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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

T.M.

JUVENILE APPELLANT.

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WASHINGTON STATE
SUPREME COURT
b/h

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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I. INTRODUCTION

This case involves the troubling prosecution of a teenager who made statements about a third party to a licensed therapist *while in therapy*. The teenager did not directly communicate these statements to anyone but his therapist, and the putative victims were informed by authorities only after he was already in custody. Despite the lack of any evidence of intent to harm, the trial court found T.M. criminally liable for harassment because his statements could be viewed as threatening by an objective listener. After certification by Division III, this Court accepted review on the question of the effect of recent United States Supreme Court case law on this Court's precedent adopting an objective test for what constitutes a "true threat."

The Court should take this opportunity to overrule its decision in *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) (setting forth objective test for what constitutes a true threat) and hold that Washington's true threat test requires subjective intent to threaten. Such a holding would make our state law consistent with the two most recent relevant United States Supreme Court decisions, *Virginia v. Black* and *Elonis v. United States*. It would also be sound policy, as the facts of this case underscore the unequal burdens created by the objective test, which disproportionately impact (and chill the speech of) marginalized

populations such as juveniles and those in mental health treatment.

II. STATEMENT OF INTEREST

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 50,000 members dedicated to the preservation of civil liberties. The ACLU strongly opposes laws and government action that infringe on the free exchange of ideas and unconstitutionally restrict protected expression. It has advocated for free speech as *amicus curiae* at all levels of the state and federal court systems. The ACLU is particularly concerned with the chilling effect of criminal sanctions on those who engage in protected speech.

III. ISSUE TO BE ADDRESSED BY *AMICUS*

Whether this Court should adopt an intent standard for Washington State “true threat” jurisprudence based upon the United States Supreme Court’s decisions in *Elonis v. United States* and *Virginia v. Black*. This brief also addresses policy considerations *amicus* submit the Court should consider.

IV. ARGUMENT

A. The Court Should Revisit and Overrule *State v. Williams* and Require True Threats to Have a Subjective Intent Element

The First Amendment’s protection is not limited only to thoughtful, deliberate, or well-reasoned speech. First Amendment protection “extends to speech and conduct that society at large views as

vile, politically incorrect, or born of hate.” *Williams*, 144 Wn.2d at 209.

As Justice Douglas famously noted in *Terminiello* (an incitement case):

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4-5, 69 S. Ct. 894, 93 L. Ed. 1131

(1949). Although pure speech generally cannot be criminalized, there are a few narrow categories of speech that fall outside of First Amendment protections, including “true threat[s].” *United States v. Alvarez*, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012) (noting that content-based restrictions are generally permissible “only when confined to the few historic and traditional categories [of expression] long familiar to the bar”). *See also Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

Courts have interpreted the First Amendment to allow for prohibitions of true threats because of the government’s interest in “protect[ing] individuals from the fear of violence” and “from the

disruption that fear engenders.” *Virginia v. Black*, 538 U.S. 343, 359-60, 123 S. Ct. 1536, 155 L. Ed. 535 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)). However, “true threats” must be narrowly defined to avoid sweeping constitutionally protected speech into their ambit, and “must be interpreted with the commands of the First Amendment clearly in mind.” *Watts*, 394 U.S. at 707.¹

1. “True threats” must require subjective intent.

The United States Supreme Court defines true threats as “statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359. In *Virginia v. Black*, the Court found unconstitutional Virginia’s ban on cross burning—even though cross-burning has been linked to lynching, fire-bombing, white supremacy, intimidation, threats, and terrorism. The Court held that while the state could proscribe cross burning that satisfies the “true threat”

¹ The statute under which the appellant was convicted contains the term “knowing” but this has been interpreted by this Court to only apply to the communication itself, not that it would reach the putative victim or that it was known to constitute a threat. *See State v. J.M.*, 144 Wn.2d 472, 483, 23 P.3d 720 (2001). As to the *mens rea* underlying the threat itself, despite acknowledging that if the term knowingly “had been left to its ordinary meaning, it could be understood to require that the speaker be aware that his words or actions frightened the hearer,” *State v. Schaler*, 169 Wn.2d 274, 286, 236 P.3d 858 (2010), the Court has not imposed a requirement that the speaker know or intend that the words spoken constitute a threat. *Id.* at 287 n.3.

standard, it could not adopt a statute that presumed all cross burnings were intended to intimidate. *Id.* at 366-67. In so doing, it emphasized the long-held First Amendment principle that speech can only be criminalized as a “true threat” when there is intent to intimidate. *Id.* at 359. As such, *Black* recognizes that a speaker’s subjective intent to threaten is a requisite constitutional element in a criminal conviction predicated on threatening speech.

Instead of requiring that a speaker actually intend to threaten, as per *Black*, speech in Washington may be punished as long as an objective, reasonable person could view it as threatening—regardless of whether the speaker meant the speech to be a joke, or otherwise did not actually intend for it to be a threat. *See Schaler*, 169 Wn.2d at 287. This Court’s true threat test was adopted in the wake of *Watts*, but prior to the Supreme Court’s ruling in *Black*. Similarly situated courts that previously had adopted an objective standard for their “true threat” jurisprudence — including the Seventh Circuit on whose decision the Court relied—have expressed doubt about or outright abandoned the objective test post-*Black*. *See, e.g., United States v. Heineman*, 767 F.3d 970, 978 (10th Cir. 2014) (reading *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. Parr*, 545 F.3d

491, 500 (7th Cir. 2008) (noting that in light of *Black*, “an entirely objective definition is no longer tenable.”). *See also Brewington v. State*, 7 N.E.3d 946, 964-65 (Ind. 2014). This Court should do the same.

2. Use of the objective test will result in a chilling effect on speech and arbitrary enforcement.

The United States Supreme Court has repeatedly warned of the “chilling” effect that the threat of criminal prosecution has on free speech, even where that speech contains reference to conducting future criminal activity. *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) (“The chilling effect upon the exercise of First Amendment rights may derive from the fact of [criminal] prosecution, unaffected by the prospects of its success or failure.”). Requiring a *mens rea* of subjective intent for crimes that are predicated on pure speech provides critical “breathing room” for potentially valuable speech by “reducing an honest speaker’s fear that he or she may accidentally incur criminal liability for speaking.” *Alvarez*, 132 S. Ct. at 2553. The true threat test similarly requires such breathing room.

The rationale for subjective intent in “true threat” jurisprudence to ensure that protected speech is not unduly burdened was first articulated by Justice Thurgood Marshall in his concurring opinion in *Rogers v. United States*. 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975). There,

Justice Marshall expressed a particular concern with the First Amendment implications of an objective test for determining whether speech rose to the level of a “true threat[.]” *Id.* at 47. He found that an objective test would sweep too broadly and undermine the First Amendment, and warned that courts “should be particularly wary of adopting such a standard for a statute that regulates pure speech” *in part because such a standard* “charg[es] the [speaker] with responsibility for the effect of his statements on [] listeners.” Justice Marshall also warned of the possible chilling effect of such a test on speech. *Id.* at 47-48. As stated by the United States Supreme Court in another context, “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134, 112 S. Ct. 2395, 120 L. Ed. 101 (1992). Yet this is precisely what the objective test accomplishes.

Justice Marshall’s concerns were echoed in *Virginia v. Black* and formed the basis for requiring intent to determine whether speech was an unprotected “true threat.” *Black*, 538 U.S. at 359. *See also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (overturning conviction for threatening the president because the defendant lacked subjective intent to threaten); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (applying subjective test articulated in *Black*); *Brewington*, 7 N.E.3d at 969 (requiring intent but also requiring a reasonable person to

perceive the statement as a test); *People v. Dye*, No. 4–13–0799, 2015 WL 4609913 (Ill. App. Ct. Aug. 3, 2015) (holding true threats require intentionality despite state statute requiring only “knowledge”); *O’Brien v. Borowski*, 461 Mass. 415, 426, 961 N.E.2d 547 (Mass. 2012) (requiring subjective intent), *abrogated on other grounds by Seney v. Morhy*, 467 Mass. 58, 3 N.E.3d 577 (Mass. 2014); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011) (adopting subjective intent test to determine whether defendant intended to threaten in the course of his mental health treatment).

So-called “objective” enforcement standards are not in fact objective at all, but rather largely dependent upon the identities of the speaker and/or the listener. Recent press reports on trigger warnings, for example, underscore the impossibility of identifying what any one person would find threatening. *See, e.g.,* Libby Nelson, *Why Trigger Warnings Are Really so Controversial, Explained*, Vox Magazine (Sept. 10, 2015), <http://www.vox.com/2015/9/10/9298577/trigger-warnings-college>. Such standards are also impossible to insulate from the now widely understood phenomenon of implicit bias—which means the chilling effect created by an objective standard would not in fact be borne equally by all members of society.

B. The Objective Test is Required by Due Process and Longstanding Principles of Criminal Law

In addition to the objective test's friction with the First Amendment, there are also fundamental due process issues at stake. Convicting a speaker for threats based on the objective, reasonable-listener standard does not require sufficient culpability on the part of the speaker. As a matter of due process, the true threat analysis should incorporate some *mens rea* more than mere negligence. And this is precisely the approach the Supreme Court recently took when it interpreted a federal threat statute without an explicit *mens rea* requirement.² See *Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).

In *Elonis*, an individual posted on Facebook threatening, “crude, degrading, and violent material about his soon-to-be ex-wife,” *id.* at 2002, and was convicted under 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another.” *Id.* The United States Supreme Court vacated *Elonis*' conviction because the jury instruction failed to require any awareness of wrongdoing on the part of the defendant; the failure to include such an instruction violated the

² *Elonis* presents a separate but related rationale from *Black* to require intent on the part of the speaker.

fundamental principle of due process “that a defendant must be ‘blameworthy in mind’ before he can be found guilty[.]” *Elonis*, 135 S. Ct. at 2009 (quoting *Morrisette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (2015)). The Court concluded that federal threat statutes must incorporate a sufficiently high *mens rea* requirement to “separate wrongful conduct from ‘otherwise innocent conduct.’”³ In so holding, the *Elonis* Court relied on the basic principle that “wrongdoing must be conscious to be criminal,” particularly where a conviction is to be based solely upon pure speech. *Elonis*, 135 S. Ct. at 2009; *Morrisette*, 342 U.S. at 252. Although the Court did not indicate what level of *mens rea* was sufficient, it specifically noted that an objective reasonable-person standard is inconsistent with “the conventional requirement for criminal conduct—awareness of some wrongdoing.” *Elonis*, 135 S. Ct. at 2011.

Despite the Washington threat statute’s use of “knowingly,” this Court has not required a standard higher than negligence (as to the threat element) before a speaker may be convicted. *See Schaler*, 169 Wn.2d at

³ At least one court has already reconsidered its intent requirement for a threat statute post-*Elonis*. *See Aboye v. United States*, No. 13-CM-1219, 2015 WL 4714153 at *4 n.18 (D.C. C.A. Aug. 6, 2015) (describing a threat conviction that was reheard and vacated in light of the *Elonis* subjective-intent requirement); *but see State v. Krona*, No. 71810-0-I, 2015 WL 4531223 (Wn. App. July 27, 2015) (declining to revisit a statutory reading requiring the objective test in light of the ruling in *Elonis*). *See also People v. Murillo*, 238 Cal. App. 4th 1122, 1129, 190 Cal.Rptr.3d 119 (2015) (rejecting *Elonis*’ statutory construction for a California law that already had an intentionality element built into it and therefore comported with the general principles of *Elonis*).

287 n.3. In fact, it expressly adopted “simple negligence” as the *mens rea* required to convict for a threat. *See id.* at 287. This approach is at odds with *Elonis*, which cautioned that mere negligence is *not* sufficient to distinguish “wrongful conduct from ‘otherwise innocent conduct.’” *Elonis*, 135 S. Ct. at 2010 (quoting *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000)). *Elonis* holds that when faced with a threat statute with no *mens rea* as to the threat, courts should infer the requirement of criminal intent (*i.e.*, something higher than negligence).⁴ The Court should take that approach here.

C. This Court Should Consider the Collateral Consequences of Criminalizing Speech by Juveniles When Crafting a True Threat Standard

This case represents part of a troubling larger trend of prosecuting juveniles for their speech. *See, e.g., State v. Kohonen*, ___P.3d___, 2016 WL 492651 (Wn. App. Feb. 8, 2016). Criminal prosecution can have negative long term consequences for anyone, but especially for young people. Requiring proof of intent to harm in criminal prosecutions for threatening speech will help to limit unnecessary prosecutions of young

⁴ The State in its supplemental brief argues that the statute already requires that “the defendant act with knowledge in communicating a true threat,” (Defs.’ Supp. Br. at 6), but this misconstrues the mental state that *Elonis* requires. *Elonis* requires *mens rea* as to the nature of the threat, not the fact of the communication. *See Elonis*, 135 S. Ct. at 2012 (“calculated purveyance” of a threat would require that *Elonis* know the threatening nature of his communication”).

people for typical adolescent behavior.

- 1. Failing to require intent to establish a true threat is likely to result in increased prosecution of young people engaging in typical adolescent behavior.**

The criminalization of typical adolescent behavior—speaking angrily and hastily without intent to follow through—contributes to adolescent alienation from the authority figures in their lives and can have long-lasting effects.⁵ A number of studies have now revealed fundamental differences between adolescent and mature brains in risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure.” *State v. O’Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015) (citing *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. Ed 1 (2005)). Each of these developmental factors could contribute to an adolescent making ostensibly threatening statements with no actual intent to cause harm.⁶ As such, “[w]e should [be careful to] not criminalize and pathologize typical juvenile behavior.” *State v. E.J.J.*, 183 Wn.2d 497, 528, 354 P.3d 815 (2015). This is because:

⁵ The law may require a mental health provider to give notice to individuals or the police when a young person threatens harm to others at school. This is appropriate. What is inappropriate is prosecuting children who need help and are not a credible threat to others.

⁶ D. Cornell, et. al., *A Retrospective Study of School Safety Conditions in High Schools Using the Virginia Threat Assessment Guidelines Versus Alternative Approaches*, *School Psychology Quarterly* Vol. 24 No. 2, 119-129 (2009) (differentiating between transient threats, such as jokes or statements made in anger, and substantive threats, which are expressions of a genuine intent to harm someone).

[A]s any parent knows . . . “a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”

Roper, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993)). See also *Miller v. Alabama*, 132 S. Ct. 2455, 2467, 183 L. Ed. 2d 407 (2012) (“[Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity[,] and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage[.]” (first alteration in original) (internal quotation marks and citations omitted)).

Routing juveniles through the criminal justice system for speech that is often an expression of trauma has several negative consequences. First, even when the speech in question doesn’t happen on school grounds, juveniles are often removed or at least temporarily derailed from their educational pursuits to their (and society’s) long-term detriment.

Reclaiming Students: The Educational and Economic Costs of Exclusionary Discipline in Washington State, Washington Appleseed and TeamChild (Nov. 2012) at 18, available at http://www.teamchild.org/docs/uploads/Reclaiming_Students_-_a_report_by_WA_Appleseed__TeamChild.pdf (surveying statewide

school discipline practices and impact of exclusionary discipline). Second, such a tack ignores more effective—and non-legal—ways to address students who speak out in this way.⁷ For example, Washington State and King County have implemented a number of restorative and creative justice programs to provide communities with methods other than incarceration for intervening with inappropriate and disruptive behavior.⁸ Third, the criminalization of this behavior absent actual intent to threaten disproportionately affects juveniles with disabilities.¹⁰ Finally, the risk of prosecution for statements that are not actually intended to be “true threats” is further heightened in an age in which teenagers increasingly

⁷ Council for State Governments, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System* (2014) at 119-2, available at https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf (discussing systems that promote positive conduct and use graduated systems of responses to student misconduct that hold young people accountable while keeping them in school and community as much as is possible).

⁸ Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to rectify the harms. To accomplish this restorative justice focuses on providing the person, who broke the law or caused injury to another, to be held accountable by their community and to have the opportunity to take corrective action.

⁹ For example, King County’s Creative Justice arts based program “works to increase understanding of the root causes of incarceration, like systemic racism and other forms of oppression, while simultaneously strengthening the protective factors and pro-social behaviors that allow us to make positive life choices.” *About Creative Justice*, creativejustice4culture.org, <http://creativejustice.4culture.org/about/> (last visited Mar. 21, 2016).

¹⁰ Depending on their disability, young people may not understand how their words will be interpreted or how their statements may be inappropriate. Prosecuting youth with disabilities is both inhumane and counter-productive, particularly when support from a school counselor or community mental health provider can be an effective way of intervening in a situation that involves hurtful or threatening speech.

transmit content over social media, which further enables the impulsivity adolescents already experience. *Kohonen*, 2016 WL 492651 (reversing conviction of a high school student who sent tweets that bore “hyperbolic expressions of frustration”).

2. Speech made in therapy sessions should only be criminalized when there is subjective intent to harm.

Regardless of T.M.’s motivation, he expressed his thoughts in a wholly appropriate forum, and should not be punished for them absent any proof of his actual intent to cause harm. Mental health treatment should be a place where all—but especially children—are encouraged to speak freely, bond with, and open up to their counselors, without fear that their statements alone can be used as a basis for prosecution.¹¹ Frank and open discussion is the cornerstone of therapy and is an area in which constitutional protections should be robust in order to prevent any “chilling” of expression. *See Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (“[A] psychiatrist’s ability to help her patients is completely dependent upon [the patient’s] willingness and ability to talk freely.” (internal quotation marks omitted)). The subjective intent test ensures that individuals can seek counseling without fear that

¹¹ The duty to warn is an important safeguard and serves a great societal interest by protecting those who may be in danger—but nowhere does it require criminal sanctions against the patient.

transient threats or statements made in anger will lead to prosecution.

Although there are times when it may be appropriate to intervene in mental health treatment, prosecution should be a last resort. If the goal is to maintain public safety—and to protect the safety of young people seeking mental health treatment—any standard other than a subjective intent standard would inevitably chill people from seeking treatment that could otherwise prevent harm. And, as Justice Sanders stated in his opinion in *Schaler*, there are other alternatives short of prosecution available, e.g. civil commitment if a person is a harm to themselves or others, when a patient makes statements in counseling that may be viewed as threatening. *Schaler*, 169 Wn.2d at 296 (Sanders, J., concurring and dissenting in part).

Indeed, the *Schaler* Court recognized the problems the objective reasonable-speaker standard creates in the context of mental health treatment:

While the standards may yield no meaningful difference in many cases, in this case the difference is not academic. Here, there was a genuine issue of whether a reasonable person in Schaler's position would foresee that threats he uttered to a mental health counselor while receiving medical care, which referred to third parties not present, would be interpreted as serious expressions of intent to harm those third parties.

Schaler, 169 Wn.2d at 290 n.7. A concurring and partially dissenting

Justice Sanders lamented that the Court's ruling overcriminalized speech and penalized someone for seeking help:

Schaler's speech in the context here had everything to do with Schaler, his attempt to get help, and his admirable efforts to try to work through his problems and—to the extent he was tempted to actually commit an unlawful act—his intent to resist that temptation. His speech had *nothing* to do with any intent to coerce, intimidate, or humiliate his neighbors. To the extent Schaler posed a danger to his neighbors or the community if released without further treatment, there is a legal mechanism (not at issue here) where a person can be civilly confined involuntarily.

Id. at 296 (Sanders, J., concurring and dissenting in part).

V. CONCLUSION

For the foregoing reasons this court should apply the subjective intent standard to Washington's "true threat" jurisprudence and reverse T.M.'s conviction.

Respectfully submitted this 21st day of March, 2016.

By:  _____

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