IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2016-166

**William Schenk,**
Petitioner/Appellant

v.

**State,**
Respondent/Appellee

Appeal from Vermont Superior Court, Criminal Division, Chittenden Unit
Docket No. 4227-11-15 Cncr

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# Brief Amicus Curiae of the American Civil Liberties Union Foundation of Vermont

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## INTERESTS OF AMICUS CURIAE[1]

The interests of amicus are set forth in the accompanying motion for leave to file this brief amicus curiae.

[1]No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## STATEMENT OF THE CASE

Amicus adopts the Statement of the Case from Appellant's brief.

## SUMMARY OF ARGUMENT

In this case, the State attempts to criminalize protected expressive conduct which communicated a political message promoting the Ku Klux Klan (KKK). Although finding an impersonal political message promoting the KKK near one's front door may place a reasonable person in fear, the protected conduct involved in delivering that message to another's door cannot be criminalized without evidence that it was delivered with intent to place the recipient in fear of bodily harm.

The KKK is a despicable hate-group which advocates an abhorrent ideology of white supremacy. The KKK has a well-known history of murdering, assaulting, and intimidating African-Americans, among many others. The group espouses hateful and offensive messages. However, it is a longstanding constitutional principle that unpopular, inciting, offensive, vicious, and hateful speech receives First Amendment protection. In particular, speech that is political in nature is specifically protected because the First Amendment was designed to "allow free trade in ideas – even ideas that the overwhelming majority of people might find distasteful or discomforting . . . ." *State v. Krijger*, 97 A.3d 946, 956 (2014) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

"True threats," including racially motivated threats, are clearly unlawful. However, the U.S. Supreme Court has said the First Amendment's "true threat" exception requires specific intent to place another in fear of bodily harm, especially when the expressive conduct could arguably be constitutionally protected. In this case, no evidence exists that Mr. Schenk intentionally or knowingly placed the complaining witnesses in fear of harm when he left a KKK recruitment leaflet outside the doors to

their homes. Nevertheless, Mr. Schenk's motion to dismiss the "true threat" charges was denied because Vermont's disorderly conduct statute only requires reckless intent.

Recklessness cannot be the intent standard for "true threat" prosecutions. A recklessness standard limits factfinders to determining whether certain speech or the delivery of certain speech was a "gross deviation from the standard of conduct others would observe." This forbids consideration of a defendant's actual intent because it is irrelevant. It is self-evident that a reasonable layperson will always view pro-KKK speech as a gross deviation from the standard of conduct, and likely that a reasonable person would experience fear upon receiving pro-KKK messages. Thus, a factfinder will always find a "true threat" involving pro-KKK leafletting where a reasonable recipient would experience fear, regardless of whether evidence proves the defendant's actual intent to engage in nonthreatening core political speech. This assured outcome violates the language, purpose, and spirit of the First Amendment and its longstanding interpretations.

Similarly, targeted leafletting of promotional materials which, on their face, promote the KKK is constitutionally protected. The State is attempting to shoehorn Mr. Schenk's constitutionally protected conduct into the "true threat" exception. But, it presents no evidence that his expressive conduct was "mean[t] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. Even in the light most favorable to the State, no record evidence exists showing Mr. Schenk intended to threaten or for a particular person to receive the leaflet; knew who he was delivering to; knew their race, ethnicity, or gender; or envisioned that any recipient would feel threatened. Because the record evidence shows that Mr. Schenk only undertook

constitutionally protected expressive activity, this case fits squarely within established precedent protecting targeted speech, door-to-door leafletting, and advocacy for association with historically violent groups.

The State has failed to produce any evidence that Mr. Schenk committed a "true threat." Because the statutory intent standard is unconstitutional as to "true threats," Mr. Schenk's conditional guilty plea must be vacated, the lower court's denial of Mr. Schenk's motion to dismiss must be reversed, and the recklessness standard must be struck.

In addition, the hate-crime enhancement cannot apply in this case where there were no "special harms" over and above the harm caused by the underlying offense itself.

## ARGUMENT

### I. The First Amendment Protects Mr. Schenk's Speech and Actions.

#### a. The Court Must Review the Whole Record to Determine Whether Constitutional Protections Apply.

The First Amendment to the United States Constitution, made applicable to Vermont by the Fourteenth Amendment, forbids state laws and actions "abridging the freedom of speech." *Vt. Soc'y of Ass'n Executives v. Milne*, 172 Vt. 375, 378 (2001). Whether the speech at issue is protected is a question of law. *Id.* Any review of statements' constitutionality must account for the context. *State v. Krijger*, 97 A.3d 946, 955 (2014) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964)) (internal quotation marks s omitted). Therefore, appellate courts apply a *de novo* standard of review of constitutional questions regarding speech, making "an independent constitutional judgment on the facts of the case," with a review of lower court legal

conclusions being "nondeferential and plenary." *State v. Tracy*, 2015 VT 111, ¶ 14; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (where a line must be drawn between protected speech and speech that may be legitimately regulated, appellate courts make an independent examination of the whole record); *State v. Fletcher*, 2010 VT 27, ¶ 8.

b. Expressive Activities Can Only Constitute a "True Threat" When the Speaker Intentionally or Knowingly Places a Reasonable Person in Fear of Bodily Harm.

Punishment for expressive conduct must be reviewed "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. at 270 (internal quotation marks omitted)). In fact, "[t]he hallmark of the protection of free speech is to allow free trade in ideas – even ideas that the overwhelming majority of people might find distasteful or discomforting . . . ." *State v. Krijger*, 97 A.3d 946, 956 (2014) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)). "Equally fundamental is the principle that 'the Constitution protects expression . . . without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Tracy*, 2015 VT 111, ¶ 16. The First Amendment prevents states from prohibiting the dissemination of social, economic, and political ideology, regardless of whether "a vast majority of [] citizens believes [it] to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374 (1927); *see id.*

"True threats" are one of few limited categories of speech excepted from First Amendment protection. *Black*, 538 U.S. at 359; *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment"). There is little social value in an expression meant to cause another to fear bodily harm and be

disrupted by that fear, and the State may protect people from such fear and disruption. *Black*, 538 U.S. at 359; *Tracy*, 2015 VT 111, ¶ 35. But, categories of unprotected speech must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Narrow constitutional limits on what constitutes a "true threat" restrict a state "to prohibit[ing] only those forms of intimidation that are most likely to inspire fear of bodily harm." *Black*, 538 U.S. at 363.

To prevent protected speech from being swept up in "true threat" prosecutions, the Supreme 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." *Black*, 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708). In *Black*, a Klansman who, with the property owner's permission, burned a cross at a KKK rally in view of the public, was prosecuted and convicted under a Virginia statute banning cross-burning with the intent to intimidate. Despite no evidence that Black intended to intimidate,[2] the conviction was obtained because the statute's prima facie provision permitted an inference of intentionality based on the act of cross-burning alone. *Black*, 538 U.S. at 348.

Upon review, the Supreme Court found cross-burning with intent to intimidate constitutionally proscribable under the First Amendment's "true threat" exception. But, in a four-justice plurality, the Court concluded that the statute's prima facie provision was unconstitutional because it effectively eliminated the requirement that the defendant intended to intimidate. *Id.* at 365 (plurality opinion). Nullifying the intent to intimidate standard "create[d] an unacceptable risk of the suppression ideas" because it

[2] "Intimidation in the constitutionally proscribable sense of the word is a type of true threat where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 359.

allowed juries to disregard a defendant's actual intent – permitting protected expressive conduct to be treated the same as threatening conduct. *Id.* at 365 (plurality opinion) (internal quotation marks omitted); *see also id.* at 366 (the statute was struck because the prima facie provision "does not distinguish between cross burnings done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim"). The plurality saw that without evidence of specific intent defendants would be forced to prove their innocent intent, juries could convict without evidence of the defendant's actual intent, and protected speech would be chilled. *Id.* at 365-66.[3] For the Court, these results too greatly risked punishing protected speech. *Id.* at 366.

*Black's* four concurring justices agreed with the plurality that a "true threat" necessarily requires evidence of a defendant's specific intent. Justices Souter, Kennedy, and Ginsburg agreed that the prima facie provision "encourage[d] a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one." *Id.* at 386. Thus, nullifying the specific intent standard in the threat statute "skews prosecutions" and in turn "skews the statute toward suppressing ideas." *Id.* at 387. In contrast to the plurality, however, the three concurring judges sought to invalidate the entire cross-burning statute as unconstitutional because the prima facie provision showed an impermissible purpose to make content-based speech distinctions. Nevertheless, seven justices agreed that a "true threat" conviction requires evidence of the defendant's

[3] In citing these factors, the Court expressed substantial concern because the provision permitted, and even encouraged, the conviction of a person whose only intention was to share, promote, or celebrate the KKK's political ideology. *Id.* at 366; *see also id.* at 385-86 (Souter, J., concurring in the judgment in part and dissenting in part).

specific intent to ensure First Amendment protections.

Justice Scalia, although disagreeing with the plurality's facial invalidation of the prima facie provision, nonetheless agreed that Black's conviction could not stand because the provision was interpreted to allow cross-burning "by itself" to be sufficient basis to infer specific intent. *Id.* at 379. Justice Scalia did not believe a factfinder should be permitted to ignore a defendant's evidenced specific intent to focus exclusively on the fact that the defendant burned a cross. *Id.* at 379-80. Therefore, like the plurality opinion and Souter concurrence, Justice Scalia believed that to prosecute and convict for a "true threat," there must be some evidence showing the defendant's actual specific intent. *Id.*

Still, federal circuits disagree about whether *Black* interpreted the "true threat" exception to require a specific intent element.[4] While a significant minority of courts insist that *Black* definitively determined the "true threats" exception to require the defendant's specific intent, other courts have argued that "*Black* did not work a 'sea change,' tacitly overruling decades of [Circuit] case law by importing a requirement of subjective intent into all threat prohibiting statutes." *Compare 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 . . . ."), *with United States v. White*, 670 F.3d 498 (4th Cir. 2013) *abrogated on other grounds by United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016)("We are not

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[4] *See United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013) (recognizing split of Circuit authority but declining to decide whether *Black* overruled objective test in light of defendant's failure to raise issue). The Supreme Court has since expressly declined to rule on whether the First Amendment's "true threat" exception required a particular level of intent. *United States v. Elonis*, 135 S. Ct. 2001, 2012 (2015) (narrowly concluding that Congress intended a particular federal criminal threat statute, which did not include a specified *mens rea* standard, to include an intent standard greater than negligence).

convinced that *Black* effected the change that [the defendant] claims.")[5].

Despite the Circuit disagreement, both a plain and contextual reading of *Black* requires this Court to hold that "a statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011). As mentioned *supra*, *Black* expressly defines "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." 538 U.S. at 359 (emphasis added). "A natural reading of this language 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." *Cassel*, 408 F.3d at 631.

It is difficult to reconcile *Black* with the conclusion of some circuits that a speaker must only intend to communicate or that a reckless intent standard could suffice. For example, the *Black* Court described "intimidation" as "a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360 (emphasis added). This explicit definition of a type of "true threat" as including "the intent of placing the victim in fear of bodily harm" was how the Court justified preserving the cross-burning statute. It would be utterly nonsensical to allow a lesser intent standard in different situations that allegedly involve "true threats."

Additionally, both Justice O'Connor's plurality opinion and Justice Souter's concurrence emphasized that a specific intent standard provided the required level of

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[5] The Fourth Circuit has maintained its constitutional rule that the "true threat" test does not require a review of the defendant's subjective intent. *White*, 810 F.3d at 220, *cert. denied*, 136 S. Ct. 1833 (2016).

First Amendment protections for core political speech - most importantly where the evidence of intent to place another in fear of bodily harm was weak. *Black*, 538 U.S. at 366 (plurality opinion); *id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).[6] Particularly, when expressive political conduct is alleged to deserve proscription because of its context and impact, a specific intent standard minimizes the increased risk of improperly criminalizing protected speech. *Black*, 538 U.S. at 365 (plurality opinion). Specifically, *Black's* plurality found Virginia's prima facie provision unconstitutional because it did "not distinguish between a cross burning done *with the purpose* of creating anger or resentment" which is constitutionally protected, "and a cross burning done *with the purpose* of threatening or intimidating a victim" which is constitutionally proscribable. *Id.* at 366 (emphasis added); *see also id.* at 367 ("The First Amendment does not permit such a shortcut."). And, because the prima facie provision allowed for the "possibility" of criminalizing protected speech, the O'Connor plurality and Souter concurrence agreed that the First Amendment required the provision to be struck down. *Id.* at 366; *see id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).

Vermont Supreme Court jurisprudence lends itself to an interpretation that *Black* required evidence of a defendant's "intentionality" to prosecute a "true threat." Specifically, as a matter of statutory construction, the Vermont Supreme Court has defined "threaten" as the use of words or behavior to place another in fear of harm by "a choice to act combined with intentionality." *See State v. Cahill*, 2013 VT 69, ¶ 17. In *Cahill*, this court explicitly likened *Black*'s definition of a "true threat" to the specific

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[6] "[T]he risk of improperly criminalizing protected speech increases when the speaker does not intend for his words to convey a real threat." *Krijger*, 97 A.3d 946, 958 (2014).

intent element of aggravated assault, approving them both as effectively describing the intent standard for a threat. *See id.*

In addition, when determining the elements of parole condition violations, this Court has decided that "the word 'threaten' includes some element of volition" and that punishable threatening behavior must "communicate[] the requisite intent." *State v. Cole*, 150 Vt. 453, 456 (1988). In *State v. Johnstone*, 2013 VT 57, ¶ 17, this Court required that revocation for Violation of Parole Condition M for "violent or threatening behavior" include "a finding that [the] statement represented an actual intent to put another in fear or harm or to convey a message of actual intent to harm a third party." Where Johnston was speaking animatedly outside the courthouse after an unfavorable parole revocation hearing, he told his girlfriend that his parole officer was "going to end up in a body bag." *Id.* at ¶ 27. Unbeknownst to the Johnstone, his parole officer heard the statement. But, since there was no evidence "that defendant intended to put his probation officer in fear of harm" or "convey a message of actual intent to harm," the revocation was overturned. *Johnstone*, 2013 VT 57, ¶ 17. Where expression is the subject of a threat prosecution, this Court's precedent has aligned with the notion that a "true threat" requires the defendant's specific intent to place another in fear of bodily harm.

In Mr. Schenk's case, the statutory recklessness standard, on its face and as applied, violated his First Amendment rights because 1) it forbids the factfinder from considering his actual intent and 2) it cannot distinguish between protected and criminal expressive conduct when the "same act" can be viewed either way. *See Black*, 538 U.S. at 365 (plurality opinion); *id.* at 385 (Souter, J., concurring in the judgment in

part and dissenting in part).[7] The *Black* plurality and Souter concurrence demanded that defendants not be forced to prove their innocence, juries be permitted to consider evidence of the defendant's actual intent, and that threat statutes not risk chilling protected speech through the "possibility" of prosecution.[8] But here, the recklessness standard necessarily contradicts *Black's* demands, and assuredly punishes protected speech where the prima facie provision only made it likely. *See id.* at 365.

For example, the recklessness standard would always prevent a judge or jury from considering any evidence of a defendant's "actual intent" for leaving KKK recruitment leaflets at the home of another. (Order) P.C. 13; s*ee Johnstone* 2013 VT 57, ¶ 17. The recklessness standard with regard to a "true threat" asks whether the defendant consciously disregarded a substantial and unjustifiable risk that his conduct would place another in fear of bodily harm. (Order) P.C. 13. Conscious disregard is the gross deviation from the standard of conduct that a law-abiding person would observe in that situation. *See id.* In this case, the recklessness *mens rea* could be met because the State presented evidence that an objective layperson understands the violent history of the Klan. Others would observe that leaving Klan leaflets at the home of another would unjustifiably risk placing the recipient in fear of bodily harm, and therefore they would avoid such a gross deviation from the standard of conduct to not cause such fear.

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[7] The Decision on the Motion to Dismiss conducted a constitutional analysis. (Order)P.C. 5. The lower court found *Black* unclear on the question of intent and did not discuss it further. *Id.* at 7. Instead, the court "follow[ed] the Second Circuit's lead," despite acknowledging that the Second Circuit expressly declined to determine whether the First Amendment requires "true threat" statutes to maintain a particular intent standard. *Id.*

[8] Even Justice Scalia agreed that a jury must be required to consider evidence showing an innocent intent when potentially protected expressive conduct is implicated. *Black*, 538 U.S. at 379-80 (If the act is enough to convict without a requirement of specific intent, "it is impossible to determine whether the jury has rendered its verdict in light of the entire body of facts before it – including evidence that might rebut the presumption that [the charged act] was done with an intent to intimidate – or, instead, has chosen to ignore such rebuttal evidence.").

By only considering the standard of conduct that others would observe in the circumstances, the recklessness standard impermissibly forbids a fact finder from considering the defendant's actual purpose. Many people, if not most, fear the KKK. The KKK is a widely despised white supremacist hate-group with a history of violence. Delivering KKK leaflets to another's home will always be a gross deviation from the generally held standard of conduct.

However, the community's generalized apprehension and abhorrence of the KKK cannot overcome the First Amendment's protections of KKK-related speech without more. *Black* prohibited "true threat" prosecutions and convictions where a factfinder was merely unlikely to consider evidence of a defendant's actual intent to threaten. Eight justices substantially agreed that "where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason [for the expressive activity]" there is too great a danger that a factfinder would criminalize protected expression. *Black*, 538 U.S. at 366 (plurality opinion); *see also id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).

Here, the disorderly conduct statute's recklessness standard makes it a certainty that factfinders will not consider a defendant's actual intent. The standard only considers what others would observe as a gross deviation from the standard of conduct; a defendant's actual intent is irrelevant and prohibited from consideration. Therefore, because a recklessness standard requires a factfinder to convict when the act "by itself" grossly deviates from the generally observed standard of conduct, it would necessarily forbid a factfinder from even considering evidence which proves a KKK leafletter actually intended to engage in First Amendment protected activities. The standard ensures a "true threat" conviction in these circumstances for what has long been First

Amendment protected expressive conduct, endangering First Amendment freedoms much more than the mere "possibility" of prosecution and conviction excoriated by the *Black* plurality and Souter concurrence. *Black*, 538 U.S. at 365 (plurality opinion); *see also id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).

As discussed *infra* in Part c., there is no question that the First Amendment protects the act of leaving a KKK recruitment leaflet on or near another's door for the purpose of communicating, promoting, or celebrating the KKK's political ideology. The First Amendment even protects such an act done for the purpose of creating anger or resentment. *Black*, 538 U.S. at 366 ("It may be true that a cross burning . . . arouses a sense of anger or hatred among the vast majority of citizens . . . [b]ut this sense of anger or hatred is not sufficient to ban all cross burnings.").[9] As evidenced in this case, the recklessness standard effectively eliminates the protection of longstanding First Amendment precedent for disfavored speech. To allow such a statute or application of law to survive would allow for an intolerable infringement of First Amendment freedoms.

In this case, the State provided no evidence that Mr. Schenk actually intended to place another in fear of bodily harm and made no argument to that effect. Even assuming *arguendo* that Mr. Schenk knew of and targeted the complaining witnesses for receipt of the KKK recruitment leaflet, his intent could nonetheless have arguably been to engage in core political speech. In fact, Mr. Schenk's statements and the findings of investigators provide factual support for his intention to engage in constitutionally

[9] *See also id.* at 384 (Souter, J., concurring in the judgment in part and dissenting in part) (distinguishing "the intimidation cross burning causes when done to threaten" from "the particular message of white supremacy that is broadcast even by nonthreatening cross burning").

protected leafletting activity.[10] *See* (Affidavit) P.C. 21-22; see also P.C. 21 ¶ 18 ("Schenk further stated, 'Well like I said I don't want no trouble. I mean it was just kind of like a recruitment you know. It's nothing to deal with hate . . . .'"). Such evidence would be irrelevant under the recklessness standard and therefore would have no impact on a factfinder – significantly endangering First Amendment protected expression.

Also, the statute's recklessness standard contravenes *Black* as applied to expressive political activity because it requires defendants to prove their innocence and chills protected political speech. As with *Black*'s prima facie provision, the recklessness standard would always convict a defendant similar to Mr. Schenk where the defendant exercised their constitutional right not to put on a defense. *See Black*, 538 U.S. at 364 (plurality opinion). Were Mr. Schenk tried, to avoid conviction he would have been forced to provide evidence that he did not commit the charged act of leafletting a KKK flier, at least not in the way charged by the prosecution. Only with rebuttal evidence to modify a factfinder's understanding of the charged act could Mr. Schenk force a factfinder to recalibrate the standard of conduct in accordance with modifying evidence. But, as discussed *supra*, the recklessness standard still ignores his actual intent. And, where a similar defendant exercised their constitutional right to not rebut evidence of the charged acts, they would surely be convicted. Since time immemorial our justice system has recognized that defendants are innocent until proven guilty, but in this circumstance the recklessness standard turns that notion on its head by requiring factfinders to conclusively deduce guilty intent from the act itself.

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[10] While modifying evidence is excluded from consideration at the motion to dismiss stage, evidence of Mr. Schenk's constitutionally protected intent stands alone. The state presented no evidence or argument that Mr. Schenk's intentionally threatened the complaining witnesses. It was only because of the statutory recklessness standard that the court could ignore any evidence of Mr. Schenk's stated intent.

In addition, the recklessness standard chills protected speech in violation of the First Amendment. *See Black*, 538 U.S. at 365 (plurality opinion). The recklessness standard impermissibly "blurs the line" between the protected and proscribable meanings of delivering a KKK leaflet to a home. *See id.* As was implicitly asked in *Black* regarding the prima facie provision, under the recklessness standard when would the leaving of a KKK recruitment leaflet at a residence *not* be susceptible to prosecution? Given a reasonable layperson's understanding of the KKK as having a violent history and being deserving of scorn, it will always be a gross deviation from the standard of conduct to leave KKK materials at the home of another. If the act of leafletting is shown beyond a reasonable doubt, conviction is assured. Hence, the recklessness standard results in much more than the mere "possibility" that conviction will result for "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Id.* It makes certain that any prosecution will result in conviction, and therefore is substantially likely to chill protected activities. Thus, a KKK leafletter will have to risk criminal sanction to communicate their political ideology through door-to-door leafletting. This assured criminalizing of speech and the First Amendment cannot coexist.

In this case, Mr. Schenk's KKK recruitment leaflet was judged as a threat without regard to whether he "mean[t] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. 359. Constitutional precedent and norms demand that courts err on the side of caution when expressive activity is prosecuted as a "true threat," especially when it could arguably be protected political speech. Courts have long required that exceptions to the First Amendment have "well-defined" dividing lines between protected

and unprotected speech. This Court must require prosecutors to present evidence of a specific intent to threaten, particularly those involving potentially protected political communications — not only because *Black* requires it, but because only a specific intent standard will safeguard the free trade in ideas the First Amendment was designed to promote.

Because the State has provided no evidence that Mr. Schenk intended to or even knew that his protected expressive activity would place another in fear of harm, his conviction must be vacated, the lower court's decision must be reversed, and the recklessness must be struck as it pertains to "true threats."

c. A Recklessness Standard Endangers First Amendment Freedoms By Too Easily Allowing Constitutionally Protected Activity to Be Indicative of a "True Threat."

The State's argument that Mr. Schenk's conduct constitutes a "true threat" contradicts decades of First Amendment precedent. The alleged criminal act in question, leaving a leaflet promoting the KKK outside the door of targeted recipient, is wholly First Amendment protected conduct. The State cannot claim a "true threat" without some direct evidence indicating the leaflet was left with the intent to threaten. Because the State has no such evidence, it attempts logical gymnastics and repackages First Amendment doctrine to cast a false light on the historically protected activities of targeted communication, door-to-door leafletting, and advocacy for violent groups.[11]

In a facial challenge to the overbreadth of a law, a court's first task is to determine

[11] Despite the concerns raised by defense counsel, the lower court accepted the State's arguments, finding that Mr. Schenk "used the flier as a tool to convey a strong message of intimidation and the potential for harm." (Order) P.C. 13. The court's implicit finding that Mr. Schenk intended to threaten and mask his threat is without factual basis in the record. As eight justices in *Black* predicted, and the lower court's decision unfortunately demonstrates, without the requirement of evidence of specific intent to find a "true threat," constitutionally protected activity can easily be converted to criminal activity, endangering First Amendment freedoms.

whether the statute reaches a substantial amount of constitutionally protected conduct. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). The recklessness standard of the disorderly conduct statute reaches a substantial amount of constitutionally protected conduct, not only because it permits prosecution without specific intent, but because it allows evidence of criminal intent to be found solely in otherwise constitutionally protected activity. First Amendment precedent is clear that free speech exceptions are narrowly limited. And, *Black*'s plurality and Justice Souter's concurrence encourage courts to err on the side of preventing the criminalization of speech where it is arguably of a protected nature. The Court's language suggests that expressive conduct be given "the benefit of the doubt" where it arguably could be protected. *See* 538 U.S. at 365-66; *see also id.* at 385 (Souter, J., concurring in the judgment in part and dissenting in part).

Allowing the State to prosecute constitutionally protected activities without any evidence that the expressive conduct intended to mask proscribable conduct "authorizes the punishment of constitutionally protected conduct." *See Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (an anti-loitering ordinance banning annoying groups in public was invalidated because it "ma[de] a crime out of what under the Constitution cannot be a crime."); *see also Snyder v. Phelps*, 562 U.S. 443, 455 (2011).

As evidenced by Mr. Schenk's case, the recklessness standard allowed constitutionally protected activity to be used as evidence of a "masked" threat based solely upon a reasonable layperson's generalized apprehension of and abhorrence for the KKK. With that backdrop, the lower court cited Mr. Schenk's alleged 1) targeting of communications, 2) door-to-door leafletting, and 3) advocacy of a historically violent group as evidence that Mr. Schenk intended to "use[] the flier as a tool to convey a

strong message of intimidation and the potential for harm." (Order) P.C. 13. Even in the light most favorable to the State, without additional evidence of intent to threaten or other criminal conduct, these activities on their own and in combination are constitutionally protected. This Court cannot allow the State to criminalize plainly protected expressive activities and content just because the State despises the delivered message.

It hollows the First Amendment to allow such activities alone to be the basis for inferring criminal intent. To paraphrase the *Black* plurality, inferring criminal intent from First Amendment protected activities ignores the need for contextual factors to decide whether a particular leaving of a KKK leaflet is intended to threaten or not. "The First Amendment does not permit such a shortcut." *Black*, 538 U.S. at 366.

i. Targeting individuals for the receipt of political communications is constitutionally protected.

It is uncontroversial that the targeted delivery of a political message to another is constitutionally protected. For instance, in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997), the Supreme Court struck down a fifteen-foot abortion clinic buffer zone because, in part, it prevented anti-abortion protesters from effectively communicating with targeted individuals walking into abortion clinics. Thus, the First Amendment protects a speaker's right to reach an intended recipient because that is how the speech attains its effectiveness.

The Court further articulated the right to target speech to a particular person or group of persons in *Snyder v. Phelps*. In that case, the Westboro Baptist Church intentionally targeted a funeral with heinous messages, and the deceased's father sued for damages. While finding the messages protected under the public concern doctrine,

the Court emphasized that no evidence showed that Westboro's expressive conduct was intended as a personal attack on Snyder, although targeted at the funeral gathering. *Snyder*, 562 U.S. at 455 ("There was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder."). Thus, despite the highly charged emotional and personal circumstances, the targeting of messages to Mr. Snyder's son's funeral could not negate the constitutional protections afforded to Phelps's core political speech without evidence of a specific intent.

While *Snyder* and *Schenck*'s targeting occurred in traditional public spaces, their rulings should equally apply in leafletting cases. As discussed in Part I.c.ii *infra*, door-to-door leafletting is sacrosanct because "[t]he Supreme Court has tenaciously protected the right of a speaker to reach a potential listener and get the listener's attention." *Ad World, Inc. v. Doylestown Twp.*, 672 F.2d 1136, 1141 (3d Cir. 1982) (citing *Kovacs v. Cooper*, 366 U.S. 77, 87 (1949)). That right extends to and includes the outer areas of a home, as long as the speech does not intrude within the home or trespass a homeowner's notice stating leafletters are unwelcome. *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943).

Here, assuming *arguendo* that Mr. Schenk purposefully targeted the complaining witnesses for receipt of the KKK leaflets, his actions would nonetheless be protected by the First Amendment. Targeting one's speech to another is clearly protected expressive conduct under the First Amendment, particularly with regard to political communications. *Schenck*, 519 U.S. at 377. As in the *Schenck* buffer-zone case, a law that wholly prevents or punishes Mr. Schenk's alleged attempts to effectively communicate a political message to its intended recipient is an unconstitutional limit on

his First Amendment rights. Similarly, the State presented no evidence that Mr. Schenk's leaving of, objectively viewed, a KKK promotional leaflet was "intended to mask an attack" on the complaining witnesses. His right to leave political materials extends to and includes any place at or near the door to the home. He did not intrude into the home and there was no allegation that he trespassed a notice banning leafletters at either residence. Therefore, the First Amendment protects the leaving of KKK recruitment leaflets at the complaining witnesses' homes, targeted or not. To deny First Amendment protection to Mr. Schenk's core political activity without some evidence that he intended to threaten criminalizes his speech, when the Supreme Court in similar circumstances has deemed regulation and tort liability unconstitutional.

ii. Leafletting Homes is Constitutionally Protected Activity.

The act of placing a leaflet containing a political or religious message near the doorway of home, anonymously or otherwise, is unquestionably protected by the First Amendment. *Watchtower Bible & Tract Society of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160 (2002) (ruling that anonymous door-to-door leafletting is protected by the First Amendment). For over 60 years, the Supreme Court has invalidated restrictions on door-to-door canvassing and pamphleteering. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved." *Martin*, 319 U.S. at 146-47. To protect this freedom while considering homeowners' right to be free from unwanted intrusion, the Court has repeatedly determined that leafletting can only be completely banned by a homeowner's order or notice barring leafletters from their property. *Id.* at 148; *Watchtower*, 536 U.S. at 160. Hence, courts have consistently held that the right to leaflet door-to-door, unless

otherwise noticed or ordered by the homeowner, extends to and includes the door of a home. *Martin*, 319 U.S. at 148;*see also People, on Inf. Hotaling v. Dale*, 47 N.Y.S.2d 702, 708 (City Ct. 1944).[12]

It is a longstanding principle that a leafletter need not restrain their communication unless a homeowner has by order or notice barred solicitors or canvassers from her property. *Martin*, 319 U.S. at 148. The First Amendment "does not permit the government to prohibit speech as intruding into the home unless the 'captive' audience cannot avoid objectionable speech." *Consol. Edison Co. v. Pub. Svc. Comm'n,* 447 U.S. 530, 542 (1980). Recipients of objectionable speech are instead asked to "'avoid further bombardment of their sensibilities simply by averting their eyes.' " *Id.* (quoting *Cohen v. California,* 403 U.S. 15, 21 (1971)). Consequently, with regard to objectionable leaflets, the "short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Lamont v. Comm'r of Motor Vehicles,* 269 F. Supp. 880, 883 (S.D.N.Y.), aff'd, 386 F.2d 449 (2nd Cir. 1967); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983). The Supreme Court has clearly determined that it "does not seem onerous to impose on the potential listener some of the costs of this important freedom." *Ad World*, 672 F.2d at 1141 (citing *Cohen,* 403 U.S. at 21).

Even when door-to-door leafletting is targeted at specific households or persons, the Court has intimated that such actions are protected by the First Amendment. In *Frisby v. Schultz,* 487 U.S. 474 (1988), the Court upheld an ordinance banning the

[12] The First Amendment also protects the right to leave leaflets in a residential mailbox or to mail protected communications, unless the recipient has given affirmative notice that they do not wish to receive such leaflets or mailings. *See Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736-38 (1970)("[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.").

picketing of individuals outside their private residences. Significantly, the Court explicitly distinguished "focused picketing" of a home from constitutionally protected "more generally directed means of communication" such as leafletting or solicitation. Where focused picketing forces information "into the homes," leafletting only leaves information outside the home. *Id.* at 486. Thus, when anti-abortion picketers effectively trapped a doctor in his home and prevented him from avoiding the unwanted speech, the picketers' First Amendment rights could be restrained by the State's interest in preventing such intrusive actions.

In this case, Mr. Schenk left identical KKK recruitment leaflets wedged inside an outer screen door and in a second home's residential mailbox. (Affidavit) P.C. 19-20. The lower court saw these actions, by themselves, as indicating "threatening confrontational behavior" because "citizens' homes are afforded heightened protection from intrusion." (Order) P.C. 11-12. This finding misapprehends longstanding Supreme Court precedent. *Martin*, 319 U.S. at 148. While an individual has a heightened protection from a speaker's intrusion *within their home*, no such heightened protections exist outside their door other than where they affirmatively bar leafletting. *Id.*

The alleged targeted homes were not subject to intrusion. No evidence suggests that the homes barred leafletters by order or notice. Upon receipt of an objectionable flier, First Amendment precedent hears the recipients' concerns, but asks that they discard the offensive materials, all the while remaining free to engage in counter-speech. *Lamont,* 269 F. Supp. at 883; *see also Bolger*, 463 U.S. at 72; *Cohen,* 403 U.S. at 21. The burden on the recipients does not outweigh Mr. Schenk's right to deliver a political leaflet to the door or mailbox of another. *Ad World,* 672 F.2d at 1141 (citing *Cohen,* 403 U.S. at 21). To convert Mr. Schenk's leaving of recruitment leaflets outside the homes of

the complaining witnesses into an implicit threat unconstitutionally punishes protected activity and ignores Supreme Court precedent holding door-to-door leafletting as sacrosanct.

Because the State has not provided evidence that Mr. Schenk's act of leafletting was anything other than a mode of communication specifically protected by the First Amendment, the lower court's decision must be reversed, lest the court "authorize[] the punishment of constitutionally protected conduct."

iii. Associating and Advocating for Association with a Historically Violent Group is Constitutionally Protected.

It is fundamental Supreme Court doctrine that the First Amendment restricts guilt by mere association, absent evidence of a specific criminal act. *See, e.g., Healy v. James*, 408 U.S. 169, 185–86 (1972); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605—610 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Scales v. United States*, 367 U.S. 203 (1961); *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975). Even where an organization has both legal and illegal aims, punishing association with that organization presents "a real danger that legitimate political expression or association would be impaired." *Scales*, 367 U.S. at 229. More specifically, "[t]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a *specific intent to further those illegal aims.*" *Claiborne Hardware*, 458 U.S. at 919-20 (quoting *Healey*, 408 U.S. at 186) (emphasis added); *see also Noto v. United States*, 367 U.S. 290, 299 (1961) ("It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets [of a particular

group]."). Thus, in *Claiborne Hardware*, the First Amendment prohibited liability for peaceful civil rights boycotters seeking governmental and economic change by boycotting Mississippi businesses, even though other boycotters in the group may have been liable for violence against those same businesses. 458 U.S. at 919-20.

Furthermore, since *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969), advocating violence has long been protected by the First Amendment, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Court explained further in *Noto* that "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." 367 U.S. at 298. Given the right to advocate violence generally and the freedom to associate as one wishes, Mr. Schenk clearly has a right to associate with and advocate for joining a historically violent hate group, as long as he does so without specific intent to further the illegal aim of threatening another.

Nevertheless, Mr. Schenk's motion to dismiss was denied explicitly because of the Klan's past violence and advocacy of violence. (Order) P.C. 11-12 (¶ c, "fliers refer to a group known to be hostile and violent toward minority ethnic groups"; ¶ e, "the Klan name and imagery . . . implies impending harm."). The court punished Mr. Schenk's association and advocacy of association with the Klan as inherently indicative of a threat. *See id.* Of course, there is no record evidence indicating that Mr. Schenk had specific intent to further the illegal aim of threatening another through his expressive conduct. In fact, the only record evidence available regarding his intent are his own statements explaining that he distributed the leaflets to promote and recruit for the Klan. (Affidavit) P.C. 21-23. To punish his advocacy of and association with the Klan,

without any particular record evidence showing an intention to do anything other than communicate the KKK's political ideology, unjustly punishes constitutional conduct.

Because the political advocacy promoted in Mr. Schenk's leaflets is protected by the First Amendment, the lower court's determination that his expressive conduct could indicate a "true threat" must be overturned, the recklessness standard upon which it was based must be struck, and Mr. Schenk's conditional guilty plea must be vacated.

## II. Application of the Hate Crime Enhancement to Mr. Schenk's Leafletting Is Impermissible Where there Were No "Special Harms" Over and Above those Caused by the Underlying Offense Itself.

In addition to the facial and as-applied infirmities of the hate crime enhancement statute, 13 V.S.A. § 1455 discussed by Mr. Schenk, the application of the enhancement in this case is unconstitutional for an additional reason. The lower court read the Klan's malicious racial motivations into Mr. Schenk's leaflets—motivations that were necessary to its finding that the leaflets constituted "true threats"—and then used those same exact motivations to enhance the penalty for the offense. However, the narrow rationale that protects hate crime enhancements against First Amendment challenges cannot support such "double-counting" of Mr. Schenk's speech and associations.

The Supreme Court has identified the justification for hate crime enhancements as follows:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. The state's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

*Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (citations omitted); *see also R.A.V.*

*v. City of St. Paul*, 505 U.S. 377, 416 (1992) (Stevens, J., concurring in the judgment) ("Conduct that creates special risks or causes special harms may be prohibited by special rules."). However, this most basic of explanations is also the explanation for why a hate crime enhancement would *not* be permissible in this case: the State's interest in redressing the harms caused by the leaflets is already served by the criminalization of Mr. Schenk's speech and expressive conduct. Hate crime enhancements are justified by the special harms bias-motivated crimes cause over and above the harms caused by the underlying offense itself. But where the underlying conduct is only an offense because of that bias, there is no additional harm for the enhancement to redress.

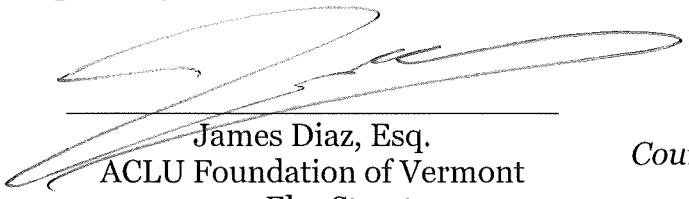
For example, a person who commits simple assault by "purposely . . . caus[ing] bodily injury to another," 13 V.S.A. § 1023(a)(1), causes physical and mental harms that the Legislature determined would be redressed by up to one year's imprisonment and/or a fine of up to $1,000. If the person committed the assault because of the victim's race, that would cause the sort of additional harm that the Supreme Court has held justifies additional punishment. But here, the bias-motivated conduct of the Klan, imputed by the lower court to Mr. Schenk, was what purportedly transformed Mr. Schenk's otherwise-protected speech and association into the crime of threatening behavior—and the Legislature has determined that the harms arising from threatening behavior are redressed by up to sixty days' imprisonment and/or a fine of up to $500. There is no additional harm over and above the crime itself, and there can be no additional punishment over and above that which redresses its harms; *Mitchell*'s justification for additional punishment does not apply.[13]

[13] Assuming that a hate crime enhancement could properly be applied to a purely speech-based crime, *but see* Br. of the Appellant Part IV.A, the situation would be different if Mr. Schenk's leaflets contained an explicit threat: the fear and apprehension caused by the threat are one type of harm that merits punishment, and the racial motivation for

## CONCLUSION

For all of these reasons, this Court should vacate Mr. Schenk's conditional guilty plea, reverse the decision below, and strike the recklessness standard from Vermont's disorderly conduct statute as it pertains to the First Amendment's "true threat" exception.

Respectfully submitted,



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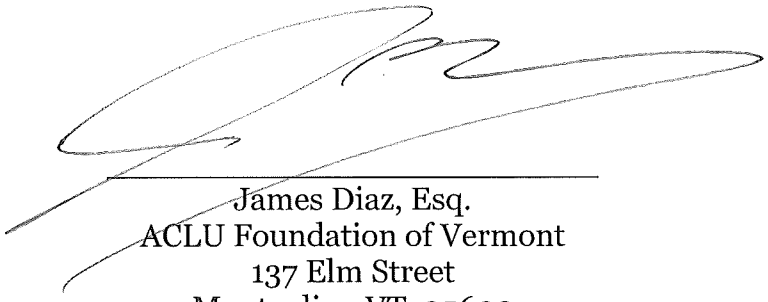
delivering that threat causes another type of harm that merits additional punishment. But there was no explicit threat here—on the contrary, the leaflet on its face was an exhortation to join the Klan—and the trial court found an implicit threat only because of the perceived racial motivation of Mr. Schenk's speech and leafletting.

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 8306 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32. I have relied upon the word processor used to produce this brief, Microsoft Word 2010, to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court via email was scanned for viruses, and that no viruses were detected.



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