

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 THOMAS JEFFERSON CENTER FOR
THE PROTECTION OF FREE EXPRESSION,
THE PENNSYLVANIA CENTER FOR THE
FIRST AMENDMENT, CARTOONISTS RIGHTS
NETWORK INTERNATIONAL, AND CHRIS
DICKEY IN SUPPORT OF THE PETITIONER

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

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

*Counsel of Record for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICI CURIAE	1
ARGUMENT	3
I. Modern Communicative Norms are Inconsistent with an Objective Intent Approach to True Threat Analysis	4
A. Musical Expression.....	5
B. Comedy and Satire	7
C. Political Hyperbole	9
D. “Trash Talk”	12
II. Online Speech is Shaped by Unique Behavioral and Structural Dynamics that are Incompatible with an Objective Intent Approach to True Threat Analysis.....	15

III. Interpreting 18 U.S.C. § 875 to Require a Showing of Subjective Intent to Threaten is More Protective of First Amendment Rights and Consistent with Real World Threat Investigations..... 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases	Pages
<i>Americans United For Separation of Church & State v. City of Grand Rapids</i> , 980 F.2d 1538 (6th Cir. 1992).....	19
<i>Clark v. United States</i> , 250 F. 449 (5th Cir. 1918) ..	22
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	6
<i>Doe v. Small</i> , 964 F.2d 611 (7th Cir. 1992).....	19
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	7
<i>Goodling v. Wilson</i> , 405 U.S. 518 (1972).....	12
<i>Hedges v. Wauconda School Dist.</i> , 9 F.3d 1295 (7th Cir. 1993).....	19
<i>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	6
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988)	7
<i>Nat'l Endowment for the Arts v. Finley</i> , 524 U.S. 569 (1998).....	6

<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	10, 23
<i>Pinette v. Capitol Square Review & Advisory Bd.</i> , 30 F.3d 675 (6th Cir. 1994) <i>aff'd</i> , 515 U.S. 753 (1995)	19
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	10
<i>United States v. Apel</i> , 44 F.Supp. 592 (D.C.N.D. Ill. 1942).....	22
<i>United States v. Jasick</i> , 252 F. 931 (D.C.E.D. Mich. 1918).....	23
<i>United States v. Stickrath</i> , 242 F. 151 (D.C.S.D. Ohio 1917).....	22
<i>Virginia v. Black</i> , 538 U.S. 343 (2003).....	1, 3, 15
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)....	6
<i>Watson v. Memphis</i> , 373 U.S. 526 (1963).....	18
<i>Watts v. United States</i> , 394 U.S. 705 (1969).....	11, 22, 23

Other Authorities

- U.S. Const. amend. I..... *passim*
- 414: *Right to Remain Silent*, This American Life, Sept. 10, 2010, <http://www.thisamericanlife.org/radio-archives/episode/414/transcript>..... 9
- Jessica Bennett, *The Emoji Have Won the Battle of Words*, N.Y. Times, July 25, 2014, <http://www.nytimes.com/2014/0727/fashion/emoji-have-won-the-battle-of-words.html>..... 21
- 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> 11
- Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (Houghton Mifflin 2008) 4, 5
- Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, The Guardian, Feb. 18, 2009, <http://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race> 12

Heather Chaplin, *The Selective Subculture of 'Fantasy' Gamers*, NPR.org, Jan. 31, 2011, <http://www.npr.org/2011/01/31/133371941/the-selective-subculture-of-fantasy-gamers> 15

GEORGE CARLIN, *CARLIN ON CAMPUS* (Eardrum Records 1984)..... 7, 8

Nigel Collins, *A Little (or a Lot) on the Trashy Side*, ESPN.com, Apr. 17, 2013, http://espn.go.com/boxing/story/_/id/9181554/boxing-distinguished-history-art-trash-talking13, 14

Oliver Ben Conmy, *Trash Talk in a Competitive Setting: Impact on Self-Efficacy, Affect, and Performance 2* (Oct. 30, 2008) (unpublished Ph.D. dissertation, Florida State University)..... 14

Robert A. Fein and Bryan Vossekuil, *Protective Intelligence and Threat Assessment Investigations: A Guide for State and Local Law Enforcement Officials*, 37 (1998)..... 24

Bill Hicks “Loses It” (Chicago, 1989), YouTube, http://www.youtube.com/watch?v=kQt_cNEvJI8..... 8

An H. Kuppens & Frank van der Pol, “True” *Black Metal: The Construction of Authenticity by Dutch Black Metal Fans*, 39 EUR. J. COMM. RES. 151 (2014).
..... 7

Pierre Kröll, *Obama and NRA*, The Cagle Post, Dec. 17, 2012, <http://www.cagle.com/2012/12/obama-and-nra/> 12

Randall C. Manning, *Texting Dictionary of Acronyms* (2009)..... 20

Katla McGlynn, *Daniel Tosh Apologizes For Rape Joke Aimed At Female Audience Member At Laugh Factory*, Huffington Post, July 10, 2012, http://www.huffingtonpost.com/2012/07/10/daniel-tosh-rape-joke-laugh-factory_n_1662882.html..... 9

Anthony Mitchell, *A Leet Primer*, Technews World, Dec. 6, 2005, <http://www.technewsworld.com/story/47607.html> 21

Sean O’Neal, *Tracy Morgan Under Fire for Homophobic Rant*, A.V.Club, June 10, 2011, <http://www.avclub.com/article/updated-tracy-morgan-under-fire-for-homophobic-ran-57385>..... 8

Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin 2011)..... 16

David W. Rainey & Vincent Granito, *Normative Rules for Trash Talk Among College Athletes: An Exploratory Study*, 33 J. SPORT BEHAVIOR 276 (September 2010)..... 13

Richard Sandomir, *Tyson and Lewis Meet in the Fight Before the Fight*, N.Y. Times, Jan. 23, 2002, <http://www.nytimes.com/2002/01/23/sports/boxing-tyson-and-lewis-meet-in-the-fight-before-the-fight.html> 14

Herbert D. Simons, *Race and Penalized Sports Behaviors*, 38 INT’L REV. FOR SOC. OF SPORT 5 (March 2003) 13

Sam Stein, *Sharron Angle Floated ‘2nd Amendment Remedies’ as ‘Cure’ for ‘The Harry Reid Problems’*, Huffington Post, June 16, 2010, http://www.huffingtonpost.com/2010/06/16/sharron-angle-floated-2nd_n_614003.html..... 11

Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford Univ. Press 2006) 16

Ken Walters, *Despite Efforts to Protect Privacy, Users Increase Amount of Personal Information Available Online, Carnegie Mellon Study Finds*, Carnegie Mellon University, Mar. 5, 2013, http://www.cmu.edu/news/stories/archives/2013/march/march5_facebookprivacystudy.html 18

Ralph Wiley, *Jive Trash Talkin’*, ESPN.com, <http://espn.go.com/page2/s/wiley/010125.html> ...12, 13

Jason Zinoman, *Toe-to-Toe at the Edge of the Comedy Club Stage*, N.Y. Times, July 17, 2012 8

Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection* (W.W. Norton 2013).....5, 16

STATEMENT OF INTEREST OF AMICI CURIAE¹

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in this and other federal courts, and in state courts around the country. The Center has been especially active in cases involving the “true threats” exception to First Amendment protection. In *Virginia v. Black*, 538 U.S. 343 (2003) the Center appeared as amicus curiae in every court that heard the case, including this Court. In the present case, the Center was a party to the only amicus curiae brief filed in support of the petition for a writ of certiorari.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici curiae represents that it entirely authored this brief and no party, its counsel, or any other entity but amici and their counsel made a monetary contribution to fund the brief’s preparation or submission. This amicus curiae brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

years, the Pennsylvania Center for the First Amendment has been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

Cartoonists Rights Network International has been advocating for the free speech rights of political cartoonists for more than 20 years. CNRI fights to protect the human rights and the personal and creative freedom of editorial cartoonists around the world who find themselves under threat, arrest, or intimidation because of the power and influence of their professional work. CRNI's network of over 60 editorial and social cartoonists throughout the world monitors these threats to editorial cartoonists and their families and activates campaigns to raise awareness and public pressure that push back against these threats.

Chris Dickey, professionally known as Chris Bliss, is a writer and comedian whose 30 year career has included performances at venues around the country and appearances on *The Tonight Show with Jay Leno* and *The Late Show with David Letterman*. He is also the founder and Executive Director of *MyBillofRights.org*, the Bill of Rights

Monument Project, a non-partisan nonprofit whose mission is to raise awareness of and respect for the freedoms and principles in the Bill of Rights through the creation of monuments and permanent displays in civic spaces across America. Of his interest in this case, Dickey states: “The First Amendment is critically important to both my professional and nonprofit work. Internet speech is particularly important in my professional work, as social media like Facebook and Twitter are essential ways to reach my audience. My experience as an artist, both in writing and live performance, is that the right to express myself freely and without reservation is absolutely necessary to the creative process. Whenever I can't speak freely in that exploration, it has a direct negative impact on my ability to think clearly and creatively. Speech and written words that cross the line of what's reasonable and acceptable are often the shortest path to discovering the most interesting premises. Put another way, as the poet William Blake wrote some 200 years ago, “The road of excess leads to the palace of wisdom, for we never know what is enough until we know what is more than enough.”

ARGUMENT

Confirmation that *Virginia v. Black*, 538 U.S. 343 (2003) requires a subjective intent element in defining true threats is essential to prevent the erosion of First Amendment protections. To hold that

the true threat exception need only take into account how a hypothetical reasonable person would assess the alleged threat ignores the reality that in today's culturally fragmented society, "reasonableness" is more relative than ever before. Individuals who share similar beliefs and values are clustering into culturally homogenous groups that often deliberately limit exposure to outside influence. Within such hubs, unique communicative norms emerge and evolve, heightening the likelihood of misinterpretation by juries not intimately familiar with these novel means of expression.

Although not the cause of this cultural balkanization, the Internet has significantly contributed to it. The same technology that allows users to discover unfamiliar customs, values, and viewpoints, also allows them to discover likeminded people to an extent not previously possible. This in turn facilitates the creation of the homogenized communities discussed above.

I. Modern Communicative Norms are Inconsistent with an Objective Intent Approach to True Threat Analysis

Sociologists have long understood the propensity for people to deliberately sort themselves into like-minded communities based on lifestyle, faith, politics, and various other demographic factors. See generally Bill Bishop, *The Big Sort: Why the*

Clustering of Like-Minded America Is Tearing Us Apart (Houghton Mifflin 2008) (describing the historic precursors to a dramatic self-segregation of the American population over the last quarter of the twentieth century); Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection* 70 (W.W. Norton 2013) (noting that the phenomenon is characterized by researchers as “a basic organizing principle’ of human societies and groups”). Certain important consequences of this behavior are equally well known. It is readily accepted, for example, that such communities act as social resonators, amplifying the voices and beliefs of those within the group while simultaneously drowning out competing expression. See Bishop, *supra*, at 6. Furthermore, such groups are understood to have a direct effect on the reasoning and expression of group members. Specifically, group members are subject to the phenomenon of group polarization—also known as the “risky shift” phenomenon—whereby a community becomes increasingly more extreme over time in the direction of its constituent members’ average opinion. See *id.* at 66–69. In short, “mixed company moderates; like-minded company polarizes.” *Id.* at 68.

These phenomena apply to large and small groups alike, and neither popularity nor pedigree can alter the inevitable outcome. One can observe group polarization and its effect on inter-group communication in a number of distinct areas of expressive activity.

A. Musical Expression

This Court has repeatedly recognized the protections afforded to music as a form of artistic expression under the First Amendment. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998). A survey of several contemporary musical subcultures quickly brings to mind Justice Harlan's observation that, often, "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). Hip-hop and rap, for example, are notorious for frequently presenting aggressive and explicit content through a unique mix of slang, idiom, and unconventional dialect that acts to divide those within the genre and culture from outsiders.² Heavy metal music—particularly the subgenre known as "black metal"—employs structural and communicative barriers to outside observers similar to those found in rap. Within this community, a number of lyrical themes and tropes have come to define both the music and its fans. Black metal is one of heavy metal's most extreme offshoots in that the artists attempt to deviate as far as possible from what they perceive to

² For an extensive discussion of how the communicative norms of hip-hop are frequently misunderstood by listeners outside the community, see the amici curiae brief filed by the Marion B. Brechner First Amendment Project and Rap Music Scholars in this case.

be mainstream values in pursuit of artistic authenticity. *See generally* An H. Kuppens & Frank van der Pol, “True” Black Metal: The Construction of Authenticity by Dutch Black Metal Fans, 39 EUR. J. COMM. RES. 151 (2014) (noting that “authenticity” in this context is more a measure of how controversial or grotesque the theatrical aspects of an artist’s act are rather than a measure of legitimacy or genuineness). Although the outrageous elements that characterize black metal generally reflect fantasy rather than reality, those outside of the culture are unlikely to appreciate the extent to which the performance is instructed by various stock mannerisms and expressive tropes. As a result, there is a high likelihood that outsiders exposed to black metal may misconstrue its violent lyrical imagery and grotesque physical performance as actual menace.

B. Comedy and Satire

This Court has also recognized the importance of comedic and satirical speech to our public discourse. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–55 (1988) (noting the important role of political satire in public life); *cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 747 (1978) (assuming, *arguendo*, that George Carlin’s “Filthy Words” monologue enjoyed full First Amendment protection). Throughout our history, from Mark Twain to Lenny Bruce, speakers have pushed the boundaries of protected expression through humor, often endeavoring to make light of taboo or

macabre subjects through sarcasm, hyperbole, and satire. See, e.g., Sean O’Neal, *Tracy Morgan Under Fire for Homophobic Rant*, A.V.Club, June 10, 2011, <http://www.avclub.com/article/updated-tracy-morgan-under-fire-for-homophobic-ran-57385> (The comedian joked that he would stab his own son to death if the boy turned out to be gay.); GEORGE CARLIN, *CARLIN ON CAMPUS* (Eardrum Records 1984) (Carlin proclaimed his personal motto to be: “Live and let live. Anyone who can’t go along with that, take ‘em outside and shoot the motherfucker.”).

Humorists thus comprise another discrete subculture whose communicative norms are developed and policed from within. As a result, comedy enthusiasts will approach and interpret a performer’s material much differently than unfamiliar listeners. This is particularly true in live settings where performers often employ violent rhetoric as a means of responding to unruly audience members, known as “hecklers.” See, e.g., *Bill Hicks “Loses It”* (Chicago, 1989), YouTube, http://www.youtube.com/watch?v=kQt_cNEvJI8 (Responding to multiple hecklers in the audience, the comedian began ranting that “Hitler had the right idea, he was just an underachiever. Kill ‘em all, Adolf. All of ‘em—Jew, Mexican, American, White—Kill ‘em all!”); see also Jason Zinoman, *Toe-to-Toe at the Edge of the Comedy Club Stage*, N.Y. Times, July 17, 2012, at C1 (describing the unspoken rule among comedians and hecklers as: “You fire at a cop, get ready to die”). To members of the community, this sort of behavior is

not only normal, it is celebrated. Outsiders, however, frequently find the interaction highly disturbing. When the comedian Daniel Tosh was interrupted by a female audience member who loudly objected to his joke about rape, he responded by asking “Wouldn’t it be funny if that girl got raped by, like, five guys right now? Like *right now*?” The crowd erupted with laughter, but the woman was so overcome with concern for her personal safety that she left the show, later describing the experience as “viscerally terrifying and threatening.” Katla McGlynn, *Daniel Tosh Apologizes For Rape Joke Aimed At Female Audience Member At Laugh Factory*, Huffington Post, July 10, 2012, http://www.huffingtonpost.com/2012/07/10/daniel-tosh-rape-joke-laugh-factory_n_1662882.html.

Misunderstandings are likely to arise in other contexts as well, such as when comedians “perform” in nontraditional settings that are open to outside listeners. This very situation found comedian Joe Lipari facing criminal threat charges after he posted on Facebook about the bad service he had received at a local Apple Store. Paraphrasing a scene from the movie *Fight Club*, he changed his public Facebook status to “Joe Lipari might walk into an Apple store on Fifth Avenue with an Armalite AR-10 gas-powered semi-automatic weapon and pump round after round into one of those smug, fruity little concierges.” 414: *Right to Remain Silent*, This American Life, Sept. 10, 2010, <http://www.thisamericanlife.org/radio-archives/episode/414/transcript>. Although the charges were

ultimately dropped, the fact remains that had Lipari made the exact same comment as part of his stand-up show, it is very likely that nothing would have come of it. By exposing “objective” outsiders to controversial—yet protected—expression, Lipari and other comedians risk damage to their careers as well as their constitutional rights.

C. Political Hyperbole

Political speech clearly lies at the core of First Amendment protection. *See, e.g., Roth v. United States*, 354 U.S. 476, 484 (1957) (noting that the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (endorsing the principle that “debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”). Those who are immersed in political activity exist in yet another distinct community—albeit one more mainstream than others. The politically active speaker may still find his expressive norms alienating to those less engaged with politics. This is often due to the prevalence of hyperbole among political speakers. Although political hyperbole is common among speakers of various political persuasions, positions articulated by

way of extreme or even violent exaggeration may easily offend or intimidate outside listeners. *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969) (distinguishing protected political hyperbole from true threats). In such cases, protected political hyperbole may appear threatening if the speech is targeted at or inadvertently reaches an “objective” outsider unfamiliar with the prevailing norms. This very scenario occurred in 2010, when Sarah Palin’s political action committee issued a map featuring crosshairs placed atop the districts of twenty House Democrats who had voted in favor of the Affordable Care Act. 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>. The map urged Palin’s followers to “take a stand” and to “take back the 20.” *Id.* When Rep. Gabrielle Giffords—whose district was targeted on the map—was the victim of a shooting, Palin was criticized for employing what some saw as dangerous and incendiary symbolism, even though there appeared to be no ties between the map and Gifford’s shooting. When asked to explain the use of the crosshair imagery, a spokesperson for the political action committee stated “it never occurred to us that anybody would consider it violent.” *Id.* See also Sam Stein, *Sharron Angle Floated ‘2nd Amendment Remedies’ as ‘Cure’ for ‘The Harry Reid Problems’*, Huffington Post, June 16, 2010, http://www.huffingtonpost.com/2010/06/16/sharron-angle-floated-2nd_n_614003.html.

Occasionally, the divide between in-group speakers and outsiders is so great that even simple political cartoons are perceived as threats by otherwise “reasonable” listeners. *See, e.g.*, Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, *The Guardian*, Feb. 18, 2009, <http://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race> (cartoon depicting two police officers having just shot a chimpanzee that many readers believed was intended to represent President Obama); Pierre Kroll, *Obama and NRA*, *The Cagle Post*, Dec. 17, 2012, <http://www.cagle.com/2012/12/obama-and-nra/> (cartoon depicting President Obama being held at gunpoint by an individual wearing a National Rifle Association t-shirt).

D. “Trash Talk”

The First Amendment protects the use of “opprobrious words or abusive language” which do not, “by their very utterance . . . tend to incite an immediate breach of the peace.” *Goodling v. Wilson*, 405 U.S. 518, 525 (1972). This bulwark extends to most trash talk, a form of verbal jousting interwoven into various athletic and competitive cultures. Legendary figures such as Muhammad Ali and Larry Bird have been celebrated for the way they used trash talk to skillfully get inside the heads of their opponents. *See, e.g.*, Ralph Wiley, *Jive Trash Talkin’*, ESPN.com, <http://espn.go.com/page2/s/wiley/010125>.

html (lauding Ali as “a fountain of rich, thoughtful abuse”). In most circumstances, the subjective intent of all trash talkers is the same: to gain a competitive advantage by throwing their opponent off of their game. Both competitors understand that different rules govern what can and cannot be said in the course of play. This is also usually clear to spectators and others within a particular sporting community. Outsiders, on the other hand, may easily misunderstand these interactions, mistaking carefully orchestrated strategy for wanton animus.

Outsiders are further disadvantaged because, while trash talk is prevalent at nearly all levels of competition, *see* David W. Rainey & Vincent Granito, *Normative Rules for Trash Talk Among College Athletes: An Exploratory Study*, 33 J. SPORT BEHAVIOR 276 (September 2010), its nature and acceptability varies widely. Studies have identified differences in the usage, content, and frequency of trash talk based on gender, level of competition, and type of sport. *Id.* Norms governing trash talk vary by culture as well, Herbert D. Simons, *Race and Penalized Sports Behaviors*, 38 INT’L REV. FOR SOC. OF SPORT 5, 13–14 (March 2003), further leading to potential misinterpretations of a speaker’s intent.

In some sports, trash talk is not just tolerated but encouraged as a means of attracting interest for an upcoming event. *See* Nigel Collins, *A Little (or a Lot) on the Trashy Side*, ESPN.com, Apr. 17, 2013,

http://espn.go.com/boxing/story/_/id/9181554/boxing-distinguished-history-art-trash-talking. This is most common in combat sports, where due to the violent nature of the competition and the circus-like atmosphere surrounding its promotion, trash talk takes a particularly menacing (and public) form. See, e.g., Richard Sandomir, *Tyson and Lewis Meet in the Fight Before the Fight*, N.Y. Times, Jan. 23, 2002, <http://www.nytimes.com/2002/01/23/sports/boxing-tyson-and-lewis-meet-in-the-fight-before-the-fight.html> (describing one notoriously chaotic press conference with the boxer Mike Tyson as “both comic and frightening”).

Trash talk is not just limited to athletic competitions. It has also become a common feature of the rapidly growing online gaming community. See Oliver Ben Conmy, *Trash Talk in a Competitive Setting: Impact on Self-Efficacy, Affect, and Performance 2* (Oct. 30, 2008) (unpublished Ph.D. dissertation, Florida State University) available at <http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=2617&context=etd>. While on some levels, online competitors mirror their real-world counterparts in their methods of verbal sparring, the lack of face-to-face interaction and the fact that gamers don't have to use their real names means the level of vitriol is often ratcheted up in online gaming. Furthermore, while many people play video games, there are distinct niches within the broader gaming culture devoted to specific game genres, each of which attract different types of players and exhibit unique expressive

conventions. See Heather Chaplin, *The Selective Subculture of 'Fantasy' Gamers*, NPR.org, Jan. 31, 2011, <http://www.npr.org/2011/01/31/133371941/the-selective-subculture-of-fantasy-gamers>.

II. Online Speech is Shaped by Unique Behavioral and Structural Dynamics that are Incompatible with an Objective Intent Approach to True Threat Analysis

Confirming that *Virginia v. Black*, 538 U.S. 343 (2003), requires a subjective approach in true threat analysis is paramount to the protection of free speech because of the ways in which the Internet impacts communication. Although the Internet has the technical capacity to bring those with diverse and disparate viewpoints together to exchange ideas, its nature and infrastructure have instead driven many users further apart. The Internet also limits the control a speaker has over her audience. The coexistence of these two factors makes it increasingly difficult to assign an objective meaning to a particular expression, especially when it was intended for a limited audience but found its way into a larger community with different sensitivities.

While the Internet provides individuals with unprecedented access to viewpoints that differ from their own, it also increases access to likeminded people and permits users to shield themselves from competing expression. See Cass R. Sunstein,

Infotopia: How Many Minds Produce Knowledge 188 (Oxford Univ. Press 2006) (“The rise of blogs makes it all the easier for people to live in echo chambers of their own design. Indeed, some bloggers, and many readers of blogs, live in information cocoons.”); Zuckerman, *Rewire* at 100–01 (observing that the Internet “isolation index”—a measurement used by economists and sociologists to determine the likelihood of meeting someone from another social group or belief system—is greater than those of local newspapers, national magazines, and both broadcast and cable television). This, in turn, has facilitated the proliferation of insular online communities whose members often devise their own forms and methods of communication.

The creation of these communities has been expedited by the infrastructure of the Internet itself. See generally Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin 2011). Pariser reveals that many major platforms from which Internet users receive content, such as Google and Facebook, self-edit in an effort to provide particular individuals with content that most coincides with their preexisting interests and opinions. Users who do not actively insulate themselves from opposing viewpoints still only receive content that a computer algorithm has deemed favorable to them. See *id.* at 2. Instead of uniting those with conflicting views, the Internet has created an experience that caters to each user’s idiosyncratic views and sensitivities. Because of this

tendency to separate individuals into different groups with unique perspectives, interests, and styles of communication, the notion that a single “reasonable person” exists relative to these disparate interests is a fiction. Instead, countless audiences exist absent any clear delineation, all of which have the capacity to interpret a single piece of expression in numerous ways.

This problem is exacerbated by the lack of audience control experienced by online speakers. Although a speaker may intend for a message to reach only those in a defined and limited social network (an audience for which the speaker is less likely to censor herself), the Internet has the capacity to transform such targeted, quasi-private speech into a message accessible by much larger audiences. As such, an individual using the Internet as a medium of dissemination may not always be certain that her expression is reaching only the intended audience and not Internet users at large.

For several reasons, speakers are often unaware of this lack of audience control. First, some speakers may not be able to manipulate the technical aspects of each social media platform to limit their conversations to a certain audience. While many social media outlets allow users some level of control over how far-reaching their messages will be, many users have difficulty understanding these controls. See Ken Walters, *Despite Efforts to Protect Privacy*,

Users Increase Amount of Personal Information Available Online, Carnegie Mellon Study Finds, Carnegie Mellon University, Mar. 5, 2013, http://www.cmu.edu/news/stories/archives/2013/march/march5_facebookprivacystudy.html. Second, some speakers may be aware of the aforementioned “filter bubble” and thus wrongfully assume that their message will only reach others within their respective online communities, however defined, not understanding that the audience within digital earshot is in fact much larger. Finally, even in circumstances where a speaker has done their best to limit their audience, the Internet facilitates sharing by and among unintended third-party listeners. *See id.* Because speakers may have a false sense of security when expressing themselves on the Internet, particularly through social media, their expression may be more candid than it otherwise would be. Listeners outside of the intended audience may be more sensitive than those with whom the speaker intended to communicate. Under an objective approach to true threat analysis, this lack of audience control makes contextualization and, thus, objective interpretation more difficult.

An objective intent approach to true threat analysis also subjects speakers to a heckler’s veto, whereby hostile listeners enjoy an ad hoc veto power over a speaker’s freedom of expression. *See Watson v. Memphis*, 373 U.S. 526, 535 (1963) (“constitutional rights may not be denied simply because of hostility to their assertion or exercise.”). In the context of the

Internet and social media, in which a speaker's control over her message and her audience is limited, a hypersensitive or ignorant listener could silence otherwise protected speech under an objective intent standard.³ Audience members unfamiliar with the speaker's use of language, sense of humor, or other communicative peculiarities will be more likely to misinterpret her speech and misinform an objective intent analysis, potentially chilling protected speech. A subjective intent requirement, in contrast, would eliminate concerns about an uninformed audience member holding a veto over a speaker as it would provide greater context to the speech and would be more reflective of actual intent.

Filtering and audience control are not the only issues contributing to the disconnect experienced by outside listeners exposed to unfamiliar online speech. The Internet offers an abundance of unique modes of communication, each of which may be used by only one subgroup, or, if shared, may be used in entirely different ways by each community. The common factor

³ An analogous concept in the context of religious speech has often been referred to as the "ignoramus's" or the "obtuse observer's" veto and courts have often been critical of the government's enforcement of such a veto. *See Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring); *Americans United For Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992); *Hedges v. Wauconda School Dist.*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993); *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 679 (6th Cir. 1994) *aff'd*, 515 U.S. 753 (1995).

among all of these modes, however, is their propensity for confusion, alienation, and misinterpretation by outside listeners.

Some are deceptively simple, such as the 140-character limit imposed by the microblogging app Twitter. Speakers communicating on Twitter are forced to ruthlessly edit their expression to fit within this character limit, stripping away most—if not all—of the contextual clues that would ordinarily inform the speaker’s written communication. As a result, Twitter functions much like a newspaper that elects to withhold any semblance of in-depth reporting from its readers, opting instead for the naked efficiency of attention-grabbing headlines.

More disorienting still are communicative modes that alter existing linguistic conventions or create new ones from whole cloth. It will come as no surprise to anyone who has ever sent or received a text message that, for matters of efficiency and expediency, speakers frequently abbreviate their expression in any number of ways when texting. However, the extent to which text messages can be—and commonly are—fundamentally distorted is truly staggering. *See, e.g.,* Randall C. Manning, *Texting Dictionary of Acronyms* (2009) (providing “over 1,000 acronyms and symbols used by the mainstream texting world”). Many text-based speakers have taken abbreviation to an entirely new level, communicating exclusively through pictorial icons known as “emoji.” *See, Jessica*

Bennett, *The Emoji Have Won the Battle of Words*, N.Y. Times, July 25, 2014, <http://www.nytimes.com/2014/0727/fashion/emoji-have-won-the-battle-of-words.html> (noting, among other developments, that *Emoji Dick*, an all-emoji version of *Moby Dick*, was recently accepted into the Library of Congress). Then there are the invented languages, the oldest and most well known of which is “1337” (pronounced “leet”). Half substitution cypher, half alternative alphabet, 1337 “has outgrown its roots as an obscure communication system for computer bulletin board users and has become a broad cultural phenomenon.” Anthony Mitchell, *A Leet Primer*, Technews World, Dec. 6, 2005, <http://www.technewsworld.com/story/47607.html> (Mitchell notes that the language can be so disorienting to newcomers that “non-native speakers of English are often quicker to pick up and expand upon leet than native speakers.”).

The implications of insular communities communicating via unfamiliar modes are highly troubling, as the disconnect between speaker and listener is magnified exponentially, practically ensuring misunderstandings. The First Amendment demands that such misunderstandings must not be permitted to inform application of criminal threat statutes such as 18 U.S.C. §875 in the guise of a reasonable person, objective intent standard.

III. Interpreting 18 U.S.C. § 875 to Require a Showing of Subjective Intent to Threaten is

More Protective of First Amendment Rights and Consistent with Real World Threat Investigations

This Court's deliberation in *Watts* reminds us that, in the absence of a subjective intent requirement, the government may all too easily target political dissent by labeling disfavored speech as unprotected threats. Prior to the *Watts* decision, the Alien and Sedition Laws and other acts including 18 U.S.C. §871 (proscribing threats against the President of the United States) were commonly applied to protected political hyperbole. *See, e.g., Clark v. United States*, 250 F. 449 (5th Cir. 1918); *United States v. Stickrath*, 242 F. 151 (D.C.S.D. Ohio 1917); *United States v. Apel*, 44 F.Supp. 592 (D.C.N.D. Ill. 1942). One district court judge explained the accepted scope of §871 at the time thusly:

The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. . . . It arouses

resentment and concern on the part
of patriotic citizens.

United States v. Jasick, 252 F. 931, 933 (D.C.E.D. Mich. 1918). The *Watts* decision ensured that such statutes would no longer be used to punish speakers' protected expressions. To that end, this Court recognized that threat statutes must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)).⁴

In addition to being more compatible with the way contemporary society communicates, the subjective test is also more consistent with the criteria used by law enforcement agencies when evaluating threats.⁵ This approach is exemplified by a guide published by the Justice Department detailing the procedures followed by the Secret Service when

⁴ Interestingly, in *Sullivan*, the Court concluded that a subjective intent standard was required in libel cases against public figures in order to ensure the maintenance of robust and open debate.

⁵ An exception to this may be bomb threats. Due to the inevitable disruption these threats cause, the resources spent investigating their authenticity, and the fact that the threat has usually been cleared by the time the perpetrator is questioned, law enforcement is generally not concerned with the mindset of the threat initiator.

investigating threats against the president. The guide states that the primary purpose of a threat investigation is to collect “information and evidence that will help determine whether an individual has the interest, motive, and capacity to mount an attack on a target.” Robert A. Fein and Bryan Vossekuil, *Protective Intelligence and Threat Assessment Investigations: A Guide for State and Local Law Enforcement Officials*, 37 (1998) available at www.secretservice.gov/ntac/PI_Guide.pdf. The guide acknowledges that while the act of making the threat itself is often criminal behavior, that fact alone is merely a reason to begin an investigation. *Id.* at 26.

In order to determine if a suspect is an actual threat, the service investigates a variety of subjective factors, including the facts surrounding the alleged threat, the suspect’s educational background, criminal history, interest in extremist ideas or radical groups, and mental health history, with the understanding that “any errors should be made on the side of safety and violence prevention.” *Id.* at 39. Despite this cautious approach, the high stakes involved, and a broad spectrum of reported incidents, the secret service still successfully employs a subjective investigation standard to keep the President safe.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the decision below.

Respectfully submitted,

/s/ J. Joshua Wheeler

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

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

*Counsel of Record for Amici Curiae