No. 22-138

In The
Supreme Court of the United States

BILLY RAYMOND COUNTERMAN,

Petitioner,

v.

COLORADO,

Respondent.

On Writ of Certiorari
to the Court of Appeals of Colorado

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER AND REVERSAL

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QUESTION PRESENTED

Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Price v. Garland*, No. 22-665 (Feb. 21, 2023); Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

FIRE has a direct interest in the question presented—whether, in order to punish speech as a "true threat," the First Amendment requires a specific intent to cause fear of bodily harm in another, or requires only a general intent to utter a communication that a reasonable person would deem to be a threat. This question implicates the speech rights of those whom FIRE represents, both on campus and beyond. FIRE advocates on behalf of students and professors, among others, who face

[1] Under Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief.

punishment for statements that others deem threatening, though the speakers had no specific intent to threaten. FIRE files this brief in support of Petitioner to urge the Court to hold that the First Amendment requires evidence of a speaker's specific intent to make a threat.

SUMMARY OF ARGUMENT

Like sports fans across the country every day, University of Utah student Meredith Miller hyperbolically exaggerated how she would vent her frustration if her beloved Utes lost their upcoming football game. "[I]f we don't win today, I'm detonating the nuclear reactor on campus," she joked on social media. For that innocuous expression of fandom, the University of Utah treated her like a criminal and a terrorist.

University law enforcement officials took Miller's joke literally: arresting, charging, and jailing her for making "terroristic threats," and forcing her to post $5,000 bail to be released. The University also prosecuted Miller in a disciplinary tribunal with the possibility of a two-year suspension. The Salt Lake County District Attorney dropped the criminal charge after FIRE wrote to him. The University ultimately found Miller not responsible, after an evidentiary hearing for which she retained counsel.

But as FIRE's experience can attest, occurrences like this are far too common and are sharply at odds with our national commitment to freedom of expression. Because free expression and free debate require "breathing space to survive," *NAACP v.*

Button, 371 U.S. 415, 433 (1963), this Court should clarify that speech that is vituperative, inexact, abusive, crude, or even simply unpopular cannot be a "true threat" unless the speaker had a specific intent to cause fear of bodily harm in another.

This Court's precedents are properly read to require that specific intent. Speech is proscribable as a "true threat" only "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." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment."). Further, by avoiding "conviction[s] . . . premised solely on how [a defendant's speech] would be understood by a reasonable person," a specific intent to threaten standard is more consistent with this Court's interpretation of the federal threats statute discussed in *Elonis v. United States*, 575 U.S. 723, 737 (2015).

Some courts still apply a general *mens rea* standard to punish a "true threat" under the First Amendment. *See, e.g.*, *United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016) ("[A] 'true threat' is one that a reasonable recipient familiar with the context would interpret as a serious expression of an intent to do harm."). But criminalizing the mere act of communication, regardless of the speaker's desire to cause fear in another, fails to safeguard "speech at the core of what the First Amendment is designed to protect." *Black*, 538 U.S. at 365. The general-intent standard reaches political hyperbole, attempts at

humor, religious exhortations, and other "vehement, caustic, and sometimes unpleasantly sharp" commentary that constitute the fabric of the American political and cultural tradition. *See Watts*, 394 U.S. at 708. It is therefore incompatible with *Watts* and *Black*, and the spirit of *Elonis*. The Court should take the present opportunity to clarify the law and protect our profound national commitment to robust and wide-open debate by requiring proof of a specific intent as a requirement of punishing speech as a "true threat."

Attaching a specific-intent requirement to "true threats" analyses strikes the optimal balance between protecting that commitment to uninhibited debate and deterring the harm that true threats may cause. Because a general-intent standard can reach lawful expression, including hyperbolic or humorous but fully protected commentary on matters of public concern, it unnecessarily chills speech. *See Black*, 538 U.S. at 365. In contrast, the specific-intent standard protects speech on the margins, maintaining space for the wide-open and robust discussion of all manner of ideas.

Requiring specific intent for true threats does not mean foregoing convictions secured under a general-intent standard. Importantly, a specific *mens rea* still provides justice for true threats because, in all but the most borderline cases, the speaker's specific intent to threaten will be obvious based on their words, the surrounding context, or a combination of the two. A specific-intent standard would properly protect our national commitment to free expression while still punishing those who unlawfully threaten others.

A "true threats" exception can provide the "breathing space" necessary for uninhibited debate only if it limits punishment to those who, through their communication, desire to cause another to fear bodily harm—those who communicate with a specific intent to threaten. The Court should hold that a specific intent to place another in fear of bodily harm is a necessary element of a constitutionally proscribable "true threat."

ARGUMENT

I. FIRE's Experience Defending Campus Speech Makes Clear That a General-Intent Standard Punishes Protected Expression.

Public college and university administrators routinely suppress and punish faculty and student speakers for threats that the administrators deem to be threatening, though the speakers had no intention of causing fear. While most "true threats" cases arise in the context of criminal prosecutions, FIRE's experience in the public college and university settings demonstrates the prevalence of state officials administratively punishing speech that they deem to be threatening, even though the speakers had no intent to make a threat.

It is well established that the First Amendment protects the expressive rights of students[2] and faculty

[2] *See Healy v. James*, 408 U.S. 169 (1972). The decision made clear that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id*. at 180.

at public colleges and universities.[3] Indeed, this Court has consistently protected the "expansive freedoms of speech and thought associated with the university environment." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

The application of "true threats" doctrine should be no different. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (stating that this Court's "cases le[ft] no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."). Nevertheless, in FIRE's experience, public universities and their administrators continue to brazenly assert an unfounded authority to punish First Amendment-protected expression based on a general-intent test for threats.

Meredith Miller's example is instructive. She commented: "[I]f we don't win today, I'm detonating the nuclear reactor on campus." Letter from Alex Morey, Director, FIRE, to Sim Gill, District Attorney, Salt Lake County (Sept. 23, 2022), *available at* https:

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[3] *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *see also Keyishian v. Bd. of Regents, State Univ. of N.Y.*, 385 U.S. 589 (1967). Employees of government institutions do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). Instead, faculty members retain a First Amendment right to speak as private citizens on matters of public concern. *Id.*; *see also Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Because "expression related to academic scholarship or classroom instruction implicates additional constitutional interests," this Court has reserved the question of whether its holding in *Garcetti v. Ceballos* applies to faculty members of public colleges and universities. 547 U.S. 410, 425 (2006).

//www.thefire.org/research-learn/fire-letter-salt-lake-county-district-attorney-september-23-2022 [perma.cc/4J8H-G9QE].

University police characterized the hyperbole as a "veiled threat," and charged Meredith with making a "threat of terrorism" under Utah Code § 76-5-107.3. *Id.* The university police chief justified the arrest by stating the school has "a zero-tolerance policy for these kinds of threats." University of Utah, *University statement: Reactor detonation bomb threat* (Sept. 22, 2022), *available at* https://attheu.utah.edu/university-statements/university-statement-reactor-detonation-bomb-threat [https://perma.cc/6Y5G-5JDY]. "In the age we're living in, we have to take every threat seriously," he said. *Id.* A post on social media—where irreverent, caustic, and incendiary banter is the norm[4] —calling for an absurdly high gravity of unrealistic harm (nuclear detonation) for a trivial reason (a loss by Utah's college football team), should have made it clear that Meredith was joking. But law enforcement and University officials did not take it that way: For her joke, Meredith was treated like a criminal and threatened with a two-year suspension from school. FIRE, *University of Utah: Student Arrested, Investigated, Then Cleared for Nuclear Meltdown Joke*, *available at* https://www.thefire.org/cases/university-utah-student-arrested-investigated-then-cleared-nuclear-meltdown-joke [perma.cc/L2YH-FA38].

[4] *See generally* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🤜U: Considering the Context of Online Threats*, 106 Calif. L. Rev. 1885 (2018).

In another example, University of Virginia student Morgan Bettinger, driving home from work in July 2020—during which the nation was reeling from the police murder of George Floyd—came upon a street blocked by protestors. She exited her car and told the driver of a city garbage truck blocking the roadway that "[i]t's a good thing you are here because, otherwise, these people would have been speed bumps." Letter from Sabrina Conza, Program Analyst, FIRE, to James E. Ryan, President, University of Virginia (July 27, 2021), *available at* https://www.thefire.org/research-learn/fire-letter-university-virginia-july-27-2021 [perma.cc/8L8P-F9GQ].

This was idle, albeit darkly humorous, chatter. The First Amendment protects the "freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674 (1944). Regardless, the remark was not a statement of intent to commit future violence. Indeed, Bettinger used the past-conditional tense. While it may have expressed contempt for the demonstrators' method of protest or their message, or displeasure at being delayed unexpectedly, it was not a true threat. The University initially recognized Bettinger's speech rights and did not punish her directly. However, the student-run University Judiciary Committee found Bettinger responsible for "shameful" comments that "put members of the community at risk" and imposed sanctions, including a required apology, 50 hours of community service at an approved social justice organization, and three hours of remedial education on police-community relations. The University

compounded the constitutional error in punishing Bettinger by refusing to expunge her disciplinary record that resulted from her comment regarding the protestors. Letter from James E. Ryan, President, University of Virginia, to Adam B. Steinbaugh, Director, FIRE (Aug. 18, 2021), *available at* https://www.thefire.org/research-learn/university-virginia-letter-fire-august-18-2021 [perma.cc/MDD6-64K3].

In yet another example, New Jersey's Montclair State University rescinded professor Kevin Allred's employment offer after he tweeted, regarding President Trump's support of repealing the Affordable Care Act: "This is all a sham. I wish someone would just shoot him outright." Letter from Adam B. Steinbaugh, Senior Program Officer, FIRE, to Mark J. Fleming, University Counsel, Montclair State University (Aug. 4, 2017), *available at* https://www.thefire.org/research-learn/fire-letter-montclair-state-university-august-4-2017 [perma.cc/QL48-SWRU]. The statement is remarkably similar to the statement this Court protected in *Watts*: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. This sort of "political hyperbole" may amount to a "very crude offensive method of stating political opposition to the President," *Watts*, 394 U.S. at 707–08, but it is nonetheless protected speech.

In a similar instance, President Trump's 2018 tweet stating his intention to "declar[e] ANTIFA . . . a major Organization of Terror," prompted Professor Jeff Klinzman to comment on a political Facebook group: "Yeah, I know who I'd clock with a bat . . . ."

Letter from Adam B. Steinbaugh, Director, FIRE, to Dr. Lori Sundberg, President, Kirkwood Community College (Aug. 27, 2019), *available at* https://www.thefire.org/news/kirkwood-community-college-parts-ways-antifa-professor-raising-first-amendment-concerns [perma.cc/E2RR-EZCL]. Iowa's Kirkwood Community College used this statement, among others, as grounds to remove Professor Klinzman from classroom instruction, quickly leading to his resignation, based upon "safety" concerns.[5]

These examples demonstrate the real-world censorship that results from using a general-intent standard. That standard punishes hyperbole—whether the sports-fan talk of Meredith Miller, the caustic speech of Morgan Bettinger, or the political speech of people like Kevin Allred or Jeff Klinzman. To protect the "breathing space" necessary for "free debate," *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964), and prevent the unnecessary silencing and punishing of individuals speaking their minds across the nation, this Court should definitively rule that a "true threat" is only that expression which is communicated with the specific intent to cause fear in another.

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[5] FIRE represented Klinzman, who settled the matter with the College. FIRE, *VICTORY: College settles with 'antifa' professor fired for criticizing President Trump on Facebook, avoids First Amendment lawsuit from FIRE* (Apr. 27, 2020), *available at* https://www.thefire.org/news/victory-college-settles-antifa-professor-fired-criticizing-president-trump-facebook-avoids [perma.cc/KP25-5X7C].

II. This Court's "True Threats" Precedents Require a Specific Intent to Threaten.

"True threats" are one of the few limited categories of speech excluded from First Amendment protection. It is intended to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur[.]" *R.A.V.*, 505 U.S. at 388. But categories of unprotected speech must be "well-defined and narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

This Court's "true threats" jurisprudence, beginning in 1969 with *Watts*, is best read to require proof of a specific intent to threaten. *Watts* demonstrates that the First Amendment requires more than the reaction of an objectively reasonable listener to convict a speaker of criminal threatening. There, a Vietnam War protestor was convicted of threatening the president for telling a crowd that he would like to get President Johnson "in my sights" after receiving a draft notice. *Watts*, 394 U.S. at 706. The Supreme Court reversed the conviction. *Id.*

"What is a threat," the Court wrote, "must be distinguished from what is constitutionally protected speech." *Id.* at 707. Noting disagreement below and in prior cases about what "willfullness" required, the Court reasoned: "But whatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term." *Id.* at 707–08.

Going further, the *Watts* Court, quoting *New York Times Company v. Sullivan*, determined that statutes criminalizing speech must be judged "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 708 (quoting *New York Times Co.*, 376 U.S. at 270 (1964)). It noted that the "language of the political arena . . . is often vituperative, abusive, and inexact," and decided that Watts's speech was within that tradition. *Id.*

In *Virginia v. Black*, this Court upheld the essential holding of *Watts* that the First Amendment requires more than a general intent to criminalize "true threats," and defined the elements of a "true threat" to include the defendant's specific intent. 538 U.S. at 359. To prevent protected speech from being swept up in true-threat prosecutions, this Court narrowly defined "true threats" 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." *Id.* (citing *Watts*, 394 U.S. at 708). "The speaker need not actually intend to carry out the threat." *Id.* at 359–60 (citing *R.A.V.*, 505 U.S. at 388). But a true threat can be found only "where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

In *Black*, a Klansman had a property owner's permission to burn a cross in public view and was

convicted without evidence of a specific intent to threaten. 538 U.S. at 348. Overturning the conviction, seven Justices agreed to invalidate a provision of the Virginia statute that allowed the act of cross-burning alone to be *prima facie* evidence of an intent to threaten. *Id.* at 367.

Black's four-Justice plurality opinion, by Justice O'Connor, found the statute's *prima facie* provision unconstitutional under the First Amendment because it did not require the defendant to have acted with a desire to intimidate. *Id.* at 365. This "create[d] an unacceptable risk of the suppression of ideas" because it allowed juries to disregard the defendant's actual intent, and thereby swept up protected expression along with proscribable criminal conduct. *Id.* (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984); *see also id.* at 366 (striking the *prima facie* provision because it "does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim."). The plurality recognized that failing to require evidence of specific intent would force defendants to prove their innocent intent—turning the justice system on its head—while also allowing juries to convict without evidence of a defendant's actual mental state and thus chill protected speech. *Id.* at 365–66. The lack of a specific-intent element too greatly risked punishing protected speech. *Id.* at 366.

Four concurring Justices agreed. Although three concurring Justices—Justices Souter, Kennedy, and Ginsburg—would have invalidated the entire statute as having an impermissible content-based purpose,

they agreed with the plurality that the *prima facie* provision "encourage[d] a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one." *Id.* at 386. Thus, nullifying the specific-intent standard "skews prosecutions" and in turn "skews the statute toward suppressing ideas." *Id.* at 387.

Justice Scalia, while disagreeing with the invalidation of the statute, nonetheless agreed that cross burning "by itself" could not provide a sufficient basis for inferring specific intent. *Id.* at 379. In other words, like the plurality and the other concurring Justices, Justice Scalia believed that a conviction for making a true threat requires some evidence showing the defendant's specific intent to place another in fear of bodily harm through their communication. *See United States v. Cassell*, 408 F.3d 622, 632 (9th Cir. 2005) ("[E]ight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction.").

As Justice Sotomayor has recognized,

> *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.

Perez v. Florida, 137 S. Ct. 853, 855 (2017) (Sotomayor, J., dissenting from the denial of certiorari).

The specific-intent standard, required by *Black*, is also most consistent with this Court's interpretation of the federal-threats statute, 18 U.S.C. § 875(c), as discussed in *Elonis*. In *Elonis*, the Petitioner was convicted—under a general-intent standard—of making threats to injure amusement park patrons and co-workers, his ex-wife, police officers, a kindergarten class, and an FBI agent, based on violently themed rap lyrics he posted to his Facebook page. 575 U.S. at 726–31. This Court reversed the conviction and refused to infer a negligence standard into the threats statute, reasoning that, "communicating *something* is not what makes the conduct 'wrongful.'" *Id.* at 737. Rather, "the crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat." *Id.* "Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person," a standard that is "inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Id.* at 737–38.[6]

[6] The Court also noted that for Elonis to be convicted according to its obscenity precedent, he would have to "know the threatening nature of his communication." *Id.* at 739. In other words, "[know] the *character* of" his communication. *Id.*

So too, under the First Amendment the speaker's intent to place another in fear is what causes the actionable harm, not a mere communication that a reasonable person would find threatening. For this reason, requiring proof of a specific intent is most consistent with this Court's reasoning in *Watts*, *Black*, and *Elonis*.

III. Requiring a Specific-Intent Standard Optimally Balances Safeguarding Protected Expression and Addressing the Harms Caused By True Threats.

The First Amendment—properly interpreted to require a specific-intent element to proscribe speech as a true threat—balances the individual's right to expression, society's interest in the robust and wide-open debate and discussion of ideas, and the prevention of the harm caused by true threats. The general-intent standard, by contrast, exposes protected expression to punishment based on the reactions of listeners, putting speech at risk because of the ideas expressed. Case law demonstrates that convictions won under the general-intent standard could have been equally secured under the specific-intent standard, addressing the harm caused without sacrificing First Amendment principles.

A. Protecting our "profound national commitment" to uninhibited debate requires a specific-intent standard.

"The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find

distasteful or discomforting." *Black*, 538 at 358; *accord Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

This protection is not absolute, and certain limited categories of speech—in this case true threats—are properly proscribed because of the harm they cause. True threats are beyond the First Amendment's boundary to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388; *see also Black*, 538 U.S. at 360. But these reasons do not support a broad ban of all speech that a reasonable person might find threatening, which is why this Court singled out the narrow category of true threats as constitutionally proscribable while continuing to protect "political hyperbole." *Watts*, 394 U.S. at 708 (quoting *New York Times Co.*, 376 U.S. at 270, for its description of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

It is the specific intent to threaten standard—not the general intent to communicate standard—that optimally upholds that "profound national commitment."

> Instead of simply prohibiting speech based on the reaction it incurs, this [specific intent to threaten] standard punishes . . . a speaker who

> wishes to bring about the harms associated with threatening speech . . . [but] at the same time, the speaker who had no such intention will be given the necessary "breathing space" to speak freely and openly.

Paul T. Crane, *True Threats and the Issue of Intent*, 92 Va. L. Rev. 1225, 1273 (2006). Only by requiring evidence of specific intent can courts appropriately balance protecting speech at the proverbial margins while allowing punishment for speakers with a specific intent to threaten.

The general-intent standard flunks this test. "Put simply, [a general-intent] standard chills speech." *Id.* at 1272; *see also Black*, 538 U.S. at 365 ("[T]he [*prima facie*] provision chills constitutionally protected political speech because of the possibility that the [State] will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect."). The general-intent standard "embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech" because it "would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring).

Under the general-intent standard, speakers are accountable for the effect their words will have on listeners regardless of their own intent, and therefore

they will steer far clear of the criminal line to avoid the "possibility" of prosecution and conviction for lawful speech—be it political hyperbole, religious exhortation, attempts at humor, or biting commentary. *Black*, 538 U.S. at 365. Instead of facing the possibility of prosecution and conviction, speakers will dilute their messages or refrain from communicating at all—creating "'an unacceptable risk of the suppression of ideas.'" *Id.* (quoting *Sec'y of State of Md.*, 467 U.S. at 965). Free debate cannot survive the chilling of those whose language is hyperbolic, abusive, inexact, crude, or simply unpopular.

Some courts have favored a general-intent standard because, as they say, it "best satisfies the purposes of" punishing threatening speech. *United States v. Kosma*, 951 F.2d 549, 553, 557 (3d Cir. 1991); *United States v. Aman*, 31 F.3d 550, 555 (7th Cir. 1994) (stating that the general-intent standard best accomplishes the aim of preserving the recipient's sense of personal safety). But this rationale fails entirely to do the balancing required by the First Amendment. The general-intent standard "undervalues the tenet that language which is vituperative, abusive, and inexact may still be protected under the First Amendment" and is therefore "over-inclusive when it comes to prohibiting threatening speech." Crane, 92 Va. L. Rev. at 1272. "By focusing on how a reasonable person may react, the objective approach severely discounts the speaker's general First Amendment right to communicate freely, even if that means using language which a reasonable person might find disagreeable." *Id.*

B. The specific-intent standard meaningfully addresses the harms of true threats.

Despite the claims of its detractors, a specific-intent standard meaningfully protects against the harms caused by threatening speech. Neither of the two common criticisms of a specific-intent standard are persuasive. First, critics argue that requiring specific intent increases the prosecutor's burden at trial. Crane, 92 Va. L. Rev. at 1273. While technically accurate, this argument does not account for the purpose of criminal law—to "prohibit conduct society finds worthy of punishment." *Id.* As it pertains to protected speech, the argument is illegitimate because society has already decided, via the First Amendment and this Court's precedent, that "the burden on the prosecutor *should* be heightened when the regulation of pure speech is involved." *Id.* (emphasis added).

Second, critics argue that requiring a specific-intent element "would allow carefully crafted statements by speakers who actually intend to threaten to go unpunished." *Id.* (citing Jordan Strauss, *Context Is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 Sw. U. L. Rev. 231, 263 (2003)). Assuming this is true, though, "[i]n the vast majority of cases, if a statement seems clearly threatening, it will be difficult for the defendant to plausibly explain how his communication was not intended to be threatening." Crane, 92 Va. L. Rev. at 1273.

The circuit case law illustrates that, in the clearest true threat cases, defendants who have uttered

statements that a reasonable person deems threatening—that is, defendants who have been convicted under the less stringent general-intent standard—also could have been readily convicted under the specific-intent standard proposed here.

Take, for example, the case of William White, the neo-Nazi and self-described "Commander" of the American National Socialist Workers' (Nazi) Party. *United States v. White*, 670 F.3d 498, 501 (4th Cir. 2012). Pre-*Elonis*, White was convicted under the federal threats statute of, among other things, sending threatening communications to a Citibank employee who worked in the collections department. *Id.* at 502. White's threatening message included statements like: "If you resolve this issue quickly and efficiently I can guarantee you will not hear from me again; if you don't, well, you will be well known to the Citibank customers you are currently in litigation with in [a] very short amount of time." *Id.* White informed the employee that he had purchased phone directory information and that he could "probably make you better known to your customers than the security measures you enact at your company indicate you would like." *Id.* He continued: "Consider this, as I'm sure, being in the collections business and having the attitude about it that you do, that you often make people upset. Lord knows that drawing too much publicity and making people upset is what did in Joan Lefkow." *Id.* White included a hyperlink to a Google search on Judge Joan Lefkow, from which the employee learned that "Lefkow was a judge whose husband and mother had been murdered by a

disgruntled litigant who had appeared before Judge Lefkow in court." *Id.* at 502–03.

Pre-*Elonis*, the United States Court of Appeals for the Fourth Circuit applied the general-intent standard. But if the trial court had applied the specific-intent standard, the court could have instructed the jury that it could infer from this communication that White specifically intended to make a threat. That White intended to cause fear of bodily harm is obvious on the face of his statements and the surrounding context.

Critics also claim that, oftentimes, criminals who intend to make threatening statements attempt to mask their intentions by expressly disclaiming any such intent. But the speaker's protestations are often not credible.

In *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994), for example, the defendant said to Internal Revenue Service employees: "Ma'am, do you know how long it takes to bury a person? . . . Do you know how long it takes to kill a person? . . . I am tired of the IRS with their G** d*mn bullsh**. If I don't hear from you today, it's going to be a massacre." *Id.* at 1061. After stating that he had gone "to the hardware store, and gotten all that they had, and everything that he needed to make a strong explosive," he asked: "How would you like to have a pipe bomb delivered to your place of employment? This is not a bomb threat." *Id.*

Darby too could have been convicted under the specific-intent standard. The intent to place another in fear of bodily harm is obvious and can be inferred

from Darby's words and the context—discussing buying bomb-making materials and threatening a massacre in the context of a complaint to the IRS—despite his feeble attempts to negate the obvious threat.

These are not hard cases and neither are the majority of true threat cases that have advanced through the federal circuits, both pre- and post-*Black* and *Elonis*. In these cases, "any attempt by the defendant to explain the intent of his communication as non-threatening would most likely be laughable and unbelievable." Crane, 92 Va. L. Rev. at 1274. "Only in cases at the proverbial margin, where the line between protected idea and punishable threat is more thinly sliced, will the application of the specific intent to threaten standard potentially lead to a different outcome than if an objective test were applied." *Id.* "In those close-call situations, however, it is much better to let the 'crafty criminal' go free than to imprison the innocent speaker whose words unintentionally seemed threatening to a 'reasonable person.' Otherwise, speech, especially at the fringe of the First Amendment's protections, will be unnecessarily chilled." *Id.* at 1276; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327 (2010) (the First Amendment "give[s] the benefit of any doubt to protecting rather than stifling speech." (citation omitted)).

As the above examples illustrate, most criminals convicted of making true threats cannot outwit police, prosecutors, and juries. Factfinders can readily infer a defendant's specific intent to threaten from the communications and surrounding circumstances

when given the opportunity. They only need be properly instructed to find a specific intent in the first place.

CONCLUSION

In FIRE's experience, the risk to protected speech—including jokes and political hyperbole at the core of the First Amendment's protections—far outweighs the risk that speakers who actually intend to threaten others will go unpunished. A specific-intent standard is most consistent with this Court's precedents and best protects speech while also protecting individuals from the harms of intentional threats. To safeguard our national commitment to uninhibited debate, the Court should clearly rule that the finding of a "true threat" requires evidence of a speaker's specific intent to cause fear of bodily harm in another.

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Respectfully Submitted,

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