No. 22–1715

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2022 TERM

CITY OF KENSINGTON, ET. AL.,

Petitioners,

v.

JON HENRIKSON,

Respondent.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BRIEF FOR THE PETITIONER

October 9, 2022

Team 216

QUESTIONS PRESENTED

I. Under the First Amendment, is the New Delta Terrorist Threat Statute constitutional when it only regulates true threats, and the Statute's narrow and clear language prevents a substantial amount of constitutionally protected speech from falling within its coverage?

II. Under the First Amendment, is an individual properly arrested when he violates a disorderly conduct statute by acting in a hostile manner, using profane language at a loud volume, and resisting removal by security guards from the premises?

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STATEMENT OF JURISDICTION

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Statement of Facts

On February 6, 2018, Jon Henrikson drove to The Gold Mine (the "Casino"), a casino located in Kensington, New Delta. (J.A. at 4.) He had previously received a coupon in the mail for a $150 credit of "free play," which would allow him to play certain games at the Casino. (J.A. at 4.) The promotion lasted from 9:00 a.m. to 5:00 p.m. on February 6, and Henrikson arrived at the Casino that day at 5:05 p.m. (J.A. at 4.)

When the only employee behind the counter, Shantora Patterson, informed Henrikson that she could not override the computer system to redeem the coupon because it was past 5:00 p.m., Henrikson demanded that Patterson call a manager and accused Patterson of being uncooperative. (J.A. at 5.) When manager Cynthia Bone arrived and explained that Patterson had followed the correct procedure, Henrikson became agitated and started speaking at a loud volume. (J.A. at 5.) Then, he flailed his arms, shook his fist, and yelled out the following statements:

> This is utter and complete bullshit.
> You casino employees are pieces of shit.
> I'm a high roller—how dare you disrespect me.
> I ought to come out and roll you all.
> I ought to go out to my truck and get my gun and blow this place up with how much money I've lost up in this bitch-ass place.
> You two [referring to Patterson and Bone] are ignorant dumbasses, mindless corporate kissbutts who can't think on your own.
> I have half a mind to come around there and teach you a lesson.

(J.A. at 5.)

When Henrikson mentioned getting his gun out of his vehicle, Patterson looked visibly upset, and Bone called security to escort Henrikson off the premises. (J.A. at 6.) When the security guard arrived, he ordered that Henrikson leave, but Henrikson only became more upset. (J.A. at 6.) When another security guard arrived, the two physically attempted to remove

Henrikson, but Henrikson began gesticulating and yelling at the top of his lungs. (J.A. at 6.) At first, customers were simply annoyed that Bone and Patterson could not serve them, but then many became concerned about the incident and expressed their fears to the Casino employees. (J.A. at 6.)

After attempts to remove Henrikson failed, the security guards called the local police, who arrived shortly thereafter. (J.A. at 6.) When they arrived, the officers spoke with the Casino staff and the security guards about the incident but were interrupted by Henrikson. (J.A. at 6.) Henrikson cursed at the police officers and alleged that they were corrupt, calling them "Keystone cops," saying that they were "in the pocket of the Casino," and yelling, "Cha-Ching! Ring up another one for the casino owners." (J.A. at 6.)

Before arresting Henrikson, Officer Thomas called the Police Chief and asked for his guidance. (J.A. at 6.) While they spoke on the phone, Henrikson increased the severity and volume of his comments. His behavior attracted attention from most nearby customers and seriously inhibited the Casino's regular activity to the point that it was barely functioning. (J.A. at 6–7.) The Police Chief reminded Officer Thomas of his discretion but also cautioned him about not letting the situation get out of hand. (J.A. at 43.) Immediately after their call ended, Officer Thomas arrested Henrikson and verbally charged him under New Delta Rev. Stat. § 32-11-102 (the "Disorderly Conduct Statute") for disorderly conduct and New Delta Rev. Stat. § 32-22-107 (the "Terrorist Threat Statute") for making terrorist threats. (J.A. at 7, 44.)

Procedural History

Two months after his arrest, prosecutors dropped the charges against Henrikson. However, Henrikson responded by filing a civil rights lawsuit under 42 U.S.C. § 1983, claiming that he was improperly arrested for protected speech. (J.A. at 7–8.)

The district court granted the City of Kensington's motion for summary judgment holding that the police had probable cause to arrest Henrikson because his speech was disruptive and threatening, in violation of the Disorderly Conduct Statute and the Terrorist Threat Statute. (J.A. at 13–14.)

Henrikson appealed this decision to the Twelfth Circuit Court of Appeals, which found that the police did not have probable cause to arrest him under either statute. (J.A. at 29.) The court also found the Terrorist Threat Statute unconstitutionally broad and vague and held that Henrikson's arrest was made in retaliation for criticizing the police. (J.A. at 29–30.)

The City of Kensington filed a timely petition for a writ of certiorari to this Court, which it granted. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

First Amendment protections are expansive but must cease when societal chaos and safety concerns are at stake. The Twelfth Circuit's decision, however, prioritizes intimidation and antagonization at the expense of citizens' well-being. Thus, this Court should reverse the Twelfth Circuit's decision for two reasons: the Terrorist Threat Statute is constitutional, and the police properly arrested Henrikson.

First, the Twelfth Circuit erred in finding the Terrorist Threat Statute unconstitutional because the Statute does not regulate speech protected by the First Amendment and the Statute's Prohibitions are sufficiently clear and narrow.

The Terrorist Threat Statute only punishes true threats. True threats are a form of expression that is not protected by the First Amendment. Such expressions are unworthy of constitutional protection because they jeopardize public safety and misdirect resources. The Statute's specific intent requirement ensures that only true threats are criminalized. Specific intent crimes typically require that the perpetrator intentionally commits an act and intends that

his act cause a particular result. The Terrorist Threat Statute requires the perpetrator to "make an illegal threat," "threaten to commit any offense involving violence," and "intend to" elicit at least one of the six listed reactions. The speaker's subjective intent as espoused by him does not control the *mens rea* requirement. Rather, it is up to a reasonable fact finder to consider the totality of the circumstances and decide whether the speaker intended to provoke a reaction when he uttered the true threat.

Additionally, the Terrorist Threat Statute's language is narrow and clear. A speaker makes a true threat by communicating intent to commit an act of unlawful violence to a particular individual or group of individuals. The threat must be serious and not merely a joke or political criticism. However, a speaker may still utter a true threat even if he does not actually intend to carry out the threat. Generally, threat statutes are overbroad and vague if they criminalize wholly lawful action or non-violent threats. New Delta's Terrorist Threat Statute does neither. Instead, it explicitly prohibits "illegal threat[s]" which "involv[e] violence" and "inten[d] to" cause at least one of the six listed reactions. Because the Terrorist Threat Statute is limited to illegal threats, it does not criminalize wholly lawful action. Similarly, the Terrorist Threat Statute is limited to offenses "involving violence," so it does not criminalize non-violent threats.

Ordinary people of common intelligence should have no trouble understanding the Terrorist Threat Statute because its plain language clearly prohibits making illegal threats of violence with intent to cause a panicked reaction. New Delta modeled its statute after Texas's terrorist threat statute, which was upheld as constitutional against overbreadth and vagueness challenges. In fact, at least fourteen states' terrorist threat statutes have been upheld as constitutional against similar challenges. Therefore, New Delta's Terrorist Threat Statute is constitutional under the First Amendment.

Second, the Twelfth Circuit erred in finding Henrikson's arrest to be retaliatory because his speech was fighting words, and thus is not protected under the First Amendment. Additionally, the police officers had probable cause to arrest Henrikson under the Disorderly Conduct Statute, they did not have a retaliatory animus, and Henrikson did not provide objective evidence that he was arrested because he shouted insults and profanities at the police officers.

Primarily, Henrikson's "speech" consisted of insults and profanities, which under this Court's precedent, qualifies as fighting words, and thus is not protected speech under the First Amendment, and so Henrikson's retaliation claim must fail.

Further, according to this Court's precedents on First Amendment civil damages claims, a retaliatory arrest claim is generally defeated by probable cause. In this case, Henrikson violated the Disorderly Conduct Statute by shouting, yelling profanities, and refusing to leave the premises when security guards tried to remove him. All these actions provide ample probable cause for the police officer's decision to arrest him, defeating any retaliatory arrest claim. Additionally, there is insufficient evidence to support any claim that Henrikson was arrested only for his inappropriate language toward the police.

Lastly, there was no causal connection between a retaliatory animus on behalf of the police and the arrestee's subsequent injury. Even if there was not probable cause to arrest Henrikson, there is no evidence of animus on behalf of the police officers who did arrest him. Officer Thomas called his supervisor for advice on how to proceed, which is not an indication of animus. Therefore, this Court should reverse the Twelfth Circuit's decision on both issues.

ARGUMENT

The First Amendment was designed to protect social values and intellectual ideas—not intentional threats of violence and disorderly behavior. Protecting both distorts the former by transforming the freedom to discuss and debate into the freedom to create chaos and concern.

U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech"). Although First Amendment protections are robust, the right of free speech is not absolute. *Virginia v. Black*, 538 U.S. 343, 347 (2003). This Court has long recognized "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never raised any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). These include "true threats"—expressions meant to communicate a serious intent to commit an act of unlawful violence, and "fighting words"—expressions likely to incite an immediate breach of the peace. *Id.* at 572; *Black*, 538 U.S. at 347. This Court should not punish the City of Kensington and its officials for following duly enacted laws designed to cultivate a safe and peaceful community. New Delta's Terrorist Threat Statute and Disorderly Conduct Statute outline clear guidelines to protect its citizens while strictly adhering to this Court's articulation of what constitutes protected and prohibited speech. Blocking the enforcement of such statutes not only gives unwarranted rights to intimidators and aggressors, but more importantly, strips lawful citizens' rights to be free from harassment and fear of violence.

This Court should reverse the Twelfth Circuit's decision for two reasons. First, the Threat Statute is constitutional because it only regulates true threats, which the First Amendment does not protect. However, even if this Court believes that the Terrorist Threat Statute regulates constitutionally protected speech, the Statute's narrow and clear language prevents a substantial amount of speech from falling within its coverage. Second, Henrikson's arrest was proper because he uttered fighting words, which the First Amendment does not protect. However, even if Henrikson's speech was constitutionally protected, the police still had probable cause to arrest him because he broke the Disorderly Conduct Statute, failed to prove that similarly situated

individuals were arrested for the same crime, and failed to prove that the police had retaliatory animus.

I. The Terrorist Threat Statute Is Constitutional Because It Does Not Regulate Speech Protected By The First Amendment, And Even If It Does Regulate Protected Speech, The Statute's Prohibitions Are Still Sufficiently Narrow and Clear.

A speaker cannot threaten his neighbor with violence intending to terrify him and then successfully maintain that the State is prohibited from punishing his conduct based on the overbreadth doctrine. *Lansdell v. State*, 25 So. 3d 1169, 1175 (Ala. Crim. App. 2007). This Court has made clear that threats of violence enjoy no protection under the First Amendment. *See Black*, 538 U.S. at 353. In addition, the overbreadth doctrine is inapplicable when no First Amendment rights are at stake because the doctrine only applies to constitutionally protected speech. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168 (1972). Consequently, because the Terrorist Threat Statute prohibits intentional, illegal threats of violence, *see* New Delta Rev. Stat. § 32-11-107, it does not "sweep[] within its coverage a substantial amount of constitutionally protected speech," *Garcia v. State*, 583 S.W.3d 170, 178 (Tex. App. 2018). However, even if this Court believes that the Terrorist Threat Statute's prohibitions do regulate protected First Amendment speech, and consequently decides to apply the overbreadth doctrine, its narrow and clear language still warrants its constitutionality.

A. The Terrorist Threat Statute Does Not Regulate Protected First Amendment Speech Because It Only Criminalizes True Threats.

Generally, the First Amendment forbids the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). The protections afforded by the First Amendment, however, are not absolute, and courts have long recognized that the government may nevertheless regulate certain categories of expression. *Black*, 538 U.S. at 358. Thus, the First Amendment permits restrictions

upon the content of speech in a few limited areas which are "of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

Although some threats are protected under the First Amendment, "true threats" are not. *Watts v. United States*, 394 U.S. 705, 708 (1969). The difference between an empty threat and a true threat is the speaker's intent. *Black*, 538 U.S. at 347. A speaker makes a true threat by communicating an intent to commit an act of unlawful violence to a particular individual or group of individuals, regardless of whether the speaker *actually intends* to carry out the threat. *Id.* Thus, as a policy matter, true threats are unworthy of constitutional protection because they jeopardize public safety and misdirect resources. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (no First Amendment right to defamation); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (no First Amendment right to incite violence); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (no First Amendment right to falsely yell "fire" in a crowded theater). A true threat is serious, not uttered in jest, idle talk, or political argument. *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983). Whether a statement is a true threat must be decided by the trier of fact. *Id.* A threat is *knowingly* made if the speaker comprehends the meaning of the uttered words; it is *willfully* made if the speaker voluntarily and intelligently utters the words in an apparent determination to carry out the threat. *Id.*

Generally, criminal law seeks to punish conscious wrongdoing. *Ruan v. United States*, 142 S. Ct. 2370, 2372 (2022). Thus, when interpreting criminal statutes, this Court "start[s] from a longstanding presumption . . . that Congress intends to require a defendant to possess a culpable mental state." *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). This culpable mental state, known as scienter, refers to the degree of knowledge necessary to make people

criminally responsible for their acts. *Id.* Applying the presumption of scienter, general intent is presumed to be a required element when a criminal statute is "silent on the required mental state." *Ruan*, 142 S. Ct. at 2377; *see, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2008–12 (2015) (holding that even though the statute lacked an explicit *mens rea* requirement, the government must prove a mental state beyond mere negligence to support a conviction). On the other hand, specific intent applies when a statute "includes a general scienter provision." *Ruan*, 142 S. Ct. at 2377.

When a perpetrator intends to commit a specific crime, it is immaterial that he could not complete his intended crime for some collateral reason. *See, e.g.*, S*chad v. Arizona*, 501 U.S. 624, 661 (1991) (affirming defendant's conviction for a specific intent crime—felony murder—even though the defendant failed to complete the underlying felony). Although the law does not punish guilty intent alone, it does impose punishment where guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant. *See, e.g.*, U*nited States v. Aguilar*, 515 U.S. 593, 602 (1995) (explaining that a defendant who endeavors to obstruct justice, but is "foiled in some way," would still be guilty of committing a specific intent crime). In light of this principle, it is more appropriate to focus on Henrikson's intent rather than the reaction of his specific recipients. *United States v. Fulmer*, 108 F.3d 1486, 1500 (1st Cir. 1997) (adopting a legal standard that determines a "true threat" from the perspective of the person who makes the statement). Shifting the focus to the specific recipients' feelings would frustrate the purpose behind specific intent crimes. *See generally United States v. Brown*, 915 F.2d 219, 225 (6th Cir. 1990). Thus, even if Henrikson's actual recipients suffered no fear of imminent serious bodily injury—because, for

example, they could not hear him or were professionally trained in martial arts—that fact has no bearing on whether he uttered a true threat with intent to cause fear.

In divining Henrikson's intent, this Court should also consider whether an ordinary, *reasonable recipient* who is familiar with the context of the communication could interpret it as a threat of injury. *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013). Consequently, a balanced approach requires a factfinder to objectively look at the entire factual context and balance the speaker's subjective intent with a reasonable recipient's objective interpretation. *United States v. Bagdasarian*, 652 F.3d 1113, 1125 (9th Cir. 2011). Applying these rules, as long as Henrikson intended to cause fear of imminent serious bodily injury and a reasonable person of ordinary intelligence could understand that he was making a true threat based on the totality of the circumstances, he has violated the Terrorist Threat Statute.

The New Delta Terrorist Threat Statute explicitly requires specific intent. The statute reads:

> A person makes an illegal threat when they threaten to commit any offense involving violence to any person or property *with intent to*:
> (1) cause a response to the threat by an official or volunteer agency organized to deal with emergencies;
> (2) place any person in fear of imminent serious bodily injury;
> (3) prevent or interrupt the occupation or use of a building, room, place of assembly, place to which the public has access, place of employment or occupation, aircraft, automobile, or other form of conveyance, or other public place;
> (4) cause impairment or interruption of public communications, public transportation, public water, gas, or power supply or other public service;
> (5) place the public or a substantial group of the public in fear of serious bodily injury; or
> (6) influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state.

New Delta Rev. Stat. § 32-11-107 (emphasis added). To violate the Statute, the perpetrator must "make an illegal threat," "threaten to commit any offense involving violence," and "intend to" elicit one of six listed reactions. Importantly, the Statute's intent requirement is directed to the

speaker's appreciation for the probability of eliciting a reaction—not the speaker's subjective intention to carry out the threat. When factfinders decide the intent element, they must consider the content of the speaker's statements and may disregard the speaker's profession that he did not intend to provoke a response. *See, e.g.*, *United States v. Williamson*, 81 F. Supp. 3d 85, 92 (D.C. Cir. 2015) (finding that defendant intended to make a threatening 911 call despite his contrary professions). Thus, the speaker's subjective intent as espoused by him does not control the *mens rea* required to establish the charged offense. Rather, the relevant inquiry is whether a reasonable factfinder could conclude that the speaker intended to provoke a reaction when he uttered the alleged true threat.

Here, Henrikson was visibly upset that the Casino refused to honor his coupon for $150 of "free play." (J.A. at 4–5.) As a result, he demanded that the employee call a manager. (J.A. at 5.) After the manager refused to honor Henrikson's coupon, he became agitated, spoke at a loud volume, flailed his arms, and shook his fist. (J.A. at 4–5.) He began yelling obscenities, insulting the employee and manager, and threatening to "get [his] gun" and "blow [the Casino] up." (J.A. at 5.) *Cf. Commonwealth v. Griffin*, 456 A.2d 171 (Pa. Super. Ct. 1983) (holding that the defendant violated the Pennsylvania Terroristic Threat Statute when he stated, "I ought to kill you"). Henrikson also threatened to "come around [the counter] and teach [the employee and the manager] a lesson." (J.A. at 5.) Even giving Henrikson the benefit of the doubt, if his only purpose for threatening the employees was to bait them into honoring his coupon, he still violated the Terrorist Threat Statute. Henrikson's lack of subjective intent to actually carry out this threat does not negate the fact that a reasonable factfinder need only find that he intended to elicit a fearful response when he spoke to the Casino employees.

As a result of his erraticism, the manager called the Casino's security guard. (J.A. at 18.) The security guard then quickly called for backup after realizing that he could not control Henrikson. (J.A. at 18.) When the security officers' attempt to escort Henrikson off the premises failed, they called the local police department. (J.A. at 18.) Henrikson clearly did not comply with removal from the premises. (J.A. at 18.) Instead, he gesticulated, yelled at the top of his lungs, and heckled the police officers. (J.A. at 18.) During each call to higher authority, Henrikson never ceased his behavior. In fact, with each escalating call, his behavior escalated. (J.A. at 17–19.) To meet the true threat intent requirement, a reasonable jury need only find that Henrikson intended that his threat cause a response by an official or volunteer agency organized to deal with emergencies—not that he intended to carry out his threats. New Delta Rev. Stat. § 32-11-107(1).

A prohibition on true threats "protects 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." *Black*, 538 U.S. at 360. Henrikson has no First Amendment right to terrorize a person by threatening acts of violence or property damage. As this Court has made clear, threats of violence enjoy no protections under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Consequently, the New Delta Terrorist Threat Statute is constitutional because it does not attempt to regulate constitutionally protected speech.

B. Even If The Terrorist Threat Statute Regulates Protected First Amendment Speech, Its Sufficiently Narrow And Clear Language Prevents A Substantial Amount of Speech From Falling Within Its Coverage.

Occasionally, citizens may raise the overbreadth doctrine to challenge speech regulations as unconstitutional. However, this Court has cautioned that the overbreadth doctrine is "strong medicine" that should be used "sparingly" and "only as a last resort" because it carries the potential for the judiciary to entangle itself in the drafting of legislation. *Broadrick v. Oklahoma*,

413 U.S. 601, 613 (1973). When a court does apply the doctrine, it will consider a statute impermissibly overbroad only if, in addition to proscribing activities that may constitutionally be forbidden, it also sweeps within its coverage a substantial amount of constitutionally protected speech. *United States v. Williams*, 553 U.S. 285, 292 (2008). Such a sweep may occur if a statute's language is too vague or imprecise. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citing *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.")

The first step in an overbreadth analysis is to construe the challenged statute to determine what it covers. *Williams*, 553 U.S. at 293. In analyzing the text of the New Delta Terrorist Threat Statute, it reaches to and punishes only those individuals who "make an illegal threat" and "threaten to commit any offense involving violence to any person or property" under circumstances supporting the inference that the speaker intended to elicit a response from an official. New Delta Rev. Stat. § 32-11-107. *Cf.* Tex. Penal Code Ann. § 22.07(a).[1]

[1] In *Garcia v. State*, 583 S.W.3d at 178, the Texas Court of Appeals upheld the constitutionality of its Terroristic Threat Statute against an overbreadth challenge. Almost exactly resembling New Delta Rev. Stat. § 32-11-107, Texas Penal Code § 22.07(a) states:

> (a) A person commits an offense if he threatens to commit any offense involving violence to any person or property with intent to:
> (1) cause a reaction of any type to his threat by an official or volunteer agency organized to deal with emergencies;
> (2) place any person in fear of imminent serious bodily injury;
> (3) prevent or interrupt the occupation or use of a building, room, place of assembly, place to which the public has access, place of employment or occupation, aircraft, automobile, or other form of conveyance, or other public place;
> (4) cause impairment or interruption of public communications, public transportation, public water, gas, or power supply or other public service;
> (5) place the public or a substantial group of the public in fear of serious bodily injury; or

On its face, the Terrorist Threat Statute is sufficiently narrow because it does not criminalize wholly lawful action or non-violent threats. *See, e.g.*, S*eals v. McBee*, 898 F.3d 587, 593–94 (5th Cir. 2018) (holding that the statute was overbroad because it criminalized "constitutionally protected threats" such as threats to sue an arresting officer, threats to call a lawyer when under police interrogation, threats to run against an incumbent unless he votes for a favored bill, or threats to complain to a DMV manager if paperwork is wrongly processed); *Gooding v. Wilson*, 405 U.S. 518, 527 (1972) (holding that the statute was overbroad because it over-criminalized words that did not "have a direct tendency to cause acts of violence"). Instead, the Terrorist Threat Statute explicitly criminalizes an "illegal threat . . . involving violence . . . with intent "to elicit one of the Statute's six listed reactions. New Delta Rev. Stat. § 32-11-107. Because the Terrorist Threat Statute is limited to illegal threats, it does not criminalize wholly lawful action. Additionally, it is limited to offenses "involving violence," so it does not criminalize non-violent threats.

The Terrorist Threat Statute is also sufficiently clear because it specifically lists how one may violate it. A law is only declared unconstitutional if it is "so vague that [people] of common intelligence must necessarily guess at its meaning." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Furthermore, failing to define statutory terms will not automatically render the law void for vagueness. *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F.3d 235, 247 (6th Cir. 2018). The Terrorist Threat Statute, however, leaves no guesswork. Ordinary people should have no trouble understanding that making illegal threats of violence with intent to cause a panicked reaction is prohibited by the Terrorist Threat Statute's plain language. Accordingly, the Threat Statute may properly criminalize nonverbal threats so long as

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(6) influence the conduct or activities of a branch or agency of the federal government, the state, or a political subdivision of the state.

they are unlawful and violent. *See, e.g.*, C*ommonwealth v. Kline*, 201 A.3d 1288, 1291 (Pa. Super. Ct. 2019) (holding that the defendant communicated a true threat when he signaled a "menacing gesture of a shooting gun recoiling while pointed at the victim").

Additionally, the Terrorist Threat Statute is narrow and clear because it does not regulate speech made with solely an "apparent determination" for violence. A true threat may still be uttered absent "an expression of serious intent to bring the threat to fruition." (J.A. at 26); *see Black*, 538 U.S. at 347 ("[t]he speaker need not actually intend to carry out the threat" to utter a true threat). Additionally, apparent determination is only ever questioned under general intent statutes. *See, e.g.*, *Perez v. Florida*, 580 U.S. 1187, 1188 (2017). In *Perez v. Florida*, Justice Sotomayor criticized Florida for making it a felony to utter a threat without specific intent. *Id.* ("States must prove more than the mere utterance of threatening words—some level of intent is required."). By synonymizing "apparent determination" with "uncredible threats," Sotomayor argued that the Florida statute was not limited to true threats because the State only needed to prove "what [the defendant] 'stated' alone—irrespective of whether his words represented a joke, the ramblings of an intoxicated individual, or a credible threat." *Id.* Here, however, the Terrorist Threat Statute only regulates speech made with specific intent. Therefore, there is no risk that it criminalizes speech made with an apparent determination.

Although the Terrorist Threat Statute does not explicitly criminalize "true" threats, it still places many qualifiers on its proscribed threats—namely illegal, intentional ones. Even if this Court believes that the Terrorist Threat Statute could have been more precise, courts must uphold a statute if they can determine a reasonable construction that will render it constitutional and carry out legislative intent. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 48*5 U.S. 568, 575 (1988) ("This cardinal principle has . . . for so long been applied by

this Court that it is beyond debate."). Thus, when deciding how to interpret "illegal threat . . . involving violence . . . with intent," this Court should construe the Terrorist Threat Statute so that its reading would render it constitutional. This type of statutory construction is especially common among state courts. In fact, many state statutes that criminalize terrorizing others by threatening violence or damage to property have been repeatedly upheld as constitutional against overbreadth and vagueness challenges. *See Lansdell*, 25 So. 3d at 1177–78 (citing fourteen cases in which states have upheld their terrorist threat statutes against overbreadth and vagueness claims). Thus, the Terrorist Threat Statute is sufficiently narrow and clear because its plain language describes what types of threats are prohibited and lists the requisite intent needed to constitute a violation.

However, just because it is possible to conceive of some impermissible applications does not mean that a statute is unconstitutionally overbroad. *Williams*, 553 U.S. at 303. An overbreadth challenge is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the [a]ct would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The fact that a statute might operate unconstitutionally under the right set of circumstances is "insufficient to render it wholly invalid" since the overbreadth doctrine has not been recognized "outside the limited context of the First Amendment." *Id.* Thus, even if Henrikson presented a hypothetical that swept some constitutionally protected speech, he must prove that the sweep is both substantial and realistic. *See Williams*, 553 U.S. at 292 (holding that a statute's overbreadth must be substantial without "summon[ing] forth an endless stream of fanciful hypotheticals"). Subsequently, without evidence that the Terrorist Threat Statute substantially limits real-world speech, it should be upheld as constitutional.

II. Henrikson's Arrest Was Proper Because The First Amendment Did Not Protect His Speech, And Even If It Was Protected Speech, There Was Probable Cause To Arrest Him.

In *Nieves v. Bartlett*, this Court created a framework to filter First Amendment civil claims for damages to prevent frivolous lawsuits and preserve the sanctity of free speech principles. 139 S. Ct. 1715, 1722 (2019). Yet, before this Court addresses the *Nieves* framework, it must first determine whether the individual's words or actions are protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in *protected* speech.") (emphasis added). If the speech is unprotected, the individual's behavior constitutes criminal conduct, and the State has the authority to regulate it. *See United States v. Alvarez*, 567 U.S. 709, 717–18 (2012). Thus, if an individual commits a crime—or if a reasonable police officer believes he commits a crime—then the officer has probable cause to arrest him, which generally defeats a First Amendment retaliation claim. *Nieves*, 139 S. Ct. at 1721.

A. Henrikson's Speech Was Not Protected By The First Amendment Because He Uttered Fighting Words Which Breached The Peace.

Fighting words are a type of speech that "ordinary men" know are likely to start a fight and breach the peace by their very utterance. *Chaplinsky*, 315 U.S. at 573. Despite the "verbal character" of fighting words, they are essentially a "nonspeech" element of communication. *R.A.V.*, 505 U.S. at 386. Fighting words are "analogous to a noisy sound truck." *Id.* Many states prohibit fighting words with disorderly conduct statutes. *See, e.g.*, S*tate v. Hale*, 110 N.E.3d 890, 894 (Ohio Ct. App. 2018) (citing Ohio Rev. Code Ann. § 2917.11, which prohibits "[i]nsulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response"). The New Delta Disorderly Conduct Statute also prohibits what this Court has defined as unprotected speech under the fighting words doctrine.

Broadly, statements that breach the peace are unprotected speech. *See Chaplinsky*, 315 U.S. at 573 (holding that calling someone a "damned fascist," among other things, constituted fighting words under a reasonable person standard). Henrikson told the Casino workers that he "ought to go get his gun and blow this place up." (J.A. at 5.) His threats of violence disrupted the Casino's normal course of business both for the customers and employees. Additionally, even if this Court does not find that Henrikson was attempting to start a fight, "[d]erisive and annoying words can be taken as coming within the purview of the statute . . . when they . . . plainly tend[] to excite the addressee to a breach of the peace." *Gooding*, 405 U.S. at 523. Threatening to blow up the Casino would reasonably breach the peace.

Although this Court has not ruled on a fighting words matter in several years, lower courts across the country have continued to develop the fighting words doctrine through cases that arise under disorderly conduct statutes. *See, e.g.*, *In re J.K.P.*, 296 P.3d 1140, 1148 (Kan. Ct. App. 2013) (citing a disorderly conduct statute that criminalized fighting words). Lower courts have considered various factors beyond pure speech to determine if one's speech has divulged from protected speech into unprotected fighting words by breaching the peace. *State v. York*, 732 A.2d 859, 860 (Me. 1999) (finding defendant was guilty of fighting words because his "conduct included not just speech, but also the physical acts of declining obstreperously to leave the building . . . and attempting to spit [on the recipient]"). Some of these factors include the volume, profanities, the speech's recipient, and a refused request to leave the vicinity. *See Hale*, 110 N.E.3d at 894 (shouting and profane language found to be fighting words); *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191, 1201 (D. Kan. 2004) (profanities shouted at police officer found to be fighting words); *State v. Nelson*, No. A14-0356, 2014 WL 7237043, at *11 (Minn. Ct. App. Dec. 22, 2014) (defendant's refusal to leave contributed to his conviction).

Shouting profanities can constitute fighting words even when police constrain the speaker. *See Hale*, 110 N.E.3d at 894 (explaining that defendant was convicted for disorderly conduct partly because, during his arrest, he yelled "obscene remarks" in a "provoking" manner). In this case, *before* the police constrained Henrikson, he shouted profanities at the Casino employees such as "this is bullshit," calling the workers "pieces of shit" and "ignorant dumbasses." (J.A. at 5.) These phrases, shouted before the police arrived, may have made the observers and receivers concerned for their safety. But, because the police were not yet there to constrain him, onlookers had more reason to believe that violence would ensue.

Harassing employees and refusing a command to leave a business can constitute fighting words and criminal activity under disorderly conduct statutes. *See Nelson*, 2014 WL 7237043, at *11 (explaining that defendant was convicted under disorderly conduct statute for swearing at employees and remaining at the business after employees asked him to leave). The employees not only asked Henrikson to leave but called the security guards to remove him. Yet, he still refused to leave the premises. (J.A. at 6.) By remaining in the Casino and yelling at its employees, Henrikson breached the peace.

Further, the recipient of the hostile expression is also a factor in the analysis because "[a] store clerk at his place of work should not be expected to tolerate the same level of abuse" as police officers. *Nelson*, 2014 WL 7237043, at *4. Henrikson's most hostile behavior was directed at the Casino employees before the police officers arrived. (J.A. at 5.) Police are specially trained to respond calmly to insults and hostile behavior in a way that Casino employees are not. Thus, Henrikson's fighting words directed at the employees would further breach the peace.

Even yelling profanities and insults at police officers in public can still break disorderly conduct statutes and thus constitute fighting words. *McCormick*, 325 F. Supp. 2d at 1191 (finding that plaintiffs shouting profanities at police officers was "inherently likely to produce a violent reaction"). Similarly, Henrikson's statements included cursing at the officers, saying that they were "in the pocket of the Casino," that they were "Keystone Cops," and that they were going to "ring one up" for the Casino. (J.A. at 6.) Though merely questioning police officers' legitimacy may not rise to the level of fighting words, cursing at them would likely support a fighting words finding.

Henrikson's speech constituted fighting words because of its loud volume, use of profanities, and numerous insults directed toward the Casino employees and police officers. Since fighting words are not protected under the First Amendment, Henrikson's arrest was proper because it did not violate his rights.

B. Even If Henrikson's Speech Was Protected, The Police Had Probable Cause To Arrest Him Because He Broke The Disorderly Conduct Statute, He Failed To Prove That Similarly Situated Individuals Were Not Arrested For The Same Crime, And The Police Had No Retaliatory Animus.

"Probable cause to arrest exists when the information within the officer's knowledge at the time of the arrest would be enough to allow a reasonable law enforcement officer to believe that an offense has been or is being committed by the person to be arrested." *United States v. Cruz*, 910 F.2d 1072, 1076 (3d Cir. 1990) (citing *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979)). Probable cause is determined based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). This is a low standard because "[o]fficers need to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

The New Delta Disorderly Conduct Statute states in relevant part:

> A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disruptive conduct, annoys or interferes with another person; or (3) makes unreasonable noise.

New Delta Rev. Stat. § 32-11-102(1)–(3).

At the Casino, Henrikson had been shouting at the employees and stated that he "ought to go get his gun and blow the place up." (J.A. at 5.) The reference to his gun would constitute threatening behavior under subsection (1), and his shouting would violate section (3)'s prohibition on unreasonable noise. New Delta Rev. Stat. § 32-11-102(1), (3). At least one of the employees felt fearful because of his actions, and his behavior caused the other customers to leave the premises entirely, violating section (2). *Id.* § 32-11-102(2). By the time the police arrived at the scene, Henrikson still had not left despite the security guards' attempts to remove him, and he began shouting insults at the police, alleging that the Casino corrupted them. (J.A. at 6.)

Officer Thomas assessed the situation and concluded that merely escorting Henrikson out of the building would not resolve the situation, especially because he had already been asked by security guards to leave. (J.A. at 6–7.) In the mind of a reasonable police officer, considering the totality of the circumstances, there was probable cause to support an arrest for criminal conduct under the Disorderly Conduct Statute. Additionally, as discussed in Section I-A, the police had reason to believe that Henrikson violated the Terrorist Threat Statute, and thus probable cause existed under both criminal statutes. (J.A. at 7.)

An officer can still have probable cause at the time of arrest even if prosecutors later drop the charges against an arrestee, the case is dismissed, or if he is declared not guilty at trial. *Whiting v. Bonazza*, 545 F. Appx. 126, 127 (3d Cir. 2013) (holding that probable cause still

existed to arrest a woman for aggressively arguing with neighbors about her property line even though the case was dismissed); *see also Cruz*, 910 F.2d at 1076 (determining whether there was probable cause based on the time of the arrest). Although Henrikson was not convicted for violating the Disorderly Conduct Statute, that does not negate the fact that the officers had probable cause at the time of his arrest based on his language, volume, and refusal to be escorted from the Casino. (J.A. at 7.)

Further, arresting someone for non-violent speech can provide probable cause if the volume and context of the speech allow a reasonable police officer to believe the speech violates a disorderly conduct statute. *See Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998) (finding that there was "arguable probable cause" when police arrested a man preaching on the sidewalk for disorderly conduct because he was loud and at a very busy intersection). Even if this Court does not believe probable cause existed in hindsight, the probable cause standard requires courts to step into the shoes of a reasonable police officer at the time of the arrest. Because there was probable cause under the Disorderly Conduct Statute for Henrikson's arrest, his First Amendment retaliatory arrest claim fails.

i. *Henrikson's Retaliatory Arrest Claim Fails Because He Has Insufficient Evidence That Similarly Situated Individuals Were Not Arrested For The Same Crime.*

In *Nieves*, this Court recognized a narrow exception to the "no-probable-cause" requirement for First Amendment civil claims. 139 S. Ct. at 1727. The burden of proof falls on the arrestee to demonstrate with "objective evidence" that even though probable cause existed at the time of arrest, similarly situated individuals would not be arrested for the same crime. *Id.* The distinguishing factor is that the similarly situated individuals are not engaged in the same protected—likely inflammatory—speech as the arrestee. For example, suppose an individual insults a police officer while jaywalking and is subsequently arrested for jaywalking, whereas

another jaywalker is not arrested. In that case, the court may have reason to believe that the arrest was retaliatory. *Id.*

Here, as the arrestee, Henrikson has failed to meet his burden of proof that similarly situated individuals would not be arrested for the same crime. Previous Casino patrons were not arrested because the severity of their behavior was less hostile than Henrikson's. In all prior incidents, agitated patrons' behavior quickly subsided upon an escort off the premises and a simple verbal warning not to return. (J.A. at 39.) However, Henrikson acted hostilely, shouted profanities, and resisted removal by the security guards from the premises. (J.A. at 5–6.) Henrikson has not met his burden of proof because he failed to demonstrate the factors needed to draw a similarity between himself and other agitated patrons. For example, he did not present the volume, language, and recipient of those other outbursts. Therefore, there is no evidence that these other patrons are similarly situated to Henrikson and thus cannot be used as an objective metric for proving retaliation.

The *Nieves* exception does not apply to an arrestee if his only form of "objective evidence" is that similarly situated individuals broke a different aspect of the same law. *See Gonzales v. Trevino*, 42 F.4th 487, 492 (5th Cir. 2022) (finding that the Nieves exception did not apply when the plaintiff only presented evidence of a different type of conduct that was criminalized under the same statute). Henrikson violated subsections (1), (2), and (3) of the Disorderly Conduct Statute by shouting, cursing, disrupting business, refusing to leave, and putting at least one employee in fear of her safety. (J.A. at 6.) Thus, he cannot claim to be similarly situated to a person guilty of violating only subsection (3) of the Disorderly Conduct Statute because they each violated different aspects of the same law.

Although the *Nieves* majority stated that the evidentiary standard is "objective," one circuit has taken an overly broad approach. *See, e.g.*, *Lund v. City of Rockford*, 956 F.3d 938, 945 (7th Cir. 2020). The Seventh Circuit has strayed from the objective evidence standard by instead recognizing a "comparison-based" evidentiary standard to fulfill the *Nieves* exception. *Id.* at 945 (arguing that the dissenting opinions are more "commonsensical" than the majority approach). This approach ultimately contradicts the plain language of the majority's opinion and ignores this Court's intent to construe a narrow safety valve for retaliatory arrest claims. *See Gonzales*, 42 F.4th at 493 ("Had the majority wished to soften or broaden the language of the exception in response to . . . criticisms, it could have done so.")

In *Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022), although there was probable cause to arrest the plaintiff, the court found it to be retaliatory. *Ballentine* is distinguishable from the present case for two reasons. First, the police arrested the plaintiff for writing explicit messages in chalk outside a local police station. *Id.* The messages were not permanent, and unlike Henrikson's actions, there was no risk of physical harm or threats to anyone. *See id.* Second, other people were writing chalk messages outside the police station, but police only arrested the individual who wrote anti-police messages. *Id.* Thus, there was clear objective evidence supporting his retaliation claim.

ii. *Even If There Was Not Probable Cause, The Arrest Was Not Retaliatory Because The Police Had No Retaliatory Animus.*

First Amendment civil claims generally are only successful when plaintiffs can show that the police officers did not have probable cause to arrest them. *Nieves*, 139 S. Ct. at 1722 (citing *Hartman*, 547 U.S. at 260). This protects police officers from frivolous civil damages claims while allowing officers the necessary flexibility in performing their duties. *See Egbert v. Boule*, 142 S. Ct. 1793, 1807 (2022). *Nieves* indicates that if there was no probable cause for the arrest,

the inquiry then becomes whether there was a "causal connection" between the government's retaliatory animus and the subsequent injury. *Nieves,* 139 S. Ct. at 1722 (finding that the only evidence of animus was a police officer stating "bet you wish you talked to me now" to the defendant but did not address if this was enough to establish a causal connection). The retaliatory motive must cause the injury; it is not enough to have a retaliatory motive at *some point* in the interaction. *Id.*

There is no evidence that Officer Thomas had retaliatory animus when he arrested Henrikson. In fact, the evidence demonstrates the opposite. When he first arrived at the scene, Officer Thomas did not arrest Henrikson. (J.A. at 6.) Even after Henrikson insulted and cursed at the officers who were present, Officer Thomas still did not arrest him. (J.A. at 6.) Officer Thomas first called his supervisor to receive a second opinion on whether an arrest was necessary, and only then did he proceed with the arrest. (J.A. at 6.) By taking time to check with another more highly trained officer on whether he should conduct an arrest, (J.A. at 6), Officer Thomas was not attempting to retaliate against Henrikson for his disrespectful comments towards the police.

Because there is no evidence of Officer Thomas seeking to retaliate with animus against Henrikson, there is no causal link between retaliation and any alleged subsequent injury. Thus, Officer Thomas properly arrested Henrikson, and Henrikson cannot recover.

CONCLUSION

Freedom of speech should promote social values and intellectual ideas—not societal chaos and safety concerns. The Twelfth Circuit erred in holding that the Terrorist Threat Statute was unconstitutional and that Henrikson's arrest was retaliatory. Unless this Court reverses that decision, law-abiding citizens will risk losing their right to be free from disruption and fear of

violence, and intimidators and aggressors will continue to cause panic, conflict, and harm. Therefore, this Court should reverse the Twelfth Circuit's decision.