No. 22-138

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QUESTION PRESENTED

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

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

SUMMARY OF ARGUMENT

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

University law enforcement officials took Miller's joke literally: arresting, charging, and jailing her for making "terroristic threats," and forcing her to post $5,000 bail to be released. The University also prosecuted Miller in a disciplinary tribunal with the possibility of a two-year suspension. The Salt Lake County District Attorney dropped the criminal charge after FIRE wrote to him. The University ultimately eh drod tple, aftdron ev d tdeTcTw -22.89tiary hearing for which she retained counsel.

But as FIRE's expdroence can attest, occurrences like this are far too common a-3k0.92 are sharply at odds with our national commitment to freedom of expression.

, 371 U.S. 415, 433 (1963), this Court should clarify that speech that is vituperative, inexact, abusive, crude, or even simply unpopular cannot be a "true threat"

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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[3] , 354 U.S. 234 (1957); , 385 U.S. 589 (1967). Esmployees of. 589 a

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

University police characterized the hyperbole as a "veiled threat," and charged Meredith with making a "threat of terrorism" under Utah Code § 76-5-107.3.

The university police chief justified the arrest by stating the school has "a zero-tolerance policy for these kinds of threats." University of Utah, (Sept. 22, 2022), https://attheu.utah.edu/university-statements/university-statement-reactor-detonation-bomb-threat [https://perma.cc/6Y5G-5JDY]. "In the age we're living in, we have to take every threat seriously," he said. A post on social media—where irreverent, caustic, and incendiary banter is the norm[4] —calling for an absurdly high gravity of unrealistic harm (nuclear detonation) for a trivial reason (a loss by Utah's college football team), should have made it clear that Meredith was joking. But law enforcement and University officials did not take it that way: For her joke, Meredith was treated like a criminal and threatened with a two-year suspension from school. FIRE,

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

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

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

In yet another example, New Jersey's Montclair State University rescinded professor Kevin Allred's employment offer after he tweeted, regarding President Trump's support of repealing the Affordable Care Act: "This is all a sham. I wish someone would just shoot him outright." Letter from Adam B. Steinbaugh, Senior Program Officer, FIRE, to Mark J. Fleming, University Counsel, Montclair State University (Aug. 4, ,

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

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

This Court's "true threats" jurisprudence, beginning in 1969 with , is best read to require proof of a specific intent to threaten. demonstrates that the First Amendment requires more than the reaction of an objectively reasonable listener to convict a speaker of criminal threatening. There, a Vietnam War protestor was convicted of

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

four-Justice plurality opinion, by Justice O'Connor, found the statute's provision unconstitutional under the First Amendment because it did not require the defendant to have acted with a desire to intimidate. at 365. This "create[d] an unacceptable risk of the suppression of ideas" because it allowed juries to disregard the defendant's actual intent, and thereby swept up protected expression along with proscribable criminal conduct. (quoting , 467 U.S. 947, 967 n.13 (1984)

they agreed with the plurality that the

, 137 S. Ct. 853, 855 (2017)

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

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

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

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

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

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

Paul T. Crane, ,

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they will steer far clear of the criminal line

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

Take, for example, the case of William White, the neo-Nazi and self-described "Commander" of the Amer

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

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

These are not hard cases and neither are the majority of true threat cases that have advanced

March 1, 2023

Respectfully Submitted,

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