NOS. 18-1576/18-1608/18-1695

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

KIMBERLEY THAMES
Thames-Appellee/Cross-Appellant/Appellant

V.

NORMAN BROOKS; JOHN GATTI; JASON SOULLIERE; ADAM TARDIFF,
Defendants-Appellants/Cross-Appellees

AND

CITY OF WESTLAND; JEFF JEDRUSIK, individually and in his official capacity as Chief of Police, City of Westland Police Department
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE GEORGE CAREM STEEH
CASE NO. 2:16-cv-14130

PETITION FOR REHEARING EN BANC

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INTRODUCTION

This appeal arises from an allegation that Plaintiff Kimberly Thames said "something like 'I prophesy that bombs are going to fall, they're going to fall in the near future, and they're going to fall on you people, and on America, and bombs will blow up this building,'" while protesting outside of an abortion clinic. (Op. at 13). In defiance of controlling Supreme Court precedent, the panel made at least two fundamental errors warranting full court review. First, it erroneously concluded that Thames's alleged statement(s) provided probable cause to arrest and detain her for over 49 hours for making a "true threat." And second, it erroneously concluded that the officers who arrested Thames based on the alleged statement(s) are entitled to qualified immunity because they could reasonably believe that the statement(s) constituted a "true threat" under clearly established law.[1]

The panel's decision is "dangerously wrong" and must be reversed by the full Court before it becomes "a blueprint for the next police force that wants to silence speech without having to go through the burdensome process of law enforcement." *Bible Believers v. Wayne Cty.*, 765 F.3d 578, 596, 600 (6th Cir. 2014) (Clay, J., dissenting), *rev'd en banc*, 805 F.3d 228 (6th Cir. 2015).

[1] The panel also erroneously concluded that the City is not liable for Thames's unlawful arrest, which was executed by nearly the entire day shift and its supervisor, or her unlawful 49-hour detention—both of which were ratified by the City through its police chief. (Op. at 19-20).

In sum, this case involves questions of exceptional importance, and consideration by the full Court is necessary to secure and maintain uniformity of its decisions and to protect core First Amendment freedoms. Fed. R. App. P. 35(b)(1)(A) & (B).

SUMMARY OF THE CASE

Per the panel's opinion (verbatim): "On Saturday morning, August 27, 2016, Kimberley Thames, a 57-year old, Roman Catholic, pro-life activist, stood with three other people—an elderly woman who appeared to be a Catholic nun, and a wheelchair-bound man with his wife—on the public sidewalk outside Northland Family Planning, an abortion clinic. Thames was holding a two-foot-by-two-foot sign with a photo and handwritten words, advocating pro-life beliefs and protesting abortion. While *many Northland Clinic employees knew Thames as an occasional protestor*, the Clinic's security guard, Robert Parsley, apparently did not. He was standing somewhere near her when she engaged him in conversation, beginning with *her offer that she was praying for him and praying that he would find a different job*. But, at some point, there was discussion of bombs. *Thames said that Parsley raised the topic of bombs, telling her that there had been bombings and threats at abortion clinics*, but Parsley says that Thames initiated it and said something like: 'I prophesy bombs are going to fall and they're going to fall in the near future'; 'I prophesy bombs are going to fall and they're going to fall on you people'; and 'bombs, bombs on

America, and bombs will blow up this building.'" (Op. at 1-2 [emphasis added]).

As the record demonstrates, Parsley, the clinic security guard, (falsely) accused Thames of making a bomb threat, telling the officers *prior to Thames's arrest* that she stated the following: "***I prophesy bombs are going to fall and they're going to fall in the near future***."[2]

Prior to the police leaving the scene of the arrest, Parsley was instructed to make a written statement, in which he contradicted his prior statement and told the officers that the alleged "threat" was as follows: "***She said, bombs, bombs on America, and bombs will blow up this building***."[3]

Thames vehemently denied making any bomb threat, telling the police *at the scene and prior to her arrest*, that Parsley brought up the issue of clinic bombings, claiming that abortion clinics in Michigan have been bombed, to which Thames responded that she was not aware of any such bombings and that she is not the type of person who would do such a thing.[4] (*See* Op. at 2-4).

At the scene of the arrest, two officers searched Thames's vehicle, but did not find any explosives or any other contraband.[5] And despite the alleged concern about a bomb, the officers did not request the assistance of a bomb squad or bomb sniffing

[2] (R-35-7:Def. Ex. F Gatti Dep. at 52:12, 23-25 to 53:5-23, Pg.ID 490-91; R-36-3:Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg.ID 586).
[3] (R-36-3:Ex. E [Parsley Statement] [emphasis added], Pg.ID 614).
[4] (R-36-3:Ex. J Soulliere Dep. at 57:24-25 to 58:1-17, Pg.ID 655; R-36-3:Ex. C [Investigation] at 6, Pg.ID 593; R-36-2:Ex. 1 Thames Decl. ¶¶ 9-12, Pg.ID 565-66).
[5] (R-49:D.C. Op. at 7, Pg.ID 863).

dog, they did not direct the evacuation of the clinic, they did not search the clinic for a bomb, they did not search the surrounding area for a bomb, they did not search the adjacent parking lot for a bomb, they did not search the dumpster for a bomb, and they did not impound Thames's vehicle.[6]

The evidence also shows that there was no "alarm" on the part of the security guard or the clinic staff. As the recording of the 9-1-1 call demonstrates, Mary Guilbernat, the abortion clinic employee who made the call, was calmly speaking with the 9-1-1 dispatcher, and she told the dispatcher, *inter alia*, that Thames was simply holding a sign and that she (Mary) saw nothing to indicate that Thames had anything like a bomb.[7]

Based on the security guard's false accusation, Thames was handcuffed, brought to the police station, and jailed for ***over 49 hours*** under exceedingly difficult conditions. (*See* Op. at 7). Thames was finally released from jail when a detective reviewed the police report and properly concluded: "*I do not see a direct threat where Kimberley threatened to bomb the clinic*."[8]

Defendant Brooks, the senior officer directing Thames's arrest, explained his rationale for doing so as follows:

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[6] (R-36-3:Ex. J Soulliere Dep. at 34:14-25 to 35:1-12, Pg.ID 649; R-36-3:Ex. L Brooks Dep. at 26:15-25, 27:18-19, 28:1-17, Pg.ID 676).
[7] (R-36-3:Ex. J Soulliere Dep. at 46:5-25 to 48:1; R:36-3:Ex. A [9-1-1 Recording]).
[8] (R-36-3:Ex. N Farrar Dep. at 24:19-24, Pg.ID 686; R-36-3:Ex. D [Report] at 5, Pg.ID 611).

> I don't know the exact verbiage that—that he [Parsley] said to Officer Gatti. My—there's only one word that concerns me in this whole thing and that's bombs. Just like you can't yell fire in a crowded theater, ***you can't say anything about bombs near a facility that performs abortions***.

(Op. at 4). Brooks also testified that the "[t]hreat doesn't have to be credible according to the law."[9] (Op. at 7).

The district court properly held that the officers did not enjoy qualified immunity. However, the court erred by failing to find that the alleged "threats" do not constitute "true threats" as a matter of clearly established law under the First Amendment and thus erred by failing to enter judgment in Thames's favor. The panel compounded the district court's error by reversing the court's decision on the qualified immunity issue. Accordingly, the panel dismissed the case, thereby giving its imprimatur to the violation of Thames's rights and providing "license to lawless conduct." *See infra*.

ARGUMENT

The panel made a number of egregious errors when it decided these related appeals. First and foremost is the panel's erroneous conclusion that the statements attributed to Thames provided probable cause for her arrest and prolonged detention

[9] Contrary to the panel's claim (Op. at 13), credibility and capability are two distinct concepts. While the person making the threat need not have the *capability* to carry it out, the threat itself must still be *credible*—even more, it must be a "serious expression of an intent to commit an act of unlawful violence." *Va. v. Black*, 538 U.S. 343, 359 (2003). The officers' actions at the time of the arrest, as noted above, demonstrate without contradiction that they did not consider this a "true threat."

because the statements constituted a "true threat" and not protected speech. This conclusion conflicts with controlling Supreme Court precedent. Following from this error is the panel's erroneous conclusion that the arresting officers were entitled to qualified immunity because they could reasonably believe that the statements were "true threats," when in fact the statements were protected speech and could not serve as a basis for the arrest as a matter of clearly established law.

I. Thames's Alleged Statements Are Protected by the First Amendment.

To determine whether probable cause existed for arresting and detaining Thames for over 49 hours for allegedly making a terrorist threat, we must analyze the alleged crime. There is no dispute that Thames was arrested *for pure speech*. That is, there is no evidence of her making any threatening gestures, brandishing any weapons, or possessing or displaying anything that could remotely be considered criminal contraband (*e.g.*, a hoax bomb).[10] Further, statutes criminalizing speech "must be interpreted with the commands of the First Amendment clearly in mind" in order to distinguish true threats from constitutionally protected speech. *Watts v. United States*, 394 U.S. 705, 707 (1969). This principle applies to the alleged crime at issue here (Mich. Comp. Laws § 750.543m). *See People v. Osantowski*, 274 Mich. App. 593, 601, 736 N.W.2d 289, 297 (2007) (construing the statute as limited to "true threats" so as not to infringe on First Amendment protections, and confirming that "[s]tatutes that

[10] (*See* R-36-3:Ex. J Soulliere Dep. at 37:2-8; 44:15-17, Pg.ID 650, 651; R-36-3:Ex. L Brooks Dep. at 27:14-1850:2-7, Pg ID 676).

criminalize pure speech 'must be interpreted with the commands of the First Amendment clearly in mind'") (quoting *Watts*, 394 U.S. at 707); Mich. Comp. Laws § 750.543z ("[A] prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment . . . ."). And in cases involving the First Amendment, the Supreme Court demands *de novo* review "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

Thus, when there is no dispute of material fact, as in this case, the First Amendment question is ultimately a question of law. For example, in *Watts*, the Supreme Court instructed that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that is punishable under the law. By contrast, communications which convey political hyperbole (even if they mention weapons, such as guns or bombs) are protected by the First Amendment. *Id*. at 707-08; *see id.* at 706 ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). The Court instructed that Watt's alleged "threat" in its factual context (*i.e*., Watts was engaging in a political protest, not unlike the fact that Thames was also engaging in a protest against abortion on the public sidewalk outside of an abortion clinic) was not a "true threat" which could be constitutionally prosecuted, but

instead was mere "political hyperbole" immunized by the First Amendment. *Id*. at 706-08. Accordingly, the Court held that the speech could not be punished as a matter of law, thereby *reversing the jury conviction* and ordering the "entry of a judgment of acquittal." *Id*. at 708. The Court did not defer to the jury, as the panel asserts is required here (Op. at 14)—it *reversed* the jury.[11]

Likewise, in *Virginia v. Black*, 538 U.S. 343, 359 (2003), the Court stated that "'[t]rue 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." Accordingly, the Court held *as a matter of First Amendment law* that the burning of a cross itself cannot serve as the basis for prosecution since it is an expressive act. *See id*. at 360-68. In this way, *Black* confirms the concerns expressed in *Watts* about punishing pure speech and makes clear that whether the speech is protected is a legal determination for the court, particularly when there is no dispute as to the actual alleged "threat." *See also United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (upholding the dismissal of an indictment for making a threat). Significantly, the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), has this same thrust, emphasizing as it does that "the constitutional guarantees of free speech and free press do not permit a

[11] The panel's opposite conclusion (Op. at 14 [quoting *United States v. Hankins*, 195 F. App'x 295, 301 (6th Cir. 2006) and concluding that "[t]he jury determines whether a statement is a true threat"]) runs afoul of the First Amendment and threatens core First Amendment protections, requiring the full Court to correct this error.

State to forbid or proscribe *advocacy of the use of force or of law violation* except where such advocacy *is directed* to inciting or producing *imminent* lawless action *and is likely to incite or produce such action*." *Id*. at 447 (emphasis added).

This controlling precedent establishes that the *precise* words allegedly uttered by Thames are crucial and thus serve as the threshold for our inquiry. For if the words themselves cannot be criminalized within the commands of the First Amendment, there is *no basis* (probable cause or otherwise) for arresting Thames for uttering them.

The undisputed record reveals (by way of the sworn testimony of Defendant Gatti *and* the police video recording) the following with regard to the critically important question of fact: "*What exactly did she say*?":

* * *

> BY MR. MUISE:
> Q. We went over this in the internal investigation report and I stopped [the police video] at 8:52:53. [Parsley] told you, "I prophesy bombs, I prophesy bombs are going to fall in the near future." Is that your recollection?
> A. After seeing the video, yes.
> Q. And those are the -- you asked him specifically *what exactly did she say*, and that's what he told you, "*I prophesy bombs, I prophesy bombs are going to fall in the near future*", correct?
> A. Yes.[12]

This is *the* crucial exchange between Defendants' *only* witness to the alleged crime and the officers who are required to have probable cause before arresting Thames for this crime.

[12] (R-35-7:Def. Ex. F Gatti Dep. at 52:12, 23-25 to 53:5-23, Pg.ID 490-91; R-36-3:Ex. B [Police Video: JGatti at 8:51:31 to 8:52:53], Pg.ID 586).

Additionally, per the sworn *written* statement of Defendants' *only* witness to the alleged crime: "***She said, bombs, bombs on America, and bombs will blow up this building***."[13] This statement was signed by Parsley at the scene of the arrest and just minutes after Thames was taken into custody.[14]

The controlling—and well established—precedent cited above establishes that the statement(s) allegedly made by Thames are protected speech *as a matter of law*. The district court's findings support this conclusion. With regard to the alleged "prophesy threat," the district court properly observed the following: "In essence, to 'prophesy' means to prognosticate, but it does not suggest willful conduct or that the speaker will be responsible for carrying out the prediction."[15] The district court further noted that the "threat" described in the written statement, which wasn't conveyed to the officers until *after* they had arrested Thames, "is a vague prediction about the future and does not suggest any present intention on the part of Thames to carry out a crime of violence against the clinic." [16]

On these points, the district court was correct. The alleged statements utterly fail to meet the constitutionally mandated standard to constitute a "true threat" as a matter of law under *Watts*, *Black*, or *Brandenburg*. And changing the word "bomb" to "brimstone, or God's fiery wrath, or something that might be considered overzealous

[13] (R-36-3:Ex. E [Parsley Statement], Pg.ID 614).
[14] (R-36-3:Ex. M Tardiff Dep. at 18:21-25 to 20:1, Pg.ID 682).
[15] (R-49:D.C. Op. at 19, Pg.ID 875).
[16] (R-49:D.C. Op. at 20, Pg.ID 876).

proselytizing" doesn't change the legal conclusion, as the panel seems to suggest. (Op. at 13). Indeed, the panel's suggestion underscores the fact that neither statement is a true threat—each is political hyperbole at best. And neither statement projects the imminence required by *Brandenburg*. Remarkably, the panel does not deal with *Watts* or *Brandenburg*, and makes only passing mention of *Black* through a borrowed cite to a state court appellate decision.

Because there is no dispute of any *material* fact about what Thames is *alleged* to have said, probable cause should have been determined by the court as a matter of law. *Hale v. Kart*, 396 F.3d 721, 728 (6th Cir. 2005) (stating that "[w]hen no material dispute of fact exists, probable cause determinations are legal determinations that should be made" by the court); (*but see* Op. at 14 [stating that "[b]oth sides . . . are wrong" to "insist this is not a question of fact for a jury but a strictly legal decision for the court"]). And this is particularly important in a case such as this, which involves an arrest and detention for *pure speech*.

In the final analysis, Defendants' inability, *as a matter of law*, to make a threshold showing of an actionable "threat" is fatal to the officers' claim that they had probable cause to arrest Thames based on her alleged statement(s), and it is fatal to the panel's conclusion that the officers nonetheless enjoyed qualified immunity. It is also fatal to the panel's dismissal of Thames's claims based on a conclusion that no constitutional violation occurred. (*See* Op. at 19-20).

II. The Officers Do Not Enjoy Qualified Immunity.

Officers enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Saucier v. Katz*, 533 U.S. 194 (2001); *Pearson v. Callahan*, 555 U.S. 223 (2009). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

The qualified immunity analysis is ultimately an objective, legal analysis. As stated by the Supreme Court, "By defining the limits of qualified immunity essentially in objective terms, *we provide no license to lawless conduct*." *Harlow*, 457 U.S. at 819 (emphasis added). Additionally, when advancing their qualified immunity argument, the officers "must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case."[17] *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998).

[17] As the panel opinion notes, Thames acknowledges, *for the purpose of these interlocutory appeals*, that there is no genuine issue of material fact concerning the *allegation* that she made the statements attributed to her. (Op. at 8 n.4). But the

As demonstrated above, the question of whether an *alleged* statement qualifies as a "true threat" under clearly established law is a question of law when there is no dispute of fact about the *alleged* statement. *See Watts*, 394 U.S. at 708. And if the *alleged* speech is not a "true threat" under clearly established First Amendment jurisprudence, then the arrest was unlawful and the officers do not enjoy qualified immunity.

The undisputed material facts establish that no statement attributed to Thames qualifies as a "true threat" *as a matter of clearly established law*. *See supra*. As a result, the officers had *no legal basis* (probable cause or otherwise) for arresting, searching, and detaining Thames for *over 49 hours* based on these alleged statements. The officers do not enjoy qualified immunity. *See Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987) ("When an officer makes an arrest, it is a 'seizure' under the Fourth Amendment, and the arrest is a violation of a right secured by the amendment if there is not probable cause.").

Indeed, there are multiple reasons for finding Thames's arrest unlawful as a matter of clearly established law in addition to the central point that the alleged speech

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opinion mischaracterizes her position to the extent it suggests more than that. Thames has never conceded *for purposes of this case* that she had made the statements attributed to her by Parsley or that the officers actually believed she made these statements. Indeed, Thames emphasized that the statements were "allegedly" made over 30 times in her opening brief and more than 10 times in her reply, and she has consistently emphasized that the officers' actions belied their claim that they actually believed she made the statements or regarded them as a "true threat."

is not proscribable under the First Amendment. First, the officer (Brooks) who directed Thames's arrest testified that she could be arrested for merely uttering the word "bomb" outside of an abortion clinic and that the alleged threat need not be "credible" at all. Second, not only was there no imminence in the actual *words* of the alleged threat for which Thames was arrested, the actions of the officers demonstrate that they perceived no imminent fear or apprehension nor did they perceive the alleged "threat" to be credible in any way. In fact, the officers' actions demonstrate that they did not believe that this was a "*serious* expression of an intent to commit an act of unlawful violence" or that there was any reasonable ground to believe that the danger apprehended was imminent. As the undisputed evidence shows and as the district court properly found,[18] the officers did not evacuate the clinic nor did they search it or the surrounding area for a bomb, among other failings. In short, the officers did *nothing* that a reasonably prudent person who actually believed the alleged threat was serious, real, or imminent would do. And the only "witness" that the officers relied upon—the security guard—was not credible at all. He made *materially conflicting* statements at the scene of the arrest.

In the final analysis, there is only one reasonable—and legal—conclusion that can be drawn from the undisputed evidence: there was no justification, probable cause or otherwise, to arrest Thames as a matter of law. Defendants are liable for violating

[18] (R-49:D.C. Op. at 19, Pg.ID 875).

Thames's clearly established rights under the First and Fourth Amendments. Full Court review is warranted.

CONCLUSION

For the foregoing reasons, Thames respectfully requests *en banc* review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached petition is proportionally spaced, has a typeface of 14 points Times New Roman, and it contains 3,777 words.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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