

Nos. A163458, A163800

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

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

v.

BRUCE PETERSON,
Defendant and Appellant.

Contra Costa County Superior Court
No. 52006922

The Honorable Charles B. Burch

**APPLICATION OF THE AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA TO APPEAR AS *AMICUS CURIAE* AND
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
DEFENDANT/APPELLANT BRUCE PETERSON**

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**APPLICATION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE ACLU OF NORTHERN CALIFORNIA**

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Northern California (“ACLU NorCal”) respectfully applies for permission to file the attached *amicus curiae* brief pursuant to California Rule of Court 8.200.

ACLU NorCal is an affiliate of the national ACLU, a nonpartisan, nonprofit organization with approximately 1.8 million members dedicated to defending the guarantees of individual liberty secured by the state and federal Constitutions. Since its founding in 1920, the ACLU has been focused on protecting the free expression that is at the core of our constitutional democracy. The ACLU and its affiliates have appeared as both direct counsel and *amicus curiae* in a number of free speech cases, including cases addressing the “true threat” doctrine. *See, e.g., Counterman v. Colorado*, 143 S. Ct. 2106 (2023) (*amicus*); *People v. Smolkin*, 49 Cal. App. 5th 183 (2020), *review granted and transferred* No. S258769 (Cal. 2019) (*amicus* in support of request for review); *Elonis v. United States*, 575 U.S. 723 (2015) (*amicus*); *Virginia v. Black*, 538 U.S. 343 (2003) (counsel); *Watts v. United States*, 394 U.S. 705 (1969) (*amicus*). As such, the proper resolution of this case is a matter of substantial interest to the ACLU and its members. In addition, ACLU NorCal’s participation as *amicus curiae* will assist the Court in resolving the present matter.

No party or counsel for any party in this matter authored any part of the accompanying proposed *amicus curiae* brief, nor has any person or

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entity made any monetary contribution to fund the preparation or submission of this brief.

Dated: July 26, 2023

Respectfully submitted,

By: /s/ Hannah Kieschnick
Hannah Kieschnick
**ACLU FOUNDATION OF
NORTHERN CALIFORNIA**

Attorney for Amicus Curiae

***AMICUS CURIAE* BRIEF OF ACLU OF NORTHERN CALIFORNIA**

I. INTRODUCTION

California’s stalking statute makes it unlawful to follow or harass someone, *and* to make a “credible threat” against them. To avoid constitutional infirmity, this Court should construe the credible threat element to encompass only “true threats,” which receive no protection under the First Amendment. So construed, this distinct credible threat element guards against the government punishing someone for their constitutionally protected speech. A heightened standard of review likewise serves to protect against criminalizing protected speech. The Court therefore should also confirm that independent review applies when, as here, First Amendment issues are at stake.

The facts of this case involve no true threat as the U.S. Supreme Court has construed that category of speech. *See Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023). Instead, they involve three instances of protected speech—speech that may have been unwelcome and uncomfortable, but was nonetheless non-violent and non-threatening. In arguing otherwise, the State claims a more deferential standard of review than applies when First Amendment rights are at issue, and then uses that standard to pay lip service to the distinct elements of a criminal stalking offense. This Court should resist the State’s efforts to collapse the harassment and credible threat elements and, instead, find that sufficient evidence does not support Mr. Peterson’s criminal stalking conviction.

II. BACKGROUND

Mr. Peterson was convicted of one count of criminal stalking in violation of Penal Code section 646.9. (*See* 1CT 130–31; 2CT 324–25.¹)

¹ The Clerk’s Transcript is cited as “CT” and the Reporter’s Transcript is cited as “RT.”

California’s stalking statute makes it unlawful to either “follow[]” or “harass[]” another person, *and* to “make[] a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family.” Penal Code § 646.9(a). Because there is no evidence that Mr. Peterson followed anyone, this brief does not address that form of criminal stalking. A person “harasses” another when they “engage[] in a knowing and willful course of conduct”—that is, “two or more acts . . . evidencing a continuity of purpose[]”—“directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.” *Id.* §§ 646.9(e) & (f).

Section 646.9 defines a “credible threat” as:

a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family.

Id. § 646.9(g). “Constitutionally protected activity” is not included within the meaning of “credible threat” or the “course of conduct” reflecting harassment. *Id.* §§ 646.9(e) & (g).

Mr. Peterson’s conviction turned on three communications: an in-person conversation, a Facebook post, and a letter. First, in February 2020, a local politician, Cameron Lee Burks, and his wife, Julia Ackley, hosted an open house in support of a school bond measure. (6RT 265–67; Defense Ex. H.) Mr. Peterson attended the event and had a stilted conversation with

Ms. Ackley, during which he awkwardly referenced that it had been 22 days since her birthday (which was on her public Facebook page). (6RT 226–28, 250–26.)

A month later, Mr. Peterson reposted on Facebook a family photo from Ms. Ackley’s still-public page, writing, “A politician’s family. I have never met the younger 2 girls.” (6RT 268–71; 2CT 507–14; Ex. 7.) He then wondered “where they hid the girls” during the open house because the hosts had stated they supported the bond measure as parents of school children. (*Id.*) He mused in the comments, “They live near Burton Valley School. Considering the politician Cameron Burks has a different name than his wife, I wonder what their daughters last name is.” (*Id.*) He also referenced Mr. Burks being a politician: “He is one of the Mayor’s [sic] who abdicated his throne. But he remained in power, on the Lafayette Ca. City Council.” (*Id.*)

Finally, one month after the Facebook post, Ms. Ackley received a strange letter and check from Mr. Peterson. (*See* Exs. 3 & 4.) The check was made out to “anyone who is not corrupt” for an “IOU” amount. (Ex. 3.) Mr. Peterson had written on the check: “Thanks for hosting the event on February 3rd, 2020. I do not recall your two daughters’ names.” (*Id.*) He also referenced Ms. Ackley’s parents, whose names were available on her Facebook page. (*Id.*) Finally, the letter was addressed to “Julia, 2 unnamed daughters, and their unnamed pets.” (Ex. 4.) The letter was rambling and “didn’t make a lot of sense” (6RT 232 [Ackley testimony]), but generally expressed displeasure with political corruption (2RT 30 [prosecutor’s description]; Ex. 4; 2CT 515–16). For example, the letter questioned, “How does a father of 2 daughters, live with himself, being a puppet for these totalitarian, nasty jerks from hell? They are above all laws, in this corrupt, little city.” (Ex. 4; 2CT 515–16.)

III. ARGUMENT

A. The Court Must Apply the “Independent Review” Standard Applies to First Amendment Questions Such as Those at Issue Here.

When First Amendment rights are at stake, reviewing courts must “make an independent examination of the record . . . to ensure that a speaker’s free speech rights have not been infringed by a trier of fact’s determination.” *In re George T.*, 33 Cal.4th 620, 632 (2004). The California Supreme Court’s requirement in *George T.* is consistent with the U.S. Supreme Court’s emphasis that appellate courts have “an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (internal quotation marks, citation omitted). This heightened standard applies here where Mr. Peterson contends that his stalking conviction was premised on protected speech. (*See* AOB 28–31; Reply 10–11.) In arguing instead that this Court need only review for substantial evidence (*see* RB 25–27), the State adopts a cramped reading of the relevant case law and downplays the serious stakes of this case.

In particular, the State contends that because *George T.* addressed the independent review standard in a criminal threats case arising under Penal Code section 422, that standard *only* applies in criminal threats cases arising under Penal Code section 422. (*See* RB 25–26.) Not so. The *George T.* court declined to “limit independent review to specific First Amendment contexts.” 33 Cal.4th at 632. Instead, it explained, independent review applies “in various First Amendment contexts.” *Id.* (listing, *inter alia*, contexts such as fighting words, obscenity, and incitement). Subsequent case law bears out that independent review “has general application and is not limited to a specific type of charge, such as criminal threats.” *In re*

Curtis S., 215 Cal. App. 4th 758, 762 (2013) (independently reviewing sufficiency of evidence for conviction under Penal Code § 415(2)); *see also, e.g., People v. Smolkin*, 49 Cal. App. 5th 183, 187, 189 (2020) (applying independent review to conclude that, “as a matter of law, a ‘reasonable listener’ would not have understood [the defendant’s] letter to be a true threat” under Penal Code § 69).

People v. Lopez, 240 Cal. App. 4th 436 (2015), *as modified on denial of reh’g* (Sept. 30, 2015), is not to the contrary. While the State is correct that the *Lopez* court explained that criminal threats and criminal stalking are substantively different crimes (*see* RB 26), the court offered this explanation only to affirm the lower court’s decision, *not* to determine the applicable standard of review, *see* 240 Cal. App. 4th at 449. In fact, the *Lopez* court *declined* to determine whether substantial evidence or independent review applied because it would have “affirm[ed] under either.” *Id.* at 447.

That a threat is one of multiple elements for criminal stalking but the main element for criminal threats does not, as the State suggests (*see* RB 26), diminish Mr. Peterson’s First Amendment interests.² As *George T.* instructs without qualification, “[i]ndependent review is particularly important in the threats context,” 33 Cal.4th at 634, because the “undesirability” of “disturbing, frightening, or painful” speech “will place a heavy thumb in favor of silencing it”—a result antithetical to First Amendment protections, *Counterman*, 143 S. Ct. at 2121–22 (Sotomayor, J., concurring in part and concurring in the judgment). And even the State

² It also does not, of course, diminish the State’s burden to prove beyond a reasonable doubt every element of an offense, whether those elements involve conduct, speech, or some combination thereof. *See In re Winship*, 397 U.S. 358, 361 (1970).

agrees that a “credible threat” is an “element of stalking” (RB 26), thereby conceding that this case too arises in the “threats context.”

Thus, any distinction between sections 422 and 646.9 does not alter the heightened standard applicable here: the Court’s “independent legal determination whether a ‘reasonable listener would understand’” Mr. Peterson’s communications to be a “true threat” based on “the context and surrounding circumstances.” *Smolkin*, 49 Cal. App. 5th at 188 (quoting *People v. Lowery*, 52 Cal.4th 419, 427 (2011)). As will follow, a reasonable listener would *not* understand Mr. Peterson’s statements as threats.

B. Sufficient Evidence Does Not Support Mr. Peterson’s Conviction Because He Did Not Threaten Unlawful Violence.

1. A true threat is a serious expression of an intent to commit an act of unlawful violence.

The First Amendment protects ideas and speech that even “the overwhelming majority of people might find distasteful or discomforting.” *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citation omitted); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”). While broad, however, the First Amendment’s protections are “not absolute.” *Black*, 538 U.S. at 358. The U.S. Supreme Court has long recognized “certain well-defined and narrowly limited classes of speech” that do not receive First Amendment protection. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Section 646.9 implicates one of these classes: “true threats.”

“True threats are ‘serious expression[s]’ conveying that a speaker means to ‘commit an act of unlawful violence[.]’” against a specific person or group of people. *Counterman*, 143 S. Ct. at 2114 (quoting *Black*, 538 U.S. at 359) (first alteration in original). Section 646.9 does not, by its terms, incorporate this standard into the definition of “credible threat.”

Even so, at a minimum and as courts have done with “threat” elements in other sections of the Penal Code, the Court must construe a credible threat under section 646.9 consistent with the “true threats” doctrine to be a serious expression of an intent to commit an act of unlawful violence. *See, e.g., Lowery*, 52 Cal.4th at 422, 427 (construing Penal Code § 140(a) to require “proof that a reasonable person would understand the allegedly threatening statements—when considered in their context and surrounding circumstances—‘to communicate a serious expression of an intent to commit an act of unlawful violence’”) (quoting *Black*, 538 U.S. at 359).³ Any other construction would render section 646.9 unconstitutionally overbroad by “sweep[ing] within its ambit” and criminalizing protected speech. *See Klein v. San Diego Cnty.*, 463 F.3d 1029, 1038 (9th Cir. 2006) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940))).⁴

2. An implied threat must still satisfy the “serious expression” standard.

As the U.S. Supreme Court recently affirmed, a threat of “unlawful violence” must be “true” and “serious” to fall outside the bounds of First Amendment protection. *Counterman*, 143 S. Ct. at 2114. That is, those terms distinguish “what is at issue from jests, ‘hyperbole,’ or other

³ *Amicus* takes no position on whether this Court should, beyond the constitutional floor articulated in *Black* and recently reaffirmed in *Counterman*, also incorporate the more exacting statutory requirement that a criminal threat be “unequivocal, unconditional and specific.” (See AOB 36–37, 41, 46, 50; Reply 14–17; Penal Code § 422.)

⁴ In addition to confirming the “serious expression” standard, the U.S. Supreme Court in *Counterman* held that the First Amendment requires a showing of the subjective mental state of at least recklessness in the context of true threats. *See* 143 S. Ct. at 2117. Section 646.9’s requirement that the defendant act “with the intent to place that person in reasonable fear for his or her safety[]” comports with this constitutional requirement. *See* Penal Code § 646.9(a).

statements that when taken in context do not convey a real possibility that violence will follow[.]” *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)). Both California and federal courts use “context and surrounding circumstances” to determine whether a threat is sufficiently serious to qualify. *See Lowery*, 52 Cal.4th at 422; *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 746 (9th Cir. 2021).

The role of context explains why “a statement that does not explicitly threaten violence” may nonetheless be considered a true threat and therefore subject to punishment. *See Thunder Studios, Inc.*, 13 F.4th at 746. For example, courts have found implied true threats where the “speaker makes a statement against a known background of targeted violence,” *id.*, such as by burning a cross, which is “often” considered a true threat because of its “long and pernicious history as a signal of impending violence,” *Black*, 538 U.S. at 363. Similarly, in a case relied on by the State (*see* RB 30), the defendant repeatedly yelled, “You’re a rat” to a fellow inmate and cajoled other inmates into chanting, “Benji is a rat.” *People v. Pineda*, 13 Cal.5th 186, 248–49 (2022). These statements could reasonably be interpreted as a true threat, explained the court, because it is “well understood” that inmates labeled as rats or “snitches” are “reviled” and at risk of violence in the carceral system. *Id.* at 249 (citation omitted).

In the absence of a “known background” of violence, courts look to other cues to determine whether a statement or series of statements rises to the level of an implicit threat of violence. Such cues include the use of explicitly violent language, reliance on euphemisms for violence, and references to “actual acts of violence” carried out by others in similar circumstances. *See United States v. Turner*, 720 F.3d 411, 421–22 (2d Cir. 2013) (true threat directed towards three judges where defendant’s statements included reference to violent attack against different judge). For example, in *People v. McPheeters*, 218 Cal. App. 4th 124 (2013), the

defendant “bragged about beating people up” and told his ex-girlfriend that “someone” or “somebody” was going to beat her up too. *Id.* at 135–36; *see also, e.g., People v. Halgren*, 52 Cal. App. 4th 1223, 1233 (1996) (implied true threat where defendant told victim she “would be sorry” for being rude to him and that he would “fix her”).

Other cues include escalating or persistent communications, particularly over the recipient’s protestations. In *People v. Uecker*, 172 Cal. App. 4th 583 (2009), the defendant engaged in a “pattern of unrelenting conduct” by calling one of his victims more than 30 times in three weeks and, among other things, referencing that he was a registered sex offender. *Id.* at 596–97; *see also Lopez*, 240 Cal. App. 4th 436 at 451–52 (implied true threat where defendant maintained contact with victim for multiple years, even after she asked him to stop and turned to police for help).

By contrast, courts have concluded that the totality of circumstances does not add up to a true threat where, for example, the communications are “utterly nonsensical” or extremely improbable. *See Smolkin*, 49 Cal. App. 5th at 189. In *Smolkin*, a defendant sent a letter to a district attorney who played a role in his conviction, claiming that his confinement “constituted kidnapping of a Russian military operative” and threatening that the district attorney’s office “would be sentenced to death by firing squad.” *Id.* The court emphasized, among other factors, that the letter was “patently delusional” in concluding that it did not constitute a true threat. *Id.*; *see also Elonis v. United States*, 575 U.S. 723, 747–48 (2015) (Alito, J., concurring in part and dissenting in part) (true threat must be likely “to be taken seriously”). The *Smolkin* court also emphasized that the defendant did not have “a record of committing acts of violence” in concluding that any threat in the letter was not “serious.” 49 Cal. App. 5th at 191.

3. At worst, Mr. Peterson’s communications were emotionally distressing, not violent or threatening.

The record reflects that Mr. Peterson’s criminal stalking conviction fails to meet the “true threat” bar that enables the government to criminalize speech. *Amicus* need not retread the reasons—such as the special protection for political speech and speech on matters of public concern—offered by Mr. Peterson as to why his communications were not a true threat. (See AOB 38–40.) *Amicus* simply emphasizes for the Court that Mr. Peterson’s impassioned but rambling communications were more akin to the utterly delusional letter in *Smolkin* than the violent language and context in cases like *Black*, *Pineda*, and *McPheeters*. As one neighbor testified, Mr. Peterson may “like to rant” but “that’s the extent of it”: there is “[a]bsolutely no follow-through or violence of any kind.” (See 9RT 542.) And, unlike in cases like *Uecker* and *Lopez*, Mr. Peterson did not persist in his contacts in the face of requests to cease contact.

The State quotes the “serious expression” standard (see RB 23, 33 [quoting *Black*, 538 U.S. at 359]), and recognizes that “a credible threat under section 646.9 includes only a threat to commit acts of violence” (*id.* at 52). Even so, the State’s analysis effectively reads the “credible threat” element out of section 646.9 by focusing solely on the evidence supporting harassment. (*Id.* at 28–30.) To the State, the “subtext” of Mr. Peterson’s communications was that he was going to approach and physically harm the couple’s daughters so that they would pay closer attention to Mr. Peterson’s political views. (*Id.* at 30.) To support its interpretation, the State focuses on the emotionally distressing nature of Mr. Peterson’s speech, emphasizing that Ms. Ackley felt “unnerved,” “uncomfortable,” and “a little freaked out” by Mr. Peterson. (RB 15 [quoting 6RT 228].) The State also highlights that Mr. Peterson likes to make people feel “a little

uncomfortable” in order “to get their attention to be listened to.” (*Id.* at 21 [quoting 9RT 450–51].)

While substantial emotional distress may be sufficient to satisfy the harassment element of criminal stalking, it does not bring speech outside the First Amendment or satisfy the true threat standard needed for the credible threat element. As the U.S. Supreme Court has long emphasized, protected speech may not be punished solely because it “may have an adverse emotional impact on the audience.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *see also Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011) (holding that Westboro Baptist Church could not be liable for intentional infliction of emotional distress based on picketing soldier’s funeral with signs like “Thank God for IEDs” and “You’re Going to Hell”).

Thus, a reasonable person might have understood Mr. Peterson to be engaging in his usual, attention-seeking pattern of expressing political views in a crude and intemperate way. But it would strain logic and the law to conclude that the family’s emotional distress *also* means that a reasonable person would have understood Mr. Peterson to have been intentionally threatening *violence* against the daughters. *Amicus* therefore urges the Court to hew to the well-established definition of a true threat, conclude that there is not sufficient evidence of such a threat, and reverse Mr. Peterson’s conviction.

Dated: July 26, 2023

Respectfully submitted,

By: /s/ Hannah Kieschnick
Hannah Kieschnick
**ACLU FOUNDATION OF
NORTHERN CALIFORNIA**

Attorney for Amicus Curiae

CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the computer program used to generate this *amicus curiae* brief indicates that the text contains 3,543 words, including footnotes.

Dated: July 26, 2023

Respectfully submitted,

By: /s/ Hannah Kieschnick
Hannah Kieschnick
**ACLU FOUNDATION OF
NORTHERN CALIFORNIA**

Attorney for Amicus Curiae

PROOF OF SERVICE

I, Brandee Calagui, declare as follows:

I am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is: ACLU Foundation of Northern California, 39 Drumm Street, San Francisco, CA 94111.

On July 26, 2023, I served true copies of the enclosed Application to Appear as *Amicus Curiae* and Brief of *Amicus Curiae* in support of Defendant/Appellant Bruce Peterson on the trial court as follows:

By U.S. mail, first-class postage prepaid to counsel for each party and on the Superior Court clerk for delivery to the trial judge: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is placed in a sealed envelope and deposited with the U.S. Postal Service on that same day with first-class postage thereon fully prepaid in the ordinary course of business.

Hon. Charles B. Burch
c/o Clerk of the Superior Court
Department 23
725 Court Street
Martinez, CA 94553

Electronic service through TrueFiling: I am e-filing this document through the Court of Appeal's TrueFiling service. I am designating that electronic copies be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: July 26, 2023

By: /s/ Brandee Calagui
Brandee Calagui