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## Eliminating the Subjective Intent Requirement for True Threats in *United States v. Bagdasarian*

### I. INTRODUCTION

From the founding of our nation, freedom of speech has been considered a sacrosanct right of citizens, but has never been absolute. The Supreme Court has “long recognized that the government may regulate certain categories of expression consistent with the Constitution.”<sup>1</sup> The categories of speech that fall outside of the scope of First Amendment protection include “a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’”<sup>2</sup> As a result, “true threats,” or “threats of physical violence,” are not protected by the First Amendment and may be proscribed by government.<sup>3</sup> Although this rule appears straightforward, courts have found it difficult to distinguish between what does and does not constitute a true threat.<sup>4</sup>

The fine line between what is a true threat and what is protected speech was revisited by the Ninth Circuit Court of Appeals in *United States v. Bagdasarian*, in which the court found that a subjective intent analysis is required by the First Amendment in determining what constitutes a true threat.<sup>5</sup> This Note argues that the Ninth Circuit erred in finding that a subjective intent analysis must be engrafted onto every true threat statute because the rationale for proscribing true threats from First Amendment protection originates from objective harm to others and not from the subjective intent of the individual. Therefore, the Supreme Court should resolve the split this decision creates among circuit courts by holding that *Virginia v.*

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1. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

2. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

3. See *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Watts v. United States*, 394 U.S. 705, 707 (1969).

4. Compare *Watts*, 394 U.S. at 708 (holding that “political hyperbole” regarding the President of the United States does not constitute a true threat) with *R.A.V.*, 505 U.S. at 388 (“[T]he reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President.”).

5. *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011).

*Black* does not automatically require a subjective intent analysis to determine what constitutes a true threat.

Part II of this Note discusses the context and procedural background of *Bagdasarian*. Part III reviews the *Bagdasarian* majority opinion, while Part IV reviews the concurring opinion of Judge Wardlaw. Part V argues that the court erred in presuming that the First Amendment requires a subjective intent analysis to be grafted onto all true threat statutes. Part VI concludes this Note.

## II. CONTEXT & BACKGROUND

On October 22, 2008, Walter Edward Bagdasarian joined a “Yahoo! Finance—American International Group” message board, where comments are posted by the public regarding “financial matters, AIG, and other topics.”<sup>6</sup> Under the username “californiaradial,” Bagdasarian made a series of comments that were racially charged and that encouraged violence.<sup>7</sup>

At 1:15 a.m., Bagdasarian posted the first comment for which he would later be charged with a crime when he wrote under the subject heading “OBAMA,”: “fk the niggar, he will have a 50 cal in the head soon”<sup>8</sup> (“Bagdasarian’s first statement”). This was followed six minutes later by another post under that same heading that “combined [Bagdasarian’s] pro-bomb and anti-Obama rhetoric,” by writing, “yea, the honest people have NO guns and the scum bags, niggars and drug fks do, thanx obombhaaaaa.”<sup>9</sup>

At 1:35 a.m., Bagdasarian posted the second threat for which he was criminally charged by creating his own subject heading, “shoot the nig,” and writing: “country fkd for another 4 years+, what nig has done ANYTHING right? ? ? long term? ? ? never in history . . . .”<sup>10</sup> (“Bagdasarian’s second statement”).

6. *Id.* at 1115.

7. *Id.*

8. *Id.* at 1124 (Wardlaw, J., concurring in part and dissenting in part).

9. *Id.* Bagdasarian immediately followed these comments with two others that “reiterated his racist animus” by referencing Obama’s combination of African and Irish heritage. *Id.* He stated: “full monkey, hey can you crank the music box, I wanna see the puppet monkey dance . . . .” *Id.* Only four minutes later, Bagdasarian reiterated these sentiments with this comment: “a lepraaaaaanigggggggamuch? blank that one, yahoo a-holes.” *Id.*

10. *Id.*

At this point, several other participants had endured enough of Bagdasarian's crude and violent comments, and a handful of participants fired back. "Dan757x" responded to Bagdasarian's Second Statement stating: "You've been reported by me, a good ole' white boy."<sup>11</sup> The next post by "Freddie226" said, "I hope everyone reports this type of garbage."<sup>12</sup> This was followed by "Sniper1agent" commenting, "[b]e advised Federal Law Enforcement is monitoring," and by "Brown.romaine," who warned: "I am reporting this post to the Secret Service."<sup>13</sup> By 8:00 a.m. the next morning, Bagdasarian sought to excuse his earlier comments by claiming he was drunk.<sup>14</sup>

Ultimately, a retired Air Force officer reported californiaradial's threats to the Los Angeles Field Office of the United States Secret Service because "he was 'concerned that the posting threatened harm to Barack Obama.'"<sup>15</sup> The Secret Service investigated these online threats, traced californiaradial's IP address to Bagdasarian, and confronted him at his home on November 21, 2008.<sup>16</sup> Bagdasarian admitted that he wrote the posts in question under the username "californiaradial," and he also admitted that he had weapons in his home.<sup>17</sup> While completing a search of Bagdasarian's home a few days later, Secret Service agents discovered "six firearms, including a Remington model 700ML .50 caliber muzzle-loading rifle."<sup>18</sup>

Additionally, while searching the hard drive of Bagdasarian's computer, agents discovered two e-mails written by Bagdasarian that reiterated his racial prejudice and his violent opposition to Barack Obama.<sup>19</sup>

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11. *Id.*

12. *Id.* at 1124–25.

13. *Id.*

14. *Id.* at 1130.

15. *Id.* at 1125.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* One email, written on November 4, 2008, stated: "Pistol??? Dude, Josh needs to get us one of these, just shoot the nigga's car and POOF!" *Id.* Included in the email was a web-link to a "photograph of a rifle on the Barrett Rifles website." *Id.* In the second email, written later that same day, Bagdasarian wrote, "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this." *Id.* The email then included a link to a "YouTube video of a car being blown up." *Id.*

*A. The U.S. District Court's Findings*

The Secret Service filed a criminal complaint against Bagdasarian, and charged him with two counts of violating 18 U.S.C. § 879(a)(3), which prohibits “threatening to kill and inflict bodily harm upon a major candidate for the office of president of the United States.”<sup>20</sup> After waiving his right to a jury trial, Bagdasarian’s case was tried by a United States district judge. Bagdasarian was found guilty on both counts by the district court, and appealed to the Ninth Circuit Court of Appeals.<sup>21</sup>

III. *UNITED STATES V. BAGDASARIAN*

The Ninth Circuit began its analysis of the law in *United States v. Bagdasarian* by recognizing that “the state cannot criminalize constitutionally protected speech,” but that “true threats” as a category are not protected by the First Amendment.<sup>22</sup> Citing to *Virginia v. Black*, the court found that the state can only punish threatening expression when 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.”<sup>23</sup> Based on this statement, the court reasoned in dicta that it is “not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.”<sup>24</sup> Instead, the court found that a subjective intent analysis was required in every case to determine whether a statement was a true threat.<sup>25</sup>

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20. *Id.* at 1116 (majority opinion).

21. *Id.* at 1116.

22. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). Judge Wardlaw recognized in the concurring opinion that the burden in this case rested upon the government to prove that Bagdasarian made a true threat. *Id.* at 1124 (Wardlaw, J., concurring in part and dissenting in part); *see also* *United States v. Mitchell*, 812 F.2d 1250, 1255 (9th Cir. 1987) (recognizing that the standard of review when “reviewing the sufficiency of the evidence to support a conviction” is to “determine whether viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

23. *Bagdasarian*, 652 F.3d at 1116 (majority opinion) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

24. *Id.*

25. *Id.* at 1117.

To clear up “perceived confusion”<sup>26</sup> about whether a subjective or an objective analysis is required by the First Amendment to determine “whether a threat is criminal under various threat statutes,” the court held that “the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.”<sup>27</sup> As a result, the court determined that while a subjective intent analysis was required in every case, an objective intent analysis was required only where a statute called for that inquiry.<sup>28</sup> The court also determined that, according to its earlier case law, 18 U.S.C. § 879(a)(3) must be interpreted as requiring “the application of both an objective and subjective standard.”<sup>29</sup>

The court’s application of both an objective and subjective test under 18 U.S.C. § 879(a)(3) means that the government had the burden to prove: (A) that Bagdasarian’s statements “would be understood by people hearing or reading [them] in context as a serious expression of an intent to kill or injure a major candidate for President,” and (B) that Bagdasarian “intended that [each] statement be understood as a threat.”<sup>30</sup> Ultimately, the court found that the government failed to meet its burden of proof under both tests.

#### *A. The Court’s Objective Intent Analysis*

Under the objective analysis, the court considers the important questions of “whether a reasonable person who heard the statement would have interpreted it as a threat.”<sup>31</sup> This inquiry requires that a fact-finder fully consider a statement’s context, including “the surrounding events, the listener’s reaction, and whether the words are conditional.”<sup>32</sup> The court must also determine whether the defendant’s statements constitute “a serious expression of an intention to inflict bodily harm on or to take the life of [a president

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26. The confusion was more than a matter of perception. The Ninth Circuit previously “adopted an objective intent standard for interpreting the requirement that a threat be made ‘knowingly and willfully.’” *Mitchell*, 812 F.2d at 1256 (quoting *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969)).

27. *Bagdasarian*, 652 F.3d at 1116–17.

28. *Id.* at 1117.

29. *Id.* (citing *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992)).

30. *Id.* at 1118 (citing *Gordon*, 974 F.2d at 1117).

31. *Id.* at 1119 (citing *Gordon*, 974 F.2d at 1117).

32. *Id.* (quoting *Gordon*, 974 F.2d at 1117) (internal quotation mark omitted).

or presidential candidate].”<sup>33</sup> Under this objective intent analysis, the court determined that there was insufficient evidence for any reasonable person to conclude that Bagdasarian’s statements “threatened to injure or kill” Barack Obama.<sup>34</sup>

In reaching this conclusion, the court considered the following factors: (1) the plain meaning of the words used by Bagdasarian;<sup>35</sup> (2) the conditional nature of his statements;<sup>36</sup> (3) the fact that Bagdasarian’s statements were anonymous;<sup>37</sup> (4) the reaction of message board members to his statements;<sup>38</sup> and (5) the Secret Service’s acquisition of additional information about Bagdasarian in their investigation.<sup>39</sup>

### *1. The Plain Meaning of the Words Used by Bagdasarian*

The court determined that the plain meaning of the words used by Bagdasarian did not constitute a threat.<sup>40</sup> Bagdasarian’s first statement was interpreted by the court as a mere prediction that did not convey a threat.<sup>41</sup> Bagdasarian’s second statement was interpreted by the court as “an imperative intended to encourage others to take violent action” but not as a threat from Bagdasarian.<sup>42</sup> The court concluded that “[i]t is difficult to see how a rational trier of fact could reasonably have found that either statement . . . expresses a threat against Obama.”<sup>43</sup>

### *2. The Conditional Nature of Bagdasarian’s Statements*

Although the court found that Bagdasarian’s statements were “alarming and dangerous” and expressed in unconditional terms, the court held that they did not constitute a threat.<sup>44</sup> Conditional

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33. *Id.* (quoting *Gordon*, 974 F.2d at 1117) (internal quotation mark omitted).

34. *Id.*

35. *Id.* at 1119–20.

36. *Id.* at 1120.

37. *Id.* at 1120–21.

38. *Id.* at 1121.

39. *Id.* at 1115–16, 1121–22.

40. *Id.* at 1119.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1120.

statements are much less likely to be construed as true threats.<sup>45</sup> Even though Bagdasarian's statements were unconditional, the court believed that the plain meaning of Bagdasarian's statements could not be reasonably construed as threats.<sup>46</sup>

### *3. The Anonymity of Bagdasarian's Statements*

Despite recognizing that "in some circumstances a speaker's anonymity could influence a listener's perception of danger," the court nevertheless determined that the anonymous nature of Bagdasarian's statements did not make them any more likely to be considered true threats.<sup>47</sup> The court believed that the "non-violent [nature of the] discussion forum" where Bagdasarian made his statements would "tend to blunt any perception that statements made there were serious expressions of intended violence."<sup>48</sup> Thus, the anonymous nature of Bagdasarian's statements under these circumstances did not make them any more threatening.

### *4. The Forum Readers' Reaction to Bagdasarian's Statements*

The court also found that the forum readers' reaction to Bagdasarian's statements was not decisive in determining whether he made true threats. Although the court recognized that four discussion board members wrote that they "planned to alert authorities" after Bagdasarian's second statement, the court pointed out that only one of them actually did so.<sup>49</sup> The court further noted though that these readers might have been offended by the racist sentiments in Bagdasarian's statements, they apparently did not believe that they were threats.<sup>50</sup> Therefore, the fact that people were disturbed by Bagdasarian's statements did not persuade the court that "others [necessarily] interpreted them as a threat."<sup>51</sup>

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45. *See* *Watts v. United States*, 394 U.S. 705 (1969) (overturning a conviction of a threat to kill Lyndon B. Johnson because the statement was conditional).

46. *Bagdasarian*, 652 F.3d at 1120.

47. *Id.*

48. *Id.* at 1121.

49. *Id.*

50. *Id.*

51. *Id.*

*5. Additional Information Obtained About Bagdasarian After His Statements Were Made*

The court also gave no weight to the fact that Bagdasarian personally owned a .50 caliber rifle or that he sent a friend an email depicting a car being blown up.<sup>52</sup> According to the court, these details were unknown to those reading Bagdasarian's statements and could therefore have no bearing on an objective test that considers whether Bagdasarian's statements would have been interpreted as a threat "by a reasonable person in the position of those who saw his postings on the AIG discussion board."<sup>53</sup>

In sum, the court ultimately concluded that the plain meaning of Bagdasarian's statements did not constitute a threat, and that a reasonable, objective person reading his postings in context could not have interpreted his statements as a threat against Barack Obama.<sup>54</sup>

*C. The Court's Subjective Intent Analysis*

After determining that Bagdasarian's statements did not constitute a threat under an objective analysis, the court considered Bagdasarian's statements under a subjective intent analysis and determined that Bagdasarian did not intend his statements to convey a threat. Under a subjective intent analysis, the government must prove that Bagdasarian "made [his] statements intending that they be taken as a threat."<sup>55</sup> Otherwise, Bagdasarian's statements would be "afforded constitutional protection."<sup>56</sup> The court interpreted the Supreme Court's opinion in *Black* as indicating that the State may punish threats only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual."<sup>57</sup>

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52. *Id.* at 1121–22.

53. *Id.* at 1122.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (internal quotation mark omitted). In addition, the court looked to its decision in *Gordon* where it was recognized that Congress "construe[d] 'knowingly and willfully' [in § 879] as requiring proof of a subjective intent to make a threat[.]" *Id.* (quoting *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992) (alterations in original)).

The court's subjective intent analysis closely paralleled its objective intent analysis. First, the court relied on the "predictive" and "exhortatory" nature of Bagdasarian's statements to conclude that "the evidence [was] not sufficient for any reasonable finder of fact to have concluded beyond a reasonable doubt that Bagdasarian intended that his statements be taken as threats."<sup>58</sup> Second, the court found that the entire context in which Bagdasarian made his comments did not indicate that he intended his statements to be taken as a threat. The court distinguished this case from *United States v. Sutcliffe*, where the court affirmed the conviction of the defendant under a different threat statute, 18 U.S.C. § 875(c).<sup>59</sup> In *Sutcliffe*, the defendant's statements were made in the "first-person" and were "highly specific" (e.g., "I will kill you").<sup>60</sup> Since Bagdasarian's statements "fail[ed] to express any intent on his part to take any action," the court reasoned that his statements lacked the personal declaration and specificity that constitute a true threat.<sup>61</sup>

Hence, under both an objective and subjective intent analysis, the court concluded that Bagdasarian's statements were protected by the First Amendment because no reasonable interpretation of his postings could be seen as a true threat.<sup>62</sup>

#### IV. JUDGE WARDLAW'S CONCURRING OPINION

Although Judge Wardlaw fully concurred with "the majority's analysis of the law of 'true threats,'" his objective and subjective intent analyses reached the opposite conclusions from the majority opinion. Judge Wardlaw ultimately concluded that "there [was] sufficient evidence to find Mr. Bagdasarian guilty of threatening" Barack Obama.<sup>63</sup>

##### *A. Judge Wardlaw's Objective Intent Analysis*

Under Judge Wardlaw's analyses of Bagdasarian's statements, he found that there was "sufficient evidence supporting a finding of objective intent" to threaten Barack Obama under *Jackson v.*

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58. *Id.*

59. *Id.* at 1123 (citing *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007)).

60. *Id.*

61. *Id.*

62. *Id.* (citing *Black*, 538 U.S. at 359).

63. *Id.*

*Virginia*.<sup>64</sup> Judge Wardlaw argued that the majority of the court therefore erred in its objective intent analysis by reading Bagdasarian's statements in isolation and by determining that "they were not even threats."<sup>65</sup> Judge Wardlaw emphasized that "threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners."<sup>66</sup> Wardlaw argued that the court's analysis failed to consider "America's history of racial violence, the uniquely racial and violent undercurrents of the 2008 presidential election," the entirety of Bagdasarian's statements, and the reaction of those who read Bagdasarian's posts.<sup>67</sup>

*1. The full context of Bagdasarian's statements*

Judge Wardlaw noted that Bagdasarian made his statements "two weeks before the 2008 election," at a time "when violent and racist threats against candidate Obama were being taken very seriously."<sup>68</sup> The 2008 election stirred "polarizing racial animus"<sup>69</sup> that resulted in at least one "viable assassination attempt" against Barack Obama.<sup>70</sup> Additionally, Judge Wardlaw indicated that the majority opinion failed to fully consider that several of those who read Bagdasarian's posts "perceived the posts as threatening when they were made" and acted upon their perceptions by replying to Bagdasarian directly while one individual contacted government authorities.<sup>71</sup>

An additional contextual factor that Judge Wardlaw considered in his opinion was the growing number of violent shootings that have been presaged by internet postings. The 1999 shootings at Columbine High School, the 2007 killings at Virginia Tech, and the

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64. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

65. *Id.* at 1125.

66. *Id.* (quoting *United States v. Orozco-Santillan*, 290 F.3d 1262, 1265 (9th Cir. 1990)).

67. *Id.* at 1125–26.

68. *Id.*

69. *Id.* at 1126.

70. *Id.* (citing Dave McKinney, Frank Main & Natasha Korecki, *A Plot Targeting Obama? 3 in Custody May Be Tied to Supremacists, Said to Talk of Stadium Shooting*, CHI. SUN-TIMES, Aug. 26, 2008). Judge Wardlaw also points out that concern for the safety of Barack Obama led to him receiving Secret Service protection earlier than any of the other presidential candidates other than former First Lady Hilary Clinton. *Id.*

71. *Id.* at 1125–26.

more recent shooting of Arizona Representative Gabrielle Giffords all occurred after the assailants posted material on the internet that revealed their violent feelings.<sup>72</sup> According to Judge Wardlaw, the public awareness of these tragic events makes it “logical to conclude that online postings of impending violence would be perceived by reasonable people as serious threats.”<sup>73</sup> In light of all of these contextual factors, Judge Wardlaw found that there was “sufficient evidence for ‘a rational juror’ to find objective intent.”<sup>74</sup>

### *B. Judge Wardlaw’s Subjective Intent Analysis*

Judge Wardlaw agreed with his colleagues that “in every threats case the Constitution requires that the subjective test is met.”<sup>75</sup> Unlike his colleagues, Judge Wardlaw concluded that there was sufficient evidence to affirm Bagdasarian’s conviction under the subjective intent analysis. He emphasized that the government needed to demonstrate only that Bagdasarian intended to make a threat, not that he planned to carry out the threat.<sup>76</sup> As the court held in *Black*: “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protects individuals from the fear of violence,’ . . . in addition to protecting people ‘from the possibility that the threatened violence will occur.’”<sup>77</sup>

Employing this standard, Judge Wardlaw determined that Bagdasarian knew “he had access to [a .50 caliber] weapon and could implement the threat.”<sup>78</sup> Additionally, Bagdasarian’s second statement was made with the intent to “threaten harm to candidate Obama[, which] generated fear for the candidate’s safety and mobilized the Secret Service . . . .”<sup>79</sup> Judge Wardlaw argued that Bagdasarian’s later excuse that he made his comments while intoxicated suggests that several hours after making his comments,

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72. *Id.* at 1126–27 n.2.

73. *Id.* at 1127.

74. *Id.* at 1129 (quoting *United States v. Nevils*, 598 F.3d 1158, 1166 (9th Cir. 2010) (en banc)).

75. *Id.* at 1124 (Wardlaw, J., concurring in part and dissenting in part) (citing *Virginia v. Black*, 538 U.S. 343 (2003)).

76. *Id.* at 1130.

77. *Black*, 538 U.S. at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

78. *Bagdasarian*, 652 F.3d at 1131 (Wardlaw, J., concurring in part and dissenting in part).

79. *Id.*

he realized “the serious nature of his threats.”<sup>80</sup> Based upon these facts, Judge Wardlaw concluded that it was reasonable for the lower court to conclude that Bagdasarian “acted with the specific intent to threaten candidate Obama.”<sup>81</sup>

#### V. OVERRULING THE SUBJECTIVE INTENT REQUIREMENT FOR TRUE THREATS

The Ninth Circuit erred in assuming that a subjective intent analysis must be engrafted onto every “true threat” statute. The Supreme Court should overrule the Ninth Circuit’s decision in Bagdasarian, and resolve the circuit split created by that case by clarifying that *Black* does not require a subjective intent analyses for every true threat statute, and by clarifying that the rationale for not protecting true threats under the First Amendment only requires an objective intent analyses for determining a true threat.

##### A. Virginia v. Black

The Supreme Court’s decision in *Black* should not be interpreted as requiring a subjective intent inquiry for every true threat statute. The issue raised in *Black* was whether a Virginia statute containing a provision that treated any burning of a cross as “prima facie evidence of an intent to intimidate” violated the First Amendment.<sup>82</sup> The Court found that while people frequently burn crosses for the purpose of intimidating others, there are also instances in which a cross might be burned for legitimate reasons, and therefore, the burning of a cross alone cannot be “prima facie evidence of an intent to intimidate” under the First Amendment.<sup>83</sup> *Black* only engaged in a subjective intent analysis because the criminal statute at issue required subjective intent—not because the analysis was a constitutional requirement.<sup>84</sup> Nowhere in *Black* did the court specifically hold that the First Amendment required a subjective analysis.

Additionally, “*Black* did not criticize the existing case law,” which predominantly applied only the objective standard when

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80. *Id.* at 1130.

81. *Id.* at 1131.

82. *Black*, 538 U.S. at 347–48.

83. *Id.* at 348.

84. *People v. Lowery*, 257 P.3d 72, 79 (Cal. 2011) (Baxter, J., concurring).

determining whether a statement was a true threat.<sup>85</sup> Since *Black* was decided, the majority of courts addressing the issue have not engrafted a subjective intent analysis onto true threat statutes either.<sup>86</sup> For example, the Fifth Circuit Court of Appeals in *Porter v. Ascension Parish School Board*, held:

Speech is a “true threat” and therefore unprotected if an objectively reasonable person would interpret the speech as a “serious expression of an intent to cause a present or future harm.” The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat . . . .<sup>87</sup>

The decision of the Ninth Circuit to engraft a subjective intent analysis onto every true threat statute is therefore not justified by the Court’s opinion in *Black* or supported by other circuit courts.

The Ninth Circuit was correct, however, in noting that under the court’s own precedent, Bagdasarian’s case required both a subjective and an objective analysis. The Ninth Circuit noted in *Gordon* that Congress “construe[d] ‘knowingly and willfully’ [in section 879] as requiring proof of a subjective intent to make a threat.”<sup>88</sup> As a result of Congress’ express intent, the Ninth Circuit held in *Gordon* that the statute under which Bagdasarian was convicted required both a subjective and an objective analysis. However, the court went even further in *Bagdasarian* by holding that under *Black*, the First Amendment requires a subjective intent analysis for all true threat

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85. *Id.* at 78–79 (citing *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (“All the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm.”); *see also* *United States v. Malik*, 16 F.3d 45, 48 (2d Cir. 1994); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States v. Welch*, 745 F.2d 614, 619 (10th Cir. 1984); *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

86. *Lowery*, 257 P.3d at 80; *see also* *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (“Statements constitute a ‘true threat’ if ‘an ordinary reasonable recipient who is familiar with the[ir] context . . . would interpret [those statements] as a threat of injury.”); *United States v. Jongewaard*, 567 F.3d 336, 339 n.2 (8th Cir. 2009) (“In this circuit, the test for distinguishing a true threat from constitutionally protected speech is whether an objectively reasonable recipient would interpret the purported threat ‘as a serious expression of an intent to harm or cause injury to another.’”).

87. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004).

88. *United States v. Gordon*, 974 F.2d 1110, 1117 (citing 128 CONG. REC. 21, 218 (1982)).

statutes regardless of whether the criminal statute contains a “knowingly and willfully” requirement.<sup>89</sup>

*B. Policies for Not Protecting True Threats Under the First Amendment*

In addition to the fact that *Black* simply does not hold that a subjective intent analysis is required for true threat statutes under the First Amendment, the rationale for excluding true threats from First Amendment protection does not indicate that subjective intent must be considered. Justice Sanford articulated why the government can legitimately proscribe certain forms of speech, such as speech threatening to harm political candidates. In *Gitlow v. New York*, he wrote:

[I]t is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose . . . [A] State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. . . . In short this freedom does not deprive a State of the primary and essential right of self preservation . . . [U]tterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of [the state’s] police power.<sup>90</sup>

Since our democratic society is based upon the election of citizens to provide government leadership, speech that specifically threatens to harm or assassinate political candidates chills the democratic process underlying our government. However, the court has also recognized that “debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>91</sup> The tension created between the need to protect dissident political speech while maintaining a

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89. *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (2011).

90. *Gitlow v. New York*, 268 U.S. 652, 666–68 (1925).

91. *Watts v. United States*, 394 U.S. 705, 708 (1969) (internal quotation mark omitted) (reversing a conviction under a presidential threat statute because the defendant’s statements about taking the life of the President were conditional).

legitimate democratic process pulls at the very core of our American ideals. The practical result is that the First Amendment does not protect an individual's right to say whatever he may desire. Even in the realm of political speech, where First Amendment rights are traditionally extremely robust, individuals do not have the right to threaten acts of violence on public officials. Robert Bork, one of the strongest advocates for free speech in the political realm observed:

Speech advocating violent overthrow [of government] is . . . not 'political speech' as that term must be defined by a Madisonian system of government. It is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. Violent overthrow of government breaks the premises of our system concerning the ways in which truth is defined, and yet those premises are the only reasons for protecting political speech.<sup>92</sup>

Part of the rationale, therefore, in prohibiting "true threats" against a political candidate like Barack Obama, is that such threats undermine our democratic system of government. Although typically political speech can be robustly debated in the marketplace of ideas, there is no adequate response in the marketplace for threats of physical violence against a political candidate. As the Supreme Court stated in *Chaplinsky v. New Hampshire*, such threats have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>93</sup>

Additionally, the harm created from such speech may be real whether or not the individual speaker intended his speech to be received as a threat, and regardless of whether the speaker actually intended to carry out such a threat. The Court recognized this in *Black*, stating that "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders' in addition to protecting people 'from the possibility that the threatened violence will occur.'"<sup>94</sup> Since fear and its disruptions can arise regardless of whether an individual intended to make a threat, a subjective intent analysis is not necessary for

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92. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971).

93. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

94. *Virginia v. Black*, 538 U.S. 342, 360 (2003) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)).

determining whether society has a legitimate interest in prohibiting that speech.

Finally, engrafting a subjective intent analysis onto every true threat statute reduces the likelihood that individuals making threatening statements will be convicted for their crime. Determining the subjective intent of an individual is much more onerous than determining whether an objective listener would interpret a message as a threat. If the purpose for criminalizing true threats is to protect others from fear of violence, then an objective intent analysis would presumably be an adequate inquiry for determining whether a statement is a true threat proscribable by the state.

## VI. CONCLUSION

The Ninth Circuit Court of Appeals erred in presuming that the First Amendment requires a subjective intent analysis to be engrafted on all true threat statutes. The Supreme Court should resolve the circuit split created by *Bagdasarian* and hold that while the First Amendment requires an objective analysis for determining a true threat, it does not require a subjective intent analysis to be engrafted onto all true threat statutes.

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