K10K-CR17-0338626-S	:	SUPERIOR COURT
STATE OF CONNECTICUT	:	
v.	:	
EDWARD TAUPIER	:	September 6, 2017

DEFENDANT'S MOTION TO DISMISS

The defendant in the above-captioned matter moves, pursuant to Practice Book Sections 41-8(5), (8) and (9) to dismiss the charges against him. He contends the instant prosecution can be, and must be, resolved without trial as the warrant plainly, and on its face, criminalizes speech in violation of the First and Fourth Amendments to the United States Constitution and Article First, §§ 7 of the Constitution of the State of Connecticut, to the dismiss the charges against him. In sum, the defendant has been charged with crimes arising from his utterance of protected speech on social media, to wit: Facebook. His comments are neither illegal advocacy of imminent lawless action pursuant to *Brandenburg v. Ohio*, 395 U.S. 444 (1969) nor true threats pursuant to *Virginia v. Black*, 538 U.S. 343 (2003).

I. FACTUAL BASIS

The warrant at issue charged five counts of Inciting Injury arising under Connecticut General Statutes Section 53a-179a and five counts of threatening in the second degree arising under Section 53a-62. All the charges are apparently related to the defendant's vocal, and, candidly shocking, public disaffection with the administration of justice in our courts. Under any conceivable reading of the allegations recited in the warrant, the defendant engaged in protected speech. The prosecution is unsustainable

as a matter of law and is deeply offensive to the core values protected by the guarantees of freedom of expression at both the state and federal levels.

The defendant sets forth only facts alleged in the warrant. *See e.g. State v. Colon*, 230 Conn. 24, 34 (1994)("the information to establish probable cause must be found within the [warrant] affidavit's four corners"). He primarily catalogues the arguably inciting and threatening statements. The comments, set forth in as near chronological order as the warrant permits, are recited in the tabular form. All were published on Facebook. For purposes of this motion only, the defendant concedes that he both wrote them and caused them to be published. To place the matter in context, it bears noting that the defendant is engaged in highly contentious family litigation in the Middletown Superior Court. He has also been tried, and convicted, of making threatening statements about a Superior Court judge presiding over early stages of the family litigation. That conviction is on appeal and is awaiting argument before the state Supreme Court. *State v. Taupier*, S.C. 19950.

Post Date/Time	Comment
January 6, 2017	"856 days political prisoner by Dan Fucktard Malloy-with judge Gold and Brenda Hans." *Warrant*, ¶14.
January 8, 2017	"CROMWELL POLICE DUPED BY MENTALLY ILL EX TO THINK CHILDREN ARE ENDANGERED..THEY SAY THEY DON'T NEED WARRANTS TO COME IN HOME....POLICE DON'T NEED WARRANTS, THEY WILL NEED BODY BAGS NEXT TIME" *Warrant*, ¶4. Posted with or contemporaneous to pictures of children and family dog. *Warrant*, ¶16.
January 9, 2017	"I JUST GOT NOTICE OF CONTEMPT FROM THE STATE WEBSITE WITHOUT GETTING OFFICIAL SERVICE, I GUESS THE JEWS THAT RUN THE MIDDLETOWN CLERKS OFFICE (JOE BLACK – JONATHON FIELD) DON'T NEED TO GET OFFICIAL SERVICE TO SCHEDULE A HEARING..THIS IS WHY WE NEED TO START KILLING WITH LOVE THOSE THAT

Time not clear	VIOLATE THE CIVIL RIGHTS OF SOCIETY THAT ARE JUDGES WHO HAPPEN TO PRACTICE THE JEWISH FAITH." *Warrant*, ¶4. A response from a Jennifer Mariano stated "I had someone else in mind, but we can start with the judges." *Warrant*, ¶5. A response from Adrienne Baumgartner saying "for that comment, ed, you no doubt could get arrested & also used against you in custody case." Followed by, "you really should either edit or delete that." Mr. Taupier allegedly responded with "meme" set forth below and "Free Speech." *Warrant*, ¶17.
January 9, 2017	"KILL COURT EMPLOYEES AND SAVE THE COUNTRY....Stop driving the SUV and save a planet...this is what a liberal would say..." *Warrant*, ¶4.
Date not included	"Meme"stating: -"JUDGE BOZZUTO FOR LIBERTY TREE CHALLENGE" -"The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.-Thomas Jefferson" -"Nominate Judge Bozzuto to Liberty Tree Refreshment Challenge. Spill some blood, save a tree!" *Warrant*, ¶4.
January 11, 2017	"I was given 5 yrs for disturbing peace hmm no judicial retialiation in CT with Judges...btw Devlin said he felt sorry for the cop...and wanted to make it right despite the girl and her family wanting the maximum...im on $1.3m bond for disturbing the peace...kill everyone of these judges."
January 12, 2017	"we the public have no trust in the CT judiciary...time to burn the courts down!" *Warrant*, ¶19.
January 13, 2017	"News flash I am incarcerated-house arrest for 860+days, like DT-Rip" Followed by "for disturbing peace on 1.3 million dollar bond." Then "Judge David p Gold lives in Middlefield, CT if you want to ask him why at his house." *Warrant*, ¶20.
January 14, 2017	"CT courts destroy this every sec of every day!>The family courts in CT are run by Beth Bozzuto, the mother destroying families across the state! Time to burn down the courts." *Warrant*, ¶21.

II. LAW AND ARGUMENT

The defendant made legal, political statements in a quintessential public forum. Each of his comments is protected under the imminent lawless action test and the true threat doctrine. None of the statements rise beyond abstract advocacy of lawlessness, a form of speech the United States Supreme Court has unequivocably declared to be protected speech. *Brandenburg v. Ohio*, 395 U.S. 444 (1969.

A. Facebook Is A Quintessential Public Forum.

The defendant's comments were made in a public forum: they deserve the full protections of the First Amendment and corresponding provisions of the state constitution. The state Supreme Court observed last summer that:

> The prevalence of Facebook use in American society cannot be reasonably questioned. Indeed, a 2015 survey performed by the Pew Research Center reveals that 72 percent of American adults that use the Internet also use Facebook. Pew Research Center, "The Demographics of Social Media Users," (2015) available at http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users (last visited May 25, 2016); see also *Vincent v. Story County*, United States District Court, Docket No. 4:12CV00157 (RAW), 2014 U.S. Dist. LEXIS 184287 (S.D. Iowa January 14, 2014) ("[t]he use of . . . social media like Facebook is an ever [***23] increasing way people speak to each other in the twenty-first century"); *State v. Craig*, 167 N.H. 361, 369, 112 A.3d 559 (2015) ("Facebook and other social media sites are becoming the dominant mode of communicating directly with others, exceeding e-mail usage in 2009"); *Forman v. Henkin*, 134 App. Div. 3d 529, 543, 22 N.Y.S.3d 178 (2015) ("Facebook and other similar social networking sites are so popular that it will soon be uncommon to find a . . . [person] who does not maintain such an on-line presence"). Nor were they "technically complex issue[s]" requiring expert testimony. *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 78, 848 A.2d 395 (2004); see also *Graziosi v. Greenville*, 985 F. Supp. 2d 808, 810 (N.D. Miss. 2013) ("Facebook claims to enable 'fast, easy, and rich communication'"), aff'd, 775 F.3d 731 (5th Cir. 2015); *United States v. Amaya*, 949 F. Supp. 2d 895, 912 (N.D. Iowa 2013) ("Facebook offers . . . an affordable, easy, and extremely viable option to

seek information"); *Olson v. LaBrie*, Docket No. A11-558, 2012 Minn. App. Unpub. LEXIS 126, 2012 WL 426585, *1 (Minn. App. February 13, 2012) (process for finding users on Facebook "simple"), review denied (Minn. April 17, 2012); *Smith v. State*, 136 So. 3d 424, 432 (Miss. 2014) (creating Facebook account "easy").

State v. Buhl, 321 Conn. 688, 700-02 (2016)(holding that expert witness on basic Facebook concepts was not necessary). More importantly, the United States Supreme recently noted that, in the digital age, Facebook and other social media platform are—essentially—the public square for First Amendment purposes:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward* v. *Rock Against Racism*, 491 U. S. 781, 796, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
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> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 868, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5-6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.*, at 6. This is about three times the population of North America.
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> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno, supra,* at 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15-16. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as

> diverse as human thought." *Reno, supra*, at 870, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (internal quotation marks omitted).

Packingham v. North Carolina, _ U.S. _, 2017 LEXIS 3871, 10 (2017). There can be no doubt that the defendant was acting as cyber town-crier for purpose of his constitutional rights.

B. The Defendant's Comments Do Not Constitute Incitement Under *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The incitement counts are governed by the test set forth in *Brandenburg v. Ohio*, supra, 395 U.S. 444 (The "*Brandenburg* test"): "[T]he constitutional guarantees of free press and free speech do not permit a 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." *Brandenburg v. Ohio*, 395 U.S. at 447. In subsequent cases, the courts have shed additional light on the "imminence" and "likely to incite" requirements.

> In the seminal case of *Brandenburg*...the Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment. Although the Court provided little explanation for this holding in its brief *per curiam* opinion, it is evident that Court recognized from our own history that such a right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

Rice v. Paladin Enter., 128 F.3d 233, 243 (4th Cir., 1997). Accordingly, the *Brandenburg* court held that speech that "'advocates [a] law violation [is protected by the first amendment] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" *State v. Ryan*, 48 Conn.App. 148, 159 (1998) citing *Brandenburg*, supra, 395 U.S. at 447. Put more

simply, the comments at issue must (1) be directed to inciting or producing imminent lawless action and (2) likely to incite or produce the action advocated. The comments in the warrant fail on both counts.

Speech, even menacing speech, is protected unless it directly tends to violence. Thus, "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even the moral necessity of a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States*, 367 U.S. 290 (1961)(overturning a Smith Act prosecution against a Communist Party member). To be an imminent threat, "[t]here must be some substantial or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to otherwise ambiguous theoretical material ..." Id., pp. 297-98.

Even expression of a desire to see another person dead, even to wish in some hypothetical future to be the executioner of a foe, is not enough to transform an abstract hope into an imminent threat. "Sometime I will see the time we can stand a person like this S.O.B. against the wall ... and shoot him," the defendant said in *Noto*. Id., 296. The Supreme Court was unmoved: "Surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party toward its enemies, and might be expected from the Party if it should ever succeed to power." Id., 298. "It is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once groundwork has been laid, which is an element of the crime...." Id, 298.

"Political hyperbole" is distinguishable from a true or imminent threat. Thus, a speaker convicted of violating a federal law against threatening to take the life of the president had his conviction vacated when the Supreme Court concluded the following utterance was protected speech when uttered by a draft resister: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." *Watts v. United States*, 394 U.S. 705 (1969).

A menacing utterance spoke directly to another person is also protected. The Court considered both the context in which an utterance was made and the emotionally charged nature of the speech itself in concluding that the following was protected speech: An NAACP organizer told a group of African-Americans attending a rally in support of the boycott of white-owned business: "If we catch any of you going in any of those racist stores, we're gonna break your damn neck." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982). "[M]ere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." Id. 927.

> In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, intending to create a fear of violence whether or not improper discipline was specifically intended.... The emotionally charged rhetoric of ... [the language] did not transcend the bounds of protected speech...

Id., 927-928.

Finally, in *Hess v. Indiana*, 414 U.S. 105 (1973) the Court overturned the conviction of a Vietnam antiwar protestor who uttered to a crowd of activists who had just been removed from a public street by local law enforcement agents: "[W]e'll take the fucking street later (or again)." The Court determined this utterance was, "at worst, ... nothing more than advocacy of illegal action at some indefinite future time." Id., 108.

Each and every one of the comments from the warrant in the instant case, taken either individually, or as a whole, fits easily within the framework of protected speech adumbrated by *Brandenburg* and its progeny: they are either political hyperbole, as in *Watts*; mere advocacy of the use of force, as in *Noto* and *Claiborne Hardware Co.*; advocacy of illegal action at some future time, as in *Noto*; or a wish in some hypothetical future to see others dead or see courthouses burn, as in *Noto*. None of the utterances, taken individually, or as a whole, was made in a context supporting *any*, let alone "some substantial or circumstantial evidence of a call to violence now or in the future which is sufficiently strong and sufficiently persuasive" to rise to the level of inciting violence. *Noto*, 298.

First and foremost, the comments were posted on Facebook, and were not directed toward anyone in particular. There is no indication that the messages were sent to confederates bent on mayhem. The comments do not come close to the declaration that protestors would "take the streets" after police had cleared them, a declaration made to fellow protestors who had just been moved by police, by a man facing a crowd of fellow protestors. The Court held the protestor's comments, in this context, did not constitute incitement. "[A]t worst, ... [the comments] were nothing more than advocacy of illegal action at some indefinite future time." *Hess*, 414 U.S. at 108. Facebook, a new social media public forum, lacks the immediacy of face-to-face communication; it favors the crank, and its commentary, often vitriolic and ugly in the extreme, is made possible largely by the very lack of immediate contact with another. A call to arms on Facebook is neither an imminent nor likely threat of danger, absent other circumstances altogether lacking in this case.

While the defendant concedes that a fellow travel (Jennifer Mariano) – another person disaffected with the judicial system – did reply to at least one of his messages and appeared to draw some perverse form of encouragement from it, it cannot be said that their exchange represents anything like a conspiracy or agreement to join in unlawful conduct. The exchange represents two cranks cackling at the digital water cooler.

Consider the comments and their analogues in the reported cases. (The defendant does not see the need to argue that reference to the governor as a "fucktard" is lawful; the presence of the remark in the warrant gives new meaning to the term "surplusage." Neither does the defendant see the need to address the warrant's reference to the defendant's hostility toward the judge presiding over, and the prosecutor handling, his case. Presumably the town in which the judge lives is a matter of public record.)

1. **"Police don't need warrants, they will need body bags next time."**

This is far removed from civil discourse in support of the "castle doctrine," supporting the ancient Anglo-American doctrine that a man's home is his castle. But merely being impolitic does not make the utterance criminal. Is this not the equivalent of the "teaching of the moral propriety or even the moral necessity of a resort to force and violence," the sort of speech found protected in *Noto* because it did not "prepar[e] a group for violent action and steel[] it so such action"? *Noto*, 367 U.S. 297.

2. **"[W]e need to start killing with love those that violate the civil rights of society that are judges who happen to practice the Jewish faith."**

Even if this not an inartful way of referring to "killing with kindness," it is far from incitement. It is exhortation, to be sure, but of the sort indistinguishable from the words

found protected in *Noto*: "Sometime I will see the time we can stand a person like this S.O.B. against a wall ... and shoot him." Id., 296.

3. **"Kill court employees and save the country.... Stop driving the SUV and save a planet ... this is what a liberal would say..."**

A court employee reading this would no doubt feel apprehensive. But would they feel any more apprehensive than a capitalist or industrialist listening to the protected teaching of a member of the Communist Party last century? The call to class war, and the teaching of the need for violent revolution is protected speech. Again, *Noto* is instructive: "surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party toward its enemies,..." Id., 298. This is not present advocacy.

4. **"Judge Bozzuto for liberty tree challenge... "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.... Nominate Judge Bozzuto to Liberty Tree Challenge."**

Again, there is no doubt these words are highly disturbing to Judge Bozzuto. But it bears noting she is a public figure who chose to don a robe and preside over the disputes of others as a jurist. Jefferson expected violent opposition to constituted authority from time to time, and thought it a necessary tonic. This is simply "the teaching of the moral propriety or even the moral necessity of a resort to force and violence." *Noto*. The defendant, like anyone of us, has a right to express that point of view, or are we now prepared to ban Thomas Jefferson's works as too incendiary for our tender sensibilities?

5. "...[I'm] on $1.3 million bond for disturbing the peace...kill everyone of these judges."

This is no doubt chilling, and in the imperative voice. It does differ in degree from the comments of a NAACP organizer who threatened to "break ... [the] damn neck" of anyone who crossed a picket line. The *Claiborne* Court noted in ruling this speech protected that "mere advocacy of the use of force does not remove speech from the protection of the First Amendment." The solitary ranting of a disaffected litigant on Facebook is not the sort of "passionate atmosphere" in which speech "create[s] a fear of violence." Atmospherics matter. Facebook represents the collective Id; if it is a public square, it is nonetheless a square composed of solitary individuals. Nothing in Mr. Taupier's speech created an imminent risk that anyone would actually heed his words and act. *Clairborne Hardware Co.*, 927-928.

6. "The family courts in CT are run by Beth Bozzuto, the mother destroying families across the state! Time to burn down the courts."

The defendant sounds like a simple-minded pamphleteer in this instance, writing the divorced dads' version of The Communist Manifesto. But rather than asking workers of the world to unite so as to throw off the chains, by means of violent revolution, of industrial bondage, the defendant wants a different form of violence – burning down the courts. "It's time," he says. This simple declaration is imminent only in form.

As a matter of law, "[t]here must be some substantial or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive..." *Noto*, 298. This call to arms, if it can be so characterized, is not a call for future action, the time is now, the defendant writes. But what supports the conclusion

that this call is "sufficiently and sufficiently pervasive" to transform it from political hyperbole into a crime? Nothing distinguishes from garden variety social media vitriol.

In sum, the comments were not directed at producing *imminent* lawless action. There is no doubt the comments at issue were directed at lawlessness: clearly, killing anyone—including judges—is illegal. But there is no evidence that the murder of judges, court staff, or arson of courthouses was imminent as a result of this speech. The defendant had every right to advocate those actions in support of his political cause. There is no evidence in the warrant that a mob was forming to act on this invocation. Nor was there evidence that a bona fide conspiracy was forming. In fact, the defendant's use of Facebook makes the threat of violence *less* imminent: he clearly believed in the power of persuasion insofar as he made these arguments in a public forum, seeking acolytes. These comments would be far closer to imminent lawless action were they made in a less public forum or in a furtive way: that would be closer to imminent lawlessness because it would be creating a mob for the purposes of ambush.

Second, the comments at issue were not likely to produce any of the violent acts contemplated. It is not hyperbolic to suggest that the Internet is an ocean of human bitterness and represents our collective id. There is little evidence to suggest that *public* Facebook posts are effective exhortations to violence. These comments were little more than all-caps whispers in the winds of grievance and not likely to produce any meaningful real-world action. There is a widespread public debate on whether social media is an effective or meaningful form of political mobilization. *See* L. Seay, "*Does Slacktivism Work?*" Washington Post, March 12, 2014, available at https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/12/does-slacktivism-

work/?utm_term=.3c99bdd2782f. There is some evidence that it does work in the form of inflammatory but truthful viral videos, cultivated messaging, and calculated presentation of issues of mass appeal. But it is difficult to think the barely coherent ramblings of irate individuals will coalesce into a wave of political violence. These are the type of hyperbolic ramblings that are frequently seen and quickly dismissed by the internet's marketplace of ideas. They are not likely to lead to violence under the second prong of *Brandenburg*.

C. The Defendant's Alleged Statements Did Not Constitute "True Threats" As Defined By *Virginia v. Black*, 538 U.S. 343 (2003).

The true threat doctrine is close cousin of the *Brandenburg* test. The Supreme Court most recently addressed this in *Virginia v. Black*:

> 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects 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.' Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. 360-59. (Internal cites omitted). *Black* turned on a Virginia cross-burning statute: the statute outlawed cross burning with the intent to intimidate and stated that the burning of a cross was *prima facie* evidence of an intent to intimidate. *Id.* 348. It relied on two fact patterns, consolidated into one appeal: in the first, a leader of the Klu Klux Klan burned a cross at a Klan rally; in the second, a man burned a cross in his black neighbors' yard in retaliation for those neighbors complaining about his use of his backyard as a firing range. The Supreme Court held that there was no doubt that a state could lawfully

proscribe cross burning *with the intent to intimidate a person*—hence burning a cross in a black neighbor's yard was illegal. *Id.* 362-63 (majority)(emphasis added). However, a plurality of the Court held that the *prima facie* evidence provision of the statute was unconstitutional because cross burning in the context of a political rally could constitute protected expression. *Id.* 363-68. The question of intent was critical to the *Black* court's analysis.

Connecticut's most recent consideration of the true threat doctrine was *State v. Krijger*, 313 Conn. 343 (2013). There, the state Supreme Court held that:

> Prosecution under a statute prohibiting threatening statements is constitutionally permissible 'as long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.

Krijger, supra, 313 Conn. at 450 quoting *United States v. Malik*, 16 F.3d 45, 51 (2d. Cir.) cert. denied, 513 U.S. 968, 115 S.Ct. 435, 130 L.Ed.2d 347 (1994). Critically, the state Supreme Court has "traditionally applied" this test as an objective one and declined to "decide whether *Black* requires a subjective test." *Id.* 451 n.10. Under *Krijger*, whether the First Amendment requires a subjective intent element is an open question. 313 Conn. at 451 n.10. The comments at issue in *Krijger* were insufficient to prove a true threat even under the negligence standard the court applied.

The United States Supreme Court recently opined on the question of intent in *Elonis v. United States*, _ U.S. _, 135 S.Ct. 2001 (2015). It did not, however, reach the First Amendment question. *Id.* 2013. In interpreting 18 U.S.C. §875(c)—"mak[ing] it a crime to transmit in interstate commerce 'any communication containing any threat....to injure the person of another"—the court held that the negligence standard, used by the

Third Circuit, was insufficient. The reason was that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil' and Congress left it intact here:..." *Elonis*, 134 S.Ct. at 2012. The Court did not address what mental state should be required under the statute or the First Amendment. *Id.* 2013; see also *id.* 2013-2028, *Alito J.*, dissenting in part, *Thomas, J.*, dissenting in part. Specific intent should be required as an element of the offense of threatening, to hold otherwise is to yield to the tender-hearted and faint the ability to criminalize vigorous speech merely because it makes them uncomfortable.

D. The State Cannot Circumvent *Brandenburg* Doctrine With The True Threat Doctrine.

This case poses a novel question of law to both *Brandenburg* and true-threat jurisprudence: can speech that is lawful advocacy of political violence under *Brandenburg* be, nonetheless, unlawful as a true threat on the grounds that it makes the real subjects of abstract violence feel, actually, uncomfortable? The answer to this must, categorically, be "no." This would undermine the protections so carefully drawn in each line of cases. A hypothetical illustrates the point.

Imagine a political leader, elected to office and controlling the powers of the executive, so sensitive to any expression of disapproval in the free press that he or she could do little other than respond to petty grievances. Imagine another political or cultural leader who publicly stated something that called for violence against the elected leader but was squarely legal under *Brandenburg*. Were the elected leader able to claim that the statement was a true threat a prosecute his political opposition, then *Brandenburg* would be meaningless. This a not a workable or permissible interpretation

of the first amendment. Accordingly, both *Brandenburg* and true threat doctrines must be drawn in a way that one does not proscribe the freedoms granted by the other.

E. State Constitutional Considerations.

It is well settled that the federal constitution sets a floor, rather than a ceiling, on fundamental constitutional rights. *See e.g. Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 155 (2008)("[i]t is beyond debate that federal constitutional and statutory law establishes a *minimum* national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights"). In the event the Court concludes that the First Amendment does not encompass the defendant's comments, Article First, § 4, 5, and 14[1] of the state constitution do.[2]

In *State v. Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992), the state Supreme Court identified six factors that, "to the extent applicable are to be considered in construing the contours of our state constitution." *Kerrigan*, supra, 289 Conn. at 157.

> Theses factors are: (1) the text of the operative constitutional provision; (2) holdings and dicta of [the state Supreme Court] and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations including relevant public policies.

Id. The defendant addresses each of these factors *seriatim.*

The text of the operative provisions marginally supports the defendant's position—particularly in the digital age. The Supreme Court noted the textual

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[1] The state Supreme Court referred to these provisions collectively as protecting free expression in *Leydon v. Greenwich*, 257 Conn. 318, 347 (2001).

[2] The defendant has raised this issue in *State v. Taupier* SC 19950 which is now pending in the Connecticut Supreme Court.

distinctions in *State v. Linares*, 232 Conn. 345, 380-81 (1995). Specifically, §14 includes a right of remonstrance in addition to a right of petition: the missive in this case fits a liberal definition of "remonstrance."

The holdings and dicta of the state's appellate courts support the defendant. The Supreme Court "explicitly...stated that the Connecticut constitution, under article first, §§ 4, 5 and 14, provides greater protection for expressive activity than that provided by the first amendment to the federal constitution." *Leydon v. Town of Greenwich*, 257 Conn. 318, 347 (2001) citing *Linares*, supra, 232 Conn. at 380-81. While *Leydon* was a public forum case, the court specifically used the phrase "expressive activity" not "expanded public forums." The email at issue here was expressive activity and, therefore, falls within *Leydon's* ambit. While the *Krijger* noted that that it traditionally applied an objective test, that tradition is neither binding nor articulated as holding or dicta of this court. *See* 313 Conn. 451 n.10.

Persuasive, relevant federal precedent is split. The Second Circuit observed that the Federal Courts of Appeals are divided on this issue in *United States v. Turner*, 720 F.3d 411, 420 n.4 (2013)(noting divide but that the relevant statute in that case imposed a subjective intent element, the issue was not briefed, and subjective intent was clear from evidence). The Ninth Circuit, after analyzing the *Black* plurality and concurrences, concluded "eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." *United States v. Cassel*, 408 F.3d 622, 632 (2005). It was "therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Id.* 633. The Sixth Circuit claimed that

Cassel "read too much into *Black*." *United States v. Jeffries*, 693 F.3d 473, 479 (2012). The Fourth Circuit agreed with this approach in *United State v. White*, 670 F.3d 498, 508-09 (4th Cir. 2009) when it interpreted 18 U.S.C. § 875(c)—the *Elonis* statute. But *Elonis* has since been decided and the Ninth Circuit's subjective—if not specific—intent standard is ascendant and the Ninth Circuit was prescient.[3]

Sister state precedent is sparse and unremarkable. A Washington Court of Appeals recently reversed a stalking conviction based on off-colored Tweets on the grounds that the Tweets did not even meet the negligence standard: though that defendant raised the specific intent issue, the court did not reach it. *State v. Kohonen*, 192 Wn.App. 567, 583 n.9 (2016). The Colorado Court of Appeals, Fifth Division rejected the contention that, following *Black*, the First Amendment required a subjective intent requirement. *State v. Stanley*, 170 P.3d 782, 789 (2007). It preceded *Elonis* and neglected the state constitution.

The history and policy considerations require few remarks. The bulk of the sections' history concerns issues of libel, slander, commercial speech, and assembly. *See W. Horton*, "*The Connecticut State Constitution: A Reference Guide*," 44-48, 72-73 (1st Ed., 1993). Contemporary concerns include the increasingly acrimonious nature of our—perhaps oxymoronic—civil discourse and its symbiotic relationship with the digital age. Incendiary speech, however, may be pernicious to policy but remains a perquisite of liberty. *But see Baccala*, supra, 326 Conn. at 276-78, *Eveleigh, J.*, dissenting.

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[3] The Connecticut Supreme Court compiled these cases in their entirety in *Krijger*, 313 Conn. at 451 n.10. Notably, the majority of circuits that still continued to the apply the objective standard following *Black* included the Third Circuit in *Elonis* lending further support to the defendant's contention that this issue is decided on the quality, rather than quantity, of precedent.

The text of §14, the *Leydon* holding, *Elonis*—in the form of a relevant federal precedent, and the Ninth Circuit rationale suggest a state constitutional requirement of specific intent under the true threat doctrine.

III. CONCLUSION

The First Amendment and its corresponding state constitutional provisions protect the market place of ideas. *See e.g. Carl v. Children's Hospital,* 702 A.2d 159, 183 (D.C. Court of Appeals, 1998)("It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail . . . ."). It is a duty of citizenship—and certainly of the courts—to understand when an individual is acting a as a market maker and when an individual is acting as a market participant. Every citizen and courtroom has a duty to defendant the integrity of the market place. Our economic markets long-ago issued their verdicts on the horse-and-buggy, the rotary phone, and the typewriter: they are inferior to the automobile, the smartphone, and the personal computer. But no one contends an individual lacks the liberty to peddle those goods in the marketplace and let the market decided. So too here. There can be no doubt that the defendant was peddling the horse-and-buggy of political theories—at best. But the state and federal constitutions give him every right to do so. We cannot let our role as market participants cloud our judgment as guardians of the market's integrity. But that is precisely what the state asks the Court to do when it arrests Mr. Taupier for his deeply held political beliefs and hauls him before this to account for them. His comments were entirely legal under prevailing law, there is no probable cause to believe a crime was committed, and this case, respectfully, should be dismissed.

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CERTIFICATION

This is to certify that a copy of the foregoing has been served on counsel, the Office of the Chief State's Attorney for the Judicial District of New London at Geograhical Area 10 at 860-443-8444, by facsimile, this 6th day of September 2017.

_____
NORMAN A. PATTIS