No. 19-1037

IN THE

Supreme Court of the United States

KIMBERLY THAMES,

Petitioner,

v.

CITY OF WESTLAND, MICHIGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

When City of Westland police officers responded to a 911 call reporting a bomb threat at an abortion clinic, the clinic security guard (supported by the clinic administrator) specifically identified to the officers that Petitioner Kimberly Thames had uttered the threat directly to the security guard. The guard told an officer that Thames had said: "*There is going to be a bombing in the near future*" and "*they're going to fall on you people.*" For purposes of appeal, Thames has admitted doing so.

By statute, Michigan criminalizes "making a terrorist threat." Michigan Compiled Laws 750.543m. When Thames refused to give responsive answers to an officer's questions at the scene, Thames was arrested pursuant to the statute. Thames has not made any facial challenge to the statute.

After further investigation, Thames was not charged. Neither a conviction, nor the *mens rea* requirement for a conviction, is at issue in this case. The issue has only been whether there was probable cause for the arrest.

1. Should this Court deny Thames' petition, because Thames seeks review solely of an issue (*i.e., the required mens rea to convict for making a "true threat"*) that the factual context of Petitioner Thames' case (i.e., *probable cause to arrest*) does not present?

2. Should this Court deny Thames' petition, where the circuit court correctly granted summary judgment to the Respondents on the ground that the arrest of Petitioner Thames was reasonable in the circumstances?

PARTIES TO THE PROCEEDINGS

Petitioner (who was plaintiff below) is Kimberly Thames.

Respondents (who were defendants below) are the City of Westland, Michigan, the City of Westland Police Chief Jeff Jedrusik, City of Westland Police Sgt. Norman Brooks, City of Westland Police Officer John Gatti, City of Westland Police Officer Jason Soulliere, and City of Westland Police Officer Adam Tardif.

CORPORATE DISCLOSURE

None of the Respondents is a publicly owned corporation or a subsidiary or affiliate of such.

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JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued December 6, 2019. A petition by Thames seeking rehearing *en banc* was denied January 10, 2020.

Taking advantage of this Court's COVID-19 order of March 19, 2020, Petitioner Thames filed her petition with this Court on June 8, 2020 (the last day permitted by that order). Therefore, Petitioner Thames has timely invoked the jurisdiction of this Court under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. Amend. I

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Michigan Compiled Laws 750.543m

> (1) A person is guilty of making a terrorist threat or of a false report of terrorism if a person does either of the following:
>
> > (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
> >
> > (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.
>
> (2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.
>
> (3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $20,000.00, or both.

STATEMENT OF THE CASE

Introduction

Kimberley Thames seeks review of an issue that her own case does not present. Thames asks this Court to resolve a supposed "*disparity and conflict among the circuits as to how a 'threat' should be analyzed under the First Amendment*." **(Petition 11)**. In so doing, Thames

discusses *mens rea* for conviction and references multiple cases, including ***Kansas v. Boettger***, Docket No. 19-1051, in which the *mens rea* for criminal conviction was genuinely at issue.

Thames' case, however, does not concern the *mens rea* for a criminal conviction. The issue before the courts in the present case is whether the Respondent police officers had *probable cause* to arrest Thames, when she was accused (orally and in writing) by an eyewitness (present at the time of the arrest) of having threatened the bombing of an abortion clinic. When Thames proved evasive during investigative questioning by an officer at the scene, Thames was arrested and detained for further investigation by detectives.

The question of "probable cause" at issue in this case does not involve the supposed "confusion" over *mens rea* that Petitioner Thames offers as bait to obtain review by this Court. Her petition should be denied.

Substantive Facts

On August 27, 2016, the Westland Police Department received a 911 call from a "*Mary*" at the Northland Family Planning Clinic in that city. The call was recorded. Plaintiff-Appellee Thames has never disputed the accuracy of the recording, which Thames herself submitted as an exhibit to the district court. **(R. 35-3, Pg ID 427; R. 36-3, Pg ID 384)**.[1]

1. Thames and the Respondents also submitted the individual officers' dashcam/body microphone recordings in conjunction with their motion for summary judgment. **(R. 35-3 and R. 35-6; See also R. 40; R. 46, Pg ID 809, p. 1, n.1)**.

Mary told the dispatcher that "*We have protestors outside and one of them just made a statement that there's going to be a bombing.*" **(R. 35-3, Pg ID 427, 911 Recording, 00:04-09)**. The 911 dispatcher then asked, "*Ok. What exactly did they say*?" **(R. 35-3, Pg ID 427, 911 Recording, 00:09-12)**. Mary repeated, "*There's going to be a bombing.*" **(R. 35-3, Pg ID 427, 911 Recording, 00:12-14)**.

The dispatcher then asked, "*That's all they said is there's going to be a bombing? That's what they said, word for word*?" **(R. 35-3, Pg ID 427; 911 Recording, 00:14-18)**. Mary responded, "*Yes.*" **(R. 35-3, Pg ID 427, 911 Recording, 00:18-19)**.

The dispatcher obtained from Mary a description that the person making the threat was a "*darker complected*" woman with "*black hair up in a bun*," wearing a light blue short-sleeved top, a long blue skirt and flip-flops. **(R. 35-3, Pg ID 427, 911 Recording, 00:30-33, 1:01-11)**. But the dispatcher then asked again, "*Ok. Again, I need to ask you what the exact words that she stated.*" **(R. 35-3, Pg ID 427, 911 Recording, 01:54-57)**. Mary reiterated: "*Because there's going to be a bombing.*" **(R. 35-3, Pg ID 427, 911 Recording, 01:57-58)**.

Plaintiff Thames' Complaint acknowledged that she was wearing a long blue skirt and flip-flops. **(R. 1, Pg ID 10, Complaint, ¶ 43)**. Thames also acknowledged speaking to the Northland Family Planning Clinic security guard that morning. **(R. 1, Pg ID 10, Complaint, ¶¶ 42-47)**. It is this guard (identified through his written statement to the police as Robert Parsley) who then personally identified Thames to the officers at the scene. **(R. 35-2, Pg ID 425, Parsley Statement)**.

Respondent Officers Jason Soulliere, John Gatti, Adam Tardif and Sgt. Norman Brooks arrived at the clinic in response to the 911 call. **(R. 1, Pg ID 11, Complaint, ¶ 49; R. 35-4, Pg ID 434, Brooks Dep., p. 19; R. 35-5, Pg ID 449, Soulliere Dep., pp. 17, 19)**. Officer Halaas arrived later. Officers Soulliere, Gatti and Halaas wore body microphones that provide an audio recording of their interactions at the scene. As with the 911 recording, Petitioner Thames has never disputed the accuracy of the body microphone recordings *or* the accompanying video, which Thames herself submitted to the district court. **(R. 35-6, Pg ID 475; R. 36-3, Pg ID 586)**.

Officer Gatti arrived first and spoke to Robert Parsley and Mary Guilbernat. They pointed out Plaintiff Thames as the person who had made the threat, with Guilbernat later confirming "*this is her*" and "*I know that this is her*." **(R. 35-6, Pg ID 475, Gatti Video, 08:50:19-25, 08:51:41-2, 08:52:01-03)**. Parsley told Gatti that Thames "*threw the bomb word out there, a couple times*." **(R. 35-6, Pg ID 475, Gatti Video, 08:50:43-6)**. Officer Gatti then asked Guilbernat and Parsley for clarification of "*What exactly did she say*?" **(R. 35-6, Pg ID 475, Gatti Video, 08:52:20-22)**. Parsley responded that:

> She said, uh I prophesy bombs, I prophesy bombs. There is going to be a bombing in the near future.
>
> **(R. 35-6, Pg ID 475, Gatti Video, 08:52:34-45)**.

Seeking confirmation, Gatti asked, "*I prophesy bombs*?" **(R. 35-6, Pg ID 475, Gatti Video, 08:52-45-7)**. Parsley responded again:

> Yeah. I prophesy bombs are going to fall, and they're going to fall on you people.
>
> **(R. 35-6, Pg ID 475, Gatti Video, 08:52:46-53)**.

Thames' Complaint acknowledged that Parsley made these accusations. **(R. 1, Pg ID 11, Complaint, ¶ 52)**.

Meanwhile, Officer Soulliere arrived and immediately observed Plaintiff Thames, who matched the description of the bomb threat suspect he had been dispatched to confront. **(R. 35-5, Pg ID 449, Soulliere Dep., pp. 17, 22)**. Soulliere approached Thames and asked, "*Did you tell someone there was going to be a bombing*?" **(R. 35-6, Pg ID 475, Soulliere video, 08:51:31-33)**. Thames responded, "*No.*" **(R. 35-6, Pg ID 475, Soulliere Video, 08:51:33-4)**.[2]

Soulliere then asked, "*Well, what did you say*?' **(R.35-6, Pg ID 475, Soulliere Video, 08:51:38-39)**. Rather than directly answering Soulliere's actual question, Thames responded that, "*I didn't say anything like that.*" **(R. 35-6, Pg ID 475, Soulliere Video, 08:51:41-2)**.

Soulliere then asked repeatedly for Thames to explain what she *did* say. But Thames never gave a responsive answer to that question. The encounter proceeded as follows:

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2. The exchange between Petitioner Thames and Officer Soulliere is recited in the Opinion of the Sixth Circuit, but without specific time code references to the dashcam recording. **(Pet. App. 4-6)**.

Soulliere: Well there's several cops coming this way so I need to know why you said what you said and what you said.

Thames: Uh, I think you should ask him because I think he's misrepresenting something that I must have said. I certainly didn't . . . I didn't say that.

Soulliere: Well what did you say?

Thames: I didn't say that.

Soulliere: Well I understand that.

Thames: I didn't say that. I don't really know.

Soulliere: But what did you say?

Thames: What I would have said that [inaudible] would have made him say such a thing.

Soulliere: Well I don't know. That's why we're here to investigate because he said that you said there is going to be a bombing.

Thames: I did not say that.

Soulliere: This is a pretty serious threat.

Thames: Right, and I think he has an issue.

Soulliere: What did you say to him?

Thames: I didn't say that. I wasn't. . . .

Soulliere: Ma'am I understand that you didn't say that to him. But what did you say? Can we get to the bottom of this?

Thames: I do not know. I do not know.

Soulliere: Ok, you don't know what you said to him?

Thames: I do not know what he's referring to. I do not know.

Soulliere: Well what did you say to him?

Thames: I really didn't say anything.

(R. 35-6, Pg ID 475, Soulliere Video, 08:51:43-08:52:31).

As noted above, Plaintiff Thames admitted in her Complaint that she *did* converse with the security guard (i.e., Parsley). **(R. 1, Pg ID 10, Complaint, ¶¶ 42-47)**. And when speaking to Officer Soulliere, Thames never denied that she *did* say *something* to the guard. As the conversation continued:

Thames: I can't believe he said that. He said that? [*Referencing the bomb threat accusation*].

Soulliere: Alright, well you won't even tell me what you said to him . . .

> Thames: It wasn't something for me to say that could be misconstrued.
>
> **(R. 35-6, Pg ID 475, Soulliere Video, 08:52:54-08:53:04).**

But Thames never did tell Soulliere what the "*it*" was that she did say to Parsley. Thames only protested that "*There is nothing I said that would, should be even misconstrued as such.*" **(R. 35-6, Pg ID 475, Soulliere Video, 08:53:10-15).**

After obtaining contact information for Thames, Soulliere told Thames that they would speak with another officer. **(R. 35-6, Pg ID 475, Soulliere Video, 08:55:20-6, 08:55:51-4)**. Other voices are heard, but the substance is unclear. Then proximity allowed both Soulliere's and Gatti's microphones to hear the encounter.

At that point, the voice of Sgt. Brooks can be heard asking, "*That is her*?" **(R. 35-6, Pg ID 475, Gatti Video, 08:56:22-4)**. Parsley responded, "*Yes sir.*" **(R. 35-6, Pg ID 475, Gatti Video, 08:56:24-5)**. Brooks then advised Thames that, "*Ma'am, you're under arrest for making terrorist threats* and directed his officers to "*put handcuffs on her.*" **(R. 35-6, Pg ID 475, Gatti Video, 08:56:25-9; R. 35-6, Pg ID 475, Soulliere Video, 08:56:25-29)**. In accordance with Brooks' order **(R. 35-6, Pg ID 475, Gatti Video, 08:56-25-9; R. 35-6, Pg ID 475, Soulliere Video, 08:56:25-29)**, Soulliere handcuffed Thames. **(R. 35-5, Pg ID 452, Soulliere Dep., p. 30)**.

Brooks confirmed that he is the one who directed that Thames be arrested. **(R. 35-4, Pg ID 437, Brooks**

Dep., p. 30). Brooks had arrived as the supervising officer. **(R. 35-4, Pg ID 434, Brooks Dep., p. 19)**. Brooks had no direct contact with Parsley or Thames, but he spoke to his officers. **(R. 35-4, Pg ID 435, 438, Brooks Dep., pp. 23, 33)**. Gatti told Brooks that Parsley had identified Thames as making a bomb threat. **(R. 35-4, Pg ID 437, Brooks Dep., p. 21)**. Soulliere told Brooks that Thames had been "*evasive*" regarding what she had said. **(R. 35-4, Pg ID 437, Brooks Dep., pp. 31-2)**. In Brooks' assessment, this gave adequate probable cause to order the arrest.

In the courts below and in her petition, Thames has disputed the sincerity of the officers' belief in the bomb threat by observing that the officers did not evacuate the clinic, call for a bomb sniffing dog or search the clinic premises. **(See R. 46, Pg ID 814, 830, Plaintiff's Response, pp. 6, 22, and Petition, p. 4)**. But Soulliere and Halaas *did* search Thames' car. **(R. 35-6, Pg ID 475, Halaas Video, 08:57:36-09:02:50; R. 35-5, Pg ID 462-3, Soulliere Dep., pp. 72-3)**. Thames acknowledges this search. **(R. 1, Pg ID 12, Complaint, ¶ 56; See Also R. 46, Pg ID 814, Plaintiff's Motion Response Brief, p. 6)**.

Ironically, Thames' Complaint asserted an "unlawful search" claim on the contention that the officers should *not* have searched. **(R. 1, Pg ID 28, Complaint, ¶ 138)**. As Thames postured her case, officers are both damned if they do search *and* damned if they don't.

More significantly, Thames misses the point. As explained by Brooks:

> At that - - at that point we were not concerned about a bomb being physically there at that

> particular time because of the amount of protestors and employees and patients of the clinic. The reason we were sent there was because of the threat.
>
> **(R. 35-4, Pg ID 436, Brooks Dep., p. 28)**.

In light of Michigan's anti-terrorism statute, Brooks recognized that a threat "*doesn't have to be credible according to the law*." **(R. 35-4, Pg ID 436, Brooks Dep., p. 28)**. As Brooks explained:

> [M]y probable cause to arrest was based on the threat. Whether - - whether the threat is credible or imminent, that was something that was going to be investigated by the Detective Bureau.
>
> **(R. 35-4, Pg ID 441, Brooks Dep., p. 47)**.

As described in the argument that follows, Sgt. Brooks' assessment of the law is correct under this Court's precedents.

Thames has also contended that the officers should have believed a nun who protested the arrest of Thames at the scene. **(R. 36, Pg ID 539, Plaintiff's Motion Response Brief, p. 2; R. 46, Pg ID 813, Thames Motion Brief, p. 5)**. But the nun's comments (*also recorded*) did nothing to dispel the officers' concerns.

The nun scolded the officers - - asserting that the officers should be arresting the clinic director and clinic staff instead of Thames. **(R. 35-6, Pg ID 475, Gatti Video,**

08:58:35-42, 08:59:29-34). The nun then told the officers that "*This is a Nazi concentration camp.*" **(R. 35-6, Pg ID 475, Gatti Video, 08:59:36-40)**. The nun admonished the officers to "*arrest them all*" referring to the clinic personnel, because "*they're the ones killing God's children.*" **(R. 35-6, Pg ID 475, Gatti Video, 09:00:07-10)**.

When Officer Gatti explained to the nun that the clinic personnel are "*not violating the law*," the nun responded:

> The law is the law of God. God's the law. You shall not kill. You don't abide by God's law. You abide by the Supreme Court's law. That's wrong. This is evil.
>
> **(R. 35-6, Pg ID 475, Gatti Video, 09:00:10-25)**.

Thus, the nun's expressed goal was to uphold her perception of "*God's law*," over and above any man-made law (e.g., the terrorist threat statute).

Moreover, Thames denied that anyone else was present to hear the statements between her and the security guard. **(R. 36-3, Pg ID 639, Thames Dep., pp. 33-4)**. Therefore, the nun could not have had personal knowledge regarding what Thames did or did not say to the guard.

Thames was placed in Halaas' patrol vehicle, but Halaas was called away to respond to another incident. **(R. 35-6, Pg ID 475, Halaas Video [camera 2 view], 08:57:35-09:01:49; R. 35-5, Pg Id 463, Soulliere Dep., pp. 74-5)**. Thames was transferred to Soulliere's vehicle, and Soulliere transported her to the Westland Police station.

(R. 35-7, Pg ID 486, 505, Soulliere Video [camera 2 view], 09:02:14 through 09:12:32; R. 35-5, Pg ID 463, Soulliere Dep., pp. 74-5). Soulliere uncuffed Thames, collected her property in the booking area, and then left her with booking personnel. **(R. 35-5, Pg ID 467-9, Soulliere Dep., pp. 89-99)**. Soulliere's only involvement after transporting Thames to the booking area was to write the initial sections of the Westland Police Department report. **(R. 35-9, Pg ID 522-27, Westland P.D. Case Report, pp. 1-4)**.

Although Gatti heard the arrest directive from Brooks, Gatti did not participate in the actual arrest and had no contact with Thames at all. **(R. 35-7, Pg ID 485, 492, 502, Gatti Dep., pp. 31, 59, 100)**. He did not participate in the search of Thames' vehicle. **(R. 35-7, Pg ID 486, 505, Gatti Dep., pp. 33, 112)**.

Officer Tardif arrived late and his only involvement was giving Rob Parsley a form in which Parsley could provide the written version of his statement. **(R. 35-8, Pg ID 516, Tardif Dep., p. 16)**. Tardif did not assist Parsley in writing the statement. **(R. 35-8, Pg ID 517-8, Tardif Dep., pp. 20-1)**. There is no evidence that Tardif (as Thames now suggests, **Petition 3**) "instructed" Parsley to make a statement. Tardif was unaware of a search of Thames' vehicle. **(R. 35-8, Pg Id 517, Tardif Dep., pp. 17-8)**.

In his written statement, the words attributed by Parsley to Thames are somewhat different than those documented in the audio recording of his statements to Officer Gatti. Nevertheless, Parsley did not (as Thames now claims, **Pet. 3**) "contradict" his oral statement. Rather, he reiterated that Thames threatened that there would be a bombing of the clinic. As he wrote:

> She said, bombs, bombs on America. And Bombs will Blow up this building.
>
> **(R. 35-2, Pg ID 425, Parsley Statement)**.

A Detective Farrar ultimately interviewed Thames at the police station. He concluded that:

> Even though there was probable cause to arrest Kimberly I find at this time there is insufficient evidence to charge her with a crime. I advised PSA staff to release Kimberly.
>
> **(R. 35-9, Pg ID 528, Westland P.D. Case Report, p. 5)**.

Critically, the question below was *not* whether the Defendant officers had "probable cause" to arrest Thames for intent or capacity *to bomb* the Northland clinic. Plaintiff Thames was not arrested for actual possession of a bomb or for any supposed ability or intent on her part to use one. Rather, as Thames herself concedes, she was arrested "*for making terrorist threats*." **(R. 1, Pg ID 13, Complaint, ¶ 60; R 35-9, Pg ID 522-3, Westland P.D. Case Report, pp. 1-2)**. The key question, therefore, is whether the office had probable cause to arrest Thames for "*making a terrorist threat.*"

Moreover, Thames was never charged. The *mens rea* necessary for a jury to convict a defendant on such a charge is not at issue. The issue is whether there was probable cause for arrest.

Procedural Facts

Plaintiff Thames' Complaint predicated her claims upon two primary allegations. First, Thames asserted that:

> [T]he threat that Defendant Doe [Parsley] attributed to Plaintiff could not serve as a basis for concluding that Plaintiff engaged in any criminal conduct. Rather, *this alleged "threat" is protected speech* under the First Amendment.
>
> **(R. 1, Pg ID 11-2, Complaint, ¶ 53, *emphasis added*).**

Second, Thames asserted that:

> Aside from conducting a search of Plaintiff's vehicle - - a search which revealed no evidence of criminal activity - - Defendants Soulliere, Gatti, Tardif, and Brooks didn't bother to conduct an investigation.
>
> **(R. 1, Pg ID 12, Complaint, ¶ 56).**

On this substantive foundation, Plaintiff Thanes asserted five federal-law claims against the Westland Defendants, alleging for each claim that the individual "defendants" - - collectively and without individual specification - - violated her constitutional rights by virtue of a supposed policy or practice of the City of Westland.

Significantly, and as specifically observed by the Sixth Circuit, "*Thames has deliberately pressed her claims, and her arguments in this appeal, as if she made the statements as Parsley represented, effectively admitting Parsley's accusation of what she said*." **(Pet. App. 14)**. Thames' argument has been that even a bomb threat is absolutely protected by the First Amendment, so long as it is "pure speech." The Respondents maintain that Thames' argument defies this Court's precedents.

Thames and the officers filed competing motions for summary judgment **(R. 35, Pg ID 386-422, Defendants-Appellants' Motion; R. 36, Pg ID 530-561, Plaintiff-Appellee's Motion)**. The district court denied Plaintiff-Appellee Thames' motion entirely. **(Pet. App. 71)**. The district court granted the Defendants-Appellants' motion, but only *in part*. **(Pet. App. 70-71)**.

The district court denied summary judgment to all four Defendants-Appellants - - Soulliere, Gatti, Tardif and Brooks - - on Thames' Fourth Amendment "*unlawful search and seizure*" claim. The district judge held that a question of fact for jury resolution "*exists as to whether the officers had probable cause to arrest Thames*." **(Pet. App. 48, 53, 54)**. In particular, the district court held that the officers could arrest Thames (or be protected by immunity) only if they could "reasonably" believe that Thames made a "true threat" and that a jury should decide whether such a belief could be reasonable. **(Pet. App. 53-54)**.

With regard to Thames' claims alleging arrest in violation of her First Amendment rights to free speech (Complaint Count I) and free exercise of religion

(Complaint Count II), the district court granted summary judgment to Soulliere and Tardif. But the Court denied summary judgment to Gatti and Brooks. The Court noted a statement by Brooks at the scene that "*anybody who has anything to do with this whole thing, they're fanatics*" and deposition testimony by Brooks that "*You can't say anything about bombs near a facility that performs abortions*." The district court held that these raised an inference that Brooks had discriminatory animus "*against pro-lifers*." **(Pet. App. 58)**. Likewise, the district court held that Gatti's reference to the nun at the scene as "*a disgrace*" and Gatti's deposition testimony that abortion is "*a very politically religiously charged issue*" raised an inference of discriminatory animus on Gatti's part. **(Pet. App. 58)**.

As Appellants to the Sixth Circuit, all four officers contended that the video record demonstrated probable cause for Thames' arrest - - or at least such reasonable basis for Thames' arrest that the officers are entitled to qualified immunity.

It was the further position of Brooks and Gatti that, even if their statements could raise an inference of animus against pro-life protestors, this does not give rise to liability. Objectively reasonable probable cause still justified the arrest of Thames under Michigan's terrorist threat statute, M.C.L. 750.543m.

The Sixth Circuit took care to distinguish the grounds for its decision regarding the parties' cross-appeals.

Despite Thames having "*effectively admitt[ed]*" Parsley's accusation of what Thames had said to him

(Pet. App. 14, 21-22), the Sixth Circuit nevertheless held that Thames' motion for summary judgment could not be granted. In the context of her claim on the merits, a jury would have to make the determination whether Thames' statements were a "true threat." **(Pet. App. 22-23)**.

As the Sixth Circuit recognized, however, the question of the officers' qualified immunity "*is different*." **(Pet. App. 23)**. As that court summarized, "*[t]he qualified-immunity question does not require a decision that the statements were or were not true threats, but only a determination of whether the officers' (even mistaken) belief that the statements were true threats was reasonable*." **(Pet. App. 23)**. In light of events as recorded by the dashcam videos, the Sixth Circuit concluded that the officers' arrest of Thames had been reasonable. Therefore, the Respondents, including the officers, the City and the Police Chief, were entitled to summary judgment. **(Pet. App. 24-25, 32)**.

ARGUMENT FOR DENYING THE PETITION

I. THIS COURT SHOULD NOT BE BAITED BY THAMES' PETITION FOR REVIEW OF AN ISSUE (*MENS REA FOR CONVICTION*) THAT THE FACTUAL CONTEXT OF HER CASE (*PROBABLE CAUSE FOR ARREST*) DOES NOT ACTUALLY PRESENT TO THE COURT.

"The Constitution does not guarantee that only the guilty will be arrested." ***Baker v. McCollan***, 443 U.S. 137, 145 (1979). "[P]ersons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." ***Illinois v. Wardlow***, 528 U.S. 119, 126 (2000). "The validity of the arrest does not depend

on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested to the validity of the arrest." ***Michigan v. DeFillippo***, 443 U.S. 31, 36 (1979).

"[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." ***Devenpeck v. Alford***, 543 U.S. 146, 152 (2004). "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." ***Id***.

Moreover, the officer's subjective intent is "irrelevant." ***Id.***, at 153. So long as there is an objective basis to believe the arrestee committed an offense, the arrest is reasonable under the Fourth Amendment "whatever the subjective intent" of the officer. ***Id.***, ***Ashcroft v. al-Kidd***, 56 U.S. 731, 736 (2011). This rule applies in the circumstance of an arrest alleged to be in retaliation against the arrestee's exercise of First Amendment rights. To prevail on such a claim, the arrestee must plead and prove the absence of objective probable cause for the arrest. ***Nieves v. Bartlett***, 587 U.S. ___, 139 S. Ct. 1715, 1724 (2019).

Petitioner Thames does not present any developed argument regarding the standard for a "probable cause" determination. Rather, she seeks review of the supposed "confusion" of the circuit courts regarding the *mens rea* that a jury must find in order to *convict* a defendant under a statute criminalizing threats.

It is already well established that a suspect cannot be *convicted* on such a charge, unless her utterance

constituted a "true threat." ***Watts v. U.S.***, 394 U.S. 705, 708 (1969). "True threats" have been defined by this Court as "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 . . . with *the intent of placing the victim in fear* of bodily harm or death." ***Virginia v. Black***, 538 U.S. 343, 359-60 (2003), *emphasis added*. "But the speaker need not actually intend to act upon the threat. ***Id***. The "intent" need only be to influence the actions of the victim through intimidation. ***Id.***, at 360.

As recognized by the Sixth Circuit, however, the issue in this case is not whether Thames could be convicted. Thames was never charged. The question in this case is whether the Respondents could reasonably conclude that probable cause existed to arrest Thames for violation of M.C.L. 750.543m.

For purposes of "probable cause" on the part of the officers in the present case, it is irrelevant whether Thames had the intent or capability *to bomb* the Northland Clinic. Nor does it matter whether the officers had any reasonable basis to think she did. The officers only needed reasonable basis to believe that Thames uttered a threat with intent to influence the actions of clinic personnel by way of intimidation.

Critically for the present case, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." ***Adams v. Williams***, 407 U.S. 143, 149 (1972). As this Court has stated, probable cause "is not a high bar." ***District of Colombia v. Wesby***, ___ U.S. ___, 138 S.

Ct. 577, 586 (2018), quoting ***Kaley v. U.S.***, 571 U.S. 320, 338 (2014). Thames' focus upon whether the facts known to the officers would have justified a jury in finding the *mens rea* necessary to convict Thames for uttering a "true threat" is misdirected. The information known to officers on the scene need only show "a probability or substantial chance of criminal activity, not an actual showing of such activity." ***Wesby***, 138 S. Ct. at 586.

This Court has recognized that the "reasonableness" basis for a finding of "probable cause" is distinct from "*mens rea*." ***U.S. v. Montoya de Hernandez***, 473 U.S. 531, 541 (1985). Particularly apt is the observation of the First Circuit that "the practical restraints on police in the field" require that "latitude" be accorded to officers who are "considering the probable cause issue in the context of *mens rea* crimes." ***Cox v. Hainey***, 391 F.3d 25, 34 (1st Cir. 2004); accord ***Cass v. City of New York***, 864 F.3d 200, 210 (2nd Cir. 2017). As explained by the 7th Circuit:

> [W]e have repeatedly held that it is up to the courts, not police officers, to determine a suspect's mental state. On the ground, it is not a police function to sort out conflicting testimony and assess the credibility of putative victims and witnesses. Police have a hard time evaluating competing claims about motive; they are entitled to act on the basis of observable events and let courts resolve conflicts about mental states.
>
> ***Dollard v. Whisenand***, 964 F.3d 342, 360 (7th Cir. 2019) *citations and quotations marks omitted.*

Whether or not there is "confusion" among the lower courts regarding the *mens rea* required for a jury to convict a person of making a "true threat," that confusion is not a matter to be resolved through the vehicle of this case. The Respondent officers were not obligated to make a jury-level determination of intent at the scene of the arrest. The issue on which the courts ruled below was probable cause, which Thames neither addresses in her petition nor substantively asks this Court to review.

II. THE CIRCUIT COURT CORRECTLY RESOLVED THIS CASE ON THE GROUND THAT THE RESPONDENTS' ARREST OF PETITIONER THAMES WAS REASONABLE.

As just described, the issue of *mens rea* necessary to convict a person for making a "true threat" is distinct and far removed from the "probable cause" issue that Thames' case actually presented below. As the Sixth Circuit also recognized, the issue of the officers' qualified immunity "*does not require a decision that the statements were or were not true threats, but only a determination of whether the officers' (even mistaken) belief that the statements were true threats was unreasonable*." **(Pet. App. 23)**.

Thames asserts to this Court that "*if the alleged speech is not a 'true threat' under a clearly established First Amendment jurisprudence, then the arrest was unlawful and the officers do not enjoy qualified immunity*." **(Pet. 24)**. But as the Sixth Circuit recognized, immunity turns not on whether the officers were "*mistaken*" but, rather, whether their actions were "*unreasonable*." **(Pet. App. p. 23)**. Qualified immunity covers "mistakes in judgment, whether the mistake is one of fact or one of law." ***Pearson v. Callahan***, 555 U.S. 223, 231 (2009).

This is illustrated by this Court's opinion in ***Hunter v. Bryant***, 502 U.S. 224 (1991), in which the plaintiff had been mistakenly arrested for having written a letter threatening violence to the President. Recognizing that whether "a reasonable officer could have believed the arrest to be lawful" is a question of law that "should be decided by the court long before trial," this Court admonished that qualified immunity "gives ample room for mistaken judgments," precisely so that officials will not be overly cautions regarding suspected threats of violence. ***Hunter***, 502 U.S. at 227-8, 229.

"[T]he court should ask whether [the officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of events can be constructed . . . after the fact." ***Hunter***, 502 U.S. at 228. "[L]aw enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." ***Id.*** at 227. As this Court has since admonished, "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." ***Brigham City, Utah v. Stuart***, 547 U.S. 398, 406 (2006), ***Michigan v. Fisher***, 558 U.S. 45, 49 (2009).

It is particularly relevant that this Court's opinion in ***Virginia v. Black*** recognized a "true threat" exists not only where actual violence is planned. A "true threat" also exists where there is an "expression" of a fictitious intent to do violence but, with real intent to "intimidate" the hearer to alter his or her behavior. ***Black***, 538 U.S. at 360.

It is beyond dispute that abortion protestors desire not just to change government policy toward abortion but

to influence the conduct of the patients and medical staff involved. Confronted by Parsley's undisputed accusation of what Thames had said, it was reasonable for officers to surmise that Thames' statements were made to intimidate clinic personnel to alter their conduct (i.e., to stop doing abortions). Under ***Virginia v. Black***, *this* *is* a "true threat." Therefore, the arrest of Thames was reasonable, and the officers are protected by immunity.

CONCLUSION

Petitioner Thames seeks to bait this Court to review an issue that her case does not present. The courts below correctly resolved this case in the context of the "probable cause" issue that the facts actually present. The petition by Thames should be denied.

Respectfully submitted,

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