No. _____

In the

Supreme Court of the United States

STEVEN J. PARR

Petitioner,

- v. -

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "true threat" doctrine, as articulated by this Court in *Virginia v. Black*, 538 U.S. 343 (2003), requires a speaker to have a subjective intent to threaten in order for the speech to be constitutionally proscribable under the First Amendment, or whether the speech need only be objectively threatening?

II. Whether, under the First Amendment, the government may introduce testimonial evidence of prior statements and actions unknown to the recipient of the alleged threat in order to establish a subjective intent to "threaten"?

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The decision of The United States Court of Appeals for the Seventh Circuit is reported at 545 F.3d 491, and is reprinted in the Appendix ("App.") at 1a-28a. The district court orders denying defendant's motion for acquittal and motion to suppress evidence were not reported but are reprinted at App. 29a-33a and 34a-46a. The district court order on Defendant's motion to exclude Rule 404(b) Evidence is not reported but is reprinted at App. 46a-84a.

JURISDICTION

The court of appeals entered judgment on September 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STAUTORY PROVISIONS

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. § 2332a is reprinted at App. 85a-88a.

STATEMENT OF THE CASE

I. Factual Background of the Prosecuted Threat

In August of 2004, while serving out the end of a two-year sentence for marijuana distribution at the Oshkosh medium security prison in Oshkosh, Wisconsin, defendant Steven J. Parr was assigned a new cellmate. Trial Transcript Vol. 1 ("Tr. 1"); 43; Tr. 2; 266. This new cellmate, John Shultz, was serving sentences for multiple sexual assaults and attempted child enticement. Tr. 2; 266. Shultz was also facing the possibility of indefinite civil commitment following his release from prison pursuant to Chapter 980 of Wisconsin General Laws. Tr. 2; 258-60.

On August 23, 2004, 28 days before Parr's scheduled release to a halfway house, Shultz wrote a letter to the FBI alleging that "somebody is making plans to blow up the federal building." App. 3a, 49a. The federal building in question was located in Milwaukee, and this alleged "somebody" was Schultz's cellmate, Parr. App. 3a. Schultz described Parr's alleged plan as a "serious threat," and explained that Parr, "told me, swor[e] to me, that he is going to get you guys." Trial Exhibit 1 ("Tr. Exh. 1") 6-7. Shultz further asserted that Parr was a self-professed "follower" of the domestic terrorist Timothy McVeigh. App. 3a. FBI agents subsequently convinced Shultz to wear a wire and to induce Parr to repeat the alleged threats against the federal

building in Milwaukee. Tr. 2; 290-91, 310. Shultz agreed, and on September 20, 2004, the day before Parr's scheduled release, FBI agents outfitted Shultz with a recording device. App. 3a, 48a.

Shultz recorded over four hours of conversation, much of which involved joking and discussion of the trials and tribulations of prison life. Tr. Exh. 2A. After an initial reference to the alleged plot fail to elicit the desired response, approximately two hours into the conversation, Shultz began questioning Parr about how to construct a silencer for a gun and how and where he learned about various chemical reactions that could be used to make bombs. Tr. Exh. 2A; 21, 24-36. Parr responded that much of what he knew he learned either from the *Anarchist's Cookbook*, an underground anti-government publication, or from a basic course on chemistry in college. Tr. Exh. 2A; 22-25. Parr had in fact taken only one chemistry course in college—where he received an "F" on his first assignment—ultimately dropping out of both the class and college shortly thereafter. Tr. 3; 327-28. Indeed, Shultz, himself a college graduate with a minor in chemistry, would later testify at trial that Parr's knowledge of chemistry was "kind of a joke," and that he often amused himself by correcting Parr's chemistry and observing Parr's dumbfounded reactions. Tr. 2; 264-65, 269-70. The two went on to discuss Parr's exploits with a number of small-scale explosives Parr claimed he had constructed at his

home. Tr. Exh. 2A; 37-55. Parr made no implicit or explicit threats in describing his experiences with small-scale explosives, however.

Approximately half an hour later, Parr left the cell. Tr. Exh. 2A; 53. Shultz, narrating events unfolding to the FBI agents listening in, explained that Parr was "gonna get his pill . . . And his pill's gonna kick in and I'm just gonna get him talkin' like you wouldn't believe." Tr. Exh. 2A; 53-54. Shultz was referring to the fact that Parr had left the cell to take prescription Quetiapine, a drug commonly used to treat mood and anxiety disorders, including bi-polar disorder. Tr 3; 500. Shultz also explained to the FBI agents that "You wanted a homerun. You're gettin' a home run;" and that "[I'm] [t]akin' a big risk for you guys." Tr. Exh. 2A; 54.

Upon Parr's return, Shultz began questioning him about how to build a bomb big "enough to blow up my parole building, my parole officer's building." Tr. Exh. 2A; 54. After discussing Parr's opinion on a number of options, the conversation shifted to a bomb Parr allegedly constructed out of a cosmetic face cream can to disfigure a former girlfriend; one he "chickened out" on actually using. App. 4a. Shultz then asked Parr "Why didn't [sic.] bomb anybody if you were makin' all these fuckin' bombs? What are you waiting for"? Parr replied that "I didn't wanna, I just, I didn't wanna hurt no one." Tr. Exh. 2A; 73. Shultz then stated "[y]ou don't give a

fuck about hurtin' anybody when you do the federal building." Parr replied that this was "different" and that his attitude towards the federal government was "changing" for the worst. Tr. Exh. 2A; 73.

The worsening attitude Parr referenced stemmed from his belief that the federal government was responsible for "taking away" his son, after a paternity suit filed by a former girlfriend. Tr. Exh. 2A; 98. Although Schultz pointed out that Parr's anger towards the federal government was misplaced since it was Wisconsin, not the federal government, that divested Par of custody, Parr explained he believed "[t]he states are subservient to the feds," and that the state government was just the "messenger." Tr. Exh. 2A; 98-99. Accordingly, Parr explained that the loss of his son was "the straw that broke the camel's back," with regards to his attitude towards the federal government. Tr. Exh. 2A; 98. Parr subsequently admitted that he was fascinated by violent acts towards the government, like those of Timothy McVeigh, that "would change the attitude of the country," and "get a lot of people motivated." Tr. Exh. 2A; 98-101. When asked by Schultz if he "would like to be the next McVeigh," in this regard, Parr didn't object, stating: "[y]eah, the next McVeigh." Tr. Exh. 2A; 101.

While inducing Parr to discuss his anger towards the federal government, Shultz told Parr he wanted to know more about a "urea bomb," because

"this is the one I think I can make." Tr. Exh. 2A; 74. Shultz explained that he wanted to know about the bomb because "I saw one of those 20/20 or Discovery channel . . . shows and they used urea." Tr. Exh. 2A; 86. Shultz then inquired if Parr "could make a bomb just like what they blew up in there," and if "just a van full" would be enough to blow up the Milwaukee Federal building Schultz wanted to continue discussing. Tr. Exh. 2A; 86.

Despite Shultz's prompting, by this point in the conversation Parr had not volunteered a detailed version of the allegedly extensive plan of bombing the Milwaukee federal building. Accordingly, Shultz began pressing Parr on how Parr might overcome a plethora of tactical and strategic hurdles that would prevent him from making such a fantasy "statement" that "would change the attitude of the country." For example, Shultz questioned Parr if a van full of explosives would be enough or if he needed "a Ryder truck like McVeigh used"? Tr. Exh. 2A; 91. Similarly, in response to Schultz's allegation that driving a truck up to the building would look "awful suspicious," Parr opined that he could go to a store "and get me a set of Work n' Sport brown pants . . . [a]nd a brown button shirt . . . [and] get some sort of silly little, little ah name tag patch to make it look official." Tr. Exh. 2A; 91-92. Parr then agreed with Shultz's suggestion that the best "statement" would be to hurt the maximum number of federal agents

with the bomb, although he "hadn't quite figured out how." Tr. Exh. 2A; 102-03.

Having induced Parr to discuss some details of his fantasy "statement," Shultz pressed for a commitment to act. Shultz first tried to obtain a promise from Parr for exclusive interview rights after Parr did the deed, prompting Parr to laugh. Tr. Exh. 2A; 93-94. Parr then explained it would be a number of years before he would commit any act. Tr. Exh. 2A; 94. When Shultz asked "How long? How long do I gotta wait"? Parr responded, "Well, I'm 40 now. Maybe 50. Maybe it'll be my 50th birthday present." Tr. Exh. 2A; 94. Parr also expressed a desire to "pump out a few kids," first. Tr. Exh. 2A; 113. In an effort to get Parr to commit to a concrete date, Shultz pressed Parr four more times for an explicit commitment to follow through with the plan. Shultz first asked Parr if "there is a chance I won't have to wait 10 years"? Parr responded "Certainly is." Tr. Exh. 2A; 103. When asked, however, if there was a "[g]ood chance," Parr responded "I, I don't know. I, I'm not a gambler." Tr. Exh. 2A; 103. Later, Shultz pressed Parr a third time, stating:

> [Shultz]: So all this shit that you [sic.] been [sic.] tellin' me is not just all bullshit. Someday, someone's gonna get it I hope right?
>
> Parr: Absolutely.

[Shultz]: No doubt about it.

Parr. No doubt.

[Shultz]: Someone's gonna get it.

Parr: Someone's gonna get it.

App. 5a-6a.

Finally, upon Shultz confiding in Parr that "when my life becomes worthless . . . when I get cancer, when I get sick I wanna take somebody out," Parr agreed with the sentiment stating "there's gonna come a certain point in time where I just have nothing else and there's nothing else I wanna do . . . it's time to make my statement cause [sic.] I have nothing to lose." Tr. Exh. 2A; 112-13.

On September 21, 2004, Parr was released to a halfway house. App. 36a. The very next day, however, Parr was taken back into custody under the authority of his parole agent because of the concerns the FBI had about his conversation with Schultz. App. 36a. Parr was held in custody without a warrant for eight days and, on the eighth day, was finally interviewed by the FBI. App. 6a, 39a. Parr initially waived representation by counsel, and denied making any threatening statements against the Milwaukee federal building; asserting that it was Shultz who conceived of the plot. App. 6a. When confronted with the fact that the FBI had recorded his conversation with Shultz, however, Parr later

admitted to, "lawyering-up," i.e., refusing to say any more about the incident. App. 23a. Finding it significant that Parr declined to suggest his statements to Shultz were mere "jokes," on September 29, 2004, the day Parr was first interviewed, the FBI obtained an arrest warrant. Tr. 1; 107; App. 39a. The government then proceeded to charge and indict Parr under 18 U.S.C § 22321(a) for "threate[ning] . . . to use, a weapon of mass destruction . . . against any . . . property within the United States." App. 48a.

II. Proceedings Below

a. Pre-Trial Evidentiary Issues

The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to 18 U.S.C. § 3231. In district court, Parr filed a motion to suppress the statements made to the FBI during his custodial interview and also to suppress anti-government writings and literature FBI agents recovered after searching Parr's prison possessions and, among other places, his last known residence. App. 35a. Following the denial of this motion, the government moved under Federal Rule of Evidence 404(b) ("Rule 404(b)") to introduce the testimony of several of Parr's former neighbors, girlfriends, co-workers and cellmates at trial to corroborate the government's claim that Parr held anti-government views and would likely someday act on his alleged fantasy. App. 47a, 67a-69a.

Additionally, the government moved to introduce the anti-government and bomb making literature recovered from its searches of Parr's personal effects and his personal diary. App. 75a-80a. Finally, the government sought to introduce testimony of an FBI explosives expert to explain that, with practice, Parr would someday be capable of building the bombs he spoke of with Shultz. App. 12a.

In weighing the merits of introducing this evidence, the district court stated the requirements of Rule 404(b) as follows:

> Evidence of other crimes, wrongs or acts is admissible under this rule, if it meets four requirements: "(1) it is directed toward establishing a matter other than the defendant's propensity to commit the crime, (2) the evidence was sufficient to support a jury finding that the defendant committed the similar act, (3) the other act is similar enough and close enough in time to be relevant to the matter at issue, and (4) the probative value is not substantially outweighed by the danger of unfair prejudice." *United States v. Coleman*, 179 F.3d 1056, 1061 (7th Cir. 1999).

App. 66a.

In reviewing the proffered Rule 404(b) evidence, the district court initially established that, under the statute and the Seventh Circuit's "true threat" jurisprudence, Parr's subjective intent was irrelevant to the factfinder's determination of whether the statements were "true threats." App. 65a, 69a. Nevertheless, based on its understanding of Rule 404(b), the district court ruled that testimony from Parr's former neighbors and girlfriends about his anti-government views and experiences building small scale bombs was at least "relevant" and therefore not unfairly prejudicial for the jury to consider when evaluating whether the prosecuted statements were themselves "true threats." App. 71a-76a. The district court accordingly permitted the testimony of the former girlfriends and neighbors, who later testified at trial about Parr's great interest in chemistry and bomb building, his sincere anti-government views and his admiration of Timothy McVeigh. App. 7a-8a, 71a-76a. The district court also permitted the testimony of the FBI explosives expert. App. 72a. It rejected the testimony of only those witnesses whose accounts were either cumulative in light of the evidence already admitted, or too remote to be reliable. App. 73a, 75a, 81a, 83a. Notably, the majority of the admitted witnesses' testimony would ultimately be in regard to facts, statements and acts unknowable to Shultz at the time he induced Parr to make the statements the government prosecuted.

b. Trial and Sentencing

At trial, the government presented the testimony of 12 witnesses, all of whom were either FBI agents or former associates of Parr's not present for the actual "true threat," the government prosecuted. App. 6a-7a, 71a-76a. Their testimony was proffered to establish Parr's statements about his alleged fantasy were "true threats" because: 1) Parr had access to explosives; 2) he often bragged about explosives; 3) some of this bragging may have been warranted; and 4) he maintained a genuine dislike of the federal government. App. 6a-8a. The defense called five witnesses, including Shultz. Tr. 2; 252. In addition to Shultz, the defense's witnesses were Parr's brother, a former FBI bomb blast expert, a psychiatrist and Parr himself. Tr. 3; 323, 388, 442, 472. The defense's witnesses testified that: 1) Parr suffered from a form of post-traumatic stress disorder and was being treated with mood stabilizers and anti-psychotics while in prison; 2) Parr was a braggart prone to exaggeration; and 3) Parr's knowledge of chemistry and bomb making was substantially exaggerated by Schultz and the government. Tr. 3; 323-27, 388-405, 442, 472. At the close of trial, the district court judge instructed the jury that, in order to find Parr's statements constituted a "true threat":

> you must find that the statement attributed to the defendant was made in a context or under such circumstances

> wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza.

App. 98a.

Without elaboration, the district court also informed the jury that it must be satisfied "the defendant intended his statement to be understood in [a threatening] manner." App. 98a. The trial court further explained that a "true threat"

> is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension is a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner.

App. at 98a.

During deliberations, the jury requested the anti-government documents, pamphlets and the *Anarchist's Cookbook* recovered from Parr's residence. Tr. 4; 627. Parr's counsel objected, arguing that introducing this material into the deliberation was highly prejudicial and inflammatory. Tr. 4; 638-39. The district court

judge overruled the objection and the materials were provided to the jury. Tr. 4; 640-44. Shortly after receiving these documents, the jury returned with a guilty verdict. Tr. 4; 645.

Parr was subsequently sentenced to 120 months in prison with 60 months supervised release and a $2,000 fine. App. 8a. Although the pre-sentencing report and a number of sentencing enhancements (including an enhancement for crimes "involving a federal crime of terrorism" under U.S.S.G. § 3A1.4) recommended a guideline range of 360 months to life, the district court settled for 120 months because the crime did not fall in the "heartland" of the guidelines due to the fact that Parr's threat was not "imminent." App. 8a.

c. Appeal

Parr appealed under 18 U.S.C. § 1291, which granted the Seventh Circuit jurisdiction. On appeal, Parr argued that his conviction violated the First Amendment because the prosecuted statements were not "true threats," since the statements, taken in the context in which they were actually made, were neither threatening in fact nor expressions of "imminent" harm. App. 11a. Furthermore, Parr argued the district court erred in admitting the testimony of a majority of the 12 witnesses under Rule 404(b), since none of this testimony went towards proving or disproving either the objective or subjective "threatening" nature of the prosecuted

statements and only served to prejudice the jury. App. 11a.

The government cross-appealed, arguing that the district court's imposition of a 120 month sentence was unreasonably low. App. 26a. The basis for this cross-appeal was that the district court failed to properly justify its departure. App. 26a. Furthermore, the government argued, because the district court acknowledged Parr's conviction involved a "crime of terrorism" the downward departure was especially unwarranted. App. 2a, 26a.

In affirming Parr's conviction, the Seventh Circuit acknowledged a circuit split on the intent a speaker must have for a statement to constitute a "true threat." App. at 13a-16a. The panel also acknowledged that the district court's instruction to the jury that it must find Parr had a subjective intent to threaten was contrary to Seventh Circuit precedent, which required the alleged threat be evaluated from a strictly objective "reasonable speaker" or "reasonable listener" point of view. App. at 18a-19a. Nevertheless, the panel held that, in light of this Court's opinion in *Virginia v. Black*, 538 U.S. 343 (2003), an instruction on subjective intent to threaten, when coupled with the Seventh Circuit's requirement of an instruction on objective intent, was not constitutionally infirm. App. 16a. Finally, the court held that there was no unconstitutional prejudice in the government's use of witness

testimony unconnected to the content or context of the alleged "threat" because background information in the government's possession obtained via search warrants and interviews (but not in the recipient's possession at the time of the alleged "threat"), was relevant to the jury's determination of "true threats." App. 17a-18a. Although this evidence was introduced at trial under the guise of Rule 404(b), the Seventh Circuit affirmed its use under Federal Rule of Evidence 403 ("Rule 403"). App. 46a, 18a, 67a. The panel did concede, however, that the district court's decision to allow the jury to review the anti-government literature in the deliberation room was prejudicial, but ultimately concluded this error was harmless. App. 20a-21a. Finally, with regards to sentencing, the Seventh Circuit remanded, finding that the district court erred in calculating enhancements and that the court failed to provide the requisite "strong justification" for a 20 year departure for the sentencing guidelines. App. 26a-27a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE INTER- AND INTRA-CIRCUIT SPLITS ON THE REQUISTE INTENT A SPEAKER MUST HAVE FOR HIS STATEMENTS TO CONSTITUTE "TRUE THREATS" UNPROTECTED BY THE FIRST AMENDMENT AND TO REJECT THE

VALIDITY OF THE SEVENTH CIRCUIT'S BROAD FORMULATION OF THE "TRUE THREAT" DOCTRINE AND ITS UNCONSTIUTIONAL EVIDENTIARY STANDARD

Prohibitions against the content of pure speech are presumptively invalid under the First Amendment unless drafted in a way that, while protecting a compelling state interest, also limit likely and foreseeable restrictions on protected speech. *See e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). This immutable premise has been the guiding light of this Court's First Amendment jurisprudence and the litmus test for evaluating the constitutionality of countless state and federal restrictions on speech. *See e.g. Chaplinsky v. N.H.*, 315 U.S. 568, 571-72 (1942); *Carroll v. Princess Anne*, 393 U.S. 175, 183-184 (1968); *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Yet, despite the mandate of this fundamental principle of the First Amendment, since this Court first established the doctrine of "true threats" in *Watts v. United States*, 394 U.S. 705 (1969), for nearly 40 years, it has by and large left lower courts to sort out a broad and unclear constitutional standard imposing criminal liability on the content of pure speech. *See e.g. U.S. v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (describing this Court's most recent formulation of the "true

threat" doctrine in *Virginia v. Black*, 538 U.S. 343 (2003), as "unclear"); *Planned Parenthood of the Columbia Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2002) (noting that, with respect to the definition of "true threats," "[t]he Supreme Court has provided benchmarks, but no definitions"); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA L. REV. 1225, 1252 (2006) ("the lack of clear guidance from the Supreme Court on this subject has fostered the proliferation of eclectic and contradictory standards.").

As most recently articulated by this Court in *Virginia v. Black*, "true threats," proscribable under the First Amendment "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (internal citations omitted). Notwithstanding this definition, the circuit courts remain bitterly and irreversibly divided on whether the government must prove a purely objective "reasonable listener" or "reasonable speaker" would find a statement truly threatening, or whether the government must show a speaker had a "subjective intent to threaten," before the statement constitutes a "true threat." *Compare U.S. v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004) ("a communication is a 'true threat' if a reasonable person would foresee that the statement would be interpreted by those to whom the maker

communicates the statement as a serious expression of an intention to inflict bodily harm") (internal quotation omitted), *with U.S. v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (holding that, in light of this Court's *Black* opinion, "[w]e are [] bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' *only* upon proof that the speaker *subjectively* intended the speech as a threat.") (emphasis added) (citing *Black*, 538 U.S. at 360). Depending on the standard applied, these two approaches lead to dramatically different outcomes and different restrictions on the content of pure speech within and across the circuit courts.

In holding that the fantastical statements teased out of Parr by his cellmate constituted a "serious expression of an intent to commit an act of unlawful violence," *Black*, 538 U.S. at 359, the Seventh Circuit panel below took neither approach, however. Instead, the panel broke with its own precedent (and that of a majority of circuits) to fashion a new hybrid subjective/objective standard for "true threats." *See Parr*, 545 F.3d at 500. Not only did the Seventh Circuit contribute a fresh division to the inter- and intra-circuit splits with its "split the baby" approach to "true threats," it also endorsed an evidentiary standard that is unconstitutional when applied to restrictions on pure speech—a standard permitting the government to establish the purported threatening nature of the prosecuted speech primarily by reference to the prior

acts and statements known to the *government* through warrants and subpoenas but not the recipient of the alleged threat. *Id.* at 498-99.

The Seventh Circuit's broad definition of "true threats," is in direct conflict with its sister circuits, and the new three way inter- and intra-circuit split leaves the lower courts with an ambiguous "true threat" doctrine at war with the fundamental principles of the First Amendment. Moreover, not only is the Seventh Circuit's new evidentiary standard, as applied to its broad definition of "true threats," in conflict with the objective and subjective approaches it purports to advance, it also violates the principle of the First Amendment that an evidentiary standard must protect against convictions based solely on "speech [that] stirred people to anger, invited public dispute, or brought about a condition of unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949).

a. This Court's Definition of "True Threats" Is Open To Multiple Competing Interpretations And The Numerous Inter- And Intra Circuit Splits Demonstrate The Lower Courts Are Intractably Divided On The Correct Constitutional Standard, Leading to an Unconstitutionally Broad "True Threat" Doctrine.

This Court has clearly established that, although the government may not proscribe categories of expressive speech because of a disapproval of the ideas expressed therein, *see R.A.V.*, 505 U.S. at 382, it may, in certain "well defined and narrowly limited" circumstances, place restrictions on the content of pure speech where the underlying message or conduct expressed will cause a clearly articulated and imminent harm. *Chaplinsky*, 315 U.S. at 571-72; *c.f.also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *Ashcroft*, 535 U.S. at 253 ("The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'") (quoting *Hess v. Indiana,* 414 U.S. 105, 108 (1973) (*per curium*)). Furthermore, not only must the harm be clear, imminent and narrowly defined,

but the benefit to society of restricting the speech must substantially outweigh the violence done to the principles of the First Amendment by such content based restrictions. *See Chaplinsky*, 315 U.S. at 571-72.

This Court has thus far failed to provide lower courts with such a coherent and narrowly defined standard for its self-created doctrine of "true threats"; a doctrine utilized by the circuit courts to impose penal restrictions on the content of pure speech through constitutionally based statutory interpretation. *See e.g. U.S. v. Hanna*, 293 F.3d 1080, 1087 (9th Cir. 2002). Indeed, as evidenced by the competing definitions of "true threats" both within and across the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, the "true threat" doctrine is being interpreted in myriad open-ended and conflicting ways. *Compare Fuller*, 387 F.3d at 646 (collecting "objective intent to threaten" approaches to "true threats" across the circuits), *with U.S. v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (endorsing a "subjective intent to threaten" standard for "true threats"), *and Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (outlining Ninth Circuit internal split on the intent requirement for "true threats").

i. This Court's Formulation of the "True Threat" Doctrine Is Open to

Multiple Irreconcilable Interpretations.

This Court has only fleetingly addressed what speech constitutes "true threats." In the first case to address the question, this Court held in *Watts v. United States*, that a statute prohibiting a person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States," could not be constitutionally applied to the statement of a Vietnam War protester who asserted at a public anti-war rally that "[i]f they ever make me carry a rifle the first man I want in my sights is L.B.J." 394 U.S. at 706, 708. In overruling a jury and a D.C. Circuit panel that found these statements constituted "true threats," this Court simply disagreed, instead characterizing the statements as "political hyperbole." *Id.* at 708. Because of the Constitution's "commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," and this Court's recognition that such debate might include "vehement caustic, and sometimes unpleasantly sharp attacks on government and public officials," the *Watts* Court held that the context of the defendant's statements made the jury's threat determination unconstitutional. *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)). This Court, however, failed to establish a clear standard for what would constitute a "true threat," under different circumstances.

Subsequently, in the only other majority opinion to address the issue since *Watts*, this Court briefly articulated a definition of "true threats" in *Virginia v. Black*. 538 U.S. at 359-60. In *Black*, this Court addressed the question of whether a state statute making it a felony "for any person . . . with the intent of intimidating any person or group . . ., to burn . . . a cross on the property of another, a highway or other public place," was unconstitutional in light of a provision of the same statute that made "any such burning . . . prima facie evidence of an intent to intimidate a person or group." *See Id.* at 348. While the *Black* Court was principally concerned with the question of whether the statute was an unconstitutional form of viewpoint or content discrimination, in holding the statute unconstitutional, the Court explained that "true threats," "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. The Court further elaborated its "true threat" definition by noting that, "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where the speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added). Only a plurality, however, went on to assert that, because a cross might be burned for purposes other than intimidation (resulting in speech protected by the

First Amendment), the trial court's instruction on the prima facie evidence provision rendered the threat determination unconstitutional. *Id.* at 364.

ii. The Lower Courts Are Deeply And Irreversibly Divided on the Question of the Intent a Speaker Must Have For a Statement to Become a "True Threat"

Prior to *Black*, seven circuits, including the Seventh, adopted a "reasonable speaker" test for "true threats," requiring the government to prove the speaker made the prosecuted statement "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *U.S. v. Roy*, 416 F.2d 847, 877 (1969); *see also* Crane, 92 VA L. REV. at 1244-45 (compiling pre-*Black* circuit approaches). Essentially a "negligence" test for speech, *see e.g. id.* at 1241 (citing *Rogers v. U.S.*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring)), many circuits anchored this objective standard in the First Amendment, holding it was constitutionally mandated. *See e.g. U.S. v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984). Rifts among and within the circuits began to emerge, however, as panels from five circuits, interpreting various statutes, adopted a "reasonable listener" test

for "true threats," requiring the government to prove "any ordinary reasonable recipient [of the statement] who is familiar with the context of the [statement] would interpret it as a threat of injury." *U.S. v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973); *see also* Crane, 92 VA L. REV. at 1246-47 (compiling "reasonable listener" approaches). Meanwhile, the Fifth Circuit adopted a "neutral reasonable person" test, defining a "true threat" as a statement that "in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *See e.g. U.S. v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1997) (internal quotations omitted).

To further confuse matters, in *Rogers v. United States,* Justice Marshall brought to the fore a subjective standard for "true threats" in a concurring opinion. 422 U.S. at 48 (Marshall, J., concurring). In *Rogers*, this Court granted certiorari in order to address the emerging circuit divide on the correct intent standard for "true threats," under 18 U.S.C. § 871(a), the statute criminalizing threats made against the President of the United States. *See id.* at 36. Ultimately, however, the *Rogers* court declined to address the question certiorari was granted for, instead opting to reverse on procedural error grounds. *See id.* at 42 (Marshall, J., concurring). In a concurring opinion, however, Justice Marshall did address the intent question, proposing that "true threats" only encompassed those statements "the

speaker *intends* to be interpreted as expressions of an intent to kill or injure." *Id.* at 47 (emphasis added). Thus, under this "specific intent to threaten" version of "true threats," the speaker must have intended for the statement to cause the recipient to fear imminent injury to himself or to some third person, *see e.g. U.S. v. Patillo*, 438 F.2d 13, 15 (4th Cir. 1971) (holding that "true threats" may be communicated to third parties), at the time the prosecuted statement was made.

Although Justice Marshall's proposed "specific intent to threaten" test failed to meaningfully impact the predominantly objective approaches to "true threats" in the circuit courts, this Court's reference to a subjective intent requirement for "true threats" in *Black* caused total chaos to erupt. *See e.g.* Crane, 92 VA L. REV. at 1261-1269.

For starters, in the first post-*Black* "true threat" case in the Seventh Circuit, a panel maintained the validity of the "reasonable speaker" approach, without a single citation to *Black* and its subjective intent definition of "true threats." *See Fuller*, 387 F.3d 643. This "head in the sand" approach was initially popular in the First, Fourth, Fifth, Eighth and Eleventh Circuits. *See U.S. v. Nishnianidze*, 342 F.3d 6, 15-17 (1st Cir. 2003); *U.S. v. Lockhart*, 382 F.3d 447, 451-52 (4th Cir. 2004); *U.S. v. Reynolds*, 381 F.3d 404, 406 (5th Cir. 2004);

U.S. v. Koski, 424 F.3d 812 (8th Cir. 2005); *U.S. v. Alaboud*, 347 F.3d 1293, 1297-98 (11th Cir. 2003).

Recently, however, many circuit courts began to acknowledge but dodge the import of a potential subjective approach to "true threats," articulated in *Black*. Thus, in *United States v. Cope*, the Sixth Circuit refused to decide if *Black* required a wholesale revision of the Sixth Circuit's objective "true threat" standard on plain error review of a jury instruction where the panel ultimately agreed with the outcome. 283 Fed.Appx. 384, 389 (6th Cir. 2008) (unpublished opinion). Similarly, in *United States v. Floyd*, an Eight Circuit panel implied it was powerless to address the import of *Black*. 458 F.3d 844, 848 (8th Cir. 2006) ("[O]ur panel is bound by *Koski*, decided two years after *Black*, which specifically noted that the intent of the sender is not an element of a section 876(c) offense. If the reasoning in *Koski* is faulty in light of *Black*, our panel cannot address it—only the *en banc* court can do so.").

Meanwhile, in *United States v. Magleby*, the Tenth Circuit held *Black* mandated a departure from its "reasonable speaker" test in favor of a subjective standard where, in order to qualify as a "true threat," a statement must be made "'with the intent of placing the victim in fear of bodily harm or death.'" 420 F.3d at 1139 (quoting *Black*, 538 U.S. at 360). *See also Parr*, 545 F.3d. at 499 (describing *Magleby*

as a "subjective" approach); Crane, 92 VA L. REV. at 1227 (same). Thus, the Tenth Circuit found great significance in this Court's use of an explicit subjective intent to threaten requirement for "intimidating true threats" and, accordingly, applied this requirement to all "true threats." Recently, however, without citation to *Black* or *Magleby*, a different Tenth Circuit panel announced in *United States v. Pinson* that "[o]ur Court, like most others, employs an objective standard [for 'true threats'] to evaluate [only] whether a defendant 'willfully' made a threat," thus setting up an intra-circuit split on intent. 542 F.3d 822, 831-32 (10th Cir. 2008).

For its part, the first panel to address the intent question post-*Black* in the Ninth Circuit took the same approach as the Seventh, First, Fourth and Eleventh Circuits by simply ignoring *Black* while maintaining the "reasonable speaker" test was the law of the land. *See U.S. v. Lincoln*, 403 F.3d 703, 706 (9th Cir. 2005). Within two months, however, a different panel arrived at the same conclusion as the Tenth Circuit in *Magleby*, asserting that *Black* overruled the Ninth Circuit's "reasonable speaker" test because the Supreme Court's "definition of a constitutionally proscribable threat is, of course, binding on us even though it is in tension with some of the holdings and language in prior cases of this circuit." *Cassel*, 408 F.3d at 633. Once again, however, in less than two months time a third Ninth Circuit panel held that the *Cassel* panel was

mistaken about the scope of *Black* and that "*Cassel* does not alter the analysis of presidential threats, [where] we employ the decades-old approach to analyzing threats [utilizing the 'reasonable speaker' test]." *U.S. v. Romo,* 413 F.3d 1044, 1051 n.6 (9th Cir. 2005). Evidently reaching an insurmountable impasse on the constitutional definition of "true threats," the Ninth Circuit now analyzes "true threats" under both intent standards, either hoping they will not conflict or justifying the ultimate conclusion on the alleged threat *ex post.* Thus, in *United States v. Stewart*, a Ninth Circuit panel held it need not resolve the intra-circuit split on the correct intent standard where both tests failed to provide First Amendment protection for the prosecuted speech. 420 F.3d 1007, 1018 (9th Cir. 2005). Most recently in *Fogel v. Collins*, another panel once again determined that it need not adopt a uniform intent test where both tests resulted in the prosecuted speech falling under the protection of the First Amendment. 531 F.3d at 831. *See also U.S. v. Sutcliffe*, 505 F.3d 944, 961-62 (9th Cir. 2007) ("Defendant argues that the jury was erroneously instructed to apply an objective, rather than subjective, test to determine whether his statements constituted true threats. Given our contradictory case law on this issue, it is not clear that the instruction was actually erroneous."). Indeed, the District Court for the Northern District of New Jersey recently highlighted the absurdity of the Ninth Circuit approach, observing that "[t]he Third

Circuit does not share the Ninth Circuit's apparent inability to determine what comprises a 'true threat.'" *U.S. v. D'Amario*, 461 F.Supp.2d 298, 302 (D.N.J. 2006).

The divide on the requisite intent for "true threats" reached its apex in the Seventh Circuit's *Parr* decision below. Rather than hold the district court's hybrid objective/subjective jury instruction either flatly violated the purportedly constitutionally mandated Seventh Circuit objective standard, or hold that it was plainly erroneous and must be overruled in light of the subjective intent standard other panels found mandated by this Court in *Black*, the Seventh Circuit panel simply hedged. *Parr*, 545 F.3d at 500. Thus, according to the panel:

> a standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder might be asked first to determine whether a reasonable person, under the circumstances, would interpret the speakers statement as a threat, and second, whether the speaker intended it as a threat.

Id.

In short, *Black* failed to move the circuit courts towards a uniform "true threat" standard. Indeed, if this Court achieved anything with its

definition of "true threats" in *Black*, it was to deepen the circuit divide and increase the opportunity for inconsistent approaches. Because these divergent standards fail to comprise a "narrowly drawn and limited," body of First Amendment law, *Chaplinsky*, 315 U.S. at 573, and because, contrary to the Ninth and Seventh Circuits' current approach, there is great potential for divergent outcomes under the two standards, this Court must grant certiorari.

iii. The Conflicting Intent Standards in the Circuit Courts Lead to Divergent Outcomes.

The conflict in the lower courts over intent is meaningful, and the diverging approaches lead to dramatically different outcomes and available defenses when applied to the content of similar or identical speech. *See e.g.* Crane, 92 VA L. REV. at 1236. More importantly, however, as the Seventh Circuit's *Parr* decision illustrates, there are at least two ways of establishing a "subjective intent to threaten" that result in dramatically different doctrines and outcomes.

With regards to prosecution of "true threats" under the objective standard, as Justice Marshall noted in *Rogers*, the objective "negligence" standard subjects the defendant to prosecution "for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention."

Rogers, 422 U.S. at 47 (Marshall, J., concurring). Thus, the only requirement for prosecution under the objective standard is that the statement "was not the result of mistake, duress or coercion." *See e.g. U.S. v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972). On its face, then, this test precludes a defendant from successfully asserting he intended the statement as a crude joke, an expression of fantasy or "political hyperbole" if a reasonable speaker (as determined by a factfinder) doesn't "get" the joke or fails to perceive the hyperbole. *See e.g. Lockhart*, 382 F.3d at 452. The objective standard also eliminates the diminished capacity defense. *See e.g. U.S. v. Myers*, 104 F.3d 76, 80-81 (5th Cir. 1997) (holding that an individual suffering from post traumatic stress disorder was capable of making "true threats"); *U.S. v. Richards*, 415 F.Supp.2d 547, 551 (E.D. Pa. 2005) ("defendant's "evident . . . mental health problems . . . do not prevent his threats from being true threats.").

Under the subjective test, by contrast, the government must prove both that the statement was "voluntary" (as in the case of the objective tests) and that the defendant "*intended* to make a threatening statement, and that the statement he made was in fact threatening in nature." *Rogers*, 422 U.S. at 47 (emphasis added). Accordingly, the defendant is free to assert diminished capacity, if it prevents him from having formed the requisite intent. *See e.g. U.S. v. Twine*, 853 F.2d 676, 679-80 (9th Cir. 1988) (holding

that diminished capacity defense is available for certain statutorily defined "specific intent" "true threat" crimes). Additionally, the factfinder must weigh the relevant evidence surrounding the statements to determine whether the context suggests the speaker actually meant to place his audience "in fear of bodily harm or death." *C.f. Magleby*, 420 F.3d at 1139.

Despite the requirement of subjective intent, on its face, the subjective test fails to provide any guidance on how the government may establish defendant's the intent. Two standards with dramatically different consequences are possible. First, the government might be limited to presenting evidence of what the speaker and the recipient of the threat knew or reasonably could know about each other at the time of the alleged threat. *C.f. Koski*, 424 F.3d at 822-23 (Bye, J., dissenting) (arguing for an evidentiary standard limited to the speaker's and the recipient's relationship). This approach limits the admissible evidence on subjective intent to all the relevant interactions between the speaker and the recipient at the time of the alleged threat and excludes statements, conduct and evidence unknown or unknowable to the recipient. *C.f. U.S. v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990) (applying the objective "reasonable listener" test and limiting admissible evidence to statements a recipient "familiar with the context of the communication" could evaluate).

A second approach, adopted by the Seventh Circuit in *Parr*, is allowing the factfinder to evaluate evidence unconnected to the prosecuted statements of prior actions or statements made by the defendant tending to show an omnipotent listener who knows everything there is to know about this defendant *should* construe the prosecuted statements as threats, even if it would be unreasonable for the recipient to do so. *Parr*, 545 F.3d at 501. Under this approach, prior statements, beliefs and actions unknown or unknowable to the recipient are permitted to influence the factfinder's determination of subjective intent. *Id.* Thus, according the Seventh Circuit, a factfinder's "true threat" determination

> is informed by but not limited to what the recipient or target of the alleged threat knew about the defendant. Contextual information—especially aspects of the defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible *regardless* of whether the recipient or targeted victim had full access to that information.

Id. at 502 (emphasis added). This approach is the crux of the constitutional infirmity of the Seventh Circuits hybrid subjective/objective approach.

b. The Evidentiary Standard For Establishing A "Subjective Intent To Threaten" Adopted By The Seventh Circuit Is Incorrect And Violates The First Amendment.

In affirming Parr's conviction, the Seventh Circuit found it significant that, at oral argument, Parr did not commit to facially challenging the jury instruction on the intent required for his statements to constitute a "true threat." *Parr*, 545 F.3d at 497. Moreover, the court noted, Parr's First Amendment challenge to the government's use of prior statements and anti-government literature as evidence to prove his purported subjective intent failed to constitute such a meaningful challenge because the trial court reasonably relied on the Federal Rules of Evidence. *Id.* at 501.

Put bluntly, The Seventh Circuit mischaracterized the basis of Parr's challenge and, while doing so, gave its blessing to an evidentiary standard that begs this Court's attention. The basis of Parr's challenge below was that he was entitled to a trial and jury instruction on whether his statements, based solely on the *content* and especially the *context* in which they were made, constituted "true threats," not simply whether a fleeting generalized instruction on present subjective intent sufficed in light of the evidence presented by the government. The distinction is a meaningful one, and one this Court's must resolve in the context

of the "subjective intent to threaten" approach to "true threats" currently applied (in some form) by the Seventh, Ninth and Tenth Circuits. *See supra* at 28-31. Regardless, as this Court noted in *Terminiello*, a petitioner's failure to object to a jury instruction is immaterial to this Court's consideration of a case where the instruction was unconstitutional. 337 U.S. at 5.

In *Black*, a plurality of this Court held that evidentiary standards applied to penal restrictions on the content of pure speech are unconstitutional where they are likely to "'skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak.'" *Black*, 538 U.S. at 366 (quoting *Black*, 538 U.S at 385 (Souter, J., concurring in judgment and dissenting in part)). Moreover, it has long been acknowledged by this Court that juries are particularly unreliable vehicles for evaluating restrictions on pure speech when the underlying facts "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988). Thus, convictions obtained primarily based on evidence of speech that "stirred people to anger, invited public dispute, or brought about a condition of unrest . . . may not stand." *Terminiello*, 337 U.S. at 5; *c.f. also Old Chief v. U.S.*, 519 U.S. 172, 180 (1997) (holding that "relevant" evidence is not admissible under Rule 403's "unfair prejudice" rule

where the relevant evidence only serves "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.")

As noted *supra*, the Seventh Circuit's evidentiary standard, for "true threats" in light of Rule 403 provides that, "[c]ontextual information—especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat—is relevant and potentially admissible regardless of whether the recipient or targeted victim had full access to that information." *Parr*, 545 F.3d at 501. According to the Seventh Circuit, this interpretation of Rule 403 as applied to speech crimes strikes the right balance because "when a person says he plans to blow up a building, he will naturally be taken more seriously if he has a history of building bombs and supporting terrorism." *Id.* at 501.

The difficulty with the Seventh Circuit's new evidentiary standard is that it fails to acknowledge the critical distinction between highly prejudicial evidence of the probability of committing an *act* completely unconnected to the prosecuted statements, and evidence that proves an intent the prosecuted statements were meant to *threaten*. In any "true threat" case that applies the "subjective intent to threaten" approach there will always be potential evidence of both an intent to cause the recipient of the speech to fear some imminent harm,

either to himself or some third party, public building or official, *c.f. Patillo*, 438 F.2d at 15 (holding that threats against the president may be communicated to third parties because "[a] threat against the President may [itself] cause substantial harm . . . A President . . . has a personal interest in his own security, as does everyone."); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (noting that "true threats" may be communicated to third persons), as well as evidence connected or unconnected to the statements that the speaker actually intended to act in a certain way. Thus, in any given "true threat" case there are four possible intent scenarios. First, a speaker may have no intent to act and no intent for his speech to be threatening. Second, the speaker may have a private unexpressed desire to act, but no present intention for his otherwise innocuous statements to be threatening or to cause fear or disruption. Third, there may be an intent to threaten, but no actual intent to act on the threat. Finally, there may be an intent to act and an intent to threaten.

The "true threat" doctrine articulated by this Court in *Black* clearly covers the last two scenarios. *See* 538 U.S. at 359-60. Under the wide net cast by the Seventh Circuit's Rule 403 subjective intent evidentiary standard, however, convictions for "true threats" are also possible—indeed probable—under the first two scenarios. Under this standard, even if a reasonable speaker or listener (as determined by a

factfinder) would never find the prosecuted statements, standing alone in their proper context, to be "truly threatening," a factfinder might nevertheless compelled to find that the same statements spoken by *this particular defendant*, become "true threats" because of what the government, through warrants and subpoenas, has *subsequently* learned about the speaker's past statements and associations, as opposed to what the listener knows or can know.

That Parr was convicted for making non-imminent, qualified and hypothetical statements to his cellmate about a desire of someday expressing his anger towards the government with violence illustrates the danger of this approach. The bulk of the evidence admitted by the district court at Parr's trial went towards establishing a probability of *acting*, and not towards Parr's subjective intent of placing Shultz in fear of some *imminent* harm to himself or to a third party. At trial, the government presented the testimony of 12 witnesses who testified about Parr's anti-government views, his admiration of Timothy McVeigh and his affinity for explosives. App. 7a; 67a-72a. The Government also presented the testimony of an FBI explosives expert who claimed Parr would someday be able to build a big enough bomb "with practice." App 12a, 72a. Finally, in the deliberation room the jury reviewed, in their entirety, Parr's anti-government pamphlets and bombmaking handbooks. App. 21a, 80a; Tr 4; 640-41.

Absolutely *none* of this evidence did or could have established Parr's present "*intent* of placing [the recipient of the threat] in fear of bodily harm or death," or fear of harm to a third party. *Black*, 538 U.S at 360. Indeed, scant attention was paid to the content and context of the actual *qualified* statements that were prosecuted, where Parr only discussed the plan after taking his prescription mood-stabilization medication and after excessive pestering from Shultz. Tr. Exh. 2A; 53-54, 98-113. To the contrary, the jury was instructed to consider "*all* the evidence in the case, including the circumstantial evidence," to determine if Parr's possible past and future intentions conclusively proved his present intent. App. 93a, 98a (emphasis added).

If all this evidence, entirely unrelated to Parr's subjective intent to communicate a present *threat* to Shultz, did not "'skew jury deliberations toward conviction," *Black*, 538 U.S. at 366, it is difficult to imagine what would. If anything, evidence admitted under Rule 404(b) (affirmed by the Seventh Circuit under Rule 403, App. at 18a, 67a), of the hypothetical threat Parr might someday pose if released from prison forced the jury to ignore the contextual circumstances necessary for determining whether the statements were made with an actual subjective intent to *threaten*. As a plurality of this Court noted in *Black*, however, "[t]he First

Amendment does not permit such a shortcut." *Id.* at 367.

CONCLUSION

For the reasons stated, the Court should grant the petition for certiorari.

Respectfully submitted,

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