No. 22-30509

In the United States Court of Appeals for the Fifth Circuit

WAYLON BAILEY,

Plaintiff-Appellant,

vs.

RANDELL ILES, in his individual capacity;
MARK WOOD, in his official capacity as Sheriff,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* TECHFREEDOM AND THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

On Appeal from the United States District Court for the Western District of Louisiana, No. 1:20-cv-01211

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiff-Appellant's Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

Amici Curiae:

The Electronic Frontier Foundation

TechFreedom

Counsel for Amici Curiae:

Corbin K. Barthold

The Electronic Frontier Foundation and TechFreedom have no parent corporations. No publicly held company has any ownership interest in the Electronic Frontier Foundation or TechFreedom.

/s/ Corbin K. Barthold

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INTEREST OF *AMICI CURIAE**

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

Government attempts to control online speech are a major threat to free expression, free association, and the open Internet. TechFreedom therefore appears often as *amicus curiae* in cases where the government attempts to dictate what views are acceptable online, see, e.g., *NetChoice v. Moody*, 34 F.4th 1196 (11th Cir. 2022), or to punish jokes, satire, or other speech that falls far short of the kind of "true threats" or calls to "imminent lawless action" that lack First Amendment protection, see *FDRLST Media, LLC v. NLRB*, 35 F.4th 108 (3d Cir. 2022).

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world.

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* No party's counsel authored any part of this brief. No one, apart from *amici* and their counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

EFF, with over 38,000 members, represents the interests of technology users in court cases and broader policy debates surrounding the application of law to the Internet and other technologies. EFF represents people exercising their First Amendment rights online and files *amicus* briefs in cases implicating the same. See *PETA v. Young*, No. 20-cv-02913 (E.D. Tex. 2020) (First Amendment challenge to Texas A&M's blocking of critical comments on the university's social media pages); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (quoting EFF's *amicus* brief in striking down a state law that prohibited sex offenders from accessing social media websites).

SUMMARY OF ARGUMENT

Would seeing the following social media post be likely to incite you to imminent lawless action?

Of course it wouldn't. The post is obviously not from an authoritative source. It contains emojis. It says "#weneedyoubradpitt." No reasonable person would, say, destroy property, or attack a police officer, in reaction to this post.

When it comes to the First Amendment, the proper legal analysis in this case has just ended. The post neither aimed, nor was likely, to spur "imminent lawless action," *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and no one contends that government suppression of the post could satisfy strict scrutiny. Nothing further is needed to set up a discussion of whether the appellant, Waylon Bailey, was illegally arrested for engaging in protected speech.

This is not how the district court saw things. The district court expressly invoked *Schenck v. United States*, 249 U.S. 47 (1919), with its long-ago overturned "clear and present danger" test and its discredited "falsely shouting fire in theatre" dictum. Further, the district court focused on whether the post might have "incit[ed] fear"—an inquiry that current First Amendment jurisprudence repudiates.

In Section I, we elaborate on these legal errors. In Section II, we explain why these errors are especially problematic in the context of speech on the Internet.

ARGUMENT

I. The District Court Misapplied The First Amendment

The First Amendment instructs Congress and (via the Fourteenth Amendment) state legislatures to "make no law … abridging the freedom of speech." The list of exceptions to this command is short: it includes obscenity, defamation, "fighting words," speech "integral to criminal conduct," speech that gravely endangers national security, "true threats," and "advocacy intended, and likely, to incite imminent lawless action." *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

The purported basis for Bailey's arrest was a Louisiana anti-terrorism statute that prohibits a speaker from placing "the public" in "sustained fear for their safety," La. R.S. § 14:40.1(A)—a vague standard even before the district court further condensed it to "inciting fear." ROA.467. Speech that stimulates "fear" is not among the narrow exceptions to the First Amendment. See also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly."). And the Supreme Court has been loath to expand the list of unprotected categories of speech, even in cases involving extremely offensive speech. See *United States v. Stevens*, 559 U.S. 460, 469-70 (2010) (rejecting the government's call for a balancing test to determine whether speech is

protected under the First Amendment as both "startling and dangerous"). In treating the creation of "fear" as a potentially legitimate basis for Bailey's arrest, the district court erred.

The only potentially valid basis for the arrest—and the only First Amendment exception the district court raised—was speech inciting "imminent lawless action." *Brandenburg*, 395 U.S. 444. The question, framed in *Brandenburg*'s terms, is whether Bailey's speech was "directed to inciting or producing imminent lawless action and [wa]s likely to incite or produce such action." *Id.* at 447. Yet the district court never squarely considered whether Bailey's post was intended, and likely, to incite lawless action *unprotected by the First Amendment*. Instead, the district court cursorily invoked the *Brandenburg* standard, and then assumed a violation of the Louisiana anti-terrorism statute to be such a "lawless action," despite the First Amendment's plainly barring criminal liability that stands solely on the creation of "fear."

Instead of confining itself to the operative *Brandenburg* standard, the district court reached back to *Schenck*, 249 U.S. 47, which has not been good law since the Supreme Court overrode it in *Brandenburg*. Under *Schenck*, the First Amendment recedes whenever there exists a "clear and present danger" that the speech in question could "bring about the substantive evils that Congress has a right to prevent." 249 U.S. at

52. The *Schenck* test was broader, more nebulous, and altogether more vulnerable to government abuse than the more precise *Brandenburg* test that replaced it. For these and other reasons, the *Schenck* test should "have no place in the interpretation of the First Amendment." 395 U.S. at 449-50 (Black, J., concurring).

Moreover, the district court quoted with approval *Schenck*'s notorious assertion that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. at 52. This is "perhaps the most well-known—yet misquoted and misused—phrase in Supreme Court history." Trevor Timm, *It's Time to Stop Using the 'Fire in a Crowded Theater' Quote*, The Atlantic (Nov. 2, 2012), available at https://bit.ly/3NIWEyV. Besides not being good law for more than 50 years, *Schenck* had nothing to do with fires or theaters. The decision cleared the way for the government to imprison a man for writing a pamphlet in opposition to the draft during World War I. The pamphlet did not call for violence or even civil disobedience. By modern standards, it was positively tame. Make no mistake: the "shouting fire in a theatre" metaphor was used in service of a ruling that, applied today, would empower the government to shut down run-of-the-mill street protests, even mainstream editorial pages, and vast swaths of the Internet.

No surprise therefore that both *Schenck* and the "shouting fire in a theatre" line have been widely and persistently denounced. See, e.g., Timm, *supra* ("['shouting fire in a theatre'] has become a crutch for every censor in America, yet the quote is wildly misunderstood"); Emma Camp, *Yes, You Can Yell 'Fire' in a Crowded Theater*, Reason (Oct. 27, 2022), available at https://bit.ly/3UiB7j8 ("This old canard, a favorite reference of censorship apologists, needs to be retired. It's repeatedly and inappropriately used to justify speech limitations."); Jeff Kosseff, *America's Favorite Flimsy Pretext for Limiting Free Speech*, The Atlantic (Jan. 4, 2022), available at https://bit.ly/3tb6nV8 ("*shouting 'Fire' in a crowded theater* has become an all-purpose justification for regulating speech while evading judicial scrutiny"); Ken White, *Three Generations of a Hackneyed Apologia For Censorship Are Enough*, Popehat (Sept. 19, 2012), available at https://bit.ly/3zTNeuW ("[The] quote is the most famous and pervasive lazy cheat in American dialogue about free speech. … *Schenck* supports a loose and unprincipled interpretation of what the 'fire in a theater' might be.").

In denying Bailey his First Amendment rights, the district court claimed that his post was "remarkably similar in nature to falsely shouting fire in a crowded theatre." ROA.467. This generalized analysis

promotes "the obfuscation of what dangers, exactly, the government has the power to prevent." White, *supra*.

The district court's passing remarks that Bailey's post satisfied the *Brandenburg* exception do not remedy the court's core error: the court took a patently unconstitutional ban on spreading "fear," a discarded legal standard, and one of the most twisted and abused lines of dictum in the U.S. Reports, shook them together, and pulled out a finding of qualified immunity on Bailey's claim for First Amendment retaliation.

II. The District Court Misunderstood The Spontaneous, Fluid, And Often Playful Nature Of Internet Speech

The district court repeatedly wrote that it considered the "context" of Bailey's post, in deciding that the post plausibly lacked First Amendment protection. But the court considered neither the spontaneity and jocosity, nor the shifting contexts, nor the novel cues that give meaning to speech on the modern Internet.

Internet speech enjoys full First Amendment protection. *Reno v. ACLU*, 521 U.S. 844 (1997). On the Internet as elsewhere, "the interest in encouraging freedom of expression … outweighs any theoretical but unproven benefit of censorship." *Id.* at 885. Indeed, this is *especially* true

on the Internet, a "vast democratic forum" where speech norms are constantly evolving. *Id*. at 868.

Generally speaking, a federal court should not take seriously a social media post containing the hashtag "#weneedyoubradpitt." The Internet is rife with speech environments "in which legal decision-makers do not share a frame of linguistic reference with the speaker or her audience." Lyrissa B. Lidsky & Linda R. Norbut, *#I 🤜U: Considering the Context of Online Threats*, 106 Cal. L. Rev. 1885, 1891 (2018). Online speech is "spontaneous," "informal," and "unmediated." *Id*. It replaces "traditional context clues signaling a speaker's intent" with "new clues that may be difficult to decode, such as hashtags, emojis, and gifs." *Id*. "Different social media platforms have different discourse conventions," and speakers "of different ages and backgrounds use social media differently"—factors that add "another layer of contextual complexity." *Id*. All of this "magnif[ies] the potential for a speaker's innocent words to be misunderstood." *Id*. See also So Yeon Park, et al., *Dancing With Ambiguity Online: When Our Online Actions Cause Confusion* 38 (2022); Megan R. Murphy, *Context, Content, Intent: Social Media's Role in True Threat Prosecutions*, 168 U. Pa. L. Rev. 733, 734 (2020); Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New*

Uncertainty About the Constitutional Test for True Threats, 41 Sw. L. Rev. 43, 72 (2011).

Facetiousness, in particular, has become commonplace in online speech—especially during stressful times. See Appellant's Opening Br. 19-20. For example, Hurricane Florence, in 2018, spawned several satirical events, Ethan May, *Facebook Events Invite People to Yell, Angry Tweet and Throw Shoes at Hurricane Florence*, IndyStar (Sept. 13, 2018), available at https://bit.ly/3WWkLhA, such as a "Blow Your Saxophone at Hurricane Florence" event hosted by a music store in Cary, North Carolina (available at https://bit.ly/3UugTTD).

The judiciary should be protecting citizens from government actors bent on exploiting the fluidity and ambiguity of online discourse as a means of punishing disfavored speakers. See *Novak v. City of Parma*, 932 F.3d 421, 428 (6th Cir. 2019) (plaintiff sufficiently alleged that a Facebook account imitating a police department and advertising a "Pedophile Reform Event" was protected speech). Yet in its analysis of probable cause, the district court volunteered that "misinformation was … rampant in the early days of the COVID-19 pandemic"—indeed, that "the W.H.O. termed it an 'infodemic.'" ROA.463. The court then proffered various bits of "false information" that "circulated on social media" in early 2020, such as that "a self-diagnosis of COVID-19 could be made by

holding your breath for 10 seconds" or that "drinking bleach could cure the virus." *Id.*

The presence of such false speech on the Internet cannot justify the police's conduct here. After all, the police could not have rounded up everyone who posted or repeated "false information" in the early days of the Covid-19 pandemic. Spreading "false information" does not, without more, violate the First Amendment. *Alvarez*, 567 U.S. 709. Was the idea that, with all this *other* misinformation floating about, *Bailey's* misinformation was somehow the straw that broke the camel's back? But it would be quixotic to make misinformation legal up to the *n*th piece of misinformation, after which all further pieces of misinformation become illegal. If anything, the court's discussion of all this *other* misinformation cuts *against* a finding of probable cause. When someone says, "It's on the Internet, it must be true," we understand the irony.

Determining what is true, what is reliable, and what is authentic on the Internet is only going to get harder. Deep fakes and AI-generated text are on the horizon. In the future, "our trust in what we read and who we are speaking with online is likely to decrease," and we will have to "find new ways of deciding what and whom to trust." Renée DiResta, *The Supply of Disinformation Will Soon Be Infinite*, The Atlantic (Sept. 20, 2020), available at https://bit.ly/3zSanOk. With these challenges ahead,

it is crucial that, when it comes to jest, mockery, and satire on the Internet, we maintain "a reasonable reader standard, not a 'most gullible person on Facebook' standard." *Novak*, 932 F.3d at 424. A social media post that contained several typos, four exclamation points, two hashtags, two emojis, one reference to Brad Pitt, and zero indicia of coming from an official source fell far short of warranting police action.

CONCLUSION

The judgment should be reversed.

November 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 2,285 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2022, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Corbin K. Barthold