Record Nos. 10-4241, 10-4452, 10-4597

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

***Appellant*,**

v.

WILLIAM A. WHITE,

Appellee.

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLEE WILLIAM A. WHITE IN SUPPORT OF REVERSAL IN PART

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/s/_____ Dated: October 4, 2010
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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia") is the Virginia affiliate of the American Civil Liberties Union, and has approximately 10,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes. Since its founding, the ACLU of Virginia has been a forceful advocate of the freedom of speech.

All parties have consented to the filing of this Brief *Amicus Curiae.*

QUESTION PRESENTED

Whether specific intent is required to prove a true threat under 18 U.S.C. § 875(C).

SUMMARY OF ARGUMENT

The First Amendment's free speech clause excludes from its protection those statements categorized as "true threats." Courts have differed as to the level of intent required to establish a punishable true threat. Some courts, including this Court and the district court in this case, have applied an objective standard—requiring only a general intent to communicate a statement which a reasonable person would perceive as threatening. But Supreme Court precedent mandates that a defendant be shown to specifically intend his statements to be threatening. Furthermore, the "specific intent to threaten" standard normatively is the best

approach because it achieves the optimal speech-protective balance between First Amendment values and the harms caused by true threats.

ARGUMENT

The First Amendment does not protect "true threats" because their very utterance can cause harms, including "the fear of violence, . . . the disruption that fear engenders, and . . . the possibility that the threatened violence will occur." *Virginia v. Black*, 538 U.S. 343, 360 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) (internal quotations omitted). Threats "must be distinguished from what is constitutionally protected speech," such as "political hyperbole." *Watts v. United States*, 394 U.S. 705, 707-08 (1969). The precise definition of "true threats" is a matter of controversy among the circuit courts, particularly with regard to the level of *mens rea* that the defendant must have in order to be guilty of a true threat.

Some courts, including this one, have adopted objective tests, in slightly different forms, resulting in potential culpability for speakers who negligently communicate statements later deemed threatening. *See, e.g., United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States v. Zavrel*, 384 F.3d 130 (3d Cir. 2004); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004). Under this test, "[w]hether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context

of the communication . . . [not by whether] the defendant subjectively intended for the recipient to understand the communication as a threat." *Darby*, 37 F.3d at 1066. As the trial court noted, "the Fourth Circuit, in concurrence with many Circuit Courts of Appeal around the country, has maintained that making a 'true threat' is a general intent crime, and the defendant need not have subjectively intended to threaten the individual." (J.A. 1133.)

However, other Circuit Courts have applied a subjective standard, requiring proof that the defendant specifically intended to threaten the recipient, based on the Supreme Court's definition of true threats in *Virginia v. Black*. *See United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound [by *Black*] to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) ("The threat must be made with the intent of placing the victim in fear of bodily harm or death."). *See also United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (describing "an entirely objective definition" of true threats as "no longer tenable.").

In the instant case, the defendant requested a jury instruction that would have required a finding of a specific intent to threaten in order to conclude that the defendant had made a true threat. The trial court rejected that instruction, instead

charging the jury that they need only find that a reasonable person would find the defendant's statement threatening. (J.A. 907.) Later, the district court again applied an objective standard, over the defendant's objection, in its ruling on the defendant's motion for acquittal. (J.A.1133). While the district court's failure to use a specific intent standard was in accord with this Court's precedents, *amicus* urges the Court to revisit the issue of true threats in light of the *Black* case, and to reverse and remand this case with instructions to apply a specific intent standard.

I. SUPREME COURT PRECEDENT REQUIRES THIS COURT TO APPLY THE "SPECIFIC INTENT TO THREATEN" STANDARD.

Virginia v. Black discussed the concept of true threats in the context of a Virginia statute criminalizing cross-burning with intent to intimidate. The Supreme Court struck down a provision of the statute stating that the act of cross-burning would constitute *prima facie* evidence of an intent to threaten. *Id.* at 367. The Court 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.* at 359. The plain meaning of this passage is that a speaker must specifically intend to threaten for his words to constitute true threats and thus fall outside First Amendment protection.

Thus, for example, in *Magleby*, 420 at 1139, the court stated that true threats, "[u]nprotected by the Constitution[,] . . . must be made 'with the intent of placing the victim in fear of bodily harm or death.' An intent to threaten is

enough; the further intent to carry out the threat is unnecessary." (quoting *Black*, 538 U.S. at 359-60).

Similarly, in *Cassel*, the Ninth Circuit replaced its earlier objective test with a subjective one—a result the court read as required by *Black*. After quoting *Black's* definition of true threats, the court said: "The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that 'the speaker means to communicate . . . an intent to commit an act of unlawful violence.' A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim." *Cassel*, 408 F.3d at 631 (quoting *Black*, 538 U.S. at 359-60) (emphasis in original).

Not only *Black*'s explicit definition of "true threat," but also its holding in the case, compels the use of a specific intent standard. "The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Cassel*, 408 F.3d at 631. Further, although Justice O'Connor's full opinion commanded only a plurality of

votes, "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction," *id.* at 632, and "[e]ven the ninth, Justice Thomas, did not disagree that intent to intimidate is necessary; he would, however, have permitted intent to be inferred from the act of cross burning itself." *Id.* at 632 n. 7. The court concluded that it was "therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* at 633.[1]

Similarly, in *United States v. Parr*, 545 F.3d 491 (7th Cir. 2008), the Seventh Circuit discussed the definition of true threats in *Black*, as well as post-*Black* developments on the issue of intent, and concluded:

> It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality's discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable. But whether the Court meant to retire the objective "reasonable person" approach or to add a subjective intent requirement to the prevailing test for true threats is unclear. If the latter, then a standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it

[1] The Ninth Circuit has not been completely consistent on this issue. In *United States v. Romo*, 413 F.3d 1044 (9th Cir. 2005), a case involving a conviction for threats made against the President, it applied an objective standard, but cast later doubt on "*Romo's* continued use of the objective 'true threat' definition" in light of "*Black's* subjective 'true threat' definition." *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005).

> as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.

545 F.3d at 500 (emphasis in original). The court did not resolve the question, because at trial the defendant had asked for and received a jury instruction that required proof of a specific intent to threaten. *Id.*

Commentators have agreed that a plain-language reading of *Black* requires a specific intent to threaten for speech to be "true threats" and thus constitutionally proscribable. *See* Frederick Schauer, *Intentions, Conventions, and the First Amendment*, 55 Sup. Ct. Rev. 197, 217 (2003) ("[I]t is plain that . . . the *Black* majority (and, perhaps, the *Black* dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate. If there is no such First Amendment requirement, then Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it."); Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on* Virginia v. Black, 54 Cath. U. L. Rev. 1, 33 (2004) ("*Black* now confirms that proof of specific intent (aim) must be proved also in threat cases.").

Most of the circuits that have continued to apply an objective standard post-*Black* have not attempted to justify how that standard comports with the explicit language of *Black* – defining true threats as "those statements where the speaker

means to communicate a serious expression of an intent to commit an act of unlawful violence." *Zavrel*, 384 F.3d at 136; *United States v. Fuller*, 387 F.3d 643 (7th Cir. 2004); *United States v. Nishnianidze*, 342 F.3d 6 (1st Cir. 2003); *United States v. Alaboud*, 347 F.3d 1293 (11th Cir. 2003). *See also United States v. Hankins*, 195 Fed. Appx. 295, 301, 2006 WL 2787074, at *5 (6th Cir. 2006) (unpublished decision) (citing the *Black* definition but, without explanation, applying an objective standard from a pre-*Black* case).

In *Porter*, 393 F.3d at 616-17, the court cited *Black*'s "true threat" definition for the proposition that "to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person." In other words, the court apparently read the phrase "means to" in the *Black* definition to encompass only the verb "communicate," rather than the entire phrase "communicate a serious expression of an intent to commit an act of unlawful violence." This is not a tenable reading of *Black.* First, it simply is not a natural reading of *Black's* language. Second, and more importantly, such a reading is inconsistent with the holding of *Black*. As the *Cassell* court explained, *Black* would not have invalidated Virginia's law making the act of cross-burning prima facie evidence of intent to intimidate unless the intent to intimidate was a requirement for a true threat.

Although this Court has maintained an objective test post-*Black*, it has not squarely addressed what effect *Black* should have on its true threats doctrine, at least not with respect to the issue of intent. *See United States v. Armel*, 585 F.3d 182 (4th Cir. 2009); *United States v. Bly*, 510 F.3d 453 (4th Cir. 2007); *United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004).

In the instant case, this Court should revise its definition of true threats to bring it into compliance with *Black*'s subjective intent requirement.

II. THE "SPECIFIC INTENT TO THREATEN STANDARD" ACHIEVES THE OPTIMAL SPEECH-PROTECTIVE BALANCE BETWEEN FIRST AMENDMENT VALUES AND THE HARMS CAUSED BY TRUE THREATS.

"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 U.S. 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 principle, of course, is not absolute, and must be balanced against the reasons for proscribing the category of true threats: "protecting 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. Just such a balance led the Supreme Court to single

out the narrow category of true threats as constitutionally proscribable while continuing to protect "political hyperbole." *See Watts*, 394 U.S. at 708 (noting that "we must interpret the language Congress chose 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," and that political language "is often vituperative, abusive, and inexact") (internal quotations and citations omitted). *See generally* Paul T. Crane, Note, *True Threats and the Issue of Intent*, 92 Va. L. Rev. 1225, 1269-77 (2006) (arguing that the subjective intent to threaten standard strikes the optimal speech-protective balance).

The objective test adopted by this Court—the reasonable recipient test—does not strike the proper balance between the values underlying the First Amendment and the purposes for punishing threatening speech. It undervalues our national commitment to open and robust trade in ideas. Moreover, because under the objective test the subjective intent of the speaker is irrelevant, the standard adopted by this Court risks punishing speech that is distasteful or even condemnable but not intended to be threatening. Those who speak in language that is hyperbolic, inexact, crude, or simply unpopular face punishment, notwithstanding the time-tested principles animating the free speech clause.

Nonetheless, some courts have favored the objective test on the grounds that it "'best satisfies the purposes' of punishing threatening speech." *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991). "The threat alone is disruptive of the recipient's sense of personal safety and well-being." *Id.* at 557; *see also United States v. Aman*, 31 F.3d 550, 555 (7th Cir. 1994) (stating that the objective standard best accomplishes the aim of preserving the recipient's sense of personal safety).

The problem with this rationale is that it fails entirely to do the balancing required by the First Amendment. The objective 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. 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." Crane, 92 Va. L. Rev. at 1272 (internal quotations and citations omitted).

"Put simply, an objective standard chills speech." *Id.* The objective standard "embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. . . . We 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). Because under the objective standard speakers are tasked with responsibility for the effect their words will have on listeners, they will steer far clear of the criminal line, and instead will dilute their message or refrain from communicating it at all.

In contrast, the subjective standard, as formulated by the specific intent to threaten test, both protects against the harms caused by threatening speech and protects First Amendment values. "Instead of simply prohibiting speech based on the reaction it incurs, this subjective intent standard punishes the speaker who intends to create the harms of threatening speech. . . . By requiring a specific intent to threaten, a speaker who wishes to bring about the harms associated with threatening speech will be punished; at the same time, the speaker who had no such intention will be given the necessary breathing space to speak freely and openly." Crane, 92 Va. L. Rev. at 1273 (internal quotation marks omitted).

Although there are two common criticisms of the subjective standard, neither is persuasive. First, critics argue that the subjective standard will increase the prosecutor's burden at trial. This argument has little merit. "If anything, the burden on the prosecutor should be heightened when the regulation of pure speech is involved." *Id.* Second, critics argue that adoption of the subjective standard

"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 (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 facts of this Court's prior cases illustrate that in the clearest "true threat" cases, defendants may be readily convicted under a subjective standard. For example, in *Armel*, this Court upheld the conviction of a man who repeatedly called an FBI office, making statements such as: "[I]f you don't pay me within three days, none of you, male or female, are gonna be able to have sex again. . . . [Y]ou're gonna lose you're [sic] genitalia. . . . You will die. Not by my hand, by the hand of God. Or maybe by my hand, but it will be self-defense. . . . Get it straight or fucking die!" 585 F.3d at 183-84.

Similarly, this Court upheld the conviction under 18 U.S.C. § 875(c) of a defendant who made several statements to Internal Revenue Service employees in Durham, including: "[D]o 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."

Darby, 37 F.3d at 1061 (asterisks in original). The defendant also said that "he had went [sic] to the hardware store, and gotten all that they had, and everything that he needed to make a strong explosive," and, "How would you like to have a pipe bomb delivered to your place of employment? This is not a bomb threat." *Id.* The defendant referenced Adolph Hitler and Jeffrey Dahmer, and said that the IRS would "need a flower fund" for "all of the funerals in Durham." When an employee told the defendant that she would refer his case to another office that would call him back in a few days, he said: "[I]f it's going be a few days, never mind . . . it would be too late, people in Durham would be dead. . . . Do you understand?" *Id.* at 1062 (internal quotations omitted).

In these cases, this Court applied an objective test and upheld the defendants' convictions under that standard. However, even under the subjective standard, these defendants could have been convicted. 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. 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." Crane, 92 Va. L. Rev. at 1274. "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, will be unnecessarily chilled." *Id.* at 1276.

CONCLUSION

For the forgoing reasons, *amicus curiae* respectfully urges the Court to reverse the convictions of Appellee as to Courts One, Three and Five.

Respectfully submitted,

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I hereby certify that on this 4th day of October, 2010, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system which will send notice of such filing to:

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