ARIZONA SUPREME COURT
No. CV-04-0280-PR

Court of Appeals No. 2 CA-SA 2004-0041
Pima County Superior Court No. C20040194

CITIZEN PUBLISHING CO., An Arizona Corporation,
Petitioner,

vs.

THE HONORABLE LESLIE MILLER,
Judge of the Superior Court of Arizona, Pima County,
Respondent,

and

ALY W. ELLEITHEE AND WALI YUDEEN S. ABDUL RAHIM,
Respondents-Real Parties in Interest.

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.[1]

Amicus' interest in this case is in preserving the important First Amendment principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This case involves the question of whether a newspaper may be found civilly liable for statements about a matter of profound national interest – the conduct of the war in Iraq – published in the editorial section of the newspaper. A finding of liability in this case – or even allowing a case such as this to proceed – would chill valuable and constitutionally protected speech on public issues.

Such a finding would not only make Arizona a particularly dangerous place to cover and comment on the news, it would give Arizona plaintiffs a "hecklers' veto"

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[1]This brief is filed with written consent of all parties pursuant to ARCAP 16(a). Letters of consent have been submitted to the clerk.

over publications from around the country that are accessible in Arizona. This would inhibit the valuable exchange of ideas and opinions currently provided by the public forum of the letter-to-the-editor page, and would also inhibit reporting and comment generally over fear that discussing controversial or divisive topics would lead to civil liability.

STATEMENT OF FACTS

On December 2, 2003, the *Tucson Citizen* published a letter-to-the-editor on the "Perspective" page of the paper by Dr. Emory Metz Wright, Jr. Wright's letter proposed that attacks on American troops by insurgents in Iraq could be stopped by executing Muslims attending mosques. The entire text of the letter read:

> We can stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power. Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter. After all this is a "Holy War" and although such a procedure is not fair or just, it might end the horror. Machiavelli was correct. In war it is more effective to be feared than loved and the end result would be a more equitable solution for both giving us a chance to build a better Iraq for the Iraqis.

[Petitioner's App. Tab 3]

The letter was understandably met with displeasure and opposition in the community. As the First Amendment envisions, this displeasure and opposition was expressed in 15 letters-to-the-editor published in the *Tucson Citizen* on December 4,

all condemning Wright's suggestion, including a letter by plaintiff Aly W. Elleithee. [Petitioner's App. Tab 4] On December 6, the *Tucson Citizen* published another six letters-to-the-editor condemning Wright's suggestion, and an editorial by *Tucson Citizen* editor and publisher Michael A. Chihak stating his strong opposition to Wright's suggestion and apologizing for publishing the letter. Chihak also noted that Wright had since written to clarify that he "referred only to military actions in combat zones" in his December 2 letter-to-the-editor, not to attacks on Islamic-Americans in the United States. [Appendix to Petition for Special Action, Tab 5, *Citizen Publishing Co. v. Miller*, No. 2 CA-SA 2004-0041(Ariz. Ct. App. 2004)] It has not been alleged that any violence occurred in response to Wright's letter.

On January 13, 2004, two Islamic-American residents of Tucson, Elleithee and Wali Yudeen S. Abdul Rahim, filed this lawsuit in Pima County Superior Court against the *Tucson Citizen's* publisher, Citizen Publishing Company (hereinafter "the Citizen"), alleging causes of action for assault and intentional infliction of emotional distress. [Petitioner's App. Tabs 1, 5] The plaintiffs also sought to certify a class of "all Islamic-Americans who live in the area covered by the circulation of the Tucson Citizen, including the reach of the Internet website published by the Tucson Citizen." [Petitioner's App. Tab 5] The trial court dismissed the assault claim May 10, 2004, holding:

> In the instant case, the letter published by the defendant suggested causing future harm. Plaintiffs have alleged no accompanying act that would constitute the elements of assault and no facts to indicate that the defendant acted with the intent to carry out the threat. As a result, plaintiffs have failed to allege the necessary elements of assault.

The court denied the Citizen's motion to dismiss the intentional infliction of emotional distress claim, holding that "a public threat of violence directed at inciting or producing imminent lawlessness and likely to produce such lawlessness is not protected" under the First Amendment. [Petitioner's App. Tab 1] On July 15, 2004, the Arizona Court of Appeals, Division Two, declined to accept jurisdiction over the Citizen's special action petition, and this appeal followed. [Petitioner's App. Tab 2]

SUMMARY OF ARGUMENT

This case presents a significant danger to the First Amendment freedoms of speech and of the press, and if allowed to proceed would chill protected expression and news reporting, not only in Arizona, but throughout the United States. Editorial pages and letters-to-the-editor are a vital part of our democracy. They provide a forum for discussion, comment and even venting of frustrations on matters of public interest and importance from the local to the international. A finding of liability in this case, or even allowing it to go forward, would deter newspapers and other news media outlets from providing such a forum, not only in Arizona, but anywhere where publication might become subject to a lawsuit in Arizona.

The issue in this case, whether a speaker's advocacy of illegal violence at some indefinite future time may be proscribed consistent with the First Amendment, has already been squarely addressed by the U.S. Supreme Court. The Supreme Court has repeatedly held that such speech may not be proscribed unless it rises to the level of speech directed to the incitement of imminent and likely lawless action, a threshold that the plaintiffs in this case are unable to cross. The letter was a suggestion of policy in a forum normally devoted to debate on public issues, but there is no indication that the author or anyone else actually intended to carry out that suggestion. The letter was thus not directed to incite, but to discuss, and lawless action was neither imminent nor likely.

Even though this issue has been squarely addressed by the Supreme Court in its "incitement" cases, the plaintiffs attempt to find applicable exceptions to First Amendment protection under the rubric of "true threats" and "fighting words." Neither of these exceptions is applicable in this case. The letter was not a serious expression of intent to actually cause harm, nor was it directed at particular individuals, so it may not be proscribed as a "true threat." The letter was not a direct personal insult likely to result in a violent face-to-face confrontation, so it may not be proscribed as "fighting words." Because the speech at issue in this case, while offensive, is nonetheless a valuable and protected aspect of debate on a matter of public importance, this case

should be dismissed to avoid inhibiting comment and reporting on such matters.

ARGUMENT

I. Liability in this case would violate vital First Amendment principles.

The letter at issue in this case is protected speech under the First Amendment to the U.S. Constitution. While offensive to many or even most, the letter concerned a matter of profound and undoubted public importance, the U.S.-led war in Iraq, and suggested a course of action for conducting that war. In a free and democratic society such as our own, citizens benefit from public discussion on a wide range of ideas and opinions – both good and bad – in evaluating the actions of their government and their society. The U.S. Supreme Court has recognized these values, as embodied in the First Amendment's protections of freedom of speech and freedom of the press, in carving out broad protections for speech on matters of public importance.

"At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-4 (1984). "We have therefore been particularly vigilant to ensure

that individual expressions of ideas remain free from governmentally imposed sanctions." *Hustler*, 485 U.S. at 51. *See also New York Times v. Sullivan*, 376 U.S. 254 at 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'"(quoting *Roth v. U.S.*, 354 U.S. 476, 484 (1957))); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-1 (1942) ("It is now clear that 'Freedom of speech and freedom of the press ... are among the fundamental personal rights and liberties.'" (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938))); *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982) ("This court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))); *Garrison v. Louisiana*, 379 U.S. 64, 74-5 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.")

Because of the importance of free expression on matters of public concern, the protections of the First Amendment must be broad and apply not only to speech that is tempered, well-reasoned or palatable to a majority of Americans, but also to speech that is harsh, disfavored and unpopular. The U.S. Supreme Court has recognized that

there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times*, 376 U.S. at 270. "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). "A principle 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Id*. at 408-9 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas." *Id.* at 418. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." *Claiborne Hardware*, 458 U.S. at 928. "[B]eing offensive and provocative is protected under the First Amendment." *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1080 (9th Cir. 2002).

Even hateful and dissonant speech has value and may not be prohibited on that basis alone consistent with the First Amendment because "[d]ebate on public issues

will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison*, 379 U.S. at 73. "[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." *Hustler*, 485 U.S. at 53. "The language of the political arena ... is often vituperative, abusive, and inexact." *Watts v. U.S.*, 394 U.S. 705, 708 (1969). "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of privilege, these fundamental societal values are truly implicated." *Cohen v. California*, 403 U.S. 15, 25 (1971).

The proper method of response to speech, such as the letter at issue in this case, by those who disagree with it is not to attempt to silence or punish the distasteful speech, but to challenge it with more speech. "[T]he fitting remedy for evil counsels is good ones." *New York Times*, 376 U.S. at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375-6 (1927) (Brandeis, J. concurring)). *See also Johnson*, 491 U.S. at 419-20 ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. ... We can imagine no more appropriate response to burning a flag than waving one's own.");

Virginia v. Black, 538 U.S. 343, 366-7 (2003) (O'Connor, J., concurring) ("The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." (quoting Gerald Gunther in Casper, Gerry, 55 Stan L. Rev. 647, 649 (2002))).

Such a constitutionally appropriate response is exactly what happened in this case. Wright's letter was met by 21 letters from other readers, including one of the plaintiffs, and an editorial from the Citizen's publisher. Wright's ideas were quickly and decisively countered and denounced in a public forum. Further relief is unnecessary and contrary to core First Amendment principles. Punishing or censoring controversial or ill-conceived ideas does not eliminate them, it merely drives them underground where they may gain strength and legitimacy through martyr status and remain insulated from challenge and debate. The wiser course, charted by our Constitution, is to answer such speech with reasoned opposition.

II. Liability in this case is foreclosed by the U.S. Supreme Court's decision in *Brandenburg v. Ohio*.

Liability in this case is foreclosed by the U.S. Supreme Court's decisions in *Brandenburg v. Ohio* and subsequent cases because the letter at issue in this case merely advocates unlawful activity at some indefinite future time without being

directed to the incitement of imminent lawless action and likely to produce such action. 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. 105, 108 (1973). The factual and legal similarities between the letter at issue in this case and the speech that the Court has held to be protected in *Brandenburg* and subsequent cases precludes a finding of liability.

In *Brandenburg*, an Ohio television station filmed and broadcast footage of a Ku Klux Klan rally. *Brandenburg*, 395 U.S. at 445-6. The rally participants, standing around a burning cross, were hooded and armed and could be heard saying "This is what we are going to do to the niggers," "Send the Jews back to Israel," "Bury the niggers. We intend to do our part," "Nigger will have to fight for every inch he gets from now on," and other statements, most of which were incomprehensible. *Id*. Clarence Brandenburg gave a speech at the rally, dressed in Klan regalia, which included the statement, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible there might be some revengeance taken." *Id*.

Brandenburg was convicted under Ohio's Criminal Syndicalism statute for advocating "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id*. at 444-5. The U.S. Supreme Court reversed the conviction, drawing a distinction

between what it termed "mere advocacy" and the directed incitement to imminent and likely lawless action. *Id*. at 447. The Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id*. "[T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id*. at 448 (quoting *Noto v. U.S.*, 367 U.S. 290, 297-9 (1961)).

The Supreme Court reiterated the distinction between constitutionally protected advocacy and incitement to imminent and likely lawless action in *Hess*. 414 U.S. at 108. When between 100 and 150 protestors were ushered from the center of the street to the curb by police at an Indiana antiwar demonstration, Gregory Hess yelled "We'll take the fucking street later," or "We'll take the fucking street again." *Id*. at 106-7. Hess was convicted of disorderly conduct but the Supreme Court reversed. *Id*. Citing *Brandenburg*, the Court held that Hess' statement was "At best ... counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id*. at 109.

The Supreme Court addressed this distinction again in *Claiborne Hardware*.

458 U.S. at 927. At speeches concerning a boycott of white-owned businesses in Claiborne County, Mississippi, before crowds of hundreds of people, Charles Evers told the crowds, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," *Id*. at 902, and "Are we all willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our ... (Yea) We are all saying it now." *Id*. at 940.

The Court found that this language failed to rise to the level of speech that could be punished under *Brandenburg*. *Id*. at 927-8.

> While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

Id. at 927. "This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id*. (emphasis original) "The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*." *Id*. at 928.

The U.S. Court of Appeals for the Ninth Circuit also recognized this distinction in *Planned Parenthood*, a case Plaintiffs place significant reliance on. Respondent's

Opposition to Petition for Review at 4, 6. In *Planned Parenthood*, the defendant anti-abortion activists published "Wanted" and "Guilty" Posters that identified abortion providers by name, address, photograph and other personal information, and an Internet Web site that listed 200 abortion providers, as well as 200 judges, law enforcement officials and others deemed to support abortion rights. 290 F.3d at 1063-5. The Web site, called the "Nuremberg Files" in order to compare abortion providers to Nazi war criminals, indicated which of the listed abortion providers or other perceived abortion rights supporters had been wounded or killed. *Id*. In the cases of three doctors, David Gunn, George Patterson and John Bayard Britton, a "Wanted" poster had preceded their murders. *Id*.

Although the court found that the defendants' speech was not protected by the First Amendment, it held that if the defendants "had merely endorsed or encouraged the violent actions of others, its speech would be protected." *Id*. at 1072. *See also White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000).

> However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on

> *both* the Nuremberg Files *and* the GUILTY posters is purely protected, political expression.

Planned Parenthood, 290 F.3d at 1080. "By replicating the poster pattern that preceded the elimination of Gunn, Patterson and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists' File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head." *Id*. at 1086. The court distinguished *Brandenburg* and *Claiborne Hardware* because in those cases, as in Wright's letter, there were no individualized threats as there were in the "Wanted" posters and "Nuremberg Files" Web site. *Id*. at 1073, 1084.

When interpreting these cases to determine whether speech is "mere advocacy" or the directed incitement to imminent and likely lawless action, courts must be mindful of the value of uninhibited and even offensive speech as discussed in Section I, and the Supreme Court's admonitions that any exceptions to the freedoms of speech and press must be narrowly limited. "There are certain *well-defined* and *narrowly limited* classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky*, 315 U.S. 571-2 (emphasis added). "Freedoms of expression require 'breathing space.'" *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *New York Times*, 376 U.S. at 272.) "Since respondents would impose liability on the basis of a public

address – which predominantly contained highly charged political rhetoric lying at the core of the First Amendment – we approach this suggested basis of liability with extreme care." *Claiborne Hardware*, 458 U.S. at 926-7. Cases where First Amendment rights are implicated must be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times*, 376 U.S. at 270. When viewed through this prism, the letter at issue in this case can only be characterized as advocacy and falls well short of directed incitement to imminent and likely lawless action.

Like the speech in *Brandenburg*, *Hess* and *Claiborne Hardware*, the letter at issue in this case advocated violent and unlawful activity. But such advocacy is protected by the First Amendment unless it is directed to the incitement of imminent lawless action and likely to produce such action. Even when viewed in the worst possible light, the letter at issue in this case fails to cross that constitutional threshold because the letter was not directed to incitement, and any lawless action was not imminent and was not likely.

The language of Wright's letter was of a tentative, speculative nature. He wrote of what he thought "we *should*" do and what the effects "*would* be" if it were done. At no point did Wright state an intention on his or anyone else's part to actually carry out his suggested actions, even if he did believe they were advisable. This is the

essential difference between advocacy and incitement. Wright was not "preparing a group for violent action." *Brandenburg*, 395 U.S. at 448. He was merely advocating such action in a forum usually devoted to discussing political opinions. *Amcor Investment Corp. v. Cox Arizona Pub.*, 158 Ariz. 566, 571, 764 P.2d 327, 332 (Ct. App. 1988) (quoting *Ollman v. Evans*, 750 F.2d 970, 990 (D.C.Cir. 1984)). He proposed an idea only, and even the proposal of a horrible idea such as Wright's is protected by the First Amendment.

The actions suggested in Wright's letter were neither imminent nor likely. Unlike the speakers in *Planned Parenthood*, Wright did not single out identifiable targets and provide information necessary to find and act upon those targets. Unlike the speakers in *Brandenburg*, *Hess* and *Claiborne Hardware*, Wright did not speak directly to a crowd of people who could immediately go and carry out his suggestions. Wright merely wrote a letter to the newspaper. If someone were to act to carry out Wright's suggestion, which it has not been alleged anyone did, they would have to determine on their own whom to attack, and when and how to do it. These additional steps clearly place culpability at the feet of the actor, and not on a speaker who merely advocated the "moral propriety or even moral necessity" of violent action. *Brandenbur*g, 395 U.S. at 447-8.

In dismissing the plaintiffs' assault claim, the trial court found that Wright's

letter suggested causing future harm, but under *Hess*, "advocacy of illegal action at some indefinite future time" does not satisfy the imminence standard for liability set forth in *Brandenburg*. *Hess*, 414 U.S. at 109. It would be a perverse result for the speakers in *Brandenburg*, *Hess* and *Claiborne Hardware* to be precluded from liability, while in this case finding the Citizen liable when it only republished someone else's speech. Such a result would deter newspapers throughout the country who might be sued in Arizona from publishing citizens' views on controversial topics and thereby damage a valuable forum for public discourse, and could also more broadly chill speech and reporting on controversial or inflammatory topics.

III. The speech at issue in this case may not be proscribed under other exceptions to the First Amendment.

Although the type of speech at issue in this case has been directly dealt with and liability foreclosed by the U.S. Supreme Court's decisions in *Brandenburg* and subsequent cases, the plaintiffs attempt to find applicable exceptions to First Amendment protection in other ways. Even if the issues in this case had not been dealt with by the *Brandenburg* line of cases, other exceptions to First Amendment protection do not apply here. Clearly, the speech at issue in this case is not libelous or obscene,

nor has such been alleged. *See Chaplinsky*, 315 U.S. at 571-2. Neither is the speech at issue in this case proscribable as a "true threat" or as "fighting words."

A. The speech is not a "true threat."

"True threats" are "statements where the speaker means to communicate a *serious expression of an intent* to commit an act of unlawful violence to a *particular individual or group of individuals*," although the speaker need not intend to carry out the threat. *Black*, 538 U.S. at 359 (emphasis added). The letter at issue in this case is not a "true threat" because it is not a serious expression of intent, nor is it aimed at a particular individual or group of individuals.

The context in which a statement is made must be taken into account in determining if it is a "true threat" or protected political hyperbole. *Watts*, 394 U.S. at 707-8. In the U.S. Supreme Court's decision in *Watts*, the defendant, speaking at a public rally, said "I have already received my draft classification as 1--A and I have got to report for my physical this Monday coming. I am not going. 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. He was convicted of knowingly and willfully threatening President Lyndon B. Johnson, but the Supreme Court overturned the conviction, finding that Watt's statement was political hyperbole and not a "true threat." *Id*. at 706, 708. The Court noted that the statement was made in the context of a political debate, was conditioned on an event that Watts

said would not happen, and was met with laughter by the speaker and listeners. *Id*. at 707. "Taken in this context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id*. at 708.

The importance of context in determining a "true threat" was illustrated in *Black*. *Black* involved three separate convictions for cross burning that arose under two unrelated and distinct factual situations. 538 U.S. at 347-50. Barry Black led a Ku Klux Klan rally on private property but visible from a public highway in Carroll County, Virginia. *Id*. at 348. A cross was burned at the rally and, according to a witness who lived next to the property, one speaker said "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Id*. at 349. The witness testified that she was "very ... scared." *Id*. In the other incident, Richard Elliott and Jonathan O'Mara, who were unaffiliated with the Klan, burned a cross on the lawn of Elliott's African-American neighbor in Virginia Beach, Virginia, in retaliation for complaints the neighbor had made to Elliott's mother. *Id*. at 350. Black, Elliott and O'Mara were separately convicted under Virginia's statute prohibiting cross burning with the intent to intimidate, which allowed an intent to intimidate to be presumed from the act of cross burning alone. *Id*. at 348. The three cases were combined on appeal to the Supreme Court of Virginia, which held the statute facially unconstitutional because it

discriminated on the basis of the content of the message. *Id*. at 351.

In a fractured opinion, the U.S. Supreme Court reversed and remanded Elliott and O'Mara's cases for further proceedings but held that Black's conviction could not stand. A majority of the Court remanded Elliott and O'Mara's cases for new trials because while the presumption of an intent to intimidate was unconstitutional, the statute could otherwise be enforced as prohibiting a "true threat." *Id*. at 367-8 (O'Connor, J., concurring); *Id*. at 379 (Scalia, J., concurring).[2] The majority noted the importance of the context and history of cross burnings in determining that a "true threat" had been made. *Id*. at 357.

> To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical.

Id. (internal citation omitted). However, four of the Justices who allowed Elliott and O'Mara to be re-tried held that Black could not be and that his conviction could not

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[2]Justice O'Connor and three other Justices would have held that the presumption was unconstitutional on its face, while Justice Scalia believed that the Supreme Court of Virginia might be able to construe the presumption in a constitutional manner before sending the case back to a jury.

stand. *Id*. at 367 (O'Connor, J., concurring). Although the text of the opinion is not clear on what difference between Black and the other defendants was key, the factual difference between the two cross burnings and the above quoted language suggest that the Justices saw Black's cross burning as political and not capable of conveying a "true threat." The remaining Justice would have allowed Black to be re-tried as well as Elliott and O'Mara. *Id*. at 380 (Scalia, J., concurring). Of the Justices who would not have re-tried Elliott and O'Mara, three Justices would have held the statute facially unconstitutional and overturned all three convictions because the statute proscribed only one type of threat based on the content of the message, *Id*. at 380-1 (Souter, J. concurring), and one Justice would have upheld the original convictions of all three. *Id*. at 388 (Thomas, J., dissenting).

As discussed in Section II, context was crucially important in the Ninth Circuit's ruling in *Planned Parenthood*. 290 F.3d at 1072, 1078. It was not the content of the defendants' statements alone that placed them outside of the protection of the First Amendment. *Id*. at 1072, 1080. It was the statements, combined with the identification of specific individuals and in the context of murders following the "Wanted" posters that made the speech "true threats." *Id*. at 1080, 1085-6. "[T]he language itself is not what is threatening. Rather it is the use of the "wanted"-type format in the context of the poster pattern – poster followed by murder – that

constitutes the threat." *Id*. at 1085.

The letter at issue in this case is unlike the "true threats" found in *Planned Parenthood* and *Black*. As discussed in Section II, the language of Wright's letter was of a tentative nature and did not express an intention on his or anyone else's part to actually carry out his suggested actions, let alone the "serious expression of intent" required to constitute a "true threat." Unlike Elliott and O'Mara's cross burning in *Black* and the "Wanted" posters and Web site in *Planned Parenthood*, Wright's letter did not target "a particular individual or group of individuals." A group comprising all Islamic-Americans or all Muslims is simply too large.[3] If a "true threat" could be made on the basis of a group that large then the speech in *Brandenburg*, *Claiborne Hardware*, and Black's cross burning in *Black* might also have been unprotected. The context of actual violence attached to the speech in *Black* and *Planned Parenthood* is also absent in this case. Wright's letter, like the statements in *Watts*, was made in the context of a forum normally devoted to political discussion. These contextual distinctions preclude a finding that Wright's letter was a "true threat."

B. The speech is not "fighting words."

[3] Or as plaintiffs have tried to certify as a class, "all Islamic-Americans who live in the area covered by the circulation of the Tucson Citizen, including the reach of the Internet website published by the Tucson Citizen." [Petitioner's App. Tab 5]

The letter at issue in this case may not be proscribed as "fighting words" because it is not a direct personal insult likely to cause an immediate breach of the peace. The U.S. Supreme Court has defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction." *Cohen*, 403 U.S. at 20. "Fighting words" are insults "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky*, 315 U.S. at 574; *Johnson*, 491 U.S. at 409. "Fighting words" must be directed at a particular individual or group of individuals, *Hess*, 414 U.S. at 107-8; *Cohen*, 403 U.S. at 20, and there must be a danger of an "immediate" breach of the peace. *Chaplinsky*, 315 U.S. at 572. In holding that wearing a jacket bearing the words "Fuck the Draft" was protected speech under the First Amendment, the Supreme Court noted that "No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult," and that there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result." *Cohen*, 403 U.S. at 20.

In *Johnson*, the U.S. Supreme Court rejected the notion that speech that was not a direct personal insult could be proscribed as "fighting words" if it was instead of a seriously offensive nature. 491 U.S. at 409. "The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is

necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption." *Id*. at 408. Regarding Johnson's burning of an American Flag in protest of President Ronald Reagan, the Court held, "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs." *Id*. at 410.

Wright's letter was not a personal insult and it was not directed at the plaintiffs, so it may not be proscribed as "fighting words." Wright's letter was a suggestion of policy, and while it may have seriously offended the plaintiffs, the U.S. Supreme Court's decision in *Johnson* forecloses proscribing speech as "fighting words" on that basis. Wright's letter was also not likely to cause an immediate breach of the peace. There is no indication, nor has it been alleged, that there was any possibility that Wright and the plaintiffs were in danger of engaging in a fist fight. A letter printed in a newspaper is incapable of sparking the immediate face-to-face confrontation that is the harm the "fighting words" exception to the First Amendment seeks to prevent.

Wright was expressing how he thought the war in Iraq should be conducted. He spoke of what he thought we "should do." His letter therefore consisted of speech in the nature of advocacy or incitement. Whether such speech may be prohibited or punished consistent with the First Amendment is thus governed by the *Brandenburg*

line of cases, and as explained in Section II, Wright's letter does not meet the standards laid out in those cases for proscription. Wright's speech was not directed at the plaintiffs and was not uttered in a context where violence was likely to occur. Thus, treating Wright's letter as a "true threat" or as "fighting words" is misplaced.

IV. Allowing this case to go forward will chill valuable protected speech.

Allowing this case to proceed will chill the protected exercise of freedom of speech and freedom of the press. The plaintiffs' claim of intentional infliction of emotional distress implicates not only letters-to-the-editor and editorials, but could also chill news reporting and a wide variety of other forms of expression that a plaintiff might find offensive or upsetting. Lawsuits such as this are time consuming and expensive to defend, even when defendants ultimately prevail and prove that their expression is protected. These costs will discourage some people from speaking. Furthermore, these effects will extend beyond Arizona to anywhere where publication might become subject to suit in Arizona – theoretically implicating publication by major news media or Internet Web sites across the United States.

"The fear of damage awards ... may be markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times*, 376 U.S. at 277. "Whether

or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id*. at 278. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id*. at 279. "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to steer wider of the unlawful zone, and thus create the danger that the legitimate utterance will be penalized." *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (internal quotations omitted).

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the spectre of a chilling effect on speech.

Auvil v. CBS, 67 F.3d 816, 822 (9th Cir. 1995). *See also Bose*, 466 U.S. at 505.

The principle that lawsuits chill protected speech has been recognized and applied in the Arizona courts. "Placing the burden on the plaintiff to show that there is a triable issue is rooted in the notion that the expense of defending a meritless defamation case could have a chilling effect on First Amendment rights." *Read v.*

Phoenix Newspapers, 169 Ariz. 353, 357, 819 P.2d 939, 943 (1991). *See also Scottsdale Publishing v. Superior Court*, 159 Ariz. 72, 74, 764 P.2d 1131, 1133 (Ct. App. 1988); *Amcor*, 158 Ariz. at 571, 764 P.2d at 332.

The heightened scrutiny placed on First Amendment lawsuits must be applied at the motion to dismiss stage. In the context of a libel lawsuit, the U.S. Supreme Court has held that "where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity." *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). The Court held that the same standard applied at the summary judgment stage. *Id*. at 255-6. The Arizona courts have applied this principle as well. *Read*, 160 Ariz. at 356, 819 P.2d at 942; *Dombey v. Phoenix Newspapers*, 150 Ariz. 476, 486, 724 P.2d 562, 572 (1986). The same principle should also apply at the motion to dismiss stage. For example, in a libel case a court should ask if a plaintiff has alleged facts that support a finding of actual malice by clear and convincing evidence.

While the above cases involve actions for libel, the logic of applying the restrictions of the substantive law in libel cases applies with equal force in cases where other First Amendment rights are implicated. A change in the cause of action or in the

exception to First Amendment protection that a plaintiff seeks to apply does not change the importance of protecting free speech and a free press, or of applying those protections at all stages of litigation. For example, the U.S. Supreme Court has applied the constitutional limitations to civil libel suits it crafted in *New York Times* to actions for criminal libel and intentional infliction of emotional distress. *Garrison*, 379 U.S. at 68, n.3; *Hustler*, 485 U.S. at 52-3, 56. Where a plaintiff has failed to allege facts that would demonstrate that the applicable First Amendment hurdles have been cleared, a case that implicates freedom of speech or freedom of the press should be dismissed.

In this case, the plaintiffs have failed to allege facts that would allow them to clear the constitutional hurdles before them. Exceptions to First Amendment protection must be "narrowly limited." *Chaplinsky*, 315 U.S. 571-2. As discussed in Section II, the plaintiffs have not alleged facts, as required by the *Brandenburg* line of cases, that demonstrate that Wright's letter went beyond advocacy of illegal activity at some indefinite future time to directed incitement of imminent and likely lawless action. Neither have the plaintiffs set forth facts to demonstrate why this cases should be distinguished from the Supreme Court's rulings in the *Brandenburg* cases. As discussed in Section III, the plaintiffs have failed to allege, as required to prove a "true threat," that Wright's letter was a serious expression of intent to commit unlawful violence against the plaintiffs. Finally, the plaintiffs have failed to allege, as required

to prove "fighting words," that Wright's letter was a direct personal insult likely to cause an immediate breach of the peace. Because the plaintiffs have failed to even issue allegations sufficient to clear the relevant constitutional hurdles, this case should be dismissed to prevent chilling valuable protected speech.

CONCLUSION

For the aforementioned reasons, *amicus curiae* respectfully urges the court to dismiss the plaintiffs' complaint with prejudice.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the attached brief complies with the form, size and length requirements of ARCAP 14 and ARCAP 16 because it was prepared in a proportionally spaced type using WordPerfect 10 in Times New Roman 14-point font double-spaced, and contains 7,456 words, excluding the portions of the brief exempted by ARCAP 14(b).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2005, I caused two true and correct copies of the foregoing Brief to be mailed to the following recipients and an original and six true and correct copies to be mailed to the clerk of the court via First-Class Mail in accordance with ARCAP 4 and ARCAP 15:

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