“What is a threat must be distinguished from what is constitutionally protected speech.”

INTRODUCTION

When the United States Supreme Court added true threats to the list of communications the First Amendment does not protect in *Watts v. United States*, it failed to announce any type of test courts should use to distinguish true threats from protected speech. Without any test, the federal courts of appeals have endeavored to determine for themselves when the government may constitutionally regulate an individual’s speech to prevent threats of violence. The circuits which have created a test unanimously agree courts should use an objective test to determine if a statement was a true threat or protected speech. While the same circuits require the speaker’s intent to communicate the threat be determined first, the circuits are split with regards to the viewpoint a court should consider the statement: that of a reasonable person acting as the speaker of the purported threat, or that of a reasonable person acting as the recipient of the purported threat. Currently, the First, Third, Seventh, Ninth and Tenth Circuits follow a reasonable speaker standard in which the court asks if a reasonable speaker would have foreseen that the recipient would interpret the communication as a true threat.

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3. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002).
4. Doe, 306 F.3d at 622.
5. Id.
6. Id.
7. See United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997) (determining a statement is a threat under 18 U.S.C. § 875(c) if a reasonable person would interprete it as a threat); United States v. Kosma, 951 F.2d 549, 556, 557 (3rd Cir. 1991) (determining a statement is a threat under 18 U.S.C. § 871 if a reasonable person would foresee it would be interpreted as an expression of intent to harm); United States v. Hartbarger, 148 F.3d 777, 782-83 (7th Cir. 1998) (determining a statement is a threat under 42 U.S.C. § 3631 because the reasonable person would foresee that it would be interpreted as an expression of intent to harm); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (determining a statement is a true threat under 18 U.S.C.
Fourth, Sixth, Eighth and Federal Circuits follow a reasonable recipient standard in which the court asks if a reasonable recipient would have viewed the communication as a serious expression of intent to harm. Additionally, the Fifth and Eleventh Circuits currently utilize an objective viewpoint neutral approach.

In *Doe v. Pulaski County Special School District*, the United States Court of Appeals for the Eighth Circuit evaluated both the necessary intent to communicate the threat test and true threat test used to distinguish an actual threat from protected speech. The mother of J.M., an eighth grade student, brought an action against the Pulaski County Special School District (“PCSSD”) for allegedly infringing on his First Amendment rights when the school district expelled J.M. for a letter he had written at home to a fellow classmate, K.G. The Eighth Circuit in an earlier panel decision of *Doe v. Pulaski County Special School District*, declined to adhere to its own reasonable recipient standard and instead favorably cited the reasonable speaker standard used in the Ninth Circuit. While the Eighth Circuit panel analyzed the factors of the reasonable recipient standard

§ 115(a)(1)(B) if a reasonable person would foresee that it would be interpreted as an expression of intent to harm; and United States v. Magleby, 241 F.3d 1306, 1311-13 (10th Cir. 2001) (stating a reasonable person would foresee a recipient as interpreting a burning cross as an expression of intent to harm under 42 U.S.C. § 3631).

8. See United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997) (stating the true threat test is whether a reasonable recipient would interpret the communication as a threat); United States v. Darby, 37 F.3d 1059, 1066 (4th Cir. 1994) (stating a communication is a threat if a reasonable recipient, who is familiar with the context of the statement, interprets it as a threat); United States v. Landham, 251 F.3d 1072, 1080 (6th Cir. 2001) (stating communications in violation of 18 U.S.C. § 875(c) must be viewed objectively from the perspective of the recipient); United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (stating a communication is a threat under 18 U.S.C. § 248 if the recipient of the threat could reasonably conclude it expresses an intent to harm); and Metz v. Dep’t of Treasury, 780 F.2d 1001, 1002 (Fed. Cir. 1986) (evaluating a threat from a reasonable recipient’s viewpoint and considering a number of factors).

9. See United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001) (stating a communication is a threat violating 18 U.S.C. § 875(c) if, when taken in its context, the statement has a reasonable tendency to create fear that the speaker will carry out the threat); and United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (stating a communication is a threat under 18 U.S.C. § 871 if a reasonable person would construe the statement as a serious expression of an intent to harm).

10. 306 F.3d 616 (8th Cir. 2002).
12. Id. at 619-20.
13. 263 F.3d 833 (8th Cir. 2001).
14. See United States v. Fulmer, 108 F.3d, 1486, 1491 (1st Cir. 1997) (determining appropriate standard in a true threat analysis is whether speaker would have reasonably foreseen the speaker’s statement would be interpreted as a threat by the recipient), and *Doe*, 263 F.3d at 837 (integrating several circuit approaches with the Eighth Circuit approach and then determining the standard for a true threat as whether a reasonable person would foresee that the letter would be interpreted as a serious expression of intent to harm recipient).
set out in an earlier Eighth Circuit decision, United States v. Dinwiddie,\textsuperscript{15} it obfuscated the circuit’s approach by instead quoting from Second, Sixth and Ninth Circuit opinions, where the courts followed a different approach.\textsuperscript{16} The Eighth Circuit panel announced the test as “whether a reasonable person would foresee that J.M.’s letter would be interpreted by K.G. as a serious expression of an intent to harm her.”\textsuperscript{17} Subsequently, the Eighth Circuit, on rehearing en banc, reversed and held a true threat “is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.”\textsuperscript{18} The Eighth Circuit concluded J.M. had intended to communicate the letter to K.G., and a reasonable recipient would have viewed the letter as a serious expression of an intent to harm K.G.\textsuperscript{19} Thus, the court viewed the letter as a true threat, not protected speech; therefore, the school board did not violate J.M.’s First Amendment rights when the school district expelled him.\textsuperscript{20}

This Note will first examine the facts and holding of the en banc decision of Doe.\textsuperscript{21} This Note will then review prior case law in which federal courts have interpreted the Supreme Court decision in Watts.\textsuperscript{22} This Note will then analyze the holding in Doe.\textsuperscript{23} Specifically, this Note will show the Eighth Circuit correctly analyzed the necessary intent required in a true threat analysis using an objective intent approach in light of the entire factual circumstances.\textsuperscript{24} This Note will further show the Eighth Circuit correctly followed and stated the reasonable recipient standard utilized in previous Eighth Circuit true threat inquiry cases.\textsuperscript{25} This Note will also demonstrate how the Eighth Circuit failed to consider the unique sensitivity issues associated with the reasonable recipient standard and how the test could infringe on a speaker’s constitutional rights.\textsuperscript{26} Furthermore, this Note will show the Eighth Circuit relied on the subjective reaction of the recipient in its objective test, thereby allowing a speaker’s First Amendment rights to turn on the persuasive character of the complaining recipient.\textsuperscript{27} This Note will show that had the Eighth Circuit

\begin{footnotes}
15. 76 F.3d 913, 917 (8th Cir. 1996).
17. Id. at 837.
18. Doe, 306 F.3d at 624, 627.
19. Id. at 624, 626.
20. Id. at 626-27.
21. See infra notes 30-134 and accompanying text.
22. See infra notes 135-302 and accompanying text.
23. See infra notes 303-437 and accompanying text.
24. See infra notes 317-56 and accompanying text.
25. See infra notes 357-71 and accompanying text.
26. See infra notes 372-94 and accompanying text.
27. See infra notes 395-420 and accompanying text.
\end{footnotes}
used the reasonable speaker standard in place of the reasonable recipient standard, the court would have reached a different outcome. This Note will conclude by demonstrating the Eighth Circuit unwisely decided to continue using the reasonable recipient standard and will suggest that the United States Supreme Court should remedy the current split in the federal circuits by adopting the reasonable speaker standard; the test which is best suited to protect an individual’s First Amendment rights.

FACTS AND HOLDING

In Doe v. Pulaski County Special School District, J.M. and his family moved to Pulaski County, Arkansas, during J.M.’s seventh grade year. J.M. enrolled at Northwood Junior High School in the Pulaski County Special School District (“PCSSD”). During the 1999-2000 school year, J.M. dated K.G., a fellow classmate and church member. The relationship suffered numerous breakups during the school year. At some point in the summer after the seventh grade year, K.G. broke up with J.M. for good because she was interested in another boy.

Upset over the breakup, J.M. planned to write a rap song similar to songs by rap artists such as Eminem, Juvenile and Kid Rock. J.M. ultimately wrote two separate compositions as letters, signing both at their conclusion. J.M. wrote both letters at J.M.’s home and J.M. did not deliver either letter to K.G. The letters included violent, profane rants expressing J.M.’s wish to molest, rape and kill K.G. Throughout the handwritten pages, J.M. used the f-word at least ninety times. The letter contained four threats to kill K.G. and three threats to rape and sodomize K.G.

Approximately one month prior to the beginning of the 2000-2001 school year, J.M.’s best friend, D.M., found one of the letters while in J.M.’s bedroom. At first, J.M. snatched the letter from D.M., but

28. See infra notes 421-32 and accompanying text.
29. See infra notes 438-56 and accompanying text.
30. 263 F.3d 833 (8th Cir. 2001).
31. Doe v. Pulaski County Special Sch. Dist., 263 F.3d 833, 835 (8th Cir. 2001).
32. Doe, 263 F.3d at 835.
33. Id.
34. Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002).
35. Doe, 263 F.3d at 835.
36. Doe, 306 F.3d at 619.
37. Id.
38. Doe, 263 F.3d at 835.
40. Doe, 263 F.3d at 839.
41. Id.
42. Doe, 306 F.3d at 619.
later gave the letter back to D.M., allowing D.M. to read it.\textsuperscript{43} However, J.M. refused to give D.M. a copy of the letter when D.M. requested one.\textsuperscript{44}

In the days following D.M.’s discovery of the letter, J.M. shared two or three telephone conversations with K.G.\textsuperscript{45} During the conversations, K.G. learned of a letter concerning threats to K.G.’s life, but J.M. told her another boy had written the letter.\textsuperscript{46} In their final telephone conversation, J.M. disclosed to K.G. he had written the letter.\textsuperscript{47} J.M. also declined to allow K.G. to read it.\textsuperscript{48}

K.G. obtained D.M.’s help to take the letter from J.M. approximately one week prior to the start of the eighth grade year.\textsuperscript{49} D.M. took the letter from J.M., without J.M.’s knowledge or permission.\textsuperscript{50} On the second day of school, D.M. delivered the letter to K.G.\textsuperscript{51} When K.G. read the letter during gym class, she began to cry and became frightened.\textsuperscript{52} A student immediately notified the school resource officer, James Kesterson (“Kesterson”), of the threats against K.G. and Kesterson then conducted an investigation.\textsuperscript{53}

Principal Robert Allison (“Principal Allison”) also conducted an investigation and recommended to the school board J.M.’s expulsion for the remainder of the eighth grade year.\textsuperscript{54} Principal Allison’s recommendation rested on Rule 36 of the PCSSD Student Handbook for Student Conduct and Discipline, which prevented a student from making a terrorizing threat against another student.\textsuperscript{55} J.M. and his parents appealed Principal Allison’s recommendation to Dr. Welsh, Director of Student Services for PCSSD.\textsuperscript{56} Dr. Welsh recommended J.M.’s expulsion for one semester, but allowed J.M. to attend the district’s alternate school, Alpha Academy, during the suspension.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Doe}, 263 F.3d at 835.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Doe}, 306 F.3d at 619.
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Doe}, 263 F.3d at 835.
\item \textsuperscript{49} \textit{Doe}, 306 F.3d at 619.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Doe}, 263 F.3d at 835.
\item \textsuperscript{52} \textit{Doe}, 306 F.3d at 619-20.
\item \textsuperscript{53} \textit{Id.} at 620.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} Rule 36 of the PCSSD Student Handbook for Student Conduct and Discipline reads in pertinent part:

\begin{quote}
Students shall not, with the purpose of terrorizing another person, threaten to cause death or serious physical injury or substantial property damage to another person or threaten physical injury to teachers or to school employees . . .

Student will be suspended immediately and recommended for expulsion.
\end{quote}
\item \textsuperscript{57} \textit{Id.} at 620 n.2.
\item \textsuperscript{56} \textit{Doe}, 306 F.3d at 620.
\item \textsuperscript{57} \textit{Doe}, 263 F.3d at 836.
\end{itemize}
J.M. and his parents appealed Dr. Welsh’s recommendation to the PCSSD School Board.\(^58\) J.M. attended Alpha Academy from August 29, 2000, until September 12, 2000, the date of J.M.’s appeal hearing.\(^59\) At the hearing’s conclusion, the school board adopted Principal Allison’s first recommendation to expel J.M. from Northwood and Alpha Academy for the remaining school year.\(^60\)

Unhappy with the decision, J.M., through his parents, sued PCSSD in the United States District Court for the Eastern District of Arkansas, seeking reinstatement at Northwood.\(^61\) J.M. claimed the expulsion violated his rights to free speech.\(^62\) On September 27, 2000, the district court granted a temporary restraining order reinstating J.M., as long as he did not have contact with K.G.\(^63\)

On November 22, 2000, Judge George Howard, Jr., sitting in a bench trial, found for J.M., holding J.M.’s letter was not a true threat because D.M. took the letter from J.M.’s home giving the letter to K.G. without J.M.’s permission and because the letter was not considered an immediate threat.\(^64\) The district court noted the unprofessional manner in which the school board allowed personal experiences to influence the outcome of the appeal.\(^65\) The district court also noted the school board did not have access to K.G. and D.M. as witnesses.\(^66\) The district court opined the board appeared to expel J.M. as a punishment for appealing Dr. Welsh’s recommendation which did not include a recommendation for expulsion from all district schools.\(^67\) The court concluded J.M.’s letter was not a true threat because J.M. wrote the letter in his home and did not intend to deliver it to K.G.\(^68\) Thus, the district court found the letter was protected speech and required PCSSD to reinstate J.M.\(^69\) The court ordered PCSSD to restore to J.M. any lost rights and privileges, and to remove the expulsion from J.M.’s school records.\(^70\)

PCSSD appealed the district court’s decision to the United States Court of Appeals for the Eighth Circuit arguing the expulsion was ap-

58. Id.
59. Doe, 306 F.3d at 620.
60. Id.
61. Id. at 616, 620.
62. Id. at 620.
63. Id.
64. Doe, 263 F.3d at 834, 836.
65. Id. at 838. The court noted it appeared several of the Board Members relied on their personal experiences, different from the facts before them, which may have influenced their decision. Id.
66. Doe, 263 F.3d at 838.
67. Id.
68. Doe, 306 F.3d at 620.
69. Doe, 263 F.3d at 836.
70. Doe, 306 F.3d at 620.
Distinguishing a True Threat

appropriate because the letter was not protected speech under the First Amendment and therefore, did not violate J.M.'s free speech rights. Circuit Judge Gerald Heaney, writing for the majority, affirmed the district court's ruling and maintained J.M.'s letter did not constitute a true threat because the letter was protected speech. Lacking any test handed down from the United States Supreme Court to distinguish protected speech from a true threat, the Eighth Circuit reviewed legal precedent regarding various tests adopted by the Second, Sixth, Eighth and Ninth Circuits. After discussing each circuits' test, the Eighth Circuit relied on the Ninth Circuit's reasonable speaker standard in determining what was a true threat.

In applying the test, the Eighth Circuit asked whether a reasonable speaker could foresee K.G. would interpret J.M.'s letter as a serious expression of intent to harm her. The Eighth Circuit responded in the negative and reasoned because J.M. wrote the letter in his home, did not show or deliver the letter to K.G. and only offered the letter to D.M. after D.M. had discovered it, a reasonable person would not foresee the letter as an intent to harm K.G. Additionally, the Eighth Circuit stated both J.M. and K.G. participated peacefully in church activities after K.G. knew of the letter. The Eighth Circuit also noted that after an investigation, the state prosecuting attorney did not file any action against J.M. and instead closed the file. The Eighth Circuit opined the school district's expulsion of J.M. and the elimination of potential educational opportunities was unwarranted. The Eighth Circuit indicated, given the total circumstances, a reasonable speaker could not foresee K.G. would interpret the letter as a serious expression of intent to harm her.

Circuit Judge David Hansen dissented, arguing a reasonable person would foresee K.G. interpreting the letter as a serious expression of intent to harm her. Judge Hansen supported his reasoning by

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71. Doe, 263 F.3d at 836.
72. Id. at 838.
73. Id. at 836-37.
74. Id. The court considered the Eighth Circuit's multiple factor, reasonable recipient standard used in United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) but relied on the Ninth Circuit's reasonable speaker standard found in Lovell v. Poway Unified School District, 90 F.3d 367, 371 (9th Cir. 1996) and United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990). Id.
75. Doe, 263 F.3d at 837.
76. Id. at 837-38.
77. Id. at 838.
78. Id.
79. Id.
80. Id.
81. Id. (Hansen, J., dissenting). Judge Hansen maintained during more than one telephone conversation, J.M. told K.G. of the letter and the letter's threats to kill her. Id.
stating K.G. considered the threats very real, so real she slept with the lights on. Judge Hansen criticized the majority for dignifying the letter as a composition — as if prepared for a class assignment. Finally, Judge Hansen reiterated the vulgarities of J.M.’s letter and described the school board as being in the best position to determine the penalties against J.M. for violating Rule 36 of the student handbook. PCSSD appealed the Eighth Circuit panel’s decision and moved for a rehearing en banc, arguing the school board did not infringe on J.M.’s First Amendment rights when it expelled him for the threatening letter. The Eighth Circuit vacated the divided panel’s decision and ordered a rehearing en banc.

On appeal, Judge Hansen, now writing for the majority, reversed the panel’s decision and held the school board did not violate J.M.’s First Amendment rights when the school board expelled J.M. The Eighth Circuit first addressed J.M’s argument that the court no longer had jurisdiction because the First Amendment claim was moot as J.M. had already passed the eighth grade and any decision by the court would provide no effective relief to J.M. The court disagreed and noted because the district court ordered the school board to expunge the Rule 36 violation from J.M.’s record and restore any lost rights and privileges, a reversal of the district court’s decision would practically effect J.M. Additionally, the court stated a reversal would allow the school district to consider the violation in determining J.M.’s present student privileges, such as preventing J.M. from attending a class with K.G. The court also noted the school district had an interest in a judicial determination of the constitutionality of Rule 36’s application.

The Eighth Circuit then rejected the vacated the panel’s use of the Ninth Circuit’s objective, reasonable speaker standard and instead applied the Eighth Circuit’s objective, reasonable recipient standard found in United States v. Dinwiddie, which the vacated panel had declined to apply. The court reasoned the difference between the two approaches was largely academic because both tests would pro-

82. Doe, 263 F.3d at 838 (Hansen, J., dissenting).
83. Id. at 839 (Hansen, J., dissenting).
84. Id.
85. Doe, 306 F.3d at 619.
86. Id.
87. Id.
88. Id. at 620-21.
89. Id. at 621.
90. Id.
91. Id.
92. 76 F.3d 913 (8th Cir. 1996).
produce the same result.\textsuperscript{94} Further, the court stated because neither party believed using either test would result in different outcomes, the Eighth Circuit viewed it as inappropriate to alter the Eighth Circuit’s test to distinguish a true threat from protected speech.\textsuperscript{95} Accordingly, the court held a true threat was one which a reasonable recipient would view as a serious expression of intent to harm or injure another.\textsuperscript{96}

Before applying the reasonable recipient standard, the Eighth Circuit discussed whether J.M. intended to communicate the letter to K.G.\textsuperscript{97} J.M. argued it was impossible for him to carry out much of the letter’s threats because K.G. lived with her parents.\textsuperscript{98} However, the court noted in a true threat analysis, there was no requirement of intent to carry out the purported threat or even the capability of carrying the threat out.\textsuperscript{99} The court stated the speaker must have intended to communicate the supposed threat to the recipient or a third person before the court could punish the speaker for the threat.\textsuperscript{100} Contrary to the vacated panel’s decision, the Eighth Circuit concluded J.M. intended to communicate his letter to K.G., and J.M. therefore would be responsible if a reasonable recipient would view the letter as a threat.\textsuperscript{101} The Eighth Circuit reasoned J.M. gave D.M. permission to read the letter and J.M. later testified he believed D.M. would likely tell K.G. of the letter.\textsuperscript{102} Additionally, the court noted J.M.’s willingness to discuss the letter with K.G. on the phone and that, in their final phone conversation, J.M. had admitted to writing the letter.\textsuperscript{103}

The Eighth Circuit next applied the reasonable recipient standard by asking if a reasonable recipient would have viewed J.M.’s letter as a true threat.\textsuperscript{104} The court disagreed with the district court’s assessment that the letter was only arguably threatening and instead concluded a reasonable recipient would have interpreted the letter as a serious expression of intent to harm K.G.\textsuperscript{105} The court stated a reasonable recipient could perceive the letter as a true threat given the letter’s particular threats and the personal, intimate nature of the letter.\textsuperscript{106} The court reasoned J.M.’s past representation of himself as a

94. Id. at 623.
95. Id. at 624.
96. Id.
97. Id.
98. Id. at 625 n.3.
99. Id. at 624.
100. Id.
101. Id.
102. Id.
103. Id. at 619, 625.
104. Id. at 625.
105. Id. at 625-26.
106. Id.
"tough guy" with an inclination for aggression also contributed to the credibility of the letter's threat and K.G.'s reaction.\textsuperscript{107} The court noted the district court had excluded evidence the school board did not consider including J.M.'s belief he was a member of the "Bloods" gang and that he had shot a cat while speaking to K.G. on the phone.\textsuperscript{108} However, the Eighth Circuit concluded the evidence was relevant to determine the reasonableness of K.G.'s response.\textsuperscript{109} The Eighth Circuit, after viewing the entire circumstances, concluded the letter amounted to a true threat and reversed the district court's ruling because a reasonable recipient would have viewed the letter as a "serious expression of intent to harm" another.\textsuperscript{110}

In a dissenting opinion, Judge Gerald Heaney faulted the majority for failing to consider the special circumstances of First Amendment rights in a school setting.\textsuperscript{111} The dissent agreed with the majority the issue before the court was whether the letter was a true threat or protected speech.\textsuperscript{112} However, the dissent explained if the letter was protected speech, the correct issue was whether the school district may regulate the speech when the speech may disrupt or interfere with other students' rights.\textsuperscript{113}

In its true threat analysis, the dissent agreed with the majority opinion that \textit{Dinwiddie} correctly set out the applicable test to determine if the letter was a true threat or protected speech.\textsuperscript{114} However, the dissent criticized the majority for omitting the analysis of how the court applied the reasonable recipient standard by considering the entire factual context.\textsuperscript{115} The dissent pointed out J.M. was in good academic standing and had a record of good behavior.\textsuperscript{116} The dissent noted J.M. had written the letter after the breakup, left the letter on his bureau for weeks or months before D.M. discovered it, and even attended school and church with K.G. without incident after K.G. read the letter.\textsuperscript{117} The dissent condemned the majority for not considering these factors in the court's analysis.\textsuperscript{118}

The dissent next turned to the question of J.M.'s intent to communicate the letter and criticized the majority for stretching the facts and

\textsuperscript{107} Id. at 626.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 626-27.
\textsuperscript{111} Id. at 627 (Heaney, J., dissenting). Judge Heaney was joined by Judges McMillian, Morris, Shepard, Arnold, and Bye in the dissent. Id.
\textsuperscript{112} Doe, 306 F.3d at 627 (Heaney, J., dissenting).
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 627-28 (Heaney, J., dissenting).
\textsuperscript{116} Id. at 628 (Heaney, J., dissenting).
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 628-29 (Heaney, J., dissenting).
law to find the required necessary intent. The dissent explained the court should consider the intent to communicate the letter under a clearly erroneous standard. Under this standard of review, the dissent determined the evidence supported the district court's finding J.M. lacked the requisite intent. The dissent also disagreed with the majority's decision to rely on certain legal precedent which stated the requisite intent was met if the threat was communicated to a third person. The dissent instead suggested a more accurate analysis would recognize the knowledge of a threat by a third-party was insufficient to conclude a true threat existed. 

Additionally, the dissent reminded the majority to consider the entire factual context in analyzing whether K.G. perceived the letter as a true threat, as a reasonable recipient would have. The dissent explained some evidence of actual intent to complete the communicated threat was required to display the seriousness of the threat. The dissent determined because K.G. did not seek the help of an adult after she knew of the letter and because J.M. interacted with K.G. in a non-violent manner during their acquaintance, a reasonable person would not have considered the letter a true threat. The dissent criticized the majority for concluding the letter, as a true threat, rose to the level of criminal conduct described in other cases where courts had found a true threat. The dissent maintained a reasonable person would not have perceived the letter as a serious expression of intent to harm K.G. 

Finally, the dissent, after finding the letter was protected speech, examined whether the speech was reasonably regulated by the school board. The dissent agreed the letter required disciplinary action, but viewed the school board's decision to expel J.M. from Northwood and Alpha Academy as an abuse of discretion. The dissent noted the school board punished J.M. more severely than the original recommendation J.M. was appealing.
Circuit Judge Theodore McMillian joined Judge Heaney's dissent, but wrote separately emphasizing his view that the letter was also protected speech because J.M. wrote the letter in the privacy of his home. Judge McMillian questioned whether the school had any authority over the letter J.M. wrote at home because J.M. did not write the letter at school, during school or using school equipment. Judge McMillian viewed the letter as a police matter and noted the local prosecuting attorney had declined to charge J.M.

BACKGROUND

A. THE SUPREME COURT DISTINGUISHES A TRUE THREAT FROM PROTECTED SPEECH

In Watts v. United States, the United States Supreme Court recognized courts must distinguish threats from protected speech and held a statement threatening the President's life was in fact political hyperbole, not a true threat. The Court noted when the government criminalizes speech, a court must distinguish between a true threat and constitutionally protected speech. In Watts, the government arrested Robert Watts ("Watts") and convicted him in the United States District Court for the District of Columbia for violating 18 U.S.C. § 871(a) when Watts threatened the life of the President of the United States during a public rally. On August 27, 1966, Watts attended and participated in a DuBois Club gathering which met on the Washington Monument grounds to discuss police brutality. During the discussion, Watts allegedly stated, "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." which

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132. Doe, 306 F.3d at 636 (McMillian, J., dissenting).
133. Id.
134. Id.
137. Watts, 394 U.S. at 707.
138. Id. at 705-706. 18 U.S.C. § 871(a) provides in pertinent part:
Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the officer of the President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than $1,000 or imprisoned not more than five years or both.
139. Watts, 394 U.S. at 705-706.
was followed by laughs from the crowd. The following day, the Secret Service arrested Watts for making a threat against the President of the United States. The Secret Service agents also found marijuana on Watts and charged him with a misdemeanor in the Court of General Sessions.

Prior to trial, Watts moved for dismissal arguing his words did not constitute a threat under the language in 18 U.S.C. § 871(a). The district court denied the motion and Watts moved to suppress the marijuana evidence arguing the Secret Service agents' arrest was illegal because the agents lacked probable cause Watts committed a threat against the President. The Court of General Sessions granted Watts' motion and after a request for reconsideration, the government dropped the marijuana charge. The district court then tried Watts for the felony charge of threatening the life of the President. After trial, the jury found Watts "knowingly and willfully" threatened the life of the President based on his statement to the crowd. The district court convicted Watts and sentenced him to four years probation.

Watts appealed the conviction of the district court to the United States Court of Appeals for the District of Columbia Circuit, arguing for reversal of the conviction on three grounds. First, Watts argued there was insufficient evidence to support a finding he threatened the President. Second, he argued the conviction violated his First Amendment rights. Finally, he argued the Court of General Sessions' decision to grant the motion to suppress acted as collateral estoppel to the felony charge. The District of Columbia Circuit affirmed Watts' conviction and reasoned that based on the evidence at trial, a jury could have reasonably concluded Watts intended the statement as a threat on the President's life. The court turned to § 871(a)'s language, legislative history and case law to clarify its meaning. The court determined one need only willfully or inten-

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140. Id. at 706-707.
142. Watts, 402 F.2d at 677.
143. Id. at 678.
144. Id.
145. Id.
146. Id.
147. Watts, 394 U.S. at 706.
148. Watts, 402 F.2d at 678 n.3.
149. Id. at 677-78.
150. Id. at 678.
151. Id.
152. Id.
153. Id. at 682, 686.
154. Id. at 678-79.
tionally utter a threat on the President's life to violate the statute, not intentionally carry out the threat.\textsuperscript{155} The court also determined even if Watts claimed his statement was made in jest, his subjective intent alone would not determine if the statement was a threat.\textsuperscript{156} Watts filed a petition for writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether Watts' statements were merely political hyperbole, and therefore protected speech, or a threat under § 871(a).\textsuperscript{157}

The Supreme Court reversed the decision of the District of Columbia Circuit and held the trial judge erred in denying Watts' motion to dismiss.\textsuperscript{158} In a per curiam opinion, the Court recognized § 871(a) was constitutional on its face because the nation had an overwhelming interest in protecting the safety of the President so he could carry out his duties.\textsuperscript{159} Nonetheless, the Court explained it must interpret the statement while keeping the First Amendment in mind because the statute criminalized "pure speech."\textsuperscript{160} The Supreme Court explained a court must construe the statutory language in light of the nation's commitment to "uninhibited, robust, and wide open" public debate on issues.\textsuperscript{161} As a result, the Supreme Court indicated a court must distinguish threats from protected speech under the Constitution and the statute at issue required the government to initially prove a true threat.\textsuperscript{162} In determining whether Watt's speech constituted a true threat, the Court focused on the conditional nature of the statement, the reaction of the listeners and the context in which Watts made the statement.\textsuperscript{163} Based on these factors, the Court declared the speech was not a true threat, but was political hyperbole.\textsuperscript{164} The Court recognized the language used in political debates was often "vituperative, abusive, and inexact."\textsuperscript{165} Therefore, the Court agreed with Watts that he only crudely and offensively made a statement in political opposition to President Johnson.\textsuperscript{166}

Justice Abe Fortas, joined by Justice John Marshall Harlan dissented, disagreeing with the per curiam ruling.\textsuperscript{167} The dissent rea-

\begin{itemize}
\item \textsuperscript{155} Id. at 678-80.
\item \textsuperscript{156} Id. at 681-82.
\item \textsuperscript{157} Watts, 394 U.S. at 705.
\item \textsuperscript{158} Id. at 707-708.
\item \textsuperscript{159} Id. at 707.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 708 (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).
\item \textsuperscript{162} Id. at 707-708.
\item \textsuperscript{163} Id. at 708.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{156} Id. Justice William Douglas concurred with the majority opinion and wrote separately to discuss the historical roots of § 871(a). Id. at 706, 712.
\item \textsuperscript{167} Watts, 394 U.S. at 712 (Fortas, J., dissenting).
\end{itemize}
soned even if the peculiar facts and Watts’ suspended sentence made the case trivial, the Court should not have granted certiorari.\textsuperscript{168} The dissent suggested the Court should require a hearing if the Court was to determine the constitutionality of § 871(a) and its application.\textsuperscript{169}

B. THE UNITED STATES COURTS OF APPEALS STRUGGLE TO DETERMINE THE CORRECT TRUE THREAT STANDARD

1. The Reasonable Speaker Standard as Defined by the First and Ninth Circuits

In \textit{United States v. Orozco-Santillan},\textsuperscript{170} the Ninth Circuit examined the true threat test and determined a reasonable speaker standard was the proper test for distinguishing whether a specific statement was a true threat or protected speech.\textsuperscript{171} In \textit{Orozco-Santillan}, the government convicted Alfredo Orozco-Santillan (“Orozco-Santillan”), in the United States District Court for the Central District of California, on three counts of violating 18 U.S.C. § 115(a)(1)(B) for his threats to a federal law enforcement officer.\textsuperscript{172} Count III stemmed from Orozco-Santillan’s arrest, which occurred when the Immigration Naturalization Service (“INS”) stopped Orozco-Santillan in a park in Los Angeles, California.\textsuperscript{173} Daniel Vela (“Vela”), an INS agent, questioned Orozco-Santillan as Orozco-Santillan was handcuffed and kneeling on the ground.\textsuperscript{174} When Vela asked him to stand, Orozco-Santillan replied by threatening to assault Vela.\textsuperscript{175} The agents took Orozco-Santillan to jail and booked him on immigration charges; there, Orozco-Santillan repeated his threat to assault Vela if Vela removed the handcuffs.\textsuperscript{176}

\begin{itemize}
  \item 168. \textit{Id.} (Fortas, J., dissenting).
  \item 169. \textit{Id.} (Fortas, J., dissenting).
  \item 170. 903 F.2d 1262 (9th Cir. 1990).
  \item 171. \textit{United States v. Orozco-Santillan}, 903 F.2d 1262, 1265 (9th Cir. 1990).
  \item 172. \textit{Orozco-Santillan}, 903 F.2d at 1264. 18 U.S.C. § 115(a)(1)(B) states in pertinent part:
    
    Whoever threatens to assault, kidnap, or murder a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).
    
  \item 173. \textit{Orozco-Santillan}, 903 F.2d at 1264.
  \item 174. \textit{Id.}
  \item 175. \textit{Id.} According to the court, Orozco-Santillan stated, “take these handcuffs off and I’ll kick your fucking ass.” \textit{Id.}
  \item 176. \textit{Orozco-Santillan}, 903 F.2d at 1264. According to the court, Orozco-Santillan stated “he would kick [Vela’s] ass if Vela removed his handcuffs.” \textit{Id.}
\end{itemize}
The government based Count II on statements Orozco-Santillan made during a phone call to Vela, approximately two months after his arrest.\(^{177}\) In the phone conversation, Orozco-Santillan stated he could discover information about Vela through another INS agent because he was back on the streets.\(^{178}\) Orozco-Santillan stated Vela would pay for arresting him.\(^{179}\) Count I stemmed from a second phone call, made two days after the first call to Vela.\(^{180}\) Orozco-Santillan identified himself and stated someone was going to die.\(^{181}\) At trial, Orozco-Santillan moved for judgment of acquittal on all three counts after the close of his case and the government's case.\(^{182}\) The district court denied Orozco-Santillan's motions and, after a jury trial, the court convicted Orozco-Santillan on all counts and sentenced him to confinement for eighteen months and three years probation.\(^{183}\)

Orozco-Santillan appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing the government did not prove he was the caller in Count I, and the government also did not prove Orozco-Santillan's statements were threats in Counts II and III.\(^{184}\) The Ninth Circuit affirmed the district court's opinion, finding there was enough evidence to sustain the jury's verdict on all three counts.\(^{185}\) First, the court examined whether Orozco-Santillan's statements constituted threats.\(^{186}\) The court began by defining a threat as "an expression of an intention to inflict evil, injury, or damage on another."\(^{187}\) Beyond its definition, the court required the analysis of any alleged threat to examine the factual circumstances, including the reaction of any listeners and surrounding events.\(^{188}\) The court then adopted an objective standard to determine whether a statement was a threat by asking if a reasonable person

\[^{177}\text{Orozco-Santillan}, 903 F.2d at 1264.\]
\[^{178}\text{Id.}\]
\[^{179}\text{Id. According to the court, Orozco-Santillan also said, "you motherfucker, lo was a pagar, which Vela translated as you will pay for this." Id.}\]
\[^{180}\text{Orozco-Santillan}, 903 F.2d at 1264.}\]
\[^{181}\text{Id. According to the court, Orozco-Santillan also said, "you ain't shit, Vela. Id. You're just a punk. Id. You better let [the neighbor] go. Id. You had no right arresting him. Id. You can't fuck with me Vela, cause I'm out on bail! Id. You're going to get you're ass kicked, punk." Id.}\]
\[^{182}\text{Orozco-Santillan}, 903 F.2d at 1264. The court noted Orozco-Santillan moved for acquittal pursuant to Federal Rule of Criminal Procedure 29. Id.}\]
\[^{183}\text{Orozco-Santillan}, 903 F.2d at 1264.}\]
\[^{184}\text{Id.}\]
\[^{185}\text{Id. at 1265-66.}\]
\[^{186}\text{Id. at 1265.}\]
\[^{187}\text{Id. (quoting United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 2382 (1993))).}\]
\[^{188}\text{Id.}\]
would have anticipated the recipient would interpret the communication as a serious expression of intent to harm.\textsuperscript{189}

The court clarified, under its objective standard, there was no requirement to show a defendant intended the threat.\textsuperscript{190} The court explained a defendant need only intentionally communicate the threat, not be able of carrying out the threat, to meet the intent requirement.\textsuperscript{191} Regarding the First Amendment, the court examined the decision in Watts\textsuperscript{192} and distinguished Orozco-Santillan's threat, which lacked any political message, from Watts' political statement and emphasized the First Amendment did not protect true threats.\textsuperscript{193}

The court found sufficient evidence to support the jury's verdict on all three counts.\textsuperscript{194} The court determined the statements, which were made in an angry manner, frightened Vela into thinking Orozco-Santillan meant to kill him.\textsuperscript{195} The court maintained, a reasonable jury could have considered the statements as threats to assault Vela in Counts II and III after considering Orozco-Santillan's statements in their entire factual context.\textsuperscript{196} The court also determined there was enough evidence to support a jury's finding Orozco-Santillan made the threatening phone call to Vela in Count I.\textsuperscript{197}

Just as the Ninth Circuit had, the First Circuit in United States v. Fulmer\textsuperscript{198} adopted and defined the reasonable speaker standard, but only after reviewing and declining to adopt the reasonable recipient standard.\textsuperscript{199} Fulmer involved the prosecution of Kevan Fulmer ("Fulmer"), in the United States District Court for the District of Massachusetts, for threatening an agent of the Federal Bureau of Investigation ("FBI") in violation of 18 U.S.C. § 115(a)(1)(B).\textsuperscript{200} Convinced

\begin{itemize}
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 1265 n.3.
\item \textsuperscript{191} Id.
\item \textsuperscript{192} Id. at 1265-66 (quoting Watts v. United States, 394 U.S. 705, 707 (1969)).
\item \textsuperscript{193} Id. at 1266.
\item \textsuperscript{194} Id. at 1264.
\item \textsuperscript{195} Id. at 1266.
\item \textsuperscript{196} Id. The court considered several factors in its analysis of identifying the caller including the "context and timing" of the call, the contents of the challenged statement, "internal patterns" and "disclosure of knowledge of facts known" to the caller. Id.
\item \textsuperscript{197} United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997).
\item \textsuperscript{198} Fulmer, 108 F.3d at 1486, 1489. 18 U.S.C. § 115(a)(1)(B) states in pertinent part:
\begin{quote}
Whoever threatens to assault, kidnap, or murder a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).
\end{quote}
\item \textsuperscript{199} Id. at 1266.
\item \textsuperscript{200} Id.
\end{itemize}
his brother and father-in-law committed pension fraud and income tax fraud by failing to disclose assets in bankruptcy, Fulmer complained to the Office of the United States Trustee which referred the matter to Richard Egan (“Egan”), an FBI agent.\textsuperscript{200} Egan met with Fulmer in August or September 1994 and described his brother and former father-in-law as “vicious” people who “used the courts to keep him away from his family.”\textsuperscript{201} Egan described Fulmer’s demeanor as “polite, articulate and tense.”\textsuperscript{202} Fulmer remained in constant contact with Egan for approximately three months following the meeting, stopping by Egan’s office to inquire about the case, sending Egan letters and faxes, and calling Egan on the telephone.\textsuperscript{203} Egan investigated the case and discussed it with an Assistant United States Attorney, who advised him he would not prosecute the case.\textsuperscript{204} In turn, Egan telephoned Fulmer to inform him the case did not merit prosecution.\textsuperscript{205} While Fulmer objected to the decision, he hung up on Egan after Egan informed him there was nothing left to discuss.\textsuperscript{206} Subsequently, Fulmer left Egan a voicemail message which in part stated, “I want you to look something up . . . It’s known as misprision . . . Just think of it in terms of misprison of a felony . . . Hope all is well . . . The silver bullets are coming.”\textsuperscript{207}

At trial, Egan testified the message “shocked” him.\textsuperscript{208} He found it “chilling” and “scary,” and even though the phrase “silver bullets” was unknown to him, he believed it indicated a threat.\textsuperscript{209} Fulmer called two witnesses who testified to the meaning of the phrase “silver bullets;” the first testifying the phrase meant “a clear-cut simple violation of law.”\textsuperscript{210} The second witness testified Fulmer used the term to mean “information that he was going to provide to banks proving the illegality of some of [his brother’s] transactions.”\textsuperscript{211} The district court also admitted evidence including actual bullets (used to show their silvery color), testimony regarding ammunition in Egan’s car on the night he received the alleged threat, and testimony regarding the Oklahoma

\begin{itemize}
\item \textsuperscript{200} Fulmer, 108 F.3d at 1489.
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 1489-90.
\item \textsuperscript{205} Id. at 1490.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. (emphasis added).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id. The court noted that Egan’s supervisor testified that Egan appeared very upset and agitated by the message. Id.
\item \textsuperscript{210} Fulmer, 108 F.3d at 1490. The court indicated the witness also testified that Fulmer used the phrase to “describe specific evidence, including an $8,200 check from a bankruptcy estate that never reached its intended recipient.” Id.
\item \textsuperscript{211} Fulmer, 108 F.3d at 1490.
\end{itemize}
City bombing.\textsuperscript{212} Following a jury trial the district court convicted Fulmer for violation of 18 U.S.C. § 115(a)(1)(B) when Fulmer threatened Egan.\textsuperscript{213} The court sentenced Fulmer to five months imprisonment, followed by a two year supervised release.\textsuperscript{214}

Fulmer appealed the decision of the district court to the United States Court of Appeals for the First Circuit, challenging his conviction, several evidentiary rulings and improper jury instructions.\textsuperscript{215} The First Circuit vacated Fulmer's conviction and remanded for a new trial reasoning several of the evidentiary rulings were not harmless error.\textsuperscript{216} The court first examined the appropriate standard to determine a true threat under 18 U.S.C. § 115(a)(1)(B).\textsuperscript{217} After noting this was a matter of first impression for the First Circuit regarding the appropriate standard in a true threat analysis, the court reviewed the work of its sister circuits in developing a true threat standard under the statute and other federal threat statutes.\textsuperscript{218} The court adopted an objective test, determining the appropriate true threat analysis test asked whether the speaker would have reasonably foreseen the recipient would interpret the statement as a threat.\textsuperscript{219} The court reasoned this was the appropriate standard because it not only took into consideration the factual context of the statement, but also avoided the downfalls of the reasonable recipient standard, namely that jurors would consider any unique sensitivities of the recipient.\textsuperscript{220} The court explained if a speaker uttered an ambiguous statement, a court should not convict the speaker simply because a uniquely sensitive recipient may find the ambiguous statement threatening due to circumstances unknown to the speaker.\textsuperscript{221}

The court then dismissed Fulmer's argument that the statement was ambiguous and not a true threat, reasoning a jury could reasonably conclude the statement was a threat given the surrounding circumstances and after considering the factual context of the statement.\textsuperscript{222} The court emphasized a jury must decide whether a statement constituted a true threat or not.\textsuperscript{223} Moreover, the court stated the use of ambiguous language did not prevent a court from

\begin{footnotes}
\item[212] Id. at 1497-99.
\item[213] Id. at 1489.
\item[214] Id.
\item[215] Id. at 1486, 1489.
\item[216] Id. at 1503.
\item[217] Id. at 1489, 1491.
\item[218] Id. at 1491.
\item[219] Id. at 1491, 1493.
\item[220] Id. at 1491.
\item[221] Id.
\item[222] Id. at 1492.
\item[223] Id. (quoting United States v. Malik, 16 F.3d 45, 49 (2nd Cir. 1994)).
\end{footnotes}
finding a statement was a true threat. The court reasoned even though a jury may interpret the statement in more than one way on its face, several factors not included in the record, such as the defendant's tone of voice and the creditability of the witnesses, may lead a jury to find the statement was a true threat.

The court then addressed Fulmer's First Amendment argument. The court observed Watts involved a statement made in political opposition in a political setting, while Fulmer's statement did not criticize Egan or any governmental figure. The court emphasized a conviction under 18 U.S.C. § 115(a)(1)(B) based on a true threat finding did not violate Fulmer's constitutional rights because the First Amendment did not protect a true threat. The court then ended its First Amendment analysis by noting a reasonable jury could have inferred Fulmer's intent to communicate the alleged threat given the surrounding circumstances of the statement.

The court then addressed Fulmer's arguments that the district court erred when it instructed the jury incorrectly on the intent to threaten, the definition of threat as presented to the jury and a supplemental instruction given to the jury on the definition of assault. The court found no error on the jury instructions for the intent to threaten or definition of threat, but did find error on the supplemental instructions given to the jury on the definition of assault. The court reasoned the supplemental jury instructions were in conflict with the court's previous instruction that a threat included an intent to inflict bodily harm because the supplemental instructions defined assault as being committed without actually doing bodily harm to another.

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224. Id.
225. Id.
226. Id.
227. Id. See Watts, 394 U.S. at 705 (observing Watts' statement was said in political opposition, in a political setting).
228. Fulmer, 108 F.3d at 1492-93.
229. Id. at 1493.
230. Id. at 1493, 1495-96.
231. Id. at 1495-96.
232. Id. at 1496. The court also addressed Fulmer's arguments that several pieces of evidence were incorrectly admitted as evidence including Egan's testimony regarding the Oklahoma City bombing, admission of actual bullets (admitted to show a bullet's silver color), admission of Egan's reaction to Fulmer's statement (including a statement made regarding the "rattling" of bullets in Egan's glove compartment), admission of a discussion between Egan and his supervisor, admission of bad acts evidence, and admission of newspapers that depicted murders, shootings and threats. Id. at 1496, 1498-1502. After reviewing the probative value of the evidence, the court found the admission of testimony regarding the Oklahoma City bombing, admission of the actual bullets, and admission of Egan's reaction to Fulmer's statement describing the "rattling" of bullets Egan kept in his car's glove compartment as erroneous. Id. at 1503. The court was careful to note that Egan's reaction to the statement was important because it "show[ed] that the recipient did perceive the message as a threat" but the testimony
2. The Reasonable Recipient Standard as Defined by the Eighth Circuit

In United States v. Whitfield,\textsuperscript{233} the Eighth Circuit used a reasonable recipient standard in analyzing true threats communicated through mail to a United States judge under 18 U.S.C. § 876.\textsuperscript{234} In Whitfield, the government indicted Odell Whitfield ("Whitfield") under 18 U.S.C. § 876 and 18 U.S.C. § 111(a) on two counts for mailing threatening letters to a United States Magistrate Judge in the United States District Court for the Southern District of Iowa.\textsuperscript{235} In March 1986, Whitfield appeared before United States Magistrate Judge Celeste Bremer ("Judge Bremer") for failing to appear earlier to serve a prison sentence.\textsuperscript{236} A week later, Judge Bremer began receiving over sixty letters from Whitfield expressing his desire to have a sexual relationship with Judge Bremer.\textsuperscript{237} In January 1992, an Iowa county attorney charged Whitfield with ten counts under an Iowa harassment law, but deferred prosecution if Whitfield agreed to not send mail to Judge Bremer for one year.\textsuperscript{238} Whitfield complied, but on August 11, 1993, Judge Bremer again received several letters from Whitfield expressing his desire to have a sexual relationship with her.\textsuperscript{239}

Based on these letters, the government indicted Whitfield on two counts for mailing threatening letters under § 876 and § 111 in the

\begin{verbatim}
regarding Egan's comfort in the bullets "rattling" in his glove compartment was likely to arouse prejudicial emotions in the jury, and thus error if admitted. \textit{Id.} at 1500.

233. 31 F.3d 747 (8th Cir. 1994).

Whoever knowingly so deposits or cause to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or any official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.


Whoever . . . forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties . . . shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title, imprisoned not more than 8 years, or both.


236. \textit{Whitfield}, 31 F.3d at 748.
237. \textit{Id.}
238. \textit{Id.}
239. \textit{Id.} The court stated, in one of the letters Whitfield wrote that his love for Judge Bremer was "driving [him] insane" and that it was difficult to love someone "you can't see or touch or hug and kiss when you want to." \textit{Id.} He also wrote, "You are my most desired goal, and I will stop at nothing to reach you." \textit{Id.}
\end{verbatim}
United States District Court for the Southern District of Iowa. The jury then found Whitfield guilty of mailing threatening letters under § 876, and the district court sentenced him to twenty-seven months in prison and another three years of supervised release.

Whitfield appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit arguing the district court erred by not admitting certain evidence at trial and denying Whitfield’s motion of acquittal for the § 876 charge. The Eighth Circuit affirmed the district court’s decision, concluding the court had submitted the charge to the jury properly and Judge Bremer reasonably perceived the letters as a threat. The court began its reasoning by stating the issue of whether the statement was a true threat should go to the jury under § 876 if a reasonable recipient, who knew of the circumstances surrounding the statement, would interpret the statement as a threat. The court emphasized to determine if a reasonable recipient felt threatened, the court must take into account the total circumstances in which the speaker communicated the statement. The court determined the district court submitted the charge to the jury properly and Judge Bremer reasonably interpreted the letters as a threat. The court based its determination on the persistence of Whitfield, the content and volume of the letters received and Judge Bremer’s reaction.

The court then considered Whitfield’s argument the district court erred when it excluded certain testimony which would have showed Whitfield lacked the subjective intent to threaten Judge Bremer. The Eighth Circuit dismissed Whitfield’s arguments because the arguments were not determinative in the true threat analysis test. The court noted the maker’s subjective intent was not important in a § 876

240. Whitfield, 31 F.3d at 748.
241. Id.
242. Id.
243. Id. at 747-48.
244. Id. at 749.
245. Id. (quoting United States v. Bellrichard, 994 F.2d 1318, 1323-24 (8th Cir. 1993)) (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982))). Id.
246. Id. (quoting Bellrichard, 994 F.2d at 1323).
247. Id.
248. Id.
249. Id. The court stated the testimony concerned a conversation between an Assistant U.S. Attorney and an FBI agent regarding the prior uncharged letters and testimony from Dr. Michael Taylor who was to testify that Whitfield did not pose a threat to Judge Bremer. Id.
250. Whitfield, 31 F.3d at 749.
violation and stated the maker need only have communicated the threat to violate § 876. The court concluded the district court did not err in excluding Whitfield's testimony.

A year and a half after Whitfield, in United States v. Dinwiddie, the Eighth Circuit outlined a number of factors to consider when determining whether a statement constituted a true threat. In Dinwiddie, the Attorney General of the United States brought a civil suit against Regina Dinwiddie ("Dinwiddie"), an anti-abortion protester, in the United States District Court for the Western District of Missouri, alleging she violated the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248(a)(1), and sought an injunction barring Dinwiddie from further violations. Beginning in mid-1994, Dinwiddie made roughly fifty comments to Dr. Robert Crist ("Dr. Crist"), the Medical Director of Planned Parenthood of Greater Kansas City, often warning Dr. Crist through a bullhorn, "Robert, remember Dr. Gunn... This could happen to you... He is not in the world anymore... Whoever sheds man's blood, by man his blood shall be shed..." Dinwiddie also threatened and used physical force against other employees of Planned Parenthood and obstructed patients from accessing the clinic on several occasions. Due to Dinwiddie's conduct, Dr. Crist wore a bulletproof vest and posted an armed guard at the entrance to the Planned Parenthood facility to appease the employees' fear. The district court issued a temporary restraining order while the court conducted hearings on the application for a permanent injunction.

251. Id. at 749 n.4. See Bellrichard, 994 F.2d at 1324 (stating "Sections 871 and 876 'recognize in their terminology that it is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat. The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense.'") (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1982)).

252. Whitfield, 31 F.3d at 749.

253. 76 F.3d 913 (8th Cir. 1996).

254. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).


Prohibited activities. Whoever, (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of person from obtaining or providing reproductive health services.

256. Dinwiddie, 76 F.3d at 917. The court noted Dr. Gunn was a physician who was killed in 1993 by an opponent of abortion. Id.

257. Dinwiddie, 76 F.3d at 917-18.

258. Id. at 918.

The district court found for the government and granted the application for a permanent injunction, which ordered Dinwiddie not to come within 500 feet of any reproductive health service facility as defined in FACE. The court reasoned injunctive relief was important to defend the public's interest in health and safety, and to protect the legal rights of women seeking abortions from threats of violence as Congress intended when it enacted FACE. The court further noted Dinwiddie's unwillingness to comply or inability to comply with the provisions of FACE. The court addressed Dinwiddie's claims that FACE was unconstitutional, but dismissed the arguments. However, the court delineated several exceptions to the injunction to ensure Dinwiddie could engage in legitimate activities within 500 feet of any reproductive health facility.

260. Id. at 1288, 1296.
261. Id. at 1294.
262. Id. at 1295.
263. Id. 1297-98. As the court points out early in its opinion:
Defendant has argued persistently on several grounds that FACE is facially unconstitutional. None of those arguments is persuasive. This Court incorporates its holdings and analyses in the temporary restraining order filed on January 6, 1995 and the preliminary injunction filed on February 3, 1995 and reiterates that FACE: (1) prohibits conduct rather than speech; (2) is content-neutral; (3) is viewpoint-neutral; (4) is not unconstitutionally overbroad; and (5) is not unconstitutionally vague. FACE also does not violate: (1) the equal protection clauses of the Fifth and Fourteenth Amendments; (2) the excessive fines and cruel and unusual punishment clauses of the Eighth Amendment; (3) the free exercise clause of the First Amendment; or (4) the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (1993). These arguments are not issues of first impression in the federal courts. Similarly, other federal district courts have consistently held that FACE is facially constitutional.

264. Dinwiddie, 76 F.3d at 1296-97. The court stated examples of what constitutes legitimate personal activity would include:
(1) acquiring routine personal health services; (2) accompanying an immediate family member who is both in need of assistance and is acquiring health services; (3) receiving personal health services in an emergency situation; (4) shopping at a retail store or pharmacy adjacent to a reproductive health facility; (5) traveling within a buffer zone while engaged in activity unrelated to any service provided by a reproductive health facility; (6) peacefully carrying a placard in a manner that would not constitute intimidation, interference, or physical obstruction; (7) peacefully distributing literature in a manner that would not constitute intimidation, interference, or physical obstruction; or (8) unamplified speaking in a manner that would not constitute intimidation, interference, physical obstruction, or violation of a local noise ordinance.

265. Id. at 1296-97. The court also stated legitimate personal activity did not include:
[Activity that: (1) is described in part III.A. of this permanent injunction; (2) constitutes intimidation, physical obstruction, interference, force, or threats of force; (3) involves any use whatsoever of a bullhorn, megaphone, or other sound or voice amplifying device; (4) brings defendant in violation of any local noise ordinance; or (5) brings defendant in violation of laws related, but not limited, to assault, battery, trespass, harassment, vandalism, disturbing the peace, destruction of property, or unlawful possession of weapons, when such activity also has the effect of violating FACE. These activities are ones in which defen-
Dinwiddie appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, arguing FACE was unconstitutional because it violated the First Amendment, and the district court's injunction was vague and overinclusive. The Eighth Circuit affirmed the district court's opinion, but remanded to modify the injunction. The court held FACE was within the commerce power of Congress and was not "facially inconsistent" with the First Amendment. The court also concluded Dinwiddie's statements were threats of force. The court first reasoned FACE was constitutional and within Congress' power because Planned Parenthood operated in interstate commerce and therefore, Congress could regulate the activities which affected interstate commerce. After examining other precedent, the court rejected Dinwiddie's argument that FACE was content neutral and concluded it was not overbroad or vague.

Next, the court disagreed with Dinwiddie's claim she did not violate FACE. The court recognized the government may regulate and prohibit threats, but could not do so under the First Amendment merely because the language was aggressive. The court reasoned "what may be forceful to some, may be passionate to others." Therefore, the court explained the First Amendment required a court or jury to distinguish true threats from protected speech.

The court then clarified an alleged threat analysis must consider the entire factual context and stated the fact-finder must determine whether the recipient could reasonably interpret the statement as an expression of intent to harm. The court further offered a list of factors, which the court had considered in past Eighth Circuit cases, including the reaction of the listeners and recipient, whether the threat was conditional or not, whether the threat was communicated to the recipient directly, any past statements made to the recipient and if the recipient believed the communicator of the threat had an inclination
dant has engaged in blatantly and repeatedly and are illegal, are related to her unlawful conduct, or are clearly within the types of activity contemplated by 18 U.S.C. § 248.

Id. at 1297.
265. *Dinwiddie*, 76 F.2d at 913, 916, 919, 921, 924.
266. *Id.* at 917.
267. *Id.* at 919.
268. *Id.* at 924.
269. *Id.* at 919-20.
270. *Id.* at 923-24.
271. *Id.* at 924-25.
272. *Id.* at 925.
273. *Id.*
274. *Id.*
275. *Id.*
towards violence.\textsuperscript{276} However, the court gave no guidance on the appropriate weight to give each factor.\textsuperscript{277} Even though Dinwiddie did not make any specific threats, the court concluded Dinwiddie's manner in which she made the statements, the context of the statement and Dr. Crist's reaction to the statement all supported a finding the statements were true threats intended to intimidate Dr. Crist.\textsuperscript{278} Consequently, the court affirmed the district court's holding that Dinwiddie's comments were threats of force in violation of FACE.\textsuperscript{279} However, the court determined certain aspects of the district court's injunction were inconsistent with the First Amendment and remanded the case to modify the injunction.\textsuperscript{280}

The Dinwiddie approach was later followed in \textit{United States v. Hart},\textsuperscript{281} where the Eighth Circuit applied the reasonable recipient based standard, incorporating the factors as described in Dinwiddie, and held Ryder trucks parked outside abortion clinics constituted a threat in violation of FACE.\textsuperscript{282} In \textit{Hart}, the government indicted Fred Hart ("Hart") in the United States District Court for the Eastern District of Arkansas on two counts of violating FACE.\textsuperscript{283} Hart rented two Ryder trucks and parked them in the driveways of two Little Rock, Arkansas abortion clinics.\textsuperscript{284} When employees arrived at the clinics that morning, they were troubled by the presence of the truck because it reminded the employees of the 1995 Oklahoma City bombing which also involved a Ryder truck.\textsuperscript{285} The employees then immediately left

\textsuperscript{276} \textit{Id.} The court noted that the "list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive." \textit{Id.}

\textsuperscript{277} See \textit{United States v. Dinwiddie}, 76 F.2d 913 (8th Cir. 1996) (for lack of discussion on the appropriate weight to give each factor in considering whether a statement is a threat of force).

\textsuperscript{278} \textit{Id.} at 925. The court added, in a footnote, that "[t]he fact that Mrs. Dinwiddie did not specifically say to Dr. Crist that she would injure him does not mean that Mrs. Dinwiddie's comments were not 'threats of force.'" \textit{Id.} at 925 n.9.

\textsuperscript{279} \textit{Dinwiddie}, 76 F.2d at 917, 925.

\textsuperscript{280} \textit{Id.} at 927-28, 929. The court indicated the injunction prohibited Dinwiddie from "doing anything that could be 'remotely construed' to violate FACE." \textit{Id.} at 927 (emphasis added). The court noted the district court failed to define the phrase in its opinion. \textit{Id.} The court also indicated the injunction ordered Dinwiddie not to "engage in 'activity that . . . is described in part III.A. of this permanent injunction.'" \textit{Id.} at 928. The court stated because part III.A. also contained activity that was within Dinwiddie's First Amendment rights, the First Amendment did not permit the injunction to incorporate that activity. \textit{Id.}

\textsuperscript{281} 212 F.3d 1067 (8th Cir. 2000).

\textsuperscript{282} \textit{United States v. Hart}, 212 F.3d 1067, 1071 (8th Cir. 2000).

\textsuperscript{283} \textit{Hart}, 212 F.3d at 1069-70.

\textsuperscript{284} \textit{Id.} at 1069.

\textsuperscript{285} \textit{Id.} at 1069-70.
the buildings and alerted the police.\textsuperscript{286} When a bomb squad investigated, the bomb squad found no explosive materials in either truck.\textsuperscript{287}

At trial, the government offered testimony from employees who said they feared that the trucks contained bombs.\textsuperscript{288} Police officers testified they believed the trucks posed a threat.\textsuperscript{289} In addition, the government introduced stipulated testimony from Hart's father, who said Hart acted with intent because Hart believed his fear-inducing action would be worth it to save the life of a baby.\textsuperscript{290} Hart offered testimony from an FBI special agent who testified she noticed several Ryder trucks parked outside the FBI's offices in Little Rock, but she did not find them threatening because she knew the other people in the building were in the process of moving.\textsuperscript{291} At the end of the government's case, Hart moved for a judgment of acquittal arguing FACE was unconstitutional and the presence of the Ryder trucks did not support a finding of intimidation.\textsuperscript{292} The district court denied the motion and the jury found Hart guilty on both counts.\textsuperscript{293}

Hart appealed the decision of the district court to the United States Court of Appeals for the Eighth Circuit, arguing the district court denied his motion for acquittal in error because a Ryder truck, in itself, did not constitute a threat under FACE.\textsuperscript{294} The court further noted Hart argued the First Amendment protected his conduct and FACE was unconstitutional because it violated the Commerce Clause.\textsuperscript{295} The Eighth Circuit affirmed the district court's opinion, holding the district court did not err when it denied Hart's motion for acquittal based on insufficiency of evidence of a threat.\textsuperscript{296} The court reasoned Hart was required to show the government's evidence was insufficient to support a reasonable jury's finding of Hart's guilt beyond a reasonable doubt.\textsuperscript{297} The court determined FACE survived First Amendment scrutiny and was within Congress' power under the Commerce Clause.\textsuperscript{298}

\begin{itemize}
\item \textsuperscript{286} Id. at 1070.
\item \textsuperscript{287} Id.
\item \textsuperscript{288} Id. The court noted the government also provided testimony from employees of neighboring establishments who feared the trucks contained bombs. \textit{Id.}
\item \textsuperscript{289} Id. The court indicated the Special Agent also testified she did not "investigate the trucks until prompted by Hart's visit to the office." \textit{Id.}
\item \textsuperscript{290} Hart, 212 F.3d at 1070.
\item \textsuperscript{291} Id. The court also sentenced Hart to "four years of probation, the first twelve months of which was to be served in home detention, 200 hours of community service and a special assessment of $50.00." \textit{Id.}
\item \textsuperscript{292} Hart, 212 F.3d at 1067.
\item \textsuperscript{293} Id.
\item \textsuperscript{294} Id. at 1069, 1073.
\item \textsuperscript{295} Id. at 1070-71.
\item \textsuperscript{296} Id. at 1073-74.
\item \textsuperscript{297} Id. at 1070-71.
\item \textsuperscript{298} Id. at 1070-71.
\end{itemize}
Following *Dinwiddie*, the court observed an act violated FACE only if it was a true threat. In distinguishing a true threat from protected speech, the court stated it must analyze the alleged threat in consideration of the entire factual circumstances and determine whether a reasonable recipient could interpret the threat as intent to harm. Based on the reasonable recipient approach, the court concluded after considering the circumstances and manner in which Hart parked the Ryder trucks and given the reaction of the employees, patients and others, the jury could have reasonably concluded Hart's conduct was a true threat. The court ended its discussion by addressing Hart's arguments that FACE was unconstitutional and subsequently dismissed those arguments because the government had a substantial interest in public safety and health.

ANALYSIS

In *Doe v. Pulaski County Special School District*, the United States Court of Appeals for the Eighth Circuit held an eighth grader's letter, written at home, amounted to a true threat and was not protected under the First Amendment. The Eighth Circuit evaluated the necessary intent test to communicate a threat and the true threat standard used to distinguish a true threat from protected speech. The mother of J.M., an eighth grade student, brought an action against the Pulaski County Special School District ("PCSSD") for allegedly infringing upon his First Amendment rights when it expelled him for a letter he had written to a fellow student, K.G. The Eighth Circuit, en banc, concluded J.M. intended to communicate the letter to K.G. because he allowed his friend, D.M., to read it and J.M. spoke with K.G. about the letter. The Eighth Circuit further concluded a reasonable recipient would have viewed the letter as an expression of an intent to harm K.G. Subsequently, the court determined the let-

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299. *Id.* at 1071.
300. *Id.*
301. *Id.* at 1072. See United States v. J.H.H., 22 F.3d 821, 827-28 (8th Cir. 1994) (stating "[e]vidence showing the reaction of the victim of a threat is admissible as proof that a threat was made" but that such evidence must be evaluated by asking "whether an objectively reasonable recipient would view the message as a threat").
302. *Hart*, 212 F.3d at 1073-74. The court reasoned FACE survives Hart's First Amendment challenge because the government has a substantial interest in public safety and health and because FACE is narrowly tailored since it imposes liability only for "uses of force, threats of force and physical obstructions." *Id.* at 1073.
303. 306 F.3d 616 (8th Cir. 2002).
304. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002).
306. *Id.* at 619-20.
307. *Id.* at 624, 626.
308. *Id.*
ter was a true threat and thus, the school district did not violate J.M.’s First Amendment rights when the school board expelled him. The Eighth Circuit reversed its earlier panel decision and the district court’s findings, and remanded the case to the district court to dismiss J.M.’s First Amendment challenge.

This Analysis will illustrate, in *Doe*, the Eighth Circuit correctly analyzed the necessary intent required as part of a true threat analysis. This Analysis will also show the Eighth Circuit correctly followed its own reasonable recipient standard to distinguish a true threat from protected speech, but failed to properly consider the shortcomings of the test. Upon review, this Analysis will demonstrate the Eighth Circuit used an objective test in consideration of the entire factual circumstances to determine intent. This Analysis will also show the Eighth Circuit correctly followed its own reasonable recipient standard to distinguish a true threat from protected speech, but failed to properly consider the shortcomings of the test. Upon review, this Analysis will demonstrate the Eighth Circuit used an objective test in consideration of the entire factual circumstances to determine intent. Furthermore, this Analysis will show the Eighth Circuit relied on the subjective reaction of the recipient in its objective test. Finally, this Analysis will show that had the Eighth Circuit used the reasonable speaker standard, the court would have reached a different outcome.

A. THE EIGHTH CIRCUIT ANALYZED AND APPLIED THE NECESSARY INTENT TO COMMUNICATE THE THREAT TEST

In a true threat analysis, a court must distinguish between the purported threat and constitutionally protected speech. To ensure an individual’s right to be free from interference by the government, a court must first find the speaker’s intent to communicate the threat in a true threat analysis. In *Doe*, the Eighth Circuit properly analyzed the necessary intent by using an objective test in consideration of the entire factual circumstances to determine J.M.’s intent to communicate the letter.

309. *Id.* at 626-27.
310. *Id.* at 627.
311. *See infra* notes 317-56 and accompanying text.
312. *See infra* notes 356-420 and accompanying text.
313. *See infra* notes 317-38 and accompanying text.
314. *See infra* notes 372-94 and accompanying text.
315. *See infra* notes 395-420 and accompanying text.
316. *See infra* notes 421-32 and accompanying text.
318. *Doe*, 306 F.3d at 624.
319. *See infra* notes 320-56 and accompanying text.
1. The Eighth Circuit Properly Used an Objective Test to Determine the Necessary Intent to Communicate the Threat

In *Doe*, the Eighth Circuit properly analyzed the necessary intent to communicate the alleged threat by using an objective test. In *United States v. Orozco-Santillan*, the United States Court of Appeals for the Ninth Circuit announced its reasonable speaker standard as whether a reasonable speaker would foresee that the recipient would interpret the communication as an expression of intent to harm the recipient. The court determined the defendant need only knowingly or intentionally communicate the alleged threat. The court maintained the defendant need not be able to carry out the threat or intend the threat to occur.

Similarly, in *United States v. Whitfield*, the United States Court of Appeals for the Eighth Circuit utilized a reasonable recipient standard in analyzing true threats communicated through the mail. The court determined Whitfield violated a federal statute when Whitfield communicated the threat through mail, regardless of any subjective intent on Whitfield's part. As the court noted, Whitfield's subjective intent was not important in a 18 U.S.C. § 876 violation when he mailed thirty letters to a judge; Whitfield need only have communicated the threat to violate § 876.

In *Doe*, the United States Court of Appeals for the Eighth Circuit correctly utilized an objective test to determine J.M.'s intent to communicate the purported threat. The court determined it must first analyze whether intent to communicate the threat existed before turning to its reasonable recipient standard. In doing so, the court

320. *Id.*
321. 903 F.2d 1262 (9th Cir. 1990).
322. United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).
323. *Orozco-Santillan*, 903 F.2d at 1265 n.3. See United States v. Francis, 164 F.3d 120, 123 (2d Cir. 1999) (rejecting addition of specific intent requirement in the reasonable recipient standard); United States v. Miller, 115 F.3d 361, 363 (6th Cir. 1997) (determining actual subjective intent or ability to carry out threat in not required to communicate a threat); United States v. Patrick, 117 F.3d 375, 377 (8th Cir. 1997) (determining that subjective intent is irrelevant in a threat analysis under 18 U.S.C. § 876); United States v. Martin, 163 F.3d 1212, 1215-16 (10th Cir. 1998) (determining a present intent to harm is irrelevant in a threat analysis under 18 U.S.C. § 871).
324. *Orozco-Santillan*, 903 F.2d at 1265 n.3.
325. 31 F.3d 747 (8th Cir. 1994).
327. *Compare Orozco-Santillan*, 903 F.2d at 1265 n.3 (noting the only intent required is the speaker knowingly or intentionally communicate the threat, not that the speaker intended to or could carry out his threat), with *Whitfield*, 31 F.3d at 749 n.4 (recognizing in a § 876 violation the maker's subjective intentions are not relevant).
328. *Whitfield*, 31 F.3d at 749 n.4.
329. *See infra* notes 330-56 and accompanying text.
noted in the intent analysis, the speaker did not need to intend to carry out the threat, nor be capable of carrying the threat out.\footnote{331} The Eighth Circuit declared the speaker need only communicate the threat intentionally or knowingly.\footnote{332}

Like the courts in \textit{Orozco-Santillan} and \textit{Whitfield}, the court in \textit{Doe} utilized the same intent test to determine J.M.'s intent to communicate the purported threat to K.G.\footnote{333} Similar to the \textit{Orozco-Santillan} court, which determined a speaker need not carry out the threat to find intent, the \textit{Doe} court determined J.M. need not be able to carry out his purported threat and rejected J.M.'s argument to the contrary.\footnote{334} Similarly, just as the court in \textit{Orozco-Santillan} determined a defendant need only intentionally or knowingly intend to communicate the threat, so did the \textit{Doe} court when it concluded J.M. knowingly communicated the threat because J.M. permitted D.M. to read the letter (knowing D.M. was friends with K.G.) and spoke about the letter with K.G. on the phone.\footnote{335} Likewise, as the court in \textit{Whitfield} did when it rejected Whitfield's claim he posed no threat to a judge, the \textit{Doe} court rejected J.M.'s argument it would be impossible for J.M. to harm K.G. in the manner his letter described.\footnote{336} The \textit{Doe} court maintained the ability to carry out the threat was irrelevant in determining whether the government can punish the speaker for communicating a statement.\footnote{337} As such, the \textit{Doe} court correctly declined to adopt J.M.'s
argument that he was unable to carry out the threat and concluded he knowingly communicated the threat to K.G. in the intent test. 338

2. The Eighth Circuit Correctly Considered the Entire Factual Circumstances in the Intent to Communicate the Threat Test

In Doe, the United States Court of Appeals for the Eighth Circuit also correctly considered the entire factual circumstances when it used an objective test to determine whether J.M. intended to communicate the threat. 339 In Watts v. United States, 340 the Supreme Court of the United States focused on the conditional nature of Watts' statement, the reaction of the listeners, and the context in which Watts communicated the statement to determine if Watts intended a true threat. 341 Based on these factors, the Court maintained Watts did not intend the communication as a true threat, but as political hyperbole. 342 The Court considered the factual circumstances in which Watts made the statement to decide if Watts intended a true threat. 343

In Orozco-Santillan, the Ninth Circuit followed the rule in Watts by considering the entire factual circumstances to determine whether Orozco-Santillan intended his statements as a true threat. 344 The court in Orozco-Santillan determined an intention to injure another should include a consideration of the factual context, in addition to the surrounding circumstances and reaction of listeners. 345 In doing so, the court examined the circumstances surrounding Orozco-Santillan's arrest to determine if Orozco-Santillan intended the statement as a true threat. 346 The court focused on Orozco-Santillan's action in resisting his arrest, resisting his questioning and the cursing and pushing of the arresting officer. 347 The court found these circumstances determinative in explaining there was sufficient evidence to lead a

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338. Id. at 624, 625 n.3.
339. See infra notes 340-56 and accompanying text.
342. Watts, 394 U.S. at 708.
343. Id.
344. Orozco-Santillan, 903 F.2d at 1265.
345. Compare Watts, 394 U.S. at 708 (examining the context, the conditional nature of the statement and the reaction of the listeners to determine if a true threat existed), with Orozco-Santillan, 903 F.2d at 1265 (noting threats are considered in light of the entire factual context, including the reaction of listeners and the surrounding circumstances).
346. Orozco-Santillan, 903 F.2d at 1266.
347. Id.
reasonable jury to conclude Orozco-Santillan intended the statements as true threats.\textsuperscript{348}

In Doe, the Eighth Circuit correctly determined J.M. intended a true threat by considering the entire factual circumstances in the intent to communicate test.\textsuperscript{349} The Eighth Circuit recognized it must initially determine J.M.'s intent to communicate the threat before applying the reasonable recipient standard.\textsuperscript{350} The court in its analysis recognized J.M. need not intend the threat, but only simply knowingly or intentionally communicate the threat to K.G. or a third person.\textsuperscript{351} However, the Eighth Circuit never explicitly determined it must view the circumstances surrounding the threat to determine J.M.'s intent.\textsuperscript{352} Nevertheless, just like Watts and Orozco-Santillan, the Eighth Circuit examined the surrounding circumstances in its intent analysis.\textsuperscript{353} The court examined the way in which J.M. gave D.M. permission to read the letter, the way in which the letter was given to K.G., and the several phone conversations J.M. and K.G. shared in concluding J.M. intended to communicate the threat.\textsuperscript{354} The court correctly considered J.M.'s intent to communicate the threat in light of the entire factual circumstances just as the courts did in Watts and Orozco-Santillan.\textsuperscript{355} Thus, while the court did not explicitly note it was considering the entire factual circumstances, it nonetheless correctly followed the manner in which intent was first determined in a true threat analysis.\textsuperscript{356}

\textsuperscript{348} Id.

\textsuperscript{349} See infra notes 350-56 and accompanying text.

\textsuperscript{350} Doe, 306 F.3d at 624.

\textsuperscript{351} Id.

\textsuperscript{352} See Doe v. Pulaski County Special Sch. Dist. 306 F.3d 616 (8th Cir. 2002) (for lack of discussion on requirement to view entire factual circumstances).

\textsuperscript{353} Compare Watts, 394 U.S. at 708 (examining the context, the conditional nature of the statement and the reaction of the listeners to determine if a true threat existed), and Orozco-Santillan, 903 F.2d at 1265 (noting threats are considered in light of the entire factual context including the reaction of the listeners and the surrounding circumstances), with Doe, 306 F.3d at 624-25 (examining the context and surrounding circumstances as to how the letter was communicated to K.G. in determining J.M.'s intent to communicate the threat).

\textsuperscript{354} Doe, 306 F.3d at 624-25.

\textsuperscript{355} Compare Watts, 394 U.S. at 708 (examining the context, the conditional nature of the statement and the reaction of the listeners to determine if a true threat existed), and Orozco-Santillan, 903 F.2d at 1265 (noting threat are considered in light of the entire factual context including the reaction of the listeners and the surrounding circumstances), with Doe, 306 F.3d at 624-25 (examining the context and surrounding circumstances as to how the letter was communicated to K.G. in determining J.M.'s intent to communicate the threat).

\textsuperscript{356} See supra notes 317-55 and accompanying text.
B. THE EIGHTH CIRCUIT ADHERED TO AND APPLIED THE
REASONABLE RECIPIENT STANDARD

In *Doe*, the United States Court of Appeals for the Eighth Circuit
correctly followed its reasonable recipient standard, but failed to con-
sider the issue of recipient sensitivity and how the sensitivity could
run afoul of a speaker's constitutional rights.\(^3\)\(^5\)\(^7\)\(^8\) Furthermore, the
court relied on the recipient's subjective reaction in analyzing a threat
under its reasonable recipient standard.\(^3\)\(^5\)\(^8\) Without any test an-
nounced by the United States Supreme Court to distinguish true
threats from protected speech, the federal courts of appeals have been
left to determine for themselves when the government may regulate
an individual's speech without infringing on a person's First Amend-
ment rights.\(^3\)\(^6\)\(^9\) In creating a test, the circuits unanimously agreed an
objective test was required when a court analyzed a statement as a
true threat or protected speech.\(^3\)\(^6\)\(^0\) However, circuits have been split
with regards to which viewpoint the statement should be judged: a
reasonable speaker of the threat, or reasonable recipient of the
threat.\(^3\)\(^6\)\(^1\) Currently, the First, Third, Seventh, Ninth and Tenth Cir-
cuits follow the reasonable speaker standard.\(^3\)\(^6\)\(^2\) Meanwhile the Sec-
ond, Fourth, Sixth, Eighth and Federal Circuits follow a reasonable

\(^3\)\(^5\)\(^7\). See infra notes 365-94 and accompanying text.
\(^3\)\(^5\)\(^8\). See infra notes 395-420 and accompanying text.
\(^3\)\(^5\)\(^9\). *Doe*, 306 F.3d at 622.
\(^3\)\(^6\)\(^0\). Id.
\(^3\)\(^6\)\(^1\). Id.
\(^3\)\(^6\)\(^2\). See United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997) (determining a
statement is a threat under 18 U.S.C. § 875(c) if a reasonable person would foresee that
it would be interpreted as a threat); United States v. Kosma, 951 F.2d 549, 556-57 (3rd
Cir. 1991) (determining a statement is a threat under 18 U.S.C. § 871 if a reasonable
person would foresee it would be interpreted as an expression of intent to harm); United
States v. Hartbarger, 148 F.3d 777, 782-83 (7th Cir. 1998) (determining a statement is a
threat under 42 U.S.C. § 3631 because the reasonable person would foresee it would be
interpreted as an expression of intent to harm); United States v. Orozco-Santillan, 903
F.2d 1262, 1265 (9th Cir. 1990) (determining a statement is a true threat under 18
U.S.C. § 115(a)(1)(B) if a reasonable person would foresee it would be interpreted as an
expression of intent to harm).
recipient standard. The Fifth and Eleventh Circuits currently utilize an objective viewpoint neutral approach.

1. **The Eighth Circuit Correctly Adhered to the Reasonable Recipient Standard as Defined in Eighth Circuit Precedent**

   The *Doe* court correctly used the reasonable recipient standard set out in previous Eighth Circuit precedent. In *Whitfield*, the Eighth Circuit determined mailed letters were a true threat if a reasonable recipient, who knew of the circumstances surrounding the statement, would interpret the statement as a threat. The court determined if a reasonable recipient would feel threatened, it must take into account the total circumstances in which the speaker communicated the statement. The court in *Dinwiddie* then clarified an alleged threat analysis must consider the entire factual context and stated the fact-finder must determine whether the recipient could reasonably interpret the statement as an expression of intent to harm. Later in *Hart*, the court stated, in distinguishing a true threat from protected speech, it must analyze the alleged threat in consideration of the entire factual circumstances and determine whether a reasonable recipient could interpret the threat as an intent to harm. The Eighth Circuit in the en banc decision of *Doe* defined a true threat as a statement a reasonable recipient would interpret as a serious expression of intent to harm. Thus, the court followed the same reasona-

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363. See United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997) (stating the true threat test is whether a reasonable recipient would interpret the communication as a threat); United States v. Darby, 37 F.3d 1059, 1066 (4th Cir. 1994) (stating a communication is a threat if a reasonable recipient, who is familiar with the context of the statement, would interpret it as a threat); United States v. Landham, 251 F.3d 1072, 1080 (6th Cir. 2001) (stating communications in violation of 18 U.S.C. § 875(c) must be viewed objectively from the perspective of the recipient); United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (stating a communication is a threat under 18 U.S.C. § 248 if the recipient of the threat could reasonably conclude it expresses an intent to harm); and Metz v. Dep't of Treasury, 780 F.2d 1001, 1002 (Fed. Cir. 1986) (evaluating a threat from a reasonable recipient's viewpoint and considering a number of factors).

364. See United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001) (stating a communication is a threat violating 18 U.S.C. § 875(c) if when taken in its context the statement has a reasonable tendency to create fear that the speaker will carry out the threat); and United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (stating a communication is a threat under 18 U.S.C. § 871 if a reasonable person would construe the statement as a serious expression of an intent to harm).

365. *See infra* notes 366-71 and accompanying text.


367. *Id.* (quoting *Bellrichard*, 994 F.2d at 1323).

368. *Dinwiddie*, 76 F.2d at 925.

369. *Hart*, 212 F.3d at 1071.

370. *Doe*, 306 F.3d at 624.
ble recipient standard as defined in previous Eighth Circuit precedent set out in Whitfield, Hart and Dinwiddie.\textsuperscript{371}

2. **The Eighth Circuit Determined a Uniquely Sensitive Recipient did not Undermine the Reasonable Recipient Standard**

In *Doe*, the Eighth Circuit incorrectly determined the issue of a uniquely sensitive recipient and how the sensitivity could conflict with a speaker's constitutional rights but not undermine the reasonable recipient standard.\textsuperscript{372} By doing so, the Eighth Circuit undermined its reasonable recipient standard by allowing a speaker's First Amendment rights to turn on a recipient's unknown sensitivity.\textsuperscript{373} In *United States v. Fulmer*,\textsuperscript{374} the United States Court of Appeals for the First Circuit adopted the reasonable speaker standard after reviewing and declining to adopt the reasonable recipient standard.\textsuperscript{375} The court expressed its test in terms of whether the speaker would have reasonably foreseen that the recipient would interpret the communication as a threat.\textsuperscript{376} The court reasoned the reasonable speaker standard was the most appropriate test to determine true threats because the standard not only took into consideration the factual context of the statement, but also avoided the downfalls of the reasonable recipient standard; namely, that a jury would consider any unique sensitivities of the recipient.\textsuperscript{377} The First Circuit was especially wary of adopting the reasonable recipient standard because a court should not convict a speaker for making an ambiguous statement a uniquely sensitive recipient may find threatening due to circumstances unknown to the speaker.\textsuperscript{378} In adopting a reasonable speaker standard, the First Circuit aligned itself with other circuits which had also adopted the rea-

\textsuperscript{371} Compare Whitfield, 31 F.3d at 749 (in determining if a reasonable recipient would feel threatened, the court must take into account the total circumstances in which the speaker communicated the statement), and Dinwiddie, 76 F.2d at 925 (stating an alleged threat analysis must consider the entire factual context, and stated the fact-finder must determine whether the recipient could reasonably interpret the statement as an expression of intent to harm), and Hart, 212 F.3d at 1071 (stating in distinguishing a true threat from protected speech, the court must analyze the alleged threat in consideration of the entire factual circumstances and determine whether a reasonable recipient could interpret the threat as intent to harm), with Doe, 306 F.3d at 624 (defining a true threat as a statement a reasonable recipient would interpret as a serious expression of intent to harm).

\textsuperscript{372} See infra notes 374-94 and accompanying text.

\textsuperscript{373} See infra notes 395-420 and accompanying text.

\textsuperscript{374} 108 F.3d 1486 (1st Cir. 1997).

\textsuperscript{375} United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997).

\textsuperscript{376} Fulmer, 108 F.3d at 1491.

\textsuperscript{377} Id.

\textsuperscript{378} Id.
sonable speaker standard and avoided the recipient sensitivity issues associated with the reasonable recipient standard.\footnote{379}

Similarly, the Eighth Circuit in the panel decision of \textit{Doe v. Pulaski County Special School District},\footnote{380} declined to adhere to its own reasonable recipient standard and instead adopted a reasonable speaker standard.\footnote{381} While the court analyzed the factors set out in \textit{Dinwiddie}, the court integrated the reasonable speaker standard as defined by the Second, Sixth and Ninth Circuit precedent, where the circuits follow a different standard from that of the Eighth Circuit's reasonable recipient standard.\footnote{382} The Eighth Circuit announced the test as whether a reasonable speaker would foresee that K.G. would interpret the letter as an expression of intent to harm K.G.\footnote{383}

In the en banc decision of \textit{Doe}, the Eighth Circuit incorrectly determined a uniquely sensitive recipient would not undermine the reasonable recipient standard.\footnote{384} The Eighth Circuit began its analysis by determining the proper standard to distinguish a true threat from protected speech, just as the courts in \textit{Fulmer} and the panel decision in \textit{Doe} had.\footnote{385} The Eighth Circuit acknowledged the reasoning of the \textit{Fulmer} court and the panel decision in \textit{Doe}, but dismissed much of the concerns of a uniquely sensitive recipient by declaring the debate over the differing tests as "largely academic."\footnote{386} The court reasoned under either test, the result would be the same.\footnote{387} The \textit{Fulmer} court's reasoning did not convince the Eighth Circuit the reasonable speaker test was best to promote the public, wide-open debate the First Amendment envisioned, even though the Eighth Circuit later recognized an individual's freedom to be free from governmental intrusion in one's own home and personal thoughts.\footnote{388}

\footnote{379} \textit{Id.}
\footnote{380} 263 F.3d 833 (8th Cir. 2001).
\footnote{381} \textit{Compare} \textit{Doe v. Pulaski County Special Sch. Dist.}, 263 F.3d 833, 836, 837 (8th Cir. 2001) (integrating several circuit approaches with Eighth Circuit approach and then determining standard for true threat as whether a reasonable person would foresee the letter would be interpreted as a serious expression of intent to harm recipient), \textit{with Fulmer}, 108 F.3d at 1491 (determining appropriate standard in a true threat analysis is whether speaker would have reasonably foreseen that his statement would be taken as a threat by the recipient).
\footnote{382} \textit{Doe}, 263 F.3d at 836, 837.
\footnote{383} \textit{Id.} at 837.
\footnote{384} \textit{See infra} notes 385-94 and accompanying text.
\footnote{385} \textit{Compare Fulmer}, 108 F.3d at 1490-91 (examining different true threat analysis tests as a matter of first impression), \textit{and Doe}, 263 F.3d at 836-37 (reviewing Eighth Circuit test and incorporating factors into reasonable speaker standard of Ninth Circuit), \textit{with Doe}, 306 F.3d at 622-24 (examining differing true threat analysis tests used by several circuits).
\footnote{386} \textit{Doe}, 306 F.3d at 623.
\footnote{387} \textit{Id.}
\footnote{388} \textit{Id.} at 623, 624.
The *Doe* court did not give proper weight or consideration to the circumstances in which a jury, not a judge sitting in a bench trial, may consider the unique sensitivity of the recipient as the *Fulmer* court had.\(^{389}\) The Eighth Circuit reasoned a recipient's unique sensitivity would only cause a different result if that sensitivity were unknown to the speaker.\(^{390}\) However, in *Doe*, the court analyzed a threat made to a thirteen year old school girl, in light of a school policy prohibiting threats against other students, and in the wake of school shootings.\(^{391}\) Moreover, just as the court in *Fulmer* noted, the unique sensitivity of the recipient may sway a jury when the reasonable recipient standard is used; circumstances the *Fulmer* court attempted to avoid by adopting the reasonable speaker standard.\(^{392}\) By adhering to its reasonable recipient standard in *Doe*, the Eighth Circuit failed to give proper consideration and weight to a recipient’s uniquely sensitive circumstance.\(^{393}\) Thus, the Eighth Circuit undermined its reasonable recipient standard by allowing a speaker’s First Amendment rights to turn on a recipient’s unknown sensitivity.\(^{394}\)

3. The Eighth Circuit Applied the Reasonable Recipient Standard but Undermined the Objectivity of the Standard When it Relied on the Subjective Reaction of the Recipient

In *Doe*, the Eighth Circuit also relied heavily on the subjective reaction of the recipient in its reasonable recipient standard, thereby undermining the objectivity of the test.\(^{395}\) While the reasonable speaker standard considered the reaction of the listeners as well, the Eighth Circuit in its test focused especially on the fearful reaction of K.G. as determinative of whether J.M.’s statement was a true threat.
or protected speech.\textsuperscript{396} Therefore, J.M.'s First Amendment rights turned on the persuasive character of the complaining recipient, K.G.\textsuperscript{397}

In \textit{Dinwiddie}, the United States Court of Appeals for the Eighth Circuit announced several factors a court should consider when determining whether a statement was a threat.\textsuperscript{398} The Eighth Circuit explained that a court must analyze an alleged threat in consideration of the entire factual context and stated the fact-finder must determine whether the recipient could reasonably interpret the statement as an expression of intent to harm, effectively adopting an objective, recipient based standard.\textsuperscript{399} The Eighth Circuit further offered a list of factors used in past Eighth Circuit cases to consider including the reaction of the listeners and recipient, any past statements made to the recipient, and whether the recipient believed the communicator of the threat had an inclination towards violence.\textsuperscript{400} The district court in \textit{Dinwiddie} admitted testimony regarding the reaction of the recipient and other listeners.\textsuperscript{401} In its analysis, the court focused primarily on whether the threats intimidated Dr. Crist.\textsuperscript{402} The court concluded the statements were "threats of force" that intimidated Dr. Crist.\textsuperscript{403} In support of this conclusion, the court looked to Dr. Crist's reaction to the statement when he wore a bullet proof vest, Dr. Crist's reaction in not laughing at Dinwiddie's statements, and Dr. Crist's awareness Dinwiddie had a propensity to use force.\textsuperscript{404} The court never asked whether a reasonable recipient might interpret the statement with an apprehension of bodily harm.\textsuperscript{405}

\textsuperscript{396} See infra notes 412-20 and accompanying text. See \textit{Lovell} v. \textit{Poway Unified Sch. Dist.}, 90 F.3d 367, 373 (9th Cir. 1996), where the Ninth Circuit would point out that it did:

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  \item not mean to suggest that [the person to whom the threat was made] need only assert that he or she felt threatened by another's conduct in order to justify overriding that person's right to free expression. While courts may consider the effect on the listener when determining whether a statement constitutes a true threat, the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect.
\end{itemize}

\textit{Lovell}, 90 F.3d at 373.

\textsuperscript{397} See infra notes 398-420 and accompanying text.

\textsuperscript{398} \textit{Dinwiddie}, 76 F.3d at 925.

\textsuperscript{399} Id.

\textsuperscript{400} Id.

\textsuperscript{401} Id. at 917-18. The district court admitted the testimony of Dr. Crist and other staff members of Planned Parenthood. \textit{Id.}

\textsuperscript{402} \textit{Dinwiddie}, 76 F.3d at 925-26.

\textsuperscript{403} Id.

\textsuperscript{404} Id.

\textsuperscript{405} See United States v. \textit{Dinwiddie}, 76 F.3d 913 (8th Cir. 1994) (for lack of discussion as to how a reasonable recipient would interpret the threats).
Similarly, the court in *Hart* followed the same reasonable recipient standard and factors set out in *Dinwiddie*, including the reaction of the recipient. The district court in *Hart* admitted evidence and testimony concerning the reaction of the listeners, just as the court in *Dinwiddie* had. The *Dinwiddie* court concluded the statements were true threats intended to intimidate Dr. Crist given the manner in which Dinwiddie made the statements, the context of the statements and Dr. Crist's reaction to the statements. The *Hart* court focused particularly on the reaction of the clinical workers. Specifically, the court examined testimony from the clinic employees believing the trucks contained bombs and were a threat to injure given similarities with the Oklahoma City bombing and the fact that the clinic employees contacted the police. The court never analyzed the test by asking if a reasonable recipient would consider Hart's conduct as a threat, only if the clinic employees' reaction was reasonable.

In *Doe*, the Eighth Circuit also relied heavily on the subjective reaction of the recipient to determine if the letter constituted a true threat or protected speech. After the Eighth Circuit rejected its panel's reasons for using the reasonable speaker standard, the court followed *Dinwiddie* and held a true threat was any statement which a reasonable recipient would interpret as an expression of intent to harm another. The *Doe* court would later recognize the reaction of the listener was relevant in a true threat inquiry as well as the circumstances surrounding the statement, just as the courts in *Dinwiddie* and *Hart* followed. Like *Dinwiddie* and *Hart*, the *Doe* court examined the reaction of the recipient to determine if a true threat was protected speech. In its analysis, the court focused not only on

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406. Compare *Hart*, 212 F.3d at 1071 (reviewing and following Eighth Circuit reasonable recipient standard and factors used as set out in *Dinwiddie*), with *Dinwiddie*, 76 F.3d at 925 (using reasonable recipient standard and reviewing previous Eighth Circuit true threat cases to enumerate several factors a court considers in the analysis, including the reaction of the recipient).
407. Compare *Hart*, 212 F.3d at 1070 (discussing various testimony admitted by court relating to reactions of clinic workers), with *Dinwiddie*, 76 F.3d at 917-18 (discussing various testimony admitted by court relating to Dr. Crist's reaction and other employees' reaction).
408. *Dinwiddie*, 76 F.3d at 925.
409. *Hart*, 212 F.3d at 1072.
410. Id.
411. See United States v. *Hart*, 212 F.3d at 1067 (8th Cir. 2000) (for lack of discussion on how a reasonable recipient would interpret Hart's statements).
412. See infra notes 413-20 and accompanying text.
414. Id. at 623, 626.
415. Compare *Dinwiddie*, 76 F.3d at 925, 926 (examining Dr. Crist's reaction to Dinwiddie's statements and his behavior after the threats in wearing a bullet-proof vest), and *Hart*, 212 F.3d at 1072 (examining the clinic workers' reaction to the Ryder trucks
In particular, the Eighth Circuit noted K.G. started to cry after reading the letter, was fearful to leave the gym, slept with the lights on after the incident and appeared and remained frightened when J.M. returned to school. The dissent in Doe reminded the majority that K.G.’s response did not determine whether the alleged threat was a true threat because the reasonable recipient standard required an objective analysis. Despite the warning, the majority misrelied on K.G.’s reaction to the letter in determining if a reasonable recipient would have viewed the letter as a true threat, just as the courts in Dinwiddie and Hart had when both those courts analyzed the reasonable recipient standard in light of the recipients’ reaction. The Doe court thereby undermined its own reasonable recipient standard when it relied on the subjective reaction of the recipient and others to distinguish a true threat from protected speech.

C. Had the Eighth Circuit Applied the Alternate Reasonable Speaker Standard, the Court Would Have Reached a Different Conclusion

The United States Court of Appeals for the Eighth Circuit acknowledged potential differences between the reasonable recipient and reasonable speaker standards could lead to different results. The court noted the different standards would only produce contrary outcomes in extremely rare cases when a recipient possessed some unique sensitivity and the speaker did not know of the sensitivity. The court dismissed much of the concerns of a uniquely sensitive recipient by declaring the debate over the differing standards as “largely academic.” However, had the Doe court used the reasonable speaker standard, the court would have reached a different conclusion.

The Eighth Circuit, in the panel decision of Doe, asked whether a reasonable speaker could foresee that K.G. would interpret J.M.’s letter as a serious expression of intent to harm her. The Eighth Cir-
cuit responded in the negative and reasoned a reasonable person would not foresee the letter as an intent to harm K.G. because J.M. wrote the letter in the privacy of his home over the summer, did not show or deliver the letter to K.G. and only offered the letter to D.M. after D.M. had discovered it.\textsuperscript{426} Additionally, the Eighth Circuit supported its conclusion by stating both J.M. and K.G. participated peacefully in church activities after K.G. knew of the letter and, after an investigation, the state prosecuting attorney did not file any action against J.M. and instead closed the file.\textsuperscript{427}

Unlike the panel decision of \textit{Doe}, the Eighth Circuit en banc adhered to its reasonable speaker standard and concluded J.M.'s letter amounted to a true threat.\textsuperscript{428} The court found that a reasonable recipient would interpret the letter as a true threat because of K.G.'s fearful reaction to the letter.\textsuperscript{429} However, by adhering to the reasonable recipient standard, the en banc court reached a conclusion contrary to the panel decision of \textit{Doe}.\textsuperscript{430} If the en banc \textit{Doe} court had used the reasonable speaker standard, focusing on J.M.'s lack of a violent history, the fact J.M. did not directly communicate the letter to K.G., and the fact J.M. wrote the letter in the privacy of his home and never showed or sent the letter to K.G., the court would have reached the same conclusion as the panel decision of \textit{Doe}.\textsuperscript{431} Had the en banc \textit{Doe} court used the reasonable speaker standard, the court would have reached a different conclusion because the court would not have relied so heavily on the subjective reaction of the speaker in the reasonable recipient test.\textsuperscript{432}

The Eighth Circuit in \textit{Doe} correctly analyzed the necessary intent required in a true threat analysis using an objective intent standard in light of the entire factual circumstances.\textsuperscript{433} The Eighth Circuit also correctly stated and followed the reasonable recipient standard utilized in previous Eighth Circuit true threat inquiry cases.\textsuperscript{434} How-

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  \item \textsuperscript{426} \textit{Id.} at 837-38.
  \item \textsuperscript{427} \textit{Id.} at 838.
  \item \textsuperscript{428} \textit{Doe}, 306 F.3d at 624, 626.
  \item \textsuperscript{429} \textit{Id.} at 626.
  \item \textsuperscript{430} \textit{Compare Doe}, 263 F.3d at 837 (concluding a reasonable speaker would not have foreseen K.G. would interpret the letter as a serious expression of intent to harm), \textit{with Doe}, 306 F.3d at 626 (concluding a reasonable recipient would have interpreted the letter as a serious expression of intent to harm).
  \item \textsuperscript{431} \textit{Compare Doe}, 263 F.3d at 837-38 (using a reasonable speaker standard and focusing on the fact J.M. wrote the letter at home, did not show K.G. the letter and participated peacefully with K.G. after K.G. read the letter), \textit{with Doe}, 306 F.3d at 626 (using a reasonable recipient standard and focusing on the fact K.G. broke down crying after reading the letter, slept with the lights on for several days and remained frightened when J.M. returned to the school).
  \item \textsuperscript{432} \textit{See supra} notes 421-31 and accompanying text.
  \item \textsuperscript{433} \textit{See supra} notes 317-56 and accompanying text.
  \item \textsuperscript{434} \textit{See supra} notes 365-71 and accompanying text.
\end{itemize}
ever, the Eighth Circuit failed to consider the unique sensitivity issues associated with the reasonable recipient standard and how it could infringe on a speaker’s constitutional rights.\footnote{435} Furthermore, the Eighth Circuit relied on the subjective reaction of the recipient in its objective test, thereby turning a speaker’s First Amendment rights on the persuasive character of the complaining recipient.\footnote{436} Finally, had the Eighth Circuit used the reasonable speaker standard, the court would have reached a different outcome.\footnote{437}

\section*{CONCLUSION}

In \textit{Doe v. Pulaski County Special School District},\footnote{438} the United States Court of Appeals for the Eighth Circuit held an eighth grader’s letter, written at home, amounted to a true threat and was not protected under the First Amendment.\footnote{439} The Eighth Circuit evaluated the necessary intent to communicate a threat test and the true threat standard used to distinguish a true threat from protected speech.\footnote{440} The mother of J.M., an eighth grade student, brought an action against the Pulaski County Special School District (“PCSSD”) for allegedly infringing upon his First Amendment rights when it expelled him for a letter he had written to a fellow student, K.G.\footnote{441} The Eighth Circuit in the panel decision of \textit{Doe v. Pulaski County Special School District},\footnote{442} declined to adhere to its own reasonable recipient standard and instead favorably cited the reasonable speaker standard used in the Ninth Circuit.\footnote{443} While the court analyzed the factors and reasonable recipient standard set out in an earlier Eighth Circuit decision, \textit{United States v. Dinwiddie},\footnote{444} the court integrated the reasonable speaker standards used in the Second, Sixth and Ninth Circuits, where the circuits follow different approaches from the Eighth Circuit’s reasonable recipient standard.\footnote{445} The Eighth Circuit an-

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\item \footnote{435}{See supra notes 372-94 and accompanying text.}
\item \footnote{436}{See supra notes 395-420 and accompanying text.}
\item \footnote{437}{See supra notes 421-32 and accompanying text.}
\item \footnote{438}{306 F.3d 616 (8th Cir. 2002).}
\item \footnote{439}{Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 621 (8th Cir. 2002).}
\item \footnote{440}{Doe, 306 F.3d at 622-24.}
\item \footnote{441}{Id. at 619-20.}
\item \footnote{442}{263 F.3d 836 (8th Cir. 2001).}
\item \footnote{443}{Compare United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (determining appropriate standard in a true threat analysis is whether speaker would have reasonably foreseen that the speaker’s statement would be interpreted as a threat by the recipient), with Doe, 263 F.3d at 837 (integrating several circuit approaches with the Eighth Circuit approach and then determining the standard for a true threat as whether a reasonable person would foresee the letter would be interpreted as a serious expression of intent to harm recipient).}
\item \footnote{444}{76 F.3d 913 (8th Cir. 1996).}
\item \footnote{445}{Doe, 263 F.3d at 836-37.}
\end{itemize}
ounced the test as “whether a reasonable person would foresee that J.M.’s letter would be interpreted by K.G. as a serious expression of an intent to harm her.” The Eighth Circuit, en banc, held a true threat was “a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.” The Eighth Circuit concluded J.M. had intended to communicate the letter to K.G. and a reasonable recipient would have viewed the letter as a serious expression of an intent to harm K.G. Thus, the court viewed the letter as a true threat, not protected speech, and therefore the Doe court found the school district did not violate J.M.’s First Amendment rights when the school district expelled him.

The Eighth Circuit in Doe correctly analyzed the necessary intent required in a true threat analysis using an objective intent test in light of the entire factual circumstances. The Eighth Circuit also correctly stated and followed the reasonable recipient standard utilized in previous Eighth Circuit true threat inquiry cases. However, the Eighth Circuit failed to consider the unique sensitivity issues associated with the reasonable recipient standard and how it could infringe on a speaker’s constitutional rights. Furthermore, the Eighth Circuit relied on the subjective reaction of the recipient in its objective test, thereby turning a speaker’s First Amendment rights on the persuasive character of the complaining recipient. However, had the Eighth Circuit used the reasonable speaker standard, the court would have reached a different outcome.

Courts, which have considered the issue of what standard to employ for true threats, have uniformly adopted some variation of an objective standard. Most espouse a general reasonableness standard, but the circuits do not agree from which viewpoint a court should analyze the speech of expressive conduct — that of a reasonable speaker or of a reasonable recipient. Despite arguments to the contrary, the reasonable recipient standard does not achieve the high level of protection for free speech demanded by United States Supreme Court jurisprudence. When a court using the reasonable recipient standard

446. Id. at 837.  
447. Doe, 306 F.3d at 624.  
448. Id. at 624, 626.  
449. Id. at 626-27.  
450. See supra notes 317-56 and accompanying text.  
451. See supra notes 365-71 and accompanying text.  
452. See supra notes 372-94 and accompanying text.  
453. See supra notes 395-420 and accompanying text.  
454. See supra notes 421-38 and accompanying text.  
455. See supra notes 5-9 and accompanying text.  
456. Id.
examines the reaction of listeners, and more specifically the subjective reaction of the recipient, it substantially undermines its own test. An individual's right to free speech ought not turn on another's sensitivities or special circumstances. Indeed, affecting other persons is precisely why people in a free society engage in speech of expressive conduct. To protect these freedoms, the Supreme Court must resolve the current split in circuit approaches and announce the correct standard to distinguish true threats from protected speech as the reasonable speaker standard.

Justin F. Carter — '05