2022 AQ 149812

IN THE

SUPREME COURT

OF

THE STATE OF DIANNIA

(Docket No. 149812)

PEOPLE OF THE STATE OF DIANNIA, Plaintiff-Appellee, v. JEREMY JAMM, Defendant-Appellant.

ETHEL BEAVERS, Clerk of the Supreme Court of the State of Diannia, hereby certifies that the following original document was duly filed and constitutes the entire Record on Appeal in this matter:

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CHIEF JUSTICE GREENE delivered the judgment of the court, with opinion.

Justices Ross, Lewis, and Carter concurred in the judgment and opinion.

Justice Hathaway specially concurred, with opinion.

Justice Benton dissented, with opinion, joined by Justice Boulet.

OPINION

The issues presented are whether (1) a discovery order compelling defendant to unlock his phone by providing his phone password violated the Fifth Amendment; and (2) Diannia's criminal disturbing the peace statute is unconstitutional as applied to defendant under the First Amendment.

BACKGROUND

The small town of Pawnee, Diannia, nestled in a quiet corner of the state's North Woods region, can sometimes feel immune to the popular trends and social concerns shared by the rest of the state and country. On Swanson Avenue, near the town's only stoplight, a one-screen movie theater usually plays films a few months after their national release. Cell phone service is spotty outside the tiny downtown.

And local traditions—like eating burgers and shakes at Paunch Burger and block parties to celebrate the start and end of hunting season—continue to unite the community of about 3,000 residents.

One such tradition is the annual Pawnee Harvest Festival. Every year for the celebration of the founding of the town, the community gathers in Lot 48 to commemorate the town's history. The most highly anticipated attraction is Lil' Sebastian, a mini horse, with amazing talent. He brings wonder and joy to all of Pawnee's citizens. Children enjoy performances from Freddy Spaghetti and Johnny Karate. This festival is also home to Diannia's largest corn maze. Other attractions include the Wamapoke Artifact museum, Ferris Wheel, and Sue's Salads. Pawnee's largest business, Sweetums, sponsors the festival every year and provides a Nutriyum bar to every festival goer.

Leslie Knope, city councilwoman, takes the lead in organizing the event every year. Councilwoman Knope is very diligent and thorough. She drew up rules for the Harvest Festival to keep children and adults safe. She found local sponsors to set up booths at the festival. She organized a committee made up of Pawnee's Parks and Recreation Department to help decorate the entire lot 48. And she coordinated with law enforcement to manage traffic through downtown.

Knope also supervised communications with the community to make sure everyone would be familiar with the safety protocols. Despite sending out fliers to every home in the county explaining the plans for the Pawnee Harvest Festival, Knope received a lot of questions from Pawnee residents. Pawnee Residents are notably inquisitive regarding the events occurring in the town. During the weeks leading up to July 4, Knope and her team of volunteers fielded dozens of calls from around the area, answering questions about safety measures, festival procedures, contingency planning, and other matters.

On the afternoon before the Harvest Festival, while Knope worked alone in the city council office finalizing plans for the big day, she received an unusual call. On the line was a male voice she did not recognize. The man identified himself as a resident of Eagleton and told Knope that he wanted to bring his two young

sons to participate in the next day's festivities. But, he told Knope he had concerns about security for the event. In particular, the man began asking a battery of questions about the potential threat posed by weapons mounted on aerial drones.

Now even a year earlier, questions about aerial drones would only have confused Knope. She had never seen a drone, and until recently, she had never even heard about them. But the Pawnee Journal, the last remaining daily newspaper in the county, had run a series of articles about drones in early 2020.

The impetus for this coverage was a series of troubling events in the Diannia metropolis of Diannopolis, on the opposite end of the state. Most worrisome, FBI agents arrested Joan Callamezzo, who had been planning to send a drone equipped with a caustic chemical agent to spray concertgoers at a large outdoor music festival in the city center in the summer of 2019. Thankfully, an anonymous tip led law enforcement to arrest the would-be terrorist before she could unleash her weapon. The authorities were shocked to learn, however, that Callamezzo had been able to acquire the chemical and engineer a drone to carry enough of the substance to potentially injure dozens of people.

Over the ensuing months, drones were spotted at a handful of other outdoor events in Diannopolis, sending some citizens running in terror. And in the fall, at the Diannopolis Marathon, a competition that annually draws runners from around the world as well as thousands of spectators, an aerial drone sprayed an unknown liquid on a group of marathoners as they neared the finish line. The liquid turned out to be harmless, but the incident, unsurprisingly, caused a great deal of havoc.

Knope had read about these events with great interest. But until July 3, 2020, it all seemed like another modern phenomenon that only affected the big city, miles away from Pawnee.

On that day, the mysterious caller spent twenty minutes quizzing Knope, in increasingly agitated tones, about the threat of drones at the Harvest Festival. He asked how authorities would respond "if he or someone else" sent an aerial drone armed with weaponry into Pawnee the following day. He explained that current technology allowed drones to be outfitted not only with chemicals but with guns or grenades. He asked whether anyone would monitor the airspace above Pawnee. He opined that the Northwoods was full of "right-wing militiamen and anti-government wackos" who might want to rain terror upon the community. He pointed out that Diannopolis had been the target for Callemezzo's planned attack.

And he queried whether anyone had called to report similar plots in or around Pawnee.

The man asked Knope whether she planned to have her own children participate in the festival. What would she do, he wondered, "if a drone or a fleet of drones suddenly descended on the event"? Was Knope prepared "to have the sacrificial blood of the lambs [of the town children] on her hands"?

His questions continued. He asked whether the local or state police would be present for the Harvest Festival, whether they would be armed and with what weaponry. He asked whether the spectators or even the children in the festival should be allowed to carry arms—or perhaps be encouraged to wear bullet-proof clothing or carry gas masks.

The man told Knope that he had visited Pawnee the day before to scout the festival lot. He was concerned that the pilot of a drone could watch events unfold from "a number of locations" along Lot 48 without attracting notice.

When Knope asked the man for his name, he seemed to become upset and abruptly ended the call. Knope, distressed by the conversation, immediately dialed 911 to report the incident. She told police that she thought the unidentified caller might be planning a drone attack the next day.

Law enforcement and members of the Town Council held a late-night meeting to discuss the matter. They ultimately decided that the festival ought to be canceled, out of an abundance of caution. When news of the decision reached Pawnee's citizens, everyone was understandably upset. Ann Perkins, owner of the house behind Lot 48, phoned authorities to say that she had seen a man she did not recognize taking pictures with his phone around where the festival would be held on July 2. She had not given the man much thought at the time, but now she believed it might be the same man who spoke to Knope. Unfortunately, because he had been wearing a face mask (as all Pawnee citizens were required to do as a public health measure for the COVID-19 virus), Perkins could not provide much of a description.

Just as authorities met to consider whether and how to conduct a manhunt for the mystery caller, Knope received a voicemail message on the City Council office phone line. The call was from defendant Jeremy Jamm. He began by identifying himself and giving his address. Next, he said he wanted to apologize. He had not intended to scare Knope when he called the day before. He had been reading the coverage of drones in the Pawnee Journal and had been genuinely

concerned about the safety of the festival. He conceded that he had lied about having children; he was, in fact, single and living alone. But he sincerely hoped that the town would reschedule the festival for a later date because "these kids deserve a little fun after being cooped up inside for the last few months." He even offered to help the city council with security planning for a future event.

Knope provided this message to the police. That afternoon, officers were dispatched to Jamm's address, an apartment complex in the nearby town of Eagleton. They observed Jamm standing in the apartment complex parking lot. He took a smart phone out of his pocket, unlocked it, and made a call. Before he could return inside his home, the officers swooped in, arrested Jamm, and seized his phone. Police conducted a search of the property. They found no drones or other evidence that Jamm had been preparing a drone attack.

Concluding that Jamm had not actually been planning an attack, the town breathed a collective sigh of relief. But the State nonetheless charged Jamm with one count of disturbing the peace. Under Diannia law, "[a] person is liable for disturbing the peace when he or she knowingly does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." A "breach of the peace" connotes conduct that incites or is likely to incite immediate public turbulence, or which leads to or is likely to lead to an immediate loss of public order and tranquility.

Prior to trial, the prosecution sought a discovery order compelling Jamm to unlock his smartphone. The police had attempted to search the phone, believing they might find photos of Main Street from July 2, consistent with the tip received from Perkins. But they had been unable to decrypt the device without a password.

Jamm objected that the federal Fifth Amendment right against self-incrimination prevented the State from forcing him to unlock his phone. But the trial court overruled the objection and ordered Jamm to unlock the phone. Consistent with Diannia criminal procedure, Jamm complied with the discovery order while preserving his right to appeal the Fifth Amendment question. Police ultimately did not find any photos of Main Street, but they did find that Jamm had visited websites containing schematics for attaching weapons to drones.

Jamm filed a pretrial motion alleging that the statute criminalizing disturbing the peace was unconstitutional as applied to him because his phone call had been protected by the First Amendment. Under our case law, the statute has been

interpreted to require a finding that defendant committed an act that a reasonable person would perceive to be threatening—an objective test. Jamm argued, however, that the First Amendment, protects speech unless the speaker subjectively intends to convey a threat. According to Jamm, he did not have such an intent. Consistent with Diannia procedure, the trial court deferred ruling on this as-applied challenge until after hearing the trial evidence.

At trial, the State presented testimony from Knope and admitted into evidence Jamm's voicemail and copies of the websites that he visited on his phone. A jury convicted him of disturbing the peace. The trial court denied the motion to declare the statute unconstitutional as applied to Jamm and sentenced him to two months of probation.

Jamm appealed, and the Diannia Appellate Court affirmed. We granted him leave to appeal to resolve two questions: (1) whether the discovery order compelling him to provide his phone password violated the Fifth Amendment; and
(2) whether the disturbing the peace statute is unconstitutional as applied to him under the First Amendment.

ANALYSIS

I

This appeal calls on us to decide first whether the Self-Incrimination Clause of the Fifth Amendment should have shielded Jamm from having to comply with the trial court's order to unlock his phone.

The State asks us to affirm, arguing that the court's order was proper because it is undisputed that Jamm knew the password to his phone and the mere act of entering one's password, and thus unlocking one's phone, is neither testimonial nor incriminating.

Jamm asks us to reverse. He argues that the Fifth Amendment required an additional showing by the State that the phone contained relevant evidence, identified in advance with reasonable particularity. In complying with the order, Jamm contends, he became a witness against himself by implicitly communicating that the files used in the State's prosecution existed on his smartphone, and that he knowingly possessed them. If we were to find a Fifth

Amendment violation, Diannia law provides that Jamm receive a new trial at which all evidence discovered on the phone would be suppressed.

Although we agree with Jamm's reading of the relevant case law, we nonetheless hold that the motion to compel was properly granted because the record shows that the State did identify with reasonable particularity the relevant evidence on Jamm's smartphone, given two witnesses' reported observations of him and the voluntary admissions he made during the second call. Thus, the Fifth Amendment was no bar to Jamm's compliance with the trial court's order.

The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This privilege is the "essential mainstay" of criminal prosecutions, whether state or federal, and it shields people accused of crimes from having to provide even a link in the chain of evidence needed for prosecution. *Malloy v. Hogan*, 378 U.S. 1, 7-8 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951). But only evidence that is testimonial, incriminating, and compelled falls under this constitutional protection. *Hiibel v. Sixth Jud. Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 189 (2004).

As is relevant here, to be testimonial, evidence like a person's "communication must itself, explicitly or implicitly, relate to a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988). The most common form of testimony is verbal or written communications. *Id.* at 213-14. But the Fifth Amendment does not generally protect the contents of papers that an accused person may have created. *Fisher v. United States*, 425 U.S. 391, 410-11 (1976).

In those circumstances, the Fifth Amendment protects against the physical act of disclosing only when that act also has a testimonial aspect. *Id.* at 410. The act of disclosure is testimonial if it implicitly conveys information about the disclosed documents. *See id.* at 428-29 (Brennan, J., concurring); *United States v. Hubbell*, 530 U.S. 27, 36 (2004). Still, the State can overcome this hurdle by showing that it already knew this conveyed information, making its later discovery a "foregone conclusion." *Fisher*, 425 U.S. at 411.

Putting this all together, courts ask whether, by complying with an order to disclose, a person implicitly conveys any testimonial communication containing facts the

State already knew. If so, the exception for foregone conclusions permits the State to use this information, despite the privilege against self-incrimination.

In this appeal, one question arises at the outset: What exactly does an accused person implicitly convey by complying with a court order to unlock a smartphone? No case we discussed above had occasion to answer this question. As we do, we will take a "fresh-eyed" approach, or de novo, in legal parlance. *United States v. Tsarnaev*, 968 F.3d 24, 78 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 1683 (2021). The parties agree about this standard of review but, unsurprisingly, agree on little else.

The State contends that the one fact implied by Jamm entering the password into the locked phone was his knowledge of the password. The State treats this password as the only evidence it sought and thus applies the foregone conclusion test to the password only. Because Jamm admittedly made both calls and was arrested with smartphone in hand, the State contends, its later discovery of his password—even if compelled—was a foregone conclusion.

In contrast, Jamm contends that, by having to enter the password, he implicitly communicated that (1) he knew the password; (2) any sought-after files on the smartphone existed; and (3) he knowingly possessed those files. Jamm contends that the exception for foregone conclusions should also apply to any files the State sought, and that the State failed to prove this exception did in fact apply. The State, in the alternative, disagrees.

Again, the United States Supreme Court has not addressed this issue. But state high courts have, and the parties' positions reflect a split among those of Massachusetts and Indiana. *Compare Commonwealth v. Jones*, 117 N.E.3d 702 (Mass. 2019), *with Seo v. State*, 148 N.E.3d 952 (Ind. 2020). In both states, the high courts canvassed Supreme Court precedent (and a burgeoning debate in the law reviews), before applying that precedent to the novel technologies underlying today's smartphones. *Jones*, 117 N.E.3d at 709-11; *Seo*, 148 N.E.3d at 955-59. *Compare* Orin S. Kerr, Compelled Decryption and the Privilege Against Self-Incrimination, 97 Tex. L. Rev. 767 (2019), *with* Laurent Sacharoff, What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr, 97 Tex. L. Rev. Online 63, 68 (2019).

Ultimately, whether we adopt the standard in *Jones* or *Seo*, the outcome of this case would not change. Under *Jones*, which requires only that the State show that defendant knows the password to the device, the State easily prevails here. Police

observed Jamm unlock the phone, so any admission on his part that he knows the password is a foregone conclusion.

But upon careful consideration, we find that the Indiana Supreme Court's decision in *Seo* takes the better reasoned approach. *See* generally *Hoffman*, 341 U.S. at 486 (1951) ("This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure."). We conclude that entering a password to unlock a smartphone is analogous to the physical act of handing over evidence. *Seo*, 148 N.E.3d at 957. And any files on the smartphone are analogous to the evidence ultimately produced. *Id.* Thus, we agree with Jamm. By complying with the court's order, he communicated more than the fact that he knew the phone's password. He also communicated, implicitly, that the files used in the State's prosecution existed on the phone, and that he knowingly possessed them. *Seo*, 148 N.E.3d at 957; *Fisher*, 425 U.S. at 409; *Hubbell*, 530 U.S. at 36 & n.19, 45.

But that does not end our inquiry. We may affirm if the record shows that the State knew with reasonable particularity that the files it used in its prosecution existed on Jamm's smartphone, and that he knowingly possessed them. *See Seo*, 148 N.E.3d at 960 & n.6. That is, we must decide whether the exception for foregone conclusions permitted the State to use this information, despite Jamm's privilege against self-incrimination.

On this point, we agree with the State. Recall that, on the afternoon before the festival, Jamm called Knope and spoke with her at length. Among other things, he revealed in this call that he intended to attend the festival; had visited Pawnee the day before to scout the festival lot; and wondered how law enforcement would respond if he or another weaponized a drone. True, he did not initially reveal his identity. But he did so the next day, during the second call, when he left a voicemail apologizing to Knope. He also said that he had been reading the coverage of drones in the Pawnee Journal and then became concerned about the safety of the festival.

We find that all these facts, known to the State when moving to compel, supported with reasonable particularity its motion to compel and its subsequent search of the photos and the websites he visited. For example, Jamm's admission that he had visited the festival lot confirmed Perkin's observation of a man photographing the area. And Jamm's admission that he had been reading the coverage on drones in the Pawnee Journal, as well as his musing about weaponizing a drone, supported law enforcement's decision to search websites Jamm had visited to research drones. In short, Jamm's admissions and

witnesses' reported observations made the State's later discovery of incriminating information—copies of websites containing schematics for weaponizing drones—a foregone conclusion. *See Fisher*, 425 U.S. at 411.

The Supreme Court's decision in *Fisher* supports our conclusion. There, the IRS subpoenaed several taxpayers' documents that accountants prepared, and that the taxpayers' attorneys possessed. *Id.* at 394-96. The attorneys responded that complying with the subpoenas would violate their clients' rights against self-incrimination. *Id.* at 395-96. The Supreme Court disagreed. *Id.* at 414. When the government can show that it already knows this information, complying with a subpoena becomes a question "not of testimony but of surrender[.]" *Id.* at 411 (quoting *In re Harris*, 221 U.S. 274, 279 (1911)). And in *Fisher*, the government knew who possessed the tax documents, and it could independently confirm the documents' existence and authenticity through the accountants who prepared them. *Id.* at 412-13. So, "compliance with a summons directing the taxpayer to produce the accountant's documents involved in these cases" did not implicate incriminating testimony within the Fifth Amendment's protection. *Id.* at 414.

Here, like *Fisher*, Jamm's voluntary admissions and the witnesses' reported observations dovetailed to make Jamm's compliance with the subpoena not a question of testimony but of surrender. *Id.* at 411. True, "*Fisher* was the first, and only, Supreme Court decision to find that the testimony implicit in an act of production was a foregone conclusion." *Seo*, 148 N.E.3d at 956 (distinguishing *United States v. Doe*, 465 U.S. 605 (1984) and *United States v. Hubbell*, 530 U.S. 27 (2004)). But here, even more so than *Fisher*, Jamm's voluntary admissions to Knope undermined his later invocation of the privilege against self-incrimination.

We acknowledge, as we must, that the Supreme Court has "hesitated to apply even entrenched doctrines to novel dilemmas, wholly unforeseen when those doctrines were created." *See Seo*, 148 N.E.3d at 960-62 (discussing, among other things, *Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018)). But the case before us causes us no pause. In our view, only the Indiana Supreme Court's decision faithfully applies the Supreme Court's precedent. And Jamm's voluntary admissions, among other things, doomed his later invocation of the privilege

against self-incrimination. As a result, on this point, we affirm the decisions of the lower courts and thus affirm Jamm's conviction.

II

Jamm argues next that Diannia's statute on disturbing the peace is unconstitutional as applied to him. According to Jamm, asking whether a reasonable person would find his speech threatening excuses the State from proving that he intended to communicate a threat. The State maintains that an objective standard, rather than a subjective one, should apply.

The First Amendment, made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law *** abridging the freedom of speech." U.S. Const., amends. I, XIV. Protections under the First Amendment are not absolute, however, and the Supreme Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). This includes speech that is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," for example, obscenity, defamation, and fighting words. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Threats of violence also fall beyond the First Amendment. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 388 (1992). Consequently, when an individual is accused of communicating an unlawful threat, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Watts v. United States*, 394 U.S. 705, 707 (1969).

For purposes of the First Amendment, true threats comprise "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. Prohibitions on true threats combat the "fear of violence," "the disruption that fear engenders," and "the possibility that the threatened violence will occur." *Id.* at 360 (internal quotation marks omitted).

To be subject to liability, a speaker "need not actually intend to carry out [his or her] threat." *Id.* But what sort of intent is necessary before the First Amendment will allow government to prohibit speech as a true threat? The question has led to two answers.

The Ninth Circuit has held that a true threat exists only where "the speaker

subjectively intended the speech as a threat." *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). Under this subjective standard, the government cannot penalize a speaker for his speech — no matter how inflammatory or frightening it might be — unless he intended the speech as a threat. The other, referred to as the objective standard, defines a true threat by asking whether a reasonable person would consider the speech a threat. *See United States v. Dutcher*, 851 F.3d 757, 761 (7th Cir. 2017). Federal courts have overwhelmingly adopted the objective standard. In fact, every circuit to weigh in on the issue *except* the Ninth Circuit analyzes "true threats" under the objective standard, even after *Black*. *See White*, 670 F.3d at 510 (collecting cases).

For good reason. The true threats exception is rooted in the idea that true threats "by their very utterance inflict injury or tend to incite an immediate breach of the peace," and that the prevention of such results outweighs a citizen's unfettered right to speak. *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 (1942). The objective standard reflects this tenet by focusing on the listener, not the speaker.

Further, the objective standard allows the government to prohibit speech that causes the fear of violence and serves only to disrupt the peace. In other words, the objective standard prohibits speech that provides no value to society. *See United States v. Martinez*, 736 F.3d 981, 984 (11th Cir. 2013) (vacated on other grounds) ("[O]bjective threats of violence contribute nothing to public discourse."). The First Amendment has never been read to protect such valueless speech. *R.A.V.*, 505 U.S. at 382-83 (the First Amendment permits restrictions on speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality").

The dissent contends that the objective standard oversteps, fails to protect legitimate speech, and will "discourage the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *See* P. R17, *infra* (citing Justice Marshall's concurrence in *Rogers v. United States*, 422 U.S. 35 (1975)). Not so. The objective standard sufficiently safeguards the fundamental purposes of the First Amendment because, in applying the standard, the reasonable person must consider the context of the speech.

For example, in *Watts*, the Supreme Court considered whether Watts' statement at an anti-war political rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J," was a true threat. *Id*. at 706. The court, albeit without naming the objective standard, employed the standard and determined that the statement was not a true threat but instead a "crude offensive method of stating a political opposition" because "taken in context, and regarding . . . the reaction of

the listeners, we do not see how it could be otherwise." *Id*. at 708. In so holding, the Court demonstrated the protective role that context provides in the reasonable person test.

And *Watts* provides just one example of the way the objective standard protects speech that deserves protection. The reasonable person requirement is also applied to appropriately "shield[] individuals from culpability for communications" in other situations, such as when otherwise threatening speech constitutes "satire, or humor." *United States v. Elonis*, 841 F.3d 589, 596-97 (3d Cir. 2016). Additionally, context "suffices to distinguish a 'true threat' from speech that is merely frightening." *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002). Thus, any concern that the objective standard will chill speech that should be encouraged is overstated.

The subjective standard, in contrast, sacrifices too much in protecting individual freedom, and affords First Amendment protection to speech that deserves no such protection. Here, for example, any reasonable person would have taken Jamm's twenty-minute diatribe—during which he exhibited intimate knowledge of drones and their capability for violence, asked specific questions about Pawnee's festival security, and even asked what would happen "if he or someone else" sent a drone to the festival—as a threat. But, simply because Jamm claims he did not intend his questioning as a threat, the subjective standard protects him. Thus, Jamm evades liability for the substantial fear and panic he caused simply because he framed his threats as questions and refrained from outright stating, "I'm planning to attack the festival."

In this way, the subjective standard allows speakers to hide threats behind creative framing and faulty excuses, and releases speakers from responsibility for the real-world consequences of their objectively threatening speech. *United States v. Fuller*, 387 F.3d 643, 647 (7th Cir. 2004) ("Disruptions, inconveniences, and substantial costs occur regardless of whether a threat was subjectively intended to be carried out."). In so doing, the subjective standard elevates true threats to "one of the most protected categories of unprotected speech." *Elonis v. United States*, 575 U.S. 723, 766 (2015) (Thomas, J. dissenting); *see also Elonis*, 730 F.3d at 330 (the subjective standard "fail[s] to protect individuals from the fear of violence and the disruption that fear engenders").

Because the objective standard does not conflict with the First Amendment's goal of promoting robust civic engagement, and better protects society from useless and dangerous speech, we hold that Diannia's criminal disturbing the peace statute is constitutional as applied to Jamm.

JUSTICE HATHAWAY, concurring:

I join the majority's discussion of the First Amendment question in full. On the Fifth Amendment question, I agree with the majority's ultimate conclusion that the trial court properly compelled Jamm to unlock his phone. I write separately because I would adopt the rule in *Jones* over the rule in *Seo*. The act of unlocking the phone conveys only one admission: that Jamm knew the password to the phone. And the State already had ample evidence that Jamm knew the password, so it gained no advantage from the trial court's discovery order. Forcing a defendant to unlock his phone is no different than forcing him to hand over documents that the State knows are in his possession. Enough said.

JUSTICE BENTON, dissenting:

I respectfully dissent. This case presents two difficult questions of constitutional law. On both questions, I believe Jamm has the better argument. I would reverse his conviction.

* * *

On the Fifth Amendment question, I disagree that the "foregone conclusion" exception applies in this case. As I view the evidence, the State failed to prove that it knew with reasonable particularity that the challenged files on Jamm's smartphone existed. Thus, I respectfully dissent.

Like the majority, I find that *Seo v. Indiana*, 148 N.E.3d 952 (Ind. 2020), is better reasoned than *Commonwealth v. Jones*, 117 N.E.3d 702 (Mass. 2019), and I agree that the act of entering a password for a smartphone is testimonial. But I cannot accept that the foregone conclusion exception applies. With little more than a cursory explanation, the majority concludes that the facts known to the State show, with reasonable particularity, that the discovery of websites containing schematics for weaponizing drones was a foregone conclusion. I disagree.

Specifically, the majority highlights the following: (1) Jamm's admission that he visited the festival lot; (2) Perkins' observation of a man photographing the route; (3) Jamm's admission that he read coverage about drone in the Pawnee Journal; and (4) Jamm's musings about weaponizing a drone.

But none of these facts establishes that the State knew that Jamm's smartphone would show he had visited websites containing schematics for attaching weapons to drones. There is no independent verification of that evidence.

For that reason, *Fisher v. United States*, 425 U.S. 391 (1975), is distinguishable. Unlike *Fisher*, the State here has not shown that it could independently verify the possession, existence, and authenticity of the challenged smartphone information. There is no third party analogous to the accountant in *Fisher*. For example, the State has not identified a witness who observed Jamm visiting these specific websites. Nor has it provided any independent records, such as from a wireless provider, listing the websites in Jamm's browser history.

Moreover, the record in this case indicates that at the time the officers searched the smartphone, they were hoping to find photographs of the festival lot, not Jamm's visits to websites. When officers are looking for something else, and

accidentally stumble across previously unknown incriminating evidence, the foregone conclusion exception does not allow that evidence's admission. Holding otherwise allows the exception to swallow the rule.

The foregone conclusion exception is supposed to be "an extremely limited exception to the Fifth Amendment privilege against self-incrimination." *Commonwealth v. Davis*, 220 A.3d 534, 549 (Pa. 2019). But the majority's application of the exception is far from narrow. Instead, it authorizes an unfettered fishing expedition into smartphones—and all the highly private and personal information they contain. *Riley v. California*, 573 U.S. 373, 385-86 (2014) (recognizing cell phones contain "vast quantities of personal information" and have become a "pervasive and insistent part of daily life").

Because I find that the foregone conclusion exception does not apply, the smartphone evidence should have been excluded under the Fifth Amendment.

* * *

I would also reverse Jamm's conviction because the disturbing the peace statute is unconstitutional as applied in this case. In *Watts v. United States*, 394 U.S. 705, 708 (1969), where a defendant was convicted for threatening the president, the United States Supreme Court concluded that the speech at issue was "political hyperbole" and reversed without deciding whether a true threat should be determined objectively or subjectively. Notwithstanding, the Court expressed "grave doubts" about whether nothing more than a speaker's "apparent determination" to act would suffice. *Id.* at 707-08 (internal quotation marks omitted).

Justice Marshall reiterated those doubts in *Rogers v. United States*, 422 U.S. 35 (1975), where another defendant was convicted of threatening the president. In a special concurrence, Justice Marshall urged the Court to clarify that a subjective test governs true threats. *Id.* at 44. An objective standard, in contrast, would amount to a negligence test and "charg[e] … defendant with responsibility for the effect of his statements on his listeners." *Id.* at 47. That rule, according to Justice Marshall, "would have substantial costs in discouraging the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.* at 48 (internal quotation marks omitted).

More recently, in *Elonis v. United States*, 575 U.S. 723 (2015), the Court construed a statute prohibiting the interstate transmission of threats, again without deciding whether an objective or subjective test applies. Justice Alito, however, specially

concurred to note that serious offenses, not rooted in common law, "should be presumed to require more" than negligence for *mens rea*. *Id.* at 745. Thus, Justice Alito posited, a defendant should be convicted only if he "consciously disregards the risk that the communication transmitted will be interpreted as a true threat." *Id.* at 746.

Notwithstanding these warnings, the objective standard has proliferated among the circuits. These courts reason that the purpose for exempting true threats from First Amendment protection cannot be achieved by "hinging constitutionality on the speaker's subjective intent." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002). The proper measure, according to these courts, is "how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm." *Id.*

In adopting this objective standard today, the Court ignores Justice Marshall's concern for protecting First Amendment rights and Justice Alito's caution against creating a negligence standard. And while the objective standard purportedly responds to the fear, disruption, and violence true threats cause, it overlooks that actual danger exists only when a speaker intends to act.

In contrast, a subjective standard, requiring the State to prove a speaker intended communication to be threatening, responds to the justices' concerns and affords an accused the opportunity to argue he did not intend to threaten another or intend for another to feel threatened. The subjective standard also tracks *Black*, where the Court defined true threats as "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359 (emphasis added); *see also United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat.").

Today's decision threatens too much protected speech. Jamm's disturbing the peace conviction should be reversed.

JUSTICE BOULET joins this dissent.

In the

Supreme Court of the United States

No. 21-1568

JEREMY JAMM, *Petitioner*, v.

STATE OF DIANNIA, *Respondent*.

On petition for the writ of certiorari from the Supreme Court of Diannia. The writ of *certiorari* is hereby GRANTED.

The parties are directed to restrict their briefing and argument to the following issues (and any subsidiary issues):

1. Whether the discovery order compelling Jamm to unlock his phone by providing his password violated the Fifth Amendment privilege against self-incrimination; and

2. Whether Diannia's criminal disturbing the peace statute is unconstitutional as applied to defendant under the First Amendment.

A true Copy.

Teste:

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Clerk, Supreme Court of the United States