

No. 13-983

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**In the  
Supreme Court of the United States**

ANTHONY D. ELONIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*.

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

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**BRIEF OF THE STUDENT PRESS LAW CENTER, THE  
ELECTRONIC FRONTIER FOUNDATION, AND PEN  
AMERICAN CENTER AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

It is a federal crime to “transmit[] in interstate or foreign commerce any communication containing \* \* \* any threat to injure the person of another,” 18 U.S.C. § 875(c). Numerous states have adopted analogous crimes. The questions presented are:

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.

2. Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant’s subjective intent to threaten; or whether it is enough to show that a “reasonable person” would regard the statement as threatening.

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Student Press Law Center (the “SPLC”) is a non-profit, non-partisan organization which, since 1974, has been the nation’s only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, *Law of the Student Press*, now in its fourth edition.

Students and other young adults are prolific users of social media. As such, they are particularly affected by the court of appeals’ application of a negligence standard to a statute criminalizing, *inter alia*, threats communicated through social networks. The SPLC has a special concern for ensuring that young Americans’ First Amendment right to free speech is not chilled through the misinterpretation of 18 U.S.C. § 875(c).

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1. Pursuant to this Court’s Rule 37, *amici* affirm that all parties have consented to the filing of this amicus brief. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk’s office. Further, no counsel for any party authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 27,600 dues-paying members have a strong interest in helping the courts and policy-makers apply First Amendment principles in a manner that protects the constitutional rights of those who use technology to communicate. EFF works directly with students and young adult community activists to increase awareness and facilitate engagement in advocacy for digital freedom issues. EFF also supports student organizations that wish to advance and promote digital rights on campus by providing resources and materials, organizing events, and keeping student leaders updated on the latest developments in digital rights issues.

PEN American Center is a non-profit association of writers that includes poets, playwrights, essayists, novelists, editors, screenwriters, journalists, literary agents, and translators (“PEN”). PEN has approximately 3,500 members and is affiliated with PEN International, the global writers’ organization with 144 centers in more than 100 countries in Europe, Asia, Africa, Australia, and the Americas. PEN International was founded in 1921, in the aftermath of the First World War, by leading European and American writers who believed that the international exchange of ideas was the only way

to prevent disastrous conflicts born of isolation and extreme nationalism.

Today, PEN works along with the other chapters of PEN International to advance literature and protect the freedom of the written word wherever it is imperiled. It advocates for writers all over the world. The interest of PEN in this case is in ensuring that the current flourishing of free speech enabled by online communication is not chilled by an overbroad interpretation of 18 U.S.C. § 875(c) that could lead to widespread censorship by the government and self-censorship by writers using digital platforms.

#### SUMMARY OF ARGUMENT

When the Court decided *Watts v. United States*, 394 U.S. 705 (1969) (per curiam), it did so against the backdrop of a readily identifiable framing context informing its interpretation of an alleged threat to the President. Thus, the statement, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,” when made at a political rally on the Washington Mall was not, as a matter of law, a threat, because of its context. *Id.* at 705-08. The context included the location of the speech, the nature of the gathering, the identity of the speaker, the demeanor of the speaker (he was unarmed and laughing when he made the statement), and the reaction of the crowd (laughter). *See id.* Given the context, the decision was not a difficult one for the Court to make: the statement was not a threat under

either a subjective test (did the speaker specifically intend the statement to be interpreted as a threat?) or an objective test (would a reasonable person interpret the statement as a threat?). *See id.* at 707-08.

In the age of social media, courts across the country will often face quite a different challenge in true threat prosecutions. Now messages including content that might be interpreted as a threat may be made anonymously on an internet message board or other social networking platform. At the time such statements are made, the audience will often not know who the speaker is or where he is, and likewise will not be able to observe the speaker's demeanor or know whether he is armed. As for the nature of the gathering, it will frequently implicate publicly accessible Internet forums. Thus, the audience might be one person or a million people; they are as hidden and anonymous as the speaker. And the reaction of "the crowd" will in many instances be only very imperfectly understood, if not entirely unknowable, because the only information available may be the reaction of other Internet users if they respond to the speaker's message. Further, the written (or other verifiable) reaction may be skewed and unrepresentative of the audience, because only the most engaged and motivated recipients are likely to invest the effort to respond.

This case raises the question of how the "true threat" analysis should be conducted in the digital

age, and in light of the emergence and ascendancy of communications through online networks. The Court should make clear that 18 U.S.C. § 875(c), prohibiting the interstate transmission of “any communication containing . . . any threat to injure the person of another,” necessarily includes a subjective intent component. The court of appeals’ approach, which adopted a mere negligence standard, is constitutionally insufficient and, if approved, would result in increasing, excessive censorship of constitutionally permissible speech.

In this regard, *amici* SPLC, EFF, and PEN concur entirely with the statutory and constitutional analysis set forth in the Petitioner’s opening brief. *Amici* also believe that a sound understanding of the integral importance of social media in the daily lives of Americans, and the manner in which people across the country constantly interact through online networks, will confirm that speakers should not face prison time based solely on misjudgments about the scope of their audience or how a potentially unintended recipient would react to a message.

## ARGUMENT

**I. THE EMERGENCE OF SOCIAL MEDIA HAS REVOLUTIONIZED AND ENHANCED HOW AMERICANS INTERACT, BUT USERS OFTEN CAN'T DEFINE THEIR AUDIENCE AND MANY COMMUNICATIONS CAN BE MISUNDERSTOOD.**

As this Court recognized nearly two decades ago, “[t]he Internet is a unique and wholly new medium of worldwide human communication.” *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (internal quotation marks and citation omitted). At that time, the Internet already provided “a wide variety of communication and information retrieval methods” that were “constantly evolving” and that, taken together, “constitute[d] a unique medium—known to its users as ‘cyberspace’—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.” *Id.* at 851.

And at that time, the World Wide Web, the “best known category of communication over the Internet,” also already provided those who wished to publish information or communicate with others “a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.” *Id.* at 852-53. Likewise, “from the readers’ viewpoint,” the Web has long furnished “a vast library including millions of readily



available and indexed publications and a sprawling mall offering goods and services.” *Id.* at 853.

In the intervening years since *Reno v. ACLU* was decided, the Internet’s profound impact on our daily lives has increased exponentially. As the Court predicted, the Internet and new communications mediums like online social networks have fundamentally changed the manner in which people interact with one another. Indeed, it is no exaggeration to say that online social media has redefined how people talk to and correspond with one another, how they resolve conflicts, and how they form friendships and communities.

However, the rising ascendancy of online social media has also implicated the erosion of the boundaries between publicity and privacy. And a well-recognized aspect of social media communications is that people, particularly young people, will say things online that they would not say in person. Finally, social network users often can’t control the scope of their audience, and messages intended for particular recipients may ultimately be read (and potentially misunderstood) by unintended recipients.

All of this means that we now live in an age when Internet users, through online social networks, can stay connected with friends and colleagues in ways that were impossible until recent years. It also means that there are substantially greater

opportunities for a careless, ill-considered, or misunderstood message, perhaps reviewed by an unintended recipient, to implicate criminal liability.

### **A. The Ascendancy of Social Media.**

Social networks are online communication platforms that enable individuals to join and create networks of users. Typically, these services require the creation of profiles by users, in order for others to view and to provide invitations to join various networks and groups. Well-known examples are Facebook, Twitter, and LinkedIn.

In recent years, social networks and online communities “have grown in expanse, complexity, popularity, and recognition, even beyond the realm of internet-savvy users.” Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 741, 742 (2008). In fact, recent research shows that, as of January 2014, 74% of adults using the Internet now use a social networking site of some kind. *Social Networking Fact Sheet*, PEW RESEARCH INTERNET PROJECT, <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/> (last visited Aug. 21, 2014). And 42% use multiple social networking sites. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RESEARCH INTERNET PROJECT (Dec. 30, 2013), [http://www.pewinternet.org/files/2013/12/PIP\\_Social-Networking-2013.pdf](http://www.pewinternet.org/files/2013/12/PIP_Social-Networking-2013.pdf).

Social networking sites have been particularly popular with teens and young adults, with research showing that 90% of 18-29 year-old Internet users are active on social networks. *See Social Networking Fact Sheet*. Notably, however, the use of social networking by all age groups, including seniors, has risen substantially in the last five years. *See id.* (includes graph showing that approximately 30% of all Internet users were on social networks in May 2008, and as of September 2013 that number had risen above 70%); *see also Social Media Update 2013* at 4 (noting that 45% of Internet users age 65 or older now use Facebook).

This data confirms an otherwise self-evident fact of modern American life: a growing majority of people of all age groups, particularly younger Americans, communicate regularly and extensively through online social networks. And this is unsurprising, because Americans' use of social networking technologies is related to core values: trust, tolerance, social support, community, and political engagement. *See* Keith N. Hampton, Lauren Sessions Goulet, Lee Rainie, & Kristen Purcell, *Social Networking Sites and Our Lives*, PEW RESEARCH INTERNET PROJECT (June 16, 2011), <http://www.pewinternet.org/files/old-media/Files/Reports/2011/PIP%20%20Social%20networking%20sites%20and%20our%20lives.pdf>. In fact, Pew Internet Research Project surveys have shown that social networks are increasingly used to keep up close social ties, and that the average user of a social

networking site has more close ties and is half as likely to be socially isolated as the average American. *Id.* at 24. Similarly, Facebook has helped to revive dormant relationships, and Facebook users have more close relationships and are “much more politically engaged than most people.” *Id.* at 4.

Thus, online networking has become embedded in our culture precisely because it has tangible, recognized social value.

## **B. Social Media Has Changed Communicative Norms.**

### **1. The key characteristics of online speech: persistence, visibility, spreadability, and searchability.**

As social media has begun to play a more central role in the daily lives of many Americans, it has altered communicative norms in many respects. Prior to the digital age, “individuals lacked the technological megaphone to broadcast their story to the world.” Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1333 (2009). Today, online social networks like Facebook provide that megaphone and facilitate the rapid distribution of communications to massive audiences because of their unique characteristics. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1667-70 (1998).

Speech occurring on social networks has been aptly described as having four key characteristics: (1) “persistence: the durability of online expressions and content;” (2) “visibility: the potential audience who can bear witness;” (3) “spreadability: the ease with which content can be shared;” and (4) “searchability: the ability to find content.” Danah Boyd, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 11 (2014) (hereafter referenced as “IT’S COMPLICATED”).

The “persistence” characteristic of online networks means that “conversations conducted through social media are far from ephemeral, they endure.” *Id.* Consequently, “those using social media are often ‘on the record’ to an unprecedented degree.” *Id.*

The visibility characteristic implicates the wide accessibility of social media communications, because most social media platforms are “designed such that sharing with a broader or more public audience is the default.” *Id.* at 12. This has also been described as the “unboundedness” of digital information. See Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 *UCLA L. REV.* at 1667-68. Digital information transcends geographic boundaries and cannot be confined to “any . . . spatially bounded audience definition to which other media might be limited.” *Id.* And because many popular systems require users to take active steps to limit the visibility of any particular piece of shared content,

social media interactions are typically “public by default, private through effort.” Boyd, *IT’S COMPLICATED* 11.

The “spreadability” and “searchability” characteristics describe how the actions of the intended recipients of social media messages, as well as others perusing the Web, can substantially expand the audience for any particular communication. By design, social media facilitates the spread of information by encouraging the sharing of links, providing reblogging or favoriting tools that repost images or texts, and by making it easy to copy and paste content from one place to another. *Id.* Finally, given the emergence of Internet search engines, people’s online communications are searchable. Thus, “any inquisitive onlooker can query databases and uncover countless messages written by and about others.” *Id.*

To give just one concrete example, the popular “micro-blogging” platform, Twitter, not only includes within its user interface the ability to “re-tweet” the speech of others to a potentially limitless audience of third- and fourth-degree contacts, but also has given rise to various online publishing tools that exist with the express purpose of empowering users to republish Twitter postings in a new and different context. Among the most popular of these is Storify, a service that enables users to collect and publish Twitter users’ “tweets” aggregated into a narrative created by the Storify account holder, with or without

the knowledge and consent of the original speaker. See Patrick Sullivan, *The “Flickr” of An Idea: Apps Don’t Necessarily Tell the Complete Digital Story*, THE NONPROFIT TIMES (Feb. 28, 2014) (explaining workings of Storify). Thus, a Twitter user’s harmless musing about a violent scene from a movie or television program could turn up, devoid of context but attributed to its original author, in a published narrative that gives the remark ominous unintended meaning.

An important corollary to these aspects of social media speech is that, in comparison to more traditional forms of communication, a person publishing a social media message generally has far less control over the scope of his audience. To begin with, using online social networks can lead to an undefined circulation and distribution of the shared content, making it difficult for speakers to limit their audiences. Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. at 1329. Of course, for many social network users, the benefit of making information available to any interested individual outweighs the cost of allowing access to an undefined group of people. *Id.* at 1317-18.

Further, the interactivity of the Internet allows receivers to use their own volition to “pull” speech, rather than having it “pushed” at them from speaker-initiated sources like the mail or the telephone. Sullivan, *First Amendment Intermediaries*

*in the Age of Cyberspace*, 45 UCLA L. REV. at 1668. When communicating through the mail, for example, the speaker has substantially more control over where the communication ends up, and can intentionally direct the message toward a particular target. *See id.* (“[E]ven a speaker who tries to confine access to information on the basis of the geographical origin of the audience may be foiled because cyberspace addresses do not now exist in territorial domains.”). In contrast, online social network users often cannot control or do not appraise their degree of control over their situation. Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. at 1328-29.

**2. Online speech implicates changed boundaries of privacy and the phenomenon of disinhibition.**

Social networking has also “erod[ed] the boundaries between publicity and privacy in fundamental ways.” Patricia G. Lange, *Publicly Private and Privately Public: Social Networking on YouTube*, 13 J. COMPUTER-MEDIATED COMM. 361, 364 (2007) (internal quotation marks omitted). On the Internet, because the barriers for entry are low, and are no greater for speakers than listeners, individuals can become mass transmitters of information and opinion. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. at 1666-67. Changed views of privacy and a



willingness to share personal information are particularly pronounced among young adults. See Mary Madden, et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CENTER (May 21, 2013), [http://www.pewinternet.org/files/2013/05/PIP\\_Teens\\_SocialMediaandPrivacy\\_PDF.pdf](http://www.pewinternet.org/files/2013/05/PIP_Teens_SocialMediaandPrivacy_PDF.pdf) (explaining that young Americans are sharing more personal information on social networks than in the past and that they aren't very concerned about third-party access to their data).

Similarly, clinicians and researchers have observed that “people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world.” John Suler, *The Online Disinhibition Effect*, CYBERPSYCHOLOGY & BEHAVIOR 321, Vol. 7, No. 3 (2004). As described by one psychologist, in cyberspace people “self-disclose or act out more frequently or intensely than they would in person,” a phenomenon “so pervasive” that a term has surfaced for it: the online disinhibition effect. *Id.*; see also Adam N. Joinson, *Disinhibition and the Internet*, PSYCHOLOGY & THE INTERNET 75, 79-81 (Jayne Gachenback ed., 2d ed. 2007).

The disinhibition effect often “indicates an attempt to better understand and develop oneself,” and to “explore new emotional and experiential dimensions to one's identity.” *Id.* at 321. In this sense, the medium of the Internet uniquely facilitates an informality and immediacy of communication that enables people to share, often

with wide (and sometimes unintended) audiences, their innermost thoughts, dreams, aspirations, and fears.

Likewise, Internet users may give vent to emotions on which they have no intention of acting, memorializing expressions of momentary anger or exasperation that once were communicated face-to-face among friends and dissipated harmlessly. Thus, the uninhibited interaction, discussion, and personal revelations facilitated so powerfully by social media also implicates speech that may be unsavory or even distressing to some recipients, but this is precisely the type of speech the First Amendment is designed to protect. *See Virginia v. Black*, 538 U.S. 343, 358 (2003) (“The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomforting.”) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

### **C. Misunderstandings on Social Media are Commonplace.**

#### **1. Context confusion and miscommunication: the risk of benign messages being misunderstood, particularly by unintended recipients.**

This Court has recognized one of the Internet’s chief democratizing features, its ability to spread

information rapidly and to wide audiences. *Reno v. ACLU*, 521 U.S. at 850 (observing that “[i]ndividuals can obtain access to the Internet from many different sources” and that “[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods”). But the speed-of-light spreadability of information and online messages, which often involves layers of republishing to larger and more diverse audiences, implicates corresponding risks for misunderstanding.

To begin with, the original context of a message, understandable and benign to an intended set of initial recipients, may be misunderstood when republished to a different audience that is unaware of the message’s original context.

An instructive example of this problem is the recent case of a young Texan, Justin Carter, who was jailed for months after making “a sarcastic Facebook comment during an argument about a video game”. Doug Gross, *Teen in Jail for Months Over ‘Sarcastic’ Facebook Threat*, CNN TECH (July 3, 2013), <http://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/>. After playing an online videogame with Carter, one of the other players commented to him online: “Oh you’re insane. You’re crazy. You’re messed up in the head.” *Id.* Carter replied, “Oh yeah, I’m real messed up in the head. I’m going to go shoot up a school full of kids and eat their still-beating hearts.” *Id.* Carter immediately followed this message with “LOL” and “J/K”—

indicating that the comment wasn't serious. *Id.* The other online gamers with whom Carter was interacting apparently understood he was making a joke, albeit a very poor one. But another Internet user who saw the comment, apparently a woman in Canada, reported it to authorities. *Id.* Carter was arrested and spent months in jail on a charge of making a genuine terroristic threat. *Id.*

As exemplified by the Carter case, for a variety of reasons young people are particularly at risk of being misunderstood. To begin with, they are sharing more personal information online than ever before. See Madden, et al., *Teens Social Media, and Privacy* (reporting results of six-year survey of teen online behavior). And while most teens are lifelong technology users and are genuinely concerned about privacy, they may not always conduct themselves accordingly. See Johann Schrammel, Christina Koffel, & Manfred Tscheligi, *How Much Do You Tell? Information Disclosure Behaviour in Different Types of Online Communities*, CENTER FOR USABILITY RESEARCH & ENG'G (2008), <http://www.sozioinformatik.org/fileadmin/IISI/upload/2009/p275.pdf>. For example, many teens post information on social media that they think is funny or intended to give a particular impression to a narrow audience, without considering how this same content might be read out of context. Boyd, *IT'S COMPLICATED* 44.

In this regard, “[t]he intended audience matters, regardless of the actual audience.” *Id.* at 30. Thus,

even when people say what they mean online, their words can be misunderstood. As a result, comments, conversations, and other content created by and intended for young audiences is being read by older audiences who may not understand the vocabulary, social references, and other context. See Boyd, IT'S COMPLICATED 30 ("Unfortunately, adults sometimes believe they understand what they see online without considering how teens imagined the context when they originally posted a particular photograph or comment.").

Of course, misunderstandings are not limited to messages posted by young adults. Earlier this year, a middle-aged art professor at a New Jersey college was suspended without pay for eight days after he posted on Google+ a picture of his smiling seven-year-old daughter wearing an oversized t-shirt with a quote from the television show "Game of Thrones." Sasha Goldstein, *N.J. College Suspends Professor Over 'Game of Thrones' Shirt Perceived as 'Threat'*, NEW YORK DAILY NEWS, (Apr. 18, 2014), <http://www.nydailynews.com/news/national/n-college-suspends-professor-threatening-game-thrones-shirt-article-1.1761354>. Game of Thrones is a hugely popular HBO show whose most recent season finale drew more than 7 million viewers. Rick Kissell, *HBO's 'Game of Thrones' Finale Draws 7.1 Million Viewers Sunday*, VARIETY (June 16, 2014), <http://variety.com/2014/tv/ratings/hbos-game-of-thrones-closes-with-7-1-million-viewers-sunday-1201221238/#>.

School administrators interpreted the quote, “I will take what is mine with fire and blood,” as uttered by one of the show’s best-known characters, as threatening a school shooting. Goldstein, *N.J. College Suspends Professor Over ‘Game of Thrones’ Shirt Perceived as ‘Threat’*. In defending the school’s actions, a spokesperson cited the number of school shootings that had occurred already this year. *Id.* Such is the school’s concern that, even after the misunderstanding was revealed and the teacher reinstated with back pay, the school required him to remain off campus for more than a week and to visit a psychiatrist before returning to work. *Id.*

Under the legal standard applied by the Third Circuit below, the types of misunderstandings described herein would often end with prosecution and potentially years of imprisonment. The mere possibility of such life-ruining consequences, however remote the likelihood of prosecution in reality, invariably will chill constitutionally protected speech. See *United States v. Stevens*, 559 U.S. 460, 480 (2010) (stating, in invalidating a criminal statute on First Amendment overbreadth grounds, that “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

## **2. Political speech may also be misunderstood.**

Finally, political speech also presents a fertile area for misunderstandings. As social media has grown, it has become a powerful forum for political speech. This speech takes many forms. Organized reporting is often done through social media, with many reporters and political commentators having thousands of followers on Twitter. Some organized news reporting and commentary exists solely on social media. The Young Turks, for example, is a political news and opinion outlet that has existed on YouTube for years.

Every election cycle, Facebook and Twitter ignite with users supporting (or deriding) candidates, parties, and positions, forwarding links to long-form analysis, or simply joining in the latest chat. Some research estimates that 39% of American adults engaged in some sort of political activity on a social network during the 2012 elections. Alex Fitzpatrick, *Pew: Online Political Engagement Can Lead to Offline Activism* (Apr. 24, 2013), <http://mashable.com/2013/04/25/pew-internet-politics-activism/>; see also Aaron Smith, *Civic Engagement in the Digital Age* (Apr. 25, 2013), <http://www.pewinternet.org/2013/04/25/civic-engagement-in-the-digital-age/>.

Politicians have recognized the power of social media. As of 2011, 98% of the members of Congress

had adopted at least one social media platform as a communication and outreach tool. Sherri R. Greenberg, *Congress + Social Media*, LBJ SCHOOL OF PUBLIC AFFAIRS, UNIV. OF TEX. 1 (Oct. 22, 2012), [https://www.utexas.edu/lbj/cpg/docs/research\\_congress\\_social\\_media.pdf](https://www.utexas.edu/lbj/cpg/docs/research_congress_social_media.pdf). Government agencies have also taken to posting certain public documents on social media sites. *Id.* at 3; *see also* Kathy Goldschmidt & Leslie Ochreiter, *Communicating with Congress: How the Internet Has Changed Citizen Engagement*, CONG. MGMT. FOUND. (2008), <http://www.congressfoundation.org/projects/communicating-with-congress/how-theinternet-has-changed-citizen-engagement> (chronicling constituents' engagement with congress on social media).

As political speech rises on social media, it is worth noting that, even before the advent of online networks, such speech has a long history of sometimes violent imagery. Legislative proposals are “killed,” “shot down,” and declared “dead on arrival.” *See, e.g., Reagan Says Democrats are Stalling Crime Bill*, PHILADELPHIA INQUIRER, Feb. 19, 1984, at A3 (quoting House subcommittee chairman who declared President’s crime legislation “dead on arrival”).

And in recent years violent metaphors in political rhetoric have at times been perceived as portending actual violence when distributed online. For example, Sarah Palin triggered an angry response with her online “rifle sights map” that



placed crosshairs over political districts targeted by Palin’s campaign. See John Berman, *Sarah Palin’s Crosshairs Ad Dominates Gabrielle Giffords Debate*, ABC NEWS (Jan. 9, 2011), <http://abcnews.go.com/Politics/sarah-palins-crosshairs-ad-focus-gabrielle-giffords-debate/story?id=12576437>. Similarly, in a notable YouTube campaign video, West Virginia Governor Joe Manchin attempted to bolster his NRA credentials by actually shooting a copy of cap-and-trade legislation with a hunting rifle. Lucy Madison, *Democrat Joe Manchin Takes “Dead Aim” at Health Care, Cap-and-Trade*, CBS NEWS (Oct. 11, 2010), <http://www.cbsnews.com/news/democrat-joe-manchin-takes-dead-aim-at-health-care-cap-and-trade/>.

It requires little imagination to surmise that similar speech occurring on social media could be misunderstood by some recipients.

## II. APPLYING THE NEGLIGENCE STANDARD TO SOCIAL MEDIA WILL CHILL CONSTITUTIONALLY PERMISSIBLE SPEECH.

This Court has consistently made clear that “whatever the challenges of applying the Constitution to ever-advancing technology, ‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quoting *Joseph Burstyn v. Wilson*, 343 U.S. 495, 503 (1952)). And “[t]he most basic of

those principles is this: “[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Id.* (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

Here, the Third Circuit has interpreted 18 U.S.C. § 875(c), which prohibits the interstate transmission of “any communication containing . . . any threat to injure the person of another,” to require that only an objective test must be met in order to obtain a criminal conviction against a speaker. Thus, under the Third Circuit’s approach, a speaker may be convicted regardless of whether he had any subjective intent to threaten, so long as he intentionally made a statement “under such circumstances wherein a reasonable person would foresee that the statement would be interpreted” as a threat. *United States v. Elonis*, 730 F.3d 321, 328 (3d Cir. 2013).

As Petitioner has explained, Pet. Br. 3-4, the Third Circuit’s objective test implicates two types of speech restrictions that this Court has made clear pose particular risks to free expression. First, the Court has identified criminal prohibitions on pure speech as “matter[s] of special concern” under the First Amendment because “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno v. ACLU*, 521 U.S. at 871-72. Second, the Court has held that

“negligence . . . is [a] constitutionally insufficient” standard for imposing liability for speech. *New York Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). And as Justice Marshall explained, “[i]n essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners.” *Rogers v. United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); accord *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (noting that the objective test “reduces culpability . . . to negligence”), *cert. denied*, 134 S. Ct. 59 (2013).

The Third Circuit’s objective standard, which “transforms even negligent misunderstandings into felonies,” Pet. Br. 52, is particularly problematic when applied to social media communications. As described herein, *see supra* Part I, social media messages often reach unintended recipients. And, for example, what may be seen as humor among a community of young adults might be seen as something quite different by other Americans. Thus, the Third Circuit’s opinion potentially criminalizes speech so “portable” that it may be copied, pasted and forwarded to a limitless worldwide audience (with or without the original speaker’s consent), and received by anyone on social media devoid of its original context. In that case, speakers will be forced to tailor their messages to the sensibilities of the most delicate-eared and easily frightened listener in the world. This Court’s frequent admonition—that

“[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox”—can be equally applied to the digital “inbox” as well. *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983)).

Likewise, a negligence-only approach will likely result in increasing and excessive censorship of constitutionally permissible speech online. That is to say, if courts apply a negligence-only standard to alleged threats transmitted online, they will more often find the presence of reasonable fear and thus the existence of a “true threat.” The result will be that constitutionally protected speech on the Internet will be chilled.

The Court should avoid this result. In assessing the value of speech for First Amendment purposes, the potential value to the public at large must be taken into account. *See, e.g.*, Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375, 420 (2009) (“Any regulation of speech must strike a livable balance among the differing claims of harm, value, culpability, and administrative clarity.”). The emergence of social networking has brought tremendous benefits to American society, exponentially enhancing our ability to connect with others, and to establish, maintain, and restore relationships and communities. The Court should ensure that an overbroad and unduly harsh interpretation of a

criminal statute does not remain in place, unnecessarily diminishing what has become a cherished public resource.

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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