* at 359-360 (majority opinion); *id.* at 366-367 (plurality opinion). Both *Watts* and *Black* demand a searching, detailed inquiry before declaring that speech is unprotected by the First Amendment and subject to criminal sanction.

B. Requiring Both Objective And Subjective Analyses Will Keep The "True Threats" Exception Narrow And Safeguard Liberty

Together, *Watts* and *Black* provide a strong foundation for holding that (at a minimum) a true threat must

be both objectively threatening to a reasonable listener *and* subjectively intended as such by the speaker. *Accord Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante). The Court in *Watts* looked to objective factors—the context in which the statement was made, its conditional nature, and the reaction of the audience—to hold that the speech at issue was not a threat. 394 U.S. at 708; *see also Elonis*, 135 S. Ct. at 2027 (Thomas, J., dissenting) ("*Watts* continued the long tradition of focusing on objective criteria[.]"). And the Court in *Black* repeatedly stressed that a true threat requires threatening intent on the part of the speaker. 538 U.S. at 359 (majority opinion) (true threats "encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit" violence (emphasis added)).

Embracing that reasoning would help ensure that the "true threats" exception remains narrow. Neither *Watts* nor *Black* considered objective or subjective analysis to the exclusion of the other. And requiring both analyses—considering both the subjective intent of the defendant and also the objective seriousness of the purported "threat"—would set an appropriately high bar for the prosecution and imprisonment of people solely for the content of their speech. *See Alvarez*, 567 U.S. at 726 (noting government's "heavy burden" in seeking to regulate protected speech). There are numerous "legal standard[s] that contain[] objective and subjective components" across the law, from the Eighth Amendment to the immigration law's "well-founded fear" requirement. *Jeffries*, 692 F.3d at 485-486 (Sutton, J., dubitante) (collecting examples). Requiring both objective and subjective components is especially appropriate before someone is locked up for speaking. *E.g.*, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("A law imposing

criminal penalties on protected speech is a stark example of speech suppression.").

By contrast, the decision of the Supreme Court of Pennsylvania will, if allowed to stand, lower the bar that the government must meet before criminalizing free expression. It allows for a criminal conviction based entirely on the speaker's supposed subjective intent, even if the speech at issue is, in context, objectively non-threatening. The court below did not consider whether the song at issue was objectively threatening and declared (mistakenly) that the objective standard is no longer viable after *Black*. Pet. App. 19a. That view incorrectly expanded the "true threats" exception, relieving courts of the need to "examine the circumstances in which a statement is made," *Jeffries*, 692 F.3d at 480, and creating the grave risk that "nonthreatening ideological expression" will be drawn "within the ambit of the prohibition of intimidating expression," *Black*, 538 U.S. at 386 (Souter, J., concurring in part in the judgment and dissenting in part).

Lowering the bar in this manner would vitiate the law's longstanding preference for more speech, not less. *See, e.g.*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011) ("The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'"); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas[.]"); *accord WRTL*, 551 U.S. at 482. Lowering the bar for invoking the "true threats" exception would endanger free expression at a time of heightened uncertainty regarding online speech in particular, and it would contravene the reasoning of *Watts* and *Black* as well as fundamental

First Amendment principles. The Court should take up this case to ensure that the "true threats" exception to the First Amendment remains narrow.

III. The Court's Guidance Is Required To Prevent The Chilling Of Protected Speech

The presence or absence of First Amendment protection has real world effects. Ill-defined categories of criminally-proscribable speech are likely to chill otherwise protected expression, as speakers who cannot discern any limiting principle attempt to steer clear of the criminal law. The rule of the Supreme Court of Pennsylvania threatens to chill artistic and political expression online in particular. And the particular error here—the adoption of a subjective-analysis-only test—exacerbates those chilling effects.

A. This Case Implicates Longstanding Concerns Over The Chilling Of Protected Political And Artistic Speech

Government action that chills free expression is in "direct contravention of the First Amendment's dictates." *Riley*, 487 U.S. at 794; *see also New York Times*, 376 U.S. at 279 (a rule that "dampens the vigor and limits the variety of public debate … is inconsistent with the First and Fourteenth Amendments."). This is especially true when the regulation at issue chills speech and expression through "'fear of criminal sanctions.'" *E.g.*, *New York* v. *Ferber*, 458 U.S. 747, 768-769 (1982); *see also Black*, 538 U.S. at 365 (plurality opinion) (challenged statute "chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech"). Concerns about chilling effects are at their zenith when there is a possibility that

government action will stifle artistic or political expression. *See, e.g.*, *Miller*, 413 U.S. at 22-23 ("[T]he courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."); *cf.* Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 257 ("Public discussions of public issues … must have a freedom unabridged by our agents.… Literature and the arts must be protected …. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.").

The Court's longstanding concerns regarding chilling artistic and political expression are fully implicated here. Petitioner was convicted of making "terroristic threats" based on rap lyrics that he performed, under a bombastic stage name, about his encounters with law enforcement as a young African-American man in the City of Pittsburgh. *See* Pet. 3-5. The performance was an homage to, and shared its name and subject matter with, a 1988 song by iconic rap group N.W.A. expressing rage at the treatment of African-Americans by police in Los Angeles. *See* Pet. 5. The performance referenced petitioner's own negative experiences with particular law enforcement officers and the death of a friend who was killed by police. *Id.* Criminalizing petitioner's speech unquestionably raises the significant risk of chilling other artistic and political expression. *E.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) ("music" and "verse" are "unquestionably shielded" by the First Amendment); *see also, e.g.*, *Watts*, 394 U.S. at 708 (even "vituperative" language must be interpreted "'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'").

The risk of chilling effects is heightened by the fact that the speech here occurred online. Users of social media sites such as YouTube and Facebook "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 1735-1736 (quoting *Reno*, 521 U.S. at 870). Such performative expression can and does include hyperbolic, rough, discomfiting language—especially on a site like YouTube, which was built for users to directly upload and share videos and recordings of themselves performing. *Cf. Watts*, 394 U.S. at 708 ("The language of the political arena ... is often vituperative, abusive, and inexact."). Here, the rap lyrics and performance for which petitioner was ultimately convicted were uploaded to YouTube and Facebook, and the supposed threats contained in the lyrics were discovered by law enforcement agents who were actively monitoring social media accounts affiliated with the petitioner. Pet. 5; *see also, e.g.*, *Packingham*, 137 S. Ct. at 1734; *Elonis*, 135 S. Ct. at 2006.

The Internet—and in particular social media—is the largest and most important public forum on the planet. *See Packingham*, 137 S. Ct. at 1735 ("[I]n identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace ... and social media in particular."). And it is also the most easily surveilled. Just as in *Watts*, where a federal investigator infiltrated a public political rally and made an arrest based on offensive political statements, 394 U.S. at 708, law enforcement now infiltrates and monitors political and artistic fora on the Internet. *See Packingham*, 137 S. Ct. at 1734; *Elonis*, 135 S. Ct. at 2006. The ease with which government agents may monitor speech online greatly magnifies the poten-

tial chilling effects caused by confusion over the scope of the "true threats" exception. *Cf. Ferber*, 458 U.S. at 768-769 (statutes permitting punishment of speech must be narrowly drawn to avoid chilling effects); *Gooding* v. *Wilson*, 405 U.S. 518, 521-522 (1972) (same).

The confused state of the law further intensifies those risks. For example, the Supreme Court of Pennsylvania and the Third Circuit have adopted *opposing* views of what is required to establish a "true threat." *Compare* Pet. App. 17a-22a (adopting subjective test) *with United States* v. *Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013) ("[O]ur test asks whether a reasonable speaker would foresee the statement would be understood as a threat."), *rev'd on other grounds*, 135 S. Ct. 2001 (2015). The lack of clarity over how the First Amendment applies, even between courts with geographically overlapping jurisdictions, makes it all the more likely that the specter of "criminal threats" liability will chill protected expression.

B. Objective Analysis Is A Critical Safety Valve For Protecting Free Expression

This Court has explained that "no reasonable speaker" would engage in expression that could be punished by the state when the "only defense to a criminal prosecution would be that [the speaker's] motives were pure." *WRTL*, 551 U.S. at 468. The specific error committed by the Supreme Court of Pennsylvania here—adopting a purely subjective intent test for whether speech is an unprotected "true threat"—is likely to chill free expression for that reason and several others.

First, a subjective-intent-only test makes it harder for courts of appeals to reject criminal liability for

speech that, while controversial or offensive, is objectively non-threatening. A defendant's subjective intent is classically a question of fact for a jury. For subjective-analysis-only courts, like the Ninth Circuit, whether speech is a "true threat" thus reduces to a fact issue. *See, e.g.*, *Melugin* v. *Hames*, 38 F.3d 1478, 1485 (9th Cir. 1994). And factfinding typically is (and should be) exceedingly difficult to overturn on appeal.

When courts adopt a subjective-intent-only standard, then, they effectively insulate the "true threats" determination from appellate review. That was the case here: Applying "our appellate standard of review," the Supreme Court of Pennsylvania treated the subjective intent question as a finding of fact and asked only whether "competent evidence" supported it. Pet. App. 22a.

Such insulation is dangerous. Courts are the appropriate final arbiters of the scope of the First Amendment, especially for speakers who are unpopular or lack political power or social capital. Hampering appellate courts' ability to intercede on behalf of unpopular or controversial speakers undercuts free expression and undermines one of the most important functions of judges in a free society: upholding the Bill of Rights against majoritarian encroachment. *See, e.g.*, *Arizona Free Enter. Club's*, 564 U.S. at 754 ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943) ("The

very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities … and to establish them as legal principles to be applied by the courts."). The deferential standard of review applicable to findings of fact does not sufficiently protect someone who faces imprisonment for unpopular speech.

Second, even where a defendant *might* have some intent to intimidate, that alone cannot be enough. *Cf. WRTL*, 551 U.S. at 468 (subjective-intent-only test "could lead to the bizarre result that identical [speech] could be protected speech for one speaker, while leading to criminal penalties for another"). Many forms of art, political theatre, and therapeutic expression are driven by and evoke genuine feelings of rage or despair. That is true not just of the music of artists like N.W.A. or Eminem,[6] but also of other forms of provocative art that explore themes of violence.[7] And it is true here. Using a fictional persona, petitioner channeled feelings of powerlessness and frustration related to his arrest by local law

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[6] *See* Oral Arg. Tr. 41, 48-49, *Elonis* v. *United States*, No. 13-983 (U.S. Dec. 1, 2014) (Roberts, C.J., discussing "very inflammatory language" in Eminem's lyrics and wondering whether the absence of a reasonable-person analysis would "subject to prosecution the lyrics that a lot of rap artists use").

[7] For example, Los Angeles artist Alex Schaefer was visited by police after he began depicting bank branches on fire in response to the 2008 financial crisis. *See* Romero, *Banks-on-Fire Paintings by Artist Alex Schaefer Inspire LAPD Concern: Now Collectors Willing to Pay Thousands*, LA Weekly (Sept. 7, 2011). *Cf.* Kerr, *Aesthetic Play and Bad Intent*, 103 Minn. L. Rev. Headnotes 101, 103-104 (2018) (discussing difficulty of determining what counts as art in era of "novel media" like rap and performance art; concluding that audience reaction is critical to the delineation).

enforcement into his lyrics. Pet. 5; Pet. App. 12a. The lyrics incorporated rude language and graphic, violent imagery as part of a musical performance documenting and interpreting petitioner's experiences, in a manner consistent with the rap genre. Pet. 3. They were posted online to a page associated with his persona and followed by his fans. *See* Pet. App. 106a.

Objective analysis is much better at distinguishing between a genuine threat and protected expression motivated by real pain or anger. *Cf. Snyder*, 562 U.S. at 460-461 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and ... inflict great pain.... [W]e cannot react to that pain by punishing the speaker."). Objective analysis thus helps ensure "sufficient breathing room for protected speech." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). By contrast, and as this case demonstrates, critical context is rendered largely irrelevant under a subjective-intent-only standard. *See, e.g.*, Pet. App. 22a. And all of this is doubly true online, where background facts may be hard to ascertain, where content is often designed to titillate and provoke, where hyperbole is common, and where context is all the more important to grasp the meaning of disembodied words, images, and media.[8]

An objectivity requirement ensures that only real threats of violence are subject to criminal sanctions.

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[8] Moreover, the gap between a speaker's intentions and the objective capacity to commit real-world harm becomes a chasm in the context of online speech. Ugly and offensive forms of provocation—"trolling," in common parlance—are rampant online. Only by objectively considering the full context could a court fairly determine whether speech in fact conveys to a reasonable observer "a serious expression of an intent to commit" violence. *Black*, 538 U.S. at 359 (majority opinion).

See Jeffries, 692 F.3d at 480. It ensures that the "true threats" exception remains anchored to its ultimate purpose—protecting listeners from genuine "fear of violence … and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. Requiring speech to be *both* objectively threatening to a reasonable listener *and* subjectively intended as such will help ensure that the "true threats" exception does not chill protected expression.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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