Terrorism, Violent Extremism, and the Internet: Free Speech Considerations

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SUMMARY

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Terrorism, Violent Extremism, and the Internet: Free Speech Considerations

Recent acts of terrorism and hate crimes have prompted a renewed focus on the possible links between internet content and offline violence. While some have focused on the role that social media companies play in moderating user-generated content, others have called for Congress to pass laws regulating online content promoting terrorism or violence. Proposals related to government action of this nature raise significant free speech questions, including (1) the reach of the First Amendment's protections when it comes to foreign nationals posting online content from abroad; (2) the scope of so-called "unprotected" categories of speech developed long before the advent of the internet; and (3) the judicial standards that limit how the government can craft or enforce laws to preserve national security and prevent violence.

At the outset, it is not clear that a foreign national (i.e., a non-U.S. citizen or resident) could invoke the protections of the First Amendment in a specific U.S. prosecution or litigation involving online speech that the foreign national posted from abroad. The Supreme Court has never directly opined on this question. However, its decisions regarding the extraterritorial application of other constitutional protections to foreign nationals and lower court decisions involving speech made by foreign nationals while outside of the United States suggest that the First Amendment may not apply in that scenario. In contrast, free speech considerations are likely to be highly relevant in evaluating the legality of (1) proposals for the U.S. government to regulate what internet users in the United States can post, or (2) the enforcement of existing U.S. laws where the government seeks to hold U.S. persons liable for their online speech.

Although the government typically can regulate conduct without running afoul of the First Amendment, regulations that restrict or burden expression often do implicate free speech protections. In such circumstances, courts generally distinguish between laws that regulate speech on the basis of its content (i.e., the topic discussed or the message expressed) and those that do not, subjecting the former to more stringent review. A law that expressly restricts online communications or media promoting violence or terrorism is likely to be deemed a content-based restriction on speech; whereas a law that primarily regulates conduct could be subject to a less stringent standard of review, unless its application to speech turns on the message expressed. Whether such laws would survive First Amendment scrutiny depends on a number of factors.

Over the past 50 years, the Supreme Court has generally extended the First Amendment's free speech protections to speech that advocates violence in the abstract while allowing the government to restrict or punish speech that threatens or facilitates violence in a more specific or immediate way. The subtle distinctions that have developed over time are reflected in the categories of speech that the court has deemed unprotected, meaning that the government generally can prohibit speech in these areas because of its content. These include incitement to imminent lawless action, true threats, and speech integral to criminal conduct. Although judicial decisions have helped to define the scope of some of these categories, open questions remain as to how they apply in the context of online speech. For instance, legal scholars have questioned what it means for speech to incite "imminent" violence when posted to social media. They have also asked how threats should be perceived when made in the context of online forums where hyperbolic speech about violence is common.

The extent to which the government can regulate speech promoting violence or terrorism also depends on whether its law or action satisfies the applicable level of scrutiny that the Court has developed to evaluate measures that restrict or burden speech. In general, laws that regulate protected speech on political or ideological matters are subject to strict scrutiny, a test that requires the government to demonstrate that its law is narrowly tailored to achieve a compelling governmental interest. Nevertheless, in some cases, courts have concluded that the government's national security interests justify restrictions on protected speech, such as in 2010 when the Supreme Court upheld certain applications of a federal statute prohibiting providing material support to U.S.-designated foreign terrorist organizations.

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As the Supreme Court has observed, while the First Amendment protects the "freedom of speech,"[1] it "does not protect violence."[2] But when speech promotes violence, a tension can form between the values of liberty and security.[3] In an oft-quoted passage from a dissenting opinion, Justice Robert Jackson argued that the problems this tension creates are not insurmountable but must be confronted with a dose of pragmatism: a government can temper "liberty with order," but to treat free speech as absolute threatens to "convert the constitutional Bill of Rights into a suicide pact."[4] While Justices of the Court have often disagreed over when free speech rights must yield to the government's interests,[5] when it comes to speech promoting violence, the Court has rejected an all-or-nothing approach.[6] Over the past 50 years, the Court has drawn a line between speech that advocates violence in the abstract and speech that facilitates it in a specific way, with the former receiving more robust constitutional protections.[7] It has done so because, in the Court's view, upholding the First Amendment requires preserving "uninhibited, robust, and wide-open" debate on public issues,[8] even if that means allowing individuals to express ideas that are "deeply offensive to many."[9]

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[1] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[2] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

[3] *See* United States v. Mehanna, 735 F.3d 32, 40 (1st Cir. 2013) ("Sometimes, [the government's efforts to combat terrorism] require a court to patrol the fine line between vital national security concerns and forbidden encroachments on constitutionally protected freedoms of speech and association.").

[4] *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."); Haig v. Agee, 453 U.S. 280, 284, 309-10 (1981) (reiterating that the Constitution "is not a suicide pact" in rejecting the First Amendment and due process arguments of a former Central Intelligence Agency (CIA) employee who challenged the U.S. government's revocation of his U.S. passport for repeatedly exposing the identities of alleged undercover CIA agents and sources abroad with "the declared purpose of obstructing intelligence operations").

[5] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 41 (2010) (Breyer, Ginsburg & Sotomayor, JJ., dissenting) (dissenting from the Court's opinion insofar as the majority held that the government may, consistent with the First Amendment, "prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated [foreign terrorist] organizations' lawful political objectives"); United States v. Stevens, 559 U.S. 460, 482-500 (2010) (Alito, J., dissenting) (dissenting from the Court's opinion holding that a law banning certain depictions of animal cruelty violated the First Amendment); Dennis v. United States, 341 U.S. 494, 582-83 (1951) (Douglas, J., dissenting) (dissenting from the Court's opinion affirming convictions for conspiracy to advocate the overthrow of the U.S. government, stating, "[W]hat petitioners did was to organize people to teach and themselves teach the Marxist-Leninist doctrine contained chiefly in four books . . . . But if the books themselves are not outlawed, if they can lawfully remain on library shelves, by what reasoning does their use in a classroom become a crime?").

[6] *See Claiborne Hardware Co.*, 458 U.S. at 928 (reasoning that when "spontaneous and emotional appeals for unity and action in a common cause" do not "incite lawless action, they must be regarded as protected speech"); *cf.* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 804 (2011) (asking whether violent video games "constitute a 'well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,' . . . ; and if not, whether the regulation of such works is justified by . . . a compelling state interest" (internal citation omitted)).

[7] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (distinguishing "mere advocacy" from "incitement to imminent lawless action"). See the section entitled "Protected and Unprotected Speech" *infra* for a discussion of the degree to which speech advocating violence is protected under the First Amendment.

[8] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (observing the "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 on government and public officials").

[9] United States v. Eichman, 496 U.S. 310, 318 (1990) (holding that defendants' prosecutions for violating a federal law prohibiting flag desecration violated the First Amendment); *see also* Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public

In more recent years, some have begun to question whether and how the Court's decisions in this area should apply to speech online.[10] The "vast democratic fora of the Internet"[11] have provided ample platforms not only for those seeking to debate issues or express controversial views, but also for individuals and entities planning violent attacks or threatening violence online.[12] Many policymakers and commentators, including some Members of Congress, have expressed concerns about the proliferation of social media content[13] promoting terrorism and violence[14] and the influence such speech can have on other internet users.[15] Some have called on Congress to restrict or even prohibit such content,[16] which raises the question of whether the First Amendment would

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debate.").

[10] *See, e.g.*, Michael J. Sherman, Brandenburg *v. Twitter*, 28 GEO. MASON U. CIV. RTS. L.J. 127, 135-36 (2018) (stating that while difficult to predict, the Supreme Court "might decide that the new realities of social media require a re-thinking of incitement and imminence standards established in 1969"); Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I[gun image]U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886, 1889 (2018) (arguing that the Supreme Court "has done relatively little to guide police, prosecutors, lower court judges, and juries seeking to make the necessary and difficult distinctions" between constitutionally protected speech online and true threats).

[11] Reno v. ACLU, 521 U.S. 844, 868 (1997).

[12] Wash. Post v. McManus, No. PWG-18-2527, 2019 U.S. Dist. LEXIS 3073, at *50 (D. Md. Jan. 3, 2019) ("[F]or all of its many benefits, the Internet has opened up virtually limitless opportunities for hostile foreign powers, criminals, and terrorists to sow mischief and undermine our democratic institutions."), *appeal filed*, No. 19-1132 (4th Cir. Feb. 4, 2019); *see also* United States v. Wheeler, 776 F.3d 736, 745 n.4 (10th Cir. 2015) ("Several attributes of the Internet substantially amplify the fear an individual can instill via threats or incitement. Such threats have the ability to reach a vast audience—far more than the traditional speaker or author published in a single venue. The threats may often come cloaked in anonymity, allowing authors to make menacing statements they would never consider making to an individual in person. And, given the prevalence and diversity of Internet fora and discussion boards, such exhortations may often find a receptive audience of like-minded individuals—perhaps audiences more willing to do the bidding of one urging violent action.").

[13] Social media refers to "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." *Social Media*, MERRIAM-WEBSTER (2019), https://www.merriam-webster.com/dictionary/social%20media. *See generally* CRS Report R45337, *Social Media Adoption by Members of Congress: Trends and Congressional Considerations 7*, by Jacob R. Straus (providing examples of social media platforms and explaining how established social media platforms like Facebook and Twitter "provide users with the ability to post multiple types of content (e.g., video, pictures, and text)," while other platforms "generally, though not universally, specialize in a single type of media").

[14] This report refers to the concepts of "promoting terrorism" and "promoting violence" to encompass a range of speech (e.g., advocacy, incitement, recordings of violent crime). The use of this shorthand is not meant to equate one form of speech to another in terms of the threat that it may pose to U.S. national security or its connection to criminal activity, but rather to facilitate the discussion of First Amendment principles and standards that may affect the government's ability to regulate internet speech to prevent violence.

[15] *See Terrorism and Social Media: #IsBigTechDoingEnough?: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 115th Cong. 1 (2018) [hereinafter *Terrorism and Social Media Hearing*] (statement of Chairman John Thune) (expressing the view that "[w]e all have a vested interest" in social media companies' success in identifying and removing terrorist content and that "this Committee has a significant role to play in overseeing the effectiveness of their efforts"); *see id.* (statement of Ranking Member Bill Nelson) (remarking that "it is startling that today, a terrorist can be radicalized and trained to conduct attacks all through social media" and "then a terrorist cell can activate that individual to conduct an attack through the internet—creating in effect a terrorist drone controlled by social media"); Tarleton Gillespie, *How Social Networks Set the Limits of What We Can Say Online*, WIRED (June 26, 2018, 7:00 AM), https://www.wired.com/story/how-social-networks-set-the-limits-of-what-we-can-say-online/ (noting that "a slow reconsideration of platform responsibility is under way" and that "[p]ublic and policy concerns around illicit content, initially focused on sexually explicit and graphically violent images, have expanded to include hate speech, self-harm, propaganda, and extremism"). *See generally* Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 13 (2017) ("The link between social media platforms and terrorism competes with privacy concerns as one of the most discussed and most concerning, dynamics emanating from modern society's explosive utilization of these communication technologies.").

[16] *E.g.*, Alexander Tsesis, Opinion, *Inciting Terror on the Internet Can Be Regulated. Congress Needs to Act*, CNN

allow such regulation.[17] A number of legal scholars have explored these issues, and some have proposed recommendations to Congress about how best to address these concerns in accordance with the First Amendment.[18]

Although governmental efforts to combat online content promoting terrorism or violence could take a number of forms, this report focuses on the First Amendment implications of imposing civil or criminal liability on individual internet users (i.e., the originators of the content) rather than the social media companies or internet service providers themselves. As such, it focuses on the underlying First Amendment issues that are likely to be common to both forms of government action, but does not discuss the additional considerations attendant to regulating a social media platform, which are the subject of another CRS report.[19] The report begins with some background on the use of the internet by terrorist groups and the reported influence of online content on certain individuals accused of committing violent attacks. It then considers the question of *who* can invoke the First Amendment by analyzing whether its free speech protections apply to foreign

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BUSINESS (Mar. 23, 2019, 8:31 AM), https://www.cnn.com/2019/03/23/perspectives/new-zealand-terrorism-internet-regulate/index.html; *see also* Mark Zuckerberg, Opinion, *The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html ("I believe we need a more active role for governments and regulators. . . . Regulation could set baselines for what's prohibited and require companies to build systems for keeping harmful content to a bare minimum."). *See generally* DANIELLE KEATS CITRON, CATO INSTITUTE, POLICY ANALYSIS: WHAT TO DO ABOUT THE EMERGING THREAT OF CENSORSHIP CREEP ON THE INTERNET 3 (2017) (discussing indicators of "how much the debate has moved toward government oversight of digital speech" globally).

[17] *See* U.S. CONST. amend. I ("*Congress* shall make no law . . . abridging the freedom of speech . . . ." (emphasis added)). *Compare* Eric Posner, *ISIS Gives Us No Choice But to Consider Limits on Speech*, SLATE (Dec. 15, 2015), https://slate.com/news-and-politics/2015/12/isiss-online-radicalization-efforts-present-an-unprecedented-danger.html ("We do not currently face a national emergency comparable to a world war, but anti-propaganda laws may nonetheless be warranted because of the unique challenge posed by ISIS's sophisticated exploitation of modern technology."), *with* David Post, *Protecting the First Amendment in the Internet Age*, WASH. POST: VOLOKH CONSPIRACY (Dec. 21, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/21/protecting-the-first-amendment-in-the-internet-age/ ("True, limits on speech have been 'tolerated . . . during times of national emergency' [referring to Professor Eric Posner's article], but we look back at them—at least, I look back at them—as deeply misguided, counterproductive and often shameful."). *See generally* Cecilia Kang, *Can Tech Companies Silence Hate Speech?*, N.Y. TIMES, Apr. 22, 2019, at B1 (stating that "Mr. Zuckerberg's call for action, and his lobbyists' response [suggesting that Zuckerberg's op-ed was not directed at U.S. regulators], encapsulate why the United States is on an island of its own when it comes to managing violent and racist speech online" and reporting that while "Britain, Germany, Australia, New Zealand and India have adopted or are considering laws that require stricter content moderation by tech platforms[,] . . . none of them need to work around free speech protections like the First Amendment in the United States").

[18] *See* Alexander Tsesis, *Essay: Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 708 (2017) (arguing that a "narrowly tailored, multi-pronged law should be grounded on permissible restrictions against incitement, material support for terror, and true threats" and that "[t]hese three separate doctrines can be used to stem the growing volume of terrorist recruitment, indoctrination, incitement, and coordination available on social media"); Posner, *supra* note 17 (suggesting "a law that makes it a crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions," and proposing changes to First Amendment standards to accommodate such a law); Daniel Hoffman, *Online Terrorism Advocacy: How AEDPA and Inchoate Crime Statutes Can Simultaneously Protect America's Safety and Free Speech*, 2 NAT'L SEC. L.J. 200, 251 (2014) (arguing that new laws to address "online terrorism advocacy" are unnecessary because "existing AEDPA [Antiterrorism and Effective Death Penalty Act] and inchoate crime statutes and their associated case law" give prosecutors "the tools to explore and better evolve the legal boundaries that Congress intended based on the threat").

[19] See CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon (discussing potential legal barriers to regulating social media companies' decisions to host or remove content).

nationals[20] when they post online content from abroad, for example, in circumstances such as U.S. prosecutions where online content is introduced as evidence of a crime.[21] The report then discusses the overarching First Amendment principles that bear on *what* the government may regulate under the First Amendment, including (1) the distinction between regulating conduct and speech; (2) the presumed invalidity of content-based laws; and (3) relevant "unprotected" categories of speech that generally can be restricted *because of* their content. The report next discusses the strict scrutiny standard and the overbreadth doctrine, which impose limitations on *how* the government can regulate by requiring that laws restricting speech be sufficiently tailored and not so broad as to chill protected speech.[22] Finally, the report concludes with some considerations for Congress in evaluating the constitutionality of regulating online content promoting terrorism or violence.

Background

According to the Federal Bureau of Investigation (FBI), the internet and, in particular, the use of social media are among the key "factors [that] have contributed to the evolution of the terrorism threat landscape" since the September 11, 2001, terrorist attacks.[23] Certain organizations that track or study hate crimes also cite the internet as a tool used to intimidate and harass people because of their race, ethnicity, religion, sexual orientation, or other attributes.[24] At the same time,

[20] This report uses the term "foreign national" to refer to a person who is a citizen of a country other than the United States and who is not a U.S. citizen or lawful permanent resident. *Cf.* 52 U.S.C. § 30121(b)(2) (defining "foreign national" for purposes of certain federal election laws to include "an individual who is not a citizen of the United States or a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act) and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act").

[21] Outside of free speech concerns, other legal considerations, such as the United States' jurisdiction over a criminal defendant or civil litigant, the extraterritorial application of U.S. statutes, and the potential applicability of international agreements, are beyond the scope of this report.

[22] *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 864-65 (1991) ("[S]peech may be privileged under current [First Amendment] doctrine either because it belongs to a constitutionally protected category, or because it merits protection as the result of a balancing test. Which type of privilege is relevant typically depends on the type of government regulation in question. If the government endeavors to regulate speech on the basis of content, the first and frequently dispositive question is whether the speech falls within a protected category. . . . By contrast, when speech enjoys full First Amendment protection, the state generally may not regulate it on the basis of content, even if the speech is harmful, unless the regulation is necessary to advance some compelling government interest." (footnotes omitted)).

[23] *See* FBI, *What We Investigate: Terrorism*, https://www.fbi.gov/investigate/terrorism (last visited Apr. 23, 2019) (citing the internet, the use of social media, and "homegrown violent extremists," which the FBI defines as "global-jihad-inspired individuals who are based in the U.S.," as "[t]hree factors [that] have contributed to the evolution of the terrorism threat landscape").

[24] *See Hate Crimes and the Rise of White Nationalism: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 2 (2019) [hereinafter *Hate Crimes Hearing*] (statement of Kristen Clarke, President and Executive Director, Lawyers' Committee for Civil Rights Under Law) (stating, "[T]he actions of online white supremacists are new in form but not substance. By directing hateful threats, intimidation, and harassment online at African Americans, Latinos, immigrants, Muslims, Jews, and other historically marginalized communities, they follow the same script as generations of white supremacists that assaulted civil rights activists at lunch counters, defaced houses of worship, and berated children on their way to school."); *id.* at 12 (statement of Eileen Hershenov, Senior Vice President, Policy, Anti-Defamation League) (positing that anonymous "'imageboards,' a type of online discussion forum originally created to share images," have contributed to the "toxicity on social media," and linking these forums to "targeted [online] harassment campaign[s]"); *see also* Rachel Hatzipanagos, *How Online Hate Turns Into Real-Life Violence*, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/ (reporting that "[s]everal incidents in recent years have shown that when online hate goes offline, it can be deadly").

some commentators have questioned the purported link between what some refer to as "hate speech" and bias-motivated crimes[25] or have expressed concern that focusing on the ideological motivations of speakers has led to calls to criminalize protected speech divorced from any criminal intent or action.[26]

While the nature or extent of the relationship between online speech and criminal conduct may be disputed, the use of the internet by terrorist groups is well documented.[27] U.S.-designated terrorist groups[28] such as the Islamic State[29] (also known as ISIS or ISIL),[30] Al Qaeda,[31] Hamas,[32] and Al Shabaab,[33] have long used social media to disseminate their ideologies and recruit new members to their causes. The Islamic State group has used Twitter and YouTube to disseminate videos of its

[25] *See, e.g.*, *Hate Crimes Hearing*, *supra* note 24 (statement of Candace Owens, Communications Director, Turning Point USA) (acknowledging "pockets of evil," but opining that changes in how data are collected and how hate crime is defined account for purported increases in hate crimes linked to white nationalism).

[26] *See, e.g.*, Kim R. Holmes, Commentary, *The Origins of "Hate Speech*,*"* THE HERITAGE FOUNDATION (Oct. 22, 2018), https://www.heritage.org/civil-society/commentary/the-origins-hate-speech (stating, "There are very serious problems with the concept of hate speech. For one thing, it fails to distinguish between legitimate political content, which is protected by the Constitution, and explicit intentions to commit violence, which are not.").

[27] *See, e.g.*, U.N. OFFICE ON DRUGS & CRIME, THE USE OF THE INTERNET FOR TERRORIST PURPOSES 3 (2012) (identifying "six sometimes overlapping categories" for the purpose of classifying "the means by which the Internet is often utilized to promote and support acts of terrorism," which are "propaganda (including recruitment, radicalization and incitement to terrorism); financing; training; planning (including through secret communication and open-source information); execution; and cyberattacks); FBI, *supra* note 23 (noting with regard to social media use that "ISIS, in particular, encourages sympathizers to carry out simple attacks where they are located against targets"); *Terrorism and Social Media Hearing*, *supra* note 15, at 1 (statement of Clint Watts, Robert A. Fox Fellow, Foreign Policy Research Institute) (stating, "Ten years ago, it was al Qaeda in Iraq videos on YouTube. A few years later, al Shabaab's deadly rampages played out on Twitter. Shortly after, Facebook groups and Twitter feeds brought the Islamic State to the world's attention and into the homes of new recruits, before they scurried off to other social media applications like Telegram.").

[28] *See generally Foreign Terrorist Organizations*, U.S. DEPARTMENT OF STATE, https://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Apr. 24, 2019); CRS In Focus IF10613, *Foreign Terrorist Organization (FTO)*, by John W. Rollins.

[29] *See generally* CRS Report R43612, *The Islamic State and U.S. Policy*, by Christopher M. Blanchard and Carla E. Humud.

[30] *See* FBI, *supra* note 23 ("ISIS, in particular, [uses social media to] encourage[] sympathizers to carry out simple attacks where they are located against targets—in particular, soft targets—or to travel to ISIS-held territory in Iraq and Syria and join its ranks as foreign fighters."); Antonia Ward, *ISIS's Use of Social Media Still Poses a Threat to Stability in the Middle East and Africa*, THERANDBLOG (Dec. 11, 2018), https://www.rand.org/blog/2018/12/isiss-use-of-social-media-still-poses-a-threat-to-stability.html ("Despite territorial losses and repression of civilian internet access, ISIS will likely continue to seek to leverage individuals' increased [information and communication technologies] usage in Africa and the Middle East to attract new followers.").

[31] *See* Ward, *supra* note 30 ("Al Qaeda in the Arabian Peninsula (AQAP) has used social media and online propaganda for more than a decade, launching its English language digital magazine, which inspired the Boston Marathon bombers, in 2010."); Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES MAGAZINE (Aug. 27, 2015), http://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html (discussing the "digital legacy" of Anwar al-Awlaki, an American citizen who became closely involved with the Al Qaeda affiliate in Yemen).

[32] *See* Sheera Frenkel & Ben Hubbard, *After Social Media Bans, Militant Groups Found Ways to Remain*, N.Y. TIMES (Apr. 19, 2019), https://www.nytimes.com/2019/04/19/technology/terrorist-groups-social-media.html (reporting that "Hamas and Hezbollah, in particular, have evolved by getting their supporters to publish images and videos that deliver their message—but that do not set off the alarm bells of the social media platforms").

[33] *See* Ken Menkhaus, *Al-Shabaab and Social Media: A Double-Edged Sword*, 20 BROWN J. WORLD AFF. 309, 309 (2014) ("Al-Shabaab . . . has distinguished itself as one of the most sophisticated—and, in more recent times, conflicted—jihadi users of communication technology. In its early years, it effectively used Internet chat rooms, websites, and YouTube videos to recruit and fundraise internationally. Its real-time tweets during the group's terrorist attack on Nairobi's Westgate Mall in September 2013 became almost as big a media story as the attack itself.").

fighters executing prisoners and to claim credit for attacks around the world.[34] Al Shabaab used Twitter to claim credit for the 2013 attack on the Westgate Shopping Mall in Nairobi, Kenya, and to distribute information about the attack while it unfolded.[35] News outlets are also beginning to examine how the alleged perpetrator of the March 2019 terrorist attacks on two mosques in New Zealand may have used social media to announce and promote his actions.[36]

In addition, the internet reportedly has played a key role in certain individuals' personal "journey[s] to terrorism" or violent extremism[37]—a process often referred to as "radicalization."[38] For example, the person convicted of killing nine black parishioners in a South Carolina church in 2015 was said to have "self-radicalized" online, adopting a "white supremacy extremist ideology, including a belief in the need to use violence to achieve white supremacy."[39] In 2015, it was

[34] Rick Gladstone & Vindu Goel, *ISIS Is Adept on Twitter, Study Finds*, N.Y. TIMES (Mar. 5, 2015), https://www.nytimes.com/2015/03/06/world/middleeast/isis-is-skilled-on-twitter-using-thousands-of-accounts-study-says.html; Mark Townsend & Toby Helm, *Jihad in a Social Media Age: How Can the West Win an Online War*, THE GUARDIAN (Aug. 23, 2014), https://www.theguardian.com/world/2014/aug/23/jihad-social-media-age-west-win-online-war; *see also* Greg Myre & Camila Domonoske, *What Does It Mean When ISIS Claims Responsibility for an Attack?*, NPR (May 24, 2017), https://www.npr.org/sections/thetwo-way/2017/05/24/529685951/what-does-it-mean-when-isis-claims-responsibility-for-an-attack (explaining that one way ISIS claims credit for attacks is through its news agency posting stories on social media and the agency's website that tie an attack to ISIS).

[35] Peter Bergen, *Are Mass Murderers Using Twitter as a Tool?*, CNN (Sept. 27, 2013, 5:28 PM), https://www.cnn.com/2013/09/26/opinion/bergen-twitter-terrorism/index.html; Mark Gollom, *Kenya Attack: Why Al-Shabaab Live-Tweeted the Assault*, CBC/RADIO-CANADA (Sept. 24, 2013), https://www.cbc.ca/news/world/kenya-attack-why-al-shabaab-live-tweeted-the-assault-1.1865566.

[36] *E.g.*, *Terrorism in New Zealand: White Supremacy, Gun Laws and the Role of Social Media*, THE INTELLIGENCE (Mar. 18, 2019), https://www.economist.com/podcasts/2019/03/18/terrorism-in-new-zealand-white-supremacy-gun-laws-and-the-role-of-social-media; Ian Bogost, *Social Media Are a Mass Shooter's Best Friend*, THE ATLANTIC (Mar. 15, 2019), https://www.theatlantic.com/technology/archive/2019/03/how-terrorism-new-zealand-spread-social-media/585040/.

[37] This report refers to terrorism and violent extremism as forces associated with the broader public policy debate over the use of social media. Because terrorism and violent extremism can take many forms, this report does not adopt a single definition of those terms. *See generally* 18 U.S.C. § 2332b(g)(5) (defining a federal crime of terrorism in relation to a host of underlying criminal offenses); U.N. Office on Drugs & Crime, *University Module Series on Counter-Terrorism: "Radicalization" and "Violent Extremism,"* THE DOHA DECLARATION: PROMOTING A CULTURE OF LAWFULNESS (July 2018), https://www.unodc.org/e4j/en/terrorism/module-2/key-issues/radicalization-violent-extremism.html ("As with the concept of 'terrorism,' there is no universally agreed definition of the term 'violent extremism' . . . . There are, however, a number of definitions which have been developed at the national, regional and international levels.").

[38] *See* Mark Townsend & Ian Traynor, *Norway Attacks: How Far Right Views Created Anders Behring Breivik*, THE GUARDIAN (July 30, 2011), https://www.theguardian.com/world/2011/jul/30/norway-attacks-anders-behring-breivik ("The fact that [the perpetrator of the July 22, 2011 attacks in Norway] chose the internet to disseminate his ideology is important. His journey to terrorism was forged within a network of blogs where violence is glorified and multiculturalism despised, along with those who embrace it."); Rich Lord, *How Robert Bowers Went from Conservative to White Nationalist*, PITTSBURGH POST-GAZETTE (Nov. 10, 2018), https://www.post-gazette.com/news/crime-courts/2018/11/10/Robert-Bowers-extremism-Tree-of-Life-massacre-shooting-pittsburgh-Gab-Warroom/stories/201811080165 (stating, with regard to the person accused of killing 11 worshipers at a Pennsylvania synagogue in 2018, that accounts from his "coworkers of two decades ago, and an analysis of his social media posts in the weeks prior to the massacre, suggest that staunch conservatism metastasized into white nationalism," and suggesting that the internet may have contributed to this progression); *see also* United States v. Wright, 285 F. Supp. 3d 443, 448 (D. Mass. 2018) (remarking that "[f]or the first time I, as a presiding officer, as a citizen, came to understand what it meant to be 'radicalized.' A couple of clicks on the computer, the dark web, and all this material is there" and surmising that there are "going to be other young men, restless, on the web—ISIS will be gone—looking for a cause" (quoting Court's Remarks, Sentencing Hr'g Tr. at 53:4-55:5, United States v. Wright, No. 15-cr-10153 (D. Mass. Dec. 19, 2017), ECF No. 417)).

[39] Mark Berman, *Prosecutors Say Dylann Roof "Self-Radicalized" Online, Wrote Another Manifesto in Jail*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-

reported that "the digital legacy" of Anwar al Awlaki—a U.S. citizen who became closely involved with Al Qaeda's affiliate in Yemen and was targeted and killed by a U.S. drone strike there—influenced the ideologies of certain individuals accused or convicted of terrorist activities, including the Boston Marathon bombers.[40]

Speech advocating violence and terrorism is prohibited by the terms of service of Facebook, Twitter, and certain other social media outlets.[41] Such prohibitions are permissible under current judicial interpretations of First Amendment law because these platforms are operated by private actors, and the First Amendment constrains only state (i.e., government) action.[42] Although the more established sites reportedly have increased their efforts to disable accounts that are associated with terrorist groups or remove content promoting terrorism or violence,[43] it is not

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charleston-church-gunman-self-radicalized-online/ (internal quotation marks omitted) (quoting from court filings by the prosecution); *see also* Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist (suggesting that the internet and message boards that this individual frequented played a role in his indoctrination).

[40] Shane, *supra* note 31. Awlaki left behind numerous videos on YouTube. *Id.* According to a news report summarizing the range of topics covered in these videos, while some of Awlaki's videos expounded upon topics such as respect for the holy month of Ramadan or the relationship between Islam and Jesus Christ, other videos depicted Awlaki exhorting his followers never to trust a non-Muslim; that the United States is waging war on Islam; and, in a video entitled "Call to Jihad," that Muslims have a religious duty to kill Americans. *Id.*

[41] *See, e.g.*, *Community Standards: Violence and Criminal Behavior*, FACEBOOK, https://www.facebook.com/communitystandards/violence_criminal_behavior (last visited Apr. 24, 2019) (stating that Facebook "remove[s] content that expresses support or praise for groups, leaders, or individuals involved" in, among other things, "terrorist activity" and asking users not to post, among other categories, "[c]redible statements of intent to commit violence against any person, groups of people, or place (city or smaller)" or "[c]alls for violence or statements advocating violence against [certain enumerated] targets (identified by name, title, image, or other reference)," including public individuals, groups of people, or places, if the threat is credible); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Apr. 25, 2019) (prohibiting, among other things, "specific threats of violence or wish[ing] for the serious physical harm, death, or disease of an individual or group of people," including "threatening or promoting terrorism" as well as some forms of "graphic violence," and outlining the "enforcement actions" Twitter may take for failure to abide by the rules, including requiring the user to remove prohibited content in order to create new posts and temporarily or permanently suspending accounts); *Community Guidelines*, YOUTUBE, https://www.youtube.com/yt/about/policies/#community-guidelines (last visited Apr. 25, 2019) (stating, in a section called "Violent Criminal Organizations" within "Additional policies" that "[c]ontent intended to praise, promote, or aid violent criminal organizations is not allowed on YouTube," and asking users not to post, among other things, content "produced by violent criminal or terrorist organizations," "praising or justifying violent acts carried out by violent criminal or terrorist organizations," or "aimed at recruiting new members to violent criminal or terrorist organizations"). Such restrictions on user content were not always the norm across social media. *See generally* VanLandingham, *supra* note 15, at 18-19 ("From 2009 through 2015, Twitter stated in its Terms of Service that 'we do not actively monitor and will not censor user content, except in limited circumstances described below.' However, in 2015 Twitter followed Facebook's lead and suddenly (and dramatically) ratcheted up its policies toward offensive speech by explicitly banning 'excessively violent media.' Additionally, in April 2015, the company also prohibited 'threatening or promoting terrorism,' . . . ." (footnotes and citations omitted)).

[42] *See* CRS Report R45650, *supra* note 19, at 5-9 (discussing the state action requirement and explaining that although the Supreme Court has not resolved the question, "lower courts have uniformly concluded that the First Amendment does not prevent social media providers from restricting users' ability to post content on their networks").

[43] *See Terrorism and Social Media Hearing*, *supra* note 15, at 2 (statement of Monika Bickert, Head of Product Policy and Counterterrorism, Facebook) ("Our proactive efforts—specifically, the use of artificial intelligence (AI) and other automation—have become increasingly central to keeping [terrorist] content off of Facebook. We currently focus our most cutting-edge techniques on combating terrorist content about ISIS, Al Qaeda, and their affiliates, and we are working to expand to other terrorist organizations."); Ali Breland, *Facebook, Twitter and YouTube to Testify on Capitol Hill About Terrorism and Social Media*, THE HILL (Jan. 9, 2018, 5:36 PM), https://thehill.com/policy/technology/368184-facebook-twitter-and-google-to-testify-on-capitol-hill-about-terrorism-and (reporting that Facebook, Twitter, and YouTube have acted "to curb terrorists' use of their platforms").

clear how comprehensive or successful these efforts have been.[44] Moreover, users banned from one platform may move to another online forum that does not have the same restrictions, sometimes finding a community of like-minded individuals who reinforce or escalate their violent rhetoric (sometimes referred to as "echo chambers").[45]

As previously noted, this report focuses on the First Amendment considerations relevant to *government* regulation of online content promoting terrorism or violence. Because of the global reach of many online platforms,[46] this report begins with the threshold question of the First Amendment's reach, and in particular, whether it applies to foreign nationals posting online content from outside of the United States.

The First Amendment and Foreign Speakers

While the First Amendment may extend to U.S. citizens speaking abroad or foreign nationals speaking within the United States under some circumstances,[47] the Supreme Court has not directly opined on whether the First Amendment applies to online content that a foreign national posts while located outside of the United States.[48] Nevertheless, the Court's decisions involving

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[44] *See* Nitasha Tiku, *Tech Platforms Treat White Nationalism Different from Islamic Terrorism*, WIRED (Mar. 20, 2019, 8:00 AM), https://www.wired.com/story/why-tech-platforms-dont-treat-all-terrorism-same/ (reporting on "concerns that Big Tech expends more effort to curb the spread of terrorist content from high-profile foreign groups, while applying fewer resources and less urgency toward terrorist content from white supremacists"); Robinson Meyer, *The 3 Questions Mark Zuckerberg Hasn't Answered*, THE ATLANTIC (Apr. 11, 2018), https://www.theatlantic.com/technology/archive/2018/04/3-questions-mark-zuckerberg-hasnt-answered/557720/ (asking how Facebook's artificial intelligence applications could accurately identify terrorist propaganda if they "can't even flag an ad for a new apartment," referring to difficulties Facebook reportedly had in detecting housing advertisements that discriminate by race); *Terrorism and Social Media Hearing*, *supra* note 15, at 3 (statement of Clint Watts, Robert A. Fox Fellow, Foreign Policy Research Institute) (positing that "[s]ocial media companies continue to get beat in part because they rely too heavily on technologists and technical detection to catch bad actors"); *id.* at 3 (statement of Monika Bickert, Head of Product Policy and Counterterrorism, Facebook) ("When we disable terrorist accounts, those account owners may try to create new accounts using different identities. We have become faster at using technology to detect new fake accounts created by repeat offenders, or recidivists.").

[45] *See Hate Crimes Hearing*, *supra* note 24, at 11 (statement of Eileen Hershenov, Senior Vice President, Policy, Anti-Defamation League) ("[A]s we have recently reported, mainstream platforms can sometimes push such individuals from an open community . . . into fringe environments . . . that foster acceptability of dangerous views. . . . Individuals can easily find sanction and reinforcement online for their extreme opinions or actions, in some cases neatly packaged alongside bomb-making instructions.").

[46] When it comes to the internet, in "actual practice . . . national boundaries are highly permeable." Yahoo! Inc. v. La Ligue Contre Le Racisme, 433 F.3d 1199, 1202 (9th Cir. 2006) (en banc) (per curiam); *see* Facebook, Inc. v. Superior Court, 417 P.3d 725, 748 (Cal. 2018) ("[W]hen, for example, a Facebook user configures a post as public, that communication becomes both (a) available to all two billion registered Facebook users, and (b) . . . 'readily accessible to the general public' via . . . search engines. The result is that . . . a public communication is available to 'everyone in the world'—even to those who are not registered Facebook users, but who have open access to the Internet." (internal citation omitted)).

[47] *See* Haig v. Agee, 453 U.S. 280, 308 (1981) (assuming "*arguendo*, that First Amendment protections reach beyond our national boundaries," in a case involving a U.S. citizen's conduct and speech abroad); Reid v. Covert, 354 U.S. 1, 5 (1957) (plurality opinion) (rejecting "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights"). *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (observing that the Court's prior decisions regarding the constitutional rights of non-U.S. citizens "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country").

[48] *See* Hedges v. Obama, 724 F.3d 170, 194 n.140 (2d Cir. 2013) (noting that the "case law regarding extraterritorial application of constitutional rights is sparse," and assuming, without deciding, that two non-U.S. citizen plaintiffs residing abroad could assert First Amendment rights because the "relevant facts . . . were not developed" in the court below and deciding the question was not necessary to resolving the case).

the extraterritorial reach of other constitutional protections, as well as lower court decisions involving the First Amendment rights of foreign nationals, suggest that foreign nationals may face barriers in claiming First Amendment protections for such speech.

The Supreme Court's decision in *United States v. Verdugo-Urquidez*—though it involves the Fourth Amendment—is instructive.[49] In that case, the Court held that the Fourth Amendment, which "prohibits 'unreasonable searches and seizures,'" did not extend to the search of a Mexican citizen's home in Mexico by U.S. authorities.[50] The Court reasoned that in contrast to the Fifth and Sixth Amendments, which concern trial rights and procedures,[51] the Fourth Amendment applies regardless of the prospect of trial, and "a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion."[52] As such, any violation would have "occurred solely in Mexico."[53] Four of the five Justices who joined the majority opinion reasoned that the Fourth Amendment reserves its protections to "the people," which they interpreted as a "term of art employed in select parts of the Constitution."[54] In the view of those Justices, a textual analysis of the Constitution suggested that "'the people' protected by the Fourth Amendment, and by the First and Second Amendments," meant "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[55] Because the defendant had "no voluntary attachment to the United States" at the time of the search, he could not claim the protections of the Fourth Amendment.[56]

At least two sitting Supreme Court justices—Justices Clarence Thomas and Brett Kavanaugh—have suggested that the First Amendment does not apply to foreign nationals abroad, citing to *Verdugo-Urquidez*.[57] The discussion that more directly addressed the applicability of free speech protections to foreign nationals came from then-Judge Brett Kavanaugh in a 2014 case involving

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[49] 494 U.S. 259 (1990); *see* Lamont v. Woods, 948 F.2d 825, 834 (2d Cir. 1991) ("Although *Verdugo* is a Fourth Amendment case, it nonetheless provides a helpful analytical framework for determining whether other constitutional provisions apply to governmental activities having extraterritorial dimensions. Specifically, the *Verdugo* Court identified three factors as significant to such a determination: (1) the operation and text of the constitutional provision; (2) history; and (3) the likely consequences if the provision is construed to restrict the government's extraterritorial activities.").

[50] *Verdugo-Urquidez*, 494 U.S. at 264 (quoting U.S. CONST. amend. IV).

[51] *See id.* The Court previously extended the Fifth and Sixth Amendments—insofar as they require "[t]rial by jury in a court of law . . . after an indictment by grand jury"—to American citizens detained in other countries. *See* Reid v. Covert, 354 U.S. 1, 10, 18-19 (1957) (plurality opinion). In contrast, the Court declined to extend certain Fifth Amendment protections to "nonresident enemy aliens" detained in other countries. Johnson v. Eisentrager, 339 U.S. 763, 781, 785 (1950)).

[52] *See Verdugo-Urquidez*, 494 U.S. at 264.

[53] *Id.*

[54] *Id.* at 265. Although the Court's opinion garnered a five-member majority, one member, Justice Kennedy, wrote separately stating that he could not "place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Id.* at 276 (Kennedy, J., concurring).

[55] *Id.* at 265 (majority opinion). Because the Court did not see its "textual exegesis" as "conclusive," it also considered "the history of the drafting of the Fourth Amendment," which it found to support its conclusion that the Framers did not intend for the Fourth Amendment to apply abroad. *Id.* at 266.

[56] *Id.* at 274-75.

[57] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring) (stating that apart from their Establishment Clause claim, "[t]he plaintiffs cannot raise any other First Amendment claim, since the alleged religious discrimination in this case was directed at aliens abroad" (citing *Verdugo-Urquidez*, 494 U. S. at 265)); Al Bahlul v. United States, 767 F.3d 1, 75-76 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (reasoning that "non-U.S. citizens have no First Amendment rights abroad in foreign countries").

the United States' prosecution of an Al Qaeda associate.[58] In that case, a U.S. military commission convicted a personal assistant to Osama bin Laden for, among other things, conspiracy to commit war crimes.[59] The defendant[60] "claim[ed] that he was unconstitutionally prosecuted for his political speech, including his production of [an] al Qaeda recruitment video celebrating the terrorist attack on the *U.S.S. Cole*."[61] When the case, *Al Bahlul v. United States*, first reached the full U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit),[62] the court ruled on a different legal question and remanded the case for consideration of the First Amendment challenge.[63] However, Judge Kavanaugh authored a separate opinion, in part to address the First Amendment's applicability.[64] He stated that "although non-U.S. citizens arguably may have some First Amendment rights at [a U.S. military base in] Guantanamo or in other U.S. territories for any speech they engage in *there*, non-U.S. citizens have no First Amendment rights abroad in foreign countries."[65]

> The Supreme Court has applied the Constitution to aliens in the United States and in U.S. territories, but has not extended constitutional rights to aliens in foreign countries. *See Boumediene v. Bush*, 553 U.S. 723, 768-71 (2008) (applying Article I, Section 9 to U.S. Naval base at Guantanamo, which was "[i]n every practical sense . . . not abroad"); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (declining to apply Fourth Amendment to search and seizure of alien's property in Mexico); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (declining to apply habeas corpus right to U.S.-controlled military prison in Germany); *see also Al Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013) (declining to apply habeas corpus right to U.S. military base in Afghanistan); *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (same). Therefore, [the defendant] had no First Amendment rights as a non-U.S. citizen in Afghanistan when he led bin Laden's media operation.[66]

Two years later, the full D.C. Circuit took up the *Al Bahlul* case again following remand.[67] This time, the court squarely rejected the defendant's First Amendment challenge, citing the concurring opinions of Judge Kavanaugh, Judge Patricia Millett, and Judge Robert Wilkins, who all concluded that the defendant could not avail himself of the First Amendment's protections.[68]

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[58] Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[59] *Id.* at 5.

[60] Al Bahlul was tried as an enemy combatant before a military commission. *Id.* at 6-7. This report uses the term "defendant" for the sake of internal consistency.

[61] *Id.* at 75-76 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[62] For purposes of brevity, references to a particular circuit in the body of this report (e.g., the D.C. Circuit) refer to the U.S. Court of Appeals for that particular circuit.

[63] *Al Bahlul*, 767 F.3d at 31 (en banc).

[64] *Id.* at 75-76 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[65] *Id.* at 76. Judge Kavanaugh observed as "an initial matter" that "[the defendant] was convicted of conspiracy based on his conduct," not his speech alone. *Id.*

[66] *Id.* (parallel citations omitted).

[67] Al Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016) (en banc) (per curiam).

[68] *Id.* at 758-59; *see also id.* at 770 n.12 (Kavanaugh, J., concurring) (calling the First Amendment challenge "frivolous, for reasons explained" in his earlier opinion); *id.* at 797 (Millett, J., concurring) (reasoning, *inter alia*, that "no governing precedent extends First Amendment protection to speech undertaken by non-citizens on foreign soil"); *id.* at 804 (Wilkins, J., concurring) (concurring with the court's disposition of the First Amendment challenge for the reasons set forth in Judge Millett's opinion). Judges Kavanaugh and Millett also reasoned that even if the First Amendment applied to the defendant's speech in Afghanistan, "the speech encompassed within the charges against Bahlul—including a terrorist recruitment video produced on foreign soil that 'was aimed at inciting viewers to join al Qaeda, to kill Americans, and to cause destruction'—was not protected speech under the First Amendment." *Al Bahlul*, 767 F.3d at 76 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (quoting United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1249 (C.M.C.R. 2011) (en banc)); *see also Al Bahlul*, 840 F.3d at 797 (Millett, J., concurring)

Thus, as the D.C. Circuit phrased it in a prior decision, "aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment."[69]

Nevertheless, "[i]n a variety of contexts th[e] Court has referred to a First Amendment right to 'receive information and ideas.'"[70] In order to preserve this right, the Court has largely rejected governmental attempts to control information because of how the government views that information.[71] For example, in *Lamont v. Postmaster General*, the Court held that a federal statute requiring the Postal Service to withhold foreign mailings classified as "communist political propaganda" from addressees unless they requested delivery of the mailings in writing amounted "to an unconstitutional abridgment of the addressee's First Amendment rights."[72] The Court concluded that the "regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."[73]

Whether or when the government must observe the First Amendment in its interactions with foreign nationals in order to preserve the rights of U.S. citizens is uncertain. As then–D.C. Circuit Judge Ruth Bader Ginsburg noted in a dissenting opinion, "[t]he [F]irst [A]mendment secures to persons in the United States the respect of our government for their right to communicate and associate with foreign individuals and organizations."[74] Referring to *Lamont*, she observed that "the first federal law the Supreme Court ever held violative of the [F]irst [A]mendment involved a condition on international correspondence—a restraint on delivery of mail from abroad."[75] While finding it unnecessary to decide in that case "whether the [F]irst [A]mendment limits the actions of U.S. officials in their dealings with foreign parties," Judge Ginsburg noted the following principle from the *Restatement (Third) of Foreign Relations*:

> The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the

("What is settled, moreover, is that the First Amendment offers no shield to speech like Bahlul's that is 'directed to inciting or producing imminent lawless action and . . . [is] likely to incite or produce such action.'" (citations omitted)).

[69] DKT Mem'l Fund v. Agency for Int'l Dev., 887 F.2d 275, 284 (D.C. Cir. 1989). *But cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 cmt. m (1987) ("Although the matter has not been authoritatively adjudicated, at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations. Thus, trial of an alien under United States authority has been held subject to constitutional safeguards. Similarly, the taking by United States authorities abroad for public use of property of a foreign national may give the former owner a right to just compensation under the Fifth Amendment." (internal citation omitted)).

[70] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[71] *See* Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." (internal citation omitted) (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

[72] 381 U.S. 301, 307 (1965).

[73] *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000) ("Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" (citation omitted)); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.").

[74] DKT Mem'l Fund v. Agency for Int'l Dev., 887 F.2d 275, 303 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part).

[75] *Id.*

> United States or abroad, and whether such authority is exercised unilaterally or by international agreement.[76]

Judge Ginsburg concluded by stating that she "would hesitate long before holding that in a United States-foreign citizen encounter, the amendment we prize as 'first' has no force in court."[77]

Based on these principles and decisions, there may be some cases involving social media content posted by foreign nationals that implicate the free speech rights of U.S. citizens, who may be members of the particular online forum or otherwise have access to it.[78] However, there could be prudential limitations on a foreign national's ability to assert those rights.[79] And, even if a court concludes that a particular foreign national has standing in a given case, it is not clear that the First Amendment would protect his or her online activities based solely on the purported interests of other Internet users.[80]

In contrast, the Supreme Court has recognized that U.S. citizens regularly exercise First Amendment rights when communicating online, so free speech protections are more directly in play when considering the United States' regulation of its own citizens' online speech.[81] Accordingly, the remainder of this report discusses the principles that bear on the government's ability to regulate online content promoting terrorism or violence when there is no dispute about the First Amendment's applicability.

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[76] *Id.* at 307-08 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 (1987)).

[77] *Id.* at 308.

[78] The U.S. Court of Military Commission Review in *United States v. Al Bahlul* specifically considered and rejected the defendant's argument that his prosecution unconstitutionally "chill[ed] the dissemination of information available to U.S. citizens." 820 F. Supp. 2d 1141, 1242, 1250 (C.M.C.R. 2011) (en banc) ("[The defendant's] prosecution does not adversely affect the rights of U.S. citizens to receive such information. The Video is readily available on the Internet and in numerous foreign languages. Possession or viewing of The Video is not criminalized . . . ."), *vacated in part on other grounds*, 767 F.3d 1, 31 (D.C. Cir. 2014).

[79] *See* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 474 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))); *e.g.*, *DKT Mem'l Fund*., 887 F.2d at 283-85 (stating that "[b]efore we can decide that [an exercise of governmental authority] violates constitutional rights, we must find that a plaintiff with standing to assert the violation of rights is properly before the court" and affirming the district court's decision that foreign nongovernmental organizations did not have standing to challenge the U.S. government's policy on First Amendment grounds). *But see* Fallon, *supra* note 22, at 863 ("Against the background of the ordinary rule that no one can challenge a statute on the ground that it would be unconstitutional as applied to someone else, a First Amendment exception has emerged. When speech or expressive activity forms a significant part of a law's target, the law is subject to facial challenge and invalidation if: (i) it is 'substantially overbroad'—that is, if its illegitimate applications are too numerous 'judged in relation to the statute's plainly legitimate sweep,' and (ii) no constitutionally adequate narrowing construction suggests itself." (footnote omitted)).

[80] *Cf.* Chevron Corp. v. Donziger, 325 F. Supp. 3d 371, 386 n.52 (S.D.N.Y. 2018) (stating that the defendant's "First Amendment argument . . . appears in significant part to be an attempt to assert First Amendment rights on the behalf of non-citizens living outside the United States and so would fail on the merits even if he had standing"), *appeal filed*, No. 18-2191 (2d Cir. 2018). *But see* Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 44, 70-76 (2018) (arguing that the First Amendment should apply to foreign nationals' online speech in prosecutions involving U.S. laws).

[81] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735-36 (2017) ("[S]ocial media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997))).

The Conduct Versus Speech Distinction

A key initial consideration in evaluating whether a law or a particular application of that law comports with the First Amendment is whether the law at issue regulates *conduct* or *speech*. The distinction is sometimes elusive because speech may occur during a course of conduct, and actions themselves can sometimes be inherently expressive or "symbolic" speech protected by the First Amendment.[82] As a potential starting point, a law typically regulates conduct if it dictates what the regulated persons or entities "must [or must not] *do* . . . not what they may or may not *say*."[83] But the touchstone for deciding whether such a law implicates the First Amendment appears to be whether the law targets expression.[84] To determine whether a law targets expression and depending on the facts of the case, a court might consider (1) the express terms (i.e., "the face") of the law, (2) the purpose of the law, or (3) its practical application to see whether the law is directed at certain content or speakers or applies to the challenger's activities solely as a result of what that party seeks to communicate.[85]

If a law does not target expression, the First Amendment extends the government more leeway to regulate that activity even if the regulation incidentally burdens speech. As the Supreme Court has explained,

> [R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. . . . [T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why . . . "an ordinance against outdoor fires" might forbid "burning a flag" . . . .[86]

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[82] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018) (noting that "[w]hile drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it"); Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006) (stating that the First Amendment's protections for "symbolic speech" concern conduct that is "inherently expressive"); *e.g.*, Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that when the defendant burned a flag in public protest, the "burning of the flag was conduct 'sufficiently imbued with elements of communication,' to implicate the First Amendment" (internal citation omitted)).

[83] *See Rumsfeld*, 547 U.S. at 60.

[84] *See* Arcara v. Cloud Books, Inc., 478 U.S. 697, 703 (1986) (noting that the Court has not subjected all criminal and civil penalties that affect the defendant's First Amendment activities to scrutiny, "only [those] where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity").

[85] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557, 567 (2011) (reasoning that a state law prohibiting pharmaceutical manufacturers from using certain pharmacy records for marketing purposes "[b]oth on its face and in its practical operation . . . impose[d] a burden based on the content of speech and the identity of the speaker"); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575-76, 581 (1983) (reasoning that although the government can impose "generally applicable economic regulations" on the press, the state's special use tax on ink and paper was not of the same character because it singled out certain publications and subjected them to the tax). *See generally* CRS Report R45700, *Assessing Commercial Disclosure Requirements under the First Amendment* 6-10, by Valerie C. Brannon (discussing the conduct-speech distinction in the commercial disclosure context).

[86] *Sorrell*, 564 U.S. at 567 (citation omitted). Even when the government seeks to regulate conduct that has an expressive component, the Court has held that a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). In general, a government regulation of this nature "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. *But see Texas v. Johnson*, 491 U.S. at 406-07 (holding that "*O'Brien*'s relatively lenient standard" is limited "to those cases in which the governmental interest is unrelated to the suppression of free expression," not situations in which a law is "*directed at* the communicative nature of conduct," which must "be justified by the substantial showing of need that the First Amendment requires" (internal quotation marks and citations omitted)).

However, the conduct-focused nature of a law does not necessarily preclude First Amendment review where the government seeks to penalize a person under that law *because of* ideas or messages that person communicated.[87]

The Supreme Court applied these principles in its 2010 decision in *Holder v. Humanitarian Law Project*, which involved the constitutionality of a federal statute concerning the provision of material support to U.S.-designated foreign terrorist organizations (FTOs).[88] The statute imposes criminal penalties on anyone who "knowingly provides material support or resources to [an FTO], or attempts or conspires to do so."[89] It defines "material support or resources" in relevant part as "any property, tangible or intangible, or service, including . . . training, expert advice or assistance, . . . false documentation or identification, communications equipment, . . . personnel (1 or more individuals who may be or include oneself) . . . , except medicine or religious materials."[90] In *Humanitarian Law Project*, a group of U.S. citizens and domestic organizations brought a preenforcement challenge to the law, arguing that it would be unconstitutional to punish them for the types of support that they wished to provide to two FTOs.[91] Specifically, the plaintiffs sought to (1) train members of one FTO on how to use humanitarian and international law in peaceful dispute resolution; (2) teach that FTO's members how to petition international organizations for relief; and (3) engage in political advocacy for the rights of certain groups, including by supporting one of the FTOs "as a political organization" for this purpose.[92] After concluding that most of these activities clearly constituted "training" or "expert advice or assistance" under the law,[93] the Court proceeded to address the First Amendment implications of applying the statute to the plaintiffs' activities.[94]

The *Humanitarian Law Project* Court rejected the "extreme positions" advanced by both sides.[95] On the one hand, it rejected the plaintiffs' contention that the statute banned their "pure political

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[87] For example, in *Cohen v. California*, the defendant was convicted under a law that prohibited disturbing the peace by "offensive conduct" because he wore a jacket that displayed a "four-letter word . . . in relation to the draft" in a municipal courthouse. 403 U.S. 15-16, 20 (1971). The Supreme Court held that his conviction was based "solely upon 'speech'" because it "quite clearly rest[ed] upon the asserted offensiveness of the *words* [the defendant] used to convey his message to the public" and the "only 'conduct' which the State sought to punish [was] the fact of communication." *Id.* at 18.

[88] 561 U.S. 1 (2010).

[89] 18 U.S.C. § 2339B(a)(1). A companion statute—§ 2339A—makes it a criminal offense to "provide[] material support or resources or conceal[] or disguise[] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [certain criminal offenses] . . . or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation," and also criminalizes attempt and conspiracy to commit such acts. The two statutes share the same definition of "material support or resources." *See id.* § 2339B(g)(4) (defining "material support or resources" by reference to § 2339A).

[90] *Id.* § 2339B(g)(4); *see also id.* § 2339A(b)(1).

[91] *Humanitarian Law Project*, 561 U.S. at 9-10, 14.

[92] *Id.* at 14-15 (citation omitted).

[93] *Id.* at 21. The Court made this determination as part of its analysis as to whether terms such as "training" and "expert advice or assistance" were unconstitutionally vague. In this regard, the Court concluded that while "the scope of the material-support statute may not be clear in every application," the "dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail." *Id.* The Court further concluded that to the extent the plaintiffs sought to engage in independent advocacy, their activities clearly would not be prohibited as the provision of "personnel," which, as defined, is limited to work under the FTO's "direction or control," or "service[s]," which the Court interpreted to refer to "concerted activity." *Id.* at 23-24 (citations omitted).

[94] *Id.* at 25.

[95] *Id.*

speech," noting that the law did not prevent the plaintiffs from becoming members of the FTOs, speaking and writing freely about these organizations, or engaging in independent advocacy.[96] The Court reasoned that "Congress has prohibited 'material support,' which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[97] On the other hand, the Court rejected the government's position that applying the law to the plaintiffs' activities implicated only conduct, not speech.[98] It reasoned that the law itself "regulates speech on the basis of its content" because whether plaintiffs are subject to prosecution "depends on what they say."[99] Referring to the statutory definitions of "training" and "expert advice or assistance," the Court noted that if the plaintiffs' speech to the organizations "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge'—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred."[100] Even if the law "*generally* functions as a regulation of conduct," the Court reasoned, in these circumstances, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."[101] As discussed in more detail *infra*,[102] the Court ultimately held that the material support statute did not violate the First Amendment as applied to the plaintiffs' proposed activities because the challenged statutory prohibitions were necessary to further the government's asserted interests in combating terrorism.[103]

Unlike a law involving "material support," which, in the Court's view, "most often" takes the form of conduct rather than speech,[104] a law that expressly prohibits or restricts, for example, social media posts promoting terrorism or violence would more clearly involve speech because of its central focus on communications. Although the Supreme Court has not had many occasions to consider laws that expressly restrict online content, in a First Amendment challenge to a federal law that restricted the online transmission of certain "indecent" and "patently offensive" content, both the parties and the Court evaluated the law as regulating speech, not conduct.[105]

Content-Based Laws

Once it is established that a law regulates speech, the next consideration is whether it does so on the basis of content. First Amendment law historically has distinguished between laws that restrict

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[96] *Id.* at 25-26 (citation omitted).

[97] *Id.* at 26.

[98] *Id.*

[99] *Id.* at 27.

[100] *Id.*

[101] *Id.* at 27-28.

[102] See *infra* section entitled "Deference to Political Branches."

[103] *Humanitarian Law Project*, 561 U.S. at 28-39.

[104] *Id.* at 26.

[105] *See* Reno v. ACLU, 521 U.S. 844, 849, 867-68 (1997) (evaluating two provisions of the Communications Decency Act "enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet" as restrictions on speech); *cf.* United States v. Stevens, 559 U.S. 460, 464-65, 468 (2010) (analyzing a federal statute banning the commercial creation, sale, and possession of certain depictions of animal cruelty, which was enacted to address the "interstate market for 'crush videos' . . . featur[ing] the intentional torture and killing of helpless animals," as a regulation of speech); United States v. Williams, 553 U.S. 285, 288, 293 (2008) (analyzing a federal law that "criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography" as a law prohibiting "the collateral speech that introduces such material into the child-pornography distribution network").

speech because of its content or viewpoint and those that do not draw content-based distinctions or that have a content-neutral justification.[106] Although the Justices of the Court have sometimes disagreed over whether a particular law is content-based for First Amendment purposes,[107] the Court has largely settled on the following definition:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.[108]

Courts scrutinize content-based distinctions because of the potential for the government to silence speech with which it disagrees by prohibiting or imposing special burdens on an entire category of speech: "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[109] Justice Anthony Kennedy wrote in a case involving federal restrictions on the transmission of sexually explicit cable programming: "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause."[110] The Supreme Court has repeatedly stated that content-based laws are "presumptively unconstitutional" and subject to the Court's most stringent review, at least insofar as they involve fully protected speech.[111] In current First

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[106] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) ("[O]ur precedents distinguish between content-based and content-neutral regulations of speech."); Genevieve Lakier, Reed v. Town of Gilbert, Arizona, *and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 233-234 (2016) ("For decades now, the Supreme Court has insisted that content-based laws—laws that restrict speech because of its ideas or messages or subject matter—are presumptively unconstitutional, and will be sustained only if they can satisfy strict scrutiny. In contrast, content-neutral laws—laws that regulate speech for some reason other than its content—are reviewed under a lesser, and often quite deferential, standard. Whether a law is found to be content-based or content-neutral therefore determines, in many cases, whether a First Amendment challenge to it succeeds." (footnotes omitted)).

[107] *Compare* Renton v. Playtime Theatres, 475 U.S. 41, 47-48 (1986) (holding that zoning ordinance restricting the locations of "adult" movie theatres was "aimed not at the *content* of the films shown [there], but rather at the *secondary effects* of such theaters on the surrounding community," and thus was "completely consistent with [the Court's] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech'" (citations omitted)), *with id.* at 56-57 (Brennan, J., dissenting) (arguing that the "fact that adult movie theaters may cause harmful 'secondary' land-use effects may arguably give [the city] a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral" and stating that "[b]ecause the ordinance imposes special restrictions on certain kinds of speech on the basis of *content*, I cannot simply accept, as the Court does, [the city's] claim that the ordinance was not designed to suppress the content of adult movies").

[108] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (internal citations omitted).

[109] R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

[110] United States v. Playboy Entm't Grp., 529 U.S. 803, 826 (2000).

[111] *Reed*, 135 S. Ct. at 2226. *But cf. id.* at 2237-38 (Kagan, J., concurring in the judgment) (explaining that the Court applies "strict scrutiny to facially content-based regulations of speech . . . when there is any 'realistic possibility that official suppression of ideas is afoot'" but arguing that "when that is not realistically possible, we may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive"). *See also Playboy Entm't Grp.*, 529 U.S. at 813 ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." (internal citations omitted)); *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid.").

Amendment parlance, such laws must survive "strict scrutiny," meaning that the government must demonstrate that they are narrowly tailored to serve compelling governmental interests.[112]

Under the Court's current formulation, a law that expressly regulates what topics can be discussed in a social media post would likely be considered a "content-based" restriction on speech, as the regulation "applies to particular speech because of the topic discussed or the idea or message expressed."[113] As such, as a general matter, such a law would likely be subject to strict scrutiny and presumptively invalid.[114] However, this level of scrutiny may not apply if the regulated content falls within a category of speech that the Court has said is not fully protected, as discussed in the next section.[115]

Protected and Unprotected Speech

If a law regulates speech, the next consideration in the First Amendment analysis is whether that speech is considered protected (sometimes referred to as "fully protected"[116]) or instead falls within one of the narrow categories of so-called "unprotected" speech (sometimes referred to as the First Amendment's "exceptions"[117]) recognized by the Supreme Court.[118] Such categories are not determinative of whether a law is constitutional, but the government generally has greater leeway to regulate unprotected speech based on its content.[119]

Cf. Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) (applying "heightened judicial scrutiny" to a content-based regulation involving commercial speech).

[112] *See, e.g.*, *Reed*, 135 S. Ct. at 2231 (majority opinion) (stating that a town had the "burden to demonstrate that [its code's] differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end"); *Simon & Schuster, Inc.*, 502 U.S. at 118 (holding that because the state's "Son of Sam law" established "a financial disincentive to create or publish works with a particular content" (i.e., works describing an author's crime), "[i]n order to justify such differential treatment, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end" (internal quotation marks and citation omitted)). *Cf.* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (per curiam) (reasoning that the constitutionality of the statute's limitation on political expenditures "turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression").

[113] *Reed*, 135 S. Ct. at 2227. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468 (2010) ("Section 48 explicitly regulates expression based on content: The statute restricts 'visual [and] auditory depiction[s],' such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed."). Setting aside for a moment whether they are ultimately constitutional, laws that prohibit advocacy of a certain type would likely be considered content-based. *See* Wilson R. Huhn, *Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 806 (2004) (stating that "a law that makes it illegal to advocate the violent overthrow of the government is purely content-based").

[114] *Cf. Reed*, 135 S. Ct. at 2226; *Playboy Entm't Grp.*, 529 U.S. at 813, 818.

[115] *See R.A.V.*, 505 U.S. at 387 ("Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech.").

[116] *E.g.*, *R.A.V.*, 505 U.S. at 387.

[117] *E.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (referring to "the obscenity exception to the First Amendment"). *But see* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 788 (12th ed. 2015) (observing that categories of unprotected speech "are often described as 'exceptions' to the First Amendment," but "once we realize just how much human communication remains untouched by the First Amendment—contract law, the law of wills, prosecution for perjury and blackmail, and much else—the language of 'exceptions' seems a bit misleading").

[118] *See Stevens*, 559 U.S. at 470 (discussing the "historically unprotected categories of speech").

[119] The Supreme Court has explained that the First Amendment imposes some limitations on the government even

The Supreme Court has long considered political and ideological speech to be at the "core" of the First Amendment and the ability to exchange ideas to be integral to a functioning democracy.[120]

> Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment. . . .
>
> The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.[121]

These principles extend even to speech that many would consider to be deeply offensive or hateful.[122] Accordingly, a law that restricts speech concerning "politics, nationalism, religion, or other matters of opinion"[123] generally receives strict scrutiny.[124]

But the First Amendment does not just protect core political and ideological speech. Even in cases involving speech historically considered to have lower "social value,"[125] the government

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when it is regulating unprotected speech.

> We have sometimes said that [certain] categories of expression are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to them. Such statements must be taken in context, however . . . . What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

R.A.V., 505 U.S. at 383-84 (internal citations omitted).

[120] *See* Williams v. Rhodes, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."); *see also* Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (per curiam) (noting that the "the central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

[121] Knox v. SEIU, Local 1000, 567 U.S. 298, 308-09 (2012) (internal citations omitted).

[122] *See* Snyder v. Phelps, 562 U.S. 443, 460-61 (2011) ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

[123] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[124] *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.' While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, the [strict scrutiny standard] provides a sufficient framework for protecting the relevant First Amendment interests in this case." (internal citations omitted)); Wash. Post v. McManus, No. PWG-18-2527, 2019 U.S. Dist. LEXIS 3073, at *22 (D. Md. Jan. 3, 2019) ("The test for [content-based] regulations mirrors the test for laws that burden political speech, in that both are subject to strict scrutiny."), *appeal filed*, No. 19-1132 (4th Cir. Feb. 4, 2019).

[125] *See* United States v. Stevens, 559 U.S. 460, 470-71 (2010) (acknowledging that the Supreme Court "has often *described* historically unprotected categories of speech as being 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,'" but explaining that when the Court has "identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis" (citation omitted)); United States v. Playboy Entm't Grp., 529 U.S. 803, 806, 826 (2000) (holding that "[b]asic speech principles" were at stake in a case involving a federal law limiting the transmission of "sexually-oriented" cable programming and reasoning that the Court "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important"); Cincinnati v. Discovery Network, 507 U.S. 410, 428 (1993) (expressing unwillingness to recognize the

generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[126] The same is generally true for speech that the legislature considers "too harmful to be tolerated,"[127] as the government generally may not proscribe speech based on its content unless that speech falls within one of the narrow categories of unprotected speech recognized by the Supreme Court.[128] Three of those categories are of particular relevance in the context of online speech that promotes terrorism or violence.[129]

(1) *Brandenburg*'s Incitement Standard

In 1969, in *Brandenburg v. Ohio*, the Supreme Court considered a state law that prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[130] The state convicted a Ku Klux Klan leader of violating the statute based on films of a Klan rally that showed, among other things, hooded figures carrying firearms burning a cross and included, in the Court's words, "scattered phrases . . . that were derogatory of Negroes and, in one instance, of

city's "bare assertion that the 'low value' of commercial speech is a sufficient justification for [the city's] selective and categorical ban on newsracks dispensing 'commercial handbills'").

126 Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790-91 (2011) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)); *see generally* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

127 *Brown*, 564 U.S. at 791. A plurality of the Court has alluded to a "historic and traditional" First Amendment exception involving "speech presenting some grave and imminent threat the government has the power to prevent." *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality opinion). However, the Justices acknowledged that "a restriction under [this] category is most difficult to sustain," citing a case where the Court held that the government did not meet its burden to enjoin the publication of a classified study in the *New York Times* and the *Washington Post*. *Id.* (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam)).

128 *See Brown*, 564 U.S. at 791 ("Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated. . . . As in *Stevens*, California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice. Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'" (citation omitted)). *But cf.* Sherman, *supra* note 10, at 139 (noting that some legal scholars have "suggested that free speech rules be modified in cases where the speech in question could be tied to 'extraordinary' levels of harm").

129 *See* Hoffman, *supra* note 18, at 240 (noting the "strong likelihood of a First Amendment, 'as applied' *Brandenburg* challenge" in a prosecution for "online terrorism advocacy"); Tsesis, *supra* note 18, at 664 (arguing that the "incitement" and "true threats" doctrines offer "viable legislative approaches for restricting terrorist incitement or propaganda" on the internet); Sherman, *supra* note 10, at 141 (positing that "[a]nother possible, though ultimately problematic, approach [to addressing terrorist recruitment and calls for violence on social media without resort to *Brandenburg*] comes from the Supreme Court's jurisprudence on speech integral to criminal conduct"). Other categories of unprotected speech could be relevant to online content promoting terrorism or violence depending on the circumstances. For example, the First Amendment may not be a defense in certain cases involving "fighting words"—words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). However, the Supreme Court "has construed the fighting words doctrine narrowly and consistently rejected [governmental] efforts to regulate speech that is merely insulting or offensive." Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 KAN. J.L. & PUB. POL'Y 78, 105 n.146 (2014) (citing relevant decisions). Moreover, there remains an open question as to whether online speech can ever qualify as "fighting words" because the speaker is unlikely to be face-to-face or in close proximity with the recipient when the speech in question is made. *See* People *ex rel.* R.D., No. 14-CA-1800, 2016 COA 186, ¶ 19 (Colo. Ct. App. Dec. 29, 2016) (observing that "a number of state['s] [courts] have concluded that '[t]he potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity,'" but noting one decision in which the court upheld an injunction that prohibited an individual from sending certain communications, including emails, to certain other individuals based on the fighting words doctrine (citation omitted)), *cert. granted*, No. 17SC116, 2017 Colo. LEXIS 770 (Colo. Sept. 5, 2017).

130 395 U.S. 444, 444-45 (1969) (per curiam).

Jews."[131] During a speech, the defendant stated, "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 that there might have to be some revengeance taken."[132] The Supreme Court reversed the defendant's conviction, concluding that the statute, by punishing "mere advocacy and [forbidding], on pain of criminal punishment, assembly with others merely to advocate the described type of action" violated the First Amendment.[133] Effectively establishing a three-part test, 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 [1] directed to inciting or producing [2] imminent lawless action and [3] is likely to incite or produce such action."[134] The Court reiterated that "the 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."[135]

Supreme Court cases since *Brandenburg* have helped to elucidate its "directed to," "imminence," and "likelihood" requirements to some degree—though not in the specific context of internet speech. *Hess v. Indiana* involved a conviction for disorderly conduct stemming from an anti-war rally at which the defendant shouted, "We'll take the [expletive] street later."[136] The Court overturned the defendant's conviction because his statement, though made to a crowd of people, "was not directed to any person or group of persons" and "amounted to nothing more than advocacy of illegal action at some indefinite future time."[137] In the Court's words, "there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder."[138]

Some argue that the *Hess* decision suggests that the Court views the "imminence" requirement to mean that violence must be likely to occur *immediately* as a result of the speech at issue.[139] State and federal courts have not always applied *Hess* or the imminence requirement of *Brandenburg*

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[131] *Id.* at 445-46.

[132] *Id.* at 446.

[133] *Id.* at 449. Decisions prior to *Brandenburg* had allowed the government to ban the advocacy of violence under less stringent standards. *See, e.g.*, Whitney v. California, 274 U.S. 357, 371 (1927) (giving "great weight" to a state's determination that to "assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power," noting that "[e]very presumption is to be indulged in favor of the validity of the statute," and holding that "it may not be declared unconstitutional unless it is . . . arbitrary or unreasonable"), *overruled by Brandenburg*, 395 U.S. at 449; Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding the defendants' convictions because they conspired "to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence" and thereby "created a 'clear and present danger' of an attempt to overthrow the Government by force and violence"). *Cf. Dennis*, 341 U.S. at 580 (Black, J., dissenting) ("I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'").

[134] *Brandenburg*, 395 U.S. at 447 (emphasis added).

[135] *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

[136] 414 U.S. 105, 106-07 (1973) (per curiam).

[137] *Id*. at 108-09.

[138] *Id*. at 109.

[139] *See* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1677 (2015) ("In light of *Hess*, imminent means nothing but immediate action, which is an almost impossible burden to satisfy."). *Cf.* Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 18-19 (2002) ("[I]n *Hess*, the Court did appear to require that the interval between speech and called-for response must be quite brief. Beyond that, uncertainty remains.").

so strictly.[140] For example, in *People v. Rubin*, a California state court ruling, the defendant was charged with solicitation of murder.[141] During a press conference to protest an upcoming march by the American Nazi Party through Skokie, IL, the defendant offered money to anyone who "kills, maims, or seriously injures a member of the American Nazi Party."[142] He added, "This is not said in jest, we are deadly serious."[143] The trial court concluded that his speech was protected by the First Amendment, but the state appeals court reversed in a split decision with one judge dissenting.[144] Analogizing criminal solicitation to incitement, the appeals court applied *Brandenburg*'s imminence and likelihood requirements and concluded that both were satisfied even though the march in Skokie was not scheduled to take place until five weeks after the defendant had spoken.[145] The court wrote that "time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature. . . . We think solicitation of murder in connection with a public event of this notoriety, even though five weeks away, can qualify as incitement to imminent lawless action."[146]

Supreme Court decisions after *Hess* suggest that whether strong rhetoric is directed to inciting or producing imminent lawless action depends on the context in which the statements at issue were made—and to some degree, whether violence actually resulted. In *NAACP v. Claiborne Hardware Co.*, "17 white merchants" filed suit against the NAACP, its Field Secretary in Mississippi, and over a hundred other individuals involved in a "boycott of white merchants in Claiborne County, [Mississippi]," that was organized to protest racial discrimination, alleging tortious interference with trade.[147] In relevant part, at issue were claims arising from certain speeches that the Field Secretary, Charles Evers, made during the middle of the boycott.[148] In the wake of the shooting and killing of "a young black man . . . during an encounter with two Port Gibson police officers," which led to mounting "[t]ension in the community" and "sporadic acts of violence," Evers allegedly stated that "boycott violators would be 'disciplined'" and that if anyone was caught entering the boycotted stores, "we're gonna break your damn neck."[149]

The *Claiborne Hardware* Court held that Evers was not liable to the boycotted store owners for their economic losses because his speech was protected under the First Amendment.[150] The Court acknowledged that "[i]n 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."[151] Still, the Court held, "[t]he emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*" because the "strong language" used was part of "lengthy addresses" that "generally contained an impassioned plea for black citizens to unify, to support

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[140] Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 670-72 (2009) (discussing cases that, in the author's view, arguably misconstrued *Brandenburg* by not adhering to its imminence requirement).

[141] 158 Cal. Rptr. 488, 489 (Cal. Ct. App. 1979). *See* Healy, *supra* note 140, at 673-74 (citing *People v. Rubin* as an example that lower courts have not strictly applied *Brandenburg*'s imminence requirement).

[142] *Rubin*, 158 Cal. Rptr. at 488.

[143] *Id.* at 489.

[144] *Id*. at 489, 494; *see also id.* at 494-500 (Roth, J., dissenting) (viewing the statements in context as hyperbole).

[145] *Id*. at 492-93 (majority opinion).

[146] *Id*.

[147] 458 U.S. 886, 888-90, 891 n.7, 915 (1982).

[148] *Id.* at 902, 926.

[149] *Id.* at 902.

[150] *Id.* at 929.

[151] *Id.* at 927.

and respect each other, and to realize the political and economic power available to them."[152] Of potential significance, the Court noted that "a substantial question [as to the defendant's liability] would be presented" if that language "had been followed by acts of violence," but there was no evidence of violence occurring after the challenged statements.[153]

In a later case, *Texas v. Johnson*, involving a criminal defendant's First Amendment challenge to his prosecution for burning a flag during a political protest, the Supreme Court ruled for the defendant, finding it notable that despite the allegedly "disruptive behavior of the protestors during their march . . . no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning."[154] The Court added that in such circumstances, the "likel[ihood]" of imminent lawless action under *Brandenburg* cannot be inferred merely because an audience may take "serious offense" to particular expression.[155] The Court explained,

> [A] principal "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." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (opinion of Stevens, J.), *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.[156]

Thus, the Court reasoned, to equate the potential for violence with speech "directed to" and "likely to" incite or produce such action would be to "eviscerate [the Court's] holding in *Brandenburg*."[157]

Scholars and commentators have noted the limits of the *Brandenburg* incitement doctrine when it comes to regulating content on social media.[158] In particular, many have questioned what constitutes "imminence" when speech is made in an online forum rather than in connection with a specific event where violence or unrest might be anticipated.[159] Others have questioned how the

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[152] *Id.* at 928 ("An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

[153] *Id.*

[154] 491 U.S. 397, 408 (1989) (internal quotation marks and citation omitted).

[155] *Id.* at 408-09.

[156] *Id.* (certain internal citations omitted).

[157] *Id.* at 409. *See generally* United States v. Williams, 553 U.S. 285, 321-22 (2008) (Souter & Ginsburg, JJ., dissenting) (stating that the *Brandenburg* standard replaced "the rule that dominated the First World War sedition and espionage cases, allowing suppression of speech for its tendency and the intent behind it" by "unmistakably insist[ing] that any limit on speech be grounded in a realistic, factual assessment of harm"). *Cf.* Zieper v. Metzinger, 392 F. Supp. 2d 516, 518, 524-25 (S.D.N.Y. 2005) (reasoning that a video posted to a website approximately two months before the New Year's Eve celebration leading up to the year 2000 that showed locations in New York City's Times Square and included narration instructing various "teams" to have people "running for their lives" by midnight "can be seen as provoking thought," was "not a call to imminent riotous actions," and was not stripped of First Amendment protection merely because "a reasonable person viewing the video for this first time" may have thought "that someone had planned to undertake activities that are unlawful"), *aff'd on other grounds*, 474 F.3d 60 (2d Cir. 2007).

[158] *See, e.g.*, John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 449 (2002) (noting that "[t]he *Brandenburg* standard was not created for cyberspace and later courts interpreting the standard had no need to address the demands of the Internet").

[159] *See* Cronan, *supra* note 158, at 449-50 (arguing that *Brandenburg*'s "imminence" requirement is ambiguous when

"directed to" or "likelihood" prongs of the test operate when speech is made to an unknown audience of internet users rather than an assembled group in person.[160]

In applying *Brandenburg* to internet speech, a few lower courts have identified certain types of content that may not constitute incitement but might constitute a true threat, another category of unprotected speech discussed below.[161] For example, the Third Circuit has stated that "merely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct," but held that under the circumstances of that case, the defendants' use of "past incidents to instill fear in future targets" amounted to unprotected speech.[162] That circuit also observed in *dicta* in another case that *Brandenburg* might allow the government to obtain an injunction to "restrain a website published by a hate group naming specific groups or individuals as targets, or specifying instructions for committing a crime."[163]

(2) "True Threats"

As with incitement of the *Brandenburg* variety, the government may prohibit some forms of intimidation such as "true" threats.[164] True threats occur when 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," even if the speaker does not "actually intend to carry out the threat."[165] In this way, the doctrine focuses on the harms related to the message the speaker communicates rather than the possibility that it will stir others to commit violent acts.[166] Like the line between incitement and "mere advocacy" that the Court drew in *Brandenburg*, the Supreme Court has distinguished true threats from "political hyperbole."[167]

In *Watts v. United States*—the 1969 decision coining the phrase "true threat"—the Court held that a statute that prohibited any person from "knowingly and willfully . . . [making] any threat to take

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applied to communications in cyberspace); Tsesis, *supra* note 18, at 667 (positing that a statute prohibiting incitement "could be effective against immediate calls for violence through applications such as Instagram or Snapchat," but because of *Brandenburg*'s imminence requirement, may not supply a remedy for speech that "seeks long-term indoctrination, mentoring, recruitment, and so on").

[160] *See* Nat'l Constitution Ctr., *Free Speech Online (Stanford): Social Media Platforms and the Future of Democracy*, YOUTUBE, at 51:00 (May 3, 2018), https://www.youtube.com/watch?v=U8RFtagcjKk (remarks of Juniper Downs, Global Head of Public Policy and Government Relations, YouTube) ("I think there are a couple of things about [the *Brandenburg*] standard that don't carry over well into the digital age. . . . [T]he problem with online speech is you have speech that is going out to an unknown audience, and so evaluating whether someone saying . . . 'go kill Americans' is likely to provoke such action is really difficult."). *Cf.* Sherman, *supra* note 10, at 138-39 ("[I]t is questionable whether [*Brandenburg*'s incitement standard] could be extended to many of the general calls for violence against, for example, any available American targets. Instead, it would likely be limited to a relatively small number of situations in which a target could be pinpointed with some degree of specificity from the speech in question.").

[161] *See, e.g.*, United States v. Wheeler, 776 F.3d 736, 745 (10th Cir. 2015) ("Exhorting groups of followers to kill specific individuals can produce fear in a recipient no less than more traditional forms of threats. Allowing defendants to seek refuge in the First Amendment simply by phrasing threats as exhortations [under *Brandenburg*] would . . . leave the state 'powerless against the ingenuity of threateners.'" (citation omitted)).

[162] United States v. Fullmer, 584 F.3d 132, 155-56 (3d Cir. 2009).

[163] United States v. Bell, 414 F.3d 474, 483 n.10 (3d Cir. 2005).

[164] *See* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[165] Virginia v. Black, 538 U.S. 343, 359-60 (2003).

[166] *See id.* at 360 ("[A] prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (internal quotation marks and citation omitted)).

[167] *Watts*, 394 U.S. at 708.

the life of or to inflict bodily harm upon the President of the United States" was "constitutional on its face."[168] But the Court ruled that it was improperly applied to an individual who, in the course of expressing opposition to the draft during a public rally, stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers."[169] The Court reasoned that this "kind of political hyperbole" was not a "true 'threat'" within the meaning of the statute because "[the Court] must interpret the language Congress chose 'against the background of 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 on government and public officials.'"[170]

Nearly 35 years later, in *Virginia v. Black*, the Supreme Court applied the true threats doctrine in a case involving a state law prohibiting cross burning with the intent to intimidate.[171] The Court explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[172] The Court held that "[t]he First Amendment permits [a state] to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."[173] A plurality of the Court went on to conclude that the particular statute before it was unconstitutional insofar as it included a presumption making cross burning "prima facie evidence of an intent to intimidate a person or group of persons."[174] They reasoned that such a presumption would likely result in convictions in any cross-burning case regardless of the purpose of the cross burning and therefore chill protected speech.[175]

While some scholars have cited the true threats doctrine as one avenue for the government to regulate social media content promoting terrorism or violence,[176] others have argued that the Supreme Court's decisions in this area may provide inadequate guidance for distinguishing between real threats online and protected expression, particularly in cases where judges do not share the same linguistic frame of reference as members of a particular online community.[177]

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[168] *Id.* at 705, 707.

[169] *Id.* at 706.

[170] *Id.* at 708 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[171] 538 U.S. 343 (2003).

[172] *Id.* at 360.

[173] *Id.* at 363.

[174] *Id.* (quoting VA. CODE ANN. § 18.2-423 (1996)).

[175] *Id.* at 365-66 (plurality opinion). The plurality reasoned that "a burning cross is not always intended to intimidate," and may not even be a statement of ideology (e.g., when used in a theatrical performance). *Id.* at 366. Justice Antonin Scalia—who joined the plurality in the portion of the opinion holding that a state may prohibit cross burning with the intent to intimidate—disagreed with his colleagues in the majority insofar as they argued that the possibility of an unconstitutional conviction rendered the statute unconstitutional. *Id.* at 368-73 (Scalia, J., concurring in part and dissenting in part). In Justice Scalia's view, such convictions "could be challenged on a case-by-case basis" and did not justify facial invalidation of the statute. *Id.* at 373.

[176] Tsesis, *supra* note 18, at 670 (citing the "true threats doctrine along with the incitement doctrine" as "two pieces of the constitutional puzzle lawmakers will need to put together in constructing a statute prohibiting terrorist threats on social media").

[177] Lidsky & Riedemann Norbut, *supra* note 10, at 1891 ("Even the Court's recent Facebook threats case, *Elonis v. United States*, failed to explain how to interpret threatening speech in situations in which legal decision-makers do not share a frame of linguistic reference with the speaker or her audience. This deficit, coupled with the doctrinal uncertainty regarding the requisite mens rea, leaves legal decision-makers at a loss in separating social media threats

This year, the Supreme Court declined to review the Pennsylvania Supreme Court's interpretation of the true threats doctrine in a case involving alleged "terroristic threats" posted to social media.[178] In *Commonwealth v. Knox*, the state court considered whether the defendant had a First Amendment right to publish "a rap-music video containing threatening lyrics directed to named law enforcement officers," including two officers who were scheduled to testify against him in a pending criminal case.[179] The defendant argued that he never intended for the video to be uploaded to social media (in that case, YouTube and Facebook) and that the song was a way to express himself and was not meant to be taken literally.[180] Several organizations filed briefs in support of the defendant, noting, among other things, the defendant's status as a semiprofessional rap artist and the First Amendment protections accorded to speech about violence in other forms of media.[181]

The Pennsylvania Supreme Court held that the song constituted a true threat.[182] It began by observing that although "First Amendment freedoms apply broadly to different types of expression," and while the government "generally lacks the authority to restrict expression based on its message, topic, ideas, or content," speech that "threatens unlawful violence can subject the speaker to criminal sanction" under the true threats doctrine.[183] The court explained that while the *Watts* decision suggested that courts should use a "contextual," "objective" standard in determining whether speech constituted a "true threat," courts since *Virginia v. Black* "have disagreed over whether the speaker's subjective intent to intimidate is relevant in a true-threat analysis."[184] For its part, the Pennsylvania Supreme Court read the opinions in the *Black* case to mean that the "First Amendment necessitates an inquiry into the speaker's mental state," which can be discerned from context.[185] After reviewing the lyrics in the defendant's song, the court concluded that certain "aspects of the song tend to detract from any claim that [the defendant's] words were only meant to be understood as an artistic expression of frustration"; namely, that the song "mentions [two police officers] by name, stating that the lyrics are 'for' them," and "proceeds to describe in graphic terms how [the defendant] intends to kill those officers."[186] The court also noted that the lyrics were "tied to interactions which had recently taken place between

from violent, yet protected, free expression."); *see also id.* at 1902-13 (discussing the informal and often hyperbolic nature of social media posts).

178 Commonwealth v. Knox, 190 A.3d 1146, 1150 (Pa. 2018), *cert. denied*, No. 18-949, 2019 U.S. LEXIS 2793 (Apr. 15, 2019).

179 *Id.* at 1148-49.

180 *Id.* at 1153.

181 *Id.*

182 *Id.* at 1149, 1160-61.

183 *Id.* at 1154-55.

184 *Id.* at 1155-58.

185 *Id.* at 1157 ("Construing the Court's discussion [in *Black*] of the speaker's intent as pertaining solely to the act of transmitting the speech appears difficult to harmonize with the assertion that '[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death.'" (quoting Virginia v. Black, 538 U.S. 343, 360 (2003))). The Pennsylvania Supreme Court also cited the Supreme Court's decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015), insofar as the Court held that a federal statute prohibiting the transmission of certain threatening communications in interstate commerce that was silent as to the speaker's intent must be interpreted to include an intent requirement above mere negligence. *Knox*, 190 A.3d at 1157. Although the facts of *Elonis* are similar in that the defendant was convicted of violating a criminal law on the basis of statements he made in "self-styled 'rap' lyrics" posted to Facebook, the *Elonis* Court did not reach the defendant's First Amendment challenge, instead overturning his conviction because the jury was not instructed on the requisite mental state to convict. *Elonis*, 135 S. Ct. at 2004, 2012.

186 *Knox*, 190 A.3d at 1159.

[the defendant and the named officers]," and that the named officers responded to hearing them by taking measures to enhance their safety.[187] With respect to the song's publication online, the court stated that "although the song was not communicated directly to the police and a third party uploaded it to YouTube, this factor does not negate an intent on [the defendant's] part that the song be heard by the officers."[188] The court accepted the lower courts' findings that the defendant "either intended for the song to be published or knew publication was inevitable," particularly where a link to the YouTube video was later posted on a Facebook page thought to belong to a codefendant who helped to write and record the song.[189]

The case law to date on online communications demonstrates that not all forms of alleged intimidation are analyzed under the true threats doctrine. In a lower court case involving state tort claims for invasion of privacy and intentional infliction of emotional distress, a federal district court in Montana rejected the First Amendment arguments of the defendant, an "alt-right website" publisher accused of launching an anti-Semitic "troll storm"[190] against the plaintiff after publishing several articles accusing her of "extortion" in business discussions with the "mother of [a] prominent neo-Nazi."[191] The defendant allegedly published the plaintiff's "phone numbers, email addresses, and social media profiles, as well as those of her husband, twelve-year-old son, friends, and colleagues" after which she and her family "received more than 700 disparaging and/or threatening messages over phone calls, voicemails, text messages, emails, letters, social media comments, and Christmas cards."[192] According to the court, the defendant had "called for 'confrontation' and 'action,' but he also told readers to avoid illegal activity."[193] In denying the defendant's motion to dismiss, the court did not analyze the defendant's speech as a true threat or any other category of unprotected speech, reasoning that "there is no categorical exception to the First Amendment for harassing or offensive speech."[194] Instead, it considered whether it was clear from the pleadings that the defendant was speaking on a matter of public concern, which might give rise to a First Amendment defense under Supreme Court precedent.[195] The court concluded that the plaintiff had "made a plausible claim that [the defendant's] speech involved a matter of strictly private concern."[196] The court reasoned that although the defendant "drew heavily on his readers' hatred and fear of ethnic Jews, rousing their political sympathies, there is more than a colorable claim that he did so strictly to further his campaign to harass [the plaintiff]" because of "a perceived conflict" between the plaintiff and his friend's mother.[197]

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[187] *Id.*

[188] *Id.* at 1160.

[189] *Id.* at 1149, 1160.

[190] *Merriam-Webster* defines the verb "troll" as "to antagonize (others) online by deliberately posting inflammatory, irrelevant, or offensive comments or other disruptive content." *Troll*, MERRIAM-WEBSTER (2019), https://www.merriam-webster.com/dictionary/troll.

[191] Gersh v. Anglin, 353 F. Supp. 3d 958, 962-63 (D. Mont. 2018).

[192] *Id.*

[193] *Id.* at 963 (internal citation omitted).

[194] *Id.* (quoting United States v. Osinger, 753 F.3d 939, 953 (9th Cir. 2014)). The court also noted that the plaintiff did not argue that the defendant's speech was categorically unprotected. *Id.*

[195] *Id.* at 964 (explaining that the First Amendment "can serve as a defense in state tort suits," but where "'matters of purely private significance are at issue, First Amendment protections are often less rigorous'" (quoting Snyder v. Phelps, 562 U.S. 443, 452 (2011))).

[196] *Id.* at 965.

[197] *Id.* at 966.

(3) Speech Integral to Criminal Conduct

Like incitement and true threats, speech that is integral to criminal conduct is considered unprotected under the Court's First Amendment jurisprudence.[198] This exception has sometimes been used to explain why the government may proscribe so-called "inchoate crimes—acts looking toward the commission of another crime" such as conspiracy, solicitation, and attempt.[199] Although these acts typically involve speech, the speech is "intended to induce or commence illegal activities" and thus is "undeserving of First Amendment protection."[200] Once again, the Supreme Court has distinguished in this context between "proposal[s] to engage in illegal activity" and "the abstract advocacy of illegality," extending the First Amendment's protections to the latter type of speech.[201] However, as one district court has observed, the "line between advocacy and action" can be "a hazy one," particularly in the case of inchoate offenses where the "action" that the law criminalizes "may be minor or look benign."[202]

Some courts have cited the speech integral to criminal conduct doctrine in rejecting First Amendment challenges to criminal convictions based on online communications.[203] However, the scope of the doctrine, particularly as it applies in the internet context, is not clear. One scholar has suggested that "[h]aving to show that something on social media is 'integral' to criminal activity seems like a tall order" except perhaps in "the case of a Tweet or Facebook posting along the lines of 'the bomb is in location x. Here is what you need to do to detonate it in location y at time z.'"[204] In contrast, another scholar has suggested that it is too easy, particularly in the context of federal terrorism statutes, to prosecute someone for conspiracy based on online speech and thereby avoid *Brandenburg*'s requirements.[205] More broadly, others have proposed ways to cabin

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[198] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now.").

[199] United States v. Williams, 553 U.S. 285, 300 (2008). A related, alternative theory is that these offenses prohibit conduct, not speech. *See, e.g.*, United States v. Daly, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (holding that statute prohibiting conspiracy to defraud the United States prohibited conduct, not speech).

[200] *Williams*, 553 U.S. at 298; *e.g.*, United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (discussing whether the First Amendment protected defendant's statements, including his advice to another individual to "find a plan to destroy or to bomb or to . . . inflict damage to the American Army," and reasoning that "[w]ords of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech").

[201] *Williams*, 553 U.S. at 298-99. *See generally* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1030 (2016) (interpreting the "zone of unprotected speech" involving attempt to commit a crime as "limited to speech that is preparatory to the actor's (or the actor's confederates') commission of some other nonspeech act" and positing that "a restriction on speech that angers listeners or creates a disturbance could not be upheld on the grounds that the speech brings about a criminally prohibited result (anger or disturbance)").

[202] United States v. Nagi, 254 F. Supp. 3d 548, 558 (W.D.N.Y. 2017).

[203] *See, e.g.*, United States v. Ackell, No. 15-CR-123-01, 2017 U.S. Dist. LEXIS 105095, at *2-4, *13, *31 (D.N.H. July 7, 2017) (rejecting defendant's argument that the First Amendment barred the government from punishing his online conduct, which included threatening to expose partially nude photographs of a 16-year-old girl ("R.R.") unless she continued to engage in a "dominant/submissive relationship" online with him, on the grounds that his "communications with R.R. were integral to a course of criminal conduct and, therefore, unprotected insofar as they were part and parcel of his 'extortionate threats to harass and intimidate [R.R] if she terminated their . . . relationship'" (quoting United States v. Sayer, 748 F.3d 425, 434 (1st Cir. 2014))), *aff'd on other grounds*, 907 F.3d 67 (1st Cir. 2018), *petition for cert. filed*, No. 18-7613 (Jan. 22, 2019); United States v. Hobgood, 868 F.3d 744, 747-48 (8th Cir. 2017) (holding that defendant's violation of the federal stalking statute also constituted extortion, which is unprotected speech integral to criminal conduct under the First Amendment).

[204] Sherman, *supra* note 10, at 142.

[205] Buchhandler-Raphael, *supra* note 139, at 1686 (arguing that "substantive criminal law—via its generous conspiracy

the doctrine's reach so that it is not used in a circular fashion to criminalize speech because of its content without "serious First Amendment analysis."[206] In view of these considerations, this category of unprotected speech appears to be less well-defined (and thus susceptible to broader application) than the standards for incitement and true threats.[207]

Strict Scrutiny and Overbreadth

Whether the government seeks to regulate protected speech, unprotected speech, or both, the First Amendment imposes some limitations on the means the government may use to achieve its regulatory objectives. When a law regulates protected speech, courts generally apply strict scrutiny and require the government to show that the law is narrowly tailored to achieve a compelling governmental interest.[208] In contrast, laws that primarily regulate nonexpressive conduct or unprotected speech normally are not subjected to strict scrutiny.[209] However, such laws can sometimes be challenged as unduly overbroad on the grounds that a "substantial number of [their] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[210] This section examines the strict scrutiny test and the overbreadth doctrine, as well as applications of those doctrines in the context of terrorism-related offenses and criminal prosecutions involving online speech, as those standards and precedents are likely to affect how the government may regulate online speech promoting terrorism or violence.

Strict Scrutiny

As previously noted, when a law regulates protected speech—especially on the basis of its content—courts generally require the government to prove: (1) a compelling governmental interest, and (2) that the law is narrowly tailored to achieve that interest.[211] As discussed below, not all of the government's interests in regulating speech promoting violence may rise to the level

doctrines—provides the government with ample measures to limit the spread of allegedly terrorist messages" because conspiracy law "functions as an effective means for the government to bypass First Amendment jurisprudence's strict requirements for prohibiting advocacy of violence, resulting in a direct collision between these two areas of law").

[206] Volokh, *supra* note 201, at 987-88 (arguing that the "doctrine can't justify treating speech as 'integral to illegal conduct' simply because the speech is illegal under the law that is being challenged," stating that this "should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal," but observing that the doctrine has "become, at times, a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down").

[207] *See* United States v. Matusiewicz, 84 F. Supp. 3d 363, 369 (D. Del. 2015) ("Under the broadest interpretation, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense. That interpretation would clearly be inconsistent with the First Amendment . . . ."), *aff'd sub nom.* United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018).

[208] See *supra* note 124. There are, however, some exceptions. For example, laws that regulate commercial speech generally receive intermediate scrutiny, as do laws that impose content-neutral time, place, or manner restrictions on speech. *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989).

[209] As previously noted, however, the First Amendment still places other limitations on regulations involving unprotected speech. See *supra* note 119. For example, the "government may not regulate . . . based on hostility—or favoritism—towards the underlying message expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[210] United States v. Stevens, 559 U.S. 460, 473 (2010).

[211] See *supra* note 112 and associated text.

of compelling.[212] In addition, even if the government can demonstrate a compelling interest, it would still have to show that the law is sufficiently tailored to that interest.[213]

Governmental Interests

The Supreme Court has held that the government does *not* have a compelling interest—or even a substantial one[214]—in shielding listeners from messages that they might find offensive.[215] In addition, where the government has deemed certain speech harmful, the Court has in some cases required the government to demonstrate actual harms that the regulation can redress.[216] In contrast, the Court has repeatedly recognized the government's compelling interests in maintaining national security and combating terrorism.[217] It has also acknowledged that Congress and the executive branch are uniquely positioned—both as a constitutional matter and in terms of their expertise—to safeguard the nation's security and regulate foreign affairs.[218] Accordingly, it

[212] See *infra* note 215, citing cases in which the Court rejected justifications based on protecting listeners from offensive or demeaning speech.

[213] *See* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.").

[214] The standard for intermediate scrutiny, which typically applies to commercial speech, is whether the law directly advances a substantial governmental interest and is narrowly drawn to achieve that interest. *See Cent. Hudson*, 447 U.S. at 564-65.

[215] *See* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (analyzing the Patent and Trademark Office's prohibition against disparaging trademarks under intermediate scrutiny, rejecting the government's asserted interest in "preventing 'underrepresented groups' from being 'bombarded with demeaning messages in commercial advertising,'" and stating that the idea that the government "has an interest in preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment" (internal citation omitted)). *Cf.* Snyder v. Phelps, 562 U.S. 443, 459 (2011) (considering whether the First Amendment barred recovery for intentional infliction of emotional distress on the facts presented, and stating, "In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' As a result, '[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" (internal citations omitted)); Robinson v. Hunt Cty., No. 18-10238, 2019 U.S. App. LEXIS 11013, at *9 (5th Cir. Apr. 15, 2019) (stating, in a case involving a county's alleged removal of "inappropriate" posts from its official Facebook page, that "[o]fficial censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination").

[216] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799-801 (2011) (stating that the government "must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution" and holding that the state did not meet that standard when it sought to prohibit the sale of violent video games to minors because it could not "show a direct causal link between violent video games and harm to minors," the research the state proffered showed at best a correlation between the two, and any effects such games had on children were "both small and indistinguishable from effects produced by other media" (internal citations omitted)).

[217] *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." (citation omitted)).

[218] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2422 (2018) (stating that "'[j]udicial inquiry into the national-security realm raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs" and that "'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'" (quoting Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) and *Humanitarian Law Project*, 561 U.S. at 34)); Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964) ("That Congress under the Constitution has power to safeguard our Nation's security is obvious and unarguable."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs. Latitude in this area is necessary to ensure effectuation of this indispensable function of government.").

has recognized some situations in which the First Amendment must yield to the "exclusive[]" authority of the political branches to "maintain[] normal international relations and defend[] the country against foreign encroachments and dangers."[219]

Narrow Tailoring

Once the government has established a compelling interest, the focus of the First Amendment inquiry is on whether the law is sufficiently tailored to achieve that interest. Under a strict scrutiny standard, narrow tailoring typically means that the law has to be the least speech-restrictive means of advancing the government's interest.[220] For example, in *Reno v. ACLU*, the Supreme Court struck down two provisions of the Communications Decency Act of 1996 (CDA) that banned the knowing transmission of "indecent" messages, and the knowing sending or display of "patently offensive" messages, to minors over the internet.[221] The CDA contained affirmative defenses for persons who took "good faith, reasonable, effective, and appropriate actions" to restrict minors' access to the prohibited communications or who restricted access through certain age-verification measures such as requesting a verified credit card.[222] The Court first concluded that the terms "indecent" and "patently offensive" were vague and thus threatened to "silence[] some speakers whose messages would be entitled to constitutional protection."[223] Moving to the narrow tailoring analysis, the Court then explained that the CDA's "burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute."[224] The Court recounted the district court's findings regarding the technological limitations of restricting minors' access to such content and the cost-prohibitive nature of age-verification solutions.[225] In contrast, the district court had found that available software for parental controls could curtail minors' access in a reasonably effective way.[226] The Court concluded that the government failed to "explain why a less restrictive provision would not be as effective as the CDA," and thus the challenged provisions were not narrowly tailored.[227]

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[219] Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (internal quotation marks and citation omitted); *see also id.* at 769-70 (declining to second-guess the Executive's decision to exclude a foreign scholar "on the basis of a facially legitimate and bona fide reason" or to "test [that decision] by balancing its justification against the First Amendment interests of those [U.S. persons] who [sought] personal communication with [him]" in view of the "plenary congressional power to make policies and rules for exclusion of aliens," which Congress delegated for this purpose to the Executive).

[220] *See* Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989) (stating that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

[221] 521 U.S. 844, 859-60 (1997) (quoting 47 U.S.C. § 223(a) and (d) (Supp. 1997)).

[222] *Id.* at 860-61 (quoting 47 U.S.C. § 223(e)(5)(A) and citing § 223(e)(5)(B)).

[223] *Id.* at 874.

[224] *Id.* ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

[225] *Id.* at 876-77.

[226] *Id.* at 877.

[227] *Id.* at 879 ("The arguments in this Court have referred to possible alternatives such as requiring that indecent material be 'tagged' in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.").

Deference to Political Branches

While a court may examine the availability and effectiveness of less speech-restrictive alternatives under some circumstances,[228] it may exercise some deference in evaluating the policy judgments of Congress and the Executive in certain areas such as national security and foreign affairs.[229] The *Humanitarian Law Project* decision discussed above is one case in which the Court applied stringent scrutiny but deferred in some measure to the means that Congress chose to combat terrorism.[230] In that case, the Supreme Court construed the federal material support statute to ban "only material support coordinated with or under the direction of" an FTO, not "[i]ndependent advocacy that might be viewed as promoting the group's legitimacy."[231] It concluded that the statute was "carefully drawn" insofar as it reached speech rather than conduct.[232] The Court then considered whether the law, as applied to the plaintiffs' proposed activities, was "necessary to further" the government's compelling interest in combating terrorism.[233] In this regard, the Court examined the plaintiffs' contention that they sought to advance only the "legitimate activities of the [FTOs], not their terrorism."[234] Reasoning that whether FTOs "meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question," the Court gave "significant weight" to "the considered judgment of Congress and the Executive that providing material support to [an FTO]—even seemingly benign support—bolsters the terrorist activities of that organization."[235] The Court then provided examples of how the plaintiffs' support could potentially further the terrorist objectives of the organizations.[236]

In upholding the statute as applied to the plaintiffs' activities, the Court cabined its decision in three respects.[237] First, it held that it was not opining on the constitutionality of "any future

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[228] In *Reno*, the Court explained that the "breadth" and "content-based" nature of the challenged CDA provisions "impose[d] an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." *Id.* at 879.

[229] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2422 (2018) ("While we of course 'do not defer to the Government's reading of the First Amendment,' the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'" (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 33-34 (2010))); *e.g.*, Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury, 660 F.3d 1019, 1033 (9th Cir. 2011) ("[T]he government's interest in national security cannot be understated. We owe unique deference to the executive branch's determination [in the executive order] that we face 'an unusual and extraordinary threat to the national security' of the United States.").

[230] The dissenting Justices observed that while the majority rejected the application of the "intermediate First Amendment standard that applies to conduct," the majority did not expressly adopt a strict scrutiny standard, stating only that a "more demanding standard" was required. *Humanitarian Law Project*, 561 U.S. at 45 (Breyer, J., dissenting) (internal quotation marks omitted) ("Indeed, where, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly'—to determine whether the prohibition is justified by a 'compelling' need that cannot be 'less restrictively' accommodated." (citations omitted)).

[231] *Humanitarian Law Project*, 561 U.S. at 31-32 (majority opinion).

[232] *Id.* at 26.

[233] *Id.* at 28 (citation omitted).

[234] *Id.* at 29.

[235] *Id.* at 29, 36. The Court also noted that "persuasive evidence" in the record supported the judgment of the two political branches. *Id.* at 36.

[236] *Id.* at 30, 36-38 (reasoning, for example, that material support "frees up other resources within the organization that may be put to violent ends" and "helps lend legitimacy to foreign terrorist groups . . . that makes it easier for those groups to persist, to recruit members, and to raise funds").

[237] *Id.* at 39.

applications of the material-support statute to speech or advocacy" or "any other statute relating to speech and terrorism."[238] Second, it suggested that "a regulation of independent speech" may not "pass constitutional muster, even if the Government were to show that such speech benefits [FTOs]."[239] And third, it expressly disclaimed any suggestion "that Congress could extend the same prohibition on material support at issue here to domestic organizations."[240]

The *Humanitarian Law Project* decision was criticized by several dissenting Justices and some outside commentators for a perceived departure from settled First Amendment standards. The three dissenting Justices agreed that the government has a "compelling" interest "in protecting the security of the United States" by "denying [FTOs] financial and other fungible resources."[241] However, they argued that the government failed to show how applying the statute to the plaintiffs' activities would "*help achieve* that important security-related end," which is typically required under any level of heightened scrutiny.[242] Legal scholars have disagreed as to whether the decision is consistent with the protections accorded to political advocacy in other contexts such as campaign finance.[243] Others have argued that the Court erred in prohibiting "mere advocacy" without asking whether the plaintiffs' activities amounted to proscribable incitement under *Brandenburg.*[244] At least one commentator has emphasized the context of the decision, suggesting that the serious national security concerns presented by terrorism may have weighed on the Justices in the majority.[245]

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[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.* at 46 (Breyer, J., dissenting).

[242] *Id*. The dissent conceded that "the Government's expertise in foreign affairs may warrant deference in respect to many matters." *Id.* at 55. But in the dissent's view, "it remains for this Court to decide whether the Government has shown that such an interest justifies criminalizing speech activity otherwise protected by the First Amendment." *Id.*

[243] *Compare* Brandon James Smith, *Protecting Citizens and Their Speech: Balancing National Security and Free Speech When Prosecuting the Material Support of Terrorism*, 59 LOY. L. REV. 89, 104-06 (2013) (arguing that the "exception for independent advocacy from the *Humanitarian Law Project* decision is akin to the protection of independent expenditures in *Buckley* [*v. Valeo*]," which the author describes as "a landmark campaign finance law decision"), *with* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 16-17 (2012) (drawing parallels between the legal issues raised in *Humanitarian Law Project* and in the campaign finance cases before the Roberts Court, but positing that "doctrinal propinquity yields no convergence in outcomes" with the result that "the government prevails when defending democracy against external threats but loses against internal corruption"). At least one scholar has argued that the *Humanitarian Law Project* Court added to the "confusion" about the scope of freedom of association in the terrorism context, including when membership in or communications with an FTO rise to the level of punishable "coordination." *See* Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 589-90 (2014). *See generally* Heidi Kitrosser, Symposium, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 511, 523-24 (2017) (summarizing the common criticisms of *Humanitarian Law Project* and commenting that "[i]t is troubling that courts treat administrative designations—specifically FTO determinations . . . —as bootstraps by which to yank speech restrictions from the clutches of probing judicial scrutiny").

[244] *See* VanLandingham, *supra* note 15, at 5 (arguing that under the material support for terrorism statute, "mere advocacy" becomes criminal when "disseminated on behalf of, or in coordination with, an FTO [that the speaker] knew was so designated," and that "[t]his nexus plus knowledge transforms otherwise lawful speech into a crime, with the Supreme Court's imprimatur").

[245] *See* Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1445 (2014) (offering, by way of explanation, the idea that the "threat of catastrophic attack weighs heavily on Justices, justifying, it would seem, government restrictions on civil liberties, notwithstanding a low or unidentified probability").

Lower courts have applied the Court's reasoning in *Humanitarian Law Project* in cases involving material support prosecutions where key evidence included the defendant's online activities.

- In *United States v. Mehanna*, the First Circuit considered the defendant's appeal from his convictions for conspiring to provide material support to Al Qaeda and providing material support for terrorism.[246] As the court described it, his indictment on the terrorism-related charges was "based on two separate clusters of activities": (1) the defendant's travel to Yemen in search of a terrorist training camp; and (2) the year after his return to the United States, the defendant's translations of "Arab-language materials into English," which he posted "on a website . . . that comprised an online community for those sympathetic to al-Qa'ida and Salafi-Jihadi perspectives," and at least some of which "constituted al-Qa'ida-generated media and materials supportive of al-Qa'ida and/or [violent] jihad."[247] On appeal, the defendant argued that the government's theory of guilt centered on the translations and that the jury's guilty verdict was improperly based on protected First Amendment speech.[248] The trial court had instructed the jury that it need not consider "the scope or effect of the guarantee of free speech contained in the First Amendment" because "activity that is proven to be the furnishing of material support" because it was undertaken at the direction of or in coordination with an FTO rather than independent advocacy "is not activity that is protected by the First Amendment."[249] The First Circuit held that the trial court's instructions were proper because they "captured the essence of the controlling decision" in *Humanitarian Law Project* and "already accounted for [free speech] protections."[250] The court further held that "[i]t makes no difference that the absence of facts showing coordination with al-Qa'ida [in the defendant's translation activities] might have resulted in constitutionally protected conduct," because the jury had ample evidence to convict him on the basis of his travel to Yemen and associated activities.[251]
- In *United States v. Elshinawy*, the defendant, a U.S. citizen, was indicted for providing and conspiring to provide material support to ISIL in the form of personnel (i.e., himself), services, and financial services.[252] Many of the allegations were based on social media communications between the defendant and a childhood friend who was a member of ISIL and resided outside of the United States.[253] These conversations allegedly included the defendant's "pledge[of] his allegiance to ISIL" and "plans to obtain or make some sort of explosive device."[254] In addition, the defendant received funds transfers from overseas

[246] 735 F.3d 32, 41 (1st Cir. 2013). The defendant was prosecuted under two separate sections of the material support statutes—18 U.S.C. § 2339A, which prohibits the provision of material support or resources "knowing or intending that they are to be used in preparation for, or in carrying out" certain offenses, and § 2339B, the statute at issue in *Humanitarian Law Project*, which concerns providing material support to FTOs. *Id.* at 42-43.

[247] *Id.* at 41 & n.3.

[248] *Id.* at 47.

[249] *Id.* at 48.

[250] *Id.* at 49.

[251] *Id.* at 50-51.

[252] 228 F. Supp. 3d 520, 524 (D. Md. 2016).

[253] *Id.* at 524-25.

[254] *Id.* at 525 (internal quotation marks and citation omitted).

allegedly for the purpose of conducting a terrorist attack on ISIL's behalf.[255] The defendant challenged the indictment on First Amendment grounds, arguing that the government sought to criminalize protected speech and association; namely, his independent interest in ISIL's cause.[256] The district court, while suggesting that the defendant's characterizations of his communications could be raised in his defense at trial, largely rejected his First Amendment argument, stating that it "distort[ed] the allegations and misapprehend[ed] the [material support] statute."[257] The court noted that in interpreting the same statute in *Humanitarian Law Project*, the Supreme Court drew a line between independent advocacy and operating under an FTO's "direction and control."[258] The court reasoned that the indictment's allegations included "more than just an expression of support during a conversation over social media" because the defendant pledged his allegiance to ISIL.[259] Moreover, the court held, to the extent that any statements were mere expressions of support, those statements could not be considered "in isolation" and must be viewed "along with defendant's conduct."[260]

- In *United States v. Nagi*, a U.S. citizen charged with attempting to provide material support to ISIL in the form of personnel (i.e., himself) moved to dismiss the indictment on First Amendment grounds.[261] The defendant argued that the government could not prosecute him merely because he allegedly traveled to Turkey with the intent of entering Syria and joining ISIL because such a prosecution would violate his First Amendment right of association.[262] The district court disagreed, based on the Supreme Court's reasoning in *Humanitarian Law Project*.[263] In particular, the court rejected the defendant's argument that his charges were based on "something that § 2339B does not prohibit: simple membership in a terrorist organization."[264] In the court's view, "the anticipated trial evidence show[ed] that the Defendant attempted to work 'under the direction of, or in coordination with' ISIL," not merely to associate with the group.[265] Among other things, the government planned to introduce the defendant's Twitter pledge to support ISIL's leader and his purchase of combat gear.[266] The court explained that although the Twitter pledge itself was protected

[255] *Id.* at 525-26.

[256] *Id.* at 535.

[257] *Id.* at 536.

[258] *Id.* at 535-36 (internal quotation marks and citation omitted).

[259] *Id.* at 536.

[260] *Id.* at 536-37.

[261] 254 F. Supp. 3d 548, 552-53, 556 (W.D.N.Y. 2017).

[262] *Id.* at 553, 556.

[263] *Id.* at 557.

[264] *Id.* at 558 (internal quotation marks omitted).

[265] *Id.* (quoting *Humanitarian Law Project*, 561 U.S. at 26). While acknowledging that § 2339B may "leave a person little room to associate with [an FTO] without violating the statute," the court reasoned that the law "does not 'establish[] guilt by association'; rather, it requires a defendant to commit some act that 'establish[es] that [the] individual's association poses the threat feared by the Government in proscribing it.'" *Id.* at 558-59 (quoting United States v. Robel, 389 U.S. 258, 265 (1967)).

[266] *Id.* at 559.

> under the First Amendment, the government could use it to show the defendant's intent.[267]

As the examples above illustrate, the First Amendment has not greatly restricted material support prosecutions concerning online speech, particularly when courts have contextualized the speech within a course of conduct.[268] However, these cases may be of limited utility in evaluating the government's authority to regulate speech promoting terrorism in a prophylactic way, because they did not present scenarios involving online speech exclusively; in other words, the government proffered or introduced evidence that the defendant took some other step in coordination with an FTO.[269]

The Overbreadth Doctrine

Although a law directed at unprotected speech is unlikely to trigger strict scrutiny, the overbreadth doctrine may nonetheless limit Congress's ability to regulate online speech. The Supreme Court has said that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[270] This rule, called the overbreadth doctrine, "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[271] Because the doctrine can result in a court declaring a law invalid on its face rather than in the specific context before it,[272] the Court has called the overbreadth doctrine "strong medicine" to be used "sparingly and only as a last resort" when the statute cannot be construed in a more limited manner.[273] According to the Court, "[r]arely, if ever, will an overbreadth challenge

[267] *See id.* at 560 ("[T]he Defendant's Twitter posts . . . standing alone [are] either First Amendment-protected speech or evidence of First Amendment-protected association. But the Government's proffer shows that the Defendant is not being charged with simply expressing radical beliefs on Twitter, nor is he being charged with attempting to merely become a member of ISIL; he is instead being charged with attempting to act on that radical speech by attempting to volunteer himself as a fighter to ISIL. The Defendant's First Amendment-protected conduct is, of course, not criminal, but that conduct may be used to show that the Defendant's other actions (for instance, traveling to Turkey) were undertaken with the intent of engaging in criminal conduct."). *Cf.* United States v. Shehadeh, No. 1:10-CR-1020, 2013 U.S. Dist. LEXIS 162234, at * n.5 (E.D.N.Y. Nov. 14, 2013) (declining to depart upward from the recommended sentencing category based on the defendant's creation of "websites regurgitating certain violent jihadist propaganda," stating that "the Court does not find [those activities] . . . to be an appropriate basis for punishment consistent with the First Amendment" or that they rise to the level of "criminal conduct" necessary to trigger the sentencing enhancement).

[268] *See, e.g.*, *Nagi*, 254 F. Supp. 3d at 560 (viewing the defendant's Twitter posts in light of his overseas travel with the alleged purpose of joining ISIL and his purchase of combat gear).

[269] *See, e.g.*, United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013) (noting that the defendant's indictment was based not only on translations of materials he posted to a website for Al Qaeda sympathizers, but also his travel to Yemen in search of a terrorist training camp).

[270] United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Wash. State Grange v. Wash. State Repub. Party, 552 U.S. 442, 449 n.6 (2008)).

[271] Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002). The overbreadth doctrine is not limited to laws aimed at regulating unprotected speech, but overbreadth challenges may arise in this context. *See* Fallon, *supra* note 22, at 865-66 (noting four ways in which a statute may fail under an overbreadth challenge, including when the government attempts to regulate an unprotected category of speech but "err[s] by defining the unprotected category more broadly than the Constitution permits").

[272] Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) ("The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" (internal citations omitted)).

[273] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[274]

At least one circuit court has upheld the material support statute against an overbreadth challenge—albeit in circumstances in which the defendant failed to allege any circumstances in which the statute might be applied to protected speech.[275] Overbreadth challenges have also arisen more generally in the context of other statutes that implicate online communications. In *United States v. Ackell*, a defendant convicted under a federal law prohibiting stalking challenged the statute as facially overbroad on appeal.[276] In relevant part, the law makes it a crime to (1) use "any interactive computer service or electronic communication service" or other facility of interstate commerce; (2) "to engage in a course of conduct" that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress" to that person or certain other individuals; (3) with the "intent to kill, injure, harass, [or] intimidate . . . [that] person."[277]

Construing the statute, the First Circuit reasoned that the law "targets conduct rather than speech" because, "[b]y its own terms," it regulates a "course of conduct."[278] Although the court acknowledged that the statute refers to interactive computer services and other facilities of interstate commerce that "are commonly employed to facilitate communication," it concluded that the statute "covers countless amounts" of nonexpressive conduct such as mailing unknown substances to another person or repeatedly infecting a person's computer with viruses.[279] Turning to whether the statute in practice might nonetheless apply to a substantial amount of protected speech in relation to its plainly legitimate sweep, the court construed the law to primarily implicate two categories of unprotected speech: true threats and speech integral to criminal conduct.[280] Beyond those categories, the court identified only one case in which the government had prosecuted a defendant under the statute for protected speech and rejected the defendant's proffered hypothetical applications as either too speculative or falling outside the statutory proscription.[281] The court acknowledged that the statute "*could* have an unconstitutional application," but declined to "administer the 'strong medicine' of holding the statute facially overbroad."[282]

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[274] *Hicks*, 539 U.S. at 124.

[275] *See* United States v. Farhane, 634 F.3d 127, 136-38 (2d Cir. 2011) (dismissing the defendant's First Amendment overbreadth challenge to 18 U.S.C. § 2339B for failure to state a claim). *Cf.* United States v. Abu Khatallah, 151 F. Supp. 3d 116, 143 (D.D.C. 2015) ("Because [the defendant] has 'failed to describe any situation in which even an insubstantial amount of speech may be restrained because of § 2339A[] and cites no case law in which this statute . . . has been found overbroad,' the Court rejects his facial challenge." (internal citation omitted)).

[276] 907 F.3d 67, 71 (1st Cir. 2018) ("Ackell does not claim that the conduct underlying his conviction was protected by the First Amendment. Rather, Ackell asserts that § 2261A(2)(B) cannot be applied to anyone because it is overbroad under the First Amendment, even though it has been constitutionally applied to him."). The defendant has filed a petition for certiorari with the Supreme Court. *See* Ackell v. United States, No. 18-7613 (Jan. 22, 2019).

[277] 18 U.S.C. § 2261A(2)(B).

[278] *Ackell*, 907 F.3d at 73; *cf.* United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012) (analyzing a facial overbreadth challenge to a prior version of the federal stalking statute and reasoning that the statute was "directed toward 'course[s] of conduct,' not speech" and did not prohibit conduct "necessarily associated with speech" (internal quotation marks omitted)).

[279] *Ackell*, 907 F.3d at 73.

[280] *Id.* at 74-75.

[281] *Id.* at 76-77 (citing United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011) (finding § 2261A unconstitutional "as applied" to defendant who was anonymously harassing a religious leader via Twitter and a blog) (parenthetical in original)).

[282] *Id.* at 77 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).

Conclusion

As the discussion above illustrates, regulating online content in accordance with the First Amendment—even online content promoting terrorism or violence—presents challenges. These challenges are due in large part to the complexities of free speech jurisprudence and the lack of controlling authority about how doctrines developed nearly 50 years ago—many in the context of statements made by identifiable speakers at political or ideological rallies—apply to speech on the internet where the lines between advocacy, incitement, threats, and conduct can be even more blurred.[283] Nevertheless, the cases and scholarship to date suggest some general guideposts for evaluating the free speech implications of scholarly or legislative proposals to restrict online content promoting terrorism or violence.

- First, a law that primarily regulates conduct online as opposed to speech may not trigger heightened First Amendment scrutiny.[284] Likewise, a general regulatory scheme that incidentally regulates online content is unlikely to trigger heightened scrutiny.[285] However, if a law expressly regulates certain types of online communications based on the words used or their effect on other internet users, it may be assumed to regulate speech rather than conduct.[286]
- Second, a law that is narrowly drafted[287] to prohibit online speech that falls within one of the so-called unprotected categories of speech may not trigger heightened First Amendment scrutiny.[288] In this regard, speech on the internet advocating violence as an abstract proposition would likely be considered protected, while speech that incites imminent violence, constitutes a true threat, or is integral to criminal conduct may be deemed unprotected.[289]

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[283] *See* United States v. Wheeler, 776 F.3d 736, 745 (10th Cir. 2015) (observing that "the line between threats and incitement, especially in cyberspace" is not always clear); Cronan, *supra* note 158, at 452 (arguing that the current "incitement standard suits situations like . . . rallies, demonstrations, and crowded streets," but is ill-suited to the internet, where the "speaker-audience relationship" is less certain).

[284] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) (noting that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *e.g.*, *Ackell*, 907 F.3d at 71 (holding that the federal stalking statute regulated conduct, not speech).

[285] *See Sorrell*, 564 U.S. at 567 (discussing general economic regulations).

[286] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 849, 868 (1997) (reasoning that "statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet" were "content-based blanket restriction[s] on speech").

[287] *See generally* NAACP v. Button, 371 U.S. 415, 438 (1963) (observing that "[b]road prophylactic rules in the area of free expression are suspect" and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

[288] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (explaining that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"). *Cf.* Virginia v. Black, 538 U.S. 343, 360-63 (2003) (holding that intimidation in the "constitutionally proscribable sense of the word is a type of true threat" and that a state can ban cross burning with the intent to intimidate because cross burning is "a particularly virulent form of intimidation").

[289] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

- Third, even if alaw is directed at nonexpressive conduct or unprotected speech on the internet, it may still be subject to an overbreadth challenge if, in practice, it prohibits a substantial amount of protected speech in relation to its plainly legitimate sweep.[290]
- Fourth, except under some circumstances involving unprotected speech,[291] a law that regulates online speech on the basis of its content would likely be subject to strict scrutiny.[292] A law that regulates online content on the basis of the viewpoints expressed would likely present a clearer case of content discrimination and would be presumptively invalid regardless of whether the underlying speech is protected.[293]
- Finally, the government may have more leeway to regulate online content when asserting its interests in national security and foreign affairs; however, such laws, to the extent they restrict or burden protected speech, would likely have to withstand heightened (if not strict) First Amendment scrutiny.[294]

In addition to the considerations listed above, close attention to legal challenges regarding the enforcement of existing laws as applied to online activities may provide guidance to lawmakers seeking to balance the First Amendment interests of internet users with the safety and security of U.S. citizens on and offline.[295]

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[290] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 464, 481-82 (2010) (holding that a federal law criminalizing the sale of certain depictions of animal cruelty was unconstitutionally overbroad because, while it may have been intended to prohibit "crush videos" or portrayals of animal fighting, it applied to a substantial amount of protected speech, such as hunting depictions).

[291] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (noting that the government may prohibit a subset of unprotected speech in a viewpoint-neutral way "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable").

[292] *Cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015); United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000).

[293] *See Reed*, 135 S. Ct. at 2230 ("Government discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995))); *R.A.V.*, 505 U.S. at 388, 391 (explaining that even in the realm of unprotected speech, laws may not discriminate on the basis of viewpoint). *Cf.* Healy v. James, 408 U.S. 169, 187-88 (1972) (reasoning that whether a student group "did in fact advocate a philosophy of 'destruction'" was "immaterial" to a state college's justification for denying the group recognition because the college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent").

[294] *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[295] *See, e.g.*, Petition for Writ of Certiorari, Ackell v. United States, No. 18-7613 (Jan. 22, 2019) (asking the Supreme Court to resolve a First Amendment challenge to the federal stalking statute); People *ex rel.* R.D., No. 17SC116, 2017 Colo. LEXIS 770 (Colo. Sept. 5, 2017) (granting certiorari on the issue of whether "the defendant's comments, made on Twitter, were protected by the First Amendment"); Ariane de Vogue, *Supreme Court Declines to Take Up First Amendment Case Brought by Rap Artist*, CNN (Apr. 15, 2019, 11:17 AM), https://www.cnn.com/2019/04/15/politics/supreme-court-jamal-knox-first-amendment/index.html (stating that by declining to review the Pennsylvania Supreme Court's decision in *Commonwealth v. Knox*, the Court "left for another day a look at the contours of so called 'true threats'").

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