

No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

v.

UNITED STATES,
Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit*

**AMICI CURIAE BRIEF OF THE MARION B. BRECHNER
FIRST AMENDMENT PROJECT AND RAP MUSIC SCHOLARS
(PROFESSORS ERIK NIELSON AND CHARIS E. KUBRIN)
IN SUPPORT OF PETITIONER**

CLAY CALVERT
Counsel of Record
MARION B. BRECHNER
FIRST AMENDMENT PROJECT
2060 Weimer Hall
Gainesville, FL 32611
(352) 273-1096
ccalvert@jou.ufl.edu
Counsel for Amici Curiae

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OTHER AUTHORITIES:

- Ernest Allen, Jr., *Message Rap*, in DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE 159 (William Eric Perkins ed., 1996) 11
- Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, in AND IT DON'T STOP 6 (Raquel Cepeda ed., 2004) 8
- NOTORIOUS B.I.G., *Things Done Changed*, on READY TO DIE (Bad Boy Records 1994) 23
- Peter Blecha, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS (2004) 18
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- Adam Bradley & Andrew DuBois, THE ANTHOLOGY OF RAP (2010) 9, 10
- Jeff Chang, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION (2005) 6
- Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007) 20
- Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP (2007) 12, 19
- Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse*, HARPER'S MAG., July 2013, at 65 21
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- Hip-hop on Trial*. INTELLIGENCE SQUARED AND GOOGLE+ “VERSUS” DEBATE SERIES, June 27, 2012, <http://www.youtube.com/watch?v=r3-7Y0xG89Q> 19, 23
- Cheryl L. Keyes, *RAP MUSIC AND STREET CONSCIOUSNESS* (2002) 8
- Bakari Kitwana, *THE RAP ON GANGSTA RAP* (1994) 14
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- Charis E. Kubrin & Erik Nielson, *Rap on Trial, RACE & JUST.* (published online before print Mar. 7, 2014), available at doi: 10.1177/2153368714525411 15, 20
- George Lipsitz, *FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC* (2007) 18, 19
- Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40.2 SOC. PERSP. 265 (1992) 12
- Erik Nielson, “*Can’t C Me*”: *Surveillance and Rap Music*, 40.6 J. BLACK STUD. 1254 (2010) 18
- Erik Nielson, “*Here Come the Cops*”: *Policing the Resistance in Rap Music*, 15.4 INT’L J. CULTURAL STUD. 349 (2011) 19-20
- N.W.A., *Fuck tha Police*, on *STRAIGHT OUTTA COMPTON* (Ruthless Records 1988) 17

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INTERESTS OF *AMICI CURIAE*¹

The Marion B. Brechner First Amendment 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 issues of freedom of expression, including current cases and controversies 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 subject at issue in this case, and presented a scholarly, refereed conference paper in early August 2014 regarding the intersection of true threats and rap music, which is at issue in this case.

Erik Nielson is Assistant Professor of Liberal Arts at the University of Richmond, where his research and teaching focus on hip hop culture and African American literature. He has published several peer-reviewed articles on African American music and poetry, with a particular emphasis on rap music. He frequently lectures on hip hop culture at conferences in the United States, Canada, and the United Kingdom, and his work has been featured in a wide range of major news media outlets. He also has served as an expert witness and

¹ Pursuant to Rule of Court 37.6, the *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or a 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. The parties have consented to the filing of this brief.

consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity.

Charis E. Kubrin is Professor of Criminology, Law and Society and (by courtesy) Sociology at the University of California, Irvine. She has published widely on the intersection of music, culture, and social identity, particularly as it applies to hip hop and minority youth in disadvantaged communities. Perhaps her most important scholarly work in this area, an article titled “Gangstas, Thugs and Hustlas: Identity and the Code of the Street in Rap Music,” was published in the journal *Social Problems* and has been cited more than 150 times and reprinted in four edited volumes. She has served as an expert witness and consultant in multiple criminal cases involving rap music as evidence of alleged underlying criminal activity. In 2005, she received the Ruth Shonle Cavan Young Scholar Award from the discipline’s flagship organization, the American Society of Criminology.

SUMMARY OF ARGUMENT

The history and conventions of rap music, the heavily stigmatized artistic and often political genre of musical expression through which Petitioner Anthony Douglas Elonis conveyed much of the speech at issue in this case, illustrate why the Court should: a) require proof of the defendant-speaker’s subjective intent to threaten under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c); and b) reverse the decision by the United States Court of Appeals for the Third Circuit in *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013).

This brief, focusing on and grounded in the work of leading rap music scholars, demonstrates the interpretative problems of meaning and understanding of rap lyrics that, unless the defendant-speaker's subjective intent is taken into account, may cause a person, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret them as a threat of violence or unlawful conduct.

Rap music resides squarely within a long tradition of African American storytelling and verbal competition, one that privileges exaggeration, metaphor, and, above all, wordplay. Underlying this tradition is the practice of signifying, or the obscuring of apparent meaning; in the process of signifying, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. This practice, along with rap's dense slang and penchant for imbuing words with new meaning(s), makes it especially susceptible to misreading and misinterpretation. It thus is critical that the defendant-speaker's subjective intent is considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Although it emerged as a voice for marginalized people who were often seeking an alternative to crime and violence, rap has, for several decades, drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain it is particularly threatening to American society. Indeed, research by social scientists reveals that people view rap as more dangerous and threatening when compared to other music genres. These negatively stigmatized perceptions

stem, in large part, from broader stereotypes, both about the genre itself and the primary creators of rap music – young men of color. Unless the defendant-speaker’s subjective intent is taken into consideration, such biases and prejudices may subtly cause jurors and jurists to erroneously find true threats where none exist.

Yet these stereotypes ignore the importance of rap music, which not only is a global, multibillion-dollar industry, but also an influential and recognized form of artistic expression. With audiences dwarfing their traditional literary counterparts, rappers have introduced the world to a powerful new poetry – one memorized and recited by millions of people – that has given voice to communities of marginalized people and, at its best, has served as an anthem of resistance in the face of injustice.

Furthermore, the case now before the Court is far from the only recent legal dispute residing at the intersection of rap music and alleged threats. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 475 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 59 (2013) (true threats case involving song written in a style that was “part country, part rap”); *Illinois v. Oduwole*, 985 N.E.2d 316, 324 (Ill. App. Ct. 2013), *appeal denied*, 2013 Ill. LEXIS 796 (Ill. May 29, 2013) (terrorist threats case involving writings that “constituted the formative stages of a rap song” by defendant with an “aspiring rap career”); *In re S.W.*, 45 A.3d 151, 153 (D.C. Cir. 2012) (threats case centering on “modified lyrics” of rap song by multi-platinum hip hop artist Lil Wayne). The problems with muddled musical meanings addressed here thus are likely to arise again in threats cases and,

in turn, necessitate consideration of the speaker-defendant's subjective intent.

With this background on rap in mind, a fundamental question illustrates a key problem with focusing only on a recipient-observer's "reasonable" perspective in the true threats analysis: What level of knowledge of rap and understanding of its complicated conventions is a defendant-speaker to assume, in advance of communication, that a hypothetically reasonable person possesses in order to properly understand a rap message? Because the answer is anything but clear and because a speaker's First Amendment rights should not hang on what amounts to guesswork about an audience's hypothetically reasonable knowledge of a complex artistic and political genre of expression, the actual subjective intent of the defendant-speaker must be considered in both the First Amendment and statutory true threats analyses.

In summary, because artistic and political genres of expression like rap, through which alleged threats ostensibly are conveyed, involve a substantial likelihood that intended meanings may be misunderstood, *amici curiae* respectfully urge the Court to require proof of a defendant-speaker's subjective intent to threaten under both the First Amendment and 18 U.S.C. § 875(c).

ARGUMENT

I. Origins of Hip Hop and Rap

In order to understand rap music, one must first understand hip hop. Hip hop is, broadly speaking, a cultural movement comprised of several artistic elements, including graffiti, break dancing, DJing, and – critically for purposes of this case and brief – rap music. See Tricia Rose, *BLACK NOISE 2* (1994). Rap thus constitutes one facet – specifically, a verbal and musical one – of the larger culture of hip hop.

Hip hop evolved with political overtones, as a means through which black and Latino youth could comment on and challenge the social conditions they confronted on a daily basis – conditions driven by deindustrialization, economic restructuring, and a precipitous rise in incarceration. As a result of these social and economic shifts, the landscape of urban America deteriorated rapidly, including in places like the South Bronx, widely regarded as ground zero for hip hop.

By the 1970s, the South Bronx was a scene of utter devastation. With thousands of burnt-out, abandoned buildings, the physical landscape mirrored the hopelessness faced by its residents. They were forced to deal with the combined effects of poverty, unemployment, and isolation from mainstream America. See Jeff Chang, *CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 17* (2005).

By the late 1970s, conditions were so dire that President Jimmy Carter, Pope John Paul II, and Mother Teresa all made trips there to witness what had become an international symbol of urban failure.

In 1980, after then-Presidential candidate Ronald Reagan visited the area, he proclaimed not seeing “anything like this since London after the Blitz.” *Reagan, in South Bronx, Says Carter Broke Vow*, N.Y. TIMES, Aug. 6, 1980, at A16.

Hip hop emerged as an expressive outlet for residents of these disadvantaged communities, a collective voice that was, in many ways, being silenced in a rapidly-changing America. Importantly, it began as (and continues to be) an agent of social and political change.

For one, it helped erode the violent gang culture that consumed places like the Bronx. Whereas gangs had long claimed territory through fighting, hip hop “posses” or “crews” (often comprised of former gang members) sought an alternative to violence. Hip hop pioneer Afrika Bambaataa, for example, once a leader of the infamous Black Spades gang, created the Universal Zulu Nation to redirect gang activity into positive social action centered around hip hop. See Emmett G. Price, *HIP HOP CULTURE* 12 -13 (2006).

Through Bambaataa’s efforts and those of many other young men and women, street gangs lost their grip on the Bronx and, more generally, New York City. By weakening gang culture throughout the city, hip hop achieved something that police and politicians had for years failed to accomplish. This marked the beginning of a movement, one centered on positive social change, which soon spread to urban centers nationwide.

And yet, given its roots in communities marred by pervasive crime and violence, hip hop and its musical

subcomponent, rap, have long been misconstrued as extensions of urban dysfunction rather than a response to it. To an outside observer, for instance, the frenetic and aggressive maneuvers of break dancers engaged in head-to-head competitions (called “battles”) can appear out of control or violent; in fact, there have been cases in which police intervened because they mistakenly believed the dancers were fighting. See Rose, *supra*, at 50.

In reality, however, the dancers are practicing a highly complex, rehearsed set of maneuvers that are anything but violent. Journalist Sally Banes, after watching a battle between rival crews in 1981, correctly observed that break dancing amounts to “ritual combat that transmutes aggression into art.” Sally Banes, *Physical Graffiti: Breaking is Hard to Do*, in *AND IT DON’T STOP* 6, 9 (Raquel Cepeda ed., 2004).

Without an understanding of the history and traditions of hip hop culture, its artistic elements are vulnerable to misinterpretation. Over the last three decades, this has proven especially true for rap music.

II. The Complexity, Hyperbole, and Rhetoric of Rap: Meanings Lost in Translation

Defined as “a musical form that makes use of rhyme, rhythmic speech, and street vernacular, which is recited or loosely chanted over a musical soundtrack,” (Cheryl L. Keyes, *RAP MUSIC AND STREET CONSCIOUSNESS* 1 (2002)), rap is what Harvard University professor Henry Louis Gates, Jr. describes as “the new vanguard of American poetry,” one “born of young black and brown men and women who found their voices in rhyme, and chanted a poetic discourse to

the rhythm of the beat.” Adam Bradley & Andrew DuBois, *THE ANTHOLOGY OF RAP* xxvi (2010).

As Gates, Jr. and many others have pointed out, rap music may have emerged from New York’s burgeoning hip hop culture, but it resides within a long tradition of African American storytelling and language games that privilege parody, pastiche, and, above all, wordplay. Russell A. Potter, *SPECTACULAR VERNACULARS: HIP-HOP AND THE POLITICS OF POSTMODERNISM* 18 (1995).

Rap’s artistic lineage is easily spotted, for example, in century-old “toasts” – long poems, orally transmitted in rhymed verse, that often are humorous, even bawdy or violent. It also is found in verbal competitions such as “the dozens,” in which two opponents trade insults, often in rhyme, until a winner emerges. See Adam Bradley, *BOOK OF RHYMES: THE POETICS OF HIP HOP* 183 (2009). Although the insults may appear to breach the lines of healthy competition – references to violence and barbs aimed at “yo’ mama” are common – the contestants and onlookers understand they are not to be taken literally.

Underlying these poems and word games is the process of signifying, or “the obscuring of apparent meaning.” Henry Louis Gates, Jr., *THE SIGNIFYING MONKEY* 53 (1988). In the signifying tradition, ambiguity is prized, meaning is destabilized, and gaps between the literal and the figurative are intentionally exploited. As Gates, Jr. notes, the relationship between meaning and intent is therefore “skewed.” Gates, Jr., *supra* at 54. An insult can be a compliment, a seeming threat just a mere joke.

Signifying lies at the heart of rap music. To the uninitiated, the lyrics at times may seem alarming, even dangerous. For example, in rap battles – competitions, reminiscent of the dozens, in which rappers verbally spar in rhymed verse – it is common to use the term “body bag” to describe an opponent’s victory over an adversary (e.g., “you just got body-bagged”). Under most circumstances, the ostensible threat of being “body bagged” suggests extreme violence, but in rap battles, it becomes a metaphor that strips the phrase of any such intent.

Similarly, when GZA from the well-known group Wu-Tang Clan raps, “I’ll hang your ass with this microphone” and later warns “I come sharp as a blade and I cut you slow,” he is asserting his virtuosity as a lyricist rather than making literal threats of violence. WU-TANG CLAN, *Clan in Da Front, on ENTER THE WU-TANG CLAN (36 CHAMBERS)* (Loud Records 1993). Recognizing this type of rhetorical flexibility is essential to interpreting rap music.

Most, if not all, art forms require some level of expertise to be fully understood. Anyone reading Geoffrey Chaucer or T.S. Eliot for the first time can attest to this fact. Yet, rap’s complexities make it particularly challenging. For starters, rappers employ all the same devices as other poets, including extensive use of symbolism and metaphor; they are also highly focused on form, choosing words not only for their meanings and connotations, but also for their place in the meter and rhyme scheme of the song. BRADLEY & DUBOIS, *supra* at xxx-xxxi.

At the same time, rap music is characterized by dense slang, coded references, intentional

mispronunciations, and sometimes blazing-fast delivery, all of which defy interpretation at every turn. This often is the point in rap, as well as in black vernacular generally, which long has employed semantic inversion (reversing word meaning), neologism (inventing new words), and other devices to maintain a “black linguistic code.” Geneva Smitherman, *TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA* 70 (1977). Speaking to this “code” in rap, Grammy-award-winning rapper Jay Z writes, “[t]he art of rap is deceptive,” noting that lyrics are imbued with multiple, unresolved layers of meaning so that “great rap remains a mystery” *JAY Z, DECODED* 54-55 (2010). This alone makes it clear why the subjective intent of the defendant-speaker should be considered under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

Even with its inherent mystery, rap music often serves as an explicit, even confrontational, vehicle for political commentary and resistance. Rappers frequently echo, or even quote directly, pioneering authors of the Harlem Renaissance, such as Langston Hughes and Claude McKay; the influential speeches of Malcolm X, Huey P. Newton, and Martin Luther King, Jr.; the radical poetry of Black Power era artists such as Amiri Baraka and Jayne Cortez; and the innovative song-poems of Gil Scott Heron and the Last Poets. See Ernest Allen, Jr., *Message Rap*, in *DROPPIN’ SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE* 159, 161 (William Eric Perkins ed., 1996). Safeguarding political speech, of course, is “central to the meaning and purpose of the First Amendment.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 329 (2010)).

For many rappers, building upon the political legacy of their artistic predecessors – and broadcasting it to the masses – is an express purpose of the music. Rapper Chuck D of the group Public Enemy once described rap as “CNN for black America,” while Queen Latifah, another influential rap artist, compared it to “a newspaper that people read with their ears.” Catherine T. Powell, *Rap Music: An Education with a Beat from the Street*, 60 J. NEGRO EDUC. 245, 252 (1991).

While it would be misleading to extend the rap-as-journalism analogy too far, rap historically has functioned as a musical form that, through invented stories and characters, draws attention to a variety of pressing social issues, particularly those facing disadvantaged urban communities. For this reason, scholars readily acknowledge its potential to serve as a vehicle for resistance, one that is often “socially aware and consciously connected to historic patterns of political protest.” Michael Eric Dyson, KNOW WHAT I MEAN? REFLECTIONS ON HIP HOP 64 (2007). As sociologist Theresa Martinez puts it, rap is “an expression of oppositional culture.” Theresa Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40.2 SOC. PERSP. 265, 268 (1992).

Rap’s oppositional stance became especially controversial with the emergence of “gangsta” rap, a subgenre first popularized in the late 1980s and early 1990s by West Coast artists such as Ice-T, N.W.A., and Snoop Dogg. See Murray Forman, THE ‘HOOD COMES FIRST: RACE, PLACE, AND SPACE IN RAP AND HIP HOP 191 (2002).

Drawing on the rich tradition of the “bad man” in African American storytelling – a figure found in rhymed tales dating back to the nineteenth century, the urban novels of Iceberg Slim and Donald Goines, and the “blacksploitation” films of the 1970s – gangsta rappers began using their rhymes to celebrate the outlaw figure and reject traditional constructs of “legitimate” American life. See Eithne Quinn, *NUTHIN’ BUT A “G” THANG: THE CULTURE AND COMMERCE OF GANGSTA RAP* (2005). Their lyrics often contained graphic, highly exaggerated depictions of violence, criminal behavior, and misogyny, which were patterned after the pimps, hustlers, and gangsters found elsewhere in black and mainstream popular culture. See Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52.3 *SOC. PROBS.* 360 (2005).

For all its explicit and potentially offensive content, gangsta rap, along with related varieties of rap that foreground depictions of violence or criminality, has allowed young men and women of color to create a poetic universe in which they are masters of their environments. Often perceiving themselves as social outcasts and targets of institutional discrimination, they craft lyrics that give voice to the conditions in urban America that many people are not willing to confront – drug addiction, gun violence, and police brutality, to name a few – all while constructing themselves as figures of power within these precarious urban spaces. Imani Perry, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP*, 104 - 110 (2004).

Many critics have decried gangsta rap’s violent, criminal themes, arguing that the music perpetuates

social ills without attempting to solve them. Yet once again, a closer look reveals a more nuanced reality than many critics recognize.

Take, for example, Tupac Shakur, one of rap's most well-known and highly respected artists. He had the words "Thug Life" tattooed across his chest, which was widely interpreted – misinterpreted, it turns out – as a sign that Shakur embraced violent gang life. In fact, one thing the tattoo signified was a complex code of ethics called "THUG LIFE," signed by members of the Bloods and Crips (rival gangs), that Shakur helped write in order to *reduce* the devastation caused by gang violence and drug addiction. Notably, acclaimed poet and university professor Nicki Giovanni now wears a "Thug Life" tattoo on her arm to honor Shakur's work. Virginia C. Fowler, NIKKI GIOVANNI: A LITERARY BIOGRAPHY 122 (2013).

While attracted to the political commentary, audiences are, no doubt, also drawn to gangsta rap's highly exaggerated, sordid tales of urban life, making it the most popular (and most profitable) subgenre of rap. Recognizing its enormous potential for commercial success, record companies long have pressured new acts to adopt gangsta-type rhetoric – a trend that continues today. Bakari Kitwana, THE RAP ON GANGSTA RAP 23 (1994).

To bolster the violent rhetoric, it is common for rappers, not unlike some well-known method actors or even professional wrestlers, to stay in character after they have left the stage, all the while acting as if they lead the lives they rap about. It is what Professor Tricia Rose calls rap's "pretense of no pretense." Tricia Rose, THE HIP HOP WARS 38 (2008). As the near-

universal adoption and use of stage names by rappers indicates, however, they live through invented characters and explore narrative voice, both on and offstage. Their preference for the first-person perspective may tempt listeners to conflate author and narrator, but as with other fictional forms, this is a mistake.

Indeed, many of the best-selling artists who have presented themselves as hardcore criminals – consider successful gangsta rapper Rick Ross, who attended college and even served as a corrections officer – are, in fact, well-educated, marketing savvy professionals. See Charis E. Kubrin & Erik Nielson, *Rap on Trial*, RACE & JUST. (2014).

Hence, when Marshall Mathers, the best-selling rapper in history, takes on the persona Eminem, one is not meant to interpret his violent, menacing lyrics (some of them aimed directly at his ex-wife, Kim Mathers) as literal reflections of intent. Mathers may push the envelope with rhetoric that, to some, is unsettling, but like other rappers, he counts on his listeners to appreciate the important distinction between an artist and his art.

In a lyric that captures the important distinction between fiction and reality in rap, Mathers, in the persona of Eminem, self-knowingly raps on the hit song “Sing For the Moment” that “[i]t’s all political, if my music is literal and I’m a criminal, how the fuck could I raise a little girl? I couldn’t, I wouldn’t be fit to.” EMINEM, *Sing for the Moment*, on THE EMINEM SHOW (Aftermath 2002). Mathers knows his music is not literal, of course, and that being a criminal is merely his persona. And in June 2014, about twelve years

after that song was released, Eminem’s “little girl,” daughter Hailie Jade Scott Mathers, graduated Summa Cum Laude from high school and thanked both her mother and father “because they have pushed me to be the person I am and have given me all the support to achieve what I have.” Corinne Heller, *Eminem’s Daughter, Hailie Jade Scott Mathers, 18, Graduates High School (With Honors) & Pays Tribute to Parents*, E! ONLINE NEWS, June 29, 2014, available at <http://www.eonline.com/news/555402/eminem-s-daughter-hailie-jade-scott-mathers-18-graduates-high-school-with-honors-pays-tribute-to-parents>.

Petitioner Anthony Douglas Elonis, who testified at trial that his own Facebook posts were partly inspired by Eminem, appears to be doing much the same thing with lines like these:

Little Agent Lady stood so close
Took all the strength I had not to turn the bitch
ghost
Pull my knife, flick my wrist, and slit her throat.

(*United States v. Elonis*, 730 F.3d 321, 326 (3d Cir. 2013)).

Although offensive, these lyrics are consistent with those found in Eminem’s songs and many others that derive from the gangsta rap tradition. Elonis himself declares that “[a]rt is about pushing limits,” Petition for Writ of Certiorari at 10, *Elonis v. United States*, No. 13-983, 2013 U.S. Briefs 983; 2014 U.S. S. Ct. Briefs LEXIS 599 (Feb. 14, 2014). Indeed, it is evident from his lyrics that Anthony Douglas Elonis has chosen a musical genre long defined by doing just that.

As the Supreme Court of New Jersey acknowledged just this month, rap constitutes “a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture,” but ultimately it is merely one of several “fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings.” *New Jersey v. Skinner*, 2014 N.J. LEXIS 803, *12 (N.J. Aug. 4, 2014).

III. Fear of Rap: Another Moral Panic

As the commercial success of artists like Eminem, Jay Z, and Tupac Shakur attests, rap music is now immensely profitable and arguably constitutes the most influential musical genre of the last thirty years. During that same time period, it also has become the most controversial. Although society has embraced other forms of entertainment that contain graphic depictions of sex, violence, and criminal behavior – violent video games (protected by the Court in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011)), horror films, gangster novels, or any number of Emmy-winning shows on HBO, for instance – rap has for decades drawn the ire and vitriol of police, politicians, religious leaders, and civic groups who maintain that it especially threatens American society.

Perhaps the most illustrative example is found in the response to N.W.A.’s 1988 protest song “Fuck tha Police,” which fiercely criticized discriminatory police practices in Los Angeles. See N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988). When the song was released, Milt Ahlerich, assistant director of the FBI, was infuriated by N.W.A.’s lyrics. In an unprecedented move, he sent a

letter expressing his disgust and displeasure to N.W.A.'s label, Ruthless Records. See George Lipsitz, *FOOTSTEPS IN THE DARK: THE HIDDEN HISTORIES OF POPULAR MUSIC* 164 (2007).

The FBI's response triggered a reaction from police departments across the country, which worked collectively to disrupt N.W.A.'s concerts, helping to set a precedent for the frequent attempts by police, even today, to prevent rap shows in their jurisdictions. See Erik Nielson, "*Can't C Me*": *Surveillance and Rap Music*, 40.6 *J. BLACK STUD.* 1254, 1258 (2010).

Although saying "Fuck tha Police" may be offensive, the Court has recognized the importance of protecting dissenting political speech, including safeguarding a very similar phrase, "Fuck the Draft." *Cohen v. California*, 403 U.S. 15 (1971).

N.W.A.'s troubles with the law were hardly isolated incidents. In the late 1980s and early 1990s, artists across the country such as LL Cool J, Too Short, and 2 Live Crew were being arrested for performances that authorities regarded as lewd or profane. See Peter Blecha, *TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS* 118 (2004).

Arguably the most famous clash with law enforcement came in 1992, when rapper Ice-T formed a heavy metal group called Body Count and released a song called "Cop Killer." (An irony worth noting is that for years Ice-T has played police detective Odafin "Fin" Tutuola on the NBC show *Law & Order: Special Victims Unit*.)

Ice-T was already a polarizing figure after Tipper Gore singled him out in a 1990 op-ed in which she

depicted rap music as “dangerous” and “frightening.” Tipper Gore, *Hate, Rape, and Rap*, WASH. POST, Jan. 8, 1990, at A15. When “Cop Killer” was released, it thus was not surprising that President George H.W. Bush and Vice President Dan Quayle denounced it and that police nationwide launched a campaign to force Time Warner to pull the song from store shelves, which the company eventually did. See LIPSITZ, *supra* at 167-168.

These kinds of attacks against rap have not come solely from police and politicians. In 1993, New York pastor and civil rights activist Calvin O. Butts held a high-profile demonstration in which he threatened to drive a steamroller over a pile of rap cassettes and compact discs that he claimed contained vulgar material. And for years, C. Delores Tucker, another civil rights activist, led an unrelenting campaign against gangsta rap, calling on rap artists to stop producing music with unabashedly violent and misogynistic themes. See DYSON, *supra* at 131-132.

Even today, the suspicion, fear, and anger rap provokes remain. Rap is routinely vilified in the press by critics from a variety of perspectives, either as “fake” music or as a scourge to minority communities. Journalist Jason Whitlock, articulating the latter view, argues that the image of African American men “has been destroyed by hip hop, at home and globally.” See *Hip-hop on Trial*, INTELLIGENCE SQUARED AND GOOGLE+ “VERSUS” DEBATE SERIES, June 27, 2012, <http://www.youtube.com/watch?v=r3-7Y0xG89Q>.

Alongside such bold criticism is the continued scrutiny of law enforcement, including police task forces across the country created for the express purpose of surveilling rappers. See Erik Nielson, “*Here*

Come the Cops”: Policing the Resistance in Rap Music, 15.4 INT’L J. CULTURAL STUD. 349, 350 (2011). Additionally, the last decade has witnessed an alarming increase in the use of rap lyrics as evidence in criminal proceedings, a practice that often involves delegitimizing rap as art altogether and (mis)characterizing it as autobiography Kubrin & Nielson, *supra*; see Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007). This practice has sent dozens of young artists to jail.

Research reveals that people often view rap as more dangerous and threatening when compared to other music genres. In a 1999 experimental study, social psychologist Carrie Fried set out to explain why. She presented two groups of people with an identical set of violent lyrics, but she also removed any information that could identify the true source of those lyrics. One group was told the lyrics came from a country song, while the other was told they came from a rap song. Fried found that respondents characterized the lyrics as significantly more threatening and dangerous when they were labeled as rap rather than country. Carrie Fried, *Who’s Afraid of Rap? Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).

As Fried and others have suggested, the visceral responses that many people have to rap music stem in large part from broader racial stereotypes, especially about young men of color. These stereotypes inform people’s perceptions and behaviors in a variety of settings beyond music, ranging from the justice system to the educational system and the workplace.

IV. Rap is Art, Even If It Often is Misinterpreted and Misunderstood

In a July 2013 article in *Harper's Magazine*, University of Virginia professor Mark Edmundson provocatively declared the “decline of American verse,” taking contemporary poets to task for, among other things, being unambitious and unwilling to offend – and for avoiding pressing social or political issues. American poetry today, claims Edmundson, is “timid, small, in retreat.” Mark Edmundson, *Poetry Slam: Or, the Decline of American Verse*, HARPER'S MAG., July 2013, at 65.

This generalization ignores the importance of rap music. Anything but “timid” or “in retreat,” rap today is a cultural force, its verses filling the airwaves from New York to New Delhi, from South Korea to South Africa.

With audiences that dwarf their traditional literary counterparts, rappers have introduced the world to a powerful new poetry, memorized and recited by millions of people, that has given voice to entire communities of marginalized people, and at its best, has served as an anthem of resistance in the face of global injustice. Its visible role in uniting voters during President Barack Obama's 2008 campaign – or motivating demonstrators during the recent Arab Spring protests – are but two of many testaments to its significance and global influence. See Lester Spence, *STARE IN THE DARKNESS: THE LIMITS OF HIP-HOP AND BLACK POLITICS* 161-163 (2011).

Yet the tendency to discount rap music as a form of poetry persists, even as its place in the academy has

become more secure. Rap lyrics now appear in a variety of major literary anthologies, and since the early 1990s, colleges and universities have offered hundreds of classes on hip hop. Now some of the country's most elite universities – including Harvard and Cornell – have made significant institutional investments by establishing major research archives that serve as repositories of hip hop music, literature, art, and scholarship. See Travis L. Gosa, *Why Do Students Resist Hip Hop Studies?*, in *TEACHING POLITICS BEYOND THE BOOK: FILM, TEXT, AND NEW MEDIA IN THE CLASSROOM* 109 (Robert W. Glover & Daniel Tagliarina eds., 2013).

And when, in July of 2012, Cornell University announced that hip hop pioneer Afrika Bambaataa would become a visiting member of the faculty, he became one of the latest in a long line of rap artists who have taken teaching appointments at institutions of higher education.

Rap's growing relevance in academic settings is hardly surprising. Although it took shape in predominantly black and Latino communities in the late twentieth century, its artistic antecedents can be traced back centuries and across oceans. Consider, for instance, the head-to-head poetry battles of ancient Greece; the rhymed couplets of medieval French romances; or the timeless verse, teeming with newly-coined words, of William Shakespeare. In many ways, rap music is universal, part of a long tradition of expressing and commenting on the human condition.

Today, its potential is mostly keenly felt in marginalized communities. In the United States, the impact has been especially profound. A multibillion

dollar industry, hip hop has not only generated career opportunities for people who otherwise would not have had them, but it has also offered an artistic outlet for countless young people. Speaking to the possibilities that hip hop opened up, rapper Ice-T once said, “[I]f I hadn’t had a chance to rap, I’d either be dead or in jail.” Patrick Goldstein, *The Hard Cold Rap of Ice-T*, L.A. TIMES, Apr. 24, 1988, http://articles.latimes.com/1988-04-24/entertainment/ca-2445_1_rap-wizard.

Rapper Notorious B.I.G. echoes this sentiment when in “Things Done Changed” he raps, “If I wasn’t in the rap game, I’d probably have a key knee-deep in the crack game.” NOTORIOUS B.I.G., *Things Done Changed*, on READY TO DIE (Bad Boy Records 1994). After more than thirty years, it is impossible to know how many other young men and women could say the same thing, but Ice-T’s and Notorious B.I.G.’s sentiments speak to the transformative, elevating potential of rap music.

It may still be difficult for some people to comprehend rap music as an art form, never mind a positive one, but time has a way of changing our perspectives. At a 2012 symposium in London, John Sutherland, emeritus professor of English at University College London, argued for rap’s place in the canon, declaring that “in 20 years’ time, Tupac Shakur will be ranked with Walt Whitman as a great American poet.” See *Hip-Hop on Trial*, *supra*. Like Whitman, whose work was hugely influential and, at the same time, deeply controversial, today’s rappers are changing the landscape of American poetry. Admittedly, this new poetry is not pleasing to everyone, especially those who misinterpret its sophisticated use of identity, wordplay, signifying, and exaggeration.

But since when has poetry ever been saddled with the burden of pleasing everyone? Indeed, one person's lyric may be another's vulgarity, as the Court observed in *Cohen v. California*, 403 U.S. 15, 25 (1971), but that difference in interpretation does not make it a true threat.

CONCLUSION

This brief demonstrated the multiple interpretative problems of meaning and understanding that surround rap music, the genre of expression used by Petitioner Anthony Douglas Elonis. Unless a defendant-speaker's subjective intent is taken into account, these problems may cause a juror, particularly one unfamiliar with the genre or who holds negative stereotypes about it, to falsely and incorrectly interpret rap lyrics as a threat of violence or unlawful conduct. As a result of such misinterpretation and misunderstanding, important political and artistic expression may be wrongfully squelched and punished.

Amici thus respectfully request that the Court reverse the decision below of the United States Court of Appeals for the Third Circuit and hold that proof of a defendant-speaker's subjective intent to threaten is required under both the First Amendment-based true threats doctrine and 18 U.S.C. § 875(c).

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Respectfully submitted,

Clay Calvert

Counsel of Record

Marion B. Brechner

First Amendment Project

2060 Weimer Hall

Gainesville, FL 32611

(352) 273-1096

ccalvert@jou.ufl.edu

Counsel for Amici Curiae