No. 19-1370

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Response confirms the need for review by this Court. It does not address the first question Petitioner Kimberly Thames presents to this Court, *i.e.*, whether her speech is protected under clearly established law, and as a result, the officers who arrested her are not entitled to qualified immunity. The Response makes no effort address the second question presented, which asserts that the municipal policy that authorized her arrest for "*say*[ing] *anything about bombs near a facility that performs abortions*," is plainly unconstitutional. For these reasons, explained further below, the Court should grant the petition for certiorari so that it can provide much needed guidance to the lower courts on issues of pressing importance.

ARGUMENT IN REPLY

Respondents' eight pages of argument do not address the actual questions presented by Thames' petition. About half the argument is devoted to knocking down a strawman, *i.e.*, the claim that Thames seeks review regarding the *mens rea* required for a true threat. The rest of the Response is devoted to an abstract discussion of probable cause utterly devoid of any meaningful engagement with the First Amendment precedent Thames relies upon as the basis for her request for review. Resp. at 22-24. Respondents do not even address the second question presented, which concerns a municipal policy authorizing arrest based on using specific words outside an abortion clinic. That policy rests upon a presumption that certain words are a "true threat"

completely at odds with this Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003).

I. Respondents' Claim that Thames Seeks Review on the Question of the *Mens Rea* Required to Show A True Threat Is Groundless.

Respondents argue that Thames' petition should be denied because she seeks review on the issue of the *mens rea* necessary to convict for a true threat. Resp. at 18-22. But that assertion is groundless. Thames specifically noted that her petition involved "two additional and critical issues that are related to, *but distinct from*, the questions presented in *Kansas v. Boettger*." Petition at 14 (italics added). Therefore, Respondents are simply wrong to suggest that Thames would "bait" this Court to grant review based on a question not presented by her case.

II. Respondents' Claim that a Reasonable Officer Could Believe there Was Probable Cause To Arrest Thames Defies Clearly Established Law and Demonstrates Confusion in the Lower Courts Concerning the Proper Application of This Court's Controlling Precedent.

Clearly established precedent requires government officials confronted with claims based on pure speech to make a threshold determination of whether that speech is protected by the First Amendment before taking any action against the speaker. The conflicting decisions of the district court and Sixth Circuit ignore this principle. Those decisions also demonstrate confusion

about how to draw the line between the vast range of heated rhetoric that is protected by the First Amendment, and those words that, when considered in context, can be classified as a "true threat" that is not protected by the First Amendment, and therefore, can provide probable cause for an arrest. Decisions from other federal circuits show there is pervasive confusion on this critical line-drawing exercise between protected speech and "true threats."

A. The Sixth Circuit's Opinion Shows Lower Courts Are Confused about How To Distinguish "True Threats" from Protected Speech.

Respondents argue that the court below correctly determined that Thames' arrest was a reasonable mistake. Resp. at 22-24. Here, they rely on the Sixth Circuit's observation that the qualified immunity inquiry turns on "whether the officers' (even mistaken) belief that the statements were true threats was unreasonable." Resp. at 22. But that general and abstract observation is worthless. As Thames' petition pointed out, the damning problem that produced her damnable fate is not in the articulation of general principles but the faithful application of those principles to specific case involving individuals engaged in disfavored speech.

The picture below shows the woman held for 49 hours for a terrorists threat because she was accused of saying something like, "'I prophesy bombs are going to fall and they're going to fall in the near future' [or] 'I prophesy bombs are going to fall and they're going to fall on you people'; [or] 'bombs, bombs on America, and

bombs will blow up this building,'" or later, "bombs, bombs on America, and bombs will blow up this building."

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

She threatens to do nothing in the statements attributed to her, and therefore, the statements are not "true threats." At most, the statements are heated rhetoric cloaked as a "prophesy" of impending doom that is plainly protected by this Court's precedent. The "totality of circumstances" at the scene make any claim that those statements, when considered in context, provided probable cause to arrest Thames for uttering

a "true threat" is patently absurd—not an objectively reasonable but mistaken judgment.

The Respondents' claim that they are entitled to qualified immunity because they had a reasonable but mistaken belief she had uttered a "true threat" defies clearly established law. The probable cause finding was premised on two conclusions. First, the officers concluded, as a factual matter, that it was probable that Thames made the statements attributed to her by Parsley, the abortion clinic security guard. Second, they concluded that those statements could qualify as "a serious expression of an intent to commit an act of unlawful violence, to a particular individual or group of individuals." *Va. v. Black*, 538 US. 343, 359 (2003).

This second determination, which turns on an evaluation of speech attributed to Thames under First Amendment law, violates clearly established law. The officers who arrested her acted with flagrant disregard for the bedrock principle this Court emphasized over fifty years ago: "a statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts v. U.S.,* 394 U.S. 705, 707 (1969).

As *Watts* makes clear, this threshold inquiry requires focus on the words spoken, the *actus reus*, of the threat, not the *mens rea*, requirement. In *Watts,* the Court addressed a statute which required that the threat be made "knowingly and willfully." *Watts*, 394 U.S. at 705. Although the judges on the Court of Appeals had differed over whether this requirement

was satisfied, this Court found the issue beside the point. As this Court put it:

> [w]hatever the 'willfulness requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe the kind of political hyperbole indulged by the petitioner fits within that statutory term. For we must interpret the language . . . against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Watts, 394 U.S. at 708 (citations and internal quotations omitted). Applying these principles, this Court reversed the conviction for a threat based on the statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J.," *Watts*, 394 U.S. at 706, because the "offense here was a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708 (internal quotations omitted).

In *Watts* this Court demonstrated that the principle it relied upon was not limited to political speech. The decision itself reasoned by analogy to cases decided in the context of labor disputes, observing that "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact." *Id.* at 708 (citations omitted). And this Court's precedent over the subsequent fifty years has both solidified the principle and provided more guidance about the kind of statements that are

protected speech, and therefore, cannot provide the grounds for criminal or civil liability.

In *Bradenburg v. Ohio*, 395 U.S. 444 (1969), decided the same year as *Watts*, this Court reversed a criminal conviction based on a film of a gathering in which speakers, some of whom wielded arms, spoke of "revengence," by the "Caucasion race" and made derogatory comments about "the nigger" and "the Jew." Despite the loathsome rhetoric, the Court reversed the conviction because the statute punished "mere advocacy not distinguished from incitement to imminent lawless action." *Id*. at 448-49.

Over twenty years later, in *N.A.A.C.P. v. Clairborne Hardware Company*, 458 U.S. 886 (1982), the Court applied these same principles to threatening rhetoric employed to ensure compliance with a boycott against racial discrimination. In that case, Charles Evers gave a speech warning, "blacks who traded with white merchants would be answerable to him." *Id.* at 900 n.28, and would "have their necks broken . . . ." *id*., adding, "the Sheriff could not sleep with boycott violators at night." *Id*. at 901. This Court held that Evers' comments "did not transcend the bounds of protected speech set forth in *Bradenburg*." *Id*. at 928. As this Court put it, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled into dulcet phrases. When appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the profound commitment that debate on public issues should be uninhibited, robust, and wide-open." *Id*. (internal quotations and citations omitted).

This clearly established precedent also shows that the officers' unlawful action cannot be justified by the decision in *Hunter v. Bryant*, 502 U.S. 224 (1991). In that decision this Court emphasized that officers had "trustworthy information that Bryant had written a letter containing references to an assassination scheme directed against the President, that Bryan was cognizant of the President's whereabouts, [and] that Bryant had made an oral statement that'[h]e should have been assassinated in Bonn.'" *Id*. at 228 (citation omitted). In contrast, the statement attributed to Thames is a "prophesy" of bombs falling on America, including the clinic where she was demonstrating. Assuming she made the statement, it makes no threat that she will do anything. No objectively reasonable officer would think Thames was going to drop "bombs on America," "including this clinic." When the context captured by the dashcam is taken into account, the idea that the statement could ever count as a "true threat" flies in the face of precedent from this Court going back fifty years.

These are bedrock principles that apply *whenever* government officials are called upon to decide whether pure speech, when considered in context, is protected speech or punishable as a "true threat" under the First Amendment. That critical inquiry applies to both arresting officers and charging prosecutors. Indeed, the absolute immunity that prosecutors enjoy for charging decisions, *see*, *Imbler v. Pachtman*, 424 U.S. 409 (1986), makes it imperative that officers take this threshold inquiry seriously in order to avoid the palpable injustice that Thames suffered here: 49 hours in jail for speech that is plainly protected.

Under clearly established law, the officers who arrested Thames were obliged to interpret Michigan's terrorist threat statute "with the commands of the First Amendment clearly in mind," *see*, *Watts* 394 at 707, and assess whether the speech was protected rhetoric, even if disturbing, or "a serious expression of an intent to commit an act of unlawful violence, to a particular individual or group of individuals." *Black*, 538 U.S. at 359. They completely failed to make this threshold—and constitutionally required—determination. Instead, they arrested Thames for pure speech protected by fifty-years of clearly established First Amendment precedent. The Sixth Circuit held that this patently unlawful arrest was a "reasonable mistake," a conclusion that reflects profound confusion about the proper application of this Court's First Amendment jurisprudence.

B. Other Lower Courts Are Also Confused about How To Distinguish Protected Speech From True Threats.

As Thames has pointed out, the Sixth Circuit is not alone in its confusion about the line between protected speech and "true threats." In *New York ex. rel Spitzer v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001), the Second Circuit held that a woman who told a doctor performing abortions that "killing babies was no different than killing doctors," *id.* at 196, was "strong rhetoric" but emphasized that "the statement (even in context) did not suggest that [the speaker] was engaged in a plan to harm the clinic doctor." *Id*. at 196-97 (brackets supplied). It held that the speech was "not a direct or even veiled threat, but an expression of

a political opinion…entitled to First Amendment protection." *Id*. at 197.

The rub here is that in *Operation Rescue National*, the court relied heavily upon the Ninth Circuit panel decision in *Planned Parenthood of Columbia/ Williamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001). In that case, a panel of the Ninth Circuit held that a group which unveiled a "Deadly Dozen" poster and "Nuremberg Files" about doctors performing abortions were protected under *Watts* and *Brandenburg* not true threats. But that panel decision was overruled by an *en banc* decision finding these were "true threats," with five judges dissenting on the ground that the speech was protected. *See Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (*en banc*).

As Thames has pointed out, Judge Baldock's dissent in *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015), likewise goes to show the confusion about the line between words that while threatening are nevertheless protected speech and "true threats." That case also arose in the abortion context and concerned whether the statement if a doctor opened a clinic providing abortions she would be "checking under [her] car everyday—because maybe today is the day someone places an explosive under it," was punishable under the First Amendment. *Id*. at 1196. The majority, relying on the Ninth Circuit's *en banc* opinion in *Planned Parenthood of Columbia/Willamette, Inc.* and this Court's decision in *Black*, held that statement could be a threat. *Dillard*, 795 U.S. at 1199. It rejected the

Second Circuit's decision in *Operation Rescue National* based on the Circuit's subsequent decision in *United States v. Turner*, 720 F.3d 411 (2d. Cir. 2013), which dismissed the part of the decision in *Operation Rescue National* that focused on imminence as *dicta*. *Dillard*, 795 F.3d at 1200. Judge Baldock dissented reasoning that the statement was conditional, non-imminent, and impersonal, and as a result, was protected speech not a "true threat." *Id*. at 1207.

These cases show that the Sixth Circuit is not alone in its inability to distinguish heated and intimidating language that, while disturbing to its listener, remains protected by the First Amendment from statements that qualify as "true threats." They also show the costs this uncertainty imposes on citizens—arrests, injunctions, and threats of criminal and civil liability that chill First Amendment expression.

III. Respondents' Make No Effort To Defend the City's Policy, which Authorizes Arrests for Uttering "Bomb" outside an Abortion Center.

Respondents make no effort to defend the municipal policy that was a "moving force" in Thames's arrest, more specifically, the policy that "*you can't say anything about bombs near a facility that performs abortions*." This policy "ignores all of the contextual factors that are necessary to decide whether" the speech "is intended to intimidate." *Black*, 538 U.S. at 367. It is unconstitutional because "[t]he First Amendment does not permit such a shortcut." *Id*.

CONCLUSION

By way of conclusion, Thames acknowledges that law enforcement is a difficult job, and officers are entitled to make reasonable mistakes. Yet there are limits to qualified immunity. She respectfully submits that the current outcry over the very legitimacy of qualified immunity shows that this Court must enforce those limits. Doing so protects citizens who seek to lawfully exercise their rights. Doing so promotes the integrity of law enforcement, an essential and honorable profession, and thereby protects its legimitacy. Doing so also ensures appropriate accountability for officers who engage in the sort of patently unlawful actions that produced Thames' unlawful arrest and 49-hour detention.

It is sad to say but nonetheless true that every age has its orthodoxies, and in every age dissenters are persecuted. It is good to know that in the long course of this great nation's history, this Court has repeatedly protected dissenters by applying the principle that "[i]f 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, or other matters of opinion . . . ." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The First Amendment needs breathing space and that means freedom from *arrest* for pure speech protected under this Court's precedent—not just relief from unlawful prosecutions, which comes too late, after speakers have been silenced and too much anguish endured.

Thames respectfully submits that her case as well as those she has cited show that there is confusion in the lower courts, which have rendered decisions that defy the overarching principle articulated in *Barnette*, and allowed individuals to be arrested or penalized for pure speech that is protected under clearly established law. She presents questions about the protection the First Amendment provides to citizens engaged in pure speech in a traditional public forum. Accordingly, Thames urges this Court to grant review and provide answers to questions that go to the very heart of the First Amendment.

Respectfully submitted,

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