

No. 05-09

In The
Supreme Court of the United States

9KILL9,

Petitioner,

v.

xSONICRAINBOOM,

Respondent.

*On Petition for a Writ of Certiorari to the United
States District Court for Nevada*

**BRIEF FOR TIMOTHY GEITHNER AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT**

TIMOTHY GEITHNER

Counsel of Record

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February 22, 2018

QUESTION PRESENTED

Whether repeatedly writing “BURN THE FBI” on a publicly accessible radio in game constitutes a form of speech protected by the First Amendment.

INTEREST OF *AMICUS CURIAE*¹

Timothy Geithner is a former Member of the Supreme Court and author and framer of the Constitution of the United States. His work includes areas of law discussing federalism, contempt citations, the Second Amendment, and many more. He has authored a substantial number of common-law opinions still in use today by the Judiciary of the United States.

ARGUMENT

At the heart of the First Amendment's guarantee of free speech is the right to criticize the government. See, e.g., *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Indeed, as Justice Blackmun put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). But that is exactly what the petitioner wishes to be done here.

¹ The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to the brief's preparation or submission.

Be not persuaded by the petitioner's assertion that this case is about incitement; it has nothing to do with inciting violence. The incitement exception to the rights provided by the First Amendment was explained clearly in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), wherein an individual was charged with advocating violence for a speech he made at a local Klu Klux Klan rally. The Court, however, reversed, holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Id.*, at 447 (emphasis added). This is the now-used standard the Court employs when evaluating whether speech actually incited violence.

The Court, in *Hess v. Indiana*, 414 U.S. 105 (1973) did just that. When petitioner in *Hess*, Gregory Heels, was removed from a public street during an anti-war protest by a policeman, he was heard saying, "We'll take the fucking street later." *Id.*, at 107. Indiana charged him for disorderly conduct, but the Court reversed; the words spoken, simply, did not constitute incitement under *Brandenburg*. The speech, at best, could have been "taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite time." *Ibid.* Here, the respondent was quoted saying "BURN THE FBI" twice on an accessible-to-all radio at the city of Las Vegas.

Whatever one's opinions may be on the respondent's message, it remains protected—and it certainly falls short of the incitement standard laid out in *Brandenburg*.

Brandenburg gives us two prongs: (1) the speech in question must advocate *imminent* lawless action and (2) it must be *likely* to produce it. That is simply not what happened here. The jurisprudence on incitement from the Court is clear that to satisfy the first prong, the speech must be particularized; that is, it must be specific and directed towards a singular action. That is why, for example, when black protesters threatened to break the necks of business owners with whom they disagreed, the First Amendment still fell into play because although the speech advocated the use of violence, just doing so “does not remove [it] from the protection of the First Amendment.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). 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.” *Noto v. United States*, 367 U.S. 290, 297–298 (1961). See also *Whitney v. California*, 247 U.S. 357, 372 (1927) (Brandeis, J., concurring).

The words, “BURN THE FBI,” certainly fail to satisfy *Brandenburg*. It is true that saying such words communicate a message heavily critical of the F.B.I., but there was no specific instruction as to when or how to commit the act; nor do the facts of the record in this case show anyone taking the respondent’s words seriously—nobody followed through. Had they, this Court might very well have had a “substantial question” to resolve, *Claiborne, supra*, at 928, under *Brandenburg*’s second prong.

What this speech represents, instead of incitement, is a mere crude attitude on behalf of the respondent—crudeness spurred by an emotional appeal against the F.B.I., whose members he felt were about to wrongly arrest him in the first place. “An advocate must be free to stimulate his audience with spontaneous and emotional appeals,” *Claiborne*, 458 U.S., at 928. That the speech contained elements that facially one may assume to advocate for general violence does not satisfy *Brandenburg*; ruling otherwise would curb the widely accepted view both by the public and by this Court that “debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Furthermore, and lastly, petitioner tries to rely on the fact that this speech was made on the public radio, as though that would change the outcome of this case. And while it is true that “[e]ach medium of expression . . . may present its own problems,” *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), the Las Vegas game radio, much like the real-life internet, allows any person to “become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). The radio is accessible to all in game, regardless of which team they may be on; it also, for convenience and organization, has individual radio channels for each team at Las Vegas. This allows citizens to contact one another or broadcast communicative messages globally through the general channel or, if working, to coordinate on individual bases with their fellow employees in an agency-specific channel. Much like one may picket in the public square, one must

also, therefore, be permitted to do the same in what constitutes an equally, though virtual in a sense, public square through the public radio.

And while, of course, use of the radio on a government team would change this case, the respondent here acted as a private citizen and his words used were communicated in the public channel. First Amendment protections must extend.

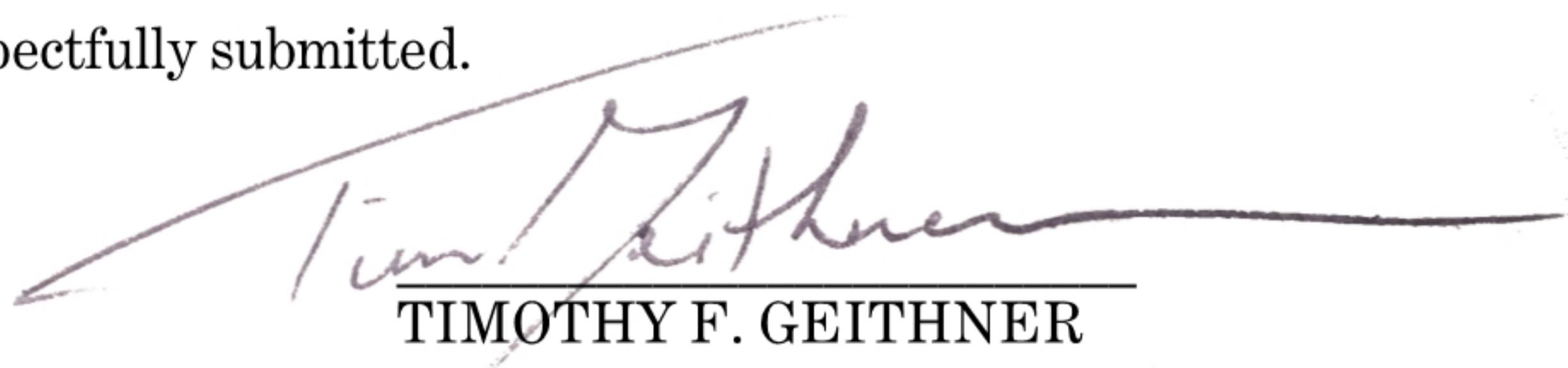
* * *

The incitement standard is clear; here, the respondent's words fall short. Should this Court rule with the petitioner, it will implicitly send a message not that saying "BURN THE FBI" is unconstitutional because it vaguely incites violence, but instead because it happens to be critical of the government. The "best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which . . . wishes [to speak] safely can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgement of the district court should be upheld.

Respectfully submitted.



A handwritten signature in black ink, appearing to read "Timothy F. Geithner". Below the signature, the name "TIMOTHY F. GEITHNER" is printed in a standard font.