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KAHN, J., concurring in the judgment. I concur in the result reached by the majority, affirming the judgment of the Appellate Court reversing the trial court and remanding the case with direction to render a judgment of acquittal on the charge of disorderly conduct. I also agree with the majority that the statement of the defendant, Laurence V. Parnoff, does not fall within the fighting words exception to first amendment protection because a reasonable person in the position of the addressees would not have been provoked to violent retaliation under the circumstances of the present case.

I write separately, however, to highlight where my reasoning diverges from that of the majority. First, I think that focusing on the threatening nature of the speech to determine if it falls within the fighting words exception conflates two related but distinct exceptions to first amendment protection of speech: fighting words and true threats. Second, I think that the nature of the addressees' employment in the present case is distinguishable from that of the addressee in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), and I therefore would not rely on the scope of the addressees' job duties in concluding that the defendant's statement did not amount to fighting words. I would reach that conclusion based on the content of the statement, under the circumstances of the present case. Third, the correct application of the exception to first amendment protection is not based on the charge or charges leveled against the defendant but, rather, on the state's theory of the case. The state could have relied on the true threats exception because the language of the disorderly conduct statute under which the defendant was charged encompasses true threats. See General Statutes § 53a-182 (a) (1). Nevertheless, by failing to articulate a true threats theory, the state forfeited any such claim. Instead, the state's case erroneously relied on a claim that the defendant's statement constituted fighting words. Accordingly, I respectfully concur.

I agree with the facts and procedural history as set forth in the majority opinion. The defendant stated to two water company employees either "if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you," or, that if the addressees did not leave his property, he was "going to get a gun or something like that . . . to shoot" them. Intuitively, both statements are threats. See, e.g., American Heritage College Dictionary (4th Ed. 2007) (defining "threat" as "[a]n expression of an intention to inflict pain, injury, evil, or punishment"). Indeed, the state charged the defendant under § 53a-182 (a) (1), which provides that "[a] person is guilty of disorderly conduct when, with

intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or *threatening* behavior . . . ." (Emphasis added.) Nevertheless, the state consistently argued that the defendant's statement was exempt from first amendment protection not because it was a true threat, but because it amounted to fighting words, *because* it was threatening.

This convoluted argument has obfuscated the issues in the present case throughout its pendency. For example, in his closing argument before the jury, the prosecutor claimed that "if the conduct consists purely of speech . . . the speech must contain fighting words that would have a direct tendency to inflict injury or cause acts of violence." Accordingly, the trial court instructed the jury on the fighting words exception.[1] At oral argument before this court, the state conceded that its theory of the case was one of fighting words, not true threats. As a result of these rhetorical and strategic choices, the state conflated the fighting words and true threats exceptions to first amendment protection, and effectively swapped a viable exception for an inapplicable one.

In light of this confusion, before setting forth my analysis of the issues presented in this appeal, I will summarize the relevant law and background. First, I note that I concur with the majority's conclusion that the standard of review is de novo.

The state's confusion is understandable, given that true threats and fighting words are closely related in two important respects. First, true threats and fighting words are both exceptions to the protection afforded speech by the first amendment. See U.S. Const., amend. I; *United States* v. *Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Second, both the fighting words and true threats exceptions are grounded in distaste for violence and concern over the effect of words on the listener. Compare *State* v. *Baccala*, supra, 326 Conn. 234 (defining fighting words as those that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" [internal quotation marks omitted]), and *State* v. *Krijger*, 313 Conn. 434, 449, 97 A.3d 946 (2014) ("a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders" [internal quotation marks omitted]). The exceptions are different in other crucial ways, however, and I provide further exposition on each in turn.

True threats "encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat." (Internal quotation marks omitted.) *State* v. *Krijger*, supra, 313 Conn. 449. "In the context

of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." (Internal quotation marks omitted.) Id., 450. "[A] prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." (Internal quotation marks omitted.) Id., 449. In other words, the concern behind the true threats exception is that a threatening statement will cause a listener to fear violence.

In contrast, fighting words are "those words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 234. Unlike true threats, the fighting words exception is driven by the concern that an offensive statement will cause "violent retaliation" by the listener. Id., 243.

"The fighting words exception was first articulated in the seminal case of [*Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942)]." *State* v. *Baccala*, supra, 326 Conn. 237. In *Chaplinsky*, the United States Supreme Court upheld the conviction of Walter Chaplinsky under a New Hampshire statute that criminalized addressing "any offensive, derisive or annoying word to any other person" in a public place. (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, supra, 569. On a public sidewalk, Chaplinsky called the complainant a " 'God damned racketeer' " and " 'a damned Fascist . . . .' " Id. The court held that the statements were unprotected fighting words: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id., 572, 573–74.

Today, "the fighting words exception is intended only to prevent the likelihood of an actual violent response"; *State* v. *Baccala*, supra, 326 Conn. 249; and a "proper contextual analysis requires consideration of . . . whether there was a likelihood of violent retaliation." Id., 240. As a result, "there are no per se fighting words; rather, courts must determine on a case-by-case basis all of the circumstances relevant to whether a reasonable person in the position of the actual addressee would have been likely to respond with violence." Id., 245.

The continuing vitality of the fighting words exception is dubious and the successful invocation of that

exception is so rare that it is practically extinct. See id. ("the Supreme Court has not considered the fighting words exception as applied to any addressee in more than twenty-five years"). Indeed, the United States Supreme Court has not upheld a fighting words conviction since *Chaplinsky*. See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993) ("[i]n the fifty years since *Chaplinsky*, the [c]ourt has never upheld another speaker's conviction under the 'breach of the peace' prong of the fighting words doctrine").

The Supreme Court has also added additional criteria to the fighting words exception since *Chaplinsky*, "narrow[ing] its scope." Id. Most obvious, the court has seemingly abandoned the suggestion in *Chaplinsky* that there are words that " 'by their very utterance inflict injury,' " and it has never used that "dictum" to "uphold a speaker's conviction." Id. Thus, statements are fighting words only if they are "likely to provoke violent reaction." *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). Furthermore, to be fighting words, statements must be directed toward an "individual actually or likely to be present"; id.; and amount to "a direct personal insult or an invitation to exchange fisticuffs." *Texas* v. *Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

Recently, this court narrowed the fighting words exception in *Baccala*, holding that "we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." *State* v. *Baccala*, supra, 326 Conn. 249. In *Baccala*, the defendant had been convicted of breach of the peace in the second degree in connection with her tirade against an assistant store manager at a supermarket. Id., 233–35. Although the defendant had called the manager a " 'fat ugly bitch' " and a " 'cunt,' " this court concluded that "[s]tore mangers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant." Id., 236, 253. As a result, the fighting words exception did not apply, "[b]ecause the words spoken by the defendant were not likely to provoke a violent response under the circumstances in which they were uttered . . . ." Id., 234. This court reversed the trial court's judgment and remanded the case with direction to render a judgment of acquittal. Id., 257.

Despite the increasing judicial constriction of the fighting words exception, perhaps nothing has diminished the scope of its applicability as much as changing societal norms. See id., 239 (observing that "public discourse has become more coarse" and speculating about resulting impact on fighting words exception). As certain language is acceptable in more situations, the bor-

ders of the fighting words exception contract. See *Eaton* v. *Tulsa*, 415 U.S. 697, 700, 94 S. Ct. 1228, 39 L. Ed. 2d 693 (1974) (Powell, J., concurring) ("[l]anguage likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances"). For example, "[w]hile calling someone a racketeer or a fascist might naturally have invoked a violent response in the 1940s when *Chaplinsky* was decided, those same words would be unlikely to even raise an eyebrow today." *State* v. *Baccala*, supra, 326 Conn. 239. As "public discourse has become more coarse"; id.; there are fewer combinations of words and circumstances that are likely to fit within the fighting words exception. Indeed, given some of the examples of egregious language that have not amounted to fighting words following *Chaplinsky*, it is difficult to imagine examples that rise to the requisite level today. See, e.g., id., 236 (holding that " 'fat ugly bitch' " and " 'cunt,' " when directed to supermarket manager, did not amount to fighting words); *Owens* v. *State*, 848 So. 2d 279, 279–80 (Ala. Crim. App. 2002) (holding that fighting words exception did not apply where defendant, in Wal-Mart store, called addressees " 'churchgoing hypocrites,' " and said of their terminally ill family member, " '[o]ne of those hypocrites is fixing to bust hell wide open . . . [a]nd it's not gonna be too much longer I hear' "). Thus, for statements to rise to the rarified level of fighting words today, they must be "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 252.

Yet, against this small and tortured canvas, the fighting words exception resurfaces occasionally. See, e.g., *State* v. *Bahre*, Superior Court, judicial district of Hartford, Docket No. 102107 (April 3, 2008) ("[f]urther, viewing the speech alone, it appears to me that the language used, considering its tone and the circumstances surrounding its use, falls within the . . . 'fighting words' [exception]"). Although the Supreme Court has not upheld a conviction under the fighting words exception since *Chaplinsky*, it continues to list fighting words among the exceptions to first amendment protection. See *United States* v. *Alvarez*, supra, 567 U.S. 717. Therefore, I assume that the fighting words exception remains valid for now, but I analyze the facts of the present case mindful that the exception is narrowly construed and poses a significant hurdle for the state to overcome.

I

With this background in mind, the first area where my reasoning diverges from that of the majority regards the applicability of the fighting words exception to statements that could prompt preemptive self-defense. The majority correctly concludes that such a theory is unpersuasive in the present case. However, I would go further, and conclude that preemptive self-defense is inconsistent with the fighting words exception in gen-

eral, because it conflates the true threats and fighting words exceptions, and would expand the disfavored fighting words exception to encompass statements it is not intended to reach.

The state argues that "[t]he defendant's unconditional threat of violence would have brought the average addressee to the cusp of violent intervention to prevent the defendant from carrying out the threat, given the deadly consequences of guessing wrongly that the defendant did not mean what he said." In other words, the state contends that the fighting words exception applies to statements that provoke violence not due to anger, but, instead, out of a perceived need for preemptive self-defense.

After an exhaustive review of fighting words cases, I am aware of no controlling precedent that supports such an argument.[2] Although fighting words jurisprudence is "concerned with the likelihood of violent retaliation"; *State* v. *Baccala*, supra, 326 Conn. 243; the underlying theory is that fighting words will provoke that violent retaliation by *angering* or *insulting* the addressee. See, e.g., *Texas* v. *Johnson*, supra, 491 U.S. 409 (rejecting application of fighting words exception to burning of American flag at protest because "[n]o reasonable onlooker would have regarded [statement as] . . . a direct personal *insult* or an *invitation to exchange fisticuffs*" [emphasis added]).

Indeed, it is telling that this court has concluded that the fighting words exception focuses on "whether there [is] a likelihood of violent *retaliation*." (Emphasis added.) *State* v. *Baccala*, supra, 326 Conn. 250. "Retaliation" has long denoted a motivation inconsistent with that of self-defense, and often embodies the idea of pay back or even revenge. See Webster's New World Dictionary (2d College Ed. 1972) (defining "retaliate" as "to . . . *pay back* injury for injury" [emphasis added]); see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) (defining "retaliate" as "to return like for like; esp[ecially]: to get revenge"). Illustrative of this distinction, in another context the Connecticut criminal jury instructions clarify that "[t]he law stresses that self-defense *cannot* be retaliatory. It must be defensive and *not* punitive." (Emphasis added.) Connecticut Criminal Jury Instructions 2.8-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 21, 2018). Thus, this court's use of the word "retaliation" in setting the boundaries of the fighting words exception indicates that the exception is justified by a concern that addressees will respond violently due to anger, and not because of a perceived need for preemptive self-defense.

This is not a matter of mere semantics; identifying the purpose behind the fighting words exception clarifies its doctrinal parameters and the types of speech that may fit within the exception. It is the *true threats*

exception that encompasses threatening statements that cause a listener to fear violence; *State* v. *Krijger*, supra, 313 Conn. 449; not the fighting words exception. Thus, allowing the fighting words exception to encompass statements that might cause violent, preemptive self-defense would be inconsistent with the underlying theory of how fighting words work. Statements that are not threatening enough to be true threats or offensive enough to be fighting words would be exempt from first amendment protection under a nebulous hybrid exception. This is a dangerous proposition given that the exceptions to first amendment protection are limited. See, e.g., *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 791, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("[f]rom 1791 to the present . . . the [f]irst [a]mendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations" [internal quotation marks omitted]).

The present case involves a particularly attenuated chain between the defendant's statement and the application of the fighting words exception, and illustrates the problems inherent in conflating the fighting words and true threats exceptions. The defendant's statement arose out of an exchange with Kyle Lavin and David Lathlean, employees of Aquarion Water Company, who were on the defendant's property to perform fire hydrant maintenance.[3] The defendant confronted Lavin and Lathlean in an animated manner, and claimed that they had no right to be on his property. The defendant either said, "if you go into my shed, I'm going to go into my house, get my gun and [fucking] kill you," or, that if Lavin and Lathlean did not "get off" his property, he would "get a gun or something like that . . . to shoot" them. The defendant was shirtless, wearing a pair of shorts, and holding a can of worms.

The defendant's comments were conditional threats: either Lavin and Lathlean would leave his property and keep away from his shed, or the defendant would retrieve a gun from elsewhere on the property, come back, and "[fucking] kill" them. An analogous statement to the one made by the defendant, would be, "if you do not do what I demand, I will get you later." Violence in the face of such comments is not the response of a reasonable addressee.

As the majority correctly noted, such threats invite a range of responses in the reasonable person. A reasonable person might have retreated, as Lathlean was trained to do. Alternatively, a reasonable person might have called the police, as Lathlean did in the present case. Given these alternatives, a reasonable person would not have responded violently to the defendant's conditional threat by attacking a shirtless man armed with only a can of worms in order to escape speculative violence. It is unsurprising and telling that neither Lavin

nor Lathlean considered responding with violence. Admittedly, it is tempting to ponder whether the fighting words exception would have applied had the threat been more immediate—for example, if the defendant had brandished a gun—but such hypotheticals tend to take the defendant's actions from the category of pure speech that must fit within a first amendment exception, to the realm of conduct in which the first amendment is not implicated. See *State* v. *Indrisano*, 228 Conn. 795, 812, 813, 640 A.2d 986 (1994) (holding that " 'fighting words' limitation . . . must be applied when the conduct sought to be proscribed consists purely of speech," but not applying that limitation to defendant who was convicted for disorderly conduct on basis of physical conduct).

Having concluded that the fighting words doctrine does not encompass threats that might cause preemptive self-defense, I must consider whether the defendant's statement could otherwise rise to the level of fighting words. As I discuss in part II of this concurring opinion, they do not.

II

I agree with the majority that the defendant's statement does not amount to fighting words. The majority reaches this conclusion in part by relying on the job duties of the addressees in the present case, effectively extending one of the holdings of *Baccala*. In that respect, I think *Baccala* is distinguishable from the present case, and I therefore reach the same result through different analysis.

In holding that the statements "fat ugly bitch" and "cunt" were not fighting words when addressed to the assistant manager of a supermarket, this court relied heavily on the nature of the assistant manager's job duties. This court observed that she was "charged with handling customer service matters. . . . People in authoritative positions of management and control are expected to diffuse hostile situations, if not for the sake of the store's relationship with that particular customer, then for the sake of other customers milling about the store. Indeed . . . the manager in charge of a large supermarket . . . would be expected to model appropriate, responsive behavior, aimed at de-escalating the situation, for her subordinates, at least one of whom was observing the exchange." *State* v. *Baccala*, supra, 326 Conn. 252–53. This court further observed that, "[s]ignificantly . . . a store manager . . . would have had a degree of control over the premises where the confrontation took place." Id., 253.

These factors are not evident in the present case, where the addressees were water company employees tasked with hydrant maintenance. First, unlike the assistant manager in *Baccala*, they had little control over the premises, as their work took them on to the

property of another.[4] Second, as the majority observes, "the addressees in the present case were not in direct customer service roles . . . ." It is intuitive that employees whose primary role is customer service would interact differently with members of the public than those who interact with the public as an auxiliary part of their job. I agree with the majority that water company employees may occasionally encounter "confrontational property owners," as the present case illustrates, but I am skeptical that it would be a matter of routine as it was for the assistant manager in *Baccala*. It is not a question of whether the job duties of the addressee should be considered as a factor in assessing the application of the fighting words doctrine. Indeed, I have considered them in the present case, but find the job duties of Lavin and Lathlean distinguishable from those of the addressee in *Baccala*. Equating the job duties in *Baccala* to those of Lavin and Lathlean focuses too heavily on that factor and invites troubling line drawing issues. We would have to accept that other professionals who enter the property of another and occasionally interact with members of the public would be expected to weather extreme verbal abuse. This category could include professionals such as delivery personnel, utility workers, and municipal employees.[5]

I would instead conclude that, in the present case, the defendant's statement did not constitute fighting words because of its content and context. Indeed, when viewed without the obfuscating haze of whether the statement was threatening, there is very little to support its inclusion in the fighting words exception. The defendant's threat would have to be so insulting that "a reasonable person in the position of the actual addressee would have been likely to respond with violence." *State* v. *Baccala*, supra, 326 Conn. 245.

Although there are no per se fighting words, it is impossible to evaluate the applicability of the fighting words exception without considering the content of the defendant's statement. See id., 251–53 (discussing offensiveness of statements in relation to circumstances in which they were made). The defendant's statement was not peppered with insults, epithets, slurs, or jeers; nor was it an "an invitation to exchange fisticuffs." *Texas* v. *Johnson*, supra, 491 U.S. 409. Although the defendant in the present case may have used the word "fucking," "[u]ttering . . . [an] offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee's position to immediately retaliate with violence under the circumstances." *State* v. *Baccala*, supra, 326 Conn. 252. It is highly unlikely that the addition of that expletive in the defendant's statement would have provoked a violent response in a reasonable person in the position of the addressees. See *Sandul* v. *Larion*, 119 F.3d 1250, 1255–56 (6th Cir.) (holding that "the use of the 'f-word' in and of itself is not criminal conduct," and that, in light of Supreme

Court precedent, its use does not amount to fighting words because "the mere words and gesture 'f—k you' are constitutionally protected speech"), cert. dismissed, 522 U.S. 979, 118 S. Ct. 439, 139 L. Ed. 2d 377 (1997). Although I recognize that a threat can be inherently demeaning, and I can imagine hypothetical examples of threats that are insulting in a manner that also makes them fighting words, the defendant's statement does not fall within that category.[6]

The circumstances surrounding the defendant's statement do not bring its content to the level of fighting words, as evidenced by the reactions of Lavin and Lathlean, who were not angered, let alone brought to the point of violent retaliation. See *State* v. *Baccala*, supra, 326 Conn. 254 (noting that "reaction of the addressee is . . . probative of the likelihood of violent reaction" [citation omitted]). As the majority explains, "[a] subjective analysis of the addressees' actual reactions confirms our conclusion that it was unlikely that imminent violence would follow from the defendant's words." Lathlean testified that the defendant's comment "bounced right off" him, and Lavin testified that the statement caused him "alarm." These staid reactions seriously undermine the state's fighting words theory: the defendant's statement was not "akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) *State* v. *Baccala*, supra, 252.

Thus, I would conclude that the state has failed to establish that the content and context of the defendant's statement rose to the high level of offensiveness required for it to fall within the fighting words exception to first amendment protection. Although the defendant's statement was reprehensible, the fighting words exception is a poor fit for the present case. The state's strongest theory relies on an incorrect hybridization of fighting words and true threats, but, once separated, there is little if anything in the defendant's statement that would qualify it as fighting words under these circumstances. This is not to say that such statements must be protected by the first amendment, however. The state could have pursued a true threats theory as I explain in part III of my concurring opinion.

III

Although the defendant's statement does not rise to the level of fighting words, it was a true threat. In the present case, the defendant told Lavin and Lathlean that he would shoot them if they did not comply with his demands. With regard to the constitutional parameters of the true threats exception, a reasonable person would foresee that threatening to shoot someone if he refused to follow demands would be interpreted as a serious expression of an intent to harm. See, e.g., *New York ex rel. Spitzer* v. *Cain*, 418 F. Supp. 2d 457, 476 n.12 (S.D.N.Y. 2006) (suggesting that "[t]he statement 'If you don't give me your wallet, I will shoot you in

the head' " would be a true threat, even if conditional). Furthermore, true threats may be conditional, like the threat made by the defendant. *State* v. *Pelella*, 327 Conn. 1, 16 n.15, 170 A.3d 647 (2017).

Thus, the defendant's statement fits within the true threats exception. See *State* v. *Krijger*, supra, 313 Conn. 450 ("[w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault" [internal quotation marks omitted]).

The remaining question is whether the state would have had to charge the defendant with threatening, instead of disorderly conduct, to pursue such a true threats theory.[7] I conclude that the state need not have charged the defendant differently to maintain a true threats theory because the language of § 53a-182 (a) (1), under which the defendant was charged, encompasses speech that could constitute true threats. It provides that "[a] person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . [e]ngages in fighting or in violent, tumultuous or *threatening* behavior . . . ." (Emphasis added.) General Statutes § 53a-182 (a) (1). In construing that statutory provision, this court has held that the phrase "fighting . . . violent, tumultuous or threatening behavior" includes conduct that is physical or that "*portends* imminent physical violence."[8] (Emphasis added; internal quotation marks omitted.) *State* v. *Indrisano*, supra, 228 Conn. 811. This statutory language is "identical" to that of the breach of the peace provision, General Statutes § 53a-181 (a) (1), which this court has held may encompass pure speech, providing that it fits within an exception to first amendment protection. *State* v. *Szymkiewicz*, 237 Conn. 613, 618–20, 678 A.2d 473 (1996). In so holding, this court focused specifically on whether § 53a-181 (a) (1) is consistent with the fighting words exception, but statutory provisions may simultaneously proscribe speech that falls within the true threats or fighting words exceptions. See *State* v. *DeLoreto*, 265 Conn. 145, 168–69, 827 A.2d 671 (2003) (concluding that § 53a-181 (a) (3) not only prohibits speech that constitutes true threats, but also fighting words). It is not the charge that determines which first amendment exception applies to speech, but, rather, the state's theory in responding to the defendant's specific first amendment defense to that charge. Thus, I would conclude that § 53a-182 (a) (1) proscribes speech that falls within the true threats exception, and, if the state had pursued such a theory, the defendant would have been culpable under that statutory provision for making a true threat.

The state waived any claim that the defendant's speech constituted a true threat when it chose to argue that it constituted fighting words. As I have explained, the prosecutor, in closing arguments before the jury, conceded that "if the conduct consists purely of speech . . . the speech must contain fighting words that would have a direct tendency to inflict injury or cause acts of violence." Similarly, at oral argument before this court, the state confirmed that its theory of the case was one of fighting words. By failing to articulate how the defendant's statement fit within the true threats exception, the state waived that theory of guilt. See *State* v. *Sabato*, 321 Conn. 729, 733, 138 A.3d 895 (2016) ("[w]e conclude that the state is precluded from arguing that the defendant's text message constituted a true threat because the state never pursued such a theory of guilt at trial").

IV

I do not condone the defendant's statement in the present case—the threat of gun violence is tasteless, shameful, and all too real. Indeed, the statement would have fit within the true threats exception to first amendment protection had the state made that argument. It did not. Furthermore, its attempt to alchemize the defendant's threatening statement into fighting words through a theory of preemptive self-defense is doctrinally and factually unpersuasive. Although I recognize that there may be instances where a true threat is insulting in a manner that also makes it fighting words, that is not the present case. The state simply failed to raise the claim that the defendant's statement constituted a true threat, rather than fighting words, and, as such, was not protected speech.

For these reasons, I respectfully concur in the judgment.

[1] Had the state argued that the defendant's statement was not protected by the first amendment because it was a true threat, the trial court no doubt would have instructed "the jury on the definition of such a threat, as it would have been constitutionally required to do if the state had made such an argument." *State* v. *Sabato*, 321 Conn. 729, 734, 138 A.3d 895 (2016).

[2] The state offers only *People* v. *Prisinzano*, 170 Misc. 2d 525, 648 N.Y.S.2d 267 (1996), in support of its argument. The court in *Prisinzano* concluded that "few words could more readily be classified as 'fighting words' than threats to physically injure the person to whom the words are directed," and that such threats might prompt an addressee to beat the speaker " 'to the punch.' " Id., 532. Although I recognize that this provides persuasive support for the state's theory, I am unpersuaded by that court's reasoning. In addition, the court reached its conclusion in the context of the peculiar circumstances of that case: a heated union protest on a city street, grounded in a dispute with a history of violence possibly connected to organized crime. Id., 527–28, 531. None of these factors exists in the present case. Additionally, at least one of the statements in *Prisinzano* could also be construed as personally insulting: " '[W]hen the cops leave, the blood is going to run off of your bald fucking head.' " Id., 527.

This court has suggested that a threat could fit within the fighting words exception, but has not based that conclusion on a theory of preemptive self-defense. See *State* v. *Baccala*, supra, 326 Conn. 256 (suggesting that addition of threats might have made fighting words out of profane outbursts). For example, in *State* v. *DeLoreto*, 265 Conn. 145, 148, 168, 827 A.2d 671 (2003), this court concluded that statements made to a police officer, such

as " 'Faggot, pig, I'll kick your ass,' " were true threats, rather than fighting words. The court observed, however, that "[t]hreatening statements that do not rise to the level of a true threat may nonetheless constitute fighting words . . . ." Id., 168. However, in reaching that conclusion, the court was focused on the offensive nature of the threats, rather than the possibility they could cause preemptive self-defense. Id. (recognizing that words must reach higher level of offensiveness "to provoke a police officer to violence" than they would to provoke "ordinary citizen" to retaliation). I agree that some threats could be so insulting that they amount to fighting words in certain circumstances, but I do not believe that the statement in the present case rises to that level for the reasons outlined in part II of my concurring opinion.

[3] I observe that the underlying incident occurred on the defendant's private land, and it is unclear to what extent, if any, the fighting words exception applies to statements made in private. See W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 965 (2000) (speculating on applicability of fighting words exception in home). The fighting words exception has typically been raised in, and arises in, situations that occur in public places. See, e.g., *State* v. *Baccala*, supra, 326 Conn. 235 (summarizing underlying conduct that occurred in supermarket). This court has never had the opportunity to consider whether the fighting words exception applies to statements made in the privacy of one's home or land, and, after an extensive review, I am aware of no Connecticut cases in which the state obtained convictions for speech occurring in private places under a fighting words theory.

The closest this court has come to addressing the issue was in *State* v. *Indrisano*, 228 Conn. 795, 812, 640 A.2d 986 (1994), where this court interpreted the language of § 53a-182 (a) (1), and concluded that the statute is "consistent with the 'fighting words' limitation that must be applied when the conduct sought to be proscribed consists purely of speech." In other words, this court noted that its "holding was consistent with *Chaplinsky*, [and] . . . recognized that § 53a-182 (a) (1) could constitutionally proscribe speech that, under a given set of circumstances, could fairly be characterized as fighting words that portend imminent physical violence." *State* v. *Szymkiewicz*, 237 Conn. 613, 619, 678 A.2d 473 (1996). This conclusion could be interpreted as a suggestion that fighting words can occur in private, because § 53a-182 (a) (1) does not require that the charged conduct occur in public, unlike the otherwise identically worded breach of the peace statute, General Statutes § 53a-181 (a) (1). Id., 618. It is hardly determinative however, because this court did not hold that the fighting words exception can apply in private. In addition, *Indrisano* was not a fighting words case, as the court concluded that the defendant violated the disorderly conduct statute through his physical conduct. *State* v. *Indrisano*, supra, 811–13.

Few courts have addressed the issue of whether the fighting words exception may be applicable to statements that occur in private, and those courts have reached different conclusions. Compare *State* v. *Poe*, 139 Idaho 885, 904, 88 P.3d 704 (2004) ("there is nothing in [United States Supreme Court precedent] that would indicate the [c]ourt believes that the use of 'fighting words' in or around one's own home should be constitutionally protected"), with *B.E.S.* v. *State*, 629 So. 2d 761, 765 (Ala. Crim. App. 1993) (holding that, "[c]onsidering the circumstances under which these statements were made, including the fact that the statements were made during a private quarrel in the residence occupied by both the speaker and the addressee, we do not think the appellant's statements rise to the level of 'fighting words,' " and observing that similar comments in public settings had been "construed as fighting words" [emphasis omitted]), cert. denied, Alabama Supreme Court, Docket No. 1921984 (December 3, 1993).

It is not obvious that the fighting words exception would apply to comments made in private for two reasons. First, if the private speech occurred in the home, the Supreme Court has held that some otherwise unprotected speech is subject to increased protection. See *Stanley* v. *Georgia*, 394 U.S. 557, 565, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) (holding that obscenity exception to first amendment protection is insufficient to warrant invasion of "the privacy of one's own home"). Second, the history of the fighting words exception suggests an interest in public order. For example, in *Chaplinsky*, the Supreme Court looked favorably on the statute's limited application to public places in concluding that Chaplinsky's conviction did not violate his first amendment rights. *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 573 (holding that statute at issue did not violate first amendment because it "is a statute narrowly drawn and limited to define and punish

specific conduct lying within the domain of state power, the *use in a public place of words likely to cause a breach of the peace*" [emphasis added]). Admittedly, subsequent Supreme Court cases have not required that speech be made in a public setting to fit within the fighting words exception, but they have rejected the applicability of fighting words theories for other reasons. See, e.g., *Cohen* v. *California*, supra, 403 U.S. 20 (not imposing or considering public requirement with fighting words exception, but rejecting fighting words theory where statements could not have been construed as "direct personal insult").

[4] I recognize that the water company had an easement over part of the defendant's land, which Lavin and Lathlean may or may not have exceeded, but any such property interest cannot be fairly equated to the control that a managing employee would have over property owned or leased by her employer.

[5] It is this inherent difficulty in line drawing that has led to much of the scholarly criticism of the fighting words exception. See generally note, supra, 106 Harv. L. Rev. 1129 (arguing that fighting words exception provides less protection from offensive language to minorities and women, who may be less likely to respond to offensive language with violence).

[6] Under such circumstances, it would be the offensiveness of the speech that would justify the application of the fighting words exception, rather than the possibility that its threatening nature might prompt preemptive self-defense.

[7] The state initially charged the defendant with threatening in the second degree, but eliminated that charge in a subsequent, long form information. At oral argument before this court, the state explained that it considered a true threats theory difficult to establish in the present case.

[8] I observe that the language this court used in analyzing § 53a-182 (a) (1) applies to the fighting words exception; see, e.g., *State* v. *Szymkiewicz*, 237 Conn. 613, 619, 678 A.2d 473 (1996) ("fighting words . . . portend imminent physical violence"); but it illustrates this court's conclusion that the provision does not apply only to physical conduct, but also to speech that falls within an exception to first amendment protection.