IN THE
INDIANA SUPREME COURT
CAUSE NO. _____

COURT OF APPEALS CAUSE NO. 15A01-1110-CR-00550

DANIEL BREWINGTON,	)	
	)	Appeal from the Dearborn County Superior
Defendant-Appellant,	)	Court
	)	
v.	)	Trial Ct. Cause No. 15D02-1103-FD-0084
	)	
STATE OF INDIANA,	)	The Honorable Brian Hill, Special Judge
	)	
Plaintiff-Appellee.	)	

BRIEF OF *AMICUS CURIAE* ACLU OF INDIANA IN SUPPORT OF PETITION TO TRANSFER

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STATEMENT OF INTEREST

The American Civil Liberties Union of Indiana ("ACLU of Indiana") is the Indiana affiliate of the American Civil Liberties Union, the nation's leading defender of the Bill of Rights. The ACLU of Indiana pursues legal claims against governmental entities in a variety of substantive areas, including violations of individuals' right to engage in free speech. In the estimation of the ACLU of Indiana, the decision of the Court of Appeals in this case contravenes well-established jurisprudence and, in so doing, does great damage to the First Amendment. The holding below, in turn, is likely to substantially chill protected speech and to silence criticism of our public leaders. The ACLU of Indiana therefore has an interest in the outcome of this case and its impact on the First Amendment rights of all Hoosiers, and writes separately to address the constitutional principles that must undergird the proper interpretation of Indiana's intimidation statute.

SUMMARY OF THE ARGUMENT

Expressive activity, particularly when that activity concerns issues profoundly important to a speaker, is often rude, vehement, caustic, and harsh. It is often undertaken in a manner that others find offensive or even disdainful. Yet our constitutional jurisprudence has striven to bestow upon even these manners of speech full First Amendment protection, for that is simply the price that must be paid in order to ensure that "debate on public issues [remains] uninhibited, robust, and wide-open."

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Nonetheless, the court below interpreted Indiana's intimidation statute in a manner that is fundamentally detrimental to these ideals, and in a manner that is likely to significantly chill criticism of public officials.

The first question in ascertaining whether government may criminalize a particular expressive activity is whether the activity constitutes "pure speech" or whether it represents speech intertwined with conduct. The latter designation has been reserved for a distinct and well-defined subset of activities—such as blackmail—and there can be no doubt that Daniel Brewington's blog posts represent "pure speech" as that term is used in First Amendment jurisprudence. The only question, therefore, is whether these blog posts fall within an exception to speech warranting constitutional protection. The Court of Appeals eschewed, to a certain extent, any reliance on these established exceptions. Regardless, neither of the only two (2) exceptions that are even arguably implicated by this case—defamation and "true threats"—are applicable. As such, the Court of Appeals's interpretation of Indiana's intimidation statute violates the First Amendment, and transfer is warranted to correct this misstep.

Finally, the decision below suffers from a more fundamental error. Although most sufficiency arguments are evaluated employing a standard of review that is extremely deferential to the verdict below, the U.S. Supreme Court has demanded a heightened standard when First Amendment interests are at play. Under this standard,

"an appellate court has an obligation 'to make an independent examination of the whole record" in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). The Court of Appeals erred in not applying this heightened standard, and this error infected its determination on the merits.

ARGUMENT

The U.S. Supreme Court has long recognized a "profound national commitment," grounded in the First Amendment, "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 on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The Court of Appeals in this case has interpreted Indiana's intimidation statute in a manner that does great injustice to these fundamental principles, and in a manner that will significantly chill the criticism of public officials. Although perhaps "vehement, caustic, and . . . unpleasantly sharp," Daniel Brewington's statements that gave rise to this prosecution are entitled to full First Amendment protection. Transfer is warranted to correct the Court of Appeals's significant departure from established constitutional jurisprudence on this important issue of law. *See* IND. R. APP. P. 57(H)(3), (6).

I. THE COURT OF APPEALS'S INTERPRETATION OF INDIANA'S INTIMIDATION STATUTE IS UNPARALLELED IN ITS BREADTH.

In pertinent part, Indiana's intimidation statute—Indiana Code § 35-45-2-1—provides that a person who "communicates a threat" to another, with the intent that the person "be placed in fear of retaliation for a prior lawful act" is susceptible to criminal punishment. A "threat," in turn, includes an expression of intention to "expose the person threatened to hatred, contempt, disgrace, or ridicule." IND. CODE § 35-45-2-1(c). The Court of Appeals in this case held both that this statute is constitutionally permissible and that it may be broadly interpreted to include a threat to expose an individual to ridicule (and, presumably, the ridicule itself) for engaging in a prior lawful act. *See Brewington v. State*, __ N.E.2d __, No. 15A01-1110-CR-550, 2013 WL 177923, at *8–9 (Ind. Ct. App. Jan. 17, 2013).

The proper First Amendment analysis, which was largely avoided by the Court of Appeals, is addressed below. However, the far-reaching import of this holding deserves mention at the outset. Under the Court of Appeals's rationale, countless forms of expressive activity that have long since been regarded as forms of constitutionally protected speech have now been rendered criminal in Indiana. For instance, sending a letter to an abortion provider informing him that protesters will be stationed outside of his clinic unless and until he ceases performing abortions almost certainly qualifies as intimidation under the Court of Appeals's interpretation of Indiana law. Similarly, referring to a legislator who voted in favor of a particular piece of legislation as a "communist" who will never again have your support violates the intimidation statute.

As does, as here, referring to a judge as a "child abuser" in order to critique his handling of a family-law dispute.

This is activity at the very heart of the First Amendment's protections. Given the breadth of the Court of Appeals's holding, transfer is warranted to ensure the continuing vitality of our constitutional freedoms and to ensure that criticism is not criminalized.

II. THE COURT OF APPEALS'S DECISION CONTRAVENES ESTABLISHED FIRST AMENDMENT PRECEDENTS.

"First Amendment rights are absolute, guaranteed, and protected unless . . . speech falls within an exception." *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997). Without acknowledging this principle—that any attempt to hold an individual liable for his or her speech must begin from the presumption that the speech is protected—the Court of Appeals affirmed in significant part Mr. Brewington's conviction (and his five-year sentence) for vigorously expressing his own opinions. In so doing, it interpreted Indiana's intimidation statute in a manner that is likely to stifle criticism of public officials and to dramatically limit the marketplace of ideas.

In pertinent part, the Court of Appeals held that Mr. Brewington "intended to threaten" Judge Humphrey by placing him in "fear of retaliation"—by exposure to "hatred, contempt, disgrace, or ridicule"—for a prior lawful act (that is, the issuance of a divorce decree). *Brewington*, 2013 WL 177923, at *8. In other words, Mr. Brewington's criticism alone—his "hatred," "ridicule," "disgrace," or "contempt" for the judge's

actions—was determined sufficient to support his intimidation conviction. This is an interpretation of Indiana Code § 35-45-2-1 that cannot be squared with constitutional norms, for "a statute . . . which makes criminal a form of pure speech[] must be interpreted with the commands of the First Amendment clearly in mind," *Watts v. United States*, 394 U.S. 705, 707 (1969). Indeed, carried to its logical extreme, the Court of Appeals's holding would bar nearly every expression of firmly worded public disagreement, which often exposes leaders to contempt or ridicule.

The constitutional issues that must be decided in this case, therefore, are two-fold: *first,* whether Indiana's intimidation statute, as interpreted, criminalizes "pure speech"; *and second,* if it does criminalize "pure speech," whether the speech it criminalizes is nonetheless unprotected by the First Amendment.

A. *As interpreted by the Court of Appeals, the intimidation statute criminalizes "pure speech."*

There can be little doubt that Mr. Brewington's actions constituted "pure speech." The blog posts at issue in this case are in strict contrast to the situations in which the U.S. Supreme Court has permitted the criminalization of speech that is intertwined with conduct:

> The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. . . . A man may be punished for encouraging the commission of a crime or for uttering "fighting words." This principle has been applied to picketing and parading in labor disputes. These authorities make it clear . . . that it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the

> conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.
>
> . . . We are not concerned here with such a pure form of expression as newspaper content or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct.

Cox v. Louisiana, 379 U.S. 559, 563–64 (1965) (internal citations and quotations omitted); *see also, e.g., Adderly v. Florida*, 385 U.S. 39, 46–48 (1966).

Thus, where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms," although the applicability of this standard is limited to those cases in which "the governmental interest is unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). It is this principle that permits the criminalization of activities such as extortion or blackmail, which are "integral to criminal conduct," even though they of course require speech for their execution. *See, e.g., United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1584 (2010).[1]

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[1] In this manner, the Court of Appeals's reliance on *People v. Hubble*, 401 N.E.2d 1282 (Ill. Ct. App. 1980), *see Brewington*, 2013 WL 177923, at *8, is unpersuasive. In *Hubble*, a defendant "threatened to bring charges against [his former wife] of trespass, forgery, and violation of his parental visitation rights unless she agreed not to testify against him in [a] forthcoming trial." 401 N.E.2d at 1283. The court determined it irrelevant that the defendant may have had lawful authority to have charges brought against his ex-wife, for the basis of an intimidation charge is "a threat made with intent to coerce another person"; "[i]t is the exercise of an improper influence which is the gravamen of the offense." *Id.* at 1285. Not only did *Hubble* not remotely address the

The analogy that the Court of Appeals drew between its interpretation of the intimidation statute in this case and traditional statutes outlawing blackmail, *see* 2013 WL 177923, at *8, is misleading. Although the court below quoted a portion of a statute defining the crime of blackmail that was at issue in *Meek v. State*, 205 Ind. 102, 185 N.E. 899, 900 (1933), it did not mention the second prong of that definition: a threat must be made "with intent to extort or gain from such person any chattel, money or valuable security . . . or with any intent to compel the person threatened to do any act against his will," *id.* There is certainly no need to determine whether even this definition would pass constitutional scrutiny following the intervening eight (8) decades of First Amendment jurisprudence, for it is the attempt to exert improper influence that permits blackmail and extortion to be criminalized. *See, e.g., Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243–45 (4th Cir. 1997).

This principle, however, has never been extended remotely so far as would be necessary for Mr. Brewington's blog posts (or other critical commentary)—which, while certainly crass and judgmental, do not specifically exhort any individual to action in exchange for a tangible benefit—to fall outside the realm of "pure speech." The most profound flaw in the Court of Appeals's rationale is that it ignores the constitutional distinction between referring to a judge hyperbolically as a "child abuser" and

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First Amendment limitations on a criminal intimidation statute but it specifically interpreted the statute as addressing extortionist behavior rather than "pure speech." Here, by contrast, the *quid pro quo* element necessary to remove Mr. Brewington's blog posts from the realm of "pure speech" is entirely lacking.

informing that judge that, if he does not rule in a particular manner, defamatory information will be published about him.

B. *No exception to the First Amendment's proscription on punishing persons for expressive conduct exists in this case.*

The question, then, is whether Mr. Brewington's speech falls within an established exception to the First Amendment's proscription on punishing persons for expressive conduct. It does not appear that the State has yet attempted to fit Mr. Brewington's speech within these exceptions, and the Court of Appeals certainly did not. However, neither of the two (2) exceptions that are even arguably applicable—defamation and "true threats"—may justify the criminalization of Mr. Brewington's speech.[2]

1. Defamation: The Court of Appeals explicitly refused to incorporate "principles of civil defamation law" into Indiana's intimidation statute, instead holding that "it is irrelevant whether the conduct Brewington intended to disclose to the public

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[2] The Court of Appeals held that a statement "intend[ing] to place [Judge Humphrey] in fear by a threat" is "of no value to public discourse and is, in fact, harmful to the administration of justice when the victim is a judicial officer." 2013 WL 177923, at *9. To the extent that this holding can be interpreted as removing something other than a "true threat" from the realm of First Amendment protection—and perhaps requiring a judicial determination of whether the harm caused by speech outweighs its value to public discourse—the U.S. Supreme Court has been clear that this form of *ad hoc* balancing may not be employed to carve out new categories of unprotected speech. *See United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1586 (2010) (The Court's precedents "do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.")

actually occurred or was an outright fabrication." 2013 WL 177923, at *8. This holding, however, cannot be squared with the decision of the U.S. Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964). In *Garrison*, the Court invalidated a criminal libel statute that permitted a finding of guilt upon the ill-will of a speaker rather than upon the speaker's reckless disregard for the truth:

> Debate 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. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, it becomes a hazardous matter to speak out against a popular politician . . . .
>
> We held in *New York Times* that a public official might be allowed the civil remedy [for defamation] only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times* apply with no less force merely because the remedy is criminal.

Id. at 73–74 (internal quotation and citation omitted). Of course, the Court of Appeals in this case has done precisely what was invalidated half a century ago in *Garrison*: it has criminalized expressions of hatred or contempt.

Given the precedential import of the Court of Appeals's decision, transfer is warranted to correct the holding that the "actual malice" test of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has no applicability here. However, even had the court below properly applied this test, under which a person may not be held liable absent a demonstration that he spoke with knowledge that his statement was false or with

reckless disregard to whether it was true, Mr. Brewington's conviction cannot be justified. This is so for two (2) reasons. First, the "actual malice" standard "is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity." *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Translated to the context of rhetorical hyperbole, this means that Mr. Brewington must have actually intended his speech as a statement of fact, and no evidence of such subjective intentions exists.

And second, a reasonable person viewing Mr. Brewington's blog posts would not have viewed them as statements of fact. While admittedly caustic, the repeated reference to the judge as a "child abuser" and as engaging in unethical behavior, read in context, is clearly a reaction to the judicial treatment of his own children and his own case, and not an accusation of criminal conduct. This is clear not only from the language utilized by Mr. Brewington, but by the forum in which he chose to express his opinions. After all, "blogs are a subspecies of online speech which inherently suggest that statements made there are not likely provable assertions of fact." *Obsidian Fin. Group, LLC v. Cox*, 812 F. Supp. 2d 1220, 1223 (D. Or. 2011).[3] Against this backdrop, the Court of Appeals nonetheless held that Mr. Brewington's statements went "beyond hyperbole" insofar as the divorce decree issued by Judge Humphrey simply "imposed reasonable visitation restrictions . . . out of a desire to protect the children's well-being."

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[3] *See also, e.g., Art of Living Found. v. Does*, No. 10-cv-05022, 2011 WL 2441898, at *7 (N.D. Cal. June 15, 2011); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1101 (N.D. Cal. 1999).

2013 WL 177923, at *9. Of course, Mr. Brewington's criticism does not fall outside the realm of First Amendment protection simply because the divorce decree issued by Judge Humphrey is legally supportable. The apparent holding to the contrary is anathema to the First Amendment and finds no basis whatsoever in established jurisprudence.

2. "True threat": Nor may the decision below be justified on the basis of that Mr. Brewington's speech constituted a purported threat. The Court of Appeals did not partake in analysis under the "true threat" doctrine, although this doctrine is the one typically employed to justify criminal intimidation statutes such as the one at issue here. *See, e.g., Virginia v. Black*, 538 U.S. 343, 360 (2003) ("Intimidation in the constitutionally proscribable sense of the word is a type of true threat."). It should, however, require little citation to demonstrate that Mr. Brewington's statements fall far short of a "true threat": after all, he neither threatened nor indicated that he planned to take any action whatsoever—let alone resort to violence—and his blog posts occurred after the divorce decree issued by Judge Humphrey was finalized.

A statement qualifies as a "true threat," unprotected by the First Amendment, if "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." *Id.* at 359. Traditionally, to determine whether speech constitutes a "true threat," most courts applied "an objective 'reasonable person' test," which "asks whether a reasonable

speaker would understand that his statement would be interpreted as a threat or alternatively, whether a reasonable listener would interpret the statement as a threat." *United States v. Parr*, 545 F.3d 491, 499 (7th Cir. 2008) (internal parentheticals omitted). However, following *Black*, several federal circuits "have held that a statement qualifies as a true threat only if the speaker subjectively intended it as a threat." *Id.* (citing cases).

The particulars surrounding the import of *Black* to "true threat" analysis, which the Seventh Circuit describes at length in *Parr*, need not be examined here: Mr. Brewington's speech does not meet any test that would remove it from full First Amendment protection. No reasonable person viewing Mr. Brewington's blog posts would conclude that Judge Humphrey was at risk of suffering a violent attack, and certainly no evidence exists that Mr. Brewington subjectively intended his speech to be threatening rather than merely critical. The criminalization of his speech may likewise not be justified on the basis of "true threat" doctrine.

III. THE COURT OF APPEALS'S DEFERENCE TO THE JURY'S VERDICT CONTRAVENES ITS CONSTITUTIONAL DUTY TO CONDUCT AN INDEPENDENT REVIEW OF THE SPEECH AT ISSUE.

The Court of Appeals committed a second significant error in evaluating Mr. Brewington's First Amendment arguments: it applied the traditional appellate standard of review for challenges to the sufficiency of the evidence. *See Brewington*, 2013 WL 177923, at *7.

In cases raising First Amendment issues, however, the U.S. Supreme Court has "repeatedly held that an appellate court has an obligation 'to make an independent examination of the whole record" in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (citation omitted); *see also, e.g., Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 455 (Ind. 1999). As the Court noted in *Bose Corp.*, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact," 466 U.S. at 501, which is necessary "in order to preserve the precious liberties established and ordained by the Constitution," *id.* at 511.

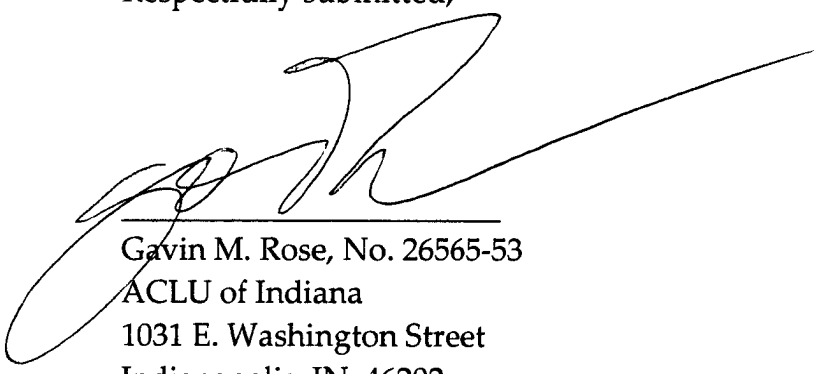
Nor may the failure of the Court of Appeals to engage in independent appellate review of Mr. Brewington's statements be characterized as harmless. To the contrary, the Court was clear that its ultimate holding with respect to Mr. Brewington's First Amendment arguments was premised on its perceived obligation to defer to the conclusions of the jury: "there was ample evidence from which the jury could have concluded that Brewington accused Judge Humphrey of child abuse and professional misconduct while knowing that the accusations were false." 2013 WL 177923, at *9.

CONCLUSION

Words can certainly hurt. However, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste." *New York Times*, 376 U.S. at

269. The Court of Appeals interpreted Indiana Code § 35-42-2-1 in a manner that cannot be squared with fundamental First Amendment principles and, in so doing, has threatens to stifle the very sort of criticisms that our constitutional jurisprudence has long sought to protect. Transfer is warranted to ensure that these errors are corrected.

Respectfully submitted,



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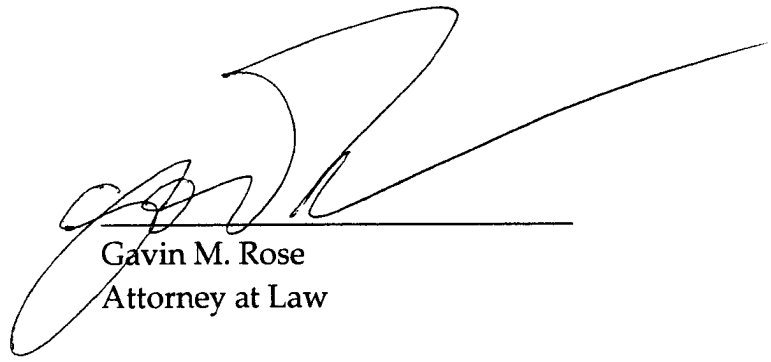
CERTIFICATE OF WORD COUNT

I hereby certify, pursuant to Rule 44(E) of the Indiana Rules of Appellate Procedure, that this brief contains no more than four thousand two hundred (4,200) words, including footnotes and excluding the parts of the brief exempted by Rule 44(C) of the Indiana Rules of Appellate Procedure, as calculated by the word processing system used to prepare this brief.



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