06-4211; 06-4296 (CON); 06-4339 (CON); 06-4436 (CON); 06-4437 (CON); 06-4438 (CON); 06-4447 (CON);

United States Court of Appeals
for the
Third Circuit

UNITED STATES,

Plainitff-Appellee,

– v. –

STOP HUNTINGDON ANIMAL CRUELTY, INC., KEVIN KJONAAS, LAUREN GAZZOLA, JACOB CONROY, JOSHUA HARPER, ANDREW STEPANIAN, and DARIUS FULLMER

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS, NATIONAL LAWYERS GUILD, and FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANTS

MATTHEW STRUGAR
RACHEL MEEROPOL
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6478

Attorneys for Amici Curaie

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. App. R. 26.1 and Local App. R. 26.1.1, *Amici Curiae* hereby certify they have no parent corporations and they have not issued any shares of stock to any publicly held company.

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENTS OF INTEREST OF AMICI CURIAE

Appellants' convictions sent a chill through the activist community. Should this Court uphold these convictions, it would blur the line between protected advocacy and criminally sanctionable speech—a line that has been quite clear since *Brandenburg v. Ohio*, 395 U.S. 444 (1969). When First Amendment protections are blurred, previously resolute voices err on the side of caution out of fear of prosecution.

Amici submit this brief in support of Defendant-Appellants to urge this Court to affirm the robust protections of the First Amendment for political activists' uncompromising speech by reversing Appellants' convictions. As listed in the appendix, *amici*—the Center for Constitutional Rights, the National Lawyer's Guild, and First Amendment Lawyers Association—are non-profit civil rights and civil liberties organizations.

SUMMARY OF ARGUMENT

Appellants have been prosecuted for words, for pure speech. Underlying the government's case are multiple acts of property destruction and harassment believed to have taken place in connection with the worldwide campaign against the practices of Huntingdon Life Sciences. But those acts are not attributed to Appellants and are not the focus of this case. Instead, Appellants are charged with being the mouthpiece for a campaign

that involved both legal and illegal elements. The government's theory is that reporting on and reveling in illegal activity is tantamount to joining a criminal conspiracy. Such protected speech cannot be the sole basis for a finding of criminal liability.

Not all pure speech is afforded the full protection of the First Amendment. But speech itself may not be criminally proscribed unless it falls within one of the narrowly tailored categories of unprotected pure speech: incitement, *Brandenburg v. Ohio*, true threats, *Watts v. United States*, 394 U.S. 705 (1969), libel, *New York Times v. Sullivan*, 376 U.S. 254 (1964), obscenity, *Roth v. United States*, 354 U.S. 476 (1957), or fighting words, *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942). Speech—especially political speech—that does not fall within these narrowly tailored categories is protected, though it may embarrass, disgrace, coerce, humiliate, and even intimidate. *See, e.g., NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 909-10 (1982).

The focus of this case is words—primarily words posted to a website—used in the context of an emotionally charged political struggle. Appellants now sit in federal penitentiaries for using those words.

If Appellants' convictions stand, virtually all internet-based social justice campaigns are at risk of prosecution. Any social justice campaign

that identifies an individual or organization as a target of a boycott or demonstration will be at risk of criminal sanction if a third person takes illegal action against that target. Anti-war website operators could be aiding and abetting a variety of crimes by reporting on an anti-war sit-in in a Senator's office. *See, e.g.*, Counterpunch, Sitting in on Senator Kohl and the War, at http://www.counterpunch.org/jacobs05042007.html (last visited Oct. 26, 2007). Participation in political and social justice campaigns, without more, simply cannot be the basis of a finding of criminal conspiracy or aiding and abetting.

As shown in *Point I*, whether Appellants' words can be the basis of a criminal sanction may not be left to the final determination of a jury, but must be assessed de novo by this Court.

As shown in *Point II*, Appellants' words were not likely to produce imminent lawless action under *Brandenburg*. Appellants' speech fell well within the bounds of established Supreme Court precedent on incitement.

In *Point III*, we show Appellants' words did not constitute proscribable crime facilitating speech under any current interpretation of that doctrine.

Finally, Appellants' words did not constitute a true threat (*Point IV*). The Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003),

requires a specific intent to threaten for speech to constitute a true threat—a standard not applied in the district court nor found by the jury. Next, *amici* urge this Court to adopt a speech-protective standard for true threats to avoid sanctioning or chilling political speech. Appellants' speech did not constitute a true threat under this Circuit's precedent.

The guidance of the Supreme Court in another case involving volatile, emotional speech in a political struggle, *NAACP v. Claiborne Hardware*, is particularly germane here: "Since [Appellee] would impose liability on the basis of public address -- which predominately contain[s] highly charged political rhetoric lying at the core of the First Amendment, we approach this suggested basis of liability with extreme care." 458 U.S. at 926-27.

ARGUMENT

I. This Court Must Exercise Plenary Review Because Pure Speech is the Sole Basis of Criminal Liability

The basic principles of free expression clearly transcend both message and medium. They provide the framework for review of any case in which the government seeks sanctions against pure speech. This review must reflect an independent, de novo assessment of the constitutional adequacy of the essential elements of the case (especially those that might warrant any departure from full First Amendment protection). *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 (1984), *Marcone v. Penthouse Int'l Magazine for*

Men, 754 F.2d 1072, 1088 (3rd Cir. 1985) (de novo review "an affirmative duty of a reviewing court").

The need for careful, plenary, and independent judicial review is greatest in a case such as this one, involving uncompromising advocacy of a politically unpopular position. It is the duty of the judicial branch to safeguard the First Amendment protections of unpopular defendants from the possibility of the passion of jurors inflamed by a prosecutor. Whether Appellants' speech fits within the narrow categories of unprotected speech, and therefore serve as the sole basis of a finding of criminal conspiracy or aiding and abetting, may not be entrusted finally to a jury, but must be determined de novo by this Court.

II. The Content and Medium of Appellants' Speech Does Not Meet the *Brandenburg* Standard for Incitement Because It Was Neither Directed at Producing Unlawful Action Nor Was Any Unlawful Action Imminent

Speech that incites others to violate the law or undertake the use of force falls outside the protection of the First Amendment. But the incitement standard is stringent: "the constitutional guarantees of free speech and free press do not permit a State [or the Federal Government] to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447.

Brandenburg's triple requirement of intent, likelihood, and imminence marked a dramatic departure from the intent-plus-likelihood standard from earlier precedents. *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919). As the Supreme Court counseled in *Bartnicki v. Vopper*, "[t]he normal method of deterring unlawful conduct is to punish the person engaging in it," not one who merely advocates. 532 U.S. 514 (2001).

Brandenburg's imminence requirement is the crucial element in differentiating advocacy from incitement. In *Hess v. Indiana*, 414 U.S. 105 (1973), the Court considered whether a state could punish a demonstrator who yelled, "We'll take the fucking street later [or again]," as police attempted to move a crowd of demonstrators off the street. *Id.* at 106-107. The Court found the state could not punish Hess on the basis of his words because he was not advocating any *present*, or imminent, action. *Id.* at 108. "[A]t worst, [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id*.

Within this framework, the reasoning and facts of *NAACP v. Claiborne Hardware* are particularly instructive to this case. *Claiborne Hardware* arose out of a seven year campaign for equal rights of African-Americans in Claiborne County, Mississippi during the height of the civil rights movement. *Claiborne Hardware*, 458 U.S. at 898. White business

owners sued the NAACP and NAACP Mississippi Field Officer Charles Evers, among others, under a conspiracy theory for business losses sustained during an NAACP-sponsored boycott of white-owned businesses. *Id.* at 889. The boycott had a "'chameleon-like' character. . . .; it included elements of criminality and elements of majesty." *Id.* at 888.

Evers had publicly proclaimed that boycott violators "would be watched[,]" *id.* at 900 n.28, "blacks who traded with white merchants would be *answerable to him*[,]" *id.*, "boycott violators would be 'disciplined' by their own people[,]" *id.* at 902, and "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id.* at 900 n.28. Evers "warned that the Sheriff could not sleep with boycott violators at night," and told his audience, "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'" *Id.* at 902.

The NAACP posted "store watchers," including Evers himself, outside of boycotted stores and identified those who violated the boycott. *Id.* at 903, 929 n.72. The names of boycott violators were published in the local Black Times newspaper and read aloud at Claiborne County NAACP meetings. *Id.* at 903-04.

Identified boycott violators were subject to repercussions beyond social ostracism. Supporters of the boycott fired gunshots into three separate

boycott violators' homes. *Id.* at 904-05. Supporters physically beat two other boycott violators. *Id* at 905 & n.39. They robbed another. *Id* at 905. They threw a brick through the windshield of a boycott violator's car. *Id.* at 904 n.37. They slashed another's tires. *Id*. at 906.

The perpetrators of the violence and property destruction did not operate separate and apart from the NAACP of Claiborne County. The leader of the NAACP-organized "store watchers" was involved in several of the acts of violence or property destruction. *Id.* at 906 n.40. The Claiborne County NAACP provided legal representation for those arrested in connection with acts against boycott violators, including three individuals apprehended in one of the shootings. *Id.* at 906 n.41.

Yet the Court found Evers' speech did not exceed the limits of protected speech set forth in *Brandenburg*. *Id.* at 927-28. The Court reasoned that Evers' incendiary language was used in the context of impassioned political pleas, and that no imminent unlawful conduct followed the speeches. *Id.* Emphasizing again the political nature of Evers' speeches, the Court stressed:

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.

Id.

The factual similarities between this case and *Claiborne Hardware* are striking. Like in *Claiborne Hardware*, Appellants were part of a broad political struggle of multiple organizations and individuals that included lawful and unlawful activity. As in *Claiborne Hardware*, the unlawful activity was not carried out by Appellants themselves. Similarly, Appellants' did not use polite, "dulcet phrases" but "emotional appeals for unity and action." And as in *Claiborne Hardware*, Appellants researched the identity of the individuals involved and published that information to a website—today's equivalent of Claiborne County's Black Times newspaper.

To the extent the circumstances of this case are distinguishable from *Claiborne Hardware*, they show Appellants' speech is even further attenuated from any illegal acts than the speech in *Claiborne Hardware*. Unlike Evers' speeches in *Claiborne Hardware*, Appellants' speech did not threaten bodily harm. Moreover, the acts of violence at issue here took place in locations around the world, unlike *Claiborne Hardware*, which involved the concerted action of a small, tight-knit community in rural Mississippi. There is virtually no evidence Appellants coordinated with the world-wide perpetrators of any harassment or property destruction beyond posting accounts of such incidents after the fact. And while the Claiborne County

NAACP provided legal representation to individuals charged with boycott-related shootings, there is no evidence of any close personal or professional relationship between Appellants and those alleged to have carried out illegal acts in campaign against Huntingdon Life Sciences.

The government's own theory acknowledges a lack of any imminent illegal activity connected to Appellants' speech. (A.2936) (testimony of Jeffrey Dillbone, the only witness to testify to viewing Appellants' website and committing an illegal act, that he viewed the website "a few weeks" before committing an illegal act). The government's theory is based on an assumption that inflammatory political rhetoric on a website incited others to illegal activity at an unspecified time in the future, in locations across the country.

But *Hess* requires more; it requires illegal action be almost contemporaneous with the inciting speech. *Hess*, 414 U.S. at 108. The government presented no evidence of a single such contemporaneous act. Like in *Hess*, nothing in the record suggests Appellants' speech was, "more than advocacy of illegal action at some indefinite future time." *Id.*

In fact, the concept of *written* incitement would seemingly destroy *Brandenburg*'s imminence requirement. *See, e.g., Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987). "The mere abstract

teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States*, 367 U.S. 290, 297-98 (1961). *See also* John Stuart Mill, On Liberty 119 (Penguin Books Ltd., 1974) (1st ed. 1859) ("An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer."). A written incitement theory would require a finding that written material essentially lies like a proverbial loaded gun, waiting to imminently go off when the unsuspecting reader picks it up.

Courts have repeatedly rejected written incitement theories in a multitude of scenarios, including actively advocating of pedophilia by a school-teacher, *Melzer v. Bd. of Edu.*, 336 F.3d 185 (2d Cir. 2003), encouraging the disclosure of information regarding agents and informants involved in a criminal prosecution, *United States v. Carmichael*, 326 F.Supp.2d 1267 (M.D. Ala. 2004), extolling the benefits of marijuana use, *Mood for a Day v. Salt Lake County*, 953 F. Supp. 1252 (D. Utah 1995), advertising cigarettes to children, *In re Tobacco Cases II*, 123 Cal. App. 4th 617, 639 (Cal. App. 4th Dist. 2004), and even advocating the random murder

of Muslims in a newspaper, *Citizen Publ. Co. v. Miller*, 210 Ariz. 513 (2005).

III. Appellants' Speech Was Not Proscribable Crime Facilitating Speech

The government seeks to avoid the imminence problem with a written incitement theory by contending Appellants' speech was proscribable as crime facilitating speech. (A.3195-97). Crime facilitating speech consists of those communications that, intentionally or not, convey information that makes it easier or safer for readers or listeners to commit crimes, or get away with criminal activity. *See generally*, Eugene Volokh, *Crime Facilitating Speech*, 57 Stan. L. Rev. 1095, 1103 (2005). Appellants' speech does not qualify as crime facilitating speech under any current understanding of this doctrine.

The Supreme Court has not squarely addressed crime facilitating speech and the parameters of First Amendment protection for such speech are murky. *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., respecting denial of certiorari). This Court has similarly not expressed a uniform standard for crime facilitating speech, but has found that at least some crime facilitating speech does not warrant *Brandenburg* protection. *United States v. Bell*, 414 F.3d 474, 482 n.8 (3rd Cir. 2005).

The lack of consistent treatment of crime facilitating speech is likely born out of the difficulty of determining the appropriate boundaries of the proscription. It may very well be sensible to permit a textbook on chemistry, even with the knowledge that it will assist some criminals in bomb or drug manufacturing, but proscribe a 130-page how-to manual on murder-for-hire, marketed to would-be hit men. *Compare* David Unze, *Suspected Meth Lab Found in Search near Paynesville*, ST. CLOUD TIMES (Minn.), Dec. 6, 2000 at 2B (discussing drugmakers using chemistry textbooks), *with Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (finding no First Amendment protection for such a murder manual).

The obvious dilemma crime facilitating speech presents is that virtually all speech that helps criminals has some independent, legal, valid purpose. *See* Volokh, at 1111-26. Exposing secret wiretaps can inform debate on government overreaching. *Id.* at 1115. Instructional books on explosives can teach chemistry. *Id.* at 1112. Publishing the names and addresses of abortion providers or people not complying with a boycott assists legal pickets of their homes or social ostracizing. *Id.*; *see also Northeast Women's Ctr. v. McMonagle*, 939 F.2d 57, 66-68 (3rd Cir. 1991) (affirming constitutionality of residential pickets). Even a detailed murder manual can serve as Nietzschian entertainment. Volokh, at 1123-25 (noting

the overwhelming number of readers of the book at issue in *Rice* seemed to have used it for entertainment purposes).

In this sense, crime facilitating speech functions like dual-use materials such as alcohol, guns, or VCRs—it has both harmful and legitimate uses, and it is often difficult for the producer to know how the consumer will use it. *Id.* at 1126-27. Though unlike dual-use materials, speech is protected by the First Amendment, and the limits on distribution that are common for dual-use materials cannot be neatly applied to crime facilitating speech. *Id.*

In *Rice*, the case on which the government's theory relies (A.3197), the Fourth Circuit Court of Appeals addressed the First Amendment concerns at length. 128 F.3d at 242-67. There, the defendant publisher stipulated for the motion to dismiss that they intended to facilitate crime. *Id.* at 241. Much of the Fourth Circuit's First Amendment analysis focused on the publisher's mens rea, and found such an intent requirement should allay the fears of newspapers, networks, and other media from the fear of future liability. *Id.* at 265-76.

A test based entirely on the speaker's mens rea is certain to cast too wide of a net. Such a test works for single-use speech, such as yelling "Here

come the police!" Volokh, at 1193-94. But for dual-use speech, which constitutes the majority of crime facilitating speech, difficulties abound.

For one, intent, as a legal term, is generally understood to cover both purpose and knowledge. *Id*. at 1180. Returning again to the chemistry textbook example, the publishers of such a textbook likely would have knowledge it could be used to facilitate a crime. As would publishers of material on cultivating plants with grow-lights. But surely such knowledge does not strip those materials of First Amendment protection.

Further, differentiating between speech with a purpose to facilitate crime versus mere knowledge is both difficult and dangerous. *Id.* at 1185 ("For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge."). Determining whether speech was made merely knowing it would help facilitate crime (motivated by profit or ideology, for instance), or made with the purpose of facilitating crime, "will usually just be a guess." *Id*. at 1186. "And this conjecture will often be influenced by our normal tendency to assume the best motives among those we agree with, and the worst among those we disagree with." *Id*. (further noting the best evidence of intent is often past political statements, actions, and affiliations). Such a standard necessarily chills marginalized voices if

passionate statements can later been used as evidence of bad intentions. *See Id*. at 1189-90.[1]

Additionally, the mens rea requirement does not to allay the fears of those who *advocate* illegal action. Advocacy, by its very terms, involves an intent to realize that which is advocated. Mr. Hess, for example, undoubtedly had the intent to encourage fellow protesters to "take the . . . street later." *Hess*, 414 U.S. at 106-08. Similarly, Martin Luther King's *Letter From a Birmingham Jail* and Henry David Thoreau's *Civil Disobedience*, for example, advocated criminal activity in pursuit of a higher purpose. As such advocacy is clearly protected speech, intent clearly cannot be the standard to distinguish unprotected speech.[2]

Nothing illustrates the problems of relying on intent alone in this area more than the "Top 20 Terror Tactics" posted on the SHAC website. (A.214-15). Ostensibly a list of illegal actions used to "encourage[] others

---

[1] This would operate differently than in hate crimes, where earlier bigoted speech is often used as evidence of intent, but where deterrence is minimized because the speaker need only avoid later criminal *conduct*, not speech. *Id*. at 1189-90.

[2] This concern motivated the Court to move away from the intent-plus-likelihood test from *Schenck*, 249 U.S. 47, to the intent-plus-likelihood-plus-imminence test in *Brandenburg*. Volokh, at 1191. The intent-plus-likelihood test was simply too broad. *See*, *e.g.*, *Debs v. United States*, 249 U.S. 211 (1919) (under *Schenck* test, upholding conviction for praising individuals who obstructed the draft).

to engage in 'direct action . . . outside the confines of the legal system,'" (A.214), the document was in fact compiled by a medical research group to document actions used against them in the past. (App.2751). If the legality of publishing such a document rests on intent, then the First Amendment protection afforded to the exact same words changes based on who is holding the document, and what the factfinder believes their intentions to be. Under such a rule, speakers are left with virtually no guidance on what speech is protected versus what speech might land them in jail for years.

Professor Volokh posits a reasonable test that protects against crime facilitating speech's greatest harms while remaining highly speech-protective. Under Volokh's test, a First Amendment exception should apply for crime facilitating speech in only three instances: 1) "When the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment" Volokh, at 1217. This would cover the previous example of someone who yells "Here come the police!"; 2) "When the speech, even though broadly published, has virtually no noncriminal uses—for instance, when it reveals social security numbers or computer passwords." *Id.*; and 3) "When the speech facilitates extraordinarily serious harms, such as nuclear or biological attack." *Id.*

Alternatively, this Court should require, at a minimum, that crime facilitating speech consist of detailed instructions combined with an intent to facilitate crime. This Court has already implied such an approach in *Bell*. The defendant in *Bell* was enjoined from marketing or selling "detailed instructions and techniques to avoid paying taxes." 414 F.3d at 483. "Bell is free to criticize the tax system," this Court affirmed, and held that only material that aided and abetted violations of the law (i.e., the detailed instructions and techniques) was unprotected by the First Amendment. *Id.* at 484. Such a test allows for the proscription of such murder manuals, narcotics manufacturing instructions, and detailed tax evasion schemes while protecting advocacy of illegal action and dual-use speech.

Appellants' speech—published names, addresses, and phone numbers of targeted individuals as well as numerous reports and anonymous statements from individuals who claimed to have vandalized targeted individuals' property—does not satisfy either of these tests. With regard to Professor Volokh's test, their speech was published on the internet to a wide audience, not said to a few people likely to use it to commit a crime, nor was it speech with virtually no noncriminal use, such as publishing social security number or computer passwords, nor did it facilitate extraordinarily

serious harms in the magnitude of tens of thousands of deaths. Volokh, at 1217.

Appellants speech is similarly not proscribable under the less speech protective test of intent-plus-detailed-instruction. The crimes Appellants are alleged to have aided and abetted are virtually self-explanatory—the "Top 20 Terror Tactics" ranged in detail from "vandalizing one's car" to "sending continuous black faxes causing fax machines to burn out." (A.214-15). Even where the published reports and statements discussed crimes in detail, it would strain credulity to classify them as detailed instructions. *See* Volokh, at 1213 ("Some information is so obvious or so general—for instance, it's easier to get away with murder if you hide the body well, cyanide is poisonous, and so on—that criminals are very likely to know it already, or figure it out with a moment's thought. Restricting such speech would yield little benefit, but impose a large First Amendment cost, since such a broad restriction would cover a huge range of entertainment, news reporting, and even ordinary conversation.").

The government's theory misinterprets this approach. The government contends Appellants' speech falls outside the First Amendment because it instructed people to commit crimes. (A.3197) ("They're direct, specific instructions on what to do.") But crime facilitating speech focuses

on *how to commit crime*, not simply telling someone what to do. In essence, the government attempts to get around *Brandenburg* and the issue of incitement versus advocacy—i.e., telling someone what to do—by mischaracterizing their speech as crime facilitation. As Appellants' speech contained no technical instruction on how to commit crime, it cannot be proscribed as crime facilitating speech.

In essence, Appellants' website functioned as the modern equivalent of Claiborne Country's Black Times newspaper in the 1960s—as a means to publicly identify, demean, and ostracize opponents. *Claiborne Hardware*, 458 U.S. at 903-04. Publicizing the fact of illegal action, or even advocating it, does not fall outside the First Amendment. An attempt to proscribe Appellants' speech would dangerously extend the crime facilitating speech doctrine beyond its recognizable limits and significantly chill future political and social advocacy.

IV. Appellants' Speech Did Not Constitute a True Threat

While true threats are unprotected speech, not all seemingly threatening language is unprotected by the First Amendment. In the landmark ruling on the subject, the Supreme Court ruled that the statement, "If they ever make me carry a rifle the first man I want to get in my sights is

[the President]," made during a speech at an anti-war rally, was protected political hyperbole, not a true threat. *Watts*, 395 U.S. at 706.

Appellants' speech did not constitute a true threat because they were not found to have a specific intent to threaten, nor did the alleged threats contain any explicitly threatening language. Proscribing such speech foreshadows a grave potential for chilling future expression.

A. The First Amendment Requires a Subjective Intent to Threaten

The mens rea requirement of true threats requires the speaker have a specific intent to threaten. Appellants were not found to have a specific intent to threaten; therefore their speech cannot be sanctioned as a true threat.

The Supreme Court squarely addressed the intent standard for true threats in *Black*, 538 U.S. 343. *Black* involved a consolidated challenge to a Virginia statute that criminalized cross burning with the intent to intimidate. *Id.* at 347. The statute also provided that cross burning itself "shall be prima facie evidence of an intent to intimidate." *Id.* The Court found that cross burning with the intent to intimidate could constitute a true threat, but cross burning itself could not be prima facie evidence of an intent to intimidate. *Id*. at 364.

The *Black* Court defined true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat." *Id.* at 359-60. While rejecting a standard that requires the subjective intent of the speaker to carry out the threat, the Court adopted a different subjective intent standard—namely that the speaker must have a specific intent ("the speaker means…") to actually threaten ("…to communicate a serious expression of an intent to commit an act of unlawful violence[.]").

The Court's rejection of the prima facie provision confirms this conclusion. The Court noted the problematic intent issue where a statute "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim." *Id.* at 366. "The prima facie evidence provision… ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is *intended* to intimidate." *Id.* at 367 (emphasis added).

In effect, the prima facie provision took an intent-to-threaten standard and reduced it to a reasonable-speaker standard by declaring it presumptively reasonable that any cross burning was intended to intimidate.

"The First Amendment does not permit such a shortcut." *Id*. The Court's refusal to accept the watered down standard can only be read as a requirement of a specific intent to threaten. *See United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) ("The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another prima facie evidence of an intent to intimidate.") (internal quotations omitted). [3]

In the wake of *Black*, a number of circuits revised their true threats analysis to require a specific intent to threaten. In *United States v. Magleby*, 20 F.3d 1136 (10th Cir. 2005), the Tenth Circuit held true threats "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" *Id.* at 1139 (quoting *Black,* 538 U.S. at 360). The Ninth Circuit in *Cassel* held that "only *intentional* threats are criminally punishable consistently with the First Amendment. . . . A natural reading of [the Court's] language

[3] *See also*, Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on* Virginia v. Black, 54 Cath. U. L. Rev. 1, 33-44 (2004) ("*Black* stands as a bright beacon reconfirming that without an intent (an aim) to intimidate, speech cannot lawfully be punished, no matter how likely the tendency that unintended intimidation in fact will result.").

embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." 408 F.3d at 631.

Admittedly, the district courts in this circuit have reached a different conclusion in the wake of *Black*. In *United States v. D'Amario*, 461 F. Supp. 2d 298, 302 (D.N.J. 2006), the district court noted that the Supreme Court rejected the subjective intent to carry out the threat standard, and from that observation and without further analysis, concluded that the objective speaker standard from *United States v. Kosma*, 951 F.2d 549, 557 (3rd Cir. 1991), survived *Black*. The court in *D'Amario* failed to address the fact that the Court in *Black* required an intent to threaten (as opposed to an intent to carry out the threat).

More detailed analysis was given to the issue by the district court in *United States v. Ellis,* 2003 U.S. Dist. LEXIS 15543 (E.D. Pa. July 15, 2003). There the district court found that the *Black* definition is not inconsistent with the decision in *Kosma* because *Black* only requires "that the statement may not be a product of accident, coercion or duress" *Id.* at *16.

Amici respectfully submit the district courts in *D'Amario* and *Ellis* incorrectly decided the intent issue. *Ellis* concluded that the standard

announced in *Black*—"the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence"—requires no intent beyond the intent to form words. That is simply a crude end-run around the Court's plain language. *Cf.* Restatement (Second) of Torts §8A ("The word 'intent' is used… to denote that the actor desires the cause of the consequences of his act, or that he believes that the consequences are substantially certain to result from it."). A proper reading of *Black* requires a specific intent to threaten on behalf of the speaker.

This conclusion is motivated not only by the plain language of *Black*, but also by fundamental First Amendment principles. Anything less than a specific intent standard essentially creates a negligence standard for the First Amendment by holding the speaker responsible for the unintended consequences of his or her speech. Without requiring an intent to threaten, courts run the risk of punishing the "kind of very crude offensive method of stating a political opposition" that the Court was so careful to protect in *Watts*. 394 U.S. at 708. Any standard that makes the intent of the speaker irrelevant and puts the weight of criminal liability on the interpretation of a third party forces speakers with no intention of threatening anyone to carefully consider how third parties may interpret their statement. The objective negligence standard, quite simply, chills speech.

As the jury did not find Appellants had a specific intent to threaten, (A.3379), their speech cannot be proscribed as a true threat.

B. Even If this Court Rejects the Specific Intent Requirement, the First Amendment Requires a Strict Standard for True Threats to Avoid Chilling Protected Speech

Even if this Court rejects a subjective intent of the speaker standard, the objective speaker test traditionally used in this Circuit since *Kosma* must be carefully applied to address the serious First Amendment considerations involved. Such a careful application of the objective test has arguably been most fully addressed by the Second Circuit in *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976). This Court should require a specific intent by Appellants to threaten, or, at a minimum, require threatening speech meet the "unequivocal, unconditional, immediate, and specific" standard articulated in *Kelner*. 534 F.2d at 1027.

Kelner was charged with threatening to injure Yasser Arafat during Arafat's visit to New York City. *Id.* at 1020. Prior to the scheduled visit, Kelner held a press conference and stated "we are planning to assassinate Mr. Arafat." *Id.* at 1021. Kelner argued in his defense that, pursuant to *Watts*, his speech was hyperbole, and the distinction between hyperbole and true threats is the specific intent to carry out the threat. *Id.* at 1024.

The Second Circuit did not discount the importance of Kelner's subjective intent but noted the incredible difficulty in determining if a speaker intended to carry out a threat.[4] *Id.* at 1025-27. The court in *Kelner* ultimately adopted an objective standard, but refined the standard to include only those statements that are "unequivocal, unconditional and specific expressions of intention immediately to inflict injury." *Id.* at 1027. Such a standard "works ultimately to much the same purpose and effect as would a requirement of specific intent to execute the threat because both requirements focus on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out." *Id*. at 1027.

Requiring the explicitness the Second Circuit mandated in *Kelner* is not a change to the Third Circuit standard, but a refinement that provides substance to the crucial First Amendment concerns in true threats cases. The requirement of explicitness in true threats protects the speech of those at the political margins who might use "vituperative, abusive, and inexact" language, *Watts* 394 U.S. at 708, but without an intention to threaten.

In many issues in the public sphere, tempers and language reach incendiary, though constitutionally protected, levels. Take, for example, a

[4] *Kelner* was decided 27 years before the Court's decision in *Black*, and did not consider to possibility of requiring a specific intent to threaten.

neo-Nazi group marching through a town with a high percentage of Holocaust survivors. *See, e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1978). Under a standard objective test a factfinder could certainly conclude that one of the intentions of the neo-Nazis is to intimidate or threaten. But such a march is clearly constitutional. *See id.; see also Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978). The *Kelner* standard of explicitness avoids the risk of proscribing such protected activity as a true threat.

Amici submit that Appellants' speech did not meet this test. This standard was required in the jury charge. (A.3379). While Appellants morally supported those committing criminal acts, Appellants' speech did not threaten. (*See, e.g.*, A.2996, Testimony of Marion Harlos that her fear came not from the text of the website but from stories she heard of other people supposedly targeted by animal rights activists). On its face and in the context of the broader animal rights movement, Appellants' speech at worst warned of annoying home demonstrations, public humiliation and harassment, and perhaps vandalism or other property damage—but at no time did it threaten physical violence.

Nor was there any evidence Appellants controlled the behavior of third parties who undertook criminal acts, or even knew their identity. The

SHAC website's reports of illegal activity clearly stated that the facts in such reports were obtained from anonymous third parties. As discussed above with regard to incitement, Appellants' speech carried no imminence or immediacy. In short, there was nothing unequivocal, nothing immediate, and nothing specific enough about Appellants' speech to meet the *Kelner* standard for true threats.

C. In Any Event, Appellants' Speech Did Not Constitute a True Threat

When faced with the difficulty of reconciling the tension between the true threats definition and speech protected by the First Amendment, a factual inquiry into the relevant precedents offers the best direction. The Supreme Court has addressed the issue of true threats at length only twice—in *Watts* and *Black*, both discussed above. In *Clairborne Hardware*, the Court briefly noted Evers' militant speech—including intimations that he would "break [boycott violators'] damn neck," 458 U.S. at 900-02—did not constitute a true threat. *Id*. at 928 n.71.

This Court has developed significant caselaw in the area of true threats as well. Faced with a substantially different threat to the President than the one presented in *Watts*, this Court found that multiple letters sent to the President, with no overt political content, threatening "21 guns are going to put bullets thru your heart & brains," constituted a true threat. *Kosma*,

951 F.2d at 550-54. Telephone messages such as "get your pro-lifers away from our clinics or we will kill you," and "call off your pro-lifers from the abortion clinics, or we will bomb your church" qualified as true threats. *Greenhut v. Hand*, 996 F. Supp. 372, 374 (D.N.J. 1998). Similarly, the act of mailing a white powdery substance to the President and local officials during the 2001 anthrax scare constituted a true threat. *United States v. Zavrel*, 384 F.3d 130 (3rd Cir. 2004).

However, mailing a threat to kill a U.S. Congressman to an insurance adjuster with ambiguously political content did not constitute a true threat. *United States v. Fenton*, 30 F. Supp. 2d 520 (W.D. Pa. 1998).

Taken together, standards emerge from these cases that offer guidance in the true threats arena. First, direct communication of a threat to the object of the threat is less protected than speech directed to a public gathering or a third party. *Kosma*, *Greenhut*, and *Zavrel* all involved direct communication of a threat to its target while *Watts* involved a speech in front of thousands and *Fenton* involved a speech to a third party. This same distinction was present in *Black*, where the Court found cross burning at a private gathering to be protected but burning a cross on another's lawn was unprotected. *Black*, 538 U.S. at 364. And while not absolute, the political context of the

speech in *Watts*, *Claiborne Hardware*, and *Fenton* afforded greater First Amendment protection than the nonpolitical speech in *Kosma* and *Zavrel*.

Appellants' speech does not meet the true threats standards developed in this Circuit. The vast majority of Appellants' speech at issue in this case was posted to a website, not directed to the object of any alleged threat. (A.2978, A.2993, A.2999) (testimony of three alleged stalking victims that they learned about the SHAC website when instructed by their employer to visit the site). In this way, Appellants' speech is more closely akin to the protected speech in *Watts* and *Fenton* than the unprotected threats in *Kosma, Greenhut*, and *Zavrel*.

Appellants' speech was also of an intensely political nature, like the protected speech in *Watts*, *Claiborne Hardware*, and *Fenton*, and unlike the nonpolitical threats in *Zavrel* and *Kosma*. And as noted above, Appellants' speech was not explicitly or unequivocally threatening—it was the impassioned hyperbole long protected by the Constitution and the judicial branch, from *Brandenburg* to *Watts* and *Claiborne County*.

Because words alone are the *actus reus* of the offense of making a threat, it must be the words—on their face and under the circumstances in which the communication was made—that define the crime. As the Supreme Court stated in *Cohen v. California*, "we cannot indulge the facile

assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." 403 U.S. 15, 26 (1971). Requiring a specific intent to threaten or requiring proscribed threats to be explicit, specific, and unequivocal serves to protect the First Amendment from a dangerous negligence standard. While such a standard may, as the *Kosma* court worried, "make[] it considerably more difficult for the government to prosecute threats," 951 F.2d at 556, difficulty to prosecutors is not the standard upon which our Constitutional rights flourish or fail. The Bill of Rights exists precisely to protect individuals from overzealous government intrusion into the rights of individuals. True threats cases should be no different.

Conclusion

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the district court and dismiss the indictment against Appellants.

Date: October 29, 2007
New York, New York

Respectfully submitted,

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae

APPENDIX

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

The **National Lawyers Guild** is a national non-profit legal and political organization dedicated to using the law as an instrument for social change. Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has a long history of representing individuals who the government has deemed a threat to national security. The Guild represented the Hollywood Ten, the Rosenbergs, thousands of individuals targeted by the House Un-American Activities Committee, and members of the Black Panther Party, the American Indian Movement. Guild members argued *United States v. United States District Court*, the Supreme Court case that established that Richard Nixon could not ignore the Bill of Rights in the name of national security and led to the Watergate hearings and Nixon's resignation. Guild lawyers helped expose illegal FBI and CIA

surveillance, infiltration, and disruption tactics (COINTELPRO) that the U.S. Senate "Church Commission" hearings detailed in 1975-76 and which led to enactment of the Freedom of Information Act and other specific limitations on federal investigative power.

The **First Amendment Lawyers Association** is a Nation-wide voluntary association of approximately 200 attorneys who substantially concentrate their practices on matters concerning freedom of expression. For nearly forty years, it has served as a forum for discussing and analyzing free speech matters and for formulating, planning, and monitoring free speech litigation. Its members have a keen interest in a wide range of free expression matters and in their sound adjudication by our courts.

Certification of Bar Membership

I, Matthew Strugar, certify that I am a member of the bar of this Court.

Date: October 29, 2007
New York, New York

Respectfully submitted,

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,882 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Microsoft Office Word 2003 in 14-point Times New Roman font.

Date: October 29, 2007
New York, New York

Respectfully submitted,

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae

Certifications Pursuant to Local Appellate Rule 31.1(c)

I certify that this brief complies with L.A.R. 31.1(c) in that prior to it being e-mailed to the Court today the brief has been scanned using Symantec AntiVirus version 10.1.5.5000, and no virus was detected. I further certify that the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical, except insofar as the paper copies contain physical signatures and the PDF version contains electronic signatures.

Date: October 29, 2007
New York, New York

Respectfully submitted,

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae

Certification of Service Upon Counsel

I certify that on October 29, 2007, two exact copies of the foregoing brief was provided via regular U.S. mail, postage prepaid, to the following individuals:

George S. Leone
Office of the United States Attorney
970 Broad Street
Newark, NJ 07102

Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003-2276

Andrew F. Erba
Williams, Cuker & Berezofsky
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002-1163

Robert G. Stahl
Laura K. Gasiorowski
Law Offices of RG Stahl, LLC
220 St. Paul Street
Westfield, NJ 07090

Hal K. Haveson
Haveson & Otis
194 Nassau Street
Princeton, NJ 08542

Paul J. Hetznecker
1420 Walnut St., Suite 911
Philadelphia, PA 19102

Robert A. Obler
Bldg. 3D, Suite 200
3131 Princeton Pike
Lawrenceville, NJ 08684

Louis Sirkin
Scott Nazzarine
Sirkin, Pinales & Schwartz
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, OH 45202

Date: October 29, 2007
New York, New York

Respectfully submitted,

/s/ Matthew Strugar
Matthew Strugar
Rachel Meeropol
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6478

Attorneys for Amici Curiae