SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On a Proposed Appeal As of Right from a Unanimous Final
v.	:	Judgment of the Superior Court of New Jersey,
CALVIN FAIR,	:	Appellate Division.
Defendant-Respondent.	:	Indictment No. 15-08-01454-I
	:	Sat Below:
	:	Hon. Clarkson S. Fisher, Jr., P.J.A.D.,
	:	Hon. Heidi Willis Currier, J.A.D., and
	:	Hon. Patrick DeAlmeida, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101

DANIEL S. ROCKOFF
Assistant Deputy
Public Defender
Attorney ID: 103522014

Of Counsel and
On the Brief
Daniel.Rockoff@opd.nj.gov

DEFENDANT IS NOT CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (cont'd)

PAGE NOS.

INDEX TO DEFENDANT'S SUPREME COURT APPENDIX

[1] Following appellate oral argument, the Appellate Division asked that the motor vehicle recording be added to the appellate record, and the parties mutually consented.

[2] Fair's Law Division brief is appended in order to respond to the State's erroneous assertion in its Supreme Court brief that in the Law Division, Fair did not rely on the New Jersey Constitution's free speech guarantee. See R. 2:6-1(a)(2) ("Briefs submitted to the trial court shall not be included in the appendix, unless … the question of whether an issue was raised in the trial court is germane to the appeal").

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases (cont'd)

Statutes

Court Rules

TABLE OF AUTHORITIES (cont'd)

Constitutional Provisions

Books

TABLE OF AUTHORITIES (cont'd)

Law Review Articles

Amicus Briefs

TABLE OF AUTHORITIES (cont'd)

Scientific Articles/Surveys

Newspaper Articles

TABLE OF AUTHORITIES (cont'd)

Newspaper Articles (cont'd)

Music/Video/Social Media

Government Statements

OTHER CITATIONS

Fair's Appellate Division brief cited the record as follows:

"Da" – defendant's Appellate Division appendix;
"1T" – pre-trial transcript dated December 16, 2016;
"2T" – pre-trial transcript dated September 29, 2017;
"3T" – trial transcript dated June 19, 2019;
"4T" – trial transcript dated June 20, 2019;
"5T" – trial transcript dated June 25, 2019;
"6T" – trial transcript dated June 26, 2019; and
"7T" – sentencing transcript dated August 30, 2019.

In this Supreme Court brief, Fair also uses the following cites:

"Db" – defendant's Appellate Division brief;
"Dm" – defendant's motion to dismiss the State's proposed notice of appeal as of right;
"Dma" – defendant's appendix to the motion to dismiss;
"Dsa" – defendant's Supreme Court appendix;
"Sb" – State's Appellate Division brief; and
"Ss" – State's Supreme Court brief.

PRELIMINARY STATEMENT

Calvin Fair is a Black man who was wrongly prosecuted for excoriating his government's carceral policies in harsh and unforgiving speech.

Fair yelled coarse, furious, unpleasant speech at officers who were called to his home. Fair also published speech lambasting law enforcement on Facebook. The ultimate issue at trial was whether his oral and written speech — however distasteful or unpleasant — amounted to free expression, or was criminal conduct punishable via the narrow true threat exception.

Fair appealed his conviction for violating N.J.S.A. 2C:12-3a "and/or" b, and won. A unanimous Appellate Division panel agreed with Fair that the prosecution was unconstitutionally overbroad because N.J.S.A. 2C:12-3a criminalizes expression protected by the First Amendment.

As a preliminary matter, this Court should decline further review of the Appellate Division's final judgment. The State's proposed notice of appeal as of right is procedurally defective and should be dismissed without oral argument. The State has no special right to re-litigate a unanimous, well-reasoned, and unexceptionable appellate ruling that correctly applied established principles guaranteeing the freedom of speech and jury unanimity. The attempt to skirt denial of certification should not be rewarded.

If this Court nevertheless decides to entertain the State's proposed appeal of the freedom of speech ruling, then it should

affirm as modified, and hold that the N.J.S.A. 2C:12-3a prosecution violated the state and federal constitutions.

Justice Louis Brandeis once said that "courage is the secret of liberty." The government of New Jersey would do well to learn that lesson, for it has displayed disconcertingly little courage in its rush to silence a voice critical of its officers. Those entrenched in power have always feared ideas and messages that challenge the existing order, but to repress speech in the name of security is to go to war with the values underpinning our democracy. Our constitutional system guarantees all of us the right to express the most fervent hostility against our government and its officials without fear of retaliatory criminal prosecution — even if the manner of expression is shocking and uncouth and unorthodox and spiteful.

PROCEDURAL HISTORY

Fair continues to rely on the procedural history in his Appellate Division brief, and adds the following.

On December 9, 2021, the Appellate Division unanimously held that N.J.S.A. 2C:12-3a is unconstitutionally overbroad and that the criminal prosecution violated principles of free speech. State v. Fair, 469 N.J. Super. 538, 548-54 (App. Div. 2021). The Appellate Division also unanimously held that the trial court failed to ensure a truly unanimous verdict. Id. at 555-58. The court partially dismissed the indictment and remanded for a new trial on the remainder. Id. at 558.

The State did not petition for certification from the unanimous final judgment of the Appellate Division. R. 2:12-3. Instead, the State only filed a notice of appeal as of right, asserting "a substantial question arising under the Constitution of the United States or this State." R. 2:2-1(a)(1). (Dma 1) Thereafter, this Court advised the State by letter to "ask for discretionary Supreme Court review by way of a notice of petition for certification," because "the substantiality requirement is not satisfied if the case involves the application of established principles." (Dm 1; Dma 2-3) The State declined. (Dm 1; Dma 4-7) On March 1, 2022, Fair moved to dismiss the proposed appeal as of right as procedurally improper. (Dm 1-9) In motion papers, Fair urged that the State is not entitled to appeal from a unanimous final judgment of the Appellate Division based on a straightforward application of previously established principles guaranteeing the freedom of speech and a unanimous jury. (Dm 1-9) This Court has not yet issued any order indicating whether it will hear or dismiss the State's proposed appeal as of right.

STATEMENT OF FACTS

Fair continues to rely on the statement of facts in his Appellate Division brief (Db 5-9), but summarizes his oral and written speech here. His transcribed and recorded oral speech from May 1, 2015 is at 4T 81-18 to 115-22 and Dsa 4. Print-outs of his written speech from that day are at Da 36-37.

Oral Speech. On May 1, 2015, as officers were speaking to Fair's girlfriend in his front yard about a verbal dispute,

Fair appeared in the building's second-story window (4T 68-19 to 22; 100-2 to 3) and repeatedly told officers to "please, please leave my property." (4T 69-4 to 5; 70-13 to 18; 100-6 to 9; 100-17 to 22; 101-5 to 6; 103-1 to 3; Dsa 4 at 11:21:40 – 11:21:55 a.m.) Fair was upset. (4T 69-7; Dsa 4 at 11:21:40 – 11:28:00 a.m.) He shouted insults at the officers and called them names, including "devil." (4T 71-25 to 72-2; 72-12; 105-8 to 9; 107-12 to 13; 110-19; Dsa 4 at 11:23:50 - 11:23:55 a.m. and 11:24:30 – 11:24:35 a.m. & 11:26:10 – 11:26:15 a.m.). He told officers that their actions were causing "chaos over here for nothing" and were "petty." (Dsa 4 at 11:22:15 – 11:22:35 a.m.) Officers responded in kind by calling Fair "a five-year-old," (4T 106-14 to 15; Dsa 4 at 11:24:10 - 11:24:20 a.m.), by yelling back at him, "Bark it up all you like," (Dsa 4 at 11:22:55 – 11:23:05 a.m.), and by audibly laughing at him, mockingly asking each other, "What kind of devil are you?" (Dsa 4 at 11:23:50 – 11:24:00 a.m.) Fair accused officers of "trying to keep him in the system." (4T 72-12 to 13) Officers told Fair's girlfriend that they would "sign a complaint on your behalf," (4T 103-23 to 24; Dsa 4 at 11:23:20 - 11:23:25 a.m.), even though she had already "opted not to sign a complaint or get a restraining order." (4T 106-17 to 20; 108-13 to 15; Dsa 4 at 11:25:05 - 11:25:10 a.m.) Fair objected to attempts to overrule his girlfriend. (4T 107-14 to 16) Fair repeatedly stated that he had done nothing wrong. (4T 100-19 to 21; 101-6 to 10; 102-23 to 24; 107-10 to 11; Dsa 4 at 11:22:50 – 11:22:55 a.m.) He angrily denounced a "$200,000 bail" (4T 111-7

to 9; Dsa 4 at 11:26:20 – 11:26:30 a.m.) and accused officers of a pattern of targeting him unfairly, stating, "How many times you all been through this? … How many times you going to come here?" (4T 102-1 to 7; Dsa 4 at 11:22:35 - 11:22:45 a.m.) Fair told officers that he was "taking care of my mother right now." (4T 110-24 to 25; Dsa 4 at 11:22:55 a.m. – 11:23:05 a.m. and 11:26:15 - 11:26:20) Officer Sean Healey characterized Fair's speech as not "very pleasant." (4T 72-13 to 14)

As the exchange between Fair and the officers grew heated, Fair stated: "I never did anything …. I never did anything …. [F]ucking tough guy." (Dsa 4 at 11:28:10 – 11:28:20 a.m.) Officers responded in a mocking tone, "I'm not the one hanging out the window. Come out here." (Dsa 4 at 11:28:20 – 11:28:23 a.m.) Fair stated, "Yeah, I'm hanging out the window because I'm taking care of my fucking mother, my 83-year-old mother, [epithet] …. I don't got nothing to come down there to talk to you about. I didn't do anything, so why I got to talk to you? …. Fucking thirsty ass [epithet]. You thirsty. Worry about a head shot, [epithet]." (4T 114-8 to 115-2; Dsa 4 at 11:28:23 – 11:28:37 a.m.) The State argued that was a punishable threat to Healey. (Da 1-2) Fair defended himself by responding that however "jerk[y]" and "stupid" (5T 36-21), the thought was still not intended as a threat. (5T 49-9 to 13)

There was absolutely no indication whatsoever that Fair had a firearm.[3] Healey was asked if Fair "ever brandish[ed]" or "ever "show[ed] or present[ed] any weapon, any type of firearm or anything like that?" (4T 75-17 to 19) Healey testified, "No, sir." (4T 75-20) Healey acknowledged that officers "didn't run for cover." (4T 151-24 to 25)

The court allowed testimony that firearms had been seized from tenants' living areas on Fair's property months earlier, during a February raid. (4T 201-18 to 202-12; 205-22 to 206-21). (Da 38-39) The State introduced Facebook posts from April; Healey "didn't know" about these posts (4T 135-9 to 15; 212-14 to 24; 5T 24-3 to 14), but in any event Fair merely mocked officers in them while denying that the seized firearms were his. (Da 38-39; 4T 120-10 to 121-7). No firearms were found in Fair's room during the February raid (4T 206-4 to 21), and no one saw Fair with a firearm at any time. (4T 75-17 to 20; 206-19 to 21)

Written Speech. After officers left the property on May 1, law enforcement monitored Fair's Facebook activity. (4T 202-19 to 20; 203-16 to 21) Healey acknowledged that a terroristic threats complaint was "only … issued against Mr. Fair" after Healey and his colleagues reviewed the speech posted later that day by Fair on Facebook. (4T 124-11 to 19) In these written posts, published to Facebook's News Feed on May 1 at 1:09 p.m., Fair complained, in part, "I think it[']s about th[a]t time to give Mr[.] Al

[3] Fair was also later acquitted by a jury of possessing firearms. (Dsa 1-3)

Sharpton & Mr[.] Rev. Jackson, internal affairs & my law[yer] a [c]all." (Da 36; 4T 122-4 to 6) Fair complained about law enforcement violating his rights and targeting him without just cause, by stating, in part, "[O]ne th[in]g y[o]u won[']t do is disrespe[c]t me or my 84 year old mother [c]ause y[o]u [c]arry a badge & another th[in]g y[o]u not doin[g] is tryin[g] to keep me in[] [the] system with p[e]tty fines & [c]omplaints wh[e]n [I']m not [yo]ur job, I don[']t rob, I don[']t steal, y[o]u don[']t see me & [I]m dam[n] sure not sellin[g] any drugs!!!" (Da 36; 4T 122-6 to 12) Fair also complained about excessive force and unreasonable searches against him and his elderly mother, by stating, in part, "My 84 year old mother didn[']t deserve[] her door bein[g] ki[cked] in[] by 30 armed offi[c]ers with a[xe]s & shields drawn. Who th[e] fu[c]k was y[']all [c]omin[g] for[,] B[i]n La[de]n[?] Smfh [shaking my fucking head.]" (Da 36; 4T 122-13 to 16) Fair complained about law enforcement's past and present treatment of him and his elderly mother, stating, in part, "Y[o]u disrespe[c]ted th[e] only person I have left on this Earth! Y[o]u will pay, whoev[er] had any involvement, wastin[g] tax payers['] money! Brin[g]ing all th[e]m offi[c]ers out for a[n] 84 year old wom[a]n! So sad but we will have th[e] last laugh! #justwaitonit[.]" (original in all caps) (Da 36) The post ended with an emoticon, accompanied by Facebook's automated descriptor, "feeling angry." (Da 36)

Fair's May 1 Facebook posting to the News Feed drew at least 27 "likes" from other users. (Da 37) His posting also drew

multiple supporting comments, including, "Wooowwww that's crazy man"; "Smh [shaking my head] i[]s mom okay[?]"; "wow"; "Smfh [shaking my fucking head]"; "Do whatever it is that you have to do!! They gon[na] learn today!"; and "I hope your mom is ok …. [T]hat's crazy." (Da 37) In the comments, Fair further posted on May 1 a complaint about the individual officers, by stating, in part, "Th[e]n y[o]u got these gay ass offi[c]ers thinkin[g] they kno[w] [yo]ur life!!! Get th[e] fu[c]k outta here!! I kno[w] wh[a]t y[o]u drive & where all y[o]u motherfu[c]kers live at[.]" (original in all caps) (Da 37; 4T 123-19 to 22)

LEGAL ARGUMENT

POINT I

AS THE APPELLATE DIVISION CORRECTLY HELD, N.J.S.A. 2C:12-3a VIOLATES THE FIRST AMENDMENT BECAUSE IT INFRINGES ON THE FEDERAL CONSTITUTION'S GUARANTEE THAT NO LAW SHALL ABRIDGE THE FREEDOM OF SPEECH. U.S. Const., Amends. I, XIV.

The Appellate Division unanimously held that N.J.S.A. 2C:12-3a violates the First Amendment. Fair, 469 N.J. Super. at 548. If this Court does not dismiss the State's improper appeal as of right, then it must affirm the Appellate Division's First Amendment holding, modified only as to the remedy.

First Amendment principles lead inexorably to the conclusion that N.J.S.A. 2C:12-3a is unconstitutional. (Db 21-40) The United States Supreme Court has repeatedly interpreted the First Amendment "to allow 'free trade in ideas' — even ideas that the overwhelming majority of people might find distasteful or

discomforting." Virginia v. Black, 538 U.S. 343, 358 (2003) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). True threats are a limited exception to our constitutional commitment to a free exchange of ideas. Watts v. United States, 394 U.S. 705 (1969). In Black, the Supreme Court held that Virginia's criminal statute was unconstitutional because it relieved the government of its burden to prove that the speaker of an alleged true threat actually intended to threaten. In Black's wake, our Appellate Division acknowledged that when the government is prosecuting speech as a true threat, it is constitutionally required to prove that the speaker had intent to threaten, and that a reasonable listener would have understood the communication as a real threat. State v. Carroll, 456 N.J. Super. 528, 539-40 (App. Div. 2018). N.J.S.A. 2C:12-3a violates these fundamental principles of our constitutional scheme. (Db 21-41)

1. In Watts v. United States and Virginia v. Black, the United States Supreme Court established that distinguishing true threats from constitutionally protected speech turns on whether the speaker intended to threaten.

In Watts, 394 U.S. at 705-08, the Supreme Court articulated the true threat exception to the First Amendment, whilst slamming the door tightly against prosecutions where the defendant merely uttered abusive words against government officials, as a means of expressing discontent against the government. Watts, who attended a discussion about "police brutality," slammed the military for its policy of drafting young men into the Vietnam War: "I have

already received my draft classification as 1-A …. I am not going." Id. at 706. In his next breath, he allegedly threatened the President: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Ibid.

Watts moved for an acquittal on the grounds that he lacked intent to threaten the President. Id. at 706-07. Rather, Watts merely meant to "stat[e] a political opposition to the President." Id. at 707. Counsel urged: "What he was saying," in "a very crude" and "offensive" way, was that the President "symbolized" his "real enemy": a military service that would draft him into combat against his will. Ibid.

The Supreme Court reversed the denial of Watts's motion for a judgment of acquittal, and emphasized that 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." Id. at 707. Watts's speech fell into the latter category, protected speech, because he made no "true threat." Id. at 708. The Court reasoned that speech intended as "political hyperbole," like Watts's, is "often vituperative, abusive, and inexact," but is nonetheless protected in light of the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Ibid. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The context, language, and reaction of the listeners all

conveyed to the Court that Watts did not mean for his speech to be taken literally. Id. at 708.

In Black, eight justices embraced the principle that in a prosecution for a true threat, the First Amendment requires the government to prove that the speaker actually intended to threaten.[4] The near-unanimous triumph in Black of this speech-protective principle is so striking because the communications in Black were as scary as speech gets. Barry Black led a Ku Klux Klan rally where speakers set fire to a 25- to 30-foot cross in view of passing cars while loudspeakers played Amazing Grace. 538 U.S. at 349. At least one witness felt "very … scared." Ibid.

It was indisputably reasonable for anyone who observed the burning crosses in Black to feel threatened. "[F]ew if any messages are more powerful" than the Klan's use of cross burnings as "a threat of impending violence" against people "antithetical to its goals." Id. at 354-55, 357. The Klan burned crosses at synagogues, housing projects, union halls, and the property of civil rights sympathizers. Id. at 354-56.

---

[4] Between Watts and Black, Justice Marshall wrote separately to better articulate this principle in a case where an alcoholic said in a coffee shop that "he was Jesus Christ" and that he would "kill [President Nixon] in order to save the United States." See Rogers v. United States, 422 U.S. 35, 44, 47-48 (1975) (Marshall, J., concurring) ("require proof that the speaker intended his statement to be taken as a threat" to avoid "such a broad construction [of allowable true threat prosecutions] that there is a substantial risk of conviction for a merely crude or careless expression of political enmity," and to avoid "discourag[ing] the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect").

But the Court recognized that, despite its capacity to cause terror, burning a cross is still not inevitably a punishable true threat, because it is not always intended to cause fear. Ibid. ("a burning cross has remained a symbol of Klan ideology and of Klan unity."). Rather, cross burning is frequently intended to promote ideas, albeit ideas as despicable as White supremacy. The symbol has, for example, been used for advertising and recruitment purposes. Id. at 353-54, 356 (e.g., on the theatrical release poster for "The Birth of a Nation," and on posters advertising upcoming rallies). The symbol has been used to promote group solidarity and ritual, even if built around an idea of hatred. Ibid. ("a cross burning would start with a prayer … followed by the singing of Onward Christian Soldiers" and "The Old Rugged Cross," and "was a sign of celebration and ceremony" at weddings). The symbol has been used to express support for political candidates. Id. at 357 (after the 1960 presidential debate, "the Klan reiterated its support for Nixon by burning crosses"). Outside of its adoption by the Klan, the symbol has been used in adaptations of the works of Sir Walter Scott, for the purpose of "dramatic effect." Id. at 352.

As speakers may intend only to express ideas, even if their communications have the capacity to cause terror, the Court defined the "narrowly limited" true threat exception to the First Amendment in the only constitutionally permissible manner: to require not only that the speaker meant to communicate expression interpretable as a threat, but that the speaker intended for his

communication to threaten. Id. at 358-59 ("'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). To define true threats otherwise would impermissibly invite proscription merely because "a vast majority of citizens believe[]" ideas to be "fraught with evil consequence." Black, 538 U.S. at 358 (quoting Whitney v. California, 274 U.S. 357, 374-76 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears")).

Applied to the symbolic expression in Black, the Court's definition of a true threat would require the government to prove not only that the speaker intentionally burned a cross (i.e., prove that a speaker meant to communicate in a manner which an observer would find threatening) but that the speaker who intentionally burned a cross meant the message to be threatening. As Virginia's ban on "cross burning carried out with the intent to intimidate" met the Court's narrow definition of a true threat, the Court concluded that such expression was "proscribable under the First Amendment." Id. at 363.

Justice O'Connor's and Justice Souter's non-majority opinions supported the Black Court's dominant view that constitutionally protected speech will be chilled unless the government is required to prove the speaker intended to threaten.

Justice O'Connor found on behalf of a four-justice coalition that relieving the government of its burden to prove intent to threaten "strips away the very reason why a State may ban cross burning." Id at 365. Permitting a conviction without requiring the State to prove intent "would create an unacceptable risk of the suppression of ideas," because the State may convict "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." Ibid.

Proof of an ordinary person's reaction is an insufficient substitute for proof of intent to threaten. As Justice O'Connor explained, "a cross burning, even at a political rally," may arouse fear in "the vast majority of citizens." Id. at 366. Nevertheless, the jury must also decide "whether a particular cross burning is intended" to elicit that reaction, because a cross burning "not … intended to intimidate" would "almost certainly be protected expression." Id. at 366-67.

Relieving the State of its burden impermissibly allowed the jury to "ignore[] all of the contextual factors that are necessary to decide" the speaker's intent. Id. at 367. Because the constitutionality of the conviction turns on the message the speaker intended the symbolic expression to convey, "The First Amendment does not permit such a shortcut." Ibid.

Similarly, Justice Souter found on behalf of three justices that "the burning cross can broadcast threat and ideology together, ideology alone, or threat alone[.]" Id. at 381. He articulated that the dividing line is the intent of the speaker:

"[R]ecall that the symbolic act of burning a cross … is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten." Id. at 385.

Like Justice O'Connor, Justice Souter worried about chilling speech made without intent to threaten. Justice Souter found the "practical effect" of relieving the State of its burden to prove intent to threaten is "to draw nonthreatening ideological expression within the ambit of the prohibition[.]" Id. at 386. That amounts to "official suppression of ideas." Id. at 387.

Justices O'Connor and Souter confirmed their agreement with each other that an intent to threaten is the constitutional dividing line. Justice O'Connor stated she "agreed" with Justice Souter that the Virginia statute chilled protected speech, by "skew[ing] jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." Id. at 366. Similarly, Justice Souter said: "By causing the jury to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity … to the criminal intent," "the provision will … tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as Justice O'Connor notes." Id. at 386.

Justice Scalia joined the majority opinion in requiring that the speaker intended to threaten. He declined to join the seven Justices who objected to the jury instruction on

overbreadth grounds only because he did not believe that a substantial number of defendants who lacked intent to threaten would abstain from presenting rebuttal evidence that they lacked intent if it were a defense under the statute. Id. at 374-75.

Justice Thomas was alone in not distinguishing true threats by proof of the speaker's intent to threaten. Id. at 395. Moreover, he understood that he was alone because his colleagues would protect from prosecution "an individual [who] might wish to burn a cross … without an intent … [to] threat[en]." Id. at 399-400. He argued in dissent that the government may prosecute any expression capable of causing fear, even if that rule would chill the expression of ideas. Ibid. He also denied that the First Amendment applied to the expression in the case at all, labeling it only conduct. Id. at 395. No other member joined Justice Thomas in these outlier positions. Thus, the Supreme Court has narrowed the true threat exception to the First Amendment to cases where the speaker intended to threaten.[5]

2. In State v. Carroll and State v. Fair, the New Jersey judiciary properly applied the United States Supreme Court's binding precedent.

[5] After Black, Justice Sotomayor wrote separately to summarize this conclusion, while concurring in the denial of certiorari on a 15-year sentence for speech that may have been "nothing more than a drunken joke." Perez v. Florida, 580 U.S. 1187, 1187-90 (2017) ("Together, Watts and Black … 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.").

As a matter of first impression in New Jersey, the Appellate Division in Carroll recognized Black to mean that in a prosecution for an alleged true threat, the First Amendment requires the government to prove the speaker's specific intent to threaten, and that speech "cannot be transformed into criminal conduct" merely because it has a tendency to provoke strong reactions in listeners. 456 N.J. Super. at 537. Thus, Carroll articulated two elements of a true threat: "the speaker's subjective intent to express a serious plan to harm," and the "objective" element of "how a reasonable person would understand the statement …. We are persuaded that both tests should apply." Id. at 539-40. The Court held, "Consistent with Black, a defendant must intend to do harm by conveying a threat that would be believed; and the threat must be one that a reasonable listener would understand as real." Id. at 540. Underscoring the values expressed by Black, Carroll explained, "Freedom of expression needs breathing room and in the long run leads to a more enlightened society." Id. at 537.

Applying these fundamental principles, the Appellate Division here found that N.J.S.A. 2C:12-3a is unconstitutionally overbroad, because the statute "proscribes speech that does not constitute a 'true threat,'" infringing upon the First Amendment. Fair, 469 N.J. Super. at 548. The court "agree[d]" that a true threat "requires proof that a speaker specifically intended to terrorize." Ibid. Thus, N.J.S.A. 2C:12-3a — which only requires proof that a speaker "reckless[ly] disregard[ed] the risk of

causing such terror" — "is facially invalid." Ibid. The court also "agree[d]" that a true threat requires a "reasonable listener" to have "believed that the threat would be carried out." Ibid. Thus, N.J.S.A. 2C:12-3a — which does not require proof that a reasonable listener would have perceived a true threat — "is overbroad." Ibid.

As in Carroll, the Appellate Division here recognized that, in Black, the Supreme Court drew a "constitutional line." Fair, 469 N.J. Super. at 550. State governments can "punish threatening speech or expression only when 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.'" Ibid. (quoting Black, 538 U.S. at 359). Pursuing convictions for merely reckless speech, as in N.J.S.A. 2C:12-3a, "crosses th[at] constitutional line" because speech without an intent to threaten is not a true threat. Ibid. The Appellate Division explained, "We are … bound by Virginia v. Black and … we agree that Black strongly suggests the 'reckless disregard' element in N.J.S.A. 2C:12-3a is unconstitutionally overbroad." Id. at 554.

3. Our society's values require narrowing the true threat exception to the First Amendment's guarantee of a free exchange of ideas.

The narrowing of the true threat exception is grounded in the recognition that free expression is fundamental to our democracy and to our individual autonomy. Several theories explain the "primary values the First Amendment is thought to serve." Geoffrey R. Stone, Perilous Times: Free Speech in Wartime

From the Sedition Act of 1798 to the War on Terrorism at 7-9 (1st ed. 2005). First, to "meet the responsibilities of democracy," citizens must be able to engage in a "robust discussion" on a "broad spectrum of … ideas." Id. at 7. Second, conflict in the public sphere encourages citizens to develop "character traits that are essential to a well-functioning democracy," including "tolerance, skepticism, personal responsibility, curiosity, distrust of authority, and independence of mind." Ibid. Third, free expression "help[s] check the danger that public officials will attempt to manipulate public discourse in order to preserve their authority. This is one of the greatest threats to democracy …. The best example is when public officials attempt to punish speech that challenges them or their policies. The First Amendment guards against such abuse by declaring such laws presumptively unconstitutional." Id. at 7-8. Fourth, free expression "promotes the long-term cohesiveness of society," as citizens are less likely to feel alienated by their government, and are "more likely to accept adverse decisions," if their "dissenting and nonconforming" views at least receive a "fair hearing," and are not instead suppressed by force. Id. at 8. Fifth, free expression furthers citizens' "search for truth," presuming it is "better for each of us to decide these things for ourselves than for the government to decide them for us." Ibid. Finally, free speech protects "individual self-fulfillment" and "integrity," because "[a]s human beings, we have an inherent need to speak our mind; express our emotions, passions, fears, and

desires; create music, art, dance, and fiction; and share ideas and experiences with others." Id. at 8-9.

Justice Holmes's Abrams dissent kickstarted a long road to protecting these values. The Justice opined that rather than "persecute … opposition by speech," it is better to let "opinions and exhortations" be subjected to the "competition of the market …. That at any rate is the theory of our Constitution." 250 U.S. at 630-31. Holmes warned: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death[.]" Id. at 630.

In more recent times, our Supreme Court has emphasized that the ideas protected from prosecution by the First Amendment include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Watts, 394 U.S. at 708 (quoting Sullivan, 376 U.S. at 270). See also Houston v. Hill, 482 U.S. 451, 458-49, 472 (1987) ("in the face of verbal challenges to police action, officers and municipalities must respond with restraint …. The First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive"); Cohen v. California, 403 U.S. 15, 26 (1971) ("words are often chosen as much for their emotive as their cognitive force," e.g., "Fuck the Draft").

Indeed, "If 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 …. If there are any circumstances which permit an exception, they do not occur to us." West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (prosecution for refusing to salute the American flag is unconstitutional). Decades after Barnette, the Court echoed that cardinal principle: "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." Texas v. Johnson, 491 U.S. 397, 414 (1989) (prosecution for burning the American flag is unconstitutional). Black recognized that an expansive true threat exception would directly undermine these fundamental values.

4. Other state and federal jurisdictions have also interpreted Black to narrow the true threat exception to cases where the speaker intended to threaten.

Other courts have read Black as Carroll and Fair did. See, e.g., State v. Boettger, 450 P.3d 805, 817 (Kan. 2019) ("[W]e too, read Black as holding that the speaker must actually intend to convey a threat."), cert. den., 140 S.Ct. 1956 (2020). Kansas prosecuted Boettger for threatening a police detective[6] under a

[6] Timothy Boettger was "upset" and "angry" about local police practices. Id. at 806. He had "found his daughter's dog in a ditch" from a gunshot wound, and "the sheriff's department had not investigated." Ibid. He went to his convenience store, "complain[ed]" to one employee "about the sheriff department's inaction," and said, "these people … might find themselves dead in a ditch somewhere." Id. at 806-07. Boettger then told another employee, whose "father was a member of the sheriff's department," "that [the employee] was going to end up finding [his] dad in a ditch." Id. at 807.

statute permitting true threat prosecutions if the defendant communicated "in reckless disregard of the risk of causing … fear." Id. at 807. At trial, Boettger argued "he had no intent to threaten anyone and did not mean … any harm." Ibid. However, the court instructed the jury that the government need only prove Boettger communicated with "reckless disregard." Ibid. The jury then convicted Boettger of making a "reckless criminal threat." Ibid. On appeal, the Kansas Supreme Court held that the First Amendment requires "subjective intent to … cause another to fear the possibility of violence," id. at 810, and therefore found that the "reckless disregard provision is unconstitutionally overbroad." Id. at 806.

One week after the Appellate Division decided Fair, the North Carolina Supreme Court likewise held that a constitutionally proscribable true threat requires intent to convey a threat. See State v. Taylor, 866 S.E.2d 740, 753 (N.C. 2021) ("We regard Black to hold that a speaker's subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats."). Because the jury was not correctly instructed, the court reversed Taylor's conviction for threatening officials,[7] and ordered a new trial. Id. at 744.

[7] David Taylor was angry at his local government. His district attorney had decided "not to criminally prosecute the parents of a child after the younger's death under unusual circumstances." Id. at 744. Taylor consumed some beer and then published Facebook posts criticizing the district attorney for her decision. Ibid. Taylor wrote, in critical part, "I[']m tired of standing back and

Among the federal circuit courts, the Ninth Circuit pronounced itself "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." United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005).[8] Later, the court re-affirmed that "the constitutional inquiry commanded by Black" is whether "the speaker subjectively intend[ed] the speech as a threat …. Black requires that the subjective test must be met under the First Amendment whether or not the statute requires it[.]" United States v. Bagdasarian, 652 F.3d 1113, 1117 at n.14, 1118 (9th Cir. 2011).[9]

---

seeing how our judicial system works …. With this[,] people question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go, period[.]" Id. at 745. Taylor's Facebook friends "communicated their shared agreement." Ibid. Taylor continued: "When the deputy ask[s] me [']is it worth it['] I would say with a Shotgun Pointed at him and a[n] ar[-]15 in the other arm was it worth [it] to him? …. I would open every gun I have. I would rather be carried by six than judged by twelve …. Death to our so called judicial system…!" Ibid. When another Facebook member called for "vigilante justice," Taylor replied, "If that's what it takes[.] I will give them … the … justice they deserve…. If our head prosecutor won't do anything then the death to her as well. Yea I said it." Ibid. Taylor received numerous "like[s]" from his network. Id. at 746.

[8] Paul Cassel, who "apparently liked his privacy," conversed with potential buyers of adjacent properties owned by the federal Bureau of Land Management (BLM), and gave "a series of dramatic reasons why the property was quite undesirable," in an effort to "dissuad[e]" these buyers from purchasing the neighboring lots. Id. at 624-25. Cassel told the buyers that those running the BLM were "crooks," that there was "cyanide in the ground," and that anything built "would definitely burn." Id. at 625.

[9] Walter Bagdasarian, an "especially unpleasant fellow," was prosecuted for threatening Barack Obama, just before the President was elected. Id. at 1115. Bagdasarian posted on a

Likewise, the Tenth Circuit "read Black as establishing that a defendant can be constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened." United States v. Heineman, 767 F.3d 970, 978 (10th Cir. 2014) (emphasis in original). Heineman had moved to dismiss the charge, arguing he lacked intent to threaten[10] and that a disorder "impair[ed] his ability to understand how others will receive the things he says and does." Ibid. The Tenth Circuit emphasized that the First Amendment "protect[s] speech that creates fear when the speaker intends only to convey a political message. As we understand Black, the Supreme Court has said as much. When the speaker does not intend to instill fear, concern for the effect on the listener must yield." Id. at 981-82.[11]

Yahoo! board while "extremely intoxicated": "Re: Obama[,] f[uc]k the n…r, he will have a 50 cal in the head soon" and "shoot the n…[,] country f[uc]k[e]d for another 4 years+[.]" Ibid.

[10] Aaron Heineman sent an email entitled "Poem" to a professor at the University of Utah. Id. at 971. The poem, which "espoused white supremacist ideology," stated in part that, at the "time of the new revolution," "we will … slay you, by a bowie knife shoved up into the skull from your pig chin[,] put the noose ring around your neck[,] and drag you as you choke and gasp …. You are a filthy traitor along the horde of anti-American and anti-Whitey comrades …. [F]uck Mexico! [F]uck South America!" Id. at 971-72.

[11] The academic literature also supports Black's proposition that a true threat must demand proof of subjective intent to threaten. See, e.g., Megan Murphy, Comment: Context, Content, Intent: Social Media's Role in True Threat Prosecutions, 168 U. Pa. L. Rev. 733, 766 (Feb. 2020) ("[T]he true threat standard requires measured, informed consideration of the context in which a speech act occurs, to assess whether a speaker actually intended to threaten harm."); Wayne Batchis, On the Categorical Approach to Free Speech – and the Protracted Failure to Delimit the True Threats Exception to the First Amendment, 37 Pace L. Rev. 1, 42-

These courts interpret the plain language of Black's majority opinion as limiting true threats to expression where the speaker intended to threaten. See Heineman, 767 F.3d at 978, 980 ("When the [majority of the] Court says that the speaker must 'mean[] to communicate a serious expression of an intent,' it …

---

43 (Fall 2016) ("The clear implication [of Black] is that intentionality is critical …. [A] number of top First Amendment scholars … agreed that a natural reading of Black does suggest that the true threat exception is limited to those threats spoken by individuals who intend to threaten …. [T]here would appear to be some critical First Amendment interests at stake in considering the intent of the speaker."); Note on Recent Case, First Amendment – True Threats – Sixth Circuit Holds that Subjective Intent Is Not Required by the First Amendment When Prosecuting Criminal Threats, 126 Harv. L. Rev. 1138, 1142, 1145 (Feb. 2013) ("The plain language in Black is most reasonably read as adopting the subjective intent requirement …. The courts are … poorly served by ignoring Black[.]"); Paul T. Crane, Note: "True Threats" and the Issue of Intent, 92 Va. L. Rev. 1225, 1273, 1276 (Oct. 2006) (The "subjective intent standard punishes the speaker who intends to create the harms of threatening speech …. Under the First Amendment, this is a much better approach. 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 room' to speak freely and openly …. When pure speech is punished, the speaker's intent should matter."); Roger C. Hartley, Cross Burning – Hate Speech as Free Speech: A Comment on Virginia v. Black, 54 Cath. U.L. Rev. 1, 33 (Fall 2004) ("Black now confirms that proof of specific intent (aim) must be proved also in threat cases."); Lauren Gilbert, Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism, 58 U. Miami L. Rev. 843, 883-85 (April 2004) (Black conveys "that the speaker must intend to make a threat for the threatening language or conduct to constitute a true threat"); Frederick Schauer, Intentions, Conventions, and the First Amendment: The Case of Cross-Burning, 2003 Sup. Ct. Rev. 197, 217 (2003) ("it 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.").

is requiring that the speaker want the recipient to believe that the speaker intends to act violently …. [T]he natural reading is that the speaker intends to convey everything following the phrase 'means to communicate' … rather than just to convey words that *someone else* would interpret" as a threat) (emphasis in original); Cassel, 408 F.3d at 631 ("The Court laid great weight on the intent requirement…. A natural reading of this ['means to communicate … an intent'] 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.") (emphasis in original); Taylor, 866 S.E.2d at 752 (same); Boettger, 450 P.3d at 813, 818 ("As a transitive verb, 'mean' is defined as: 'To have as a purpose or an intention; intend; To design, intend, or destine for a certain purpose or end.'…. [T]his sentence requires … that the speaker want the recipient to believe that the speaker intends to act violently…. It strains the plain meaning of the Court's language to conclude" otherwise. "A person who '*means* to communicate a *serious* expression of an *intent* to commit an act of *unlawful* violence' is aware of the illegality of the violence he or she purportedly *intends* to commit and makes a *serious* expression of that intent, which he or she *meant* to communicate.") (emphasis by Boettger court) (dictionaries omitted).

These courts also interpret the very next sentence in Black's majority opinion, that the speaker "need not actually intend to carry out the threat," as "a helpful qualification [to

the] requirement that the defendant [must] intend the victim to feel threatened." Heineman, 767 F.3d at 980 (citing Black, 538 U.S. at 359-60). The explanation that "the speaker uttering the threat need not actually intend to commit violence … would be meaningless if a true threat was not defined to require the intent to threaten." Boettger, 450 P.3d at 814.

These courts also interpret a later sentence in the same paragraph of Black's majority opinion - "that intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat … with the intent of placing the victim in fear of bodily harm or death" — as "identif[ying] the characteristic which transforms protected speech into a proscribable true threat: the speaker's subjective intent to threaten." Taylor, 866 S.E.2d at 753 (citing Black, 538 U.S. at 360). See also Cassel, 408 F.3d at 631 ("The clear import of this definition is that only *intentional* threats are criminally punishable consistent[] with the First Amendment.") (emphasis in original). The Tenth Circuit found no reason "why … the First Amendment [should] require a subjective intent for intimidation but not other true threats …. Nothing in Black so much as hints at a reason for such a distinction." Heineman, 767 F.3d at 981 ("What is it about nonintimidation threats that makes them so much worse than threats of bodily harm or death that the First Amendment allows them to be prosecuted even when the speaker did not intend to instill fear? One would have thought

the opposite — that there should be less First Amendment protection for threats of bodily harm or death.").

These courts also interpret the overbreadth analysis in Justice O'Connor's coalition (four votes) and Justice Souter's coalition (three votes) as limiting true threats to expression where the speaker intended to threaten. "[E]ight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." Cassel, 408 F.3d at 632 (each opinion — "with the … exception of Justice Thomas's dissent — takes the same view" of the "necessity of an intent element"). [A] "majority of the Black court determined an intent to intimidate was constitutionally, not just statutorily, required." Boettger, 450 P.3d at 815. The "insistence on intent to threaten" as the "determinative factor" and "the *sine qua non* of a constitutionally punishable threat is especially clear from [the Court's] ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated." Cassel, 408 F.3d at 631-32 (the "First Amendment does not permit" making it "unnecessary for the government actually to prove the defendant's intent"). Justice O'Connor's plurality opinion assumed "that the First Amendment requires the speaker to intend to place the recipient in fear," and found a "First Amendment flaw" in "not distinguish[ing] 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." Heineman, 767 F.3d at 978-

79. ("But how could that be a First Amendment problem if the First Amendment is indifferent to whether the speaker had an intent to threaten? The First Amendment overbreadth doctrine … says that laws restricting speech should not prohibit too much speech *that is protected by the First Amendment*") (emphasis in original). See also Boettger, 450 P.3d at 815 (Justice O'Connor's opinion found that the "First Amendment does not permit … a shortcut" that would let jurors circumvent "decid[ing] whether a particular cross burning is intended to intimidate." … Rather, the speaker's intent "must exist in order to distinguish cross burning as a means of protected expression under the First Amendment from cross burning as a threat of impending violence unprotected by the First Amendment."). Justice Souter's three-justice coalition likewise "assumed that intent to instill fear is an element of a true threat required by the First Amendment." Heineman, 767 F.3d at 979. See also Boettger, 450 P.3d at 815 (Justice Souter's coalition "noted that cross burning can be consistent" with either "proscribable and punishable intent" or "permissible intent.").

5. The State's counter-arguments, which essentially protest its constitutional burden under Black, are unavailing.

The State argues that Carroll and Fair's natural reading of Black has not yet been adopted en masse by the "vast majority." (Ss 20) This Court is bound by Black no matter how many lower courts slow-walk. But any split is not actually so wide: Many jurisdictions have simply decided not to decide until their hand

is forced, no matter the passage of decades. See, e.g., United States v. Turner, 720 F.3d 411, 420 n.4 (2d. Cir. 2013) (deciding not to address whether Black requires that the speaker intended to threaten). Even among these slow-walkers, several jurisdictions have acknowledged in dicta that Black would seem to require proof of subjective intent. See, e.g., United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (citing Cassel positively and acknowledging "[i]t is more likely" than not "that an entirely objective definition is no longer tenable …. We need not resolve the issue here."); In re Grand Jury Subpoena No. 11116275, 846 F.Supp.2d 1, 5-6 (D.D.C. 2012) ("[A]lthough many circuits apply an objective test … the D.C. Circuit has not ruled on the issue. Further, a close reading of Black raises doubts about an objectivity requirement …. The focus [in Black] was … on the speaker's state of mind …. [T]he grand jury would … need to investigate both the objective effect of the supposed threat, *and* Mr. X's subjective intent to threaten at the time of posting, as the government would need to prove both.") (emphasis in original); State v. Hanes, 192 A.3d 952, 958 (N.H. 2018) ("[W]e assume, without deciding, that the First Amendment requires proof that the speaker subjectively intended his words to be understood by the recipient as a threat."); State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004) (assessing if "subjective intent … to harm" satisfied the state's burden to present sufficient evidence of a true threat).

Momentum is also building to acknowledge the intent-to-threaten requirement; Carroll (2018), Boettger (2019), and Taylor (2021) show a trajectory of progress. Even where overbroad statutes have not been struck, there have been vocal dissents in defense of free speech. See, e.g., State v. Mrozinski, 971 N.W.2d 233, 247-56 (Minn. 2022) (Thissen, J., dissenting) ("[The reckless disregard mental standard is] too murky a signal for a speaker to figure out in advance whether the speaker is doing the thing that is not protected by the First Amendment …. [A] murky line will unnecessarily chill legitimate speech," including speech without "specific intent to cause fear" about "core public" issues where the audience also would not have "actually experienced extreme fear"); In the Int. of J.J.M., 265 A.3d 246, 275-88 (Pa. 2021) (Todd, J., concurring) (concurring with the majority's 5-2 opinion that the statements were not true threats, but disagreeing with the 4-3 opinion that the statute was not "unconstitutionally overbroad," as it failed to require the government to "prove that the defendant *intended* that the recipient feel threatened") (emphasis in original). There is a long legacy of such speech-protective dissents carrying the day in the court of history. See Black, 538 U.S. at 358 (quoting Holmes's dissent in Abrams); Stone at 211 (Holmes's and Brandeis's "dissenting opinions lent prestige and eloquence to a counterview that would eventually win the day"). Finally, the notion that this Court should decide if speech is protected by counting other courts is as wrong-headed as the indignation of

the dissent in Texas v. Johnson, which protested, "I cannot agree that the First Amendment invalidates … laws of 48 of the 50 States, which make criminal the public burning of the flag." 491 U.S. at 429 (counting N.J.S.A. 2C:33-9). Most prosecuted speech is unpopular, no less among judges. The Constitution protects the free exchange of ideas without regard to unpopularity.

The State argues that it would not be congruent with free speech jurisprudence to follow Black. This argument is ahistorical. For example, the State cites Schenck v. United States, 249 U.S. 47 (1919), for the proposition that "a heightened mens rea runs counter to the United States Supreme Court's teachings over the past century." (Ss 28) But in Justice Holmes's Abrams dissent, written less than a year after Schenck, Holmes distinguished Abrams from Schenck not only because the speech was a "silly leaflet by an unknown man," but because Abrams lacked specific intent "to impede the United States in the war." Abrams, 250 U.S. at 628-29. In other words, Holmes realized that a heightened mens rea does matter. In another example, the State specifically cited incitement — an area with similar First Amendment problems to true threats — for the proposition that "the United States Supreme Court has sanctioned proscriptions of unprotected categories of speech without requiring a showing of purpose or intent." (Ss 29) But this too is wrong: in modern times, subjective intent has been treated as an essential element of incitement. See Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (advocating force protected, "except where such advocacy is

directed to inciting or producing imminent lawless action and is likely to produce such action) (emphasis added); Hess v. Indiana, 414 U.S. 105, 109 (1973) (defendant's speech was not incitement, because "there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder"); Crane at 1276 n.224 (incitement standard an "apt analogy" for why the "speaker's intent should matter"). Indeed, the line between threats and incitement is muddled; Fair's online speech, for example, could also be protected via the incitement test, because he addressed a large audience about taking action against officers.

The State complains that it might fail to meet its burden of proving that the speaker had an intent-to-threaten. (Ss 31) Respectfully, "in a country devoted to broad speech protections, it is not too much to require the government to prove that a speaker intended to make a threat before it can put him behind bars."[12] The "burden on the prosecutor should be heightened when the regulation of pure speech is involved." Crane at 1273. See also Taylor, 866 S.E.2d at 754 (rejecting argument that subjective intent burden will unduly "hinder" the state).

It would not be absurd to require the State to meet its burden. The real absurdity is punishing a speaker for making a true threat where no one present perceives a true threat, as may

[12] Editorial: What is a True Threat on Facebook?, The New York Times (Dec. 1, 2014), https://www.nytimes.com/2014/12/02/opinion/what-is-a-true-threat-on-facebook.html.

have happened to Fair. In the State's worldview, it is fine for the government to prosecute speech as a true threat even if the speaker does not intend to cause real fear, and the audience does not feel real fear, so long as the prosecutor and the jury are sufficiently dismayed by the message. That such a scenario is consistent with N.J.S.A. 2C:12-3a is proof enough that the statute is overbroad and not narrowly drawn to protect speech.

6. Defining the true threat exception to proscribe reckless speech is overbroad, because the effect is to chill the free exchange of ideas from speakers who lack intent to threaten.

Speech is "easily chilled" by the prospect of prosecution. Stone at 10. The "direct benefit … of expressing a dissenting view is relatively slight," "but the cost … of being imprisoned … is potentially staggering." Ibid. The "effect is multiplied across society …. [W]ithout a robust protection for free speech," the citizenry get an "impoverished public debate," to the "detriment of democracy." Id. at 11. Indeed, "the risk of punishment for … criticism can effectively silence dissent." Id. at 39. To avoid imprisonment, speakers who are judged only by whether they have shown adequate regard for their listeners are more likely to shy away from the "responsibilities of democracy": engaging in "robust discussion"; developing virtues such as "distrust of authority" and "independence of mind"; "check[ing]" officials who "attempt to punish speech that challenges them or their policies"; avoiding "alienat[ion]"; "search[ing] for truth," including, for example, the justifiability of mass incarceration; and "express[ing] … emotions." Id. at 7-9.

The Kansas Supreme Court cited three examples of speech that "persuasive[ly] illustrat[ed]" how a recklessness standard for true threats "criminalizes speech protected under the First Amendment," because one may be "merely uttering protected political speech, even though aware some might hear a threat." Id. at 817-18. First, the speech in Watts itself would be punishable under a recklessness standard. When Watts "communicated he would shoot the president … he was aware of the risk of causing fear but continued anyway." Id. at 818. Second, the court offered a hypothetical of a "Black Lives Matter protester repeating the lyrics of a well-known police protest song" while "standing near police officers." Ibid. The protester might reference "tak[ing] out a cop or two," thus "run[ning] a real risk of a conviction for reckless threat," "[e]ven if the protester did not intend to threaten the police." Ibid. (citing "Fuck tha Police," a song released by American hip hop group N.W.A. in the album Straight Outta Compton (Ruthless/Priority 1989)). Third, returning to the symbolic expression in Black, the court offered a hypothetical of protesters burning crosses "as part of a political rally," within the view of a public roadway and other houses, in disregard of the "substantial" risk of causing fear, but where those engaging in this symbolism lacked any "inten[t] to cause fear of violence." Ibid.

But the examples in Boettger are only the tip of an iceberg; the "absence of formal protection for inadvertently threatening speech has the potential to chill a significant amount of

speech." Murphy, 168 U. Pa. L. Rev. at 745, 745 at n.67. In its Supreme Court brief, the State erroneously argues that a reckless disregard standard does not "reach[] a substantial amount of constitutionally protected speech." (Ss 26) (citing Hill, 482 U.S. 451, which, ironically, endorses the need to protect "verbal challenges to police action"). Speech that is made "off-the-cuff and in the heat of argument" is particularly likely to be chilled under a recklessness standard,[13] as is any "unpopular or borderline speech that could plausibly be viewed as having a threatening effect." Murphy, 168 U. Pa. L. Rev. at 745. Similarly, an "intent-indifferent definition of true threats" risks "self-censorship" by "[a]rtists and polemicists";[14] if

[13] In an "off-the-cuff" radio speech in 1984, President Ronald Reagan threatened to cause the deaths of millions of people: "My fellow Americans, I'm pleased to tell you today that I've signed legislation that will outlaw Russia forever. We begin bombing in five minutes." The Soviet government put its armed forces on red alert. The Democratic presidential nominee criticized Reagan for speaking recklessly: "A president has to be very, very careful with his words." The President's defenders posited that Reagan intended his idea of killing Russians (along with everyone else) as a joke, and that critics were being "hypersensitive." The Cold War Joke That Had the Soviets on High Alert, Ozy (Feb. 13, 2017), https://www.ozy.com/politics-and-power/the-cold-war-joke-that-had-the-soviets-on-high-alert/75326/.

[14] In 2015, artist Tyler Shields — known for "his willingness to provoke, whether intentionally or unintentionally" — released "the most polarizing photo of [his] career": a "naked black man hanging a Klansman." Shields reported, "The Ku Klux Klan is not happy about it." His colleagues "freaked out" at the threatening image, and told him, "You can't put this out there. It's too crazy." However, he explained, "I never want to not create something because I'm afraid of what it might say." His intent was to expose: "[If] someone did that to [the KKK]? Agh! It's the craziest thing. They can't handle it." One Stunning Photo is Turning America's Racist History on Its Head, Mic (May 15,

"every word must be measured to avoid the risk of prosecution," and if "every irreverent utterance is a source of uncertainty and insecurity,"[15] then messages that "would and should be protected speech" — such as "rap music with aggressive lyrics[16] or derisive

2015), https://www.mic.com/articles/118486/powerful-images-tell-a-revised-history-of-racism-in-america.

[15] In April 2014, a Bergen Community College professor of art and animation shared a photo of his smiling 7-year-old daughter wearing a shirt quoting Daenerys Targaryen, a leading female character with three fire-breathing dragons in the HBO series Game of Thrones: "I will take what is mine with fire and blood." Officials "took the quote as a threat," suspended him, forced him to "visit a psychiatrist," and required that he not display "questionable statements." N.J. college suspends professor over 'Games of Thrones' shirt perceived as 'threat', NY Daily News (April 18, 2014), https://www.nydailynews.com/news/national/n-college-suspends-professor-threating-game-thrones-shirt-article-1.1761354.

[16] See State v. Skinner, 218 N.J. 496, 517 (2014) ("Not all members of society recognize the artistic or expressive value in graphic writing about violence."). In 2003, Eminem was investigated for rhyming, "I don't rap for dead presidents / I'd rather see the president dead / It's never been said, but I set precedents." The Secret Service warned artists not to engage in speech "that can be interpreted in a manner not intended by the artist." Did Eminem Threaten the President? The Secret Service is Looking into It, MTV (Dec. 8, 2003), https://www.mtv.com/news/csal47/did-eminem-threaten-the-president-the-secret-service-is-looking-into-it; Feds Listening to Eminem, CBS News (Dec. 9, 2003), https://www.cbsnews.com/news/feds-listening-to-eminem/.

social commentary of a sardonic comedian"[17] [18] [19] — will be "withheld from the public conversation out of fear." Batchis, 37 Pace L. Rev. at 43.

---

[17] In 2014, comedian Seth Rogen released the film "The Interview," in which he was recruited by the CIA to kill a real person, the head of North Korea's government. Rogen found the leader's propaganda — which included "that he never went to the bathroom, because he had no butthole" — to be "insane and hilarious," and he filmed the death of Kim Jong Un in the most "explicit way imaginable": "blast[ing] the wax head with flamethrowers, causing the lawyers to melt," followed by a "detonat[ion], blowing up what was left of his head." The North Korean government hacked into Sony's servers and accused the United States of a "wanton act of terror." However, as President Obama responded when asked whether "The Interview" should be released, it would run counter to the American spirit for a regime to succeed in chilling communications intended to poke fun at it: "imagine if producers and distributors and others start engaging in self-censorship because they don't want to offend the sensibilities of somebody whose sensibilities probably need to be offended. So that's not who we are. That's not what America is about." Seth Rogen, Yearbook at 177-197 (1st ed. 2021).

[18] In 2006, comedian Sacha Baron Cohen released the film "Borat." In it, the title character appeared before a real crowd and sang the lyrics, "Throw the Jew down the well, so my country can be free." Similarly, in November 2020, Cohen released the film "Borat Subsequent Moviefilm," wherein Borat appeared before another real crowd and sang, in part, "Obama, what we gonna do? …. Hillary Clinton, what we gonna do? … Dr. Fauci, what we gonna do? … Chop 'em up like the Saudis do." Cohen intended his character's threatening speech to satirize anti-Semitic, racist, xenophobic, authoritarian rhetoric. Borat – Throw the Jew Down the Well, YouTube (posted June 2006), https://www.youtube.com/watch?v=Vb3IMTJjzfo; Sacha Baron Cohen Pranks Conservative Rally into Singing Racist Lyrics, Variety (June 28, 2020), https://variety.com/2020/tv/news/sacha-baron-cohen-prank-rally-who-is-america-1234692557.

[19] In April 2022, after a Republican congresswoman tweeted that her colleagues were "pro-pedophile" for their votes, comedian Jimmy Kimmel asked ABC viewers, "Where is Will Smith when you really need him?" Kimmel's intent was to express joy at the idea of the congresswoman being punched in the face. The congresswoman thereafter filed a report with the Washington, D.C. Capitol

Speech is unconscionably vulnerable to criminal prosecution and the chilling effect if the government only need prove that the speaker disregarded the risk that others would perceive the speech as threatening, and the jury is unable to consider the absence of intent to threaten. The intent-to-threaten test averts the chilling effect, by "permit[ting] the speaker an opportunity to explain" whether his statement "was articulating an idea or expressing a threat …. [U]nder a subjective test, the defendant can legitimately argue that he did not mean to threaten the recipient." Crane, 92 Va. L. Rev. at 1275-76. If the speaker's "actual intent" is "immaterial," then "speech, especially at the fringe, will be unnecessarily chilled." Id. at 1276.

7. A showing that an ordinary listener would react fearfully to a communication, or that the speaker disregarded such risk, is not a substitute for a showing of intent to threaten.

First, objective data show that ingrained racial prejudice taints listeners' perceptions of whether communications seem threatening. Second, as illustrated in Black, expression may be protected even though speakers can reasonably expect it to cause fear. Finally, if history shows anything, it is that far from being reasonable, ordinary people are too-frequently eager for their governments to suppress the ideas of perceived outsiders.

First, a test focused on how an ordinary listener would react to speech, without examination of the speaker's intent,

---

Police, accusing Kimmel of a "threat of violence." Tweet by Rep. Marjorie Taylor Greene, Twitter (April 6, 2022), https://twitter.com/RepMTG/status/1511816972610244615.

disproportionately proscribes and chills speech from minority communities. Data show that listeners are more likely to feel threatened by communications from Black speakers, even where the content is the same. As one social psychology study found, the "response to the *same* lyrics was significantly more negative when they believed the artist was black." Erik Nielson and Andrea L. Dennis, Rap on Trial at 88 (2019) (emphasis in original).[20] A later study found "the same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song." Id. at 87-88.[21]

Neuroscience research bolsters "overwhelming evidence that young Black men … are associated with threat both implicitly as well as explicitly."[22] Perhaps because of ingrained prejudices,

---

[20] The experimenter used violent lyrics taken from a song called "Bad Man's Blunder" by the Kingston Trio, a folk/pop band that began recording in the 1950s. All subjects were given the lyrics and a head shot of an artist; some were shown a head shot of a young black artist, and others a young white artist. Ibid. (citing Carrie B. Fried, "Bad Rap for Rap: Bias in Reactions to Music Lyrics," *Journal of Applied Social Psychology* 26, no. 23 (1996): 2135-46).

[21] All subjects were given the lyrics, but some were then told they from a country song, and some were told that they were from a rap song. Ibid. (citing Carrie B. Fried, "Who's Afraid of Rap? Differential Reactions to Music Lyrics," *Journal of Applied Social Psychology* 29, no. 4 (1999): 705-21).

[22] Research with "cognitive neuroscience methodology" shows "a pervasive connection between Black men and threat in the minds (and brains) of most social perceivers." Sophie Trawalter, Andrew R. Todd, Abigail A. Baird, and Jennifer A. Richeson, Attending to Threat: Race-based Patterns of Selective Attention, J Exp. Soc. Psychol. 1322-1327 (Sept. 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2633407/.

minority speakers are disproportionately pressured to chill their own expression so as not to cause negative reactions in others.[23]

A legal test focused on how listeners will react exacerbates the existing societal pressure on minority speakers to chill their own expression. "Unless the defendant-speaker's subjective intent is taken into consideration, such biases and prejudices [among listeners] may subtly cause jurors and jurists to erroneously find true threats where none exist." Brief for the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) as Amicus Curiae 12, Elonis v. United States, 575 U.S. 723 (2015). Put differently, because "artistic and political genres of expression" from Black communicators "involve a substantial likelihood that intended meanings may be misunderstood," the

---

[23] See Free Expression in America Post-2020: A Landmark Survey of Americans' Views on Speech Rights, Knight Foundation-Ipsos (Jan. 6, 2022), https://knightfoundation.org/wp-content/uploads/2022/01/KF_Free_Expression_2022.pdf. "Black Americans are significantly less likely to feel the First Amendment protects them." Id. at 6. Specifically, only 61 percent of Black Americans said the First Amendment provides either a "fair amount" or a "great deal" of protection for "people like you," compared to 89 percent of White respondents. Id. at 6. Respondents were also asked "how easy or difficult" it is for different groups "to use their free speech rights without consequence in America today," on a scale of 1 to 7, "1" being "hardest" and "7" being "easiest." Id. at 7. Black respondents, who reported a score of 2.6 for Black Americans, were, by far, the group that self-reported the most difficulty using their free speech rights "without consequence." Ibid. All respondents agreed that "wealthy people" (6.0), White Americans (5.1), and even "White supremacists" (4.6) have an easier time speaking "without consequence" than "Working-class people" (4.3) or Black, Hispanic, and Asian Americans (4.1 among all respondents). Ibid.

First Amendment's test for whether a true threat has been conveyed must not rely solely on an ordinary listener's perception, but must "require proof of a defendant-speaker's subjective intent to threaten." Id. at 5.

Second, a test focused on how an ordinary listener would react, without examination of the speaker's intent, fails to grasp that expression may be protected even when speakers reasonably expect it to cause fear. The expression in Black is illustrative of this principle because it was so viscerally scary: Everyone knows that lighting a massive cross on fire in view of a public highway is highly likely to cause fear; it would be absurd to pretend otherwise. But the Supreme Court of the United States still emphasized that if the speakers intend such terrifying expression for a non-terrorizing purpose, such as support for a political candidate, it would be protected.

Consider another well-known example of White supremacist expression, akin to that in Black, which also caused people great fear, but was nonetheless protected: the 1970s plan of the National Socialist Party of America (NSPA) to express themselves by marching in Skokie, Illinois with Nazi insignia. A "large proportion of Skokie's population was Jewish," and it "included a substantial number of Holocaust survivors." Philippa Strum, When the Nazis Came to Skokie: Freedom for Speech We Hate 7 (1999). The NSPA decided upon going to Skokie as a means to "get attention" and "media coverage." Id. at 1, 15.

Skokie initially had the march enjoined, based on its argument that a march by the NSPA was "more like a physical assault than an exchange of ideas." Id. at 52, 66. However, the Supreme Court reversed the denial of a stay, remanding for a hearing. National Socialist Party v. Skokie, 432 U.S. 43, 43-45 (1977). The Illinois Supreme Court found that notwithstanding "a hostile audience," "the swastika" is not "so … threatening to the public that its display can be enjoined." Skokie v. National Socialist Party, 373 N.E.2d 21, 24 (Ill. 1978).

In parallel litigation, the NSPA sued Skokie for denying a permit. Collin v. Smith, 447 F.Supp. 676, 681 (N.D. Ill. 1977). The federal court acknowledged "a large segment of the citizens of the Village of Skokie" are "revolted," but called for "'freedom for the thought that we hate.'" Id. at 702 (quoting United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting)). As the court explained about speakers who cause fear, "it is better to allow those who preach racial hate to expend their venom in rhetoric than to be panicked into embarking on the dangerous course of permitting the government to decide what its citizens may say and hear …. The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country." Id. at 702. The Seventh Circuit affirmed. Collin v Smith, 578 F.2d 1197, 1210 (7th Cir. 1978) ("civil rights … must

protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises"), cert. den., 439 U.S. 916 (1978).

Finally, a test focused on how an ordinary listener would react, without any examination of the speaker's subjective intent, is deficient because, if history shows anything, it is that our representative democracy can be dangerously intolerant toward, and hysterical about, the ideas of non-conformists who criticize the status quo and advocate a different social order.

Consider the contemporary treatment of civil rights leaders who were suspected of threatening violence. The FBI, through its notorious counterintelligence program (COINTELPRO), "targeted Reverend Martin Luther King, Jr. … and others," in operations "aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that" activism "challenging racial, social, and economic injustice was dangerous" and that the government had a duty "to combat perceived threats to the existing social and political order." Leslie Alexander and Michelle Alexander, The 1619 Project, Ch. 4 ("Fear") at 116 (1st ed. 2021). It is no accident that King's "historic letter came from a Birmingham jail because he had sought to condemn segregation and discrimination to audiences who hated and feared those messages." Nadine Strossen, Hate: Why We Should Resist It with Free Speech, Not Censorship at 16 (1st ed. 2018). It is also no accident that "every great champion of African American freedom in our history — including Frederick

Douglass, W.E.B. Du Bois, and … King … has also been a warrior for freedom of expression." Id. at 12. See, e.g., Great Speeches by Frederick Douglass, "A Plea for Free Speech in Boston" at 48-50 (2013) ("[T]he right of speech … is the dread of tyrants …. Thrones … are sure to tremble, if men are allowed to reason[.]").

Hysteria aimed at those who may dare to express nonconforming ideas has reared its ugly head throughout American history. During the Second World War, the government acceded to a "public clamor on the West Coast," including "crie[s]" from "all the West Coast newspapers," "for a prompt evacuation of Japanese aliens and citizens alike." Stone at 294. See generally Korematsu v. United States, 323 U.S. 214 (1944). Then-U.S. Attorney General Frances Biddle later acknowledged the nation's "lack of … courage," which resulted in Japanese-Americans being treated as "untouchables" who "had to be shut up." Stone at 304. Biddle belatedly recognized that "in times of panic," free expression is endangered by "the people themselves, who, in fear of an imagined peril," demand that "others must be stifled." Id. at 393.

Summarizing the history of hysteria against outside ideas, University of Chicago Law Professor Geoffrey Stone explained, "[A]lthough each generation's effort to suppress *its* idea of 'dangerous' speech seemed justified at the time, each proved with the benefit of hindsight to be an exaggerated response to a particular political or social conflict …. [T]here is a natural tendency of even well-intentioned citizens … to inflate the potential dangers of such expression, and to undervalue the

dangers of suppression." Stone at 524. This critique, that the law must respond with courage and not repression to "inflated" fears, builds upon the voices of earlier eras. As Judge Learned Hand wrote to Justice Holmes during the first Red Scare, "The merry sport of Red-baiting goes on, and the pack gives tongue more and more shrilly …. I own a sense of dismay at the increase in all the symptoms of apparent panic." Id. at 224 (noting "four years of national hysteria" about "exaggerated" dangers). During the second Red Scare, Judge Hand similarly commented that "hysteria in this country has now reached such a peak that there are few who would dare to acknowledge any Communist inclinations," and that it imperiled the nation "where each man begins to eye his neighbor as a possible enemy." Id. at 399.

8. Remedy: The indictment must be dismissed with prejudice. Alternatively, a grand jury must approve an amended indictment without the reckless disregard provision.

First, N.J.S.A. 2C:12-3a is facially unconstitutional, and cannot be salvaged. Thus, the indictment for a violation of N.J.S.A. 2C:12-3a must be dismissed with prejudice.

N.J.S.A. 2C:12-3a permits a conviction where the speaker spoke "in reckless disregard of the risk of causing … terror or inconvenience." As in Kansas, the recklessness provision is unconstitutionally overbroad. Boettger, 450 P.3d at 807. The reckless standard wrongly proscribes speech made without intent to threaten; moreover, it is no easy task for speakers in a diverse society to reliably predict when words will unintentionally terrify, a vagueness issue.

N.J.S.A. 2C:12-3a also permits a conviction even where, whatever the speaker's assessment of risk, the government has not proven that a reasonable audience (let alone the actual audience) would have felt any reaction at all to the speech. But because speakers need not defer to prudish or thin-skinned audiences, the First Amendment also requires that in a true threat prosecution, the government prove that a "reasonable listener" would have "believed that the threat would be carried out." Fair, 469 N.J. Super. at 548; Carroll, 456 N.J. Super. at 539-40 (same). The State concedes that the statute omits this necessary element but argues that the omission of the element can be cured by the model jury instruction, which says that "The words or actions of the defendant must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person." (Ss 35) But the specifics of what the State must prove about an ordinary audience's reaction are better decided by the Legislature; the devil is in the details. For example, in N.J.S.A. 2C:12-3b, the Legislature specified that the speech must cause the audience to "reasonably … believe the immediacy of the threat and the likelihood that it will be carried out." Since the Legislature failed to specify in N.J.S.A. 2C:12-3a what the government must prove about how a reasonable audience would react to an alleged true threat, the statute is unsalvageable. See State v. Pomianek, 221 N.J. 66, 70 (2015) (noting some limits on "judicial tinkering with legislation"). The remedy is to dismiss the N.J.S.A. 2C:12-3a charge with prejudice.

Even if N.J.S.A. 2C:12-3a other than the reckless disregard provision can be salvaged as facially constitutional, the remainder of the indictment as applied against Fair still must be dismissed with prejudice.

Bagdasarian applied this remedy. The Ninth Circuit concluded one post was a "prediction" that President Obama would "have a 50 cal in the head," and the second post was either an "imperative" or "exhortation" "encourag[ing] others" to act ("shoot" the President), or was "simply an expression of rage and frustration." 652 F.3d at 1119. The Ninth Circuit dismissed with prejudice because the State had not proven the speech "would be construed by a reasonable person as a genuine threat," and had also not proven "subjective intent." Id. at 1120, 1123.

Similarly, Watts applied this remedy. Unlike Bagdasarian, who did not convey that he would take any action, Watts did convey that he would take action against President Johnson. Nonetheless, the Court still accepted counsel's argument that the President only "symbolized" his "real enemy," the federal government for its military conscription policy. 394 U.S. at 707.

This Court should apply the same remedy. As in Bagdasarian, 652 F.3d at 1119, Fair's speech never "conveyed … that [the speaker] himself would kill or injure" the audience, or that Fair would take any action at all. New Jersey first alleged that Fair's oral speech was a true threat. But even Fair's most serious oral comment was only expressed as an "exhortation" or "imperative," telling an officer how to act ("worry") without

conveying that Fair would take action. At worst, the exhortation's or imperative's predicate ("about a head shot") was only expressing a hope or "prediction" of karma befalling the officer, arising from "rage or frustration" at law enforcement's practices, again without conveying any action from Fair. The State also alleged that Fair's written speech was a true threat. Similarly, even Fair's most serious written comments ("You will pay," "we will have the last laugh!" and "I know what you drive & where all you motherfuckers live at") did not say that Fair would take any action, and were likewise at worst hopes or predictions of karma, arising from Fair's dissatisfaction with policing. And as in Watts, the officers were "symbolic" stand-ins for Fair's local government. Because Fair's words were not true threats, the remedy is to dismiss the indictment with prejudice.

Alternatively, the indictment must be dismissed without prejudice to re-present to a new grand jury without the reckless disregard provision of N.J.S.A. 2C:12-3a. Re-presentment is necessary because the first grand jury may have only found probable cause to indict Fair for violating N.J.S.A. 2C:12-3a based on the unconstitutional recklessness provision.

By indicting Fair on N.J.S.A. 2C:12-3a, grand jurors found probable cause that Fair either had "purpose to terrorize" or "reckless[ly] disregard[ed] … the risk of causing such terror." (Da 1-2) However, the indictment is silent as to whether at least twelve grand jurors found probable cause that Fair had "purpose to terrorize." The requisite number may have found probable cause

for recklessness only. See State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 91 (App. Div. 2021) ("the entire count must fail" because "there is no way of knowing if the grand jury would have indicted solely on" the second provision in the "single count"); R. 3:6-8(a) ("An indictment may be found only upon the concurrence of 12 or more jurors"). Therefore, the State may not re-try Fair for violating N.J.S.A. 2C:12-3a with "purpose to terrorize" alone, unless it secures an amended indictment.

Finally, at minimum the reckless disregard provision must be dismissed and Fair re-tried without it. This was the remedy approved by the Appellate Division. Fair, 469 N.J. Super. at 558.

Fair's trial counsel argued that he should be found not guilty because he lacked intent to threaten. (5T 45-7 to 8; 49-9 to 18) The context is that of a Black man giving a crude social critique to officers who confronted him on his property. (1T 15-1 to 11; 5T 37-23 to 38-7) But under N.J.S.A. 2C:12-3a, the premise of counsel's argument was irrelevant; even if the jury found that Fair lacked intent to threaten, the statute could still require conviction. The same problem occurred in Boettger, where defendant's counsel argued "he had no intent to threaten anyone," but where the jury was nonetheless instructed it need only find he communicated with a "reckless disregard." 450 P.3d at 807.

Fair's exhortative language in person, that officers could "worry" (4T 114-8 to 115-2), is merely consistent with an intent to express a wish for consequences for bad policy, especially in light of his heated criticisms of the bail system (4T 111-7 to 9)

and accusations of overzealous enforcement (4T 72-12 to 13; 102-1 to 7). A speaker who "wish[es]" for and "imagin[es]" harm, and then expresses what was in his "heart," is not speech that should be punished as a true threat. Watts, 394 U.S. at 708-10 (Douglas, J. concurring). See also Carroll, 456 N.J. Super. at 541-43 (words that are "only a prediction" or "mere spiteful venting" are not punishable as threats). Fair is no more culpable for voicing aloud his "worry" — however insincere — about a backlash from over-policing than was the unfortunate New Jerseyan who voiced his glee at, or indifference to, the prospect of a cannon striking the first President Adams, during "one of our sorriest chapters." Watts, 394 U.S. at 710.

Officers "didn't run for cover." (4T 151-24 to 25) Indeed, throughout the exchange, officers reacted by taunting Fair and expressing their contempt for him (calling him "a five-year-old," yelling at him to "bark it up all you like," laughing openly, mockingly asking each other "what kind of devil are you?," and mockingly responding, "I'm not the one hanging out the window. Come out here."). Officers never expressed fear of Fair's speech.

Fair's language online is consistent with an intent to speak hyperbolically or symbolically, as a means of attracting attention, and building support within an in-group, Facebook followers who were inclined to sympathize. He spoke symbolically when he wrote that he would give activists "Mr. Al Sharpton & Mr. Rev. Jackson … a call" (Da 36; 4T 122-4 to 6), and spoke hyperbolically when he criticized officers' force by comparing it

to the force used by SEAL Team Six during the raid that killed Osama bin Laden. (Da 36; 4T 122-13 to 16) He continued his intended hyperbole by writing comments such as "You will pay," "we will have the last laugh!" and "I know what you drive & where all you motherfuckers live at." (Da 36-37) As Watts acknowledged, speech with "hyperbol[ic]" intent is protected. 394 U.S. at 708. As Black acknowledged, even symbolic speech capable of causing fear is protected where it is not intended to threaten.

Fair's Facebook followers were his audience to his online speech. They reacted by giving him the sympathy and support that he had plainly intended to elicit. To wit, his May 1 Facebook posting to the News Feed drew at least 27 "likes" and multiple supporting comments. (Da 37) No one in the online audience expressed fear for law enforcement.

Thus, the context, language, and audience reaction all might have caused the jury to agree with Fair's counsel that he lacked intent to threaten. Watts, 394 U.S. at 708. In light of the reckless disregard portion of N.J.S.A. 2C:12-3a, the jury was unable to consider Fair's defense. Fair is entitled at minimum to a dismissal of that portion of the indictment, and a new trial.

The government sent a Black man to prison because he dared to tell its officers in the most visceral, emotional terms exactly what he thought of their carceral policies. The Appellate Division correctly held that the government was required to prove Fair intended for his speech to cause real terror before it could put him behind those bars. Our Constitution demands no less.

POINT II

N.J.S.A. 2C:12-3a ALSO VIOLATES THE INDEPENDENT GUARANTEE IN NEW JERSEY'S STATE CONSTITUTION THAT NO LAW SHALL BE PASSED TO RESTRAIN OR ABRIDGE THE LIBERTY OF SPEECH. N.J. Const., Art. I, Pars. 6, 18.

N.J.S.A. 2C:12-3a also violates the expansive free speech guarantees in the New Jersey Constitution. If this Court hears the State's proposed appeal, then it must affirm as modified, to recognize that the State Constitution narrows the true threat exception to cases where the State proves intent to threaten.

In the Appellate Division, Fair provided notice that he was relying on Art. I, Pars. 6 and 18 of the New Jersey Constitution, in both the body of his brief and the table of contents (Db iv, Db 21).[24] Citing State v. Schmid, 84 N.J. 535 (1980), Fair also argued that New Jersey's Constitution protected him against the prosecution, even if the federal constitution did not. (Db 39-40)

The Appellate Division acknowledged, "Our state constitution contains a free speech clause that has been described as being 'broader than practically all others in the nation,' Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000), and is understood as offering 'greater protection than the First Amendment.' Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012)." Fair, 469 N.J. Super. at 554 n.7 (citing

[24] Par. 6 guarantees that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press," and that "[e]very person may freely speak, write and publish his sentiments on all subjects[.]" (Db 21) Par. 18 guarantees the right of the people "freely to assemble," to "make known their opinions," and to "petition for redress of grievances." (Db 21)

Art. I, Par. 6, the same provision cited by Fair in his Appellate Division brief for the proposition that N.J.S.A. 2C:12-3a violates the free speech guarantee in New Jersey's Constitution). The Court, which apparently overlooked Fair's citations to New Jersey's Constitution, wrote, "Because defendant has not argued N.J.S.A. 2C:12-3a violates our state constitutional free speech guarantee, we need not address that potentiality here." Ibid.

Nonetheless, by relying on R. 2:2-1(a)(1)'s substantial question provision, the State squarely brought before this Court the "substantial question arising under the Constitution of … this State" of whether N.J.S.A. 2C:12-3a is unconstitutionally overbroad. (Dma 1) If the Court hears the State's proposed appeal, then the State cannot dodge its own notice.

The State argues in its Supreme Court brief that Fair did not rely on the State Constitution in the Appellate Division. (Ss 33) This is an odd argument because the State's Appellate Division brief responded to Fair's argument in the Appellate Division that the New Jersey Constitution protected his speech: "[n]either the First Amendment nor Article I, Par[.] 6 of our State Constitution prohibits the State from criminalizing" true threats. (Sb 24)

The State also erroneously argues in its Supreme Court brief that Fair did not rely on the State Constitution in the Law Division. The State wrote, "[E]ven if Defendant had raised a state-constitutional issue before the Appellate Division, it would not have been proper because he did not urge dismissal of

the charge on state-constitutional grounds before the trial court." (Ss 33-34) But Fair's Law Division counsel did argue his speech was protected by Art. I, Par. 6 and that the charge should therefore be dismissed on state constitutional grounds. (Dsa 5-40)

The State further argues that Art. I, Par. 6 has "always" been interpreted as "coextensive, coterminous, and consistent with the First Amendment." (Ss 34) No. As the Appellate Division explained, Paragraph 6 offers "greater protection" than the First Amendment and "broader" protection than parallel state provisions. Fair, 469 N.J. Super. at 554 n.7.

State constitutions "independently furnish a basis for protecting individual rights of speech and assembly." Schmid, 84 N.J. at 553. See also State v. Eckel, 185 N.J. 523, 538 (2006) (the federal constitution is "not the ceiling but only the floor of minimum constitutional protection"). This Court has recognized that the "constitutional pronouncements" in Article I, Paragraphs 6 and 18 are "more sweeping in scope than the language of the First Amendment." Schmid, 84 N.J. at 557. The "language employed" in Paragraphs 6 and 18 suggests "exceptional vitality" for the "individual rights of speech and assembly," given the "affirmative[] recogni[tion]." Ibid. Indeed, "precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgment of speech found in the First Amendment." N.J. Coalition Against War in the Middle E. v.

J.M.B. Realty Corp., 138 N.J. 326, 353 (1994). "So greatly do we in New Jersey cherish our rights of free speech that our Constitution provides even broader protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 494 (2012) (referring to Article I, Paragraph 6). "In preserving and advancing those broad constitutional commands, we have been vigilant, jealously guarding the rights of the people to exercise their right to 'freely speak,' although their message may be one that is offensive to some, or even to many, of us." Ibid.

Our "philosophy" is that political speech has a "preferred position" in our "system of constitutionally protected interests …. Where political speech is involved, our tradition insists that government 'allow the widest room for discussion, the narrowest range for its restriction.'" Schmid, 84 N.J. at 558 (quoting State v. Miller, 83 N.J. 402, 411-412 (1980)). Speech is "presumed to be protected speech and … the presumption is not the other way." Ibid. (quoting Adams Theatre Co. v. Keenan, 12 N.J. 267, 277 (1953)). Constitutional protections for speech "must be given the most liberal and comprehensive construction." Ibid. (quoting State v. Butterworth, 104 N.J.L. 579, 582 (E. & A. 1928)).

The "explicit affirmation of these fundamental rights in our [New Jersey] Constitution can be seen as a guarantee of those rights." Schmid, 84 N.J. at 558. See also N.J. Coalition Against War in the Middle E., 138 N.J. at 353 (In Schmid, "We thus held

that Article I, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from governmental interference. In effect, we found that the reach of our constitutional provision was affirmative."). In other words, the State Constitution "imposes upon the State government an affirmative obligation to protect fundamental individual rights … This constitutional imperative, applicable to the freedoms of speech and assembly, comports with the presumed intent of those who framed our present Constitution." Schmid, 84 N.J. at 558-59.

And "our State Constitution not only affirmatively guarantees to individuals the rights of speech and assembly, but also expressly prohibits government itself, in a manner analogous to the federal First and Fourteenth Amendments, from unlawfully restraining or abridging 'the liberty of speech.'" Id. at 560 (quoting Article I, Paragraph 6). By so restraining New Jersey's government, our State Constitution "serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof." Ibid.

Our State Constitution's guarantee of free expression is not merely broader than its federal counterpart; it is "one of the broadest in the nation." Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 79 (2014). Therefore, consider Indiana, which recognized, as a matter of state constitutional law, the need to prove intent-to-threaten in a true threat case. In Brewington v.

State, 7 N.E. 946, 955-56 (Ind. 2014), a "disgruntled divorce litigant" was accused by the government of threatening a doctor and judge. On appeal, Brewington "ask[ed] [the Supreme Court of Indiana] to also consider whether he *intended* to put his target in fear for their safety." Id. at 964 (emphasis in original). The court found, "We believe his suggestion is consistent with Black's focus on 'whether a particular communication is *intended* to intimidate,' 538 U.S. at 345 … and consistent with our strong commitment to protecting the freedom of speech and expression as a matter of Indiana law, *even beyond what the First Amendment requires*." Ibid. (emphasis added). The court adopted a two-prong test paralleling Carroll and Fair, applying state constitutional principles. "We therefore hold that 'true threats' *under Indiana law* depend on two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target." Ibid.

This Court has already construed at least one other statute to require proof that a speaker had a prohibited specific intent, and that the audience felt an objectively reasonable fear. State v. Burkert, 231 N.J. 257 (2017). Moreover, the State in Burkert actually stressed the constitutional importance of a requirement that it prove the specific intent of the speaker. In Burkert, a corrections officer challenged the harassment statute, N.J.S.A. 2C:33-4c, which requires that a defendant engage in alarming acts with "purpose to harass," and "with purpose to alarm or seriously

annoy," without regard to the effect on an ordinary audience. This Court observed, "Criminal laws targeting speech that are not clearly drawn are anathema to the First Amendment and our state constitutional analogue because they give the government broad authority to prosecute protected expressive activities and do not give fair notice of what the law proscribes." Id. at 263, 276 ("Vague and overly broad laws criminalizing speech … give government authorities undue prosecutorial discretion, thus increasing the risk of discriminatory enforcement."). As a result, such laws "chill permissible speech because people, fearful that their utterances may subject them to criminal prosecution, may not give voice to their thoughts." Ibid. ("Vague and overly broad laws criminalizing speech have the potential to chill permissible speech, causing speakers to silence themselves rather than utter words that may be subject to penal sanctions."). To avoid that result, "penal laws" that "trench[] upon first amendment liberties" are subjected to "sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine." Id. at 275-76. Specifically, such laws must be drawn with "appropriate definiteness." Id. at 276.

In light of these principles, Burkert and two amici called for construing N.J.S.A. 2C:33-4c in a manner that required the speaker to have a prohibited specific intent, id. at 270-71 ("Under the First Amendment, the State cannot prosecute" a mere "intent to annoy" …. "[S]peech does not lose its First Amendment protection … even when its purpose is simply to offend …. [A]

defendant [must] have the conscious object to cause in the victim … fear[.]"), and that required an ordinary audience to feel reasonable fear. Ibid. ("[T]hat expressive activity causes hurt feelings, offense or resentment does not render the expression unprotected …. The statute cannot criminalize insulting and even vulgar communications … that are an inevitable part of the aggravations of daily existence.").

The State, ironically, argued that proof of the speaker's specific intent was critical to distinguishing constitutionally protected speech and avoiding a chilling effect: "The State emphasizes that [the statute] requires that a defendant act with purpose to harass … to demonstrate that permissible speech will not fall within the statute's sweep." Id. at 269.

This Court expressed concern that as written, the statute permitted the government to prosecute even where the speaker had a protected intent, like the mere intent to annoy rather than to harass: Because "N.J.S.A. 2C:33-4c permits the conviction of a person who acts with the purpose to 'seriously annoy,'" the statute "is not restricted to conduct that serves no legitimate purpose." Id. at 280. The Court also expressed concern that as written, the statute had no audience requirement. Therefore, in an echo of Carroll and Fair, the Court narrowly construed the statute to require repeated communications made with a "purpose to harass," and where the audience was "reasonably put … in fear for his safety or security." Id. at 284-85. This Court criticized prosecutions where the speaker had a "legitimate purpose," or

where an audience would merely be "shock[ed]," because "freedom of expression need[s] breathing room," and courts should avoid "play[ing] the role of censor." Id. at 273, 281, 285.

This Court has also emphasized, in the context of bias crimes, that the State must prove specific intent. State v. Pomianek, 221 N.J. 66 (2015). Constitutional problems arise when the prohibited intent is absent from the speaker's mind. In Pomianek, an employee made ugly comments at another employee's expense; the target, who understandably felt humiliated, alleged that the speaker was racially motivated. Id. at 72. The jury convicted the speaker under a statute, N.J.S.A. 2C:16-1(a)(3), that only required the State to prove that the audience "reasonably believed" the speech was made with the prohibited purpose. Id. at 73. On appeal, the State argued that proving an audience would "reasonably perce[ive]" the speaker to have the prohibited intent "gives fair notice for due process purposes." Id. at 77. According to the State, the First and Fourteenth Amendments "do not protect a defendant from his subjective ignorance or indifference[.]" Ibid. Pomianek responded that focusing on what a "reasonable" audience would believe "rather than on what the defendant actually intends, fails to give … fair notice of the conduct that is forbidden," because "a defendant should not be obliged to guess whether his conduct is criminal." Id. at 78. Similarly, amici argued that the State must prove the defendant's "subjective motivations" for speaking, that a defendant "may not even be aware" of the audience's perception,

and that the statute did not "give fair notice of where the line is drawn." Id. at 79-80.

This Court agreed that the absence of a specific intent standard rendered the statute unconstitutionally vague. The Court explained that the statute "penalizes the defendant even if he has no motive to discriminate, so long as the victim reasonably believed he acted with a discriminatory motive." Id. at 86. Thus, for example, a speaker may convicted if he is motivated by the audience "playing music too loudly," or motivated by a "terrible prank," merely because the audience "reasonably believes" the speaker acted based on prohibited sentiments. Id. at 87, 90. The Court criticized the proscribing of speech merely because the defendant failed "to predict that [a] reasonable African-American would consider defendant's words as constituting the motive for a crime, even though he had no such motive," may not have "possess[ed] the communal and individual experiences of the reasonable victim in this case," and may have only "fail[ed] to apprehend the reaction that his words would have on another." Id. at 90. In summary, the Court found the statute "unconstitutionally vague," because Pomianek was convicted for speech "not based on what he was thinking but rather on his failure to appreciate what the victim was thinking." Id. at 91. That "fails to give adequate notice." Ibid.

New Jersey's governing norms are a bulwark against federal extremism. The Chief Justice recently observed that "[s]ince the adoption of the 1947 Constitution, Governors have abided by the

tradition that no more than four members of the Supreme Court can be affiliated with a single political party."[25] No such norm exists at the federal level; thus, as the Attorney General recognized, there is perennial danger of a "devastating" clawback, where an ascendant federal "majority casts aside" a "fundamental right," and state institutions must "protect[] the right."[26] The right of New Jerseyans to speak freely must not ever be vulnerable to the whims of shifting federal coalitions. As a bulwark for the freedom of speech, this Court should hold that our State Constitution protects speech from true threat prosecutions where the government has not proven that the speaker intended to threaten.

POINT III

THE APPELLATE DIVISION ALSO CORRECTLY HELD THAT THE TRIAL COURT FAILED TO ENSURE A TRULY UNANIMOUS VERDICT. U.S. Const., Amends. V, VI, XIV; N.J. Const., Art. I, Pars. 1, 9, 10; R. 1:8-9.

Even if this Court hears the State's proposed appeal as-of-right insofar as to whether N.J.S.A. 2C:12-3a violates the free speech provisions of the federal and state constitutions, this Court should still decline to hear a proposed as-of-right appeal from the Appellate Division's remand for a new trial on unanimity grounds, Fair, 469 N.J. Super. at 555-58, because that does not

---

[25] Statement of Chief Justice (Feb. 16, 2022), https://www.njcourts.gov/pressrel/2022/pr021622a.pdf?c=3Jb.

[26] Statement from Acting Attorney General (June 24, 2022), https://www.njoag.gov/statement-from-acting-attorney-general-matthew-j-platkin-on-the-u-s-supreme-court-decision-in-dobbs-v-jackson-womens-health-organization/.

give rise to a "substantial question," R. 2:2-1(a)(1), and only involved "application of established principles." (Dm 1; Dm 7; Dma 2-3)

Fair relies on his Appellate Division brief and the Appellate Division opinion, which is a well-reasoned and unexceptionable application of the relevant case law that does not merit additional appellate review. Fair argued (Db 10-20), and the Appellate Division agreed, that the trial court failed to ensure "substantial agreement as to just what [the] defendant did," Fair, 469 N.J. Super. at 555, so as to avoid a jury verdict "impermissibly fragmented" by whether it was the oral or written speech that violated the law, and also whether the law violated was N.J.S.A. 2C:12-3a "and/or" b. Id. at 558.

If this Court separately entertains the State's proposed appeal as of right on the unanimity issue, then it should affirm on the opinion below. The State's arguments otherwise lack sufficient merit to warrant further comment. R. 2:11-3(e)(2).

CONCLUSION

The prosecution failed to comply with our constitutional commitment to the freedom of speech.

First, the proposed appeal as of right should be dismissed.

If the Court agrees to consider the State's proposed appeal, limited to the free speech issues, then this Court should affirm the Appellate Division opinion as modified, and hold that N.J.S.A. 2C:12-3a violates the state and federal constitutions, both facially and as applied to Fair.

In the event that this Court finds violations of either the state or federal constitution, as a first measure, this Court should strike N.J.S.A. 2C:12-3a in its entirety, and dismiss that charge against Fair with prejudice. Even if N.J.S.A. 2C:12-3a can be partially salvaged on its face without the "reckless disregard" provision, this Court should dismiss the indictment's combined charge as applied against Fair with prejudice. Alternatively, this Court should strike the "reckless disregard" portion of N.J.S.A. 2C:12-3a, and dismiss the indictment against Fair without prejudice, but require the State to re-present any amended indictment to a new grand jury. At minimum, this Court should strike the "reckless disregard" provision, and require a new trial on the remainder of the indictment.

If the Court also considers the State's proposed appeal as of right on the unanimity issue, then this Court should affirm the Appellate Division opinion requiring a new trial in order to ensure a unanimous verdict.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant

BY: /s/ Daniel S. Rockoff
Assistant Deputy Public Defender

Dated: September 9, 2022

FILED, Clerk of the Supreme Court, 07 Oct 2022, **086617**, **AMENDED**

Judgment of Acquittal

Superior Court of New Jersey, MONMOUTH County

State of New Jersey v.

Last Name	First Name	Middle Name
FAIR	CALVIN	

Also Known As: FAIR CALVIN

Date of Birth	SBI Number	Date(s) of Offense
11/25/1972	813202B	02/19/2015

Date of Arrest	PROMIS Number	Date Ind / Acc / Complt Filed	Original Plea	Date of Original Plea
	15 000687-004	10/08/2015	☑ Not Guilty ☐ Guilty	12/07/2015

Adjudication By ☐ Guilty Plea ☐ Jury Trial Verdict ☐ Non-Jury Trial Verdict ☑ Dismissed / Acquitted Date: 08/17/2021

☐ Sealed (*N.J.S.A. 2C:52-5.2)*

Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
15-10-01801-I	1	POSS CDS/ANALOG - SCHD I II III IV	2C:35-10A(1)	3
15-10-01801-I	3	PROHIBITED WEAPONS AND DEVICES - DEFACED FIREARMS	2C:39-3D	4
15-10-01801-I	5	CERTAIN PERSONS NOT TO HAVE WEAPONS	2C:39-7	2
S-2015-000061-1315	901	USE/POSS W/INTENT TO USE DRUG PARAPHERNALIA	2C:36-2	ORD

Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree

Sentencing Statement

It is, therefore, on _____ **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:

ON AUGUST 18, 2021, THE DEFENDANT WAS FOUND NOT GUILTY BY JURY.

☐ It is further ORDERED that the sheriff deliver the defendant to the appropriate correctional authority.

Total Custodial Term	Institution Name	Total Probation Term
000 Years 00 Months 000 Days		00 Years 00 Months

FAIR, CALVIN S.B.I. # 813202B Ind / Acc / Complt # 15-10-01801-I

DEDR (*N.J.S.A.* 2C:35-15 and 2C:35-5.11)

A mandatory Drug Enforcement and Demand Reduction (DEDR) penalty is imposed for each count. (Write in number of counts for each degree.)

☐ DEDR penalty reduction granted (*N.J.S.A.* 2C:35-15a(2))

	Standard	Doubled
1st Degree	____ @ $	____ @ $
2nd Degree	____ @ $	____ @ $
3rd Degree	____ @ $	____ @ $
4th Degree	____ @ $	____ @ $
DP or Petty DP	____ @ $	____ @ $

Total DEDR Penalty $ _____

☐ The court further ORDERS that collection of the DEDR penalty be suspended upon defendant's entry into a residential drug program for the term of the program. (*N.J.S.A.* 2C:35-15e)

Forensic Laboratory Fee (*N.J.S.A.* 2C:35-20)	Total Lab Fee
____ Offenses @ $ _____	$ _____

VCCO Assessment (*N.J.S.A.* 2C:43-3.1)

Counts	Number	Amount
_____	____ @	$ _____
_____	____ @	$ _____
_____	____ @	$ _____
_____	____ @	$ _____

Total VCCO Assessment $ _____

Vehicle Theft / Unlawful Taking Penalty (*N.J.S.A.* 2C:20-2.1)

Offense	Mandatory Penalty
	$ _____

Offense Based Penalties

Penalty	Amount
	$ _____

Other Fees and Penalties

Law Enforcement Officers Training and Equipment Fund Penalty (*N.J.S.A.* 2C:43-3.3) ☐ $ _____	Safe Neighborhoods Services Fund Assessment (*N.J.S.A.* 2C:43-3.2) ☐ ____ Offenses @ $ _____ Total: $ _____
Probation Supervision Fee (*N.J.S.A.* 2C:45-1d) ☐ $ _____	Statewide Sexual Assault Nurse Examiner Program Penalty (*N.J.S.A.* 2C:43-3.6) ☐ ____ Offenses @ $ _____ Total $ _____
Transaction Fee (*N.J.S.A.* 2C:46-1.1) ☐	
Domestic Violence Offender Surcharge (*N.J.S.A.* 2C:25-29.4) ☐ $ _____	Certain Sexual Offenders Surcharge (*N.J.S.A.* 2C:43-3.7) ☐ $ _____
Fine $ _____	Sex Crime Victim Treatment Fund Penalty (*N.J.S.A.* 2C:14-10) ☐ $ _____
Restitution Joint & Several $ _____ ☐	Total Financial Obligation $ _____

☐ Entry of Civil Judgment for court-ordered financial assessment (*N.J.S.A.* 2C:52-5.2)

Additional Conditions

☐ The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided (*N.J.S.A.* 53:1-20.20 and *N.J.S.A.* 53:1-20.29).

☐ The defendant is hereby sentenced to community supervision for life (CSL) if offense occurred before 1/14/04 (*N.J.S.A.* 2C:43-6.4).

☐ The defendant is hereby sentenced to parole supervision for life (PSL) if offense occurred on or after 1/14/04 (*N.J.S.A.* 2C:43-6.4).

☐ The defendant is hereby ordered to serve a _____ year term of parole supervision, pursuant to the No Early Release Act (NERA), which term shall begin as soon as the defendant completes the sentence of incarceration (*N.J.S.A.* 2C:43-7.2).

☐ The court imposes a Drug Offender Restraining Order (DORO) (*N.J.S.A.* 2C:35-5.7h). DORO expires _____

☐ The court continues/imposes a Sex Offender Restraining Order (SORO) if the offense occurred on or after 8/7/07 (Nicole's Law *N.J.S.A.* 2C:14-12 or *N.J.S.A.* 2C:44-8).

☐ The court imposes a Stalking Restraining Order (*N.J.S.A.* 2C:12-10.1).

☐ The defendant is prohibited from purchasing, owning, possessing, or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun (*N.J.S.A.* 2C:25-27c(1)).

Findings Per *N.J.S.A.* 2C:47-3

☐ The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

☐ The court finds that the defendant is amenable to sex offender treatment.

☐ The court finds that the defendant is willing to participate in sex offender treatment.

License Suspension

☐ CDS / Paraphernalia (*N.J.S.A.* 2C:35-16) ☐ Waived

☐ Auto Theft / Unlawful Taking (*N.J.S.A.* 2C:20-2.1)

☐ Eluding (*N.J.S.A.* 2C:29-2)

☐ Other

Number of Months	☐ Non-resident driving privileges revoked
Start Date	End Date
Details	
Driver's License Number	Jurisdiction

If the court is unable to collect the license, complete the following:
Defendant's Address

City	State	Zip

Date of Birth	Sex	Eye Color
	☐ M ☐ F	

Details

FAIR, CALVIN S.B.I. # 813202B Ind / Acc / Complt # 15-10-01801-I

Time Credits

Time Spent in Custody
R. 3:21-8
Date: From - To
-
-
-
-
-
-
-
-
-
-
Total Number of Days _____

Gap Time Spent in Custody
N.J.S.A. 2C:44-5b(2)
Date: From - To
-
-
-
-
Total Number of Days _____

Rosado Time
Date: From - To
-
-
-
Total Number of Days _____

Prior Service Credit
Date: From - To
-
-
-
-
-
-
-
-
-
-
Total Number of Days _____

Statement of Reasons - Include all applicable aggravating and mitigating factors

Attorney for Defendant at Sentencing PAUL E ZAGER	Public Defender ☐ Yes ☑ No
Prosecutor at Sentencing MICHAEL V LUCIANO	Deputy Attorney General ☐ Yes ☑ No
Judge at Sentencing Vincent Falcetano J.S.C	
Judge (Signature) /s Vincent Falcetano J.S.C	Date 08/26/2021

Video/Audio Disc

from

May 1, 2015

PAUL E. ZAGER
ATTORNEY AT LAW
157 BROAD STREET, SUITE 322
RED BANK, NEW JERSEY 07701

ROCCO RAVASCHIERE
Of Counsel
(1918-2004)

TELEPHONE: (732) 741-5000
FAX: (732) 741-9403
Email: paulzager@verizon.net

October 20, 2016

Hon. Ronald L. Reisner, J.S.C.
Monmouth County Superior Court
Civil Law Division
Courthouse, 71 Monument Park
Freehold, NJ 07728

Re: State v. Calvin Fair
Indictment No.: 15-08-1454

Dear Judge Reisner:

Please accept this letter memorandum in support of Calvin Fair's motion to dismiss Indictment No. 15-08-1454 on constitutional grounds.

TABLE OF CONTENTS

PROCEDURAL HISTORY

On August 13, 2015, a Monmouth County Grand Jury indicted Calvin Fair on a single count of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3 "a and/or b."

Mr. Fair herewith moves to dismiss the indictment on constitutional grounds.

STATEMENT OF FACTS

Based on discovery obtained from the State (appended to the

certification of counsel [1]), law enforcement (including members of the New Jersey State Police) searched the Freehold (Borough) home of Calvin Fair on February 19, 2015, pursuant to a search warrant. See Freehold Borough Police Patrolman Sean Healey's narrative report (Exhibit A). The residence (8 Conover Street) is owned by his mother, Leneva Fair, who was in her 80s, and who also resided there.

According to Patrolman Healey's report (dated May 1, 2015), at 11:07 a.m. he and other Freehold Borough officers were dispatched to 8 Conover Street to respond to a domestic disturbance on May 1, 2015. Another report by a Patrolman Hernandez (Zager certification, Exhibit B) describes the incident:

> Upon arrival, I observed the victim, Laquanda A. Washington, who I'm familiar with from previous incidents, standing on the front porch of the house. I asked Ms. Washington if she had been physically assaulted, same stated that she was not. The victim advised that her boyfriend/accused, Calvin Fair, was kicking her out of the house, but was refusing to give her the 32 inch flat screen T.V.

---

[1] None of the documents should be deemed adoptive admissions by Mr. Fair. State v. Briggs, 279 N.J. Super. 555, 562-63 (App. Div.), certif. denied, 141 N.J. 99 (1995). The documents are submitted to establish that, even if the State's proffered evidence were accepted, the prosecution of Mr. Fair for terroristic threats cannot pass constitutional muster.

None of the house occupants answered the door to speak with the officers. Ms. Washington declined to apply for a TRO [2] or otherwise file a complaint, and the police never entered the premises or otherwise retrieved the T.V. As the police were wrapping up, Officer Healey

> heard Mr. Fair calling my name from the side of the house. I acknowledged Mr. Fair at which time he began to ask for everyone to leave his property. He seemed agitated but calm and in control of his actions as he pleaded from a 2nd story window for everyone to leave his property. In an effort to keep him calm everyone was moved from the property onto the public sidewalk as patrols were nearly complete the [sic] investigation.

Apparently, Mr. Fair was upset with how the police conducted the search of his mother's home (ten weeks prior), and in particular how he felt they had disrespected his mother.

> Mr. Fair then began to become more agitated and became enraged while yelling at this officer. From his 22nd story window he he yelled that the police are the "fucking devil." He made mention of us losing our jobs, threating a lawsuit and continually calling me a "fucking devil ass nigga". Mr. Fair was now in a rage yelling about how long he lived in the house and other insignificant facts while calling me "crazy" and "nigga" repeatedly.
>
> I advised Mr. Fair that I was going to sign a warrant against him for his actions. He stated that he was going to turn himself in but screamed about taking care

[2] "Temporary Restraining Order," under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -33.

> of his grandmother [sic [3]] . He continued in his rage asking why I wanted to keep him in the justice system. Eventually patrols were complete and leaving the area when Mr. Fair stated that I was "a thirsty ass nigga" [4] and then stated "Watch out for a head shot".

Officer Hernandez also reported hearing Mr. Fair say: "Watch out for a head shot." But while Hernandez referred to this as a "terroristic threat," neither he, nor Healey, nor any officer present reported having any belief that Mr. Fair presented any immediate of harm. Nor for that matter was there any sense of 'terror,' either intended by Mr. Fair or understood by the officers. The alleged statement was in the context of Mr. Fair's criticism of perceived police misconduct and (to use Healey's words) "insignificant facts," and Patrolman Healey responded to the 'headshot' statement with "[i]nvest[igation] pending, no arrest at this time." The officers left without incident.

ALLEGED FACEBOOK POSTINGS

Later on May 1, 2015, a Detective Schwerthoffer apparently

---

[3] Mother.

[4] A vulgar epithet, the term refers to a person (usually of subordinate rank) eager to impress another person (usually of superior rank).

went on the internet and "located" Mr. Fair's alleged Facebook profile [5] .

> [There] were 2 separate facebook postings by Mr. Fair where he references the police taking several guns from his home but that he still has other guns.
>
> Patrolman Healey's narrative report.

The State actually produced three "print-outs" of alleged Facebook postings: one bearing the date April 8, 2015 (almost two months after the search warrant); the other, April 9, and the last, May 1 (the date of the incident with Ms. Washington). It should be noted that the State apparently did not produce all of the postings on April 8, April 9 and May 1, and thus it is not entirely clear whether there are prior or subsequent postings that would place the print-outs in context.

APRIL 8

The alleged April 8 postings (Zager certification, Exhibit C is apparently in reference to a "youtube" video for a song by

---

[5] "Facebook is a social networking service and website that allows registered users—among many things—to create a personal profile, add other registered users as "friends," join interest groups, and "tag" photographs with names and descriptions. The scope of personal information that can be part of a registered user's personal profile is virtually limitless—including contact information, lists of personal interests, photographs, and videos." United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2011).

Kountry Kash Kill ("Why the Good Gotta Die Young"). The undersigned reviewed the music video -- the lyrics and visual imagery of which appear to be a lamentation over the death of a young person in the singer's community. The Facebook "post" attributed to Mr. Fair appears to be commenting on the video, approving of its message, and criticizing elements responsible for deaths among youths in his own community.

> Yall niggas gonna fu$kin [6] morn!!! R yall tryin take another life, its probably sumbdy yu growup with righ!! Smh [7] Whts it gonna take! To see another life go right Smh for all yu niggas tht wanna be on ur bs at times like this! Im take ur fu$kin soul!! And all thm hammers they found inn my house! None of thm was mines. I still got all of mines [8] lol Im askin yu freehold niggss ri$e. PIZ DON'T DO THIS BEEFIN SHIT AT A TIME LIKE THIS
>
>  feeling mad

The language -- however crude -- is not a call for violence but unity. If anything, this post is decrying violence, and it was

---

[6] The posts tend to substitute the dollar sign ("$") for the letter "c" (and, occasionally, the letter "s").

[7] Shaking my head.

[8] The undersigned assumes that Patrolman Healy understood "hammers" to mean firearms.

obviously recognized as such by "Karina Reldar," "Gigi Reivera," "Daniel Cancel" and "48 others" who "like[d]" the post. If "hammers" is a reference to guns, the alleged post does not announce any intention to use them.

APRIL 9

The alleged April 9 postings (Exhibit C) expressly refer to the poster as "feeling silly." Although the alleged poster is critical of law enforcement, the message itself appears to be political (translation: Police should not spy on citizens' Facebook pages), and references to violence ('joining ISIS') are not intended to be taken seriously and are in the context of "feeling silly" ("lol" [9]).

> [Alleged Post]: This is a post for Freehold Boro poli$e, Holmdel State poli$e, & Monmouth County Tfor$e [10] , FBI, DEA. keep wall wat$chin ur not gonna get my life from fb. [ ] doesn't show anything about my life but only tha thgs I wanna post lol Oh yea [ ] does show I TAKE VERY GOOD $ARE OF MY MOTHER & KIDS

---

[9] "Laughing out loud."

[10] Unclear (possibly "task force").

[ ] FAO [11] KEEP TRYING . 

Gigi Rivera and "11 others" had "like[d]" the post, prompting a following up:

> I hope after everything is done!! I hope they burn freehold down. [happy-faced emoticon [12]]. & yu if look my way again im joining ISIS. Lol

ALLEGED MAY 1 POSTING

The alleged May 1 print-out (Exhibit C) bears the posting-time of 1:09 p.m. Assuming the police narratives are accurate, the officers arrived at shortly after 11 a.m. and thus the alleged post would have been shortly after they left. Assuming the post is Mr. Fair's, it is apparent that the "insignificant facts" referred to by Mr. Healey -- the perceived disrespect shown by police toward his 80-year-old mother [13] -- were still bothering him when they arrived regarding Ms. Washington's 911 call (the latter event is mentioned only indirectly, if at all). The post refers to the possibility of complaints to the police internal affairs unit, political protesting, a lawsuit against

---

[11] Margin of photocopied print-out is cropped. It is probably "LMFAO" (laughing my f----g a--- off).

[12] The photocopy is blurry, but it appears to be a smiling face.

[13] And, apparently, an earlier law enforcement matter involving Mr. Fair's son.

the police, and -- insofar as can be seen -- no suggestion of violence.

> I think its about tht time to give Mr Al Sharpton and Mr Rev. Jackson, internal affairs & my lawyery a $all, one thg yu wont do is disrespe$t me or my 84 year old mother kause yu $arry a badge & another thg yu not doin is tryin to keep me inn system with patty fines & $omplaints whn im not ur job, I don't rob, I don't steal, yu don't see me & im dam sure not sellin any drugs!!! My 84 year old mother didn't deserves her door bein ki$k inn by 30 armed offi$ers with aks & shields drawn. Who tha fu$k was yall komin for Ben Latin [14] smfh [15] My mom has always been a respe$tful lady to ever one & she didn't deserve wht they did. WHY Kause just 2years ago whn my son was out inn freehold runnin with tha bad kids robbin people I was impli$ated inn on one of tha robberis tht happened on my street komin home from work. So thts how my sons wrong doins kame to a end. So wht tht bein sad me & his mother agreed to have the freehold boro poli$e kome get my son from 8 $onover st inn my basement!!! So to make ths very short, IF I ALLOW YU MOTHER FU$KERS WITH OPEN ARMS OPEN DOORS TO KOME GET MY OWN SON! WHY THAT FU$K WOULDNT I ALLOW YU WITH OPEN DOORS TO KOME GET A FU$KIN STRANGER OUT OF MY HOUSE!! YES SUMBDY THTS JUST RENTIN A ROOM!! YU DISRESPE$TED THA ONLY PERSON I HAVE LEFT ON THIS EARTH. YU WILL PAY, WHEVA HAD ANY INVOLVEMENT, WASTIN TAX PAYERS MONEY! BRINING ALL THM OFFI$CERS OUT FOR A 84 YEAR OLD WOMEN! SO SAD BYT WE WILL HAVE THA LAST LAUGH! #JUST WAIT FOR IT.
>
>  feeling angry

"Gigi Rivera," "Saga GoGetta," "Q.s B Rule" and "24 others" had "like[d]" this post, presumably recognizing it as criticism of

---

[14] Probably referring to Osama Bin Laden.

[15] "Shaking my f------g head."

law enforcement methods (albeit with some swearing and hyperbole).

> THN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FUCK OUTTA HERE!! I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT

The responses to these posts for the most part expressed disbelief at the "crazy" manner in which the police had acted, and expressed concern over the well-being of the alleged poster's mother ("Smh its mom okay," "I hope your mom is ok . . . that's crazy") [16] .

THE CHARGE AND THE INDICTMENT

Calvin Fair was indicted on a single count of terroristic threats. Whereas both police narrative reports refer to "watch out for a head shot" as the terroristic threat, the language of the indictment is (whether intentionally or unintentionally) nonspecific. Indeed, when he testified before the Grand Jury, Officer Healey (and the Prosecutor) appeared to refer to the Facebook postings as the terroristic threats.

> Q. Okay. Later that day [May 1] Mr. Fair made a couple of posts on Facebook about Officers coming to his house, correct?
>
> A. That's correct.

---

16 The sole exception ("Do whatever it is that you have do!! They gone learn today") is hardly a 'call to arms' in any legal sense.

Q, Okay. When they were originally posted on Facebook you didn't see them yourself?

A. I did not see it.

Q. Another Officer discovered them on Facebook and printed them

A. Our Detective Bureau found them.

Q. Okay. On one of the posts he was talking about the fact that he will have the last laugh, correct?

A. That was one of his comments, yes.

Q. And then the second post he stated then you got these gay-ass Officers thinking they know your life. Get the fuck out of here. I know what you drive and where you motherfuckers live at. That was the second post?

A. That's correct.

Q. And those were the two posts, correct?

A. Those are two. There was one that talked about guns also, but

Q. Okay. But those were the two distinct directly at point with the Officers being at the house, correct

A. That's correct.

Q. Okay. And again those were posted on Facebook and eventually shown to you later on, correct?

A. That's correct.

Zager certification, Exhibit D (T5-11 to T6-15).

The indictment indicates that the date of the terroristic threat was "on or about May 1, 2015." The specific threat is not identified, and it is unclear which subsection of N.J.S.A. 2C:12-3 is at actually at issue.

> The Grand Jurors of the State of New Jersey, for the County of Monmouth, upon their oaths present that CALVIN FAIR, on or about May 1, 2015, in or about the Borough of Freehold, County of Monmouth, and within the jurisdiction of this Court, did commit the crime of Terroristic Threats, by threatening to commit a crime of violence with the purpose to terrorize S.H., or in reckless disregard of the risk of causing such terror, or by threatening to kill S.H., with the purpose to put him in imminent fear of death under circumstances reasonably causing S.H., to believe the immediacy of the threat and the likelihood that it would be carried out, contrary to the provisions of N.J.S.A. 2C:12-3a and/or b, and against the peace of this State, the Government, and dignity of the same.

Mr. Fair moves to dismiss the indictment.

LEGAL ARGUMENT

OVERVIEW

Defendants may challenge the constitutionality of their prosecution, by way of a pre-trial motion to dismiss the indictment, see State v. Vawter, 136 N.J. 56, 60, 77 (1994) (portions of indictment dismissed where movants established that "hate-crime" law violated their free-speech rights), by way of a pre-trial motion pursuant to R. 3:10-2(d) [17] .

In the present case, the charges against Calvin are murky due to the lack of specificity in the indictment (which is the

[17] The challenge may also be post-trial, by way a motion for acquittal. See State v. Saunders, 75 N.J. 200, 208-09 (1977) (defendant entitled to acquittal, where application of "fornication" law violated right to privacy).

subject of a separate motion). From the discovery materials, it appears that the State claims that Mr. Fair violated N.J.S.A. 2C:12-3 (subsection a or b) when he allegedly told Patrolman Healey to "watch out for a head shot" on May 1, 2015, and/or when he supposedly made the Facebook postings about the police on April 8 and April 9 (before the encounter with Officer Healey) and on May 1 (shortly after the encounter with Healey).

Assuming the State could prove all of its allegations, the indictment should be dismissed since the statements cannot be prosecuted as "terroristic threats" without violating Mr. Fair's federal First Amendment right to free speech [18]. These arguments are set forth in Point I.

In Point II, the undersigned will explain how the wording of N.J.S.A. 2C:12-3a is so vague that it violates Mr. Fair's due-process right to have fair notice of the difference between engaging in constitutionally-protected speech with the purpose of criticizing (or even insulting) law enforcement, and speaking with a "purpose to terrorize."

I. ASSUMING MR. FAIR SAID EVERYTHING THE STATE ATTRIBUTES TO HIM, HE IS BEING PROSECUTED FOR EXERCISING HIS FIRST

---

[18] Moreover, N.J. Const. art. 1, para. 6 "provides even broader [free-speech] protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club, L.L.C., 208 N.J. 491, 494 (2012).

AMENDMENT RIGHTS; THE STATEMENTS, HOWEVER OFFENSIVE, DO NOT FALL WITHIN ANY OF THE NARROW FREE-SPEECH EXCEPTIONS.

"The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I." The federal and state constitutions prohibit the government from criminalizing any speech, unless it falls into one of the "well-defined and narrowly limited classes of speech," such as obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct." U.S. v. Stevens, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (citations omitted) [19] .

The present case involves the increasingly-documented tension between members of law enforcement, and members of the African-American community being 'policed.' It is irrelevant whether one thinks one 'side' or the other is 'right' or 'wrong,' either in a general sense or as it relates to a specific police interaction (e.g., Ferguson, MO); the point is that the issue is political, even though the 'debate' is often expressed in words and formats that are not traditionally associated with political speech [20] .

---

[19] The Stevens Court is quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), which recognized the so-called "fighting words" exception.

[20] The controversial "Super Bowl 50 Halftime Show" featuring Beyonce is one example of political speech in a typically non-political format.

> The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.
>
> Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 790, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011).

Inflammatory anti-police rhetoric -- including insults directed at the officers -- must be recognized as political speech.

The undersigned cited all of Mr. Fair's alleged utterances provided by the State during pre-trial discovery. The undersigned will analyze those statements under all free-speech exceptions which the State is presumably relying on: (a) "fighting words"; (b) inciting a "clear and present danger"; and (c) words constituting a crime (the "true threat").

A. MR. FAIR'S STATEMENTS DID NOT CONSTITUTE "FIGHTING WORDS."

In Chaplinsky, supra, a Jehova's Witness confronted by law enforcement shouted that the arresting marshal was "a damned racketeer" and "a damned fascist." The Court held that such speech was not constitutionally protected but constituted mere "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572, 62 S. Ct. at 769, 86 L. Ed. 1031. While never abrogated, the Supreme Court's decisions since Chaplinsky have

continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression. Gooding v. Wilson, 405 U.S. 518, 523, 92 S. Ct. 1103, 1106, 31 L. Ed. 2d 408 (1972).

Despite Justice Alito's citation to Chaplinsky in a vigorous dissent, the Court in Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011), upheld the right of Westboro Baptist Church members to public rejoice in the death of a soldier at his funeral. What Phelps and his followers said to the grieving relatives were 'fighting words' by anyone's definition, but their issue -- whether homosexuals should be allowed to serve in the military -- was an expression of their view on a political matter, and it was therefore protected.

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here— inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

562 U.S. at 460-61, 131 S. Ct. at 1220, 179 L. Ed. 2d 172.

Since Westboro could not be held civilly liable for their 'protest,' it is axiomatic that their 'speech' could not be criminalized.

When Marine Lance Corporal Matthew Snyder was boarding an airplane to leave the United States to serve his country in Iraq, the last thing he would have needed (or deserved) was for Mr. Phelps to shout to him, "Watch out for a headshot." It also would not have helped if Cpl. Snyder then went on Westboro's Facebook page and saw references to the marines as "gay-asses," "I'm joining ISIS (lol)" and the like. All of this notwithstanding, Westboro's and Phelps' so-called 'fighting words' are constitutionally protected speech.

The same is true in the present case. Neither Patrolman Healey nor the other officers believed that Mr. Fair was challenging them to a gunfight and announcing his intention to deliver a 'head shot' -- the alleged statement was an expression of hope that the officer receive a 'head shot,' which the officers understood since they all left the scene without incident. Was the statement hurtful? Yes. But can the statement be criminalized as 'fighting words'? No. As ugly as the statement was, Mr. Fair had as much right to direct it at Officer Healey as Reverend Phelps would have had the right to direct it at Corporal Snyder.

The Facebook postings are similarly protected as the statements (even if some of them could be 'fighting words' in another context) do not (per Chaplinsky) "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Quite the opposite, the Facebook postings 'incited' a discussion of police conduct in Mr. Fair's community -- and many individuals, whether 'liking' the posts or not, responded by engaging in dialogue over an important issue. If the internet had existed back in the 1940s, Mr. Chaplinsky's post-arrest 'blogs' or Facebook postings about how he was treated by the 'fascists' and 'racketeers' would not have been actionable as 'fighting words.'

B. THERE WAS NO THREAT OF "IMMINENT UNLAWFUL ACTION."

Just as 'fighting words' may provoke the target of the speech to commit unlawful acts against the speaker, other forms of speech may 'incite' the speaker (or a listener) to engage in unlawful conduct directed at a third-party. And, as with 'fighting words,' the doctrine of 'incitement' has evolved to safeguard political speech. In Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470 (1919) [21], the Court upheld the criminalization of illegal advocacy (draft-

[21] Justice Holmes's majority opinion contains the famous "shouting fire in a theatre" illustration on the limits of First Amendment free-speech protections.

dodging) during a time of war, under the "clear and present danger" test. To the extent Schenck remains 'good law,' its applicability to political speech was substantially restricted in Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 420 (1969), involving a speech by a Ku Klux Klan leader advocating violent "revengeance."

> [T}he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
>
> 395 U.S. at ___, 89 S. Ct. at ____, 23 L. Ed. 2d 430.
>
> It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot. And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime."
>
> Bible Believers v. Wayne County, Mich., 805 F. 3d 228 (6th Cir. 2015) (quoting Eugene Volokh, Crime-Facilitating Speech, 57 Stan. L. Rev. 1095, 1190 (2005)).

"The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L. Ed. 2d 403 (2002). "In protecting against the propensity of expression to cause violence, states may only regulate that

speech which is *"directed to inciting or producing imminent* lawless action and *is likely to incite* or produce such action." James v. Meow Media, Inc., 300 F. 3d 683, 698 (6th Cir. 2002) (quoting Brandenburg, supra, 395 U.S. at 447).

In Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1972), the police were attempting to clear the street of an out-of-control antiwar protest. One of the protesters. facing the crowd as a sheriff's officer passed by, stated that "We'll take the fucking street later (or again)." While this constituted illegal advocacy, the Supreme Court held that the protester could not be prosecuted because the threat lacked the required immediacy.

> [A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech.
>
> 414 U.S. at ___, 94 S. Ct. at ____, 38 L. Ed. 2d 303 (1972).

In United States v. Bagdsarian, 652 F. 3d 1113 (9th Cir. 2011), the defendant posted comments on the internet -- in the context of the 2008 Presidential Election -- which are so alarming that the undersigned hesitates to repeat them. Suffice it to say, they were several statements -- two of which were

rather specific, threatening, racially-charged utterances vis-à-vis one of the candidates. The Secret Service located the internet poster, and he was charged with and convicted of threatening harm to another person under 18 U.S.C.A. Sec. 879. Citing such cases as Hess and Brandenburg, the Ninth Circuit Court of Appeals held that the politically-charged utterances lacked the immediacy required for criminal prosecution.

> These statements are particularly repugnant because they directly encourage violence. [ ]. We nevertheless hold that neither of them constitutes an offense within the meaning of the threat statute under which Bagdasarian was convicted.
>
> Id. at 1115 (footnote omitted).

In the present case, the State alleges that Mr. Fair told Officer Healey to 'watch out for a head shot.' The plain meaning of the words, and the officers' interpretation of the words in their narrative reports, demonstrate that there was no communication of an immediate threat -- indeed, it does not appear that the communication was even a threat of harm from Mr. Fair himself, but rather his expression of hope that someone someday harms the officer. If Mr. Fair said that, the undersigned acknowledges that it was an ugly thing to say, and 99.9% of us have the sense to refrain from saying such things 99.9% of the time -- but State and Federal free-speech provisions

guaranty the right to say such things, except in limited circumstances involving the incitement of immediate criminal activity. There being no such incitement, and in any event no immediacy, Mr. Fair cannot be prosecuted without stripping him of the constitutional rights the rest of us enjoy.

C. THERE WAS NO "TRUE THREAT," AND THERE CERTAINLY WAS NO INTENTION TO DO ANYTHING MORE THAN THAN CONVEY DISLIKE FOR POLICE; U.S. CONST. AM. I AND N.J. CONST. ART. I, PARA. 6 PROTECT THE SPEECH IN QUESTION.

As suggested from the discussion in Sub-Points A and B, the so-called 'categories' of unprotected speech have exceptions when public-speech issues are implicated. That is why the Westboro Church protesters may utter "fighting words" without civil liability, and why Klansman Clarence Brandenburg and antiwar protester Gregory Hess were allowed to advocate criminal acts without criminal punishment. The same applies with the so-called "true threat" exception: While 'true threats' are not constitutionally protected, it must be understood that when public issues are involved, certain utterances can only be 'true threats' under limited circumstances.

On one hand, it has been stated that "[t]hreats of violence are outside the First Amendment," Madsen v. Women's Health Center, Inc., 512 U.S. 753, 774, 114 S. Ct. 2516, ____, 129 L. Ed. 2d 593 (1994), and that a "true threat" is made when 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 individual." Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003). Moreover,

> [t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." [ ]. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, 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.
>
> 538 U.S. at 359-60, 123 S. Ct. at 1548, 155 L. Ed. 2d 535 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 388, 112 S. Ct. 2538, 2546, 120 L. Ed. 2d 305 (1992)).

However, the so-called "true threat" category cannot extend into the realm political hyperbole. In Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1967), the defendant was discussing police brutality, race and the Vietnam War when he made the following comment:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.

394 U.S. at 706, 89 S. Ct. at ____, 22 L. Ed. 2d 664.

While this would appear to meet the Virginia v. Black definition of "true threat" [22] , the Supreme Court held that it was protected by the First Amendment because public debate "may well include vehement, caustic and sometimes unpleasantly sharp attacks" on authority figures. 394 U.S. at 708, 89 S. Ct. at _____, 22 L. Ed. 2d 664. Because of these considerations, the Court emphasized the need to view the threat in its context -- the crowd at the rally laughed when the defendant made the statement, which was itself conditional and without specificity.

> The language of the political arena . . .is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.
>
> 394 U.S. at ___, 90 S. Ct. at 1401-02, 22 L. Ed. 2d 664.

In Commonwealth v. Beasley, ___ A. 3d ___, 2016 WL 1719408 (Pa. April 28, 2016), the defendant's rap song ("F--- the Police") posted on social media, was not protected because it contained

---

[22] Indeed, it was an even 'truer' threat than what the defendant in Bagdasarian had posted -- in the sense that Mr. Bagdasrian advised his internet 'audience' that he was posting while highly intoxicated.

unconditional threats against specifically named officers. By contrast, in State v. Metzinger, 456 S.W. 3d 84 (Mo. App. 2015), the internet poster's reference to pressure cookers and marathon races (alluding to the Boston Marathon bombings) was protected speech; the threats were nonspecific and they were made in the context of an argument involving a sports contest. In State v. Roach, 457 S.W. 3d 815 (Mo. App. 2014), the police obtained a search warrant for guns because the internet poster expressed his belief that he would likely climb a bell tower with a gun during the school semester (referring to Charles Whitman); the Court held that the search warrant should not have issued because the 'threat' was nonspecific and the context was obviously in jest.

It should also be noted that the Federal and State free-speech protections require the defendant to have a certain level of scienter regarding their intention to threaten (as opposed to a mere intention to annoy or insult). In Elonis v. United States, 575 U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d (2015), the defendant used Facebook to post threats to injure his soon-to-be ex-wife, employees at the amusement park where he had been fired, police officers, an FBI agent, and a certain classroom of schoolchildren. The defendant argued that the First Amendment required a specific intent to threaten, while the Third Circuit Court of Appeals held that only a general intent was required. While the majority of the Supreme Court elected not to resolve

whether the scienter should be specific intent as opposed to a lesser standard (such as recklessness), the Justices held that a general or negligence standard was insufficient -- there had to be a higher level of intent to threaten [23] .

As previously stated, New Jersey "provides even broader [free-speech] protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club, L.L.C., supra, 208 N.J. at 494. Four years before the Elonis opinion, and in E.M.B. v. R.F.B., 419 N.J. Super. 177 (App. Div. 2011), an FRO issued because of statements which the trial court deemed to be harassing. In reversing, the Appellate Division held that the First Amendment required that scienter -- a specific intent to harass -- had to be established.

> The harassment statute was not enacted to "proscribe mere speech, use of language, or other forms of expression." Ibid.; *see also* State v. Fin. American Corp., 182 *N.J.Super.* 33, 36-38, 440 *A.*2d 28 (App.Div.1981). Because the First Amendment to the United States Constitution "permits regulation of conduct, not mere expression[,]" the speech punished by the harassment statute "must be uttered with the specific intention of harassing the listener." *L.C., supra,* 283 *N.J.Super.* at 450, 662 *A.*2d 577.
>
> 419 N.J. Super. at 182.

---

[23] In his concurring/dissenting opinion, Justice Alito urged the Court to articulate the standard. Dissenting, Justice Thomas essentially shared the view of the Third Circuit (and most of the other Circuit Courts of Appeal) that a general intent or negligence standard was sufficient.

One year after Elonis, in State v. Buckert, 444 N.J. Super. 591 (App. Div. 2016), the defendant was charged with harassment for distributing a vulgar flyer regarding his employer. The Appellate Division stated:

> [P[roscribed speech must be uttered with the specific intention of harassing the listener.
> Id. at 601.

Synthesizing the case law, the "true threat" doctrine is subject to several caveats. First, when a public matter is being discussed, a so-called "true threat" cannot be criminalized if it is merely hyperbolic (Watts) -- hyperbole is not a "true threat" unless it is unconditional (Beasley), specific (Roach), and considered a threat in its context and given its effect on its audience (Metzinger). Second, there has to be an intention to threaten -- not a general intention, but a specific intention. Federal law would require at minimum a showing of recklessness (Elonis), and New Jersey law would require that the defendant specifically intend to threaten (Burkert).

In the present case, none of the statements attributed to Mr. Fair qualify as "true threats." It should initially be noted that the statements were all made in the context of the public issue of police conduct -- whether as a general matter, or as it relates to the actions of the police officers who searched the home of Mr. Fair's mother.

The April 8, 2015 internet posting does not contain any threat of violence; on the contrary, it is agreeing with Kountry Kash Kill's message in "Why the Good Gotta Die Young" in denouncing those forces causing tragic deaths among today's youth. Assuming the reference to "hammers" means "guns," there is no threat directed at anyone and it is unreasonable for the State to boot-strap this statement to something said months later in order to create a 'terroristic threat.' If that were the standard, then the defendant in Watts could be prosecuted if he had said "I have a gun" at another rally, months earlier and 500 miles away. The April 8 post was "like[d]" by so many people because the message -- the context -- was about social problems affecting our youth.

The April 9, 2015 posts are in the context of smiling faces, a "silly" mood, and obvious hyperbole. No rational person could understand the comment as reflecting a serious threat to 'join ISIS' (a statement followed by "lol" (laughing out loud)).

On May 1, 2015, Patrolman Healey alleges that Mr. Fair was saying "irrelevant things." The 'things' were not irrelevant to Mr. Fair; police interactions appear to have been generally hostile, and he appeared genuinely upset over how the officers had treated his mother (not his grandmother -- Officer Healey obviously was not listening, which may well be the root of the underlying problem between the police and 'the policed'). In

that context, Mr. Fair is alleged to have said, "Watch out for a head shot." The statement was not that Mr. Fair was going to do anything to anyone, the statement was that he (Mr. Fair) hopes that something bad happens to the 'thirsty devil.' The comment was hyperbolic, and his audience (the officers) knew it was hyperbolic because otherwise they would never have left the area. The officer said he was going to 'sign a warrant' before the alleged statement -- and sign it he did, after the alleged statement. Healey would have had the right to be offended by the alleged statement -- but Fair would have had the constitutional right to make such a statement. The speech was in the context of a public matter, the content and context of the speech was hyperbolic, and there is no suggestion of a specific intent to threaten. And this is true when reviewing the factual contentions in the light most favorable to the State.

Finally, there are alleged Facebook postings on May 1, 2015, shortly after the police left. Far from constituting terroristic threats, the posts demonstrate beyond question the public-speech nature of Mr. Fair's alleged verbal utterances directed at Patrolman Healy. The overwhelming reaction of the Facebook participants was one of shock over how Leneva Fair had been treated by the police when they came to the house 10 weeks prior -- they were not being incited. Indeed, the posts mention contacting Rev. Al Sharpton and Rev. Jesse Jackson (presumably as

part of a free-speech exercising), contacting Internal Affairs (petitioning for the redress of grievances), and a civil lawsuit. This is followed by:

> YU WILL PAY, WHEVA HAD ANY INVOLVEMENT, WASTIN TAX PAYERS MONEY! BRINING ALL THM OFFI$CERS OUT FOR A 84 YEAR OLD WOMEN! SO SAD BYT WE WILL HAVE THA LAST LAUGH! #JUST WAIT FOR IT.

You cannot say this without going to prison for terroristic threats? Where is the threat? Where is the specific intent to threaten? What about the context?

D. N.J.S.A. 2C:12-3 IS UNCONSTITUTIONALLY OVERBROAD.

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks*, 539 U.S. 113, 119-120, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> U.S. v. Williams, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008).

"An overbreadth challenge to a statute may be successful where there is a strong showing that the statute's deterrent effect on legitimate expression is real and substantial and that the sweep of the legislation will impermissibly hobble the exercise of protected First Amendment rights." State v. Hoffman, 149 N.J. 564, ___ (1997).

In the present case, N.J.S.A. 2C:12-3 contains two subsections, both of which are set forth in the indictment.

> a. A person is guilty of a crime of the third degree if he [sic] threatens to commit any crime of violence with the purpose to terrorize each other . . . .
>
> b. A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.

As previously stated, the United States Supreme Court has held that, in order to safeguard free-speech rights, a threat statute must contain scienter -- beyond general intent or negligence regarding the threat. Elonis. Both subsections "a" and "b" violate the rule in Elonis, as they refer to 'threatening' without identifying the requisite mens rea. Moreover, in Burkert, the Appellate Division held that free-speech requires specific intent, not merely a reckless disregard, when speech is to be criminalized.

In the present case, the unconstitutional overbreadth appears on the face of the statute, and also as applied to Mr. Fair. As a general proposition, the statute would criminalize someone for threatening without the speaker knowing whether s/he could be prosecuted for negligently threatening another in the context of speaking on a public issue. Even if one could assume that the statute requires "knowing" scienter pursuant to N.J.S.A. 2C:2-2(c)(3), see State v. Demarest, 252 N.J. Super. 323, 326-27 (App. Div. 1991), Mr. Fair is being accused of acting "with the purpose to terrorize . . . or in reckless disregard of the risk." Reckless disregard is insufficient where, as here, free speech is implicated. Elonis.

The ordinary citizen thus cannot participate in the proverbial "marketplace of ideas" if s/he cannot make controversial statements without fear of accidentally or 'recklessly' threatening someone. Mr. Fair's own prosecution herein is an example of the chilling effect of an overly broad, improperly tailored 'terroristic threat' statute. The amorphous, 'purposely and/or recklessly' nature of the indictment is a testament to that threat to our free-speech rights.

II. N.J.S.A. 2C:12-3a IS VOID FOR VAGUENESS BOTH ON ITS FACE AND AS APPLIED TO MR. FAIR; THE TERM "TERRORIZE" MUST BE DEFINED SO THAT FREE SPEECH IS NOT CHILLED.

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fourteenth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.
>
> Williams, supra, 553 U.S. at 304, 128 S. Ct. at 1845, 170 L. Ed. 2d 650.

"A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution." Hoffman, supra, 149 N.J. at ___. While subsection "b" of the statute is not vague regarding the purpose to "kill," subsection "a" is unconstitutionally vague for its failure to define the term "terrorize."

In State v. Conklin, 394 N.J. Super. 408 (App. Div. 2007), the Court held that a person could be prosecuted under subsection "a" for private speech that does not involve the immediate risk of death (phone caller states that people 'tend to disappear'). Assuming Conklin remains 'good law,' it does not apply to public speech since (for the previously mentioned reasons) there is a distinction between true threats and mere hyperbole. In the course of a heated debate on an important public issue, what is the difference between 'terrorizing' and to 'hyperbolizing'?

N.J.S.A. 2C:12 is absolutely silent on the term, and the only definition of "terrorize" in the Criminal Code is as follows:

> "Terrorize" means to convey the menace or fear of death or serious bodily injury by words or actions.
>
> N.J.S.A. 2C:38-2d.

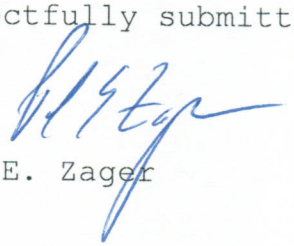
This definition would effectively make N.J.S.A. 2C:12-3 "a" and "b" identical.

Public speech on hot-button topics -- police conduct is certainly one such topic -- requires a delicate balance between what is merely offensive, and what rises (or descends) to the level of 'terrorism.' In that respect, N.J.S.A. 2C:12-3a is essentially standard-less and it allows the police to decide what 'terrorizes' based on whether or not the speech is something they wanted to hear. The average citizen's free-speech rights are child due to this vagueness, and Mr. Fair's prosecution is a tangible example of how ad hoc criminalization of speech can be misused.

CONCLUSION

For the foregoing reasons, the Court should grant Calvin Fair's motion; the indictment should be dismissed as the prosecution violates Mr. Fair's right to freedom of speech as well as his due-process rights.

Respectfully submitted,



Paul E. Zager

PEZ/gia

cc: Carey Huff, Esq., Assistant Prosecutor