No. _____

In the Supreme Court of the United States

KIMBERLEY THAMES,
Petitioner,

v.

CITY OF WESTLAND, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Kimberly Thames was praying on the public sidewalk outside of an abortion clinic when a clinic guard accused her of saying: "*I prophesy bombs are going to fall and they're going to fall in the near future*" and later claimed she said, "*bombs, bombs on America, and bombs will blow up this building.*" Thames was arrested and jailed for over 49 hours because, according to the senior officer at the scene, "*you can't say anything about bombs near a facility that performs abortions*." Thames was arrested and jailed for pure speech.

The Sixth Circuit held that Respondent police officers were entitled to qualified immunity because they reasonably believed that Thames's speech was a criminal threat. It also held that Respondent City of Westland was not liable for Thames's arrest, even though the arrest was authorized by City policy according to its Rule 30(b)(6) witness and ratified by its Chief of Police.

1. Did Petitioner's arrest and subsequent detention based on her speech violate her clearly established rights as set forth in *Watts v. United States*, 394 U.S. 705 (1969), *Virginia v. Black*, 538 U.S. 343 (2003), *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969), such that the arresting officers do not enjoy qualified immunity?

2. Is the City liable under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), for Thames's arrest and subsequent detention for allegedly

mentioning bombs outside a facility that performs abortions—a decision which was authorized by City policy and ratified by its Chief of Police and the City's designated Rule 30(b)(6) witness?

PARTIES TO THE PROCEEDING

Petitioner is Kimberley Thames ("Petitioner" or "Thames").

Respondents are the City of Westland, Michigan ("City"); Jeff Jedrusik, individually and in his official capacity as Chief of Police, City of Westland Police Department; Norman Brooks; John Gatti; Jason Soulliere; and Adam Tardiff (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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The opinion of the court of appeals appears at App. 1 and is unpublished but reported at Nos. 18-1576, 18-1608, 18-1695, 2019 U.S. App. LEXIS 36225. The opinion of the district court appears at App. 36 and is reported at 310 F. Supp. 3d 783.

JURISDICTION

The opinion of the court of appeals was entered on December 6, 2019. App. 1. A petition for rehearing en banc was denied on January 10, 2020. App. 73. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

Per the panel's opinion (verbatim): "On Saturday morning, August 27, 2016, Kimberley Thames, a 57-year old, Roman Catholic, pro-life activist, stood with three other people—an elderly woman who appeared to be a Catholic nun, and a wheelchair-bound man with his wife—on the public sidewalk outside Northland Family Planning, an abortion clinic. Thames was holding a two-foot-by-two-foot sign with a photo and handwritten words, advocating pro-life beliefs and protesting abortion."

Photo of Thames (left) taken from police dash camera upon arrival at the scene.

The panel opinion continues: "[w]hile many Northland Clinic employees knew Thames as an occasional protestor, the Clinic's security guard, Robert Parsley, apparently did not. He was standing somewhere near her when she engaged him in conversation, beginning with her offer that she was praying for him and praying that he would find a different job. But, at some point, there was discussion of bombs. Thames said that Parsley raised the topic of bombs, telling her that there had been bombings and threats at abortion clinics, but Parsley says that Thames initiated it and said something like: 'I prophesy bombs are going to fall and they're going to fall in the near future'; 'I prophesy bombs are going to fall and they're going to fall on you people'; and 'bombs,

bombs on America, and bombs will blow up this building.'" App. 2-3.

As the record demonstrates, Parsley, the clinic security guard, accused Thames of making a bomb threat, telling the officers prior to Thames's arrest that she stated the following: "I prophesy bombs are going to fall and they're going to fall in the near future."[1]

Prior to the police leaving the scene of the arrest, Parsley was instructed to make a written statement, in which he contradicted his prior statement and told the officers that the alleged "threat" was as follows: "She said, bombs, bombs on America, and bombs will blow up this building."[2]

Thames vehemently denied making any bomb threat, telling the police at the scene and prior to her arrest that Parsley brought up the issue of clinic bombings, claiming that abortion clinics in Michigan have been bombed, to which Thames responded that she was not aware of any such bombings and that she is not the type of person who would do such a thing.[3] *See* App. 4-6.

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[1] (R-35-7:Def. Ex. F Gatti Dep. at 52:12, 23-25 to 53:5-23, Pg.ID 490-91; R-36-3:Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg.ID 586).

[2] (R-36-3:Ex. E [Parsley Statement], Pg.ID 614).

[3] (R-36-3:Ex. J Soulliere Dep. at 57:24-25 to 58:1-17, Pg.ID 655; R-36-3:Ex. C [Investigation] at 6, Pg.ID 593; R-36-2:Ex. 1 Thames Decl. ¶¶ 9-12, Pg.ID 565-66).

At the scene of the arrest, two officers searched Thames's vehicle. They did not find any explosives or any other contraband. App. 11.

Despite the alleged concern about a bomb, the officers did not request the assistance of a bomb squad or bomb sniffing dog, they did not direct the evacuation of the clinic, they did not search the clinic for a bomb, they did not search the surrounding area for a bomb, they did not search the adjacent parking lot for a bomb, they did not search the dumpster for a bomb, and they did not impound Thames's vehicle.[4] *See* App. 11-12, 41.

The evidence also shows that there was no "alarm" on the part of the security guard or the clinic staff. As the recording of the 9-1-1 call demonstrates, Mary Guilbernat, the abortion clinic employee who made the call, was calmly speaking with the 9-1-1 dispatcher, and she told the dispatcher, *inter alia*, that Thames was simply holding a sign and that she (Mary) saw nothing to indicate that Thames had anything like a bomb.[5]

Based on the security guard's false accusation, Thames was handcuffed, brought to the police station, and jailed for over 49 hours under exceedingly difficult conditions. *See* App. 12-13.

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[4] (R-36-3:Ex. J Soulliere Dep. at 34:14-25 to 35:1-12, Pg.ID 649; R-36-3:Ex. L Brooks Dep. at 26:15-25, 27:18-19, 28:1-17, Pg.ID 676).

[5] (R-36-3:Ex. J Soulliere Dep. at 46:5-25 to 48:1; R:36-3:Ex. A [9-1-1 Recording]).

Thames was finally released from jail when a detective reviewed the police report and properly concluded: "I do not see a direct threat where Kimberley threatened to bomb the clinic."[6]

Respondent Brooks, the senior officer directing Thames's arrest, explained his rationale for doing so as follows:

> I don't know the exact verbiage that—that he [Parsley] said to Officer Gatti. My—there's only one word that concerns me in this whole thing and that's bombs. Just like you can't yell fire in a crowded theater, you can't say anything about bombs near a facility that performs abortions.

App. 8. Brooks also testified that the "[t]hreat doesn't have to be credible according to the law."[7] App. 12.

The district court properly held that the officers did not enjoy qualified immunity. App. 58, 60, 63. However, the court erred by failing to find that the alleged "threats" do not constitute "true threats" as a matter of clearly established law under the First

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[6] (R-36-3:Ex. N Farrar Dep. at 24:19-24, Pg.ID 686; R-36-3:Ex. D [Report] at 5, Pg.ID 611).

[7] Contrary to the Sixth Circuit's claim, *see* App. 21, credibility and capability are two distinct concepts. While the person making the threat need not have the *capability* to carry it out, the threat itself must still be *credible*—even more, it must be a "serious expression of an intent to commit an act of unlawful violence." *Va. v. Black*, 538 U.S. 343, 359 (2003). The officers' actions at the time of the arrest, as noted above, demonstrate without contradiction that they did not consider this a "true threat."

Amendment and thus erred by failing to enter judgment in Thames's favor. *See* App. 48-53. The district court also erred by finding no municipal or supervisory liability. *See* App. 63-69. The Sixth Circuit compounded the district court's errors by reversing the court's decision on the qualified immunity issue. App. 19-25. The court also affirmed the district court's municipal liability ruling. Accordingly, the panel dismissed the case.

REASONS FOR GRANTING THE PETITION

This case arises from an allegation that Petitioner Kimberly Thames said "something like 'I prophesy that bombs are going to fall, they're going to fall in the near future, and they're going to fall on you people, and on America, and bombs will blow up this building,'" while protesting outside of an abortion clinic. App. 21.

In defiance of this Court's controlling precedent, the Sixth Circuit erroneously concluded that Thames's alleged statement(s) provided sufficient justification for the officers to arrest and detain her for over 49 hours for making a "threat." Consequently, the Sixth Circuit erroneously concluded that the officers who arrested Thames based on the alleged statement(s) were entitled to qualified immunity because they could reasonably believe that the statement(s) constituted a "true threat" under clearly established law. Finally, the Sixth Circuit erroneously concluded that the City is not liable for Thames's unlawful arrest, which was executed by nearly the entire day shift and its supervisor, or her unlawful 49-hour detention—both of which were authorized by City policy per the City's

Rule 30(b)(6) witness and ratified through the City's Chief of Police.

Review by this Court is necessary because the Sixth Circuit committed precedent-setting errors of exceptional public importance and issued an opinion that directly conflicts with this Court's precedent. Sup. Ct. R. 10(c). Moreover, the problem is not limited to the Sixth Circuit. Lower courts, both state and federal, are unable to draw the line between words that, considered in context, are "true threats" and words that are protected speech.

The important First Amendment issues at stake in this case warrant this Court's attention and review, and this case provides a proper vehicle for resolving these issues because there is no dispute of any material fact.

I. Lower Courts Are Uncertain about the Standards Governing the *Mens Rea* and *Actus Reus* of True Threats.

Petitioner contends that the Second Circuit's decision in *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001), is illustrative of the confusion in lower courts on how to distinguish true threats from protected speech. In *Operation Rescue National*, the court stated, in relevant part, as follows:

> When determining whether a statement qualifies as a threat for First Amendment purposes, a district court must ask whether "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the

> person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . ." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir.), *cert. denied*, 429 U.S. 1022.

Operation Rescue Nat'l, 273 F.3d at 196-97. Significantly, this legal standard has been criticized by other circuits and dismissed as dicta by other Second Circuit panels. *See, e.g., United States v. Dillard*, 795 F.3d 1191, 1200 (10th Cir. 2015) (rejecting the district court's conclusion that the defendant's letter did not contain a true threat and criticizing the district court's reliance on *Operation Rescue National*, stating, "In recent cases, however, the Second Circuit has described this language as 'dicta' and has rejected the argument that all threats must satisfy all of these conditions in order to fall outside of the First Amendment protections.") (citing *United States v. Turner*, 720 F.3d 411, 424 (2d Cir. 2013)).

As the Second Circuit stated further in *Operation Rescue National*:

> Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates recent political support for the violent third parties.

Operation Rescue Nat'l, 273 F.3d at 196-97. Applying the law to the facts, the Second Circuit concluded as follows:

> Although we are skeptical as to whether any of [the defendant's] statements constitute true threats, there is one in particular that illustrates our concern. The District Court found that [the defendant] threatened a clinic doctor when, soon after the murder of Dr. Bernard Slepian, she told the doctor that killing babies is no different than killing doctors. Given the context, it is understandable that the clinic doctor feared for her safety, and that [the defendant's] protest and strong rhetoric reinforced that fear. *But excessive reliance on the reaction of recipients would endanger First Amendment values, in large part by potentially misconstruing the ultimate source of the fear*. [The defendant's] expression went to the core of her protest message, and the statement (even in context) did not suggest that [the defendant] was engaged in a plan to harm the clinic doctor. This statement did not indicate the "unequivocal immediacy and express intention," *Kelner*, 534 F.2d at 1027, of a true threat. It was not a direct or even veiled threat, but expression of a political opinion. As such, it is entitled to First Amendment protection.

Id. (emphasis added).

The dissent in *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015) (Baldock, J., dissenting), further illustrates the problem the lower courts have with analyzing threats in the context of the First Amendment:

This is the third "true threat" case I have sat on during the past year. *See also United States v. Wheeler*, 776 F.3d 736 (10th Cir. 2015); *United States v. Heineman*, 767 F.3d 970, 982-87 (10th Cir. 2014) (Baldock, J., concurring in the judgment). And the decisions are not getting any easier—this thorny case being a perfect example. Here, in contrast to my colleagues, I would affirm the district court because: (1) our case law, to my knowledge, has never been extended this far; and (2) the facts of this case do not merit such an extension.

The primary issue here is simple: Could a reasonable jury find that, objectively speaking, Angel Dillard threatened Dr. Mila Means? The Court says yes. The district court saw it differently, and so do I. The key "threat" in Dillard's letter is her statement that, should Dr. Means ever follow through on her plan to provide abortions, Dr. Means "will be checking under your car everyday-because maybe today is the day someone places an explosive under it." This statement was undeniably ill-advised. But was it a true threat, rather than just an ugly prediction Dillard foolishly chose to voice? *See United States v. Cassel*, 408 F.3d 622, 636-37 (9th Cir. 2005) ("Whether the threat is of injury to person or property, there is no doubt that it must be a threat of injury brought about—rather than merely predicted—by the defendant."). The district court classified it as a prediction, in part because the statement was: (1) *conditional*, hinging on actions Dr. Means may or may not

> take in the future; (2) *not imminent*, as Dr. Means was years away from acting; and (3) *impersonal*, as Dillard never took ownership of the actions in this sentence (nor indeed, of the entire surrounding paragraph). In response, the Court devotes a good portion of its analysis to showing that a true threat can indeed be conditional, non-imminent, or impersonal. And I would agree. But here we are dealing with a letter that is *all of the above*: conditional, non-imminent, *and* impersonal. The Court does not acknowledge this complication, much less wrestle with it. Any such wrestling should lead to this realization: Case law does not strongly support true threat exposure in a situation this attenuated.

Dillard, 795 F.3d at 1207 (Baldock, J., dissenting).

In short, there is disparity and conflict among the circuits as to how a "threat" should be analyzed under the First Amendment, including whether the courts should employ an objective or a subjective test in the first instance. *See, e.g., United States v. Ackell*, 907 F.3d 67, 77 n.4 (1st Cir. 2018) ("[T]he necessary subjective intent one needs to make a true threat is rather hazy."); *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) ("In determining whether a statement is a 'true threat,' we have employed an objective test so that we will find a statement to constitute a 'true threat' if an ordinary reasonable recipient who is familiar with the context would interpret the statement as a threat of injury") (internal quotation marks and alterations omitted); *United*

States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) (finding a true threat if "a reasonable person would perceive the threat as real"); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) ("It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable."); *United States v. Mabie*, 663 F.3d 322, 333 (8th Cir. 2011) ("The government need not prove that [the defendant] had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats. Rather, the government need only prove that a reasonable person would have found that [the defendant's] communications conveyed an intent to cause harm or injury."); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011) ("*Black* requires that the subjective test must be met under the First Amendment whether or not the statute requires it, an objective test is not an alternative but an additional requirement over-and-above the subjective standard."); *United States v. Heineman*, 767 F.3d 970, 979 (10th Cir. 2014) ("[A] natural reading of *Black*'s definition of true threats embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim . . . . Other circuits have declined to read *Black* as imposing a subjective-intent requirement. . . . . But the reasons for their conclusions do not persuade us."); *see also Perez v. Fla.*, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., concurring in denial of certiorari) ("Together, *Watts* and *Black* make clear that to sustain a threat conviction without

encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

Part of the confusion relates to the *mens rea* required under this Court's decision in *Black*. The petition now pending in *Kansas v. Boettger*, 450 P.3d 805 (2019), *petition for cert. filed* (U.S. Feb. 20, 2020) (No. 19-1051), illustrates that lower courts, both federal and state, also remain uncertain as to the *mens rea* required for a statement to constitute a "true threat." Members of this Court have expressed persistent concern that uncertainty on this issue is producing injustice, while differing over the *mens rea* requirement that is consistent with the First Amendment. *See, e.g., Elonis v. United States,* 135 S. Ct. 2001 (2015) (holding that negligence was insufficient to support a conviction but leaving open the ultimate question of the appropriate mental state for threat prosecutions); *id*. at 2013-18 (Alito, J., dissenting) (arguing that recklessness is consistent with the First Amendment); *id*. at 2018-24 (Thomas, J., dissenting) ("This failure to decide [the appropriate mental state for threat prosecutions] throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.").

This case implicates the confusion over *mens rea* because here Thames was arrested under Mich. Comp. Laws § 750.543m, which has been interpreted to

require only general intent. *See People v. Osantowski*, 736 N.W.2d 289, 297 (Mich. App. 2007) (construing the statute as limited to "true threats" so as not to infringe on First Amendment protections and confirming that "[s]tatutes that criminalize pure speech 'must be interpreted with the commands of the First Amendment clearly in mind'") (quoting *Watts*, 394 U.S. at 707); Mich. Comp. Laws § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . ."); *Osantowski*, 736 N.W.2d at 299 (relying on *Black* to hold that the only intent that the prosecution had the burden to prove was defendant's general intent to communicate a "true threat").

This case presents two additional and critical issues arising under this Court's "true threats" jurisprudence that are related to, but distinct from, the questions presented in *Kansas v. Boettger*. The first issue turns on the words that constitute the *actus reus* of a "true threat" under this Court's First Amendment jurisprudence. If States can impose *criminal* sanctions for speech based on mere recklessness or a general intent, as some justices have suggested and as many courts have held, then preserving the distinction between statements that count as "true threats" under *Black*, and those *statements* which are protected speech under this Court's decisions in *Watts*, *Brandenburg*, and *Claiborne Hardwar*e, becomes vitally important.

The reason is simple. If the *mens rea* requirement can be easily proven based on uttering the words that are the *actus reus* of a true threat, then First Amendment protection effectively turns on whether

those words, considered in context, fall under *Black* (and can be punished), or under *Watts*, *Brandenburg*, and *Claiborne Hardware* (and must be protected). As demonstrated herein, lower courts have proven unable to preserve that distinction on a principled basis. Sadly, in the current climate, speakers like Thames who seek to voice a pro-life message are often the victims of this vagary in the decisional process.

The second and related issue arising under the "true threats" doctrine turns on the proper application of this Court's decision in *Black*, which emphasizes the need for a careful and contextualized analysis of speech. Here, Thames was arrested and detained for over 49 hours because "you can't say anything about bombs near a facility that performs abortions," a decision which reflects a municipal policy that authorizes an arrest of an individual for using certain words. Such a policy flies in the face of this Court's decision in *Black*, which rejected the notion that the use of certain symbols, and by necessary implication the use of certain words, can be a surrogate for a case-specific inquiry about whether a given statement constitutes a "true threat." "The First Amendment does not permit such a shortcut." *Black*, 538 U.S. at 367.

Finally, there is confusion regarding the interplay between "true threats" under *Watts* and *Black* and "incitement" under *Brandenburg*. *See, e.g., United States v. Turner*, 720 F.3d 411, 429-36 (2d Cir. 2013) (Pooler, J., dissenting). The case at bar illustrates the confusion as the Sixth Circuit never addressed nor even considered the impact of *Brandenburg* in its decision.

Consider, for example, *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982). In *Claiborne Hardware*, the Court held that the "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id*. at 927. In this case, Charles Evers, a civil-rights boycott organizer, spoke out against boycott breakers during several public rallies. *Id*. at 902. At one rally, he stated that boycott breakers would be "disciplined." At another rally he stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id*. The Court acknowledged that Evers's speech "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence." *Id*. at 927. Nonetheless, the Court analyzed the threatening speech under *Brandenburg* and held that it was protected by the First Amendment. *Id*. at 927-29.

In the final analysis, this disparity and concomitant uncertainty as to how the lower courts should evaluate "threats" in the context of the First Amendment have a chilling effect on the freedom of speech as it forces those who seek to adhere to the law to steer far and wide of the perceived unlawful zone. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted). The First Amendment needs breathing space. *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide

adequate breathing space to the freedoms protected by the First Amendment.") (internal quotation marks omitted). The Court should provide this breathing space by granting review, reversing the Sixth Circuit, and providing guidance on how the lower courts should analyze "threats" to ensure the protections of the First Amendment.

II. This Case Shows that Lower Courts Remain Uncertain about When Inflammatory Speech Is Protected *as a Matter of Law* under *Watts*, *Claiborne Hardware*, or *Brandenburg*.

To determine whether Respondents were legally justified for arresting and detaining Thames for over 49 hours for allegedly making a terrorist threat, we must analyze the alleged crime. There is no dispute that Thames was arrested *for pure speech*. That is, there is no evidence of her making any threatening gestures, brandishing any weapons, or possessing or displaying anything that could remotely be considered criminal contraband (*e.g.*, a hoax bomb).[8]

Further, as this Court stated, statutes criminalizing speech "must be interpreted with the commands of the First Amendment clearly in mind" in order to distinguish true threats from constitutionally protected speech. *Watts*, 394 U.S. at 707. This principle applies to the alleged crime at issue here (Mich. Comp. Laws § 750.543m). *See Osantowski*, 736 N.W.2d at 297 (construing the statute as limited to "true threats" so

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[8] (*See* R-36-3:Ex. J Soulliere Dep. at 37:2-8; 44:15-17, Pg.ID 650, 651; R-36-3:Ex. L Brooks Dep. at 27:14-1850:2-7, Pg ID 676).

as not to infringe on First Amendment protections) (citing *Watts*, 394 U.S. at 707); Mich. Comp. Laws § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . .").

And in cases involving the First Amendment, the Court demands *de novo* review "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

Thus, when there is no dispute of material fact, as in this case, the First Amendment question is a *question of law*. For example, in *Watts*, this Court instructed that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that is punishable under the law. By contrast, communications which convey political hyperbole (even if they mention weapons, such as guns or bombs) are protected by the First Amendment. *Watts*, 394 U.S. at 707-08; *see id.* at 706 ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). The Court instructed that Watt's alleged "threat" in its factual context (*i.e.*, Watts was engaging in a political protest, not unlike the fact that Thames was also engaging in a protest against abortion on the public sidewalk outside of an abortion clinic) was not a "true threat" which could be constitutionally prosecuted, but instead was mere "political hyperbole" immunized by the First Amendment. *Id.* at 706-08.

Accordingly, the Court held that the speech could not be punished as a matter of law, thereby *reversing the jury conviction* and ordering the "entry of a judgment of acquittal." *Id*. at 708. The Court did not defer to the jury, as the Sixth Circuit asserts is required here, App. 23—this Court *reversed* the jury.

The Sixth Circuit's opposite conclusion in this case, *see* App. 23 (quoting *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006) and concluding that "[t]he jury determines whether a statement is a true threat"), where there is no material fact dispute, runs afoul of the First Amendment and threatens core First Amendment protections, requiring the Court to correct this error.

Likewise, in *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Court stated that "'[t]rue threats' encompass those statements where the speaker means to communicate a *serious expression of an intent to commit an act of unlawful violence* to a particular individual or group of individuals." (emphasis added). Accordingly, the Court held *as a matter of First Amendment law* that the burning of a cross itself cannot serve as the basis for prosecution since it is an expressive act. *See id*. at 360-68. In this way, *Black* confirms the concerns expressed in *Watts* about punishing pure speech and makes clear that whether the speech is protected is a legal determination for the court, particularly when there is no dispute as to the actual alleged "threat." *See also United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (upholding the dismissal of an indictment for making a threat).

Significantly, the Court's decision in *Brandenburg v. Ohio,* 395 U.S. 444 (1969), has this same thrust, emphasizing as it does 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 controlling precedent establishes that the *precise* words allegedly uttered by Thames are crucial and thus serve as the threshold for our inquiry. For if the words themselves cannot be criminalized within the commands of the First Amendment, there is *no basis* (probable cause or otherwise) for arresting Thames for uttering them.

The undisputed record reveals (by way of the sworn testimony of Respondent Gatti *and* the police video recording) the following with regard to the critically important question of fact: "*What exactly did she say*?":

* * *

> BY MR. MUISE:
> Q. We went over this in the internal investigation report and I stopped [the police video] at 8:52:53. [Parsley] told you, "I prophesy bombs, I prophesy bombs are going to fall in the near future." Is that your recollection?
> A. After seeing the video, yes.
> Q. And those are the -- you asked him specifically *what exactly did she say*, and that's what he told you, "*I prophesy bombs, I prophesy*

> *bombs are going to fall in the near future*", correct?
> A. Yes.[9]

This is *the* crucial exchange between Respondents' *only* witness to the alleged crime and the officers who are required to have probable cause before arresting Thames for this crime.

Additionally, per the sworn *written* statement of Respondents' *only* witness to the alleged crime: "*She said, bombs, bombs on America, and bombs will blow up this building*."[10] This statement was signed by Parsley at the scene of the arrest, just minutes after Thames was taken into custody.[11]

The controlling—and well established—precedent cited above establishes that the statement(s) allegedly made by Thames are protected speech *as a matter of law*. The district court's findings support this conclusion. With regard to the alleged "prophesy threat," the district court properly observed the following: "In essence, to 'prophesy' means to prognosticate, but it does not suggest willful conduct or that the speaker will be responsible for carrying out the prediction." App. 52. The district court further noted that the "threat" described in the written statement,

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[9] (R-35-7:Def. Ex. F Gatti Dep. at 52:12, 23-25 to 53:5-23, Pg.ID 490-91; R-36-3:Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg.ID 586).

[10] (R-36-3:Ex. E [Parsley Statement], Pg.ID 614).

[11] (R-36-3:Ex. M Tardiff Dep. at 18:21-25 to 20:1, Pg.ID 682).

which wasn't conveyed to the officers until *after* they had arrested Thames, "is a vague prediction about the future and does not suggest any present intention on the part of Thames to carry out a crime of violence against the clinic." App. 53.

On these points, the district court was correct. The alleged statements utterly fail to meet the constitutionally mandated standard to constitute a "true threat" as a matter of law under *Watts* or *Black*, or incitement under *Brandenburg*. And changing the word "bomb" to "brimstone, or God's fiery wrath, or something that might be considered overzealous proselytizing" doesn't change the legal conclusion, as the Sixth Circuit seems to suggest. App. 21-22. Indeed, the Sixth Circuit's suggestion underscores the fact that neither statement is a true threat—each is political hyperbole at best. And neither statement projects the imminence required by *Brandenburg*. Remarkably, the Sixth Circuit does not deal with *Watts* or *Brandenburg*, and makes only passing mention of *Black* through a borrowed cite to a state court appellate decision. *See* App. 21.

Because there is no dispute of any *material* fact about what Thames is *alleged* to have said, probable cause should have been determined by the court as a matter of law. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) (stating that "[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made" by the court); *but see* App. 22 (stating that "[b]oth sides . . . are wrong" to "insist this is not a question of fact for a jury but a strictly legal decision for the court"). And this is

particularly important in a case such as this, which involves an arrest and detention for *pure speech*.

In sum, Respondents' inability, *as a matter of law*, to make a threshold showing of an actionable "threat" is fatal to the officers' claim that they had probable cause to arrest Thames based on her alleged statement(s), and it is fatal to the Sixth Circuit's conclusion that the officers nonetheless enjoyed qualified immunity. It is also fatal to the Sixth Circuit's dismissal of Thames's claims based on a conclusion that no constitutional violation occurred.

In the final analysis, this petition presents important questions for this Court to resolve with regard to the interplay between *Watts*, *Black*, and *Brandenburg* in the context of a statute criminalizing pure speech and *who* (judge or jury) decides whether the speech is protected and thus beyond the reach of a criminal statute in the first instance.

III. This Case Shows that Courts Are Confused Over What Speech Is Protected under the Clearly Established Law Laid Down in *Watts*, *Brandenburg*, and *Claiborne Hardware*.

Officers enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009). "This is not to say that an official action is protected by qualified immunity unless the very action in question

has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The qualified immunity analysis is ultimately an objective, legal analysis. As stated by the Court, "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." *Harlow*, 457 U.S. at 819.

As demonstrated above, the question of whether a statement qualifies as a "true threat" under clearly established law is a question of law when there is no dispute of fact about the alleged statement. *See Watts*, 394 U.S. at 708. And if the alleged speech is not a "true threat" under clearly established First Amendment jurisprudence, then the arrest was unlawful and the officers do not enjoy qualified immunity.

The undisputed material facts establish that no statement attributed to Thames qualifies as a "true threat" *as a matter of clearly established law*. *See supra*. As a result, the officers had *no legal basis* (probable cause or otherwise) for arresting, searching, and detaining Thames for *over 49 hours* based on these alleged statements. The officers do not enjoy qualified immunity. *See Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) ("When an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and the arrest

is a violation of a right secured by the amendment if here is not probable cause.").

Indeed, there are multiple reasons for finding Thames's arrest unlawful as a matter of clearly established law in addition to the central point that the alleged speech is not proscribable under the First Amendment. First, the officer (Respondent Brooks) who directed Thames's arrest testified that she could be arrested for merely uttering the word "bomb" outside of an abortion clinic and that the alleged threat need not be "credible" at all. Second, not only was there no imminence in the actual *words* of the alleged threat for which Thames was arrested, the actions of the officers demonstrate that they perceived no imminent fear or apprehension nor did they perceive the alleged "threat" to be credible in any way. In fact, the officers' actions demonstrate that they did not believe that this was a "*serious* expression of an intent to commit an act of unlawful violence" or that there was any reasonable ground to believe that the danger apprehended was imminent. As the undisputed evidence shows and as the district court properly found, App. 52, the officers did not evacuate the clinic nor did they search it or the surrounding area for a bomb, among other failings. In short, the officers did *nothing* that a reasonably prudent person who actually believed the alleged threat was serious, real, or imminent would do. And the only "witness" that the officers relied upon—the security guard—was not credible at all. He made *materially conflicting* statements at the scene of the arrest.

In the final analysis, there is only one reasonable—and legal—conclusion that can be drawn from the undisputed evidence: there was no justification, probable cause or otherwise, to arrest Thames as a matter of law. Respondents are liable for violating Thames's clearly established rights under the First and Fourth Amendments. Review by this Court is warranted.

IV. This Case Shows that Courts Are Confused about the Application of *Black* to Municipal Policies that Authorize Arrests Based on Pure Speech.

"*Monell* is a case about responsibility." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986). It does not immunize a municipality so that individual officers who are acting consistent with how they were trained and how they are expected to operate are left holding the bag.[12] The City had multiple opportunities to distance itself from the actions of the officers, but each time it confirmed that the officers were operating pursuant to department policy and practice and how they were trained. Indeed, the witness *designated by the City to testify on its behalf* admitted this fact:

> Q. You testified aside from those three instances where officers were verbally counseled that everything that the city police officers did with regard to my client, including the arrest and subsequent detention, was consistent with the

[12] Moreover, because the officers (erroneously) enjoy qualified immunity, Thames is left with no recourse for the unjustified harm she suffered by the City and its law enforcement officials.

> policies, practices of the police department; is that right?
> A. That's correct.
> Q. As you sit here today, would the City of Westland take responsibility for all those actions?
> A. Yes.[13]

The City had no substantive response to this clear admission of liability.[14] Relying on this Court's precedent, the Sixth Circuit in *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117 (6th Cir. 1994), stated, "The requirement that a municipality's wrongful actions be a 'policy' is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. *It is meant to distinguish those injuries for which 'the government as an entity is responsible under § 1983,' from those injuries for which the government should not be held accountable*." (internal citation omitted) (emphasis added). Here, the City, as an entity, is responsible under § 1983 for the violation of Thames's rights.

Additionally, the actions of the officers were officially ratified by Respondent Jedrusik, the Chief of Police and the person responsible for the policies, practices, and procedures of the City police department and for training its officers. *See St. Louis v.*

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[13] (R-36-3:Ex. O Miller Dep. at 86:1-10, Pg.ID 700).

[14] The City's argument that it cannot be liable because there was no constitutional violation circumvents the issue by failing to respond directly to the question of who is "responsible" for the actions at issue. (*See* Appellee Br. at 45-46).

Praprotnik, 485 U.S. 112, 127 (1988) ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies."). Respondent Jedrusik did so through an official investigation, in which it was concluded that Thames's arrest was "reasonable and justified." [15] In short, the City and its Chief of Police are "responsible" for the deprivation of Thames's rights.

Finally, per Respondents' testimony and arguments, a pro-life demonstrator can be arrested in the City as a matter of policy and practice for simply uttering the word "*bomb*" outside of an *abortion facility*. It does not matter how this word was uttered *by the pro-life demonstrator* (we know the security guard said the "bomb" word first, but it was apparently permissible for him to do so), it is forbidden, and simply uttering it constitutes a crime. (*See* Appellees Br. at 8 ["[T]he supervisor making the arrest decision, Defendant Brooks, did so with specific reference to the mention of '*bombs*.' This is the '*precise word*' that *was* 'crucial' to Brooks' decision."]; *see also id.* at 15 ["Thames's alleged reference to 'bombs' was the critical element for her arrest."]).

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[15] (R-36-3:Ex. O Miller Dep. at 44:6-25 to 45:1-3, 49:5-10 [affirming no changes to policies, practices, or procedures], Pg.ID 693-95; Ex. C [Internal Investigation] at 16 [concluding that the arrest was "reasonable and justified"], Pg.ID 603).

This policy, which was the moving force behind the violation of Thames's rights, violates the rationale of *Virginia v. Black*. In that case, the jury was allowed to find intent to intimidate based solely on the burning of a cross. Per the opinion of Justice O'Connor, "The *prima facie* evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut." *Black*, 538 U.S. at 367. Here, the City's policy that "you can't say anything about bombs near a facility that performs abortions," functions just like the *prima facie* showing in *Black*, and ignores all of the contextual factors that must be considered in order to determine whether a specific statement is a true threat under *Black* or protected speech under *Watts*, *Brandenburg,* or *Claiborne Hardware*.

To summarize, first, the violations occurred as a result of the actions of nearly the entire day shift and the shift supervisor (Respondent Brooks) and not simply the acts of one or a few rogue police officers. And the officers were operating pursuant to the policy and practice that a pro-life demonstrator can be arrested for simply uttering the word "bomb" outside of an abortion facility. Second, pursuant to the *sworn testimony* of the City's designated Rule 30(b)(6) witness, the City takes full "responsibility" for the actions of the officers and admits that these actions were pursuant to the policies, practices, and procedures of its police department.[16] Third, the City, through its Chief of Police, Respondent Jedrusik, officially

[16] (R-36-3:Ex. O Miller Dep. at 86:1-10, Pg.ID 700).

sanctioned and ratified the unlawful conduct of the officers.[17] And finally, the length of the unlawful detention was caused by the policies, practices, and procedures of the City, which cites "budget" reasons for why Thames remained imprisoned for over *49 hours* before being released because there was no evidence of a crime.[18]

The City and Respondent Jedrusik are "responsible" and thus liable for the deprivation of Thames's clearly established rights and the injuries she suffered as a result.

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[17] (R-36-3:Ex. O Miller Dep. at 44:6-25 to 45:1-3, 49:5-10 [affirming no changes to policies, practices, or procedures], Pg.ID 693-95; Ex. C [Internal Investigation] at 16 [concluding that the arrest was "reasonable and justified"], Pg.ID 603).

[18] (R-36-3:Ex. O Miller Dep. at 20:5-25 to 21:1-3 [citing budget reasons for why there is only one detective on weekend duty to handle in custody prisoner cases], Pg.ID 691-92; R-36-3:Ex. N Farrar Dep. at 24:19-24, Pg.ID 686; Ex. D [Incident Report] ["I do not see a direct threat where Kimberley threatened to bomb the clinic."] at 5, Pg.ID 611). The record shows that Respondent Soulliere completed the Incident Report at 11:40:52 a.m. on August 27, 2016. The report was reviewed by Respondent Brooks at 2:37:40 p.m. that same day. Respondent Brooks approved the report and *sent it to the Detective Bureau minutes later* (2:40:17 p.m.). (R-36-3:Ex. L Brooks Dep. at 11:1-25 to 12:1-19, Pg.ID 673; R-36-3:Ex. H [Report Chronology], Pg.ID 634). Respondents' "budget constraints" justification for the City's lack of manpower and thus attention to innocent persons sitting in its holding cells is not a "bona fide emergency" or an "extraordinary circumstance." (*See* Appellee Br. at 41).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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