
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11799

Commonwealth of Massachusetts
Plaintiff, Appellee

v.

Michael Walters
Defendant, Appellant.

ON APPEAL FROM A JUDGMENT OF THE
BRISTOL SUPERIOR COURT

BRIEF FOR AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS

Kirsten V. Mayer (BBO No. 641567)
Kavitha A. Mecozzi (BBO No. 676970)
Jennifer S. Pantina (BBO No. 678436)
Alexandra L. Roth (BBO No. 687847)
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Tel: 617-951-7000
Fax: 617-951-7050
kirsten.mayer@ropesgray.com
kavitha.mecozzi@ropesgray.com
jennifer.pantina@ropesgray.com
alexandra.roth@ropesgray.com

Matthew R. Segal (BBO No. 654489)
Jessie J. Rossman (BBO No. 670685)
Mason Kortz (BBO No. 691257)
AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
Tel: 617-482-3170
msegal@aclum.org
jrossman@aclum.org
mkortz@aclum.org

TABLE OF CONTENTS

	Page
ISSUES PRESENTED FOR REVIEW	1
INTERESTS OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
BACKGROUND	4
ARGUMENT	6
I. A STATEMENT OR POST ON FACEBOOK CAN CONSTITUTE A TRUE THREAT, BUT ONLY IF IT MEETS THE SAME CRITERIA REQUIRED FOR OFFLINE THREATS.	8
A. For Speech To Constitute A "True Threat," It Must Adequately Identify the Target.	9
B. Courts Should Consider the Location or Community Where the Speech in Question Occurred.	10
C. Courts Should Consider Whether the Speech in Question Serves a Purpose Other Than Merely Delivering A Threat.	12
D. Courts Should Consider the Speech Or Actions Accompanying or Immediately Surrounding the Speech in Question.	13
II. A TRUE THREAT CAN BE COMMUNICATED OVER FACEBOOK WITHOUT DRAWING THE TARGET'S ATTENTION TO THE STATEMENT, BUT ONLY IF THE DEFENDANT INTENDED THE STATEMENT TO REACH THE TARGET.	15
A. Courts Should Consider Whether The Alleged Threat Was Made in a Public or Private Conversation.	17
B. Courts Should Consider the Presence or Absence of Clear Links Between The Speaker And Target On the Platform Used for the Alleged Threat.	18
C. Courts Should Consider the Extent to Which The Speaker and the Target Have Used the Same Platform To Communicate in the Past.	20

D. Courts Should Consider the Content and Form of The Speech in Question.21

III. WHEN DECIDING WHETHER SPEECH AMOUNTED TO A TRUE THREAT, COURTS SHOULD AVOID ASCRIBING UNDUE SERIOUSNESS, WEIGHT, OR CONNECTIONS TO OFFHAND OR DISPARATE ONLINE REMARKS. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases	Page (s)
<i>Bell v. Itawamba Cnty. Sch. Bd.</i> , 774 F.3d 280 (5th Cir. 2014)	13
<i>Bland v. Roberts</i> , 730 F.3d 368 (4th Cir. 2013)	5
<i>Commonwealth v. Chou</i> , 433 Mass. 229 (2001)	9
<i>Commonwealth v. Furst</i> , 56 Mass. App. Ct. 283 (2002)	19
<i>Commonwealth v. Hokanson</i> , 74 Mass. App. Ct. 403 (2009)	16, 17
<i>Commonwealth v. Hughes</i> , 59 Mass. App. Ct. 280 (2003)	8, 18, 20
<i>Commonwealth v. James</i> , 73 Mass. App. Ct. 383 (2008)	15
<i>Commonwealth v. Johnson</i> , 470 Mass. 300 (2014)	26
<i>Commonwealth v. Maiden</i> , 61 Mass. App. Ct. 433 (2004)	16
<i>Commonwealth v. Meier</i> , 56 Mass. App. Ct. 278 (2002)	18
<i>Commonwealth v. Milo M.</i> , 433 Mass. 149 (2001)	14, 22
<i>Commonwealth v. Sholley</i> , 432 Mass. 721 (2000)	14
<i>Commonwealth v. Troy T.</i> , 54 Mass. App. Ct. 520 (2002)	passim
<i>Commonwealth v. Valentin V.</i> , 83 Mass. App. Ct. 202 (2013)	15
<i>Copley v. Lowell</i> , Civil Action No. 14-10270 (D. Mass filed Feb. 2014)	1

<i>Doe v. Pulaski Cnty. Special Sch. Dist.</i> , 306 F.3d 616 (8th Cir. 2002)	18, 22
<i>Elonis v. United States</i> , No. 13-983	7
<i>Glovsky v. Roche Bros. Supermarkets, Inc.</i> , 469 Mass. 752 (2014)	1
<i>O'Brien v. Borowski</i> , 461 Mass. 415 (2012)	4, 7
<i>United States v. Bagdasarian</i> , 652 F.3d 1113 (9th Cir. 2011)	11
<i>United States v. Jeffries</i> , 692 F.3d 473 (6th Cir. 2012)	9, 12, 18, 24
<i>Virginia v. Black</i> , 538 U.S. 343 (2003)	7
<i>Watts v. United States</i> , 394 U.S. 705 (1969)	7, 10, 12, 24
Statutes	
Mass. G.L. c. 265, § 43(a)	1, 4, 7

ISSUES PRESENTED FOR REVIEW

(1) Whether a statement or post on a Facebook page can constitute a true threat for purposes of the stalking statute, G. L. c. 265, § 43(a);

(2) whether for such a statement or post to constitute a true threat the attention of the intended target must be drawn to the defendant's Facebook page; or

(3) whether such a statement or post constitutes speech that is protected by the First Amendment.

INTERESTS OF THE AMICUS CURIAE

The American Civil Liberties Union of Massachusetts ("ACLUM"), an affiliate of the national American Civil Liberties Union, is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. Among the rights that ACLUM defends is the right to freedom of speech. See, e.g., *Copley v. Lowell*, Civil Action No. 14-10270 (D. Mass filed Feb. 2014) (direct representation); *Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752 (2014) (amicus brief). ACLUM has a significant interest in this case because it impacts the boundaries of the First Amendment's protections of speech on the internet.

SUMMARY OF THE ARGUMENT

Facebook speech, like any speech appearing offline or online, is presumptively protected by the

First Amendment. That protection is broad but not absolute: speech on Facebook may fall within the narrow "true threat" exception to the First Amendment, but *only if* it meets the same criteria required for offline threats. As with speech made offline, courts must consider both the content and the context of Facebook speech to determine whether it is a true threat.

Thus, as is true for offline speech, Facebook speech can be a prosecutable threat only if the speaker intended it to reach the alleged target. Under this standard, it is perhaps true that the First Amendment does not strictly require a showing that the target's attention was drawn to the Facebook speech. But the First Amendment *does* require more than a mere possibility that Facebook speech will reach a particular person. After all, a Facebook post can reach nearly any Facebook user - or almost no one at all - so the fact that something is posted to Facebook does not necessarily prove the speaker's intent to reach a target. Proving intent requires something on

the order of evidence that the speaker knew the target was likely to see the speech in question.¹

Requiring evidence of intent is particularly important in the context of online speech, because the seemingly unlimited storage capacity of Facebook and other online platforms raises concerns about prosecutorial overreach. When someone makes a hyperbolic but unserious comment orally, the *fleeting* nature of that comment can help to show that it is not a true threat. But when the same unserious comment is made on Facebook and resides there indefinitely, it can more easily be portrayed (incorrectly) as weighty or serious. Such online speech can also be aggregated across time, speakers, listeners, and even different platforms much more readily than offline speech. With vast volumes of speech available at the click of a button, courts evaluating alleged "true threats" should guard against the possibility that law enforcement can selectively pull together, or unduly ascribe seriousness to, disparate or unserious online remarks.

¹ This brief is not filed in support of either party. It focuses on the legal standard that should be applied, rather than on its application to the specific facts of this case.

Online speech requires the same protection as offline speech - no more, but also no less. Courts must not water down First Amendment principles simply because technological differences create an illusion of a more serious context.

BACKGROUND

This appeal arises from defendant Michael Walters' convictions for several crimes, including stalking under Mass. G.L. c. 265, § 43(a). As the Commonwealth concedes, a stalking charge requires both a pattern of harassment and proof that the defendant made a threat with the intent to place the victim in imminent fear of death or bodily injury. Comm. Br. 25-26; see *O'Brien v. Borowski*, 461 Mass. 415, 425 n.7 (2012). Here, the alleged threat comprised speech on Facebook. Walters was alleged to have posted to Facebook a picture of himself holding a firearm, as well as the statement, "Make no mistake of my will to succeed in bringing you two idiots to justice" in the Philosophy section of his Facebook page. Comm. Br. 26.

Facebook is an online community where users share photos, life events, news articles, and information about their daily lives. Each Facebook user has a

"profile," which Facebook now refers to as a "timeline." See Br. of Facebook, Inc. as *amicus curiae* at 4, *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013). A user chooses what information to include on his profile, which typically includes the user's name, photos (often including a profile photo), biographical information, and any additional information that the user wants to share, such as interests, hobbies, favorite books, movies, or quotations.

Users can link with other users by becoming "friends" with them on Facebook, and a list of these friends is typically accessible via a user's profile. *Id.* A user can control his privacy settings such that content on his profile can be viewed only by certain audiences, such as his Facebook friends, any Facebook user, or the public at large. *Id.* A Facebook user can post photos or news stories, or craft their own content by posting a "status update" or other message on his Facebook profile. As such, a user may have a variety of information visible on his profile at any given time, including photos and comments that he posted recently alongside content he posted many months or even years ago.

When logging on to Facebook, a user generally arrives at a home page referred to as a "news feed." *Id.* at 5. The news feed is populated by content, such as photos and news articles, shared or posted by the user's Facebook friends. Likewise, when a user posts or shares content himself, that content can appear on the news feeds of his friends, unless the user selects privacy settings preventing the sharing of that information. *Id.* Users can specifically link other users to their Facebook content, in essence forming online "conversations," by using a Facebook "tag." Users can also search for other specific users' profiles and view content permitted by those users' privacy settings. For example, if a user set up his privacy settings so that his content is public, then any user could view that person's information. In contrast, if a user's privacy settings only permit his Facebook friends to view the information on his profile, other users who are not his Facebook friends have very limited access to his Facebook content.

ARGUMENT

True threats are one of the narrow categories of speech that fall outside the First Amendment's protection. This exception underwrites the

Massachusetts stalking statute, G.L. c. 265, § 43(a), and generally requires a serious expression of intent to act in an unlawful and violent manner towards another individual or group. See *O'Brien*, 461 Mass. at 423 (citing *Virginia v. Black*, 538 U.S. 343, 359-60 (2003)).² The true threat exception is drawn narrowly, to avoid pushing expressive speech or political hyperbole outside the scope of the First Amendment's protection. Distinguishing true threats from protected speech is often a difficult task, which requires considering both the content of the purported threat and the context in which it is delivered. *Watts v. United States*, 394 U.S. 705, 708 (1969).

Applying the true threat exception to internet speech requires applying those same principles, while at the same time understanding that the circumstances surrounding speech on the internet can be different than the circumstances surrounding offline speech. In either place, the prosecution must prove that the speaker intended that the purported threat be conveyed to the target. *Commonwealth v. Troy T.*, 54 Mass. App.

² This brief does not address the issue of whether the First Amendment requires a subjective intent to threaten, which is pending before the Supreme Court in *Elonis v. United States*, No. 13-983.

Ct. 520, 526 (2002); see also *Commonwealth v. Hughes*, 59 Mass. App. Ct. 280, 282 (2003). But ascertaining whether such intent existed, in the context of online speech, requires careful consideration of how such speech tends to operate.

I. A STATEMENT OR POST ON FACEBOOK CAN CONSTITUTE A TRUE THREAT, BUT ONLY IF IT MEETS THE SAME CRITERIA REQUIRED FOR OFFLINE THREATS.

To constitute a prosecutable threat, "the subject threat [must] be communicated in some manner by the defendant." *Troy T.*, 54 Mass. App. Ct. at 525.

Assessing whether speech amounts to a true threat entails examining the content of the threatening statement and the context in which it was made. See *id.* at 528. Courts frequently consider: (i) whether the threat identifies the target; (ii) where the speech occurred; (iii) whether the speech has an alternative purpose such as political, artistic, or emotional expression; and (iv) whether the immediate, surrounding behavior or speech suggests a threat.

These contextual clues, discussed in detail below, are crucial to the true threat analysis, whether the alleged threat was made offline, on Facebook, or elsewhere on the internet.

A. For Speech To Constitute A "True Threat," It Must Adequately Identify the Target.

Courts first consider whether the speech identifies the target. If an alleged threat does not clearly identify the target either by name or by a distinguishable characteristic, it does not constitute a true threat. Often, this requirement is easily met because the alleged threat includes obvious identifying information such as the target's name or picture. See, e.g., *Commonwealth v. Chou*, 433 Mass. 229 (2001) (defendant identified the target by including her picture and name on flyers that he posted around her high school).

Where the target is not obviously identified in the purported threat by name or picture, an adequately specific description may be sufficient. See, e.g., *United States v. Jeffries*, 692 F.3d 473, 475-76 (6th Cir. 2012) (court noted that defendant's music video, which included lyrics "[t]his song's for you, Judge," and referenced an upcoming hearing with the judge, identified the target although the defendant did not specify the target's name or include a picture). Conversely, in *Troy T.*, a reference to "dumb blondes" was held inadequate to identify the intended target

because the purported threat did not refer to the alleged target by name or include "distinguishing characteristics" aside from a common hair color. 54 Mass. App. Ct. at 522, 527-28. For a threat to fall in the narrow true threat exception to First Amendment protection, the speech must include more than a general description of the intended target.

The same approach applies to threatening speech posted on Facebook. If the relevant speech does not specify the intended target, then that speech cannot, as a matter of law, constitute a "true threat." While some identifiers, such as Facebook "tags," may be unique to the online context, the governing legal doctrine is exactly the same.

B. Courts Should Consider the Location or Community Where the Speech in Question Occurred.

A court also should consider the content of the alleged threat in the context of the location where it was made. In *Watts*, for example, the Court focused on the fact that the defendant made the threatening comments during a political debate at the Washington Monument when it found that the speech did not amount to a true threat. 394 U.S. at 708. The location of the defendant's comments - at a political rally -

informed the court's conclusion that the statements were protected political hyperbole and not a prosecutable threat.

The same consideration applies to online speech. Different internet forums, sites, and platforms function as different "locations" that provide context for a court's evaluation of an alleged threat. See *United States v. Bagdasarian*, 652 F.3d 1113, 1121 (9th Cir. 2011) (considering non-violent nature of financial message board to conclude that threatening post aimed at President Obama was not a true threat). Facebook, as a community where friends typically share information about their personal lives and opinions, could take on the characteristics of any number of analogous offline locations. For example, an article or comment on a Facebook page devoted to political discussion might be analyzed differently than a comment posted in a private discussion between friends. Courts must consider the nature of the online community in which the speech was shared when evaluating whether an alleged threat is actually protected speech.

C. Courts Should Consider Whether the Speech in Question Serves a Purpose Other Than Merely Delivering A Threat.

Courts also consider whether an alleged threat has an alternative communicative purpose, such as emotional expression, sharing opinions, or conveying facts. Courts have recognized that an alternative purpose, like artistic or political expression, can mitigate the threatening nature of a statement. *Jeffries*, 692 F.3d at 482 (noting that “a song, a poem, a comedy routine or a music video is the kind of context that may undermine the notion that the threat was real”); see also *Watts*, 394 U.S. at 708 (the First Amendment’s protection of robust political debate permits “sometimes unpleasantly sharp attacks on government and public officials”).

This is not to say that a claim of artistic or political expression is dispositive. In *Jeffries*, where the defendant’s allegedly threatening speech was a song, the court noted that “dressing [a threat] up” with expressive or political speech would not allow the defendant to escape prosecution. 692 F.3d at 482. In other words, a court undertaking the true threat analysis need not rely on pretextual alternative purposes.

Nonetheless, courts should at least consider potential alternative purposes when determining whether a Facebook post is a true threat. See, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 774 F.3d 280, 300 (5th Cir. 2014) (rap song posted on Facebook and YouTube was not a true threat, where speech "was not a plainspoken threat delivered directly, privately, or seriously. . . but, rather, was a form of music or art broadcast in a public media to critique the [target's] misconduct and also in furtherance of [the defendant's] musical ambitions"). This analysis should be no different than it would be for a song performed in the public square or a political statement made during a gathering of friends.

D. Courts Should Consider the Speech Or Actions Accompanying or Immediately Surrounding the Speech in Question.

Speech or actions that *immediately* surround a purported threat also inform a court's true threat analysis. The Appeals Court has noted that in some cases "where statements were made that, taken alone and on their face, might not rise to the level of a threat," the "*immediate context at the time the statements were made* . . . permitted the conclusion that the statements were the expression of an intent

to injure another." *Troy T.*, 54 Mass. App. Ct. at 529 (emphasis added). For example, in *Commonwealth v. Milo M.*, this Court considered a student's violent drawing in light of another drawing prepared minutes before and the student's irate and defiant actions toward the teacher when he presented the drawing. 433 Mass. 149, 154-55 (2001). And in *Commonwealth v. Sholley*, this Court held that the statement "Watch out, Counselor" constituted a threat where the defendant was "'yelling' and 'screaming' . . . had just been crying out a prediction of 'war' and 'bloodshed,' and [] stood only inches from [the victim] pointing his finger in her face." 432 Mass. 721, 726 (2000).

However, although a defendant's behavior or speech immediately surrounding the alleged threat should enter into a court's analysis, it is essential that courts avoid casting too wide a net. Just as this Court in *Milo M.* considered the juvenile's actions only in the immediate ramp-up to the alleged threat rather than the child's entire personal history, so too should courts cabin their consideration of a defendant's broader pattern of online behavior. In assessing a Facebook threat, for

example, courts must be cautious to avoid sweeping other, older activity - which is likely available at the click of a button - into an analysis of a single statement or post.

II. A TRUE THREAT CAN BE COMMUNICATED OVER FACEBOOK WITHOUT DRAWING THE TARGET'S ATTENTION TO THE STATEMENT, BUT ONLY IF THE DEFENDANT INTENDED THE STATEMENT TO REACH THE TARGET.

For speech to constitute a true threat, the defendant must intend to communicate the threat to the target, either directly or through a third party. *Troy T.*, 54 Mass. App. Ct. at 523. "Where a defendant communicates the threat to an intermediary, the Commonwealth must prove that he intended the intermediary to communicate it to the victim." *Commonwealth v. Valentin V.*, 83 Mass. App. Ct. 202, 204 (2013). This intent can be proven by circumstantial evidence, and may be "inferred where the circumstances indicate that the third party 'would likely communicate [the threatening statement] to the ultimate target.'" *Id.* at 204 n.3 (quoting *Commonwealth v. James*, 73 Mass. App. Ct. 383, 386 (2008)).³ In the context of Facebook, although the

³ A few Appeals Court cases have held that the prosecution can show that "the maker of the threat had any intention or reasonably should have expected that

intended target's attention does not necessarily have to be drawn directly to the post, any factors that increase or decrease the likelihood that the target viewed the post are relevant to courts' analysis of whether the defendant possessed the requisite intent.

Once again, the *factors* that demonstrate (or undermine) intent to communicate through a third party in the online context are analogous or even identical to the factors courts have applied in the offline context. But the relevant *facts* might be somewhat different; the circumstances of a Facebook post might reveal whether the poster intended it to be seen by specific people or by no one in particular. The relevant inquiry is: did the speaker intend to use Facebook to relay the purported threat to the intended target?⁴

it would be passed on to the victim"
Commonwealth v. Maiden, 61 Mass. App. Ct. 433, 436 (2004) (emphasis added); *Commonwealth v. Hokanson*, 74 Mass. App. Ct. 403, 406 (2009). However, this approach appears to conflate knowledge as evidence of intent with knowledge as an alternative to the intent requirement.

⁴ This analysis assumes that the purported threat is communicated via Facebook but not through a direct message to the intended target, which one can assume is intended to reach the target.

A. Courts Should Consider Whether The Alleged Threat Was Made in a Public or Private Conversation.

When evaluating whether a defendant intended to use Facebook to convey a threat to a specific person, courts should consider whether the statement was made publicly or privately. In the offline context, a private conversation between friends, even if overheard by an eavesdropper who then conveys the substance of the conversation to the alleged target, is not suggestive of intent to communicate through an intermediary. *Troy T.*, 54 Mass. App. Ct. at 527. Conversely, a statement made in a relatively public setting might convey an intention, or at least awareness, that the statement would be overheard and communicated to the ultimate target. *Commonwealth v. Hokanson*, 74 Mass. App. Ct. 403, 407 (2009) (defendant who made threats against police in police station, to stranger, would likely expect stranger to convey those threats).

The same concept can be applied to Facebook posts. On Facebook, a user's privacy settings dictate whether content is shared with the public at large or with only a limited group of people. If the speaker shares the Facebook post with the public, the speaker

may have intended that statement to be widely disseminated. See, e.g., *Jeffries*, 692 F.3d at 481 (defendant posted YouTube video publicly and sent it to a television news station). If the speaker shares the post with a select group of friends, the speaker likely only intended it to reach those people, unless other circumstances show that those people were likely to communicate the post to the alleged target.

B. Courts Should Consider the Presence or Absence of Clear Links Between The Speaker And Target On the Platform Used for the Alleged Threat.

For purported threats made offline, the intent to communicate a threat has often been shown by reference to the relationship between the speaker, the third party, and the target. In *Commonwealth v. Hughes*, the Appeals Court held that a statement made to the speaker's brother, who had been serving as an intermediary between the speaker and target under the terms of a restraining order, was a threat intended to be communicated to the target. 59 Mass. App. Ct. 280 (2003); see also *Commonwealth v. Meier*, 56 Mass. App. Ct. 278 (2002) (defendant intended statements made to lawyer but directed at client to be communicated to the client); *Doe v. Pulaski Cnty. Special Sch. Dist.*,

306 F.3d 616 (8th Cir. 2002) (student intended threats contained in letter to be conveyed to target where he permitted his friend to read the letter, knowing that the friend might tell the target, and discussed the letter with the target's best friend and the target). In contrast, the Appeals Court found that where the defendant made statements to a third party for the purpose of soliciting help in killing the defendant's estranged husband, the defendant did not intend to communicate the threat. *Commonwealth v. Furst*, 56 Mass. App. Ct. 283 (2002). Approaching someone as a potential partner in crime, the court reasoned, essentially assumes that the content of the conversation will not be communicated to the intended target. *Id.* at 285.

The same analysis is appropriate on Facebook and other internet speech platforms. If the speaker and the intended target are Facebook "friends," for example, it becomes more reasonable to infer that the defendant intended a Facebook post, share, or comment to be communicated to the target because the statement could automatically appear on the target's Facebook "news feed." If the defendant and the target are not friends, such an inference might be weaker but not

altogether baseless; if the defendant and the alleged target have several mutual friends in common, the defendant's Facebook posts could still reach the target.

Online relationships, like offline ones, often go beyond the basic question of whether two people are "friends." For example, the court might ask whether the defendant communicated the threat to a user who frequently "reposts" content, or to a topical page the target is known to frequent. Courts should consider both the number and the nature of online relationships in assessing the defendant's intent to communicate a threat.

C. Courts Should Consider the Extent to Which The Speaker and the Target Have Used the Same Platform To Communicate in the Past.

Third, a court should consider how the speaker and the intended target have used Facebook to communicate in the past. In assessing threats made offline, courts have considered past communications between the defendant, a third party intermediary and the intended target. *See, e.g., Hughes*, 59 Mass. App. Ct. at 283 (threat communicated to brother who had served as intermediary between speaker and intended target in the past). Similarly, if the speaker and

the target frequently used Facebook to communicate indirectly in the past, the speaker may have believed subsequent indirect communications would also reach the target.

This analysis should be narrowly focused. Rather than simply asking whether the speaker and the target have ever communicated via Facebook, the court should look at specific means of communication - direct messages, tagging, sharing between mutual friends - to see if two individuals had an established means of communication. While courts should avoid improperly aggregating the content of those previous communications, *see infra*, making the more narrow determination of *whether such communication had occurred and was likely to recur* is permissible. Courts should focus on whether the speaker intended the statement be relayed to the target through a specific medium, rather than the content of previous communications.

D. **Courts Should Consider the Content and Form of The Speech in Question.**

Finally, the content of the purported threat itself may shed light on whether or not the speaker intended for the target to receive the communication.

In the offline context, this can be achieved through an examination of the form and content of the threat to see if it suggests a specific recipient. See, e.g., *Milo M.*, 433 Mass. at 158 (defendant communicated threat by labeling target in violent picture); *Doe*, 306 F.3d at 625 (noting that the threat took the form of a letter written "as though he was speaking directly to" the intended target). The same approach applies to the online context. An online post can be directed to a specific recipient just as easily as a letter or oral statement - perhaps more so with the use of features such as tagging.

III. WHEN DECIDING WHETHER SPEECH AMOUNTED TO A TRUE THREAT, COURTS SHOULD AVOID ASCRIBING UNDUE SERIOUSNESS, WEIGHT, OR CONNECTIONS TO OFFHAND OR DISPARATE ONLINE REMARKS.

In many ways, online speech is analogous to offline speech. However, in at least one respect it is significantly different - the ability for online platforms to preserve speech is much greater than most offline modes of communication. An individual's Facebook timeline might contain years of content, directed at hundreds of recipients and covering a vast array of topics. And all of this content can be indexed, searched, and combined in innumerable ways.

This type of permanent speech record can easily lead prosecutors to miscontextualize online speech. Posts that were made weeks, months, or even years apart could be grouped together by topic, creating an illusion of temporal context. Posts directed at different users, when put side by side, might take on the appearance of a continuous conversation. And offhand posts - which the speaker might have given no more than a moment's thought - might be portrayed as manifestos.

Assigning undue weight, intention, or connection to online remarks, in order to portray them as true threats, is not consistent with First Amendment principles. Although the context in which an allegedly threatening statement was made is important to the true threat analysis, that context does not extend beyond that which is directly connected to the speech in question. See *Troy T.*, 54 Mass. App. Ct. at 529-30. This Court should be particularly cautious when a prosecutor seeks to aggregate disparate and independent pieces of internet speech to establish an alleged threat under the stalking statute.

To avoid this outcome, if a prosecutor proposes to compile speech from different discreet posts on

Facebook or from different online platforms into a single threat, the prosecutor must be required to demonstrate a clear connection that binds the pieces into one recognizable communication. For example, in *Jeffries*, the Sixth Circuit found that several of the defendant's Facebook posts, many of which included requests to the defendant's friends to share the video with the judge, were relevant to the analysis of the allegedly threatening YouTube video because the posts provided context. 692 F.3d at 482. In so doing, the court specifically noted that because the YouTube link was embedded in a Facebook message, the two effectively became the same communication. *Id.* Importantly, the court found several other YouTube videos to be irrelevant because they were not "part of the targeted communication's context." *Id.* at 483. *Jeffries* provides a useful guidepost: it is only proper to aggregate disparate online speech where there is a clear connection that ties the pieces together into a single communication.

A similar problem arises when courts gauge the severity of a threat by the reaction of the listeners. In *Watts*, the Supreme Court considered the fact that the audience laughed when hearing the allegedly

threatening speech in holding that the speech constituted a true threat. But for online speech, the reaction of listeners may be harder to discern and easier to misunderstand. Some posts attract thousands of responses, potentially from different communities over the course of weeks or months. By selectively presenting the most negative or alarmist reactions, a prosecutor could intentionally or unintentionally mischaracterize protected speech as a threat.

In summary, this Court should tailor its "true threat" jurisprudence to guard against the possibility that the permanent record created by online speech will make some of the speech seem more serious than it really is. For example, a series of posts, made in quick succession, to the same page on Facebook might be analyzed together - just as this Court analyzed a series of drawings in *Milo M.* But if those posts were made in succession on different pages, or on the same page but days apart, aggregation would likely not be appropriate under the First Amendment. See *Troy T.*, 54 Mass. App. Ct. at 530 (declining to aggregate "statements . . . made to different audiences . . . on different days"). When we speak offline, our words are rarely preserved and our written statements do not

proliferate at the push of a button. The fact that online speech lacks these physical restraints does not warrant lower First Amendment protection. This Court can be cautious about aggregating internet speech without allowing defendants to "launder their harassment . . . through the Internet to escape liability." *Commonwealth v. Johnson*, 470 Mass. 300, 313 (2014).

CONCLUSION

Although purported threats made on Facebook may present somewhat different analytical challenges from threats that occur entirely offline, courts can and should give weight to the same aspects of context that drive any assessment of a threat. By the same token, and as discussed above, courts must also exercise caution to ensure that the vast availability of information on Facebook does not translate into a less stringent test than mandated by the First Amendment for finding that a statement made on Facebook constitutes a true threat.

Respectfully Submitted,

For *Amicus* American Civil Liberties
Union of Massachusetts



Kirsten V. Mayer (BBO No. 641567)
Kavitha A. Mecozzi (BBO No. 676970)
Jennifer S. Pantina (BBO No. 678436)
Alexandra L. Roth (BBO No. 687847)
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Tel: 617-951-7000
Fax: 617-951-7050
kirsten.mayer@ropesgray.com
kavitha.mecozzi@ropesgray.com
jennifer.pantina@ropesgray.com
alexandra.roth@ropesgray.com

Matthew R. Segal (BBO No. 654489)
Jessie J. Rossman (BBO No. 670685)
Mason Kortz (BBO No. 691257)
AMERICAN CIVIL LIBERTIES UNION
OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
Tel: 617-482-3170
msegal@aclum.org
jrossman@aclum.org
mkortz@aclum.org

Dated: April 24, 2015

Certification of Compliance

Pursuant to Mass. R.A.P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.



Kirsten V. Mayer (BBO No. 641567)

Certificate of Service

I, Kirsten V. Mayer, certify that on this day I caused to be served by hand an original and seventeen copies of the foregoing brief with the clerk of this Court. I further certify that I caused to be served two copies of the foregoing brief on counsel for each party separately represented in this matter by Express Mail via the United States Postal Service to:

David B. Mark
Assistant District Attorney
Bristol District
888 Purchase Street
New Bedford, MA 02740

Ethan C. Stiles, Esq.
P.O. Box 232
Plympton, MA 02367

Signed this 24th day of April, 2015.



Kirsten V. Mayer (BBO No. 641567)