No. 10-7187

In the Supreme Court of the United States

KEVIN KJONAAS, LAUREN GAZZOLA, JACOB CONROY, JOSHUA HARPER, ANDREW STEPANIAN, AND DARIUS FULLMER,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* FOR CENTER FOR CONSTITUTIONAL RIGHTS AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*

Proposed *amici* support Petitioners' joint petition for *certiorari* and agree the issues raised in Petitioners' brief warrant review by this Court. *Amici* the Center for Constitutional Rights and the First Amendment Lawyers Association are non-profit civil rights and civil liberties organizations. *Amici* write separately to highlight the profound and disturbing implications of the Third Circuit's application of the true threats doctrine.[1]

The Center for Constitutional Rights ("CCR") is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. CCR has actively protected the rights of marginalized political activists for over forty years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

The First Amendment Lawyers Association is a Nation-wide voluntary association of approximately 200 attorneys who substantially concentrate their practices on matters concerning freedom of expression. For nearly forty years, it has

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[1] 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*, or its counsel, made a monetary contribution to its preparation or submission.

served as a forum for discussing and analyzing free speech matters and for formulating, planning, and monitoring free speech litigation. Its members have a keen interest in a wide range of free expression matters and in their sound adjudication by our courts.

Counsel of record received timely notice of our intent to file this brief, as required by Supreme Court Rule 37.2(a) and *amici* have received written consent from all parties to submit this brief.

SUMMARY OF THE ARGUMENT

Petitioners are animal rights activists who took part in a multipronged campaign to end animal experimentation through speech, advocacy, lawful protests, and use of the internet to publicize both lawful and unlawful actions. While acknowledging that much of Petitioners' political advocacy, in itself, was protected by the First Amendment, the Third Circuit held that Petitioners' "speeches, protests and web postings," could be criminalized as "implied threats" given the broad historical context of one act of violence by animal rights activists in another country, and acts of property destruction in this country. *United States v. Fullmer*, 584 F.3d 132, 156 (3d Cir. 2009).

This incredibly far-reaching holding directly contradicts foundational Supreme Court precedent, and adds to two splits in the circuits regarding application of the true threats doctrine. *Certiorari* review is essential to determine how the true threats doctrine interacts with the incitement doctrine to guide analysis of publicly disseminated menacing speech, and to resolve an explicit and intractable

circuit split on the intent standard required for true threats.

ARGUMENT

I. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE HOW THE TRUE THREATS EXCEPTION APPLIES TO PUBLIC, POLITICAL SPEECH TRADITIONALLY ANALYZED UNDER THE INCITEMENT STANDARD.

This Court has never allowed public, political speech to be proscribed as a true threat. Instead, the Court has repeatedly held that even the most heated political rhetoric is protected by the First Amendment unless it meets the stringent incitement test. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Here, the Third Circuit all but ignored the incitement standard in analyzing Petitioners' protest speech, instead extending this Court's narrow true threats exception to allow for censorship of two new categories of publicly-disseminated speech: chants and slogans at a public protest; and political advocacy undertaken on the internet. This Court has repeatedly declined the former extension, and should likewise decline the latter. *Certiorari* is thus essential to clarify whether menacing speech at a public, political protest may ever be punished as a true threat, and if so, what standard applies.

A. This Court's Distinction Between Public Political Speech and Threatening Private Speech

Unlike incitement, the true threats doctrine has developed through cases involving one-on-one communication—usually letters, telephone calls, or face-to-face conversations. Speech of this nature can be proscribed, because controlling private threats does little or nothing to endanger the value of robust debate underlying the First Amendment. Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290-94 (2001) (compiling justifications and sources in support of restricting threats). Punishing public speech, even menacing public speech, however, does affect debate, and thus must be carefully circumscribed. *Id.* at 293-94 (compiling politically valuable uses of coercive and intimidating speech).

As this Court recognized in *Virginia v. Black*, 538 U.S. 343 (2003), speech that is almost certainly protected when it occurs at a public event may be proscribed as a true threat when it occurs in private, and is directed at an individual, with an intent to intimidate that individual. *Id.* at 366. Thus, the act of burning a cross at a rally receives protection, while burning the same cross on a neighbor's lawn may not. *Id.*

The distinction between public, political rhetoric and private true threats has remained consistent through decades of this Court's precedent and is apparent in seminal cases protecting menacing public speech. Clarence Brandenburg, a Ku Klux Klan leader, spoke to a gathering of Klansmen about the need for "revengeance" against

the President, Congress, and the Supreme Court; meanwhile, others at the rally shouted chants including "bury the niggers." *Brandenburg*, 395 U.S. at 446 n.1. This speech was protected by the First Amendment. *Id.* at 449. Robert Watts, a young draftee during the Vietnam War, told a crowd of anti-war protesters that, if drafted, he would "get [the President] in [his] sights." *Watts v. United States*, 394 U.S. 705, 706 (1969). That speech was political hyperbole protected by the First Amendment, not a true threat. *Id.* at 708. And in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court again found public speech, even that which explicitly threatens, protected by the First Amendment where it does not amount to incitement. *Id.* at 928. Through each of these opportunities, this Court has never endorsed the proposition that a speech made to a crowd at a political rally, not amounting to incitement, can be punished as a true threat.

B. The Circuit Split

Despite the Supreme Court's clear precedent, a circuit split exists as to the extent to which public political speech can be punished as a true threat. *Compare United States v. Dinwiddie,* 76 F.3d 913 (8th Cir. 1996) and *New York v. Operation Rescue National,* 273 F.3d 184 (2d Cir. 2001). By its opinion below, the Third Circuit adds to that split.

In *Dinwiddie,* the Tenth Circuit punished as a true threat a pro-life activist's public speech at a protest outside an abortion clinic. *Id.* at 925-26. The "threats" in question were issued using a bullhorn, and included warnings like "remember Dr. Gunn [a

physician who was killed a year earlier by an abortion opponent] . . . this could happen to you . . . He is not in the world anymore . . . Whoever sheds man's blood, by man his blood shall be shed," *id.* at 917, and "you have not seen violence yet until you see what we do to you." *Id.*

Faced with a virtually identical fact pattern, the Second Circuit found similarly menacing public pronouncements protected by the First Amendment. *See Operation Rescue,* 273 F.3d at 190-96 (soon after the murder of another abortion provider, pro-life activist's statement at protest, directed to clinic doctor, that killing babies is no different than killing doctors and "[y]ou're next, I hope you're next, you're next," did not constitute a true threat).

Both statements are equally menacing, both occurred at a public protest, and both were directed at an individual. Neither speaker expressed an immediate plan to injure the targeted clinic employees. In reviewing these indistinguishable facts, the Second and Tenth Circuits split regarding whether the First Amendment protects these statements. The Third Circuit's ruling in this case adds to this direct circuit split, while failing to engage in any analysis as to the appropriate standard to distinguish a true threat from inflammatory, but protected, political rhetoric.

C. The Opinion Below

The court below held that several of Petitioners' statements at public protests constituted true threats, and were thus unprotected by the First Amendment. *Fullmer*, 584 F.3d at 156-57. Although *Claiborne Hardware* is clearly this Court's most

analogous decision, the Third Circuit all but ignored that case.

Claiborne Hardware involved a challenge by white merchants to an NAACP boycott, and a related campaign for integration and racial equality which "included elements of criminality and elements of majesty." 458 U.S. at 888. Along with the NAACP, the case was brought against Charles Evers individually for the leadership role he played in that organization, his role in planning and supporting the boycott, and for several heated public speeches. *Id.* at 926.

In his attempt to convince the black community to unite and boycott white-owned stores, some of Mr. Evers' language at public rallies was overtly threatening: "If we catch any of you going in any of them racist stores," he told one large gathering, "we're gonna break your damn neck." *Id.* at 902. In another public speech, he warned that boycott violators would be "disciplined" by their own people, and that the Sheriff could not sleep with boycott violators at night. *Id.* One form of promised discipline involved "store watchers" from the black community, who identified boycott violators, read their names at public NAACP meetings, and published the same in a pamphlet entitled "Black Times." *Id.* at 903-904. There were also several significant acts of property damage and violence undertaken to enforce the boycott, including shots fired at the homes of blacks who continued to shop in white-owned stores, vandalism, threatening phone calls, and several alleged beatings. *Id.* at 904-905.

While Mr. Evers was not shown to have taken part in any of the illegal activities, this Court acknowledged that his inflammatory and

threatening rhetoric "might have been understood as inviting an unlawful form of discipline or, at least, as *intending to create a fear of violence*." *Id.* at 927 (emphasis added). Indeed, violence did follow, though not immediately. *See id.* Despite his explicit public threats, directed to his listeners, and the surrounding context of violence and intimidation, the Court found his language protected by the First Amendment.

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech.* To rule otherwise would ignore the profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.

Id. at 928 (citation omitted) (emphasis added) (internal quotation marks omitted).

In joining the circuit split described above, the Third Circuit ignored the Supreme Court's clearly enunciated protection of public speech. Instead, it relied on a broad historical context that includes one act of violence and some property destruction by animal rights activists—a context virtually indistinguishable from the violence and property destruction that also marred the NAACP's boycott—and held that Petitioners' use of "past incidents to instill fear in future targets" rendered their otherwise protected speech and advocacy punishable

as true threats. *Fullmer*, 584 F.3d at 156. For example, Petitioner Gazzola's liability arises, primarily, from speeches and chants made at a protest in front of the home of Robert Harper, a property broker with a relationship to Huntington Life Sciences. The Third Circuit found that, in her chants, Ms. Gazzola referenced other home protests that involved property destruction, and stated that the police could not provide protection, nor could injunctions. *Id.* at 146.

The Third Circuit also claimed, without a record cite, that Ms. Gazzola threatened to burn Robert Harper's house down. It is likely this reference is to an August 9, 2002 protest outside Robert Harper's home which featured a call and response chant where Ms. Gazzola said "What goes around comes around" and the group answered "Burn this house to the ground." 584 F.3d at 157 n.11; *Commonwealth v. Gazzola*, 17 Mass. L. Rep. 308, 2004 Mass. Super. LEXIS 28, *15 (Sup. Ct. 2004).[2]

There is no meaningful distinction between Mr. Evers' and Ms. Gazzola's menacing speech and their use of coercion and shame: both identified and

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[2]According to the Massachusetts court that first considered whether the First Amendment protected this speech,"[t]he chant, repeated four times, was used during a single ten-second time period in a demonstration which lasted more than half an hour.... When those words were uttered, some members of the group were smiling or laughing, and police officers stood nearby, seemingly unconcerned." *Id.* The fact that the Massachusetts court found the chant protected under the First Amendment underlines the need for guidance here.

published the names of targets; and both played a leadership role in a movement that included illegality by other actors.

In finding Mr. Evers' speech protected, the Court specifically referenced its earlier decision in *Watts*, in which it held that threatening speech at a public demonstration could not be punished as a "true threat." 458 U.S. at 928 n.71 (*citing Watts*, 394 U.S. at 706, 708 (1969)). If Mr. Watts' and Mr. Evers' explicitly threatening remarks at public demonstrations could not be punished as true threats, how can Ms. Gazzola's?

Ms. Gazzola's chant is no *more* threatening than Mr. Evers' speech, and indeed, the call and response format of the chant, along with the rhyme, places it squarely in a long tradition of political protest speech. That it was not taken or intended as a true threat is evidenced by the police present for the demonstration, who "stood nearby, seemingly unconcerned." *Gazzola*, 2004 Mass. Super. LEXIS 28 at *15. And Ms. Gazzola's statement that neither the police nor court injunctions could protect Mr. Harper is nearly identical to Mr. Evers' similar warning that the sheriff would not be able to protect those who violated the boycott. 458 U.S. at 902.

The Third Circuit also focused on the allegation that Petitioners "displayed placards with photos of Brian Cass[3] after his beating, with his injuries highlighted in red, at protests." 584 F.3d at 156. Even taking the Third Circuit's version of the

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[3] Mr. Cass, the chief operating officer and managing director of Huntington, was physically assaulted in England in 2001. 584 F.3d at 138.

facts at face value,[4] the implicitly threatening nature of the sign goes no further than Mr. Evers' explicit threats of harm. *See also* Martin Luther King Jr., LETTER FROM A BIRMINGHAM JAIL (Harper S.F. ed., 1994) (warning whites of violence from black nationalists if they blocked King's nonviolent demands).

Here, like in *Claiborne Hardware*, various individuals with a unifying political purpose engaged in a concerted effort involving both lawful and unlawful activities. Like in *Claiborne Hardware*, there is evidence the various individuals communicated with each other. Like in *Claiborne Hardware*, this case involves heated rhetoric followed by illegal action. Like in *Claiborne Hardware*, Petitioners' speech was made during rallies and demonstrations which were intended to coerce their targets. And like in *Claiborne Hardware*, Petitioners selected targets for the campaign, gathered facts, and disseminated the facts to their political allies. The Third Circuit's ruling fails to distinguish *Claiborne Hardware* and eviscerates its protection. Review by this Court is necessary to correct this error, and resolve the split that now exists between the Second, Third, and Eighth Circuits.

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[4] Petitioners' Joint Petition details the lack of support in the record for this claim. See Petitioners' Joint Petition for Writ of Certiorari, at 14 n.7.

II. THE CIRCUIT COURTS ARE DEEPLY AND IRRECONCILABLY SPLIT ON THE INTENT REQUIRED FOR A SPEAKER'S STATEMENT TO CONSTITUTE AN UNPROTECTED TRUE THREAT.

If public political speech which does not amount to incitement can be punished as a true threat, the question arises: under what standard? In issuing its ruling, the panel below added to a circuit split concerning the extent to which any true threat may be punished without subjective intent to threaten. Currently, the First, Second, Third, Fourth, Fifth, Seventh, and Eleventh Circuits have embraced various objective intent standards. The Ninth and Tenth Circuits require subjective intent to threaten. And the Sixth and Eighth Circuits, while acknowledging the question, have declined to provide clear answers.

This Court should grant *certiorari* to resolve the inter- and intra-circuit splits on the requisite intent a speaker must have for his or her statement to constitute a true threat unprotected by the First Amendment.

A. This Court's Statements Regarding the Intent Required for a True Threat

While this Court first recognized the true threats exception to the First Amendment over forty years ago in *Watts*, it did not revisit the issue until *Virginia v. Black* in 2003. The only guidance issued to the circuits in the meantime came when the Court

"granted certiorari to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense [of threats to the President]" in *Rogers v. United States*, 422 U.S. 35, 36 (1975). While the Court ultimately dismissed that conviction on a procedural error, Justice Marshall, joined by Justice Douglas, wrote separately to note they would have reached the intent issue and required the government show a speaker's specific intent to threaten. *Id.* at 47. "In essence," Justice Marshall wrote, "the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes; we should be particularly wary of adopting such a standard for a statute that regulates pure speech." *Id.* (Marshall, J., concurring) (internal citations omitted).

Without a binding decision on the issue, the development of the true threats doctrine took place in the lower courts. *See* Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1237-52 (2006). Despite Justice Marshall's concern over the dangers of the objective intent standard, most of the circuit courts that considered the question in the period between *Watts* and *Black* adopted an objective intent standard to analyze threats. Some relied on an objective reasonable speaker test, finding a true threat "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *See United States v. Kosma*, 951

F.2d 549, 557 (3d Cir. 1991) (emphasis omitted). *See also United States v. Lincoln*, 462 F.2d 1368, 1369 (6th Cir. 1972); *United States v. Johnson*, 14 F.3d 766, 768 (2d Cir. 1994); *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). Others employed a different version of the objective intent standard that focused not on the speaker, but on the listener. Under the objective reasonable listener test, a true threat exists where "an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury." *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973). *See also United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999).

Finally, one circuit court adopted Justice Marshall's specific intent to threaten standard. In *United States v. Twine*, 853 F.2d 676 (9th Cir. 1988), the Ninth Circuit required the government to show that the defendant had "an intent to threaten," for speech to be proscribed as a true threat. *Id.* at 680.

This Court revisited the issue of true threats in *Virginia v. Black* and for the first time, provided a definition: "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. Directly addressing the issue of intent, this Court noted only that "[t]he speaker need not actually intend to carry out the threat." *Id.* at 359-60. Importantly, this Court elaborated its true threats definition by noting that, "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of*

placing the victim in fear of bodily harm or death." Id. at 360 (emphasis added).

This emphasized language cannot reasonably be understood as anything other than a clear requirement of a speaker's subjective intent to threaten. And while the first half of the Court's true threats definition is less clear, the Court's reference to "means to" is best interpreted to modify the entire phrase "communicate a serious expression of an intent to commit an act of unlawful violence." In other words, the speaker must mean to threaten. *See, e.g., United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (in light of *Black*, "[w]e are . . . bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat.").

However, it is also possible to read the phrase "means to communicate" as simply requiring that the utterance itself be knowing and not the result of mistake, duress, or coercion. Under this reading, the second clause—"a serious expression of an intent to commit an act of unlawful violence"—is interpreted to mean a serious expression as determined under an objective, reasonable person standard. *See, e.g., United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004). The courts that have come to this conclusion have arrived there, by and large, by completely ignoring the Court's explicit "intent of placing the victim in fear of bodily harm or death" language, and limiting their analysis to that language in *Black* more conducive to dual interpretations.

B. The Circuit Split

In the wake of *Black*, the circuits have divided on if and how the Court's true threats definition affects the requisite intent. Initially, the First, Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits maintained their objective intent standards without any citation to *Black* or its true threats definition. *See U.S. v. Nishnianidze*, 342 F.3d 6, 15-17 (1st Cir. 2003); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006); *United States v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004); *United States v. Reynolds*, 381 F.3d 404, 406 (5th Cir. 2004); *United States v. Fuller*, 387 F.3d 643 (7th Cir. 2004); *United States v. Koski*, 424 F.3d 812 (8th Cir. 2005); *United States v. Alaboud*, 347 F.3d 1293, 1297-98 (11th Cir. 2003).

In contrast, panels in the Ninth and Tenth Circuits engaged in analysis of the language and impact of *Black*, and found that establishing a true threat requires the showing of a speaker's subjective intent to threaten. *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (true threats "must be made 'with the intent of placing the victim in fear of bodily harm or death.' An intent to threaten is enough; the further intent to carry out the threat is unnecessary.") (quoting *Black*, 538 U.S. at 360); *Cassel*, 408 F.3d at 631 ("only intentional threats are criminally punishable consistently with the First Amendment. . . . A natural reading of [the Court's] language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.")(emphasis in original).

In *Cassel*, the Ninth Circuit further emphasized how the ultimate ruling in *Black* supports the requirement of subjective intent to threaten. *See id* ("The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering any burning of a cross on the property of another prima facie evidence of an intent to intimidate.") (internal quotation marks omitted).

Since the Ninth and Tenth Circuits' contrary interpretation, other circuit courts have acknowledged *Black* might require a revision of the true threats intent requirement, but have avoided ruling on the issue. *See United States v. Cope*, 283 Fed. Appx. 384, 389 (6th Cir. 2008) (recognizing the possibility that *Black* requires that a true threat be made with subjective intent to threaten, but declining to so hold, because the jury was instructed to consider specific intent under the statute); *United States v. Floyd*, 458 F.3d 844, 848 (8th Cir. 2006) ("[O]ur panel is bound by *Koski*, decided two years after *Black*, which specifically noted that the intent of the sender is not an element of a [mailing threatening communication] offense. If the reasoning in *Koski* is faulty in light of *Black*, our panel cannot address it-only the en banc court can do so.").

The impact of *Black* on the intent standard for true threats has created splits within circuit courts as well. For instance, in spite of *Magleby*'s holding that true threats require a showing of specific intent, a different panel of the Tenth Circuit later held that true threats are governed by an objective standard

without citing to either the *Black* or *Magleby* decisions. *United States v. Pinson*, 542 F.3d 822, 831-32 (10th Cir. 2008). And after *Cassel*'s requirement of a specific intent to threaten, another Ninth Circuit panel held that an objective reasonable speaker test applies for threats against the President. *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005). Subsequent Ninth Circuit panels recognized the intra-circuit conflict but declined to rectify it. *United States v. Stewart*, 420 F.3d 1007, 1016-19 (9th Cir. 2005); *Fogel v. Collins*, 531 F.3d 824, 831-33 (9th Cir. 2008). This significant confusion among the circuits requires review by the Court.

C. The Opinion Below

In deciding the case at hand, the Third Circuit joined this intractable split, ignoring the question of Petitioners' subjective intent, and implicitly adopting the objective reasonable listener standard with little analysis. *Fullmer*, 584 F.3d. at 156. *Certiorari* is required to resolve this split, and to avoid application of what amounts to a negligence standard for punishing speech.

By focusing on the reaction of a hypothetical reasonable listener, the objective approach discounts the speaker's First Amendment right to expression, as a speaker may be chilled from using a wide range of language which a reasonable person might or might not find threatening. And by considering the reasonableness of the actual listener's reaction based on specific knowledge held by that individual, the Third Circuit's approach renders it impossible for a speaker to know whether or not her speech amounts to a true threat, unless she somehow surmises ahead of time exactly what is going on in the mind of the

listener. Indeed, this approach would allow a third party to manufacture a threat, if, for example, a corporation targeted by animal rights activists spread rumors (whether true or not) about violent acts by other advocates in other communities.

And even if a court applies the slightly more protective reasonable speaker approach, by disregarding the actual intent of the speaker, both objective tests create a negligence standard for speech crimes—the same standard that applies to common law torts. In other words, an objective true threats test operates as if speech is no different than conduct, and as if the First Amendment does not exist. *See Rogers*, 422 U.S. at 47-48 (Marshall, J., concurring) (the objective interpretation "would have substantial costs in discouraging the 'uninhibited, robust, and wide-open debate' that the First Amendment is intended to protect.") (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)).

While the long-term existence of the intractable intent-standard split in itself justifies review by this Court, reconciliation is especially essential here, where a lower court has allowed punishment of public political speech as a true threat based on broad historical context. In the context of private threats, the difference between a subjective and objective intent standard will rarely be determinative; but where a menacing statement is made in the context of a political protest, especially when the politics involved have also spawned violence and illegality, a broad examination of context may mean that listeners reasonably feel threatened, regardless of whether a speaker actually expresses a threat. *See* John Rothchild, *Menacing*

Speech and the First Amendment: A Functional Approach to Incitement that Threatens, 8 TEX. J. WOMEN & L. 207, 222 (1999) ("The fact that one feels 'threatened,' in the ordinary sense, does not imply that one has been subjected to a threat. One may feel threatened by circumstances that do not involve speech of any sort. Likewise, one may instill fear in others through speech that does not contain threats.")

When an objective negligence standard is combined with consideration of broad historical context, the legitimate fear felt by individuals who are aware of illegality by *some* within a given movement can easily lead to broad censorship of the speech of other, law-abiding protestors within the same movement. This is precisely what happened below. *Certiorari* is necessary to correct the Third Circuit's broad holding that, *in context*, Petitioners' "speeches, protests, and web postings" were *all* true threats, because they were all "tools to further [Petitioners' advocacy]." 584 F.3d at 156.

Specifically, along with the chants identified above, the Third Circuit focused on Petitioners' posting of home addresses and telephone numbers on their website (*see, e.g.*, *id.* at 138, 140, 142-43, 145, 146, 148 n.6, 155) and appeared to rule that such information is beyond the protection of the First Amendment, but explains neither why nor how. *Id.* at 155 ("we find that the posts that . . . disseminate the personal information of individuals employed by Huntingdon and affiliated companies are more problematic").

The Third Circuit's holding, again without analysis, contradicts this Court's precedent. In *NAACP v. Claiborne Hardware Co.*, the Court

considered, along with Mr. Evers' menacing speech, his and the NAACP's endorsement of the publication of boycott violators names. 458 U.S. at 903-904. People who violated the boycott "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." *Id.* at 904. But this Court held that "[t]o the extent that the [state supreme] court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment." *Id.* at 921. While the "Petitioners admittedly sought to persuade others ... through social pressure and the 'threat' of social ostracism," such "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." *Id.* at 909-910. In other words, "[a] massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." *Id.* at 933.

Similarly, in *Organization for a Better Austin v. Keefe*, this Court held that "coercive" leaflets publishing the respondent's home telephone number and requesting recipients to call him was protected speech. 402 U.S. 415, 417, 419-20 (1971). Publication of other personal information has received similar protection. *See, e.g., Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010) (recognizing First Amendment value to publishing unredacted social security numbers on the internet, as a means to draw attention to invasion of privacy occasioned by Virginia's publication of the same). *See also* Eugene

Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1114-15 (2005) (discussing how the publication of names and addresses can help people evaluate and participate in public debate, as well as facilitate lawful remonstrance and social ostracism).

To find otherwise in this case, the court below relied on the context of one act of violence in another country[5] along with a wide variety of property crimes across this country, to transform protected public speech, including some speech that is rude or menacing, into true threats. 584 F.3d at 138-43. This use of context is not supported by precedent, and knows no limit.

Context is important to Free Speech analysis. For example, in *Watts* the Court held that "[t]aken in context" Mr. Watts' words were not a true threat. 394 U.S. at 708. But there, the context in question was the speaker's immediate surroundings and the reaction of the listeners—a speech at an anti-war rally where the listeners' response was laughter. *Id.* at 707. Notably, the Court did not consider recent historical context, including a Presidential assassination less than three years earlier. Similarly, in *Black* the plurality noted the importance of context, directing courts to consider, for example, whether a cross is burned on a neighbor's land with or without permission. 538 U.S. at 366. The Court did not consider the Klan's brutal history of following cross burnings with violence in its exploration of relevant context. *Id.* That view was

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[5] *See supra,* note 3. Notably, the victim of that assault was also the prosecution's lead witness.

advocated by Justice Thomas, but it only garnered his vote. *Id.* at 388-400 (Thomas, J., dissenting).

By relying so heavily on the historical, rather than actual, context of Petitioners' speeches, the Third Circuit decision expands—without discussion or citation—upon an already controversial opinion. In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) a 6-5 split *en banc* panel of the Ninth Circuit Court of Appeals found a true threat where anti-abortion activists published "wanted" posters of abortion practitioners, and a website called the "Nuremberg Files," with lines drawn through the names of murdered or wounded doctors. 290 F.3d at 1062-63. The Ninth Circuit majority held the speech proscribable as a true threat due to three prior murders of abortion practitioners immediately following dissemination of identical posters. *Id.* at 1085.

The use of historical context in *Planned Parenthood* is narrow and exact: three times a specific poster was followed by a murder, thus creation of a new poster could easily be understood as a threat that the targeted doctor would be murdered. Moreover, even the narrow *Planned Parenthood* decision has been highly criticized by scholars. *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 584 n.253 (2004) (compiling scholarly commentary).

The court below used context in a far broader and more problematic way, expanding the *Planned Parenthood* decision, without explanation or citation, beyond the context of multiple murders, instead relying heavily on a physical assault in

England years earlier. Such an expansion of First Amendment law should not happen tacitly.

A great many political movements marry vehement speech and violent action. As now-Chief Judge Kozinski of the Ninth Circuit noted,

> Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.

Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007, 1014 (9th Cir. 2001) (overturned by *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (*en banc*)).

Despite this history, the Court has repeatedly avoided the easy answer of censorship. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should grant the Joint Petition for *Certiorari*.

Respectfully submitted,

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