No. 13-983

In the Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Clay Calvert
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
P.O. Box 118400
Gainesville, FL 32611
Telephone: 352-273-1096
Email: ccalvert@jou.ufl.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson
Center the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
Telephone: 434-295-4784
Email: jjw@tjcenter.org
*Counsel of Record

(Counsel continued on inside cover)

Robert D. Richards
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802
Telephone: 841-863-1900
Email: rdr2@psu.edu

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. In fact, the Thomas Jefferson Center was significantly involved in *Virginia v. Black*, the case that is at the heart of the matter now before this Court. In *Virginia v. Black*, the Center filed *amicus curiae* memoranda or briefs in the Carroll County Circuit Court, the Virginia Court of Appeals, the Virginia Supreme Court, and this Court.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published scholarly articles on the true threats doctrine, the subjects at issue in this case.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20 years, the Pennsylvania Center for the First Amendment has been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

ARGUMENT

In light of ongoing uncertainty as to the proper application of *Watts v. United States* and the conflict among circuits following *Virginia v. Black*, it appears certain that this Court will have to revisit the issue of true threats again. *Amici* respectfully suggest that this is the ideal case with which to do so, as it provides this Court the opportunity to determine whether the true threat analysis developed by *Watts* and *Black* can adequately address issues raised by

the emergence of social networking and other modern modes of communication that, while not yet prominent when those cases were heard, underlie the vast majority of contemporary threat cases.

By accepting the Petition in this matter, this Court can also address for the first time whether the nature of the medium through which speech is conveyed affects a true threat analysis. This is an important question because individuals increasingly face prosecution for alleged threats conveyed on new media, including Facebook, YouTube, and Twitter. If context really is a key variable in determining the point at which speech loses First Amendment protection, as this Court made clear in the decidedly pre-Internet cases of *Watts* and *Black*, then lower courts urgently need this Court's guidance on how the context of online social media affects the true threats analysis.

A. This Case Presents an Ideal Opportunity for this Court to Determine Whether Its Current True Threats Doctrine is Compatible with Contemporary Modes of Communication

This Court's existing approach to true threats appears to face challenges that are both backward- and forward-looking. Certain challenges are merely products of the cultural norms and conventions of the period in which *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), was decided. Specifically, the current true threats doctrine was initially constructed exclusively around a particular type of

communication. The face-to-face, political rally rhetoric at issue in *Watts* has been supplanted by anonymous trolls wreaking havoc on message boards and individuals who, perhaps emboldened by too much "digital courage," treat the internet as a global sounding board where anything goes. This leads directly to what will likely be the more pressing challenges, as courts learn to assess, adapt, and ultimately apply *Watts* to a new breed of threat cases informed by the internet, social media, and other revolutionary developments in communication that earlier cases never contemplated.[2]

This case presents the Court with the opportunity to determine whether social media and other modern modes of communication require a reevaluation of *Watts* and *Virginia v. Black*, 538 U.S. 343 (2003), or if those cases remain relevant and fully capable of performing as intended to distinguish threats from constitutionally protected speech. 394 U.S. at 707. This is a question without an obvious answer given the degree to which aspects of contemporary expression are seemingly at odds with the factors discussed in *Watts*.

Both *Watts* and *Black* involved speakers whose identity was known, or at least readily discernable, because the allegedly threatening speech occurred face-to-face, 394 U.S. at 706 (speaking to a small

[2] While *Black* was decided in 2003, the expression at issue in that case (cross burning) was distinctly analog. This Court has yet to consider the modern incarnation of potentially threatening speech present in this case.

discussion group at a public rally near the Washington Monument), or out in the open, 538 U.S. at 348 (burning a cross before twenty-five to thirty attendees at a rally hosted on private property). This Court may well want to consider how *Watts*' contextual analysis is changed by a shift away from this type of open expression by identifiable speakers toward that which predominates online, where speakers exercise near-complete control over their persona, pseudonyms are often preferred—if not required, and discovering the actual identity of a speaker can require the intervention of law enforcement or other third parties.

While contemporary speakers may exercise more control over their online identities, their ability to control the distribution of their communications is severely constrained. The nature of social networks permits a message intended for one or more specific listeners to be distributed among countless unintended recipients in the blink of an eye, often without the speaker's knowledge or consent. Moreover, messages that a speaker *specifically intends to exclude from certain listeners* may nevertheless be received by those individuals by way of unknown overlaps among the parties' respective social networks.[3] The inability of a speaker to effectively define and limit the audience to whom he

[3] This could be especially problematic when considering a statute such as 18 U.S.C. §875(c), the same statute that the Petitioner in this case was convicted under. Section 875(c) does not require that a threat be communicated to its supposed target. Instead, it prohibits any "communication containing any threat" regardless of whom it is communicated to.

communicates online or through social media would appear to pose serious problems for a court trying to evaluate an alleged threat under *Watts*, given how important the audience was to the Court's analysis.

The audience figured into two of the three factors mentioned in *Watts*: first, as part of the "context" surrounding the defendant's speech, 394 U.S. at 706 (audience consisted of a small discussion group that splintered off from a larger public rally); and second, as the basis for surmising that the defendant's statement was made in jest, 394 U.S. at 707 (audience reaction—specifically, laughter—indicated that comment was not intended as a serious threat). It seems unlikely that this Court can continue to evaluate true threats under a standard that emphasizes the audience and its reaction to allegedly threatening speech when speakers utilizing social media have so little control over who ultimately hears their message and what those unintended listeners may make of it. On the other hand, it may prove that certain conventions make evaluating alleged threats in the context of social media easier. One could imagine, for example, a court examining the number of "likes" an allegedly threatening post has received on Facebook as evidence of the speaker's true meaning. Social media interaction may ultimately turn out to be a poor analog for an audience's laughter, but the extent to which the factors articulated in *Watts* are adaptable to modern modes of communication will remain unknown until this Court decides to reevaluate its true threat doctrine.

Just as neither *Watts* nor *Black* could have been expected to anticipate the radical changes in contemporary communication exemplified by social media based on their facts, those cases never contemplated alleged threats conveyed in the form of a specific genre of artistic expression. This case, however, does present an opportunity to address whether or not the genre of artistic expression through which a message is conveyed is relevant to a court's evaluation of alleged threats. While *Watts* and *Black* made it plain that context matters, this Court should clarify how non-traditional modes of artistic and political expression affect the contextual analysis and, in turn, the assumptions that can be made about people's understanding (or lack thereof) of that genre. This is especially important in cases like this one where a speaker communicates through a potentially controversial genre of artistic expression like rap music.

Rap, and in particular, certain extreme sub-genres of rap such as gangsta rap, carry with them many negative stereotypes of violence and crime. Furthermore, the genre is freighted with negative racial images and racist stereotypes. Rap has long been part of black oppositional culture, spurring controversies in the late 1980s and early 1990s over lyrics allegedly glorifying—if not encouraging—the killing of police officers. For instance, the rapper Ice-T's heavy metal band, Body Count, released a song titled "Cop Killer" in 1992, featuring lyrics such as "I'm 'bout to bust some shots off/I'm 'bout to dust some cops off" and "fuck the police" (that latter lyric

sung repeatedly). The song drew massive protests from politicians, lawmakers and culture warriors.

As a result of these and other stereotypes broadly associated with rap, a speaker who communicates through quoted verses or who frames his message in a particularly extreme style of rap may find the legal deck stacked against him in a true threat case, with listeners (both intended and unintended), jurors, and even judges perhaps wrongly assuming that the mere form of expression makes it more likely to be a true threat. In short, rap carries with it into court the heavy baggage of negative controversy and stigmatization; it is an entire genre of artistic expression prime for judicial and juror abuse.

Those familiar with rap music understand, however, that it often involves posturing and hyperbole, with rappers boasting and taking on personas to impress others. How should this aspect of art and fantasy affect a court's true threat analysis? This Court recently made it clear that fictional and violent entertainment fare receives First Amendment protection. *Brown v. Entertainment Merchants Association,* 131 S. Ct. 2729 (2011). Additionally, rap (including "Cop Killer") has long included a protest and political component—speech at the core of First Amendment protection. In summary, rap is complex. It involves political, violent, racial, artistic and cultural components, all of which affect the meaning and interpretation of any given instance of rap. This Court is encouraged to consider the implications of

such complex genres of artistic expression for future true threat cases, as well as what assumptions, if any, might be necessary regarding a reasonable listener's understanding of specific genres in order to ensure that protected speech is neither improperly punished nor chilled.

The questions raised above reflect the realities of contemporary communication including the rapid ascendency of social media and other new modes of expression. These developments cast serious doubt on the ability of this Court's current true threats doctrine to adequately protect speech in the context of social media and other online communications that may appear threatening but does not satisfy the constitutional standard for true threats. While these concerns might be alleviated somewhat were the existing doctrine particularly robust, that is simply not the case. In fact, *amici*'s concern regarding the continued application of *Watts* and *Black* to alleged threats is due in large part to the uncertainty that hangs over those cases.

B. *Watts* and *Black* Remain a Source of Conflict and Confusion Among the Circuit Courts

This Court's conclusion that the First Amendment does not protect "true threats," 394 U.S. at 708, may be the only aspect of that decision that lower courts seem to agree on. From the specific factors that constitute a test for true threats to whether *Watts* established an explicit test in the first place, the various Circuit Courts of Appeal have, over

the past half-century, developed a patchwork of approaches to this complex and rapidly-changing aspect of First Amendment law. *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) ("The Supreme Court's minimal guidance has left each circuit to fashion its own test."); Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 Wash. L. Rev. 1209, 1216 (1999) (Suggesting that *Watts* "failed to provide guiding analysis" on how courts should distinguish between true threats and protected speech, as "the opinion included no explicit test or criteria broadly applicable to other cases.").

The situation is most evident when one reviews the extent to which the circuits are divided over their approach to examining the "context" surrounding an alleged threat. This Court has consistently emphasized the importance of contextual analysis to its First Amendment jurisprudence. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring in judgment) ("Whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."). Consistent with that belief, *Watts* lists context first among the three factors that led the Court to conclude that the defendant's " only offense . . . was a kind of very crude offensive method of stating a political opposition to the President." 394 U.S. at 708 (internal quotations removed). Although one reading of the brief per curiam opinion suggests

that the Court's examination of context focused on the physical environment in which the alleged threat occurred, *id.* at 707, there is arguably no clear explanation of what the inquiry actually entailed. David C. Potter, Note, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. Rev. 779, 791 (1999) (noting that *Watts* failed to "articulate[] a rationale that lower courts can easily apply in examining other threat cases under the First Amendment"). As a result, subsequent courts have developed a myriad of unique formulations for contextual inquiries in true threat cases. Some of these approaches hue closely to the factors articulated in *Watts*, *see, e.g.*, *United States v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004) (considering whether the alleged threat was made in jest, concerned political matters, or was expressly conditional), but the majority have added or subtracted factors freely. The Eighth Circuit, for example, looks at "how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, [and] whether the maker of the threat had made similar statements to the victim on other occasions." *United States v. Hart*, 212 F.3d 1067, 1071 (8th Cir. 2000). The Fifth Circuit seeks to distinguish threats from "idle or careless talk, exaggeration, or something said in a joking manner," *United States v. Guevara*, 408 F.3d 252, 258 (5th Cir. 2005), while the Sixth Circuit suggests that even objectively-threatening speech "cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation." *United States*

v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997). The Second Circuit is among the most unusual in its approach, interpreting *Watts* to say that "only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). *But see id.* at 1029 (Mulligan, Circuit Judge, concurring) (expressing doubt that the standard articulated by the majority is required either "by the statute []or the First Amendment").

Many observers were optimistic that this Court might resolve at least some of these discrepancies when it agreed to revisit true threats for the first time in more than thirty years in *Virginia v. Black*, 538 U.S. 343 (2003). The nature of the resulting opinion, however, appears to have raised more questions than it answered. *See* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1226 (2006) ("Some Supreme Court decisions clarify a murky area of the law. Others further muddy an area in need of clarification. Unfortunately, the Court's decision in *Virginia v. Blac*k has proven to be another instance of the latter."). While it did, for the first time, provide an explicit definition of true threats, 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."), *Black* also led to a split among the circuits as to whether or not the plurality intended to impose a subjective, rather than objective, standard to threats. Crane, 92 Va. L. Rev. at 1261 (noting that

Black actually resulted in "three viable options when it came to the constitutional intent standard for true threats," and that "each approach has found its adherents").

CONCLUSION

Neither *Watts* nor *Black* appears to have resulted in a clear and consistent approach to the analysis of true threats among the lower courts. This uncertainty is likely to be exacerbated further by the proliferation of social networking and other new modes of communication. As such, *amici* respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ J. Joshua Wheeler

Clay Calvert
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
P.O. Box 118400
Gainesville, FL 32611
352-273-1096
ccalvert@jou.ufl.edu

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson
Center the Protection
of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784
jjw@tjcenter.org
*Counsel of Record

Robert D. Richards
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802
Telephone: 841-863-1900
Email: rdr2@psu.edu