

*Institute for*  
**Constitutional Advocacy and Protection**  

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**GEORGETOWN LAW**

## **Fact Sheet: True Threats and the First Amendment**

Political violence, hate crimes, and domestic extremism raise challenging questions about how law enforcement can respond to and prevent threats and intimidation without chilling protected First Amendment activity. Although most speech is constitutionally protected, the First Amendment does not protect particularly dangerous speech. For example, the First Amendment does not protect violent or unlawful conduct, even if it is meant to express an idea, nor does it protect speech that incites imminent violence or lawlessness.<sup>1</sup> It also does not protect “true threats,” although what qualifies as a “true threat” is itself limited. This Fact Sheet explains the differences between protected speech and unprotected true threats.

### **What is a true threat, and why doesn’t the Constitution protect it?**

The Supreme Court has long recognized that some types of speech are so dangerous that they are unprotected by the First Amendment.<sup>2</sup> True threats fall into this category. A true threat encompasses **“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.”**<sup>3</sup> “The speaker need not actually intend to carry out the threat.”<sup>4</sup> The threat alone harms its victim, and the state can punish true threats to “‘protect[] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ not just ‘from the possibility that the threatened violence will occur.’”<sup>5</sup> Threats of violence can be *implicit* and not “overtly threatening” so long as “both the actor and the recipient get the message.”<sup>6</sup>

### **Are all statements threatening violence true threats?**

**No.** As the Supreme Court has explained, “[t]he ‘true’ in that term distinguishes” serious expressions of intent to harm “from jests, ‘hyperbole,’ or other statements that when taken in context do not convey a real possibility that violence will follow (say, ‘I am going to kill you for showing up late’).”<sup>7</sup> Whether threatening language is a “true threat” therefore depends on context: is it specific, is it particularized to a person or an organization, is it made in a targeted way, how does the audience react? For example, the Supreme Court has held that a hyperbolic threat against the President made during a political debate was not a true threat because it was conditioned on an event unlikely to occur, and it was not received by the audience as serious.<sup>8</sup> Similarly,

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<sup>1</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). For more information about threats, incitement, and other categories of speech that are unprotected by the First Amendment, see Inst. for Const. Advocacy & Prot., *Fact Sheet on Threats and Incitement to Violence Related to the Election*, <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2020/12/Fact-Sheet-on-Threats-Related-to-the-Election.pdf>.

<sup>2</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“‘[F]ighting’ words” that inherently cause harm or immediate disturbance “are no essential part of any exposition of ideas, and 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>3</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>4</sup> *Id.* at 359-60.

<sup>5</sup> *Id.* at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

<sup>6</sup> *Planned Parenthood of Columbia/Willamette, Inc. v. Amer. Coal. of Life Activists*, 290 F.3d 1058, 1085 (9th Cir. 2002) (holding that “WANTED” and “GUILTY” posters featuring abortion doctors were “true threats,” even though they were not “overtly threatening,” in light of the murders of other doctors who had featured on similar posters).

<sup>7</sup> *Counterman v. Colorado*, 600 U.S. 66, 74 (2023).

<sup>8</sup> *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam) (where defendant, at an anti-Vietnam war rally said, “If they ever make me carry a rifle the first man I want to get in my sights is [the President],” concluding that the defendant’s language was merely “a kind of very crude offensive method of stating a political opposition to the President” and noting that the “expressly conditional nature of the statement and the reaction of the listeners” informed this conclusion).

the Supreme Court concluded that an ambiguous threat of violence made as part of a lengthy, “emotionally charged” political speech during a civil rights boycott was protected speech in the context in which it was made.<sup>9</sup> By contrast, the Second Circuit Court of Appeals concluded that a blog poster’s online threats made against judges for their ruling in a Second Amendment case were true threats where they included a “lengthy discussion of killing” the judges, a reference to the killing of another judge’s family, and “detailed information regarding how to locate” the three judges.<sup>10</sup> During political or election-related events, when hyperbolic rhetoric is more likely, law enforcement must consider the specificity of the threat and its context to assess its potential seriousness and distinguish it from protected hyperbole.<sup>11</sup>

## What if the threat is one of nonphysical harm?

Although the Supreme Court has generally discussed “true threats” in the context of potential violence, the threatened harm need not be physical injury or death. In the context of voter intimidation, “threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety” may be subject to prosecution as voter intimidation.<sup>12</sup> Thus, some courts have held that targeted messages—like mailings or robocalls to voters—that threaten immigration, economic, or legal consequences in order to discourage the recipients from voting are unprotected “true threats.”<sup>13</sup> Other forms of voter intimidation have also been characterized as potentially unprotected by the First Amendment (or subject to regulation consistent with the First Amendment), including posting personal information about voters who deposit ballots in a drop box, taking photos of or recording people within 75 feet of a ballot drop box, and making false statements about state ballot-fraud laws.<sup>14</sup>

## Can symbolic speech constitute a true threat?

**Sometimes.** In *Virginia v. Black*, the Supreme Court held that cross burning—a form of symbolic speech in which conduct is intended to express an idea—may be constitutionally prohibited in some instances as

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<sup>9</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 928 (1982) (concluding that “strong language” (e.g., “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck”) used in “an impassioned plea for black citizens to unify” in support of a boycott was protected speech where it did not “incite lawless action”).

<sup>10</sup> *United States v. Turner*, 720 F.3d 411, 423 (2d Cir. 2013); see also *United States v. White*, 810 F.3d 212, 216-17, 228 (4th Cir. 2016) (affirming as true threats emails suggesting someone would “beat [the recipient’s] ass,” that she would “probably be hospitalized,” or have “something violent potentially happen[] to [her] around [her] baby.”); *United States v. Wheeler*, 776 F.3d 736, 738, 744 (10th Cir. 2015) (upholding a conviction for threatening online statements in which the defendant encouraged purported religious followers to take violent action against law enforcement, because they could reasonably be considered “subject to [his] will.”)

<sup>11</sup> See *United States v. Bagdasarian*, 652 F.3d 1113, 1123 (9th Cir. 2011) (reversing a conviction for racist threats against then-President Obama because they “fail[ed] to express any intent on [defendant’s] part to take any action,” and noting that “the fact that he possessed [] weapons is not sufficient to establish that he intended to threaten Obama himself”).

<sup>12</sup> Dep’t of Just., *Federal Prosecution of Election Offenses* 50 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/dl>.

<sup>13</sup> See *United States v. Nguyen*, 673 F.3d 1259, 1261-62, 1265-66 (9th Cir. 2012) (holding that the First Amendment does not prevent states from prohibiting voter intimidation as a type of true threat and upholding a search warrant based on probable cause that evidence of voter intimidation would be found where letters were sent to presumed Latino immigrants that claimed that their personal information would be shared with anti-immigrant groups if they voted); *Nat’l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 465-66, 485-86 (S.D.N.Y. 2020) (concluding that a robocall that threatened legal and economic harm, and forced vaccination, to discourage mail-in voting constituted a true threat). But see *People v. Burkman*, 992 N.W.2d 341, 358-59 (Mich. Ct. App. 2022) (concluding the same robocall in *Wohl* was not a true threat because it did not involve a threat of unlawful violence, but concluding that the robocall was not protected by the First Amendment because it was speech integral to criminal conduct).

<sup>14</sup> *Ariz. All. for Retired Ams. v. Clean Elections USA*, No. 22-CV-1823, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022); Transcript at 74-85, *Ariz. All. for Retired Ams.*, 2022 WL 17088041 (D. Ariz. Nov. 1, 2022) (No. 22-CV-1823), ECF No. 71; see also *Minn. Voters All. v. Mansky*, 585 U.S. 1, 18 n.4 (2018) (“We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures.”).

unprotected speech “because burning a cross is a particularly virulent form of intimidation.”<sup>15</sup> If symbolic speech has the characteristics of a “true threat,” then it falls outside the protection of the First Amendment, and governments can restrict it. But even if symbolic speech does not fall within the true threats exception to the First Amendment, it may still be restricted if the government interest is substantial, the regulation is narrowly tailored, and the goal is unrelated to the suppression of speech or expression.<sup>16</sup>

## **Must the speaker have intended their statement to be a threat for it to be a true threat?**

**To a certain extent.** The Supreme Court recently held in *Counterman v. Colorado* that, in a criminal prosecution based on threatening communications, the First Amendment requires the government to prove that the speaker had “some subjective understanding of the threatening nature of his statements.”<sup>17</sup> The Court held that prosecutors need only prove that the speaker was “reckless,” meaning that he was aware “that others could regard his statements as threatening violence and deliver[ed] them anyway”—not that he specifically intended that his words would be received as a threat.<sup>18</sup>

## **How can officials mitigate the possibility of threats and violence at public events?**

Officials generally cannot preemptively silence speakers or cancel events in order to prevent threats of violence; that is a “prior restraint” on speech, which is generally forbidden by the First Amendment.<sup>19</sup> Officials should consider other methods to mitigate the potential for violence, including content-neutral time, place, and manner restrictions. Such measures could include physical separation of opposing groups at protests and rallies by using buffers or barricades or maintaining distance between demonstrators and voters at polling places.<sup>20</sup> At public meetings, such as city council and county board meetings, officials can constitutionally impose regulations on the topics that can be discussed and may remove disruptive speakers in certain circumstances.<sup>21</sup> And where probable cause exists that speech has crossed the line from protected political speech into true threats, law enforcement may enforce state and federal laws that prohibit such threats in order to protect against the fear of and potential for violence that they create.<sup>22</sup>

*This guidance was prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center. ICAP's mission is to use the power of the courts to defend American constitutional rights and values. Visit us at [www.law.georgetown.edu/icap/](http://www.law.georgetown.edu/icap/). Contact us at [reachICAP@georgetown.edu](mailto:reachICAP@georgetown.edu).*

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<sup>15</sup> 538 U.S. at 363.

<sup>16</sup> *O'Brien*, 391 U.S. at 376-77; cf. *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (striking down a ban on flag burning because the record did not support a state interest unrelated to the suppression of free expression).

<sup>17</sup> *Counterman*, 600 U.S. at 69.

<sup>18</sup> *Id.* at 79, 73 (internal quotation marks omitted) (quoting *Elonis v. United States*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)).

<sup>19</sup> *Kunz v. New York*, 340 U.S. 290, 293-95 (1951); *Collins v. Jordan*, 110 F.3d 1363, 1372-73 (9th Cir. 1996) (noting that the government cannot “suppress legitimate First Amendment conduct as a prophylactic measure” to prevent violence).

<sup>20</sup> *Grider v. Abramson*, 180 F.3d 739, 750 (6th Cir. 1999); *Burson v. Freeman*, 504 U.S. 191, 208-11 (1992). For more information, see Inst. for Const. Advocacy. & Prot., *Protests & Public Safety: A Guide for Cities & Citizens* (Aug. 2022), <https://constitutionalprotestguide.org/home/>.

<sup>21</sup> For more information on how officials can regulate public meetings, see Inst. for Const. Advocacy & Prot., *Protecting and Preserving the Public Meeting Space: Relevant Constitutional Principles*, [https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/05/GUIDANCE\\_Public-Meetings-5.1.2024-FINAL.pdf](https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/05/GUIDANCE_Public-Meetings-5.1.2024-FINAL.pdf).

<sup>22</sup> See 18 U.S.C. § 875; Nat'l Conf. of State Legislatures, *State Laws Providing Protection for Election Officials and Staff*, <https://www.ncsl.org/elections-and-campaigns/state-laws-providing-protection-for-election-officials-and-staff> (last visited June 12, 2024).