

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE GEORGE T.,
A Minor Coming Under The
Juvenile Court Law.

S111780

(Court of Appeal No. H023080)

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

(Santa Clara County Juvenile Court
No. J122537)

vs.

GEORGE T.,

Defendant and Appellant

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF
OF J.M. COETZEE, MICHAEL CHABON, PETER STRAUB, HARLAN ELLISON, GEORGE
GARRETT, AYELET WALDMAN, NEIL GAIMAN, JAYNE LYN STAHL, MICHAEL
ROTHENBERG, JULIA STEIN, GREG RUCKA, FLOYD SALAS, THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA, FEMINISTS FOR FREE EXPRESSION,
THE COMIC BOOK LEGAL DEFENSE FUND, THE FIRST AMENDMENT PROJECT, THE
NATIONAL COALITION AGAINST CENSORSHIP, PEN AMERICAN CENTER AND PEN
USA FILED IN SUPPORT OF DEFENDANT-APPELLANT GEORGE T

AFTER AFFIRMANCE OF JUVENILE COURT
FINDINGS BY THE COURT OF APPEAL,
SIXTH APPELLATE DISTRICT

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF
THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 29.1(f) of the California Rules of Court, J.M.
Coetzee, Michael Chabon, Peter Straub, Harlan Ellison, George Garrett,
Ayelet Waldman, Neil Gaiman, Jayne Lyn Stahl, Michael Rothenberg,
Julia Stein, Greg Rucka, Floyd Salas, the American Civil Liberties Union
of Northern California, Feminists for Free Expression, the First
Amendment Project, the Comic Book Legal Defense Fund, the National
Coalition Against Censorship, PEN American Center and PEN USA,
respectfully request leave to file the attached amicus curiae brief in support
of Defendant-Appellant George T.

Interests of Amici

Amici curiae are poets, novelists and other literary artists, and
organizations that support such artists and their readers. Amici curiae all
have an interest in preserving their own First Amendment rights to freedom
of artistic expression, as well as the rights of the readers. Amici curiae also
have a special interest in ensuring that young adults, honing their creative
writing talents, remain free to explore the whole range of their emotions
and experiences, try on different literary voices and personae, and address
disturbing subject matter without fear that they will be punished should
their work be misinterpreted.

J.M. Coetzee is the winner of the 2003 Nobel Prize for Literature for “writing that upholds the fragile experience of the individual against the barbaric arbitrariness of history.” Coetzee is a writer of fiction and non-fiction, and has taught literature around the world, currently at the University of Chicago. His novels, two of which have been honored with the Man Booker Prize, are acclaimed for their complexity and depth of understanding of often abhorrent subjects. They include: *Waiting for the Barbarians*; *Disgrace*; *In the Heart of the Country*, in which a spinster fantasizes about murdering her father and his young lover; his earliest novel *Dusklands*, which focuses in part on a man devising a system of psychological warfare; and his most recent book, *Elizabeth Costello*, in which the title character gives a speech comparing the slaughter of animals to the holocaust.

Michael Chabon won the 2001 Pulitzer Prize for his novel, *The Amazing Adventures of Kavalier & Clay*, a work that weaves together themes of the relationship between art and political resistance, the Holocaust, McCarthyism, homophobia, and friendship. His other works include *The Mysteries of Pittsburgh*, *Wonder Boys*, and *Summerland*, a baseball fantasy written for young adults. In addition to his novels, Chabon has written two books of short stories, articles and essays, and a number of screenplays and teleplays.

Peter Straub is the author of sixteen novels, which have been translated into more than twenty foreign languages. He has won the British Fantasy Award, the International Horror Guild Award, two World Fantasy Awards, and four Bram Stoker Awards. He was named Grand Master at the 1998 World Horror Convention. Straub's work directly addresses themes and issues of the most disturbing nature. As he explains: "The ability freely to represent terrible and distasteful subjects is essential to my purpose, which, largely speaking, concerns the moral significance of emotions such as grief and the pain of loss, as well as the spiritual and emotional consequences of trauma. An adverse decision in this case would represent an unambiguous threat to my ability to create precisely the kind of fiction that means most to me, and for which my individual gifts are most particularly suited."

Harlan Ellison has written or edited 75 books; more than 1700 stories, essays, articles, and newspaper columns; two dozen teleplays; and a dozen movies. He has been honored with the Writers Guild of America Most Outstanding Teleplay Award for solo work an unprecedented four times, the Edgar Allan Poe Award of the Mystery Writers of America twice; the Horror Writers Association Bram Stoker Award six times, including a 1996 Lifetime Achievement Award; and the Silver Pen for Journalism from PEN. Ellison's best-known work is in the fantasy genre and includes: for television, *The Twilight Zone*, *The Alfred Hitchcock Hour*,

The Outer Limits, and *Babylon 5*. His 1992 novelette, *The Man Who Rowed Christopher Columbus Ashore* was selected for that year's *Best American Short Stories*. His story, *I Have No Mouth, and I Must Scream* is one of the ten most reprinted stories in the English language. Among his multiple-award-winning books are *Deathbird Stories*, *Mind Fields*, *Slippage*, *Angry Candy*, *Ellison Wonderland*, and *Stalking the Nightmare*. His work has been translated into more than 40 languages. Ellison often employs dark or violent imagery in his writing. "The legal action brought against this young chap," says Ellison, "is not merely wrongheaded and a mark of provincial paranoia, it would be offensive to any practitioner in any of the arts."

George Garrett was named Virginia's Poet Laureate by Governor Mark R. Warner in 2002. A poet, novelist, essayist, humorist, critic and editor, George Garrett has published in almost every literary genre during his career. In 2001, he published the nonfiction book *Going to See the Elephant: Pieces of a Writing Life* and in 1998, *Bad Man Blues: A Portable George Garrett*. His most recent novel is *The King of Babylon Shall Not Come Against You* (1996). He is best known, however, for his trilogy of historical novels, *Death of the Fox* (1971), *The Succession: A Novel of Elizabeth and James* (1983), and *Entered from the Sun* (1990). His latest short story collection is *An Evening Performance: New and Selected Stories* (1985). Garrett has also published several collections of poetry and plays, has written screenplays, and has edited a number of books, most recently,

The Yellow Shoe Poets: Selected Poems, 1964-1999. He has been a recipient of a Guggenheim Fellowship, a National Endowment for the Arts Sabbatical Fellowship, a Ford Foundation Grant, and the Rome Prize of the American Academy of Arts and Letters, as well as the T.S. Eliot Award, the PEN/Malamud Award for Short Fiction, and the Commonwealth of Virginia Governor's Award for the Arts. He has taught at the University of Michigan, Bennington College, Princeton University, and Hollins College. George Garrett is currently the Henry Hoyns Professor of Creative Writing Emeritus at the University of Virginia. Garrett received his Ph.D. from Princeton and holds an honorary degree from the University of the South.

Ayelet Waldman's writing is informed by her experiences as an advocate, a teacher and a mother. Her work in drug policy reform, and as a public defender inspired her most recent book *Daughters Keeper*, the story of a young woman who faces drug charges because of her boyfriends actions. She is also the author of the Mommy-Track Mysteries series, the protagonist of which is a part-time private detective. Waldman is also an adjunct professor at the Boalt Hall School of Law at University of California, Berkeley, and an experienced lecturer on law, writing, womens issues, and drug policy reform.

Neil Gaiman has written, edited, or co-written over forty books in his twenty years as a professional writer. His last adult novel *American Gods*, was a New York Times Bestseller and was awarded the Hugo,

Nebula, Bram Stoker, SFX and Locus awards. His children's novel, *Coraline*, also won the Hugo Award and is an international bestseller. Gaiman is also the author of the multiple award-winning graphic novel series *The Sandman* and co-author of children's picture books including *The Wolves In the Walls* and *The Day I Swapped My Dad for Two Goldfish*. His work has appeared in translation in Italy, Spain, Holland, Germany, France, Brazil, Sweden, Norway, Denmark, Israel, Poland, Bulgaria, Greece, Finland, Japan, Hungary, Turkey, Korea, Portugal and several other countries. Gaiman serves on the Board of Directors of the Comic Book Legal Defense Fund, and is a member of the Writer's Guild of America and the Society of Authors (UK). He is on the Board of Advisors for the Chicago Humanities Festival. Gaiman's work has addressed themes of physical and psychological violence, which resonate with the content of the poem in the case currently before the court. Most notably, the characters of Rowland and Paine, who appear in his graphic novel *Sandman: Season of Mists*, address the issues of intimidation and violence in a school setting, as does his story *One Life, Furnished in Early Moorcock*.

Jayne Lyn Stahl is a widely published poet whose work has appeared in notable magazines, and anthologies, such as *Poetry Magazine*, *City Lights Review: 2*, *Exquisite Corpse*, *Pulpsmith*, *The New York Quarterly*, *Stiffest of The Corpse* (a City Lights anthology edited by Andrei Codrescu), and others. She is also the author of *Blue Herring*, a theatrical

piece, and a feature-length screenplay *Shakespeare & Company* which deals with Sylvia Beach's valiant struggle to publish James Joyce's *Ulysses*. Stahl is a member of the Academy of American Poets, PEN American Center, and PEN USA where she serves on the Freedom to Write Committee. She has dedicated not merely her literary work, but her professional life as well, to the principles of free speech, and freedom of expression, guaranteed by the Constitution.

Michael Rothenberg is a noted poet, editor, and songwriter. His poems have been published in hundreds of literary magazines. He is the editor of the website, *Big Bridge*, and the publisher of Big Bridge Press, in which he has published the works of many well-known authors, including Michael McClure, Philip Whalen, Andrei Codrescu, and Joanne Kyger. As a writer and publisher, Rothenberg has an interest in encouraging the arts and their proliferation in free and open manifestations. He also has an interest in preserving the constitutional right of poets to explore emotion and idea, and to embody the character of their poems, by trying on a voice – a *personae*.

Julia Stein has published four books of poetry: *Under the Ladder to Heaven* (which was a finalist in the Whitman competition), *Desert Soldiers*, *Shulamith*, and *Walker Woman*. She has been awarded grants from the Ludwig Vogelstein Foundation and the Puffin Foundation. She is also a noted critic, having published essays most recently in *Literary Los Angeles*.

She teaches English at Santa Monica College and East Los Angeles College, and has previously taught at UCLA and CSU-Los Angeles. Stein frequently writes her poems in a fictional voice including the poem *Delilah*, written in the voice of a woman who arranges the death of a man she fears is stalking her.

Greg Rucka is an award-winning comic book writer and novelist, whose work often contains dark or violent imagery. His comic series *Whiteout* (Oni Press) about a Federal Deputy Marshall in Antarctica, won the 1999 Eisner Award for Best Limited Series. He also writes *Queen & Country*, a comic book serial about an espionage detective, and has written for both DC Comics (*Batman*, *Wonderwoman*) and Marvel Comics (the *Elektra* series). Rucka has written a critically acclaimed series of crime novels about a bodyguard, *The Atticus Kodiak Series*. His most recent novel is the thriller *A Fistful of Rain*.

Floyd Salas is an award-winning writer, activist, and a teacher of writing. His four novels, *Tattoo the Wicked Cross*, *What Now, My Love*, *Lay My Body on the Line*, and *State of Emergency*, address the human struggle to balance the conflict between violence and the desire for justice. Salas depicts, in urgent prose, scenes of violence, often based on the university uprisings and protest movements in America in the 1960s, in which he was active. In 1997, Salas was awarded the PEN Oakland Literary Censorship Award for *State of Emergency*, the subject matter of

which resulted in suppression of the book for twenty years. He has also published a collection of love poems, *Color of My Living Heart*.

The American Civil Liberties Union of Northern California is a regional affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization with approximately 400,000 members dedicated to the defense and promotion of the guarantees of individual liberty secured by the state and federal Constitutions. Since its founding in 1920, a primary focus of the ACLU has been to protect and preserve the system of free expression that is at the core of our constitutional democracy.

The COMIC BOOK LEGAL DEFENSE FUND (CBLDF) is a non-profit organization dedicated to defending the First Amendment rights of the comic book industry. CBLDF members include comic book authors and artists, as well as retailers, distributors, publishers, librarians, and readers located throughout the United States and the world. The CBLDF was founded in 1986 on the principle that comics are an expressive medium deserving of the same First Amendment liberties afforded to film, literature, and art. The ability of the CBLDFs members to produce and read content addressing a wide variety of themes, topics, and concerns depends upon the recognition and exercise of rights guaranteed by the First Amendment.

FEMINISTS FOR FREE EXPRESSION (FFE) is a group of diverse feminists working to preserve the individual's right to see, hear and

produce materials of her choice without the intervention of the state "for her own good." FFE believes freedom of expression is especially important for women's rights. Censorship traditionally has been used to silence women and stifle feminist social change. It never has reduced violence. Genuine feminism encourages individuals to choose for themselves. A free and vigorous marketplace of ideas is the best guarantee of democratic self-government and a feminist future. FFE, a not-for-profit organization, was founded in January 1992 in response to the many efforts to solve society's problems by book, movie or music banning.

The FIRST AMENDMENT PROJECT is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The NATIONAL COALITION AGAINST CENSORSHIP (NCAC) is an alliance of 50 national non-profit organizations, including religious, educational, professional, artistic, labor, and civil rights groups, united in their conviction that freedom of thought, inquiry, and expression are indispensable to a healthy democracy. NCAC assists individuals in enforcing their First Amendment rights, educates the public and policy-makers about threats to freedom of expression, and works to create a more hospitable environment for laws, decisions, and policies protection of free

speech and democratic values. The views of NCAC expressed in this brief do not necessarily reflect the views of each of its participating organizations.

PEN American Center, the professional association of over 2,600 literary writers, is the largest in a global network of 131 Centers around the world comprising International PEN. PEN's mission is to promote literature and protect free expression whenever writers or their work are threatened. To advocate for free speech in the United States, PEN mobilizes the literary community to apply its leverage through sign-on letter campaigns, direct appeals to policy makers, participation in lawsuits and amicus curiae briefs, briefing of elected officials, awards for First Amendment defenders, and public events.

PEN USA, organized in 1943, is the third largest of International PEN's 132 centers that are in 90 countries around the world. International PEN was formed in London 1921, with H.G. Wells and Joseph Conrad among its founding members, to defend freedom of expression in response to the harassment and imprisonment of writers by oppressive governments in Europe. PEN is the largest organization of professional writers in the world. The writer/members of PEN USA work with International PEN to defend more than 800 writers and colleagues who are currently persecuted or imprisoned for their peaceful political activities or for the practice of their profession, provided they did not use violence or advocate violence or

racial hatred. In the United States, PEN USA's work is primarily on behalf of the First Amendment. PEN acts in coalition with other organizations such as the American Library Association, the ACLU and People For the American Way, when the free speech rights of individual writers are threatened. PEN declares for a free press and opposes arbitrary censorship in times of peace or conflict. It believes that the necessary advance of the world renders free criticism of governments, administrations and institutions imperative. Members pledge to use whatever influence they have in favor of good understanding and mutual respect between nations, to dispel race, class and national hatreds and to champion the ideal of one humanity living in peace in one world.

Focus of Brief

This case raises fundamental issues of freedom of expression in the creative arts. Amici, who are literary artists and organizations supporting literary artists, do not contend that a poem can never constitute a true threat that lies outside of First Amendment protection. We do contend that creative works such as a poem or painting cannot, *on their face*, constitute a true threat. Only the circumstances surrounding the communication of a poem or other creative work can transform it from protected expression into an unprotected true threat.

This brief focuses on the inherent tension between the intrinsic ambiguity of creative works and the true threats doctrine. It provides the Court with what amici hope will be helpful background about the poetic genre at issue in this case as well as additional analysis of the facts of the case in light of this background. Finally, it discusses the particular need for the exercise of independent judicial review in the context of a case like this one.

For the foregoing reasons, amici respectfully request leave to file the attached amicus curiae brief in support of Defendant-Appellant George T.

Dated: October 24, 2003

Respectfully submitted,

ANN BRICK
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
NORTHERN

By _____
Ann Brick

Attorney for Amici Curiae

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INTRODUCTION

Poetry, and indeed all creative and artistic expression, is an ill-suited vehicle for the delivery of a true threat. While true threats are valueless and designed only to terrorize, poetry is designed to explore emotions, persona, and voice, to enlighten, and to entertain. While true threats must be direct and unequivocal, poetry is inherently ambiguous.

Amici curiae are noteworthy literary artists and organizations supporting literary artists concerned that a decision by this Court that does not adequately consider the nature of poetry as an artistic medium will chill the creation and dissemination of literary works that explore human emotions, no matter how dark, and will discourage young people from experimenting with poetic persona. Amici curiae urge this Court to tread carefully in determining when artistic expression may be considered a true threat.

In order to ensure that the fundamental First Amendment right to freedom of artistic expression is not infringed upon, this Court must apply a strong presumption against finding that artistic expression is a true threat. This presumption may be overcome only if the circumstances surrounding the communication of a poem or other creative work somehow transform it from protected expression into an unprotected true threat.

When this presumption is applied to the record before this Court, Julius's conviction cannot stand. Julius's poem explored dark themes, but it was clearly and purposefully a poem, a work of creative expression. Nothing in the circumstances of Julius's sharing this poem with his classmates indicates either an intent to threaten his classmates or any reasonable basis upon which his classmates should have perceived the poem to be a personal threat.

ARGUMENT

I.

THE POEM AT ISSUE IN THIS CASE IS PRESUMPTIVELY ENTITLED TO THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION

I am myself indifferent honest; but yet I could accuse
me of such things that it were better my mother had not borne me:
I am very proud, revengeful, ambitious; with more offences at my
beck than I have thoughts to put them in, imagination to give
them shape, or time to act them in. What should such fellows as I
do crawling between earth and heaven? We are arrant knaves, all;
believe none of us.

Wm. Shakespeare, *Hamlet*, act III scene I

A lot of people think that. . what I say on records
or talk about on a record, that I actually do in real life
or that I believe in it
Well, shit . . if you believe that
Then I'll kill you
You know why?
Cuz I'm a
CRIMINAL
CRIMINAL

Eminem, "Criminal," The Marshall Mathers LP, Interscope Records, 2000.

The idea, indeed, perhaps fear, that we as human beings each have within us the capacity to do unimaginable evil is a recurring theme in literature. Hamlet, after famously directing Ophelia to "get thee to a nunnery," explains to her that all human beings have dark feelings and the ability to commit "more offences" than the time to commit them. Arnold Weinstein, *A Scream Goes Through the House: What Literature Teaches Us About Life* 378-79 (2003). Robert Louis Stevenson notably explored this duality in *Dr. Jekyll and Mr. Hyde*, Hyde representing the fear that the

anger, violence, and rage that resides within every person will find its way out. The main character in Hubert Selby, Jr.'s *The Demon* discovers and acts on the evil impulses all persons have. Even Charlotte Brontë's Jane Eyre had an evil alter ego, the mad Bertha Mason Rochester, whose depravity could only be controlled by keeping her locked in the attic.

Artistic expression exploring violent themes has been present throughout the history of civilization. Aristotle "posited that audiences at tragic dramas respond to depictions of even the most appalling events not with anger or frustration, nor by imitating the characters' gruesome deeds, but by identifying with their sufferings and emerging exhilarated and emotionally drained." Marjorie Heins, *Not In Front of the Children* 229 (2001). Disturbing violent images are common in the poetry and prose of Chaucer and Shakespeare. Artists have also commonly explored the theme of personal despondency. *See McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 995 n.4 (1988).

Poetry is an artistic medium particularly well suited for the examination of one's own potential for depravity. The confessional poetry of Robert Lowell, Sylvia Plath, Anne Sexton, John Berryman, W.D. Snodgrass and others are characteristically first person expressions of extraordinarily mean, ugly, violent, or harrowing experiences. Babette Deutsch, *Poetry Handbook* 36 (4th ed. 1973). The *poetes maudit*, the "accursed poets" of late 19th century France, such as Arthur Rimbaud, similarly examined the spiritual emptiness of society around them. "Poete Maudit," *Encyclopedia Britannica*, 2003 Encyclopedia Britannica Premium Service (visited Oct. 10, 2003) <<http://www.britannica.com/eb/article?eu=62065>>.

The developing genre of "dark poetry," as practiced by Julius, is merely a continuation of this literary tradition. Indeed, one need only enter

the words “dark poetry” on an Internet search engine to find hundreds of web sites devoted to this particular form of artistic expression.

Amici curiae are literary artists—including the current Nobel laureate in literature, Pulitzer Prize, Edgar Allen Poe and Hugo Award winners, the Poet Laureate of Virginia and other widely published poets—and organizations supporting literary artists sharing the belief that the application of the criminal threat statute to works of artistic expression endangers fundamental First Amendment rights. Amici curiae do not suggest that a “true threat” can *never* be expressed through artistic devise. Rather, amici contend that when the “threat” at issue is manifest exclusively in an artistic work, a very strong presumption exists against the existence of a “true threat.” This presumption may be overcome only if the circumstances of the dissemination, exhibition or performance of the artistic expression demonstrate beyond a reasonable doubt that the expression was intended to operate on a non-artistic level. *See In re Ryan D.*, 100 Cal. App.4th 854, 863 (2002) (holding that a painting “standing alone” did not constitute a threat).

There are two reasons supporting this strong presumption that artistic expression is not a “true threat.” First, artistic expression is inherently valuable, designed not to inflict harm but rather to address it. Second, artistic expression and perhaps poetry in particular, is inherently ambiguous and thus ill-suited to the unequivocality that characterizes a true threat.

A. Unlike a True Threat, Artistic Expression Has Inherent Value to the World of Ideas.

A “true threat,” despite being pure speech, lies outside the First Amendment’s protection solely because it “play[s] no part in the ‘marketplace of ideas.’” *In re M.S.*, 10 Cal. 4th 698, 714 (1995); *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). Rather than

contributing to the world of opinion or ideas, a true threat is designed to inflict harm. *In re M.S.*, 10 Cal. 4th at 710, 714. Thus true threats are words “which by their very utterance inflict injury.” *Virginia v. Black*, ___ U.S. ___, 123 S. Ct. 1536, 1547 (2003) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Artistic expression, in contrast, by its very nature contributes significantly to the world of ideas. Creative works “by their very utterance” do not inflict injury. Creative works may indeed frighten, offend or disturb. But in doing so, they contribute to our cultural fabric, encourage creativity and imagination, allow us to examine ourselves and others and to comment on the world around us. Macabre and violent creative works may disturb some. But they may entertain or enlighten others. Thus, “in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political or scientific expression.” *Miller v. California*, 413 U.S. 15, 22-23, 34 (1973) (defining obscenity to exclude artistic works because artistic expression by its nature involves “ideas” while obscenity does not).

Creative works unquestionably enjoy the full measure of First Amendment protection. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995) (holding that the First Amendment shields painting, music, and poetry even if it is without an articulable message); *Abod v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) (“[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection”); *Bery v. New York*, 97 F.3d 689, 695 (2nd Cir. 1996); *Nelson v. Streeter*, 16 F.3d 145, 148 (7th Cir. 1994); *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 404-05 (2001) (all recognizing First Amendment protection for artistic expression); *McCollum*, 202 Cal. App. 3d at 999.

This unqualified First Amendment protection extends even to artistic expression that merely entertains us, even if such forms of entertainment are of questionable social acceptance. “Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.” *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) (addressing a ban on live entertainment for the purpose of suppressing nude dancing). As this Court noted in *Spiritual Psychic Science Church of Truth v. City of Azusa*, 39 Cal. 3d 501, 512 (1985) (disapproved on other grounds in *Kasky v. Nike*, 27 Cal. 4th 939, 968 (2002)):

[T]he life of the imagination and intellect is of comparable import to the presentation of the political process; the First Amendment reaches beyond protection of citizen participation in, and ultimate control over, governmental affairs and protects in addition the interest in free interchange of ideas and impressions for their own sake, for whatever benefit the individual may gain.

That protection remains even if the subject matter of a creative work is frightening or disturbing. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, creative exploration of violence and the macabre plays a significant artistic role. As amicus curiae Peter Straub explains, the ability to represent terrible subjects allows him to explore “the moral significance of emotions such as grief and the pain of loss, as well as the spiritual and emotional consequences of trauma.” *See Statement of Interest of Amicus Curiae Peter Straub*.

This Court must also be mindful of the constructive role that artistic renderings of violence may have for young people, particularly in the school setting. The study of violence in popular culture may indeed compel critical inquiry. Marsha Lee Holmes, “Get Real: Violence in Popular Culture and English Class,” *English Journal*, May 2000, at 104. There can be specific value in encouraging the writing of personal stories by students even if such stories might reflect a student’s darkest thoughts. “Why personal story? Because without that, nothing else matters. Without that, the violence will not stop. Given story, allowed story, all else becomes meaningful. Because the story and the story writer become meaningful. Because the story writer begins to find voice and identity. In an increasingly impersonal society, personal story affords self-affirmation, a modicum of self-esteem.” G. Lynn Nelson, “Warriors with Words: Towards a Post-Columbine Writing Curriculum,” *English Journal*, May 2000, at 42, 43. Indeed, psychologists working with troubled and disruptive boys have found it therapeutic to direct violent thoughts to linguistic avenues for identifying, expressing, and channeling their thoughts and emotions. Heather E. Bruce and Bryan Dexter Davis, “Slam: Hip-Hop Meets Poetry—A Strategy for Violence Intervention,” *English Journal*, May 2000, at 119, 120.

Artistic expression is thus of an entirely different character than true threats. Artistic expression by its nature fulfills the goals of freedom of speech; threats do not. Thus in order for the dissemination of artistic expression to be a true threat there must be something external to the artistic expression that causes the interaction to lose its inherent value.

B. Artistic Expression Is Inherently Ambiguous and Thus Not Ordinarily Capable of the Directness That True Threats Require.

Before pure speech constitutionally may be punished as a criminal threat, the words used, when viewed in the context in which they are communicated, must convincingly express a serious intent to inflict harm. *See Virginia*, 123 S. Ct. at 1548; *United States v. Kelner*, 534 F.2d 1020, 1027 (2nd Cir. 1976). California Penal Code § 422 follows this model. To be punished as a criminal threat, the words, in context, must be “serious, deliberate statements of purpose.” *In re Ricky T.*, 87 Cal. App. 4th 1132, 1137 (2001). The threat must be “so unequivocal, unconditional, immediate and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat” Cal. Penal Code § 422.

This requirement of certainty incorporated into California Penal Code § 422 is a constitutional one. True threats are based on pure speech; the standard for determining whether the speech crosses the boundary from protected speech to an unprotected criminal threat is thus a high one. Statutes which attempt to punish threats “must be narrowly directed only to threats which truly pose a danger to society.” *People v. Mirmirani*, 30 Cal. 3d 375, 388 n.10 (1981). They are “not enacted to punish emotional outbursts, [they] target[] only those who try to instill fear in others.” *In re Ryan D.*, 100 Cal. App. 4th at 861 (quoting *People v. Felix*, 92 Cal. App. 4th 905, 913 (2001)). Nor may the State “punish such things as ‘mere angry utterances or ranting soliloquies, however violent.’” *Id.* (quoting *People v. Teal*, 61 Cal. App. 4th 277, 281 (1998)).

Artistic expression, by its very nature, will rarely be “so unequivocal, unconditional, immediate, and specific” in its expression of a serious intent to do harm as to constitute a true threat. As the Third District

Court of Appeal, after explaining that “painters and poets . . . have always had an equal license in bold invention,” observed:

as the expression of an idea, a painting may make “extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make-believe.” A criminal threat, on the other hand, is a specific and narrow class of communication. It is the expression of an intent to inflict serious evil upon another person.

In Re Ryan D., 100 Cal. App. 4th at 857, 863 (quoting Horace, Epistles, Book III; other citations omitted). “No one means all he says, and yet very few say all they mean, for words are slippery and thought is viscous.” Henry Adams, *The Education of Henry Adams* 451 (1918), quoted in *In re Ricky T.*, 87 Cal. App. 4th at 1137 n.6. And like a painting, a poem, “even a graphically violent [one] is necessarily ambiguous because it may use symbolism, exaggeration, and make-believe.” *Id.* See also *Yorty v. Chandler*, 13 Cal. App. 3d 467, 471-72 (1970) (noting that creative works—in that case a cartoon—make “extensive use of symbolism, caricature, exaggeration, extravagance, fancy, and make-believe”).

Poetry in particular is by its very nature open to abundant interpretations and thus an ill-suited vehicle for the direct language found in a true threat. See *Deutsch, supra*, at 11. “For poetry has powerful means of imposing its own assumptions, and is very independent of the mental habits of the reader; one might trace its independence to the ease with which it can pass from one to the other of these two sorts of meaning.” William Empson, *Seven Types of Ambiguity* 4 (2nd ed. 1966). Indeed, it may have a different meaning to each reader and several intended meanings by the author:

Thus a word may have several distinct meanings; several meanings connected with one another; several meanings which need one another to complete their meaning; or several

meanings which unite together so that the word means one relation or one process. . . . “Ambiguity” itself can mean an indecision as to what you mean, an intention to mean several things, a probability that one or the other or both of two things has been meant, and the fact that a statement has several meanings.

Id. at 5-6.

Moreover, poetry, with its roots in speech rather than in writing, is designed so that the reader will adopt the poet’s voice. Helen Vendler, *Poems, Poets, Poetry* 177-85 (1st ed. 1997). Thus, the *reader* is the first person and is made to ask the question “How would I be feeling if I said *exactly this?*” *Id.* at 181 (emphasis in original). The poem’s *persona* is the one who speaks the poem, not necessarily the one who writes it. *Id.* at 185-88.

The concept of *persona*—that the poet is speaking in the voice of a character he or she has created rather than in his or her own voice—is a powerful one in poetry. “Some 20th century critics have asked whether it is ever desirable to say that a poem—even a first person poem is the direct utterance of its author.” “*Persona*,” *The New Princeton Encyclopedia of Poetry and Poetics* 900-901 (3rd ed. 1993). Quests to discover the author’s sincerity or the author’s intentions are unresolvable “wild goose chases.” *Id.* *Persona* is a “mask” that “permits the poet to explore various perspectives without making an ultimate commitment.” *Id.* The best poetry perhaps challenges readers “to inquire which self—the true self—or a [persona]—a poet is projecting in a particular poem.” *Id.*

Even the works of the confessional poets, discussed above, should not be mistakenly read as strict autobiography. Even in these highly personal poetic forms, the first person “I” is not necessarily the poet him or herself. Rather the I is as much a fictional *persona* as one would find in prose fiction or playwrighting. David Yezzi, “Confessional Poetry & the

Artifice of Honesty,” *The New Criterion*, Vol. 16 No. 10 (June 1998)
(visited October 10, 2003)

<<http://www.newcriterion.com/archive/16/jun98/confess.htm>>. It would be a mistake to read these poems as revealing the true feelings, experiences or intentions of the author. *See supra* Vendler at 185-86.¹

As the *McCullum* court, when considering whether musical lyrics incited a listener to suicide, wrote:

[M]usical lyrics and poetry . . . simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit.

McCullum, 202 Cal.App.3d at 1002 (footnote omitted).

Take for example, the poem *Before a Cashier’s Window in a Department Store* by James Wright:

1
The beautiful cashier’s white face has risen
 once more
Behind a young manager’s shoulder.
They whisper together, and stare
Straight into my face.
I feel like grabbing a stray child
Or a skinny old woman
And driving into a cellar, crouching
Under a stone bridge, praying myself sick,
Till the troops pass.

¹ The concept of persona is consistent with Julius’s explanation that the reference to shooting students at school was a “joke.” He did not intend the poem to reflect his own intentions. Rather he was writing in the voice of a character.

. . . .

3

Am I dead? And, if not, why not?
For she sails there, alone, looming in the
Heaven of the beautiful.

She knows
The bulldozers will scrape me up
After dark, behind
The officers' club.
Beneath her terrible blaze, my skeleton
Glitters out. I am the dark. I am the dark
Bone I was born to be.

James Wright, "Before a Cashier's Window in a Department Store," *Shall We Gather at the River* (1968).

Can this poem be read as indicating an intent to abduct a "stray child" or a "skinny old woman"? Could a "stray child" or "skinny old woman" feel personally threatened by the "dark" narrator of the poem or by one who would give them the poem? Or is the poem more properly read as a character seeking to protect these people from the oncoming troops?

Or consider the poem *Chance* by amicus curiae Michael Rothenberg:

Once I started it seemed
I couldn't stop, I had
no choice,

I poisoned
his dogs, his well,
held

his wife
under water until
her face,

the pond bloomed
purple, tangled
in lilies.

I couldn't avoid,
I mean I slashed
his tires,

his truck leaned,
toy in the heat.
Cows bellowed.

Roosters
turned up dust.
What did I have?

Hens panicked
under the porch.
I couldn't

stop. I struck
the man
over the head

with a shovel
left him
bleeding

in the geraniums,
everything else
I left to chance.

Michael Rothenberg, "Chance," *Favorite Songs* (1990).

Does the poem indicate in the author a tendency towards or fascination with violence? Is the poem merely satire? Or is the author merely trying on a persona?

The Attorney General contends that merely labeling a work as "poetry" should not automatically immunize it from ever being a true threat. *Amici curiae* do not disagree. But the fact that a writing is in the form of a poem and is labeled a poem, and is distributed in the context of a conversation, albeit brief, about poetry, cannot be ignored. To the contrary,

the fact of poetry must be a primary consideration and must give rise to a strong presumption against the finding of a true threat.

C. Julius's Writings Were Poems and Are Entitled to This Strong Presumption of Constitutional Protection.

No one argues that *Faces*—with its enjambed lines and metered sentence structure—is not intentionally and in fact a poem. And no one could seriously argue that this poem, if published in an anthology of poems, in the literary magazine of the Santa Teresa poetry club, or even in the poetry section of the school newspaper, could be punished as a true threat.² The poem is on its face, presumptively protected speech.

As discussed above, Julius's poem *Faces*, although not as technically adept, does relate thematically to established literary works. Like Hamlet, Julius's character Angel acknowledges that he is "evil inside" disguised by the "face of happiness" he "slap[s] on." Like Hamlet, Angel's potential for evil is deep: Angel has within him the potential to be "the next kid to bring guns to kill students at school." And like the first person narrator in James Wright's *Before a Cashier's Window in a Department Store*, Angel is dark and doomed.

² Because this is a criminal prosecution and not a school discipline case, there can be no contention that Julius's poem is entitled to anything less than full First Amendment protection. To the extent that speech by a minor sometimes receives a lesser level of First Amendment protection, it is only in the context of whether the special circumstances of the school permit school administrators to discipline students based on what would otherwise be protected speech. See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Moreover, California's Education Code, with certain exceptions not relevant here, grants the full measure of First Amendment protection to speech by minors, even when that expression occurs at school. Cal. Educ. Code §§48907, 48950. See *Lovell v. Poway Unified School District*, 90 F.3d 367, 371 (9th Cir. 1996).

Faces is also ambiguous in its use of persona. Does the poem reflect Julius's own thoughts of alienation, anger and aggression? Or is Julius seeking to identify readers who might feel that way? Or is Julius merely trying out a voice, experimenting with what it feels like to articulate these thoughts in a creative medium? Or is Angel merely a fictional character who bears no relation Julius?

In sum, Julius's poem is entitled to unqualified First Amendment protection. This Court must apply a strong presumption in favor of the poem being protected speech and not a true threat. In order to overcome the presumption, there must be circumstances surrounding the communication of this poem to another person that transform this fully protected creative expression into a true threat that can be punished under California Penal Code § 422. Such circumstances were not present here.

II.

BECAUSE THE CORE ISSUE IN THIS CASE IS WHETHER AN OTHERWISE PRESUMPTIVELY PROTECTED WORK OF POETRY IS, IN CONTEXT, A TRUE THREAT, THE COURT MUST ENGAGE IN AN INDEPENDENT REVIEW OF THE RECORD

In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the U.S. Supreme Court examined a number of cases outside the context of defamation in which the government claimed that expression fell into an unprotected category of speech. "In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

This Court recently affirmed that this rule of independent review is not limited to the actual malice determination in a defamation case but applies in the First Amendment context whenever questions of law and fact are intertwined.

“[F]acts that are germane to” the First Amendment analysis “must be sorted out and reviewed de novo, independently of any previous determinations by the trier of fact.” And “the reviewing court must “examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.”

DVD Copy Control Assn., Inc. v. Bunner, 31 Cal. 4th 864, 889-90 (2003) (citations omitted). The Court remanded the case to the Court of Appeal instructing the Court of Appeal to “‘make an independent examination of the entire record’ (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499 [80 L. Ed. 2d 502, 104 S. Ct. 1949]), and determine whether the evidence in the record supports the factual findings necessary to establish” that the First Amendment did not bar the relief sought. *Id.* at 890.

This rule of independent review has been applied by this Court in the analogous context of an obscenity prosecution. In *Zeitlin v. Arnebergh*, 59 Cal.2d 901 (1963), this Court reviewed the denial of declaratory relief sought by a bookseller. The bookseller brought the action in order to obtain a judgment that Henry Miller’s *Tropic of Cancer* was not obscene under California law. On the key question of whether the book was obscene, this Court emphasized that it was required to review the entire record anew. *Id.* at 909-10. This level of review was especially important when the question to be determined was one “which focuses upon the character of the material involved.” *Id.* at 910. Much like the determination of what is a true threat, “The determination of what is obscene in the statutory or constitutional

sense, is not a question of fact (i.e., a question of what happened) but rather is a question of fact mixed with a determination of law: a ‘constitutional fact.’” *Id. Accord Miller v. California*, 413 U.S. 15, 25 (1973) (explaining that First Amendment values are “adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary”). *See also Los Angeles Teachers Union v. Los Angeles City Board of Education*, 71 Cal.2d 551, 557 (1969) (applying independent review to administrative ban on certain speech activities by teachers).

Despite these pronouncements, respondent claims that an independent review of the record is only required in First Amendment cases challenging the facial validity of statutes and claims of defamation. Respondent's Answer Brief on the Merits at 15, 19. More specifically, respondent argues that independent appellate review of the record is unnecessary in cases charging “true threats” because such expression “fall[s] at the farthest extremes of unprotected speech, where the concerns regarding the chilling effect of core speech are dramatically diminished.” *Id.* at 21.

Respondent’s analysis is in direct conflict with the most recent pronouncement from this Court on the issue. *Bunner*, 31 Cal. 4th at 889-90. And it is especially puzzling in the threat context. The case universally cited for establishing the “true threats” exception to First Amendment protection did not involve either defamation or a facial attack on a statute, but implicitly contains an independent review of the record by the appellate court in a matter involving an alleged threat. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

In *Watts*, the defendant was convicted for violating a federal statute prohibiting making any threat “to take the life of or to inflict bodily harm upon the President of the United States.” *Id.* The expression at issue in

Watts took place at a political rally during which the defendant declared his opposition to the Viet Nam War by stating, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” *Id.* at 706. In appealing his conviction, the defendant did not challenge the constitutionality of the statute but only its application to his statement. *Id.* at 706-07; *see also Watts v. United States*, 402 F.2d 676, 678 (D.C. Cir. 1968). In an opinion written by then Judge Warren Burger, the Court of Appeals for the D.C. Circuit affirmed the conviction holding, “[o]n the evidence and contentions developed at trial, a jury could reasonably have concluded either that the words were or that they were not a threat and either conclusion is within the range of a permissible verdict.” *Id.* at 682. No such deference was given to the trial court’s findings of fact in the U.S. Supreme Court’s reversal of the lower court’s decision. Although the Court did not specifically address the issue of independent appellate review, it is clear from the decision that such a review was undertaken. The Court examined for itself the “context” in which the statement was made, including “the expressly conditional nature of the statement and the reaction of the listeners.” *Id.* at 708. As a result of this review, the Court determined that Watts’s alleged threat was in fact “political hyperbole.” *Id.*

Thus, respondent's claim that independent appellate review of the record is only implicated in cases involving defamation or a facial attack on a statute simply cannot be squared with *Watts*.

Courts in other jurisdictions have similarly required a *Bose* independent appellate review of the record in First Amendment cases not involving defamation or a facial attack on a statute. *See United States v. Amirault*, 173 F.3d 28, 32-33 (1st Cir. 1999) (applying *Bose* standard in child pornography case); *New York v. Operation Rescue*, 273 F.3d 184, 193 (2nd Cir. 2001) (applying *Bose* standard of appellate review to an injunction against abortion clinic protestors); *United States v. Various*

Articles of Merchandise Schedule No 287, 230 F.3d 649, 652 (3rd Cir. 2000) (applying *Bose* standard in obscenity case).

The same holds true in reviewing threat cases, where appellate courts apply an independent review of the record. *See Doe v. Pulaski County Special School District*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc); *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1066-1070 (9th Cir. 2002) (en banc); *United States v. Kosma*, 951 F.2d 549, 553-555 (3rd Cir. 1991); *J.S. v. Bethlehem Area School District*, 569 Pa. 638, 648 n.7 (Pa. 2002) (“As the issue in this case deals with whether the local agency committed constitutional error, our standard of review is *de novo*”); *In re A.S.*, 243 Wis. 2d 173, 191 (Wis. 2001). California’s Third District Court of Appeal examined the standard of review for threat convictions under California Penal Code §422 in *In re Ryan D.* Although the court gave deference to the trial court’s findings of “historical facts,” it held that in “determining whether the facts thus established are minimally sufficient to meet the statutory standard, we must exercise independent judgment.” 100 Cal. App. 4th at 862. Such an independent review is directly at odds with respondent’s assertion that the appellate court need only determine if the trial court’s application of the facts to the law was reasonable.

Indeed, none of the threat cases cited by respondent (*United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997); *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001); *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000); *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999); *United States v. Malik*, 16 F.3d 45 (2nd Cir. 1994); *United States v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973); *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990); *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983); and *In re*

Douglas D., 243 Wis. 2d 204 (Wis. 2001))³ specifically address the question of whether *Bose* requires a more rigorous standard of appellate review in First Amendment cases.⁴ Moreover, because *United States v. Maisonet* and *United States v. Callahan* were decided before *Bose*, reliance on those two cases is highly questionable. *United States v. Viefhaus* provides no support for respondent’s argument in that it merely states that the question of what constitutes a threat is one for the jury. It does not, however, address the issue of the appropriate standard of review to apply to the jury’s finding.

Thus, respondent’s assertion that in threat cases appellate courts should apply a deferential standard of review to the findings of the trial court must be rejected. Independent review of the record is required here.

³ Compare *In re A.S.*, 243 Wis. 2d 173, 191 (2001) (another student threat case, decided the same day as *Douglas D.*, where the Wisconsin Supreme Court explained that “application of constitutional principles to a set of facts is a question of constitutional fact, which is a question of law”).

⁴ Respondent cites three additional cases (*Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *People v. Toledo*, 26 Cal. 4th 221 (2001); *In re M.S.*, 10 Cal. 4th 698 (1995)), not discussed above, to support the claim that the *Bose* standard of independent appellate review only applies to cases involving defamation or a facial attack on a statute. In his Reply Brief on the Merits at 5-12, appellant fully demonstrates that respondent’s reliance on these cases is misplaced. Amici will not occupy the Court’s time by repeating that argument other than to state our endorsement of appellant’s analysis of these cases.

III.

THE POEM AT ISSUE HERE IS NOT A TRUE THREAT

A. Both the Trial Court and the Court of Appeal Improperly Shifted the Burden to Defendant to Prove That, Under the Circumstances of its Communication, *Faces* Is Not a True Threat.

The most striking aspect of the trial court’s analysis of the evidence in this case is that the court relied on no affirmative evidence in concluding that Julius violated California Penal Code§422. *See* RT 312-17. Rather, the trial court based that determination on the *absence* of circumstances establishing that the poem was *not* a true threat. Specifically, the trial court pointed to the following:

- The absence of evidence showing that Julius did not mean the poem to be interpreted as a threat: “There was nothing to establish that he was not serious.” RT 317
- The absence of evidence of a prior relationship between Julius and the two girls: “There was nothing to establish that there was a relationship.”⁵ RT 317
- The absence of evidence that Julius wrote the poetry as part of an assignment or that his honors English class was studying poetry: “That would have been circumstances against it being—that would be innocent intent. But there’s nothing to establish that at all.” RT 316 (emphasis added)

Thus the trial court concluded: “Anybody [that gave me this poem] and didn’t have something to surround it, to explain to me that it was, in fact, a joke, my feeling of the evidence and the interpretation is that person intended for me to be afraid, to be a threat. And that’s how I interpret the

⁵ Given that Julius had only been at the school for 8 days, there was little time to establish any kind of relationship with either students or faculty at the school. But, as discussed in the next section, to the extent a relationship existed between Julius and Mary and Erin, it was a friendly one, unmarked by indications of hostility or a propensity for violence.

evidence.” RT 317. In short, in the trial court’s view, “there was nothing to establish that it was an innocent — just a poetry exercise,” RT 317, and hence Julius was found guilty.

As discussed in the following section, the “absences” upon which the trial court based its conclusion of guilt in fact support the conclusion that, given the circumstances of its communication, the poem was not a true threat. But the point made here is a different one. The prosecution bore the burden of presenting affirmative evidence establishing beyond a reasonable doubt that the circumstances surrounding the communication of this poem to Mary and Erin were so unambiguous and so unequivocal that they convincingly communicated a serious intent to do harm. *See In re Winship*, 397 U.S. 358, 376-77 (1970). The trial court, however, relied not on affirmative evidence showing that the circumstances of its communication established that this poem was a true threat. Instead, it based its guilty verdict in large part on the absence of evidence establishing that the poem was not a true threat. In so doing, the trial court impermissibly shifted the burden of proof to the defendant. The court of appeal fell into the same error. *Id.* at 374.⁶

This error would require reversal in even the most ordinary of criminal cases. But this is no ordinary criminal case. It is a case in which a creative work that is presumptively entitled to First Amendment protection

⁶ Thus the court of appeal held:

“The fact that there was no ongoing relationship between Julius and either Mary or Erin and that the two girls were not studying poetry or involved in the school poetry club and that Julius handed over the ‘Faces’ writing without any accompanying indication that he was joking or that its words should not be taken seriously provided evidence that Julius intended his writing as a threat to be taken seriously.”

In re George T., 126 Cal. Rptr. 2d at 374.

is the subject of a criminal prosecution. The shifting of the burden of proof in the context of such an inherently ambiguous medium of expression is thus particularly dangerous.

B. The Circumstances Under Which Julius Communicated His Poem to Mary and Erin Do Not Convincingly Evidence a Serious Expression of an Intent to Inflict Harm On Others.

Both the Constitution and California Penal Code § 422 place a heavy burden on the prosecution to establish that a particular communication has crossed the line from protected expression to an unprotected true threat. As discussed above, both require that the communication be “so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat.” California Penal Code § 422; *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976), *cited with approval in People v. Mirmirani*, 30 Cal. 3d 375, 388 n.10 (1981). As the poetic expression at issue is inherently equivocal, only the circumstances surrounding its communication to Mary and Erin can transform Julius’s poem from protected expression into a true threat. *See In re Ryan D.*, 100 Cal. App. 4th at 863. The circumstances here, however, are anything but unambiguous.

The trial court relied on essentially three factors in concluding that, given the circumstances surrounding its communication to Mary and Erin, *Faces* represents a serious expression of an intent to inflict harm on them or their classmates: (1) the apparent absence of a relationship between Julius and either of the girls; (2) Julius’s serious demeanor at the time he handed them the poem; and (3) the fact that the poem was not written as part of an assignment in Julius’s English class, which was not studying poetry at the time. As discussed below, there is great ambiguity surrounding each of these factors, making it impossible to conclude that the only reasonable

conclusion to be drawn is that under the circumstances of its communication to Mary and Erin, “Faces” must be viewed as a true threat.

1. Julius’s relationship with Mary and Erin.

Both the trial court and the court of appeal relied on the absence of a relationship between Julius and Mary or Erin as a circumstance showing that asking them to read his poem constituted the making of a threat. The more plausible inference is just the opposite. The absence of a hostile relationship between Julius and the two girls is a circumstance indicating that asking the girls to read the poem was not the communication of a threat. *In re Ricky T.*, 87 Cal. App. 4th 1132, 1138 (2001). “If surrounding circumstances within the meaning of section 422 can show whether a terrorist threat was made, absence of circumstances can also show that a terrorist threat was not made within the meaning of section 422.” *Id.* at 1139; *accord In re Ryan D.*, 100 Cal. App. 4th at 860 (“[T]he absence of circumstances that would be expected to accompany a threat may serve to dispel the claim that a communication was a criminal threat.”)

Moreover, while Julius did not know Mary and Erin well, having been at the school for only eight days (*see In re George T.*, 126 Cal. Rptr. 2d at 367), they were certainly not strangers and, to the extent a relationship existed, it was a friendly one. During the eight school days that Julius had been at Santa Teresa, Mary had spoken briefly to him on approximately three occasions. RT 17. In fact, on Julius’s first day at school, Mary had, herself, approached Julius in an effort to be kind to him, because she knew he was a new student. RT at 19-20. They then spoke briefly on perhaps two other occasions. RT 17. During none of his conversations with Mary did Julius ever indicate that he was upset or angry with any teachers or students at the school. RT 22. Nor had he ever indicated that he was thinking about engaging in violence towards anyone at school. *Id.*

While Erin certainly did not know Julius well, she had spoken to him perhaps three or four times since he had arrived at Santa Teresa eight days earlier. RT 43, 44. However, when Julius handed Erin his poem and invited her to read it, Erin was with Natalie, RT 45, who knew Julius rather well, and to whom Julius also handed a poem. Natalie and Julius had been having substantial conversations almost every day after school. RT 168, 180. They spoke about topics such as philosophy and astronomy, as well as the fact that Julius wrote poetry. RT 169, 173. Natalie testified that Julius did not appear to be a violent person. RT 172. Nor did he talk about violent subjects. RT 173. Rather, Natalie described his demeanor as “mild,” “calm,” and “serene.” RT 172.

On March 16, 2001, the day he handed Mary his poems, Julius initiated the conversation by asking Mary whether there was a poetry club at the school. RT 25. He then proceeded to hand her three sheets of paper and asked her to “read these.” RT 18. His demeanor at the time was serious, but certainly not hostile or angry. RT 21. The cover note to the poem said: “These poems describe me and my feelings. Tell me if they describe you and your feelings.” The poem itself was labeled “dark poetry.” Later that day, Julius came up to Erin and Natalie and handed each of them a poem, asking them to read it. RT 45, 170.

These circumstances are important in two respects. First, to the extent a relationship existed between Julius and Mary and Erin, it was a friendly one in which Julius exhibited no hostility either towards them or towards others. His handing them the poem, then, is indicative neither of an intent to make a threat, nor that the poem itself was a threat. *See, e.g., In re Douglas D.*, 243 Wis. at 233 (noting relevance of whether victim had reason to believe maker of threat had propensity to engage in violence or had threatened her in past); *compare Jones v. State*, 347 Ark. 409, 421-22 (Ark. 2002) (relying on fact that recipient of threat had had a personal

relationship with defendant that had cooled, causing him to be angry with her, and that she knew that defendant had spent time in juvenile detention facility).⁷

Second, given that Julius knew Mary, who had gone out of her way to be nice to him upon his arrival at Santa Teresa, the circumstances under which he handed her the poem are anything but an unambiguous communication of a threat. Julius opened the conversation by asking whether the school had a poetry club and followed that question by asking her to read his poem. The poem itself was labeled “dark poetry.” The question posed by the cover note was plainly an invitation to further discussion. This scenario is plainly open to a number of different interpretations, the least likely of which is that the poem was a true threat.

When Julius gave the poem to Erin, it is important to note that Erin was with Natalie, a person with whom Julius had an established relationship based in part on the fact that he talked to her about writing poetry. He gave Erin a poem at the same time he gave one to Natalie. Julius’s relationship with Natalie and her presence at the time he gave Erin the poem thus provides important context.

⁷ Whether Julius ever threatened Kathryn is a question raising serious questions of credibility. Significantly, the trial court, which had the opportunity to observe her demeanor, gave no weight to her testimony, not mentioning it at all as supporting its conclusions. Although respondent attempts to give the impression that Kathryn told her original story to several different people on several different occasions, it appears that Kathryn made her accusation only twice, first when she told her story to Erin after Erin discussed testifying in this case, RT 103, 106-08, and second when she was interviewed by the district attorney with her father on the line. RT 109. She had not previously mentioned the supposed threat to her father. RT 109, 119. She recanted her story not only in court but when investigators from the district attorney’s office came to interview her a second time. RT 110-11. She also told her father and Erin that Julius had not threatened her. RT 113, 114.

In sum, these circumstances are incapable of unequivocally establishing, either by themselves or in combination with the other circumstances relied upon by the trial court, that this poem is a true threat rather than an expression of adolescent angst or a lonely cry for help.

2. Julius's serious demeanor.

The trial court and the court of appeal also found it important that there was no evidence establishing that Julius was not serious when he handed his poem to Mary and Erin. But being serious is quite different from being angry. Indeed, Mary testified that Julius had a serious rather than angry demeanor when he handed her his poem. RT 21. Nor in his other conversations with Mary had Julius ever made her think that he was upset or angry with anyone at the school or that he was thinking about engaging in violence. RT 22. Similarly, Erin's description of the events surrounding receiving the poem from Julius give no indication of hostility or anger on Julius's part.

Nothing about Julius's serious demeanor leads to the unambiguous conclusion that giving the poem to Mary and Erin constituted a threat. The far more plausible inference to be drawn from Julius's serious demeanor was that he was serious about his poetry and wanted Mary's opinion. A different but equally plausible explanation, particularly given the introductory note, is that Julius hoped he could talk to Mary about his feelings of being an outsider and perhaps get to know her better.

The facts here stand in stark disparity to those of *Ryan D.* in which Ryan had been convicted of making a true threat when he painted a picture showing him shooting the school police officer who had previously arrested him for possessing marijuana. Ryan was angry not only at the time that he painted the picture, but was still angry one month later, when he turned it in to satisfy an assignment for his art class. *In re Ryan D.*, 100 Cal. App.4th at

858, 863. Nevertheless, the court of appeal still held that the painting was not a true threat. *Id.* The contrast with the facts here could not be stronger.

The court also seemed to find that Julius's serious demeanor belied his assertion that the poem was just a joke. However, not all "jokes" are necessarily accompanied by laughter or broad smiles. Black humor is a common characteristic of the confessional poetry discussed above to which "Faces" bears some resemblance. *See Deutsch supra* at 37. Black humor is frequently delivered in a deadpan or a serious tone. The most plausible interpretation of Julius's "joke" remark was that he did not mean the poem to represent his true intentions. He was not "joking" in that he expected the recipients to laugh but in that he was not serious about shooting anyone.

3. The absence of an assignment to write a poem.

The trial court and the court of appeal found it significant that Julius's honors English class was not studying poetry and that Julius had not written his poem in response to a class assignment. While a poetry assignment at a time that his class was studying dark or confessional poetry would certainly have been an additional factor showing that "Faces" was not a true threat, the absence of such an assignment does not prove the contrary.⁸ Many students write poetry on their own with no prodding from others, particularly students who are good enough to be in honors English. This is certainly not a practice for which a student should be punished. Nor does it make a poem any less of a poem. Additionally, Julius testified that writing poetry was a helpful way of dealing with his feelings when he was having a difficult time. RT 227. Julius's inquiry about the existence of a poetry club and the note accompanying the text of the poem he gave to Mary are consistent not with the actions of a student making a threat to a

⁸ Interestingly, in giving the assignment in *Ryan D.*, the teacher had instructed the students not to depict violent imagery. *In re Ryan D.*, 100 Cal. App. 4th at 858.

classmate but rather are consistent with a new student reaching out to a classmate both to further an interest in poetry and to further an interest in getting to know her better.

4. The “Columbine Effect.”

When viewed in context, as it must be, Julius’s invitation to Mary and Erin, asking them to read his poem “Faces,” is anything but the unambiguous communication of a threat. But, as the court of appeal and respondent both emphasized, “Faces” was written in the shadow of Columbine and Santee.

This circumstance, too, however, is fraught with ambiguity. Just as a class that was studying dark or confessional poetry might have explained Julius’s poem, the shootings at Columbine and Santee might provide an explanation for why Julius wrote as he did. The reference in the poem is indeed chilling. But this is a poem, a fictional soliloquy. Is it the poem’s narrator or the poem’s author who is speaking? *See supra Yezzi*. Just because Julius indicated that the poem described his feelings does not mean that the poem described his intentions. *See supra Eminem*.

Julius wrote this poem because he was having a hard day. He wrote to get his feelings out. The poem expresses the feelings of being an outsider, of being different from everyone else. As the amicus brief from the Youth Law Center emphasizes, this is healthy. If students are punished for doing what psychologists and school counselors say they should do, they will not stop having bad feelings. But they will stop expressing them. One of the consequences is that schools will be deprived of an early warning sign. *See LaVine v. Blaine School District*, 279 F.3d 719, 729 (9th Cir. 2002) (Kleinfeld dissenting from denial of request for rehearing en banc).

We can and should expect schools to take notice when a poem like this comes to their attention. But it is important to distinguish between the

legitimate interest of a school in taking steps to determine whether a student poses a threat to the safety of others and the permissibility of imposing criminal sanctions based on creative works protected by the First Amendment. *See, e.g., LaVine v. Blaine School District*, 257 F.3d 981, 983 (9th Cir. 2001) (concluding that when school officials temporarily removed student from school, “they acted with sufficient justification and within constitutional limits, **not to punish James** for the content of his poem, but to avert perceived potential harm”) (emphasis added). *Boman v. Bluestem Unified School District No. 205*, 2000 WL 297167 (D. Kan. 2000).

Reversing this conviction will in no way limit the ability of the school to investigate and respond appropriately when the circumstances warrant it. But a disturbing poem, while it may—or may not—be a cry for help or a harbinger of things to come, does not become a criminal threat within the meaning of the California Penal Code unless the circumstances surrounding its communication to others unambiguously and unequivocally transform it from poetry into a true threat. Would Santa Teresa High School have been acting responsibly had it taken steps to determine whether Julius posed a danger to himself or others? Certainly. But, an independent review of the facts of this case compels the conclusion that the clarity needed to establish that this poem, on its face and under the circumstances under which it was communicated, constituted a true threat is absent from this record.

CONCLUSION

A poem, like all artistic and creative expression, is by its nature a valuable communication. Unlike a true threat, it contributes to the marketplace of ideas the First Amendment seeks to promote. Moreover, a poem is not readily susceptible to a single interpretation. As such it is ill-suited to be the type of unequivocal and unambiguous communication which a true threat must be. As a result, this Court must apply a strong presumption that a poem is not a true threat. This presumption may be overcome only by an affirmative showing that the circumstances in which the communication was made unambiguously transformed otherwise protected speech into a true threat.

The circumstances surrounding Julius's distribution of his poems to two of his classmates are not adequately unambiguous. There are no affirmative indications that Julius intended the poem to be threatening to its recipients.

This Court should reverse.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of California Rule of Court 14(c)(1). This brief is printed in 13 point Times New Roman font and, exclusive of the portions exempted by Rule 14(c)(3), contains 9,212 words.

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