No. A169697

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

WAYNE HSIUNG,
Defendant and Appellant.

Appeal from Sonoma County Superior Court
Case No. SCR7214641
The Honorable Laura Passaglia, Judge

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

AND

PROPOSED BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, AND NATIONAL LAWYERS GUILD IN SUPPORT OF DEFENDANT AND APPELLANT

Shakeer Rahman, SBN 332888
Law Office of Shakeer Rahman
3435 Wilshire Blvd., Suite 2910
Los Angeles, California 90010
323-696-2299
shakeer@loosr.net

Shaila Nathu (SBN 314203)
snathu@aclunc.org
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493

Attorneys for Amici Curiae

[Additional Counsel Listed on Inside Cover]

Shayana Kadidal*
Jess Vosburgh
Adara Blaney (law student)
Center for Constitutional Rights
666 Broadway, Floor 7
New York, New York 10012
212-614-6438
kadidal@ccrjustice.org

*Admitted in New York. Not Admitted in California

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities .....Page(s)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, proposed *amici curiae* respectfully request leave to file the accompanying Proposed *amici curiae* brief in support of Defendant-Appellant Wayne Hsiung.

INTERESTS OF *AMICI CURIAE* [1]

The American Civil Liberties Union of Northern California ("ACLU NorCal") is an affiliate of the national ACLU, a nationwide, non-partisan, non-profit organization with over 1.3 million members and supporters dedicated to the principles of liberty and equality embodied in the federal and state constitutions. The ACLU and its affiliates share a longstanding commitment to protecting free expression at the core of our constitutional democracy and have appeared as both direct counsel and amicus curiae in a number of free speech cases, including cases addressing the "incitement" test. *See, e.g. Brandenburg v. Ohio*, 395 U.S. 444 (1969) (counsel); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (*amicus*); *People v. Rubin*, 96 Cal. App. 3d 968, 972 (1979) (*amicus*); *Virginia v. Black*, 538 U.S. 343 (2003) (counsel); *Elonis v. United States*, 575 U.S. 723 (2015) (*amicus*); *Counterman v. Colorado*, 600 U.S. 66 (2023) (*amicus*);

---

[1] Pursuant to Rule 8.200(c)(3), proposed *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no other person or entity, other than *amici curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

South Dakota Rural Action v. Noem, 416 F. Supp. 3d 874 (D.S.D. 2019) (counsel).

The Center for Constitutional Rights ("CCR") is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements and activists in the South, CCR has protected the rights of marginalized political activists throughout its fifty years and litigated historic First Amendment cases including *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990). CCR's First Amendment work continues to this day. *See, e.g.*, *In re NSA Telecomms. Records Litig.*, 522 Fed. Appx. 383 (9th Cir. 2013); *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014) (facial challenge to Animal Enterprise Terrorism Act); *United States v. Buddenberg*, No. CR-09-00263 RMW, 2010 WL 2735547 (N.D. Cal. July 12, 2010) (dismissing Animal Enterprise Terrorism Act indictments); *ALDF v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho 2015) (amicus in successful challenge to Idaho ag-gag statute); *ALDF v. Reynolds*, 8 F.4th 781 (8th Cir. 2021) (same for Iowa statute).

The National Lawyers Guild is a progressive public interest association of lawyers, law students, legal workers, and jailhouse lawyers dedicated to the need for progressive change in the structure of our political and economic systems for the furtherance of human rights and the rights of ecosystems.

Founded in 1937 as an alternative to the then-racially segregated American Bar Association, the Guild has taken an integral role in representing political movements and championed the First Amendment right to engage in unpopular speech for over eight decades. The Guild has a long history of defending individuals accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other examples of governmental overreaching that are now popularly discredited. *See, e.g.*, *Kinoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968). Since then, it has continued to represent thousands of Americans critical of government policies, from antiwar activists during the Vietnam era to current day prison abolition, environmental, and animal rights activists.

Dated: August 5, 2025

Respectfully submitted,

Shaila Nathu (SBN 314203)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm St.
San Francisco, CA 94111
Telephone: (415) 621-2493

Attorneys for Amici Curiae

BRIEF OF *AMICI CURIAE*

INTRODUCTION

California courts have cautioned, "[w]hat is permissible when ordinary criminal conduct is involved, frequently comes to grief when tested against the First Amendment." *Castro v. Superior Court*, 9 Cal. App. 3d 675, 686 (1970). This warning is relevant here, where the risk is not punishment for committing or directing unlawful acts, but merely for expressing support for civil disobedience.

Wayne Hsiung, an animal rights activist, participated in a vigil on a public road across from Reichardt Duck Farm, where other activists had locked themselves to a "slaughter line" and the farm gate. He praised their courage, called attention to conditions on the farm, and encouraged others to stand against animal suffering and provide food, water, and shade to anyone in need. There was no evidence that he planned the activity on the farm property, directed its unlawful elements, or provided material assistance. Yet California's pattern aiding and abetting jury instruction allowed his conviction based in part on these general statements.

The widely used instruction advises that an aider and abettor is one who "knows of the perpetrator's unlawful purpose and . . . specifically intends to, and does in fact . . . promote . . . the perpetrator's commission of [the] crime." CALCRIM No. 401. By advising that conviction may result by the "promotion" of a crime, the instruction directs a jury to conflate protected speech

with criminal conduct. It is unconstitutional on its face and as applied to Mr. Hsiung's speech and actions.

The inclusion of the word "promote" in the pattern instruction sweeps in expressive conduct at the core of the First Amendment. In common usage, "promote" encompasses a wide range of expressive conduct—public praise, sympathetic journalism, supportive donations, or general approval of protest goals. Its inclusion thus risks criminalizing pure advocacy—speech that falls short of incitement under *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny. By untethering liability from specific intent and actual assistance, the instruction risks punishing individuals for speech that merely expresses ideological alignment or moral support.

The instruction is unconstitutional as applied to Mr. Hsiung. There is no evidence he incited, directed, or materially assisted the unlawful conduct itself. His speech lacks the hallmarks of complicity. As the U.S. Supreme Court has made clear, individuals associated with groups that pursue both lawful and unlawful goals cannot be punished for the unlawful acts of others unless they personally and specifically intend to further those unlawful aims. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-20 (1982); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290, 299–300 (1961).

Finally, criminalizing the "promotion" of unlawful conduct threatens the very type of speech that has driven social and political change throughout American history. From the Boston Tea Party to the Civil Rights Movement, acts of civil disobedience

have been catalyzed and sustained by expressive support—rhetoric that encourages dissent, denounces injustice, and inspires collective action. Expansive theories of criminal liability, like the one advanced here, risk turning political advocacy into a criminal offense. The First Amendment does not permit such outcomes. It protects speech that challenges the status quo, even when that speech is controversial, unpopular, or associated with disruptive protest.

RELEVANT BACKGROUND

Mr. Hsiung is a co-founder of Direct Action Everywhere, a grassroots animal rights network. 17 Rep. Tr. (hereafter, "RT"), 2171. He was prosecuted, in part, for his role in and presence at a vigil on public property that was held in parallel to a separate civil disobedience action at Reichardt Duck Farm. 15 RT, 1629-1631. In that separate action, activists entered the farm: some rescued ducks in distress, while others locked themselves onto a conveyor belt used to process ducks for slaughter or to the gate in front of the farm (hereafter, the "lockdown"). 16 RT, 1890-91.

Mr. Hsiung had no role in planning or organizing the lockdown. 20-A RT, 2891-93. In fact, he discourages such tactics and has never participated in a lockdown. 20-A RT, 2990-91. Though law enforcement took him onto the farm property after arresting him, he never entered the property of his own volition. 8 RT, 546. Indeed, the District Attorney indicated that the People would stipulate that "there is no evidence of Mr. Hsiung . . . physically entering upon, in any significant way, the Reichardt Duck Farm." 8 RT, 558.

Mr. Hsiung arrived after activists who rescued the ducks had left and the lockdown was underway. 16 RT, 1890-91; 18-B RT, 2576. He, along with hundreds of others from an animal rights conference at UC Berkeley, held a vigil on the public road outside the farm gates. 17 RT, 2235; 18-A RT, 2281-82. There, he gave a few speeches, including one in which he told the crowd:

> So please take a photograph, give some shade to the activists. If somebody needs water – talk to the folks who are chained to this fence, if they need some water, if they need some food, please help them. Because they're carrying animals, they might need your help giving them water or giving them food, please do that for them.

People's Ex. 15; *see also* 18-A RT, 2294-95.

The prosecution called Sergeant Daniel Ager of the Sonoma County Sheriff's Office, who was present at the scene and later viewed a copy of the event's livestream on Direct Action Everywhere's Facebook account, as a witness. 8 RT, 526-29. When the District Attorney asked what he saw Mr. Hsiung do, Sergeant Ager said:

> He was attempting to speak with law enforcement about what was going on. He was talking to the participants, who had blocked the entryway into the farm and chained themselves together, in a sense giving them support for what they were doing, and also speaking about how several ducks were saved, as they were putting it, from the farm.

8 RT, 530-31.

Throughout the trial, Mr. Hsiung maintained that he was present solely to participate in the vigil, which was held off the farm property and separate from the lockdown. *See, e.g.*, 20-A RT,

2921; 20-A Rep. Tr., 2971. As he testified: "The activists who were doing the lockdown were going to lock down as long as it took, regardless of what we did." 18-A RT, 2294; *see also* 20-A RT, 2969-70.) But the prosecution claimed that he conspired with the other group of activists to carry out the unlawful lockdown and was liable as an aider and abettor to trespass. 15 RT, 1645.

The trial court provided the jury with Judicial Council Of California Criminal Jury Instruction 401 (hereafter, "CALCRIM No. 401") which states, in relevant part:

> Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, encourage, promote or instigate the perpetrator's commission of that crime.

Mr. Hsiung objected to the inclusion of the terms "promote," "encourage," and "instigate," arguing that each could lead the jury to convict based on constitutionally protected expression. 21 RT, 3132-33. The trial court agreed to strike "encourage" in recognition that the court in *United States v. Hansen*, 25 F.4th 1103 (9th Cir. 2022), *reversed and remanded*, had found the term laden with potential to implicate protected speech. 21 RT, 3138. But the trial court declined to strike "promote" and "instigate" on the basis that those terms can involve "behaviors well beyond speech." *Id*. As the court explained, "One can promote by handing out leaflets, one can promote by holding signs, one can instigate by physical acts." *Id*.

The jury was clearly confused by the scope of the term "promote," specifically requesting that the court provide a definition:

Legal Clarification
Re. Aiding and Abetting
Could you please provide a definition of "promote"?

Jury Note, Ex. 24 (5 CT 1497). In discussing the jury note, Mr. Hsiung cited the dissent in *Hansen*, asserting that "particular legal significance . . . must be applied to these terms" or they risk being "constitutionally fraught under the First Amendment." 21 RT, 3352. The District Attorney requested that the court refer the jury back to paragraph 6 of CALCRIM 200, which instructs that "words and phrases . . . not specifically defined . . . are to be applied using their ordinary, everyday meanings." *Id*. at 3354 (further stating, "Frustrate them and provide [them with] no further definition."). Although the court acknowledged the aiding and abetting instruction might "evolve over time in light of" the *Hansen* dissent, it ultimately declined to further define "promote" and referred the jury to paragraph 6 of CALCRIM 200. 21 RT, 3356.

Mr. Hsiung faced two charges in connection with events on Reichardt farm. He was convicted of misdemeanor trespass under Penal Code section 602(k). 22-B RT, 3378. But the jury deadlocked on the charge alleging conspiracy in connection with the lockdown, and the District Attorney chose not to retry it. 22-B RT, 3376; 3380-81. Ultimately, Mr. Hsiung was sentenced to 90 days in county jail and two years of supervised probation. 23 RT, 3412-13; 23 RT, 3415.

ARGUMENT

I. The Jury Instruction Reaches Beyond Criminal Aiding and Abetting and Sweeps in Protected Speech.

a. The First Amendment Precludes Punishment of Speech Without a Sufficient Nexus to Underlying Criminal Conduct.

In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*Brandenburg*), the U.S. Supreme Court set out a limited exception to the general prohibition on nishing advocacy:

> the constitutional guarantees of free speech and free press do not permit a State 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.

See id. at p. 447. In other words, the state may not punish speech, unless (1) the speech *encourages* the use of violence or other lawless action, (2) the speaker *intends* that the speech will result in such violence or lawless action, and (3) the imminent use of violence or lawless action is *the likely result* of the speech. *Bible Believers v. Wayne County*, 805 F.3d 228, 246 (6th Cir. 2015) (en banc). This "incitement" test, which demands a direct connection between speech and imminent illegal conduct, has robustly protected speech for decades. *See* Steven G. Gey, *The Brandenburg Paradigm and Other First Amendments* (2010) 12 U. Pa. J. Const. L. 971, 978 ("Operating in combination, the three components of the *Brandenburg* standard provide virtually absolute protection of political speech—even when that speech

creates an atmosphere in which harm (including violent harm) may result.").

Additionally, participants in protests or other actions marred by unlawful conduct do not categorically forfeit their First Amendment protections. It "has long been established that guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." *Santopietro v. Howell*, 73 F.4th 1016, 1025 (9th Cir. 2023) (quotations omitted). As the U.S. Supreme Court ruled, the "right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982). "[M]ere association" with a group "absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability." *Id*. at 925-26. These rules are necessary to reduce the "danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Id*. at 919 (quoting *Noto*, 367 U.S. at 299-300).

b. Inclusion of "Promote" in the Jury Instruction Sweeps in Protected Advocacy.

i. Plain Meaning Reveals That "Promote" Encompasses Mere Advocacy.

The jury was instructed that Mr. Hsiung could be found guilty "if he kn[ew] of the perpetrator's unlawful purpose and he specifically intend[ed] to, and d[id] in fact, aid, facilitate, encourage, promote or instigate the perpetrator's commission of that crime." CALCRIM No. 401. Notably, the jury instruction did not define the term "promote"—and the jury expressly asked the trial court for further elaboration about the meaning of the term, which the court denied. Instead, the jury was instructed to apply the canon that "words and phrases not specifically defined…are to be applied using their ordinary, everyday meanings." CALCRIM No. 200.

Common definitions reveal that "promote" is broader and more speech-oriented than "aid," "facilitate," or "instigate," the other three terms in the in the aiding and abetting instruction's operative string of verbs. "Aid" is defined as "to provide with what is useful or necessary in achieving an end" or "to give assistance." Merriam-Webster, *Aid*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/aid. (last visited Aug. 5, 2025). "Facilitate" means "to make (something) easier," "to help bring (something) about," "to help (something, such as a discussion) run more smoothly and effectively." Merriam-Webster, *Facilitate*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/facilitate. (last visited Aug. 5, 2025).

"Instigate" means "to goad or urge forward." Merriam-Webster, "*Instigate*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/instigate. (last visited Aug. 5, 2025). In the context of aiding and abetting, these three terms imply conduct in assistance to the commission of a crime.

"Promote," on the other hand, does not readily imply such conduct. It means "to contribute to the growth or prosperity of" or "to help bring (something, such as an enterprise) into being." Merriam-Webster, *Promote*, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/promote. (last visited Aug. 5, 2025). This term strays far from the proximate assistance implied by the other three terms. It could mean logistical support or material contribution, but it also easily encompasses speech that approves, advocates, endorses, supports, or celebrates illegal conduct but does not meet *Brandenburg*'s "incitement" test. As used in the jury instruction, untethered from the requirements of the "incitement" test, the term erases the vital distinction between protected advocacy and punishable aiding-and-abetting.

Looking to dictionary definitions, the Ninth Circuit recently recognized that "'promote' . . . is synonymous with 'encourage'" and "fails *Brandenburg*'s imminence requirement." *United States v. Rundo*, 990 F.3d 709, 717 (9th Cir. 2021). In doing so, the Ninth Circuit joined the Fourth Circuit, which a year earlier held that "promote" "fail[s] to bear the requisite relation between speech and lawlessness," also relying on dictionary definitions.

United States v. Miselis, 972 F.3d 518, 536 (4th Cir. 2020). It found that, like "encourage," "[t]he verb 'promote' occupies a similarly overinclusive position on the continuum of relation between advocacy and action." *Id*. Observing that the statutory term "promote" was *broader than* the term "encourage," the *Miselis* court struck *both* terms, as well as "urge," from the anti-rioting act's definitions of prohibited conduct. *Id*. ("These definitions indicate that 'promote' refers to a comparable, and perhaps even wider, range of riot-oriented advocacy as "encourage" in the context of § 2101(a)(2).").

Although *Rundo* and *Miselis* involved anti-riot statutes, the analysis of "promote" bears relevance here. Like "encourage," the term "promote" in the aiding and abetting context similarly reaches protected speech—here, that speech expresses approval of lawbreaking or seeks to persuade others to adopt a viewpoint without a direct causal connection to actual imminent unlawful conduct. But the trial court only struck "encourage" despite acknowledging how readily "promote" encompasses protected speech. 21 RT, 3138 ("One can promote by handing out leaflets, one can promote by holding signs, one can instigate by physical acts."). Because "promote" carries the risk "subsuming an abundance of hypothetical efforts to persuade that aren't likely to produce an imminent riot" *United States v. Miselis*, 972 F.3d at 536, the trial court erred in maintaining the term in the instruction.

ii. "Promoting" the Commission of a Crime can be Protected Advocacy.

Over a decade before *Rundo* and *Miselis*, Justice Scalia reasoned: "When taken in isolation, … 'promotes' [is] susceptible of multiple and wide-ranging meanings." *United States v. Williams*, 553 U.S. 285, 294 (2008). Scalia was discussing the term in the context of a law prohibiting pandering child pornography that used the following string of operative verbs: "advertises, promotes, presents, distributes, or solicits." *Id*. He found that this string in the pandering context was "reasonably read to have a transactional connotation." *Id*. Given "the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated," he determined that "'[p]romotes,' in a list that includes 'solicits,' 'distributes,' and 'advertises,' is most sensibly read to mean the act of recommending purported child pornography to another person for his acquisition," *i.e.*, for commercial purposes *Id*. at 294-95.

Noscitur a sociis is dramatically less helpful here, where "promote" appears alongside "encourage," "aid," "facilitate," and "instigate." CALCRIM No. 401. The latter three terms imply *conduct*, while, as the Ninth and Fourth Circuits held, the former is more synonymous with the *speech*-forward "encourage." *United States v. Rundo*, 990 F.3d at 717; *United States v. Miselis*, 972 F.3d at 536–37. Indeed, the Fourth Circuit "reject[ed] the government's argument that 'promote' is readily susceptible of a limiting construction under *Williams*," which "rel[ied] on the

distinctly 'transactional connotation' raising from the statutory context at issue." *United States v. Miselis*, 972 F.3d at 536-37. It did so because "the object of the promotional speech," a "riot," "is wholly non-transactional, and can't materialize until a sufficient number of people are persuaded to show up at a certain future time and place and engage in unlawful conduct." *Id*. at 537. "In this statutory context," the court continued, "we think that "promote" refers to abstract advocacy." *Id*. A conviction based on "abstract advocacy" of illegal conduct that does not rise to the level of incitement, thus, cannot stand.

II. The Jury Instruction Is Unconstitutional As Applied In This Case.

Mr. Hsiung's trespass conviction rests not on inciting unlawful action, but on speech advocating civil disobedience.

It is unclear how such speech—including that which encourages the provision of humanitarian relief to protesters who are already *locked* to a fence (and presumably awaiting arrest) or talking to the police after the lockdown— makes it more likely that they will continue to be locked to the fence. Advocating the "duty, necessity, or propriety" of such relief, *Brandenburg*, 395 U.S. at 448, does not seem, under these circumstances, to make it more likely for the illegal action—already underway and designed to last until law enforcement removed the individuals by force—to continue.

After the lockdown action had already occurred, Mr. Hsiung said:

> So please take a photograph, give some shade to the activists. If somebody needs water – talk to the folks

> who are chained to this fence, if they need some water, if they need some food, please help them. Because they're carrying animals, they might need your help giving them water or giving them food, please do that for them.

People's Ex. 15; *see also* 18-A RT, 2294-95.

These statements align more closely in both context and function to the "abstract teaching . . . of the moral propriety or even moral necessity for a resort to" illegal direct action that *Brandenburg* held to be categorically protected. *Id.*

Here, the jury instruction, "by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action." *Brandenburg v. Ohio*, 395 U.S. at 449. In the seminal Supreme Court case extending *Brandenburg*'s heightened liability thresholds into the civil context, *NAACP v. Claiborne Hardware*, the Court noted that the NAACP's provision of bond and legal representation to people arrested in conjunction with the boycott "cannot support a determination" of vicarious civil liability for after-the-fact assistance to the arrestees' illegal activities. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 931 n. 78.

In the present case, Mr. Hsiung's advocacy of providing humanitarian relief—water, food, shade—to direct-action participants is analogous to the NAACP's after-the-fact posting of bond and provision of legal services to those already arrested. In both cases, would the assistance make life easier for those ultimately arrested? Of course it would have. But did it *cause* the illegal actions to occur? Surely not. Yet where the NAACP was

relieved of responsibility for the accumulation of damages from petty vandalism and business losses from the boycotts that would have "ultimately destroy[ed]" the organization *Id.*, Mr. Hsiung was convicted for "promoting" misdemeanor trespass by urging humanitarian relief for people who had already locked themselves to a fence long before he arrived on the scene.

III. Criminalizing Promotion of Unlawful Conduct Would Chill Speech Essential to Movements Advocating for Political and Social Change.

Punishing speech and expressive conduct that promotes unlawful conduct poses an unacceptable threat to free speech and civic engagement. Speech that encourages civil disobedience has always played a vital role in our democratic development—from the Boston Tea Party to the Abolitionist, Suffrage, and Civil Rights Movements. Encouraging nonviolent defiance of laws perceived as unjust is a hallmark of protest culture and remains central to contemporary movements across the political spectrum.

If generalized support can be criminalized a "promotion," what distinguishes Mr. Hsiung' speech from that of a passerby voicing approval of the protest, or from a journalist covering the event in sympathetic terms, or a supporter donating money in response to a specific call to action? The boundaries of criminal liability become dangerously amorphous.

The risk is not limited to grassroots activists. Public officials and political leaders often use impassioned rhetoric to energize constituents and support protest movements. For example:

- During the George Floyd protests, Congresswoman Ayanna Pressley stated: *"There needs to be unrest in the streets for as long as there's unrest in our lives."*[2]
- In response to the Trump administration's family-separation policy, Congresswoman Maxine Waters declared: *"Let's make sure we show up wherever we have to show up. And if you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd. And you push back on them. And you tell them they're not welcome anymore, anywhere."*[3]
- House Speaker Nancy Pelosi remarked: *"I just don't even know why there aren't uprisings all over the country."*[4]

Each of these statements could, under a broad interpretation, be construed by a jury as "promoting" illegal conduct that occurred during contemporaneous protests. Yet they are *unquestionably* protected under *Brandenburg*.

Criminal liability cannot rest on expressive support for protest activity, especially when the connection to unlawful conduct is vague, indirect, or speculative. Allowing juries to convict based on vague notions of "promotion" untethered from *Brandenburg*'s imminence and intent requirements invites arbitrary enforcement and viewpoint discrimination, ultimately chilling the very speech that drives political reform.

---

[2] Chasmar, *Ayanna Pressley calls for 'unrest in the streets' ahead of election*, Wash. Times (Aug. 20, 2020), https://washingtontimes.com/news/2020/aug/17/ayanna-pressley-calls-for-unrest-in-the-streets-ah/.

[3] Cox, *Fact check: Quotes from Democratic leaders about riots, unrest taken out of context,* USA Today (Jan. 15, 2021),https://usatoday.com/story/news/factcheck/2021/01/ 15/fact-check-quotes-democratic-leaders-riots-out-context/ 6588222002/.

[4] *Id*.

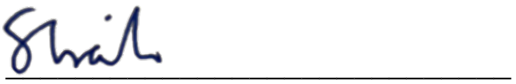
CONCLUSION

Amici respectfully submit that this Court should reverse Mr. Hsiung's conviction as to Reichardt Duck Farm and hold that California Model Criminal Jury Instruction 401 should not be used with the terms "promote" when a defendant is alleged to have aided and abetted direct lawbreaking by means of speech or expressive conduct.

Dated: August 5, 2025

Respectfully submitted,

/s/ Shakeer Rahman
Shakeer Rahman, SBN 332888
LAW OFFICE OF SHAKEER RAHMAN
3435 Wilshire Blvd., Suite 2910
Los Angeles, California 90010
Telephone: (323) 696-2299



Shaila Nathu (SBN 314203)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm St.
San Francisco, CA 94111
Telephone: (415) 621-2493

Attorneys for Amici Curiae

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed *Amici Curiae* Brief, counsel certifies that the text of this brief (including footnotes) was produced using 13-point type and contains 3,877 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File *Amici Curiae* Brief required under Rule 8.520(f), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

Dated: August 5, 2025

Respectfully submitted,

Shaila Nathu (SBN 314203)
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm St.
San Francisco, CA 94111
Telephone: (415) 621-2493

Attorney for Amici Curiae

PROOF OF SERVICE

I, Brandee Calagui, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is bcalagui@aclunc.org. On August 5, 2025, I served the attached,

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND **PROPOSED BRIEF OF *AMICI CURIAE* CENTER FOR CONSTITUTIONAL RIGHTS, NATIONAL LAWYERS GUILD, AND ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF DEFENDANT AND APPELLANT**

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

University of Denver,
Sturm College of Law
Justin F. Marceau
University of Denver
2255 E. Evans Avenue
Denver, CO 80208
Justin.Marceau@du.edu

Counsel for Defendant and Appellant

Attorney General of California
Kelly A. Styger
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Kelly.Styger@doj.ca.gov

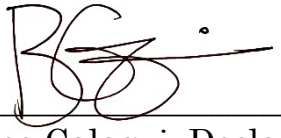
Counsel for Plaintiff and Respondent

BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid.

Clerk of the Superior Court
For: Hon. Laura Passaglia,
Courtroom 10
Sonoma County Superior Court
600 Administration Drive
Santa Rosa, CA 95403

Clerk of the California Court of Appeal
First Appellate District
Division Five
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 5, 2025, in Berkeley, CA.



Brandee Calagui, Declarant