

In the  
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2013-1174
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Lawrence County
v.	:	Court of Appeals,
	:	Fourth Appellate District
DAVID L. LABER,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 12CA24
	:	

MERIT BRIEF OF APPELLEE STATE OF OHIO

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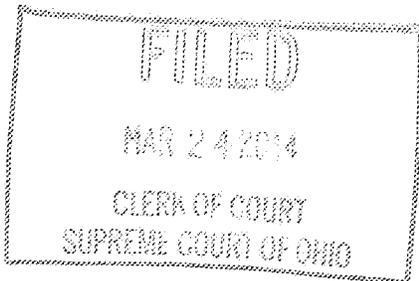
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## INTRODUCTION

This is a routine sufficiency-of-the-evidence appeal. And to the extent it raises any First Amendment issues, those issues have been waived, are still pending in the Fourth District, and are easily resolved in favor of the State even if they were considered. The Court should dismiss the appeal as improvidently allowed. In the alternative, it should affirm.

Defendant-Appellant David Laber was convicted by a jury of making a terroristic threat after talking with a coworker about shooting other coworkers and placing bombs at his workplace. In the appellate decision under review here, the Fourth District affirmed a jury verdict against challenges to the sufficiency and weight of the evidence. On appeal to the Fourth District, Laber never raised any First Amendment claim or suggested that his conviction could implicate the First Amendment. The opinion below therefore did not address any First Amendment arguments, and no First Amendment issue is before the this Court.

Shorn of a First Amendment coat that Laber added on appeal to this Court, the case is a bare sufficiency-of-the-evidence challenge. As such, it raises no constitutional issues, and no issues of public or great general interest. The Court should therefore dismiss this appeal as improvidently allowed. Any constitutional dimension to Laber's conviction is currently being litigated before the Fourth District (oral argument is scheduled for May), and this Court will have an opportunity to review the Fourth District's constitutional reasoning should either party find it wanting. For now, Laber's appeal to this Court should be dismissed.

Short of dismissal, though, Laber offers no reasons to reverse. His sufficiency challenge—as the Fourth District explained—discloses no reason to “second-guess the jury.” *State v. Laber*, No. 12CA24, 2013-Ohio-2681 ¶ 17 (4th Dist.). The Fourth District correctly held that the record contains sufficient evidence supporting the jury's finding that Laber's violent

threats against his coworkers, communicated to another coworker, satisfied each element of the statute.

And the First Amendment argument, although not properly before the Court, is equally wanting. Laber argues that the statute underlying his conviction violates the First Amendment because it criminalizes words that do not constitute “true threats.” To the extent that claim does not simply repackage his sufficiency challenge (the jury, after all, concluded that Laber’s threats *intended* to “[i]ntimidate or coerce”) it runs headlong into unanimous federal precedent holding that true threats include words that objectively tend to create a reasonable fear that the speaker will carry out the threat. If the Court does not dismiss the appeal, it should affirm Laber’s conviction.

#### STATEMENT OF THE CASE AND FACTS

**A. Laber threatened to attack his workplace, to place three bombs there, and to shoot two specific coworkers.**

One day at work, Laber asked a coworker, Linda Lawless, if she had ever thought “about shooting anyone” and “wondered what it would be like.” Trial Tr. at 66. Laber told Lawless that he had thought about it, indicating that, if he did so, he would start by shooting a particular manager because that manager had scolded him for being “out of [his] area and . . . told [him] to get back into [his] area.” *Id.* at 66; *see also id.* at 67. Laber had also thought about shooting a human-resources employee because “she came on the intercom and said that material handlers didn’t have any right to tell people for her, [‘]cause she is human resources to tell people what to do.” *Id.* at 67. Laber’s anger was not confined to these two specific coworkers. He also detailed how he might use explosives at the workplace. According to Lawless, Laber asked whether she had “ever thought about . . . bombing” their employer. *Id.* at 67. Laber communicated to Lawless that he had those thoughts, and said he would use “[t]hree bombs and [he] would start at

the front office.” *Id.* Laber then compared the attack on the workplace that he envisioned to recent incidents of mass violence; “he said[] he could bomb it like they did in Colorado,” *id.* at 68, apparently referring to the attack inside an Aurora, Colorado movie theater in July 2012. While Laber spoke using hypothetical language, Lawless believed that he was making a serious threat, took the “threat very serious[ly],” and felt intimidated by Laber’s comments. *Id.* at 69-70, 84. She reported what Laber said to her supervisor: “I went to . . . my line leader and I told him I needed to talk to him and that I needed to talk to him about something serious.” *Id.* at 70. The company, in turn, took Laber’s threatening statements seriously. It made arrangements for extra security to be present at the facility and contacted the local police. *Id.* at 104. The company also fired Laber the same day. *Id.* at 105-06.

**B. A jury convicted Laber of making a terroristic threat and the Fourth District rejected a sufficiency challenge.**

The State charged Laber with making a terroristic threat, and a jury convicted him of this crime. The terroristic-threats statute reads:

(A) No person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:

(1) The person makes the threat with purpose to . . . (a) Intimidate or coerce a civilian population; . . .

(2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense.

(B) It is not a defense to a charge of a violation of this section that the defendant did not have the intent or capability to commit the threatened specified offense or that the threat was not made to a person who was a subject of the threatened specified offense.

R.C. 2909.23.

The Fourth District Court of Appeals affirmed Laber’s conviction, rejecting all assignments of error. *Laber*, 2013-Ohio-2681 ¶ 2. The appeals court reviewed both the

sufficiency and the manifest weight of the evidence, and concluded that the jury's verdict must stand. More specifically, the court held that the record contained sufficient evidence for the jury to find that Laber "actually ma[de] a 'threat' for purposes of this statute." *Id.* ¶ 11. The appeals court further concluded that the facts permitted the jury to conclude that Laber "meant to intimidate the population at the workplace," *id.* ¶ 13, and that the threats had "cause[d] a reasonable expectation or fear" that Laber would carry out the threat, *id.* ¶ 14. The Court also held, consistent with the statute, that, whether Laber "actually intended to carry through on the remarks that he conveyed . . . is irrelevant." *Id.* ¶ 11. Laber raised two other assignments of error regarding his sentencing and the probable cause for his arrest. *Id.* ¶ 2. The Fourth District rejected these assignments of error, and Laber does not challenge those holdings here.

On July 25, 2013, Laber sought discretionary review in this Court. The Court declined jurisdiction on November 6, 2013, but then granted Laber's motion for reconsideration and accepted his appeal on December 24, 2013.

While Laber's jurisdictional request remained pending, Laber moved the Fourth District to reopen his appeal under App. R. 26(B). In that motion, Laber argued that his trial and appellate attorneys had provided constitutionally deficient counsel because they did not challenge R.C. 2909.23 on First Amendment grounds. *State v. Laber*, No. 12CA24, at 3 (entry on application for reopening appeal) (4th Dist. Nov. 5, 2013). The Fourth District agreed that Laber's counsel had raised no First Amendment challenge and determined that the constitutional question "warrant[s] a full briefing on appeal." *Id.* at 4. That briefing is complete and the Fourth District has scheduled oral argument for May 29, 2014. The appellate court has not yet issued any decision addressing the merits of the First Amendment issues raised by Laber's reopened appeal.

## ARGUMENT

### Appellee State of Ohio's Proposition of Law:

*Evidence that a defendant made statements to a coworker that reasonably made her think he was threatening violence at their workplace and that he was trying to intimidate her is sufficient to support a conviction for making a terroristic threat.*

This case is a run-of-the-mill sufficiency challenge. Resolving it requires no more than applying the well-worn deference afforded jury verdicts. *See State v. Brinkley*, 105 Ohio St. 3d 231, 2005-Ohio-1507 ¶ 40. “In a review for sufficiency, ‘[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ . . . The weight to be given the evidence and the credibility of witnesses are primarily jury issues.” *Id.* (citations omitted, quoting *State v. Jenks*, 61 Ohio St. 3d 259, syl. ¶ 2 (1991)). Laber asks the Court to reject this deference because—as he sees it—he did not make a threat, he merely engaged in “speculation” (albeit speculation about violence against their shared workplace) with a coworker. The jury disagreed, and that should resolve the case. Pressing this theme further, Laber also argues that he was prosecuted for “mere thoughts.” But that is not accurate. He was prosecuted for statements he made, statements that the jury concluded were threats made with purpose to intimidate or coerce, and that did cause a reasonable expectation or fear in the coworker who heard Laber voice his threats.

In this Court, Laber now cloaks his sufficiency arguments in First Amendment wrappings. But he did not raise any First Amendment challenge in the trial court or the Fourth District. That leaves a routine sufficiency-of-the evidence claim where the jury had sufficient evidence to find Laber guilty of making a terroristic threat. Even if this Court reaches Laber’s First-Amendment arguments, they lack merit. Ohio’s terroristic threats statute goes above and

beyond the bounds of the First Amendment and criminalizes only speech that qualifies as an unprotected “true threat” within the meaning of that provision.

**A. This appeal does not raise any First Amendment issue and the Court should dismiss it as improvidently allowed.**

Laber appeals a Fourth District judgment that never mentions the First Amendment. And that is because Laber never mentioned the First Amendment to that court. The Fourth District has since granted Laber’s motion to reopen his appeal *because his direct appeal omitted any First Amendment* argument. *See* App. R. 26(B). The Fourth District will address the First Amendment arguments in a reopened appeal, but argument in that parallel proceeding is not set until May 29, 2014.

**1. Laber never raised any First Amendment claim on direct appeal, and no such claim is before this Court.**

In the order on appeal, the Fourth District affirmed Laber’s conviction, holding that the verdict was not against the manifest weight of the evidence and was supported by sufficient evidence, that the trial judge did not abuse his discretion by considering Laber’s prior record at sentencing, and that probable cause existed for Laber’s arrest. Absent from the Fourth District’s decision is any mention of the First Amendment. The reason: Laber’s direct appeal never claimed that his conviction or the relevant statute violated the First Amendment. Laber now argues that “the court below failed to distinguish “[w]hat is a threat . . . from what is constitutionally protected speech.”” Br. at 3 (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)). But Laber never asked the Fourth District to make that distinction; he never raised any First Amendment argument at all. Nor does Laber’s proposition of law suggest anything other than a request to second-guess the jury’s determination that his speech was a terroristic threat.

His attempt to invoke the First Amendment by characterizing his speech as “an articulation of mere thoughts” simply challenges the jury’s guilty verdict.

Separate from, and after, his direct appeal, Laber applied to the Fourth District to reopen his appeal. His application, which was granted, argued that his appellate counsel “did not raise on appeal trial counsel’s failure to challenge the statute’s constitutionality.” Entry on Application to Reopen Appeal at 2 (attached to Appellant’s Brief at A-18). The Fourth District agreed with Laber that neither trial nor appellate counsel raised any challenge to the constitutionality of the statute at issue.” *Id.* at 4. The Fourth District granted the application to reopen, the reopened appeal has been fully briefed (and those briefs focus largely on the constitutionality of Laber’s conviction), and oral argument is set. Once the Fourth District has issued a decision, this Court will have an opportunity to review any remaining First Amendment claim. At that time, the issue would be properly before the Court.

**2. Because this appeal raises only a straightforward issue of sufficiency of evidence, it is not worthy of this Court’s review and should be dismissed as improvidently allowed.**

Though Laber has expressly disclaimed that he ever raised a First Amendment challenge below—indeed he *had* to make that disclaimer to secure the Rule 26(B) proceedings currently in progress—he now seeks to shoehorn the First Amendment into a routine sufficiency challenge. Entertaining this argument would circumvent the Fourth District, which is directly considering the First Amendment challenge. And entertaining this argument encourages criminal defendants to seek fruitless jurisdiction in this Court when Rule 26(B) proceedings should intervene before this Court’s review.

Nonetheless, Laber does attempt to argue that the First Amendment is integral to the sufficiency claim he raised below. He argues that because his terroristic threats were protected

by the First Amendment, his “conviction for making a terrorist threat is not supported by sufficient evidence.” Br. at 2. This is a non-sequitur. Whether a jury was presented with sufficient evidence to reasonably convict a defendant of committing a criminal act is a separate issue from whether or not the State may constitutionally criminalize that act. The latter issue is not presented here and the Court should not decide it now. The Court should defer consideration of this important question—not to avoid deciding it, but in order to do so after it has been the subject of appellate briefing and argument (currently in progress) and an appellate decision that this Court may review. Compare *State v. Cummings*, 107 Ohio St. 3d 1206, 2005-Ohio-6506 (dismissing as improvidently granted appeal involving trial court’s explanation of right to compulsory process) with *State v. Barker*, 129 Ohio St. 3d 472, 2011-Ohio-4130 (answering same question).

**B. Sufficient evidence supports Laber’s conviction for making a terroristic threat to commit workplace violence.**

David Laber’s conviction meets each of the elements of the terroristic-threat statute. He threatened to commit murder with the purpose to intimidate and his coworkers reasonably feared that he would commit those acts.

“In reviewing [a sufficiency of the evidence] challenge, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Lang*, 192 Ohio St. 3d 512, 2011-Ohio-4215 ¶ 219 (quoting *State v. Jenks*, 61 Ohio St. 3d 259, syl. ¶ 2). Here, the State was required to present evidence from which a rational trier of fact could find beyond a reasonable doubt that Laber threatened to commit murder, with the purpose to intimidate or coerce, and as a result caused “a reasonable expectation or fear of the imminent commission of the specified offense.” R.C. 2909.23(A); see also Trial Tr. at 175. After hearing

the testimony of Linda Lawless, the coworker to whom Laber made the threat, and Nona Callahan and Emit Kiristy, two managers at the workplace who were potential targets of Laber's threats, the jury found that Laber made a threat that satisfied each of these elements. The Fourth District affirmed, holding that "[i]n light of the evidence adduced at trial to support the determination, we will not second-guess the jury." *Laber*, 2013-Ohio-2681 ¶ 17.

The Fourth District specifically identified evidence that supports each element of the crime of making a terroristic threat. In his merit brief, Laber identifies two elements that he argues were not supported by sufficient evidence: "[T]he State did not, and could not, prove that Mr. Laber expressed his statements with the specific intent to intimidate or coerce . . . [or] that his statements caused a reasonable expectation or fear of the imminent commission of a felony offense of violence." Br. at 2. The Fourth District identified evidence that supports each element.

Regarding Laber's purpose to intimidate or coerce a civilian population, the Fourth District found that "appellant conveyed threats to a fellow employee against his employer while at his place of employment," and concluded that the context of the threat was sufficient "to conclude that appellant meant to intimidate the population at the workplace." *Laber*, 2013-Ohio-2681 ¶ 13. Indeed, the coworker to whom Laber communicated the threat testified the violent nature of Laber's statements led her to believe that he intended to intimidate her and that he was trying to get her attention. Trial Tr. at 84. She also felt that Laber had "a violent intent." *Id.* at 93. The statements Laber made to his co-worker, the context in which he said them, and the reaction that the statements naturally evoke provide sufficient evidence to support the jury's finding that Laber had a purpose to intimidate or coerce a civilian population.

The Fourth District also correctly held that there was sufficient evidence for the jury to find that Laber's statements caused "a reasonable expectation or fear of the imminent commission of the specified offense." R.C. 2909.23(A)(2). In this case, the specified offense was murder, which Laber threatened to commit at his workplace. Trial Tr. at 175. Ample evidence supports this element. Linda Lawless, the coworker to whom Laber communicated the threat, testified that she thought that his threats were real. Trial Tr. at 95. Nona Callahan, the manager at the company with whom Laber had come into conflict, testified that she was concerned that Laber's threats were personally directed at her. Trial Tr. at 102. She feared Laber "would make good on his threats," Trial Tr. at 115, and changed her personal routine in response. She had her husband drop her off and pick her up at work, she began locking her doors and windows, and she enrolled in a notification program so that she would know when Laber was in custody and when he was not. Trial Tr. at 107.

Laber's employer also took the threat seriously. Immediately after the threat, the company "mobilized" by arranging for extra security and notifying the police. Trial Tr. at 104, 134. The company also told all employees that Laber was no longer allowed on company property and that employees should notify a supervisor or security if they saw Laber at the workplace. Trial Tr. at 136.

The jury credited this testimony about the effect Laber's threats had on coworkers and his employer as "reasonable" fears. R.C. 2909.23(A)(2). And the Fourth District, characterizing the reactions of Coworkers and employer as "panic," rightly affirmed. *Laber*, 2013-Ohio-2681 ¶ 24.

Despite this robust evidence that Laber intended to and did intimidate his coworkers, he argues that, to support a conviction, a "communication must, when viewed objectively,

inherently indicate a specific intent to intimidate or coerce.” Br. at 5. Laber’s statements satisfy his own requirement, and he is wrong to suggest that context does not matter.

Even accepting Laber’s view that the words must be evaluated as if printed on a page, his statements show an objective intent to intimidate. The objective meaning of talking very specifically about committing violent acts at a workplace, is to intimidate. The jury could reasonably have found that Laber intended the natural consequence of his statements.

Laber is also wrong in claiming that context can be ignored. Context is a routine part of evaluating terroristic threats, both in Ohio and in other states. Many terroristic-threat prosecutions involve speech or an action that, like Laber’s statements, are threatening when considered in context.

*State v. Baughman* presents a good example. There, the defendant wrote: “I hate people! I’d like to kill everybody! Don’t be stupid & think I’m just blowing off steam because I’m in here. That’s so not the case. I have an insatiable desire & thirst for revenge & killing.” 2012-Ohio-5327 ¶ 24 (6th Dist.). In literal terms, the defendant merely described his state of mind when he wrote that he had an insatiable thirst for killing. But given the context in which he had talked about his hatred of the “pigs” and “maggots” in the criminal justice system and referred to himself “as a serial killer and a mass killer,” the Sixth District held that there was sufficient evidence that these words constituted a terroristic threat. *Baughman*, 2012-Ohio-5327 ¶¶ 24, 27.

Under similar terroristic-threat statutes, sister states have used context to show that statements satisfy the statutes and support convictions. For example, terroristic-threat statutes have been used to prosecute threats made with actions rather than explicit statements. In *State v. Murphy*, the Supreme Court of Minnesota affirmed a conviction under that state’s terroristic-threat statute after the defendant placed dismembered animals and a fake bomb near the victim’s

house. 545 N.W.2d 909, 913 (Minn. 1996). The Court reasoned that the “crucial” question was “whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.” *Id.* at 915 (internal quotation marks omitted). It held that the defendant’s actions had a reasonable tendency to create that apprehension. *Id.* Similarly, Laber’s words had the reasonable tendency to create fear of imminent workplace violence, and did in fact cause “panic” among his coworkers and his employer. *Laber*, 2013-Ohio-2681 ¶ 24.

Other courts, too, have looked to context to determine whether a given statement is a threat. The Supreme Court of New Hampshire upheld a jury conviction of “criminal threatening” after the defendant placed a stuffed animal with a bullet through its chest next to his victim’s bed. *State v. McCabe*, 765 A.2d 176, 178 (N.H. 2001). As in this case, the defendant did not make any statement that he was going to commit any crime, but his actions induced a reasonable fear that he would. Many other courts embrace the commonsense idea that whether a statement is a threat or not depends on its context—a classic fact question for juries, not courts, to decide. *See e.g., United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (“Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.”); *Allen v. State*, 453 A.2d 1166, 1168 (Del. 1982) (analyzing defendant’s statements “in light of the factual surroundings in which they were spoken”); *Clement v. State*, 710 S.E.2d 590, 593 (Ga. App. 2011) (“A communication is sufficient to constitute a threat if a reasonable person could conclude that it was a threat under the circumstances.” (internal quotation marks omitted)); *cf. Hodson v. State* 281 P.3d 1181 (Nev. 2009) (Table) (affirming conviction for statement “I’m going to blow up your car” despite claim that it was only a joke).

Swimming against this tide, Laber characterizes his speech as “speculative thoughts” and asks this Court to second-guess the jury’s conclusion that his statements in context were true threats. Br. at 6. He says that his “words constituted hyperbole expressed by a disgruntled worker against his employer, rather than a serious expression of the specific intent to intimidate or coerce.” *Id.* The jury disagreed, as did Laber’s co-worker and his employer.

Pressing the idea that his threats were not serious, Laber contrasts *State v. Baughman* as an example of a true threat. But *Baughman* proves the State’s point, not Laber’s. The threat here is *more* imminent than the threat upheld in *Baughman*. There, the defendant wrote threatening letters from prison. Here, Laber threatened coworkers to whom he had immediate physical access. The evidence supporting the jury’s determination that Laber made a terroristic threat is, if anything, stronger than the evidence presented in *Baughman*. Neither case involved an explicit threat that the defendant *was* going to commit a violent act, but the threat was nonetheless real in both cases. In both cases, the jury reasonably considered the speech in context to determine that, though it was expressed using speculative language, the natural effect and purpose of the speech was to intimidate. Both cases present sufficient evidence to uphold a terroristic-threat conviction.

In the end, it was for the jury to decide whether (as the State argued) his statements were meant to intimidate and reasonably did so, or (as Laber argued) those statements were taken out of context. The jury concluded that Laber was serious, and there is no error in that conclusion. Laber’s defense here was one for the jury, not for the courts.

**C. Even if the Court addresses the constitutionality of Laber’s conviction, the Ohio Terroristic-Threat Statute plainly satisfies all constitutional requirements for criminalizing “true threats.”**

Although the First Amendment to the United States Constitution does impose limits on the types of threats that may be criminalized, Ohio’s statute easily satisfies those limits. Since at least *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), the U.S. Supreme Court has recognized both that “true threats” fall within the “historic and traditional categories” of speech outside of the First Amendment’s protections, and that these “true threats” may be the subject of state criminal prohibitions. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality op.) (internal quotation marks omitted). These “threats of violence” fall “outside the First Amendment” because the States have valid interests in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

**1. Ohio’s terroristic-threat statute provides *greater* protection for speech than the First Amendment requires and is therefore facially constitutional.**

“[F]ollowing *Watts*, most federal courts of appeals defined true threats [i.e., those statements that receive *no* First Amendment protection] according to an *objective standard*.” *United States v. Martinez*, 736 F.3d 981, 985 (11th Cir. 2013) (per curiam) (emphasis added); *see United States v. Elonis*, 730 F.3d 321, 329 & n.5 (3d Cir. 2013) (citing cases from several federal circuits that have adopted an “objective intent standard”). “Under that objective standard, a true threat is a communication that, when taken in context, would have a reasonable tendency to create apprehension that its originator will act according to its tenor.” *Martinez*, 736 F.3d at 986 (internal quotation marks omitted). In other words, the First Amendment does *not* apply if “a reasonable speaker would foresee the statement would be interpreted as a threat,” whether or not the speaker subjectively intended for the statement to be threatening. *Elonis*, 730 F.3d at 323.

Most courts, moreover, read the Supreme Court's subsequent decision in *Virginia v. Black*, 538 U.S. 343 (2003) as "fully consistent with [their] general-intent standard examining only the *objective characteristics*" of the relevant speech. *Martinez*, 736 F.3d at 987 (emphasis added). These courts thus continue to hold that the First Amendment allows the government to adopt a "reasonable person" standard for determining whether a statement qualifies as a "true threat." Under this approach, the First Amendment is not implicated whenever a reasonable person would have viewed the defendant's statements as a threat, *see, e.g., Elonis*, 730 F.3d at 331 n.7, or whenever a reasonable recipient would have viewed the statement as such, *see, e.g., United States v. White*, 670 F.3d 498, 507-08 (4th Cir. 2012). Only one circuit (the Ninth) has indicated that *Black* incorporates a subjective-intent standard that requires the speaker to actually intend the relevant statements to be intimidating or threatening. *See United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005).

Finally, it is black-letter law that the First Amendment allows states to criminalize threats regardless of whether the person making the threat intends to follow through and complete the threatened crime. The U.S. Supreme Court has held that States may criminalize threats even if the speaker does "not actually intend to carry out the threat," because such a criminal prohibition legitimately "'protect[s] individuals from the fear of violence'" arising out of the bare threat itself. *Black*, 538 U.S. at 359-60 (quoting *R.A.V.*, 505 U.S. at 388); *see also, e.g., Doe v. Pulaski*, 306 F.3d 616, 624 (8th Cir. 2002) (en banc) ("In determining whether a statement amounts to an unprotected threat, there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence."); *United States v. Martin*, 163 F.3d 1212, 1216 (10th Cir. 1998) ("[T]he key point is whether the defendant intentionally communicated the threat, not whether he intended or had

the capability to carry it out.”) (quoting *United States v. Stevenson*, 126 F.3d 662, 664 (5th Cir. 1997)).

Ohio’s terroristic-threats statute contains legal elements that comport with these First Amendment principles. It would pass muster in any federal circuit because it includes both objective and subjective elements and appropriately has no requirement that the speaker intend to carry out a threat.

The statute includes—as a necessary legal element—a requirement that the defendant’s statement “cause[] a *reasonable expectation or fear* of the imminent commission of the” threatened violence. R.C. 2909.23(A)(2) (emphasis added). The statute is thus “fully consistent with a general-intent standard examining . . . the *objective characteristics*” of the relevant statements at issue. *Martinez*, 736 F.3d at 987. Because the statute includes this reasonable-person test, it satisfies the First Amendment’s requirements followed by the vast majority of the courts.

Indeed, the statute goes even further in protecting speech than most courts would require under the First Amendment. As relevant here, in addition to its objective requirement, the statute also mandates that the speaker have the “purpose” in making the statements to “[i]ntimidate or coerce a civilian population.” R.C. 2909.23(A)(2). Accordingly, the statute would even satisfy the Ninth Circuit’s standard because it includes this subjective-intent element—namely, the requirement that the defendant have the subjective intent that his statements be intimidating or threatening to others. *See Cassel*, 408 F.3d at 633.

Finally, the statute explains that it is “not a defense . . . that the defendant did not have the intent or capability to” execute the threat. R.C. 2909.23(B). That clause is consistent with the law in every federal circuit.

Because Ohio's Terroristic-Threat statute satisfies every constitutional requirement for criminalizing true threats, it is facially valid.

**2. Ohio's terroristic-threats statute is constitutional as applied to Laber, because the First Amendment permits a jury to resolve whether particular statements qualify as punishable "true threats" under the totality of the circumstances.**

Ohio's terroristic-threats statute is also constitutional as applied to the facts of this case. Even with the First Amendment in the background, deciding if a statement is true threat is generally a question for the jury. It is well established that "[w]hether a . . . [statement] constitutes a threat is an issue of fact for the trial jury,' involving assessments of both credibility and of context." *United States v. Clemens*, 738 F.3d 1, 13 (1st Cir. 2013) (quoting *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir.1997)); *see also, e.g., United States v. Stock*, 728 F.3d 287, 298 (3d Cir. 2013); *White*, 670 F.3d at 512; *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994).

Here, a jury convicted Laber after concluding that his statements "purpose[ly] . . . intimidate[d] or coerce[d] a civilian population" and "cause[d] a reasonable expectation or fear of the imminent commission" of the threatened actions. R.C. 2909.23. That is, the jury found—as a matter of fact—that Laber subjectively intended to intimidate others with his statements and that he caused an objectively reasonable fear in his audience that he would carry them out. With these findings, the jury necessarily concluded that Laber's statements qualified as "true threats" within the meaning of the First Amendment under every circuits' definition of that phrase. *See, e.g., Elonis*, 730 F.3d at 331-32; *White*, 670 F.3d at 507-08; *United States v. Jeffries*, 692 F.3d 473, 478-79 (6th Cir. 2012); *Cassel*, 408 F.3d at 633. And because—as discussed above—sufficient evidence supported the jury's factual findings in this regard, Laber's conviction in this case did not violate the First Amendment.

In response, Laber simply reargues the sufficiency of the evidence under the guise of a First Amendment as-applied challenge. He claims that his statements cannot legally constitute “true threats” because they were “speculative.” But, as the above cases illustrate, it was for the jury to decide whether Laber’s “speculative” statements crossed the line into “true threats.” See *Clemens*, 738 F.3d at 13. To the extent Laber argues that a “true threat” must be unequivocal, the courts have repeatedly rejected this argument. Even where the alleged “threat in [a] case [is] ambiguous, . . . the task of interpretation [is] for the jury.” *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). And “[a]n absence of explicitly threatening language does not preclude the finding of a threat . . . .” *Malik*, 16 F.3d at 49. Nor does the fact that the alleged threat was “conditional” or “inexplicit.” *United States v. Turner*, 720 F.3d 411, 424 (2d Cir. 2013). “The fact that a threat is subtle does not make it less of a threat.” *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (internal quotation marks omitted).

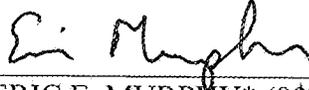
In short, it is generally for the jury to decide whether a defendant’s statements are, on the one hand, illegal “true threats” or, on the other hand, “nothing more than ‘generalized fantasy,’” “‘sarcas[m],”” *Clemens*, 738 F.3d at 13, or, as Laber claims here, “mere speculative thoughts,” Br. at 8. Because the jury in this case reasonably found that Laber’s statements crossed the line into “true threats,” his as-applied challenge must fail.

## CONCLUSION

For these reasons, the Court should affirm the decision of the Fourth District Court of Appeals.

Respectfully submitted,

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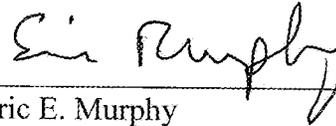
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief of Appellee State of Ohio was served by regular U.S. mail this 24th day of March, 2014 upon the following:

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