No.

In the Supreme Court of the United States

FRANKLIN DELANO JEFFRIES, II,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is a federal crime to "transmit[] in interstate or foreign commerce any communication containing * * * any threat to injure the person of another." 18 U.S.C. § 875(c). The question presented is:

Whether, in light of the plain meaning of "threat" and the constitutional rule of *Virginia* v. *Black*, 538 U.S. 343 (2003), conviction under Section 875(c) requires proof of a subjective or specific intent to threaten.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Franklin Delano Jeffries, II, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-25a) is reported at 692 F.3d 473 (6th Cir. 2012). The decision of the United States District Court for the Eastern District of Tennessee denying petitioner's motion for judgment of acquittal or a new trial (App., *infra*, at 26a-71a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2012, and a timely petition for rehearing was denied on October 31, 2012. App., *infra*, at 72a-73a. On January 18, 2013, Justice Kagan extended the time within which to file a petition for certiorari to March 30, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 875(c) provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted of violating 18 U.S.C. § 875(c), which makes it a crime to transmit in inter-

state commerce "any communication containing * * * any threat to injure the person of another." At trial, the district court instructed the jury that it was immaterial whether petitioner actually intended his statement as a threat; "[u]nlike [under] most criminal statutes, the government does not have to prove defendant's subjective intent." App., *infra*, at 8a. Instead, the jury was told it could convict so long as a "reasonable person" would regard petitioner's statement as threatening, even if petitioner did not intend it that way. App., *infra*, at 7a. The court of appeals upheld the conviction, finding that the instruction properly stated the elements of the Section 875(c) offense and that the First Amendment does not preclude punishing a person for making a statement that was not intended to be threatening.

That decision should not stand. It contributes to a conflict in the courts of appeals on whether a subjective intent to threaten is necessary for a conviction under Section 875(c). It cannot be reconciled with this Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003), which held that proof of improper subjective intent is a constitutional requirement if threatening speech is to be punished. And it is plainly wrong as a matter of statutory construction, as Judge Sutton, the author of the decision below, explained: In an extraordinary separate opinion, he demonstrated that his own majority decision, which was compelled by Sixth Circuit precedent, could not be squared with Section 875(c)'s plain language and legislative history. For these reasons, and because the decision below contributes to considerable confusion in the lower courts on statutory and constitutional questions of great practical significance, further review is warranted.

A. Factual background

The "threat" petitioner was found to have transmitted was a YouTube video of himself playing a guitar and singing a "banal," "ranting" and, at times, "menacing" song about his daughter entitled "Daughter's Love." App., *infra*, at 2a. At the time that petitioner posted the video, he was engaged in a prolonged custody dispute over his visitation and parental rights with regard to his daughter. App., *infra*, at 16a. As described by the court of appeals, petitioner "created a video of himself performing the song on a guitar painted with an American flag on it. The style is part country, part rap, sometimes on key, and surely therapeutic." *Id.* at 2a. Petitioner characterized the video as a comedic performance—a "[c]omedy for the courts." *Id.* at 7a.

The YouTube song conveys a range of emotional expressions. At many points, the video "contains sweet passages about relationships between fathers and daughters and the importance of spending time together" ("daughters are the beautiful things in my life"). App., *infra*, at 2a. At others, its emotional register escalates, culminating in several increasingly hyperbolic statements directed toward the judge in petitioner's ongoing custody battle. At points, petitioner shows desperation: "I'm not kidding, judge, you better listen to me. I killed a man downrange in war. I have nothing against you, but I'm tellin' you this better be the last court date." App., *infra*, at 4a. At others, he uses menacing language: "Take my child and I'll take your life." *Id.* at 3a.

Petitioner uploaded the video to YouTube and posted a link to it on Facebook. App., *infra*, at 6a. He subsequently sent the Facebook link to twenty-nine Facebook users including "Tennessee State Repre-

sentative Stacey Campfield, WBIR Channel 10 in Knoxville, and DADS of Tennessee, Inc., an organization devoted to empowering divorced fathers as equal partners in parenting." *Id.* at 6a-7a.

Although petitioner did not send the link to the judge, petitioner's ex-wife's sister saw the link on Facebook and made the judge aware of it. *Id.* at 7a. Petitioner removed the link from YouTube and Facebook twenty-five hours later. *Ibid.*

B. Procedural history

1. Petitioner was charged under 18 U.S.C. § 875(c), which makes it a felony to "transmit in interstate or foreign commerce any communication containing * * * any threat to injure the person of another." The district court rejected petitioner's request that the jury be instructed that "it could convict [petitioner] only if he subjectively meant to threaten the judge." App., *infra*, at 7a.[1] Instead, the court instructed the jury: "The defendant's subjective intent in making the communication is * * * irrelevant. Unlike most criminal statutes, [under Section 875(c)] the government does not have to prove the defendant's subjective intent. Specifically, the government does not have to prove that defendant subjectively intended for [the judge] to understand the communication as a threat, nor does the government

[1] Petitioner requested the following instruction: "In determining whether a communication constitutes a 'true threat,' you must determine the defendant's subjective purpose in making the communication. If the defendant did not seriously intend to inflict bodily harm, or did not make the communication with the subjective intent to effect some change or achieve some goal through intimidation, then it is not a 'true threat.'" App., *infra*, at 8a.

have to prove that the defendant intended to carry out the threat." *Id.* at 8a. Rather than look to the defendant's subjective intent to threaten, the jury was instructed:

> In evaluating whether a statement is a true threat, you should consider whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury on Chancellor Moyers [the judge] and whether the communication was done to effect some change or achieve some goal through intimidation. * * * The communication must be viewed from an objective or reasonable person perspective.

Id. at 7a-8a. Having been given this instruction, the jury convicted petitioner. *Id.* at 27a. He was sentenced to eighteen months' imprisonment.

2. The court of appeals affirmed, rejecting petitioner's challenge to the jury instruction. App., *infra*, at 2a-20a. In an opinion by Judge Sutton, the Sixth Circuit held that the district court's reading of the statute was compelled by circuit precedent, under which a prosecution under Section 875(c) "generally requires the government to establish that the defendant (1) made a knowing communication in interstate commerce that (2) a reasonable observer would construe as a true threat to another." *Id.* at 9a. Once the government makes such a showing, "it matters not what the defendant meant by the communication, as opposed to how a reasonable observer would construe it." *Id.* at 10a. The court added that several other courts of appeals also "have expressly rejected an additional subjective requirement in construing this and related threat prohibitions." *Id.* at 11a.

The Sixth Circuit also went on to hold that the First Amendment does not require proof of the defendant's subjective intent to threaten in a Section 875(c) prosecution, specifically rejecting petitioner's argument that *Virginia* v. *Black*, 538 U.S. 343 (2003), "invalidates all communicative-threat laws under the First Amendment unless they contain a subjective-intent element." App., *infra*, at 11a; see *id.* at 12a-17a. The court noted that other appellate courts "have agreed that *Black* by itself does not provide a basis for overruling the objective standard" (*id.* at 14a (citing cases)), but recognized that the Ninth Circuit, "largely consistent with its prior precedents, holds that *Black*[] * * * adds a subjective gloss that 'must be read into all threat statutes that criminalize pure speech.'" *Id.* at 14a (quoting *United States* v. *Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011)).

3. Having authored the panel's decision, Judge Sutton than added an extraordinary "dubitante" opinion, explaining: "I write separately because I wonder whether our initial decision in this area (and those of other courts) have read the statute the right way from the outset." App., *infra*, at 20a. Judge Sutton noted that "[e]very relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed the law (1932) or today, includes an intent component." *Ibid.* (citing dictionaries). "If words matter," Judge Sutton added, "I am hard pressed to understand why these definitions do not resolve today's case. The definitions, all of them, show that subjective intent is part and parcel of the meaning of a communicated 'threat' to injure another." App., *infra*, at 21a.

Judge Sutton found this conclusion reinforced by the history of Section 875, which originated "as a prohibition on extortion" that "encompassed threats coupled with an intent to extort something valuable from the target of the threat." App., *infra*, at 21a. "In prohibiting non-extortive threats through the addition of § 875(c)," Judge Sutton continued, "Congress offered no hint that it meant to write subjective conceptions of intent out of the statute." *Ibid.* Judge Sutton thought this conclusion was confirmed by "[b]ackground norms for construing criminal statutes," which "presume that intent is the required mens rea in criminal laws." *Ibid.* "Allowing prosecutors to convict without proof of intent reduces culpability on the all-important element of the crime to negligence." *Id.* at 22a.

Judge Sutton accordingly concluded: "When some law-making bodies 'get into grooves,' Judge Learned Hand used to say, 'God save' the poor soul tasked with 'get[ting] them out.' That may be [petitioner's] fate—and ours. The Department of Justice, defense lawyers and future courts may wish to confirm that the current, nearly uniform standard for applying Section 875(c) is the correct one. I am inclined to think it is not." App., *infra*, at 25a (citation omitted).

REASONS FOR GRANTING THE PETITION

Judge Sutton effectively invited further review of the decision he wrote for the Sixth Circuit in this case. He did so for good reason. The holding that a person may be punished under Section 875(c) for making a "threat" even absent any subjective intent *to* threaten is inconsistent with both the language that Congress used and the manifest congressional intent. It expands a conflict in the circuits on the question. And it rests on a rule that departs from a

constitutional principle that has been articulated by this Court. Because the question presented here is a recurring one of great importance, further review is warranted.

I. The Courts Of Appeals Are Deeply Divided On The Question Presented.

At the outset, review is warranted because there is a widely acknowledged circuit split concerning the intent required for conviction under 18 U.S.C. § 875(c). The longstanding division among the courts of appeals on this question of statutory construction has been deepened and widened by the circuits' conflicting interpretations of this Court's First Amendment holding in *Virginia* v. *Black*, 538 U.S. 343 (2003).

Although it has long been settled that "true threats" are not protected by the First Amendment (see *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam)), *Black* considered for the first time whether the speaker must have *intended* his or her statement to threaten if it is to be a "true threat." See 538 U.S. at 359. *Black* appeared to resolve that question in the affirmative, explaining that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Ibid.* (emphasis added). Over the past decade, however, the courts of appeals have divided in their interpretations of this holding. As a result, a pre-existing split over Section 875(c) has taken on a constitutional dimension and has widened to encompass the entire class of statutes criminalizing threatening speech.

1. While several courts of appeals have construed Section 875(c) to require only a general intent to make a communication that a reasonable person would deem threatening, the Ninth Circuit has long held that "the showing of an intent to threaten, required by §§ 875(c) and 876, is a showing of specific intent." *United States* v. *Twine*, 853 F.2d 676, 680 (9th Cir. 1988). As the court explained, proof of such a specific-intent offense requires "increased probing into the defendant's subjective state of mind," such that "the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior." *Id.* at 679-680. The court has reaffirmed that construction of the statute repeatedly and recently. See, *e.g.*, *United States* v. *Vaksman*, 472 F. App'x 447, 449 (9th Cir.), cert. denied, 133 S. Ct. 777 (2012); *United States* v. *Bagdasarian*, 652 F.3d 1113, 1123 (9th Cir. 2011); *United States* v. *Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007).

After this Court's decision in *Black*, moreover, the Ninth Circuit concluded that the First Amendment bolsters (and indeed requires) the subjective approach in such cases. As the court explained, "eight Justices [in *Black*] agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction." *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005). More recently, the Ninth Circuit reaffirmed that constitutional conclusion, explaining that, "[b]ecause the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Bagdasarian*, 652 F.3d at 1117.

2. Other courts, by contrast, have agreed with the approach taken by the Sixth Circuit in this case

and read Section 875(c) broadly to criminalize all intentional communications that *a reasonable person would deem threatening*, regardless of how that communication was intended by the speaker. The First, Second, Third, Fourth, Fifth, Seventh, and Eighth Circuits have each also read the statute in this way. *United States* v. *White*, 670 F.3d 498, 508 (4th Cir. 2012) (citing *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), for the presumption that Section 875(c) is a general intent crime); *United States* v. *Mabie*, 663 F.3d 322, 330 (8th Cir. 2011), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003); *United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (recently reaffirmed in an unpublished opinion, *United States* v. *Xiang Li*, 381 F. App'x 38, 39 (2d Cir. 2010)); *United States* v. *Myers,* 104 F.3d 76, 81 (5th Cir. 1997) (reaffirmed in an unpublished disposition, *United States* v. *Murillo*, 234 F.3d 28 (5th Cir. 2000)); *United States* v. *Himelwright*, 42 F.3d 777, 783 (3d Cir. 1994) (cited in *United States* v. *Zavrel*, 384 F.3d 130, 138 (3d Cir. 2004)).

Several of these courts have specifically engaged the constitutional question posed by *Black* in construing threat statutes such as Section 875(c). The Fourth Circuit, for example, expressly rejected the Ninth Circuit's reading of *Black* and concluded that "the government need not prove that a defendant transmitted the communication with the *specific intent that the defendant feel threatened* but only with the *general intent* to transmit the communication."

White, 670 F.3d at 508.[2] The Eighth Circuit has likewise reasoned that "the *Black* Court did not hold that the speaker's subjective intent to intimidate or threaten is required in order for a communication to constitute a true threat," and hence that a "reasonable person" standard is constitutionally permissible. *Mabie*, 663 F.3d at 332.

Nonetheless, several of the courts employing the objective standard under Section 875(c) have joined the Ninth Circuit in raising significant doubts about the consistency of that rule with the Court's holding in *Black*. The Seventh Circuit has concluded that after *Black* it is "likely * * * that an entirely objective definition is no longer tenable," citing the Ninth Circuit's analysis of the constitutional issue with approval. *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008).[3] The court did "not resolve the issue," however, because the defendant in that case had not challenged the jury instruction on intent. *Ibid*. And prior to its decision below, the Sixth Circuit likewise had acknowledged that "the prosecution may need to

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[2] In a detailed dissenting opinion, however, Judge Floyd explained that "*Virginia v. Black* is a superseding contrary decision that makes our purely objective approach to ascertaining true threats no longer tenable" (670 F.3d at 520), and that "imposing a specific intent to threaten requirement strikes a more appropriate balance between the ideals that the First Amendment serves and the interest in protecting victims from the harms caused by threatening speech." *Id*. at 524.

[3] In reaching this conclusion, the court observed that "whether the Court meant to retire the objective 'reasonable person' approach or to add a subjective intent requirement to the prevailing test for true threats is unclear." 545 F.3d at 500. As the court recognized, however, a subjective intent to threaten would at least be *necessary* for a true threat to exist under either of these tests.

establish that the defendant subjectively intended to make a threat" in light of *Black*, but, without explanation, limited this principle to "some circumstances" that it left unspecified. *United States* v. *Williams*, 641 F.3d 758, 769 (6th Cir.), cert. denied, 132 S. Ct. 348 (2011).

The Tenth Circuit has similarly invoked *Black* for the proposition that, under the First Amendment, a criminal "threat must be made 'with the intent of placing the victim in fear of bodily harm or death.'" *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 359). As the court explained, this rule calls for "[a]n intent to threaten" (*ibid.*), which amounts to a rejection of the general intent-to-communicate standard. The court in that case ultimately held the defendant's challenge to the jury instructions procedurally barred, however. *Cf.* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1265 (2006) ("[T]he Tenth Circuit did find that the Court clearly adopted a subjective intent standard in *Black* and changed its own approach accordingly.").[4]

In its decision below, the Sixth Circuit acknowledged that the courts of appeals have divided on the proper reading of *Black* (see App., *infra*, at 14a-15a), and recognized that the case for a subjective-intent requirement under the First Amendment was therefore "not frivolous." *Id.* at 11a. And, of course, Judge Sutton believed the subjective-intent standard required by the plain meaning of the statute. *Id.* at

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[4] The Tenth Circuit nevertheless has since applied the objective standard without significant analysis in an unpublished decision. See *United States* v. *Wolff*, 370 F. App'x 888, 892 (10th Cir. 2010).

20a-25a (Sutton, J., dubitante). Because the court read *Black* narrowly, however, it thought itself "requir[ed] * * * to stand by" its earlier decisions endorsing a purely objective standard. *Id.* at 15a. See also *United States* v. *DeAndino*, 958 F.2d 146, 149-150 (6th Cir. 1992) (rejecting the Ninth Circuit's *Twine* decision as "flawed").

3. Against this background, the circuit split concerning the intent requirement of 18 U.S.C. § 875(c) is widely acknowledged by courts and scholars. Thus, the Tenth Circuit has observed that "the Ninth Circuit requir[es] specific intent" but "[t]he others state that general intent is all that is required." *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir. 2006). See also *United States* v. *Darby*, 37 F.3d 1059, 1063 (4th Cir. 1994) ("there is a split among the circuits as to whether section 875(c) is a specific intent crime or a general intent crime"); *United States* v. *White*, 670 F.3d 498, 510 (4th Cir. 2012) (noting the circuit split in light of *Black*); *United States* v. *Myers*, 104 F.3d 76, 80 (5th Cir. 1997) ("[W]hether this instruction correctly states the law depends on whether Section 875(c) offenses require specific or general intent. The courts of appeals are divided on this issue * * *."); *United States* v. *Kammersell*, 7 F. Supp. 2d 1196, 1199 (D. Utah 1998) (noting the "conflict in the circuits on *mens rea*" required by Section 875(c)), aff'd, 196 F.3d 1137 (10th Cir. 1999).

The split also has been repeatedly noted in academic literature. See, *e.g.*, Recent Case, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2013) ("The Sixth Circuit's choice to leave its true threat jurisprudence unchanged in light of the plain language and balancing of principles in *Black* does the law a disservice, further complicating an ongoing

circuit split."); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) (although "[t]he majority of circuits have developed a version of a reasonable person test," "[s]ome judges on the Ninth and Fourth Circuits think that courts and juries should, in certain circumstances, consider the speaker's intent"); Robert Kurman Kelner, Note, United States v. Jake Baker*: Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287, 300 (1998) ("The conflict among the circuits as to the mens rea requirement of Section 875(c) remains unresolved as well."); Karen Rosenfield, Note, *Redefining the Question: Applying A Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 Cardozo L. Rev. 1837, 1837-1838 (2008) (noting the split regarding the intent requirement for Section 875(c)). This Court's intervention is necessary to resolve the conflict.[5]

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[5] In addition, the courts of appeals that interpret threat statutes to impose an objective standard "are split over whether the test should be from the perspective of the speaker or the listener." Rothman, *supra*, at 302. The First and Third Circuits have used the reasonable speaker's vantage point. See *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) (citing *United States* v. *Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997)); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991). The Fourth and Eighth Circuits have used the reasonable recipient's vantage point. See *United States* v. *Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996); *United States* v. *Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973) (reaffirmed in *United States* v. *McTeer*, 103 F.3d 121 (4th Cir. 1996) (unpublished table decision)). The Fifth Circuit follows its own viewpoint-neutral approach. *United States* v. *Morales,* 272 F.3d 284, 287 (5th Cir. 2001) (citing *United States* v. *Myers,* 104 F.3d 76, 79 (5th Cir. 1997)).

If the district court had judged petitioner using the speaker's vantage point, the context for the inquiry may well have changed the outcome. See *Fulmer*, 108 F.3d at 1491 (noting

II. The Question Presented By This Case Has Broad Significance.

The need for review is especially acute because the question presented here is one of tremendous practical significance. As the courts of appeals have recognized, the constitutional issue affects the application of numerous statutes. And even as limited to Section 875(c), the issue will determine the outcome of a great many cases—cases that themselves often are individually of great importance because they involve the punishment of speech.

A. Confusion regarding the proper construction of the First Amendment after *Black* implicates many federal criminal statutes.

1. As detailed above, the rules governing the identification of "true threats" have bedeviled the courts of appeals since this Court's decision in *Black*. Whereas many commentators deem it obvious that *Black* held the First Amendment to require a specific intent requirement, and some courts of appeals have concurred, other courts have adhered to circuit precedent that permits the government to criminalize speech deemed threatening even if that speech unquestionably was not intended as a threat. Such uncertainty in this area of the law cuts against the fundamental proposition that the boundaries of the First

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that the reasonable-speaker standard "not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the 'reasonable-recipient standard'"). Moreover, if this Court resolves the question whether Section 875(c) incorporates a subjective-intent standard, it likely would shed considerable light on whether an objective inquiry also should be conducted and, if so, from which perspective.

Amendment should be sufficiently clear, and afford speakers sufficient "breathing space" (*NAACP* v. *Button*, 371 U.S. 415, 433 (1963)), to avoid chilling protected speech.

This constitutional confusion infects not only Section 875(c), but also many other federal threat statutes. In clarifying the proper reading of *Black*, this Court would therefore resolve the potential for confusion concerning a variety of threat statutes. These include:

- Blackmail: "Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both." 18 U.S.C. § 873.
- Mailing threatening communications: "Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication * * * 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." 18 U.S.C. § 876(c).
- Threats against a grand jury member: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror * * * shall be punished as provided in subsection (b)." 18 U.S.C. § 1503(a).
- Interference with commerce: "Whoever in any way or degree * * * threatens physical vio-

lence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a).

- Threatening the President: "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 * * * containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, [or] the Vice President * * * or knowingly and willfully otherwise makes any such threat against the President, President-elect, [or] Vice President * * * shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 871(a).[6]
- Numerous other federal statutes also involve threats. See, *e.g.*, 18 U.S.C. § 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member); 18 U.S.C. § 878 (threats and extortion against foreign officials, official guests, or internationally protected persons); 18 U.S.C.

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[6] The Fourth Circuit interpreted this provision to require proof of a subjective intent. See *United States* v. *Patillo*, 431 F.2d 293, 298 (4th Cir. 1970), adhered to, 438 F.2d 13 (4th Cir. 1971) ("There is no danger to the President's safety from one who utters a threat and has no intent to actually do what he threatens."). In 1975, this Court granted certiorari to resolve a conflict in the circuits on the intent required under the provision, but ultimately did not resolve the issue. See *Rogers* v. *United States*, 422 U.S. 35, 36 (1975).

§ 879 (threats against former Presidents and certain other persons).

The Court could provide considerable guidance about the meaning of these statutes by deciding this case. Many of these provisions use language similar to that in Section 875(c). See *United States* v. *Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (analyzing Sections 875(c) and 876 together); *United States* v. *Francis*, 164 F.3d 120, 122 (2d Cir. 1999) (noting that 18 U.S.C. § 871(a) contains "language similar to that in Section 875(c)"). The constitutional rule applied to Section 875(c) will govern each of these other statutes.

2. These statutes are invoked repeatedly. Indeed, even as limited to Section 875(c), resolution of the question in this case will settle the law as it applies to a great many prosecutions. Between 1994 and 2010, there were 476 defendants in cases filed under Section 875(c). U.S. Dep't of Justice, *Bureau of Justice Statistics: Federal Criminal Case Processing Statistics,* http://tinyurl.com/bp9lcbu (last accessed Mar. 28, 2013) (compiled from year-by-year statistics).

And because the intent requirement for Section 875 implicates other threat statutes, thousands of additional prosecutions would be guided by the Court's review in this case. For example, between 1994 and 2010, there were 1132 defendants in cases filed under 18 U.S.C. § 876, the companion to Section 875(c) that criminalizes mailing threatening communications. *Ibid.* In the same time period, there were 483 defendants in cases filed under 18 U.S.C. § 871, which criminalizes threats against the President and successors to the presidency. *Ibid*. It therefore is a matter of considerable importance that the rules governing application of these statutes be settled.

B. The choice between a subjective and objective standard for threats has been rendered newly urgent by the explosion of online communication.

Although these consequences are enough to warrant the Court's attention, it should be added that the choice between the objective and subjective approach to threat statutes has grown in practical importance as the rise of social media has enabled new forms of communication that reflect unsettled social norms and expectations—as the facts of petitioner's case demonstrate. See Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011) ("[T]he widespread use of the Internet as a forum for speech has * * * eroded the shared frame of background context that allowed speakers and hearers to apply context to language.").

The gap between what a defendant actually intended and what a juror conceiving of him- or herself as a "reasonable" observer might infer about that intent from the defendant's speech is greatly magnified when the communication, including paradigmatic expressive activity, takes the form of fragments of online video, text messages, and "tweets"—presented with little or no context, and broadcast to audiences that are often unclear even as to the identity of the speaker. *Cf.* Mason, *supra*, at 73 ("The anonymity and potentially unlimited mass audience of internet speech poses difficulties for application of traditional doctrines governing speech, including the reasonable-person test for true threats." (footnote omitted)). In this case, for example, the individual who saw the video on Facebook and alerted authorities was not a

"Facebook friend" of petitioner's. See Trial Tr. 135-138; see also Recent Case, *supra*, at 1144 ("If, for example, an individual were to upload a video to YouTube and negligently but honestly believe the video's privacy settings prevented anyone else from viewing it, the objective standard would not take the individual's subjective intent into account * * *.").

The incidence of cases like this one—in which a jury convicts a defendant of criminally threatening speech, despite a possible absence of intent, based on its necessarily limited grasp of what a reasonable YouTube viewer infers from a whimsical or convoluted video presented in that medium—will therefore only increase as expressive activity continues to migrate online. *Cf.* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 286 (2001) (noting that "interest in threats has been sparked primarily by the proliferation of widely disseminated Internet speech").

Indeed, threat prosecutions on the basis of online videos have already become routine. In one recent incident, a Philadelphia man produced a string of "incoherent videos that mix pseudo-religious incantations with random warnings and threats," and was ultimately charged with threatening a congressman under Section 875(c) as a result.[7] In 2009, a Florida man posted a "rap song" called "Kill Me a Cop" on MySpace and was prosecuted for corruption by

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[7] David Kurtz, *What To Make of Norman Leboon?*, TPM Editor's Blog, Mar. 29, 2010, http://tinyurl.com/yb9ay6y; *see* Information, *United States* v. *Leboon* (E.D. Pa. Mar. 26, 2010), *available at* http://tinyurl.com/c49akxw.

threat of a public servant.[8] In a similar ongoing case, two Pittsburgh men face charges of terroristic threats and intimidation because of a "rap video," construed as threatening two police officers, that they posted on YouTube.[9]

Similar communications that have spawned prosecutions are widespread in other online fora as well. See, *e.g.*, *United States* v. *Elonis*, 2011 WL 5024284 (E.D. Pa. 2011) (defendant charged under Section 875(c) for a threatening Facebook post); *United States* v. *Stock*, 2012 WL 202761 (W.D. Pa. 2012) (defendant charged under Section 875(c) for a threatening Craigslist advertisement); *United States* v. *Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (defendant charged under Section 879(a) for a threatening Yahoo message board posting); see also Michele L. Ybarra et al., *Examining the Overlap in Internet Harassment and School Bullying: Implications for School Intervention*, 41 J. Adolescent Health S42 (2007) (finding that fourteen percent of American youth report having received online communications they perceived as "threatening or aggressive" in the last year).

Because the Internet is intrinsically "interstate," this explosion of potentially threatening content online has vastly expanded prosecutors' discretion to bring threat charges under Section 875(c). And because these communications are so often presented

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[8] Bianca Prieto, *Polk County Man's Rap Song Called Threat to Cops, So He's in Jail for 2 Years*, Orlando Sentinel, Aug. 1, 2009, http://tinyurl.com/ckpp26t.

[9] Liz Navratil et al., *FBI, Pittsburgh Police Investigate YouTube Video That Threatened Zone 5 Officers*, Pittsburgh Post-Gazette, Nov. 16, 2012, http://tinyurl.com/c55nppo.

as irreverent songs or screeds, determining whether a subjective intent to threaten is required, either by the statute or by the Constitution, has become crucially important.

III. The Decision Below Is Incorrect.

The importance and frequently recurring nature of the question presented is particularly notable because the decision below is wrong. Judge Sutton found that so clear that he took the extraordinary step of questioning the construction of the statute he was compelled by circuit precedent to follow. And the Sixth Circuit's approach is, in any event, in plain tension with this Court's analysis in *Black*. Review by this Court therefore is warranted.

A. The Sixth Circuit incorrectly construed Section 875(c) to require only general and not specific intent.

Although the court below was bound by its precedent interpreting Section 875(c) to require only an objective intent to threaten (*United States* v. *DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992)), Judge Sutton correctly noted in his *dubitante* opinion that this interpretation is analytically and historically incorrect. Construing the word "threat" in Section 875(c) to require a subjective intent to threaten is compelled by the word's standard usage, the statute's legislative history, and this Court's general approach to construing criminal statutes.

1. Plain meaning and standard usage confirm that a subjective intent is entailed by the word "threat."

Interpretation of Section 875(c) must begin with its plain language. As Judge Sutton showed, "[t]he

key word" of Section 875(c) is "threat," and "[e]very relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed the law (1932) or today, includes an intent component." App., *infra*, at 20 (citing dictionaries). In contrast, "[c]onspicuously missing from *any* of these dictionaries is an objective definition of a communicated 'threat,' one that asks *only* how a reasonable observer would perceive the words." App., *infra*, at 21a.

That understanding is confirmed by looking to the courts' understanding of the word "threat" in the fifty years preceding Section 875's enactment. Many state and federal courts at that time defined a "threat" to be a "menacing act," one that—by definition—requires the doer to harbor an actual intent to inspire fear or apprehension. See *Black's Law Dictionary* 772 (2d ed. 1910) (defining menace as "[a] threat; the declaration or show of a disposition or determination to inflict an evil or injury upon another"). Congress would have had these judicial constructions before it when it wrote Section 875(c).

The definition in *State* v. *Cushing* is representative: "'A threat, in criminal law,' says Black in his Law Dictionary, 'is a menace; a declaration of one's purpose or intention to work injury.'" 50 P. 512, 515 (Wash. 1897). See also *State* v. *Kramer*, 115 A. 8, 11 (Del. 1921) ("A threat is defined to be a menace of such a nature as to unsettle the mind of a person on whom it is intended to operate * * *."); *State* v. *Brownlee*, 51 N.W. 25, 26 (Iowa 1892) (citing the same definition); *Wilcox* v. *State*, 6 Ohio Law Abs. 571 (Ct. App. 1928) ("A threat is a menace of destruction or injury to person, character or property."); *United States* v. *French*, 243 F. 785, 786 (S.D. Fla.

1917) (citing *American and English Encyclopedia of Law* 141 (1887)) ("A threat is defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent.").

The standard definitions of "threat" today continue to reflect the need for a subjective intent that the statement actually be threatening. See*, e.g.*, *Merriam-Webster's Collegiate Dictionary* 774 (11th ed. 2003) ("[A]n expression of intention to inflict evil, injury, or damage."); *Black's Law Dictionary* 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another * * *."); *American Heritage Dictionary of the English Language* 1813 (5th ed. 2011) ("An expression of an intention to inflict pain, harm, or punishment."). Each of these definitions embodies the intuitive idea that a "threat" is a communication of the speaker's intention to cause harm, not simply words that could be interpreted by an outsider as threatening.

Indeed, as ordinary usage confirms, that intentional element is essential in distinguishing *threats* from simple *warnings*. *Cf.* Robert Nozick, *Socratic Puzzles* 31 (1997) (explaining "the notion of making a threat"). Consider, for example, the utterance: "If you don't quit smoking, you'll be sorry." If the speaker *intends* to threaten the listener with punishment for smoking, this plainly is a threat; but if the speaker intends merely to offer a dire prediction about the listener's health, it is a simple warning. It is the speaker's intent that makes all the difference. If no threat were intended, in common usage one could not say, as the court below did, that the speaker makes an intentional "threat" simply because he or she

"knowingly says the words." App., *infra*, at 14a. Real-world examples of this point abound. See, *e.g.*, *Exchange Between Bob Woodward and White House Official in Spotlight*, CNN Politics (Feb. 27, 2013), http://tinyurl.com/c6732oy.

Threats are thus by nature a way of seeking to make another feel threatened. Indeed, the commonplace that "a person who does something because of threats is subject to the will of another" could not be true if the threatener did not exercise his or her *will* in the first place. Nozick, *supra*, at 38; *cf.* H.L.A. Hart & Tony Honoré, *Causation in the Law* 54 (2d ed. 1985) (explaining that "inducement by false statement" is distinct from "inducement by threats" because the latter involves "a statement of [the inducer's] own intentions"). That understanding, incorporated in the statutory language, is what Congress meant in Section 875(c).

2. The statute's legislative history confirms that Congress imposed a subjective-intent requirement.

As Judge Sutton also explained, the plain meaning of the statutory text is confirmed by examination of the legislative background. Section 875(c) grew out of a statute that "[f]rom the beginning * * * had a subjective component to it," originating as an amendment to a 1932 provision criminalizing extortion. App., *infra*, at 21a-22a. That law banned the transmission in interstate commerce of any communication with a "demand or request for a ransom * * * *with the intent to extort* * * * money or other thing of value." Pub. L. No. 72-274 (1932) (emphasis added). By its express terms, the statute thus required a subjective intent to extort a thing from the

transmission's recipient. A mail containing a joke about extortion would not have been covered.

In 1939, Congress became concerned that the statute applied only to the limited set of threats meeting the specific technical requirements of extortion: threats that "deprive the addressee of something of value" and "secure for [the sender] something of value." *Threatening Communications: Hearing Before the H. Comm. on the Post Office and Post Roads*, 76th Cong. 4 (1939) [hereinafter *Committee Report*] (memorandum by Brien McMahon, Assistant Attorney General). This language excluded several important classes of threatening communications, including cases in which the person making the threat sought to extract a thing of value for a third party but not for himself (*e.g.*, a threat to harm the governor if he did not release a third party from prison) and threats made out of "spite," "revenge," and "animosity" without an intention to gain a thing of monetary value from the threatened party. See App., *infra*, at 22a ("In debates about the bill * * * what dominated the discussion was the distinction between threats made for the purpose of extorting money and threats borne of other (intentional) purposes: 'animosity,' 'spite' or 'revenge.'").

Congress therefore expanded the statute to encompass not only threats for the purposes of extortion, but also "threat[s] to kidnap any person or any threat to injure the person." Pub. L. No. 76-76 (1939). This became Section 875(c), the law under which petitioner ultimately was charged. The goal of these amendments was to "render present law more flexible and to contribute therefore to a better enforcement of the extortion statutes." *Committee Report*,

supra, at 5 (statement of William W. Barron, Criminal Division, Department of Justice).

This purpose must inform the proper interpretation of the statute. Congress' goal was a narrow one. It did not intend to create a new type of crime, but to extend an existing one—a speech act with "a subjective component to it"—to a new circumstance. App., *infra*, at 22a (Sutton, J., *dubitante*). In such circumstances, any change from the subjective-intent requirement would have to be grounded in "an express congressional directive." *Id.* at 23a. But here, Congress never expressly indicated its intention to change the subjective-intent standard governing the original extortion statute, either in the statutory text or in the legislative background.

Other interpretive tools lead to the same conclusion. Because the threat provision is associated in a single provision with an extortion offense, the two crimes should be construed harmoniously to each include a subjective-intent requirement: "meanings are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). And as Judge Sutton explained, "[c]ourts presume that intent is the required mens rea in criminal laws"; this presumption "applies at a minimum to the 'crucial element separating legal innocence from wrongful conduct.'" App., *infra*, at 22a (citing *United States* v. *X-Citement Video, Inc.,* 513 U.S. 64, 73 (1994)). And here, the "crucial element of § 875(c)—what divides innocence from crime—is a threat." *Ibid.* Thus, "[i]t is not enough that a defendant knowingly communicates *something* in interstate

commerce; he must communicate a threat, a word that comes with a state-of-mind component." *Ibid.*

B. The Sixth Circuit erred in its construction of the First Amendment.

1. *This Court's decision in* Black *recognized a First Amendment intent requirement for statutes criminalizing threats.*

There also is a second flaw in the decision below, and here we part ways with Judge Sutton. Although the government may criminalize "true" threats (*Watts* v. *United States*, 394 U.S. 705, 708 (1969)), the Sixth Circuit's determination that a threat statute need not include a specific or subjective intent requirement flies in the face of this Court's leading explanation of the "true threats" exception, *Virginia* v. *Black*. The Court there explained that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359 (emphasis added). Likewise: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

This premise—that "true" threats are those that are intended as such—is not an overbroad dictum, as the court below apparently believed (see App., *infra*, at 12a-14a), but rather the logical foundation for *Black*'s holding. Specifically, the respondent in *Black* was prosecuted under a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person." *Id.* at 348 (quoting Va.

Code Ann. § 18.2-423 (1996)). The statute further provided that burning a cross in public "shall be prima facie evidence of an intent to intimidate" (*ibid.*), and the trial judge therefore instructed the jury that a public cross burning could be sufficient by itself to support a finding of the proscribed intent. *Black*, 538 U.S. at 349.

Writing for a plurality, Justice O'Connor concluded that "[t]he prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional." *Id.* at 364. As she explained, the problem was that "[t]he provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself," when in fact "a burning cross is not always intended to intimidate." *Id.* at 365. The statute thus impermissibly swept more broadly than does the class of true threats; it did "not distinguish between a cross burning done with the *purpose* of creating anger or resentment and a cross burning done with the *purpose* of threatening or intimidating a victim." *Id.* at 366 (emphases added).[10]

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[10] Although Justice O'Connor wrote for a four-Justice plurality in this part of the opinion, "each of the other opinions—with the possible exception of Justice Thomas's dissent—takes the same view of the necessity of an intent element." *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005). Specifically, Justice Scalia objected only to the plurality's decision to treat the jury instruction as binding and therefore to hold the statute, as interpreted by the instruction, *facially* invalid. See *Black*, 538 U.S. at 368-380 (Scalia, J., dissenting). Justice Souter, joined by Justices Kennedy and Ginsburg, "disagreed only with the plurality's holding that the Virginia Supreme Court could, on remand, apply a narrowing construction to the prima facie evidence provision and thus save the statute as a whole from facial unconstitutionality." *Cassel*, 408 F.3d at 632.

The centrality to *Black*'s reasoning of the judgment that true threats must be specifically intended is therefore clear. If the First Amendment permitted the State to criminalize threatening communications *not* actually intended to threaten or intimidate, the statute could not have been rendered unconstitutional by its failure to limit its reach to cross-burnings with a purpose *to* threaten or intimidate. See Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217 ("If there is no such First Amendment requirement, then Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it."). The Sixth Circuit's reading of *Black*—as requiring an intent to threaten only in the sense of "knowingly say[ing] the words" (App., *infra*, at 14a)—thus cannot be squared with this Court's actual analysis and holding. *Cf.* Recent Case, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1143 (2013) ("The brief analysis that the *Jeffries* court did offer regarding *Black* evinces a potential misunderstanding of the Supreme Court's reasoning."). If knowingly burning a cross was not constitutionally proscribable absent a further "purpose of threatening or intimidating a victim," knowingly uttering threatening words should not be either.

Commentators have consistently read *Black* in keeping with its plain meaning. See*, e.g.*, Schauer, *supra*, at 217 ("[I]t is plain that both the Commonwealth of Virginia and the *Black* majority (and, perhaps, the *Black* dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate."); Recent Case, *supra*, at 1142 ("The

plain language in *Black* is most reasonably read as adopting the subjective intent requirement."); Lauren Gilbert, *Mocking George: Political Satire As "True Threat" in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843, 883 (2004) (noting that *Black* "clarified the standard for what constitutes a true threat" because it "suggests, albeit implicitly, that the speaker must intend to make a threat for the threatening language or conduct to constitute a true threat"); Leslie Kendrick, *Speech, Intent and the Chilling Effect*, Wm. & Mary L. Rev. (forthcoming 2013), *available at* http://tinyurl.com/bqu6fp6, at 16 n.67 (describing *Black* as a case in which "the Supreme Court constitutionalized" the Virginia statute's "specific-intent requirement"); Eugene Volokh, *Freedom of Speech and Mens Rea*, Volokh Conspiracy (July 5, 2007), http://tinyurl.com/d6pnks4 (noting that "*Virginia* v. *Black*, the Supreme Court's latest true threat case, seemingly treats the speaker's purpose as part of the constitutional test for whether the speech is unprotected").

The court below nonetheless found itself "require[ed] * * * to stand by [its] decisions" forswearing a subjective- or specific-intent standard because it concluded that *Black* "does not provide a basis for overruling the objective standard." App., *infra*, at 14a-15a; *cf. White*, 670 F.3d at 509 (similarly limiting *Black*); *Mabie*, 663 F.3d at 332 (same). That reading of *Black* is mistaken, and this Court should reverse it.

2. A subjective-intent standard is required by core First Amendment principles.

A subjective-intent standard is required not only by the best reading of this Court's decision in *Black*, but also by the fundamental First Amendment prin-

ciples applied in *Black*. First Amendment doctrine features numerous mental-state requirements of this kind as bulwarks against chilling protected speech. The reason for these requirements is simple: If one could commit a speech crime by accident—that is, by negligently misjudging how one's words will be construed by others—the free-ranging debate prized by the First Amendment would be severely constricted.

Public figures alleging defamation with respect to a matter of public concern must therefore demonstrate "actual malice" on the part of the defendant. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). Prosecutors charging incitement must prove conduct "*directed to* inciting or producing imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (emphasis added). See also *United States* v. *Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (characterizing *Brandenburg* as authorizing restrictions on "advocacy *intended*, and likely, to incite imminent lawless action" (emphasis added)). Some have likewise suggested that prohibitions on false statements are better reconciled with the First Amendment when they target only knowing or intentional lies. See, *e.g.*, *Alvarez*, 132 S. Ct. at 2552-2553 (Breyer, J., concurring) (construing the Stolen Valor Act "favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true").

Black therefore confirmed what the court below denied—that the recurring *mens rea* standards of First Amendment law apply as much to the "true threat" exception as to the exceptions for incitement, defamation, and other forms of unprotected speech. This constitutional rule reflects the recognition that

occasional statements perceived by others as threatening, like "erroneous statement[s]," are "inevitable in free debate." *Sullivan*, 376 U.S. at 271; *cf. Watts*, 394 U.S. at 708 (noting that "[t]he language of the political arena * * * is often vituperative, abusive, and inexact" and finding violent "political hyperbole" not to be a proscribable true threat).

Petitioner's case itself demonstrates the need for a specific-intent requirement, but other examples of potential misunderstandings leading to criminal prosecutions are commonplace. In *United States* v. *Fulmer*, for instance, the defendant was convicted of threatening an FBI agent after, having uncovered new evidence in a case, he told the agent that "the silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). Despite evidence that the defendant routinely used the phrase to refer to "specific evidence," he was convicted of threatening the agent under an objective "reasonable person" standard after the agent testified that he was unfamiliar with the phrase and found the message "scary." *Ibid*.

The First Amendment does not permit such criminal punishment "for poorly chosen words." Rothman, *supra*, at 350. This case offers a suitable vehicle for the Court to clarify that, because only true threats may be criminalized, the government must prove some form of an intent to threaten if it is to prevail in a prosecution under a threat statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2013

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 11-5722

FRANKLIN DELANO JEFFRIES, II,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 3:10-cr-100-1—Thomas W. Phillips, District Judge.

Argued: July 17, 2012
Decided and Filed: August 27, 2012

Before: SUTTON and GRIFFIN, Circuit Judges; DOWD, District Judge.*

COUNSEL

ARGUED: Jonathan Harwell, HARWELL & HARWELL, P.C., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Jonathan Harwell, Ralph E. Harwell, HARWELL & HARWELL, P.C., Knoxville, Tennessee, for Appellant. Luke A. McLaurin, Kelly A. Nor-

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* The Honorable David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.

ris, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

SUTTON, J., delivered the opinion of the court in which GRIFFIN, J., and DOWD, D. J., joined. SUTTON, J. (pp. 16-20), also delivered a separate dubitante opinion.

OPINION

SUTTON, Circuit Judge. Tangled in a prolonged legal dispute over visitation rights to see his daughter, Franklin Delano Jeffries II tried something new. He wrote a song. The title, "Daughter's Love," gives away half of the lyrics. The song contains sweet passages about relationships between fathers and daughters and the importance of spending time together. The rest boils into an assortment of the banal (complaints about his ex-wife), the ranting (gripes about lawyers and the legal system) and the menacing (threats to kill the judge if he doesn't "do the right thing" at an upcoming custody hearing). Jeffries set the words to music and created a video of himself performing the song on a guitar painted with an American flag on it. The style is part country, part rap, sometimes on key, and surely therapeutic. Had Jeffries left it at that, there would be nothing more to say.

But he did not. He posted the music video on YouTube and shared it with friends, family and a few others. The timing left something to be desired. Six months earlier, the judge assigned to his custody case, Knox County Chancellor Michael Moyers, had granted Jeffries' petition for unsupervised visits. For

reasons the record does not fully disclose, the judge set a hearing to re-evaluate Jeffries' visitation rights. Five days before the scheduled hearing, Jeffries uploaded the video.

In the video, Jeffries sings of his upcoming visitation hearing and directs his words to Chancellor Moyers, saying, "This song's for you, judge." Here are the lyrics of the song in full, a few of which Jeffries speaks rather than sings:

I've had enough of this abuse from you.
It has been goin' on for 13 years.
I have been to war and killed a man.
I don't care if I go to jail for 2,000 years.
'Cause this is my daughter we're talkin' about,
And when I come to court this better be the last time.
I'm not kidding at all, I'm making this video public.

'Cause if I have to kill a judge or a lawyer or a woman I don't care.
'Cause this is my daughter we're talking about.
I'm getting tired of abuse and the parent alienation.
You know its abuse.

I love you; daughters are the beautiful things in my life.
It keeps me going and keeps me alive everyday.
Take my child and I'll take your life.

I'm not kidding, judge, you better listen to me.
I killed a man downrange in war.
I have nothing against you, but I'm tellin' you this better be the last court date.
Because I'm gettin' tired of missin' out on my daughter's love.

(And that's the name of the song by the way "Daughter's Love.")

And I'm getting tired of you sickos
Thinking it's the right thing for the children.
You think it's the best interest of the child,
But look at my daughter from her mother's abuse.
She's mentally and physically abused her,
And I'm getting tired of this bull.

So I promise you, judge, I will kill a man.
This time better be the last time I end up in court
'Cause, damn, this world is getting tired.
When you don't have your daughter to love on or have a big hug
'Cause she's so mentally abused and psychologically gone.
She can't even hold her own dad
Because her mom has abused [her] by parent alienation [].

And this s___ needs to stop because you're gonna lose your job.
And I guarantee you, if you don't stop, I'll kill you.
'Cause I am gonna make a point either way you look at it somebody's gotta pay,
And I'm telling you right now live on the Internet.
So put me in jail and make a big scene.
Everybody else needs to know the truth.

'Cause this s___'s been going on for 13 years and now my daughter's screwed up

'Cause the judge and the lawyers need money.
They don't really care about the best interest of the child.
So I'm gonna f___ somebody up, and I'm going back to war in my head.
So July the 14th is the last time I'm goin' to court.

Believe that. Believe that, or I'll come after you after court. Believe that.

I love my daughter.
Nobody's going take her away from me.
'Cause I got four years left to make her into an adult.
I got four years left until she's eighteen.
So stop this s___ because I'm getting tired of you,
And I don't care if everybody sees this Internet site
Because it is the truth and it's war.
Stop abusing the children and let 'em see their dads,
'Cause I love you, Allison.

I really do love you. I want to hold you and hug you, and I want the abuse to stop.
That's why I started Traumatized Foundation.org.
Traumatized Foundation.org.

Because of children being left behind, being abused by judges, the courts.
They're being abused by lawyers.
The best interest ain't of the child anymore.
The judges and the lawyers are abusing 'em.

Let's get them out of office. Vote 'em out of office.
If fathers don't have rights or women don't have their rights or equal visitation,
Get their ass out of office.
'Cause you don't deserve to be a judge and you don't deserve to live.
You don't deserve to live in my book.
And you're gonna get some crazy guy like me after your ass.
And I hope I encourage other dads to go out there and put bombs in their goddamn cars.

> *Blow 'em up*. Because it's children we're, children we're talkin' about.
>
> I care about her.
> And I'm willing to go to prison,
> But somebody's gonna listen to me,
> Because this is a new war.
>
> This ain't Iraq or Afghanistan. This is goddamn America. This is my goddamn daughter. There, I cussed. Don't tell me I can't f___in' cuss.
> Stupid f___in' [Guitar crashes over in the background] *BOOM!*
> *There went your f___in' car. I can shoot you. I can kill you. I can f___ you. Be my friend. Do something right. Serve my daughter.*
>
> Yeah, look at that, that's the evil. You better keep me on God's side.
> *Do the right thing July 14th*.

R.103-7 (emphases added).

Jeffries posted a link to the video on his Facebook wall and sent links to twenty-nine Facebook users, including Tennessee State Representative Stacey Campfield, WBIR Channel 10 in Knoxville, and DADS of Tennessee, Inc., an organization devoted to empowering divorced fathers as equal partners in parenting. Twenty-five hours later, Jeffries removed the video from YouTube and his Facebook page. That was too late. By then, the sister of Jeffries' ex-wife had seen the link on Jeffries' wall and told the judge about it.

Law enforcement got wind of the video, and the italicized words caught their attention. Federal prosecutors charged Jeffries with violating a federal law that prohibits "transmit[ting] in interstate or foreign

commerce any communication containing any threat to . . . injure the person of another"—namely Chancellor Moyers. 18 U.S.C. § 875(c). A jury convicted Jeffries.

Elements of § 875(c). The heart of Jeffries' appeal turns on a jury instruction, which turns on the proper elements of a § 875(c) charge. The parties agree that Jeffries could be convicted only if his threat was objectively real, only if a reasonable person would have perceived Jeffries' words and conduct as a true threat to Chancellor Moyers. The question is whether the court, as Jeffries claims, also should have instructed the jury that it could convict Jeffries only if he subjectively meant to threaten the judge.

Here is what the court instructed the jury to do:

> In evaluating whether a statement is a true threat, you should consider whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury on Chancellor Moyers and whether the communication was done to effect some change or achieve some goal through intimidation.
>
> * * *
>
> The communication must be viewed from an objective or reasonable person perspective. Accordingly, any statements about how Chancellor Moyers perceived or felt about the communication are irrelevant. In fact, it is not relevant that Chancellor Moyers even viewed the communication. The defendant's subjective intent in making the communication is also irrelevant. Unlike most criminal

> statutes, the government does not have to prove defendant's subjective intent. Specifically, the government does not have to prove that defendant subjectively intended for Chancellor Moyers to understand the communication as a threat, nor does the government have to prove that the defendant intended to carry out the threat.

R.121 at 259–61.

Here is what Jeffries asked the court to say in the jury instructions:

> In determining whether a communication constitutes a "true threat," you must determine the defendant's subjective purpose in making the communication. If the defendant did not seriously intend to inflict bodily harm, or did not make the communication with the subjective intent to effect some change or achieve some goal through intimidation, then it is not a "true threat."

R.87 at 6.

Based on existing precedent, the court correctly rejected Jeffries' proposed instruction. The language of the statute prohibits "any" interstate "communication" that "contain[s] any threat to . . . injure the person of another." 18 U.S.C. § 875(c). In proscribing interstate "communication[s]" of this sort, § 875(c) punishes speech. That is something courts must keep "in mind" in construing the statute, *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam), but it is not something that insulates Jeffries' words from criminalization. Words often are the sole means of committing crime—think bribery, perjury, blackmail, fraud. Yet the First Amendment does not disable

governments from punishing these language-based crimes, *United States* v. *Varani*, 435 F.2d 758, 762 (6th Cir. 1970), many of which pre-dated the First Amendment.

All that the First Amendment requires in the context of a § 875(c) prosecution is that the threat be real—a "true threat." *Watts*, 394 at 708. Once that has been shown, once the government shows that a reasonable person would perceive the threat as real, any concern about the risk of unduly chilling protected speech has been answered. For if an individual makes a true threat to another, the government has the right, if not the duty, to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur," all of which places the menacing words and symbols "outside the First Amendment." *R.A.*V. v. *City of St. Paul*, 505 U.S. 377, 388 (1992); *cf. Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *see also United States* v. *White*, 670 F.3d 498, 507 (4th Cir. 2012).

A § 875(c) prosecution, then, generally requires the government to establish that the defendant (1) made a knowing communication in interstate commerce that (2) a reasonable observer would construe as a true threat to another. Once the government makes this showing, we have held it matters not what the defendant meant by the communication, as opposed to how a reasonable observer would construe it. In *United States* v. *DeAndino*, we held that § 875(c) is a general-intent crime that does not require proof of "a specific intent to threaten based on the defendant's subjective purpose." 958 F.2d 146, 149 (6th Cir. 1992). At issue there was an indictment charging a defendant with "willfully transmitt[ing] a

communication containing a threat" to "blow [the victim's] brains out." *Id.* at 147. The district court dismissed the indictment on the ground that a defendant could be convicted only if she "willfully threatened or intended to threaten." *Id.* We reversed, explaining that nothing in the statutory text indicated "a heightened mental element such as specific intent." *Id.* at 148.

United States v. *Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997), is of a piece. At issue was an indictment charging Alkhabaz with sending a co-conspirator emails "express[ing] a sexual interest in violence against women and girls." *Id.* at 1493. We upheld a dismissal of the indictment, concluding that to come within § 875(c) a threat must be communicated with intent (defined objectively) to intimidate. *Id.* at 1493, 1495. There, too, we re-affirmed that the statute does "not express[] a subjective standard." *Id.* at 1496. To convict under § 875(c), a jury need conclude only that "a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus)." *Id.* at 1495. In each case, the defendant's subjective intent had nothing to do with it.

We do not stand alone. Several circuits have expressly rejected an additional subjective requirement in construing this and related threat prohibitions. *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997); *United States* v. *Francis*, 164 F.3d 120, 123 (2nd Cir. 1999); *United States* v. *Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994); *United States* v. *Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994); *United States* v. *Myers*, 104 F.3d 76, 80–81 (5th Cir. 1997); *United*

States v. *Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990). All of the others, with one exception (more on that later), have effectively reached the same conclusion by laying out a test that asks only whether a reasonable observer would perceive the threat as real. *See United States* v. *Mabie*, 663 F.3d 322, 332 (8th Cir. 2011); *United States* v. *Welch*, 745 F.2d 614, 619 (10th Cir. 1984); *United States* v. *Callahan*, 702 F.2d 964, 965 (11th Cir. 1983) (per curiam); *Metz* v. *Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). *But see United States* v. *Twine*, 853 F.2d 676, 681 (9th Cir. 1988) (holding that conviction under § 875 "require[s] a showing of a subjective, specific intent to threaten").

That would be the end of it but for one thing: *Virginia* v. *Black*, 538 U.S. 343 (2003). As Jeffries reads the decision, it invalidates all communicative-threat laws under the First Amendment unless they contain a subjective-threat element. The argument is not frivolous, as one court (the Ninth) has accepted it. But the position reads too much into *Black*.

At issue in *Black* was a state-law prohibition on cross burning, which forbade cross burning with "an intent to intimidate a person or group of persons." *Id.* at 347. Of critical import, the statute "treat[ed] any cross burning as prima facie evidence of intent to intimidate." *Id.* at 347-48. The Court upheld the statute's prohibition on cross burning but struck down the prima facie evidence provision as overbroad because "a burning cross is not always intended to intimidate." *Id.* at 365. A cross burning used in a movie or at a political rally, the Court explained, would be protected speech and could not be used as prima facie evidence of criminal intimidation. *Id.* at 366.

Black does not work the sea change that Jeffries proposes. The case merely applies—it does not innovate—the principle that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707. It says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective "intent." The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all. The prima facie evidence provision failed to distinguish true threats from constitutionally protected speech because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate," and allowed convictions "based solely on the fact of cross burning itself." *Id.* at 365, 367.

No such problem exists here. The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made: A juror cannot permissibly ignore contextual cues in deciding whether a "reasonable person" would perceive the charged conduct "as a serious expression of an intention to inflict bodily harm." *Alkhabaz*, 104 F.3d at 1495. Unlike Virginia's cross-burning statute, which did "not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn," *Virginia* v. *Black*, 538 U.S. 343, 366 (2003), the reasonable-person standard accounts for such distinctions. A reasonable listener understands that a gangster growling "I'd like to sew your mouth shut" to a recalcitrant debtor carries a different connotation from the impression left when a can-

didate uses those same words during a political debate. And a reasonable listener knows that the words "I'll tear your head off" mean something different when uttered by a professional football player from when uttered by a serial killer.

The objective standard also complements the explanation for excluding threats of violence from First Amendment protection in the first place. Much like their cousins libel, obscenity, and fighting words, true threats "by their very utterance inflict injury" on the recipient. *Chaplinsky*, 315 U.S. at 572. While the First Amendment generally permits individuals to say what they wish, it allows government to "protect[] individuals" from the effects of some words—"from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 377, 388; *Black*, 538 U.S. at 344. What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech.

Jeffries maintains that two statements in *Black* nonetheless demand a subjective inquiry as well: "'True threats' encompass 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; and intimidation "is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death," *id.* at 360. The first statement shows only that a defendant "means to communicate" when she knowingly says the words. *See United States* v. *White*, 670 F.3d 498, 509 (4th Cir. 2012) (concluding that

"means to communicate" in Black refers to the act of communicating, not the intent to threaten); *see also United States* v. *Kimes*, 246 F.3d 800, 806-07 (6th Cir. 2001) ("[A] general intent crime requires the knowing commission of an act that the law makes a crime."). The second statement shows that intimidation is *one* "type of true threat," a reality that does little to inform § 875(c), which prohibits *all* types of threats to injure a person.

Most of the other appellate courts to consider the issue have agreed that *Black* by itself does not provide a basis for overruling the objective standard. *See White*, 670 F.3d at 508-11 (4th Cir. 2012); *Mabie*, 663 F.3d at 332 (8th Cir. 2011); *United States* v. *Wolff*, 370 F. App'x 888, 892 (10th Cir. 2010) (asking only "whether a reasonable person would find that a threat existed"). One circuit declined to resolve the issue but said in dicta "that an entirely objective definition is no longer tenable." *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008). The other, largely consistent with its prior precedents, holds that *Black*'s "means to communicate" language adds a subjective gloss that "must be read into all threat statutes that criminalize pure speech." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011). Whether *Bagdasarian* represents the best original reading of the statute is one thing; but the idea that *Black*, a case about a statute that makes cross burning prima facie evidence of intent to intimidate, requires a change to a circuit's precedent concerning threats is another. As we see it, *Black* cannot be read so broadly, requiring us to stand by our decisions in *DeAndino* and *Alkhabaz*.

Sufficiency of the evidence. Jeffries separately argues that, even if the trial court correctly instructed

the jury, there was insufficient evidence to convict him. The question is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). The government met this modest standard.

The key evidence is the video. In it, Jeffries repeatedly says he will kill Chancellor Moyers if things do not go his way in the upcoming custody/visitation hearing. The threats are many, and a jury reasonably could take them as real:

> "When I come to court this better be the last time";
>
> "Take my child and I'll take your life";
>
> "I killed a man downrange in war. I have nothing against you, but I'm tellin' you this better be the last court date";
>
> "So I promise you, judge, I will kill a man";
>
> "And I guarantee you, if you don't stop, I'll kill you";
>
> "So I'm gonna f___ somebody up, and I'm going back to war in my head.
>
> So July the 14th is the last time I'm goin' to court. Believe that. Believe that, or I'll come after you after court";
>
> "Cause you don't deserve to be a judge and you don't deserve to live. You don't deserve to live in my book";
>
> "And I hope I encourage other dads to go out there and put bombs in their goddamn cars. Blow 'em up";

> "There went your f___in' car. I can shoot you. I can kill you."

R.103-7.

The threats had an objective: getting the judge to "do the right thing July 14th." *Id.* And through all of the threats, his words (I am "not kidding") and his appearance (plenty of glares and no hints of a smile) left the distinct impression that the threats were real. He urged others to bomb judges' cars, and claimed he was willing to go to prison if necessary. Nor was he shy about his distribution of the video. He posted the video publicly, sent it to a television station and state representative, and urged others to "take it to the judge." R.103-5. On this record, a rational juror could conclude that a reasonable person would take the video as "a serious expression of an intention to inflict bodily harm . . . communicated to effect some change or achieve some goal." *Alkhabaz*, 104 F.3d at 1495.

No doubt, it is unusual or at least a sign of the times that the vehicle for this threat was a music video. Best we can tell, this is the first reported case of a successful § 875(c) prosecution arising from a song or video. One answer to the point is that the statute covers "any threat," making no distinction between threats delivered orally (in person, by phone) or in writing (letters, emails, faxes), by video or by song, in old-fashioned ways or in the most up-to-date. Nor would this be the first time that an old flask was filled with new wine—that an old statute was applied to a technology nowhere to be seen when the law was enacted. *See OfficeMax, Inc.* v. *United States*, 428 F.3d 583, 586 (6th Cir. 2005). Another answer to the point is that the method of delivering a threat illuminates context, and a song, a poem, a

comedy routine or a music video is the kind of context that may undermine the notion that the threat was real. But one cannot duck § 875(c) merely by delivering the threat in verse or by dressing it up with political (and protected) attacks on the legal system. Sure, "one man's vulgarity is another's lyric," *Cohen* v. *California*, 403 U.S. 15, 25 (1971), but we leave behind "matters of taste and style," *id.*, when an individual makes a real threat to harm another. Had Bob Dylan ended "Hurricane" with a threat to kill the judge who oversaw Rubin Carter's trial, the song's other lyrics or the music that accompanied them would not by themselves have precluded a prosecution. In the same way, Jeffries cannot insulate his menacing speech from proscription by conveying it in a music video or for that matter by performing the song with a United States flag burning in the background. *See Texas* v. *Johnson*, 491 U.S. 397 (1989).

Facebook messages. Jeffries argues that a dozen Facebook messages shown to the jury were irrelevant. Jeffries' twenty-eight posts on Facebook contained not just links to his YouTube video but also short messages to the recipients. Most of them encouraged his friends to show the video to Chancellor Moyers. Examples include: "Give this to Danny and the Judge"; "Give this to the Judge for court"; and "Tell the judge." R.103-5. A few messages sounded a different tune: "Comedy for the courts," and "Here is my public voice for the Judges in Knoxville Tennessee." *Id.* While many of these messages were shown to the jury, none of them was covered by the indictment, which charged Jeffries with transmitting "a video of himself posted on the public internet websites YouTube and Facebook." R.33.

The Facebook messages were relevant because they gave context to the video. Whether a reasonable person would take the video "as a serious expression of an intention to inflict bodily harm" depends on its setting. The messages became part of that backdrop when Jeffries included them together with the YouTube link in a single communication. Because *Alkhabaz* required the prosecution to prove that a reasonable person "would perceive such expression as being communicated to effect some change or achieve some goal through intimidation," 104 F.3d at 1495, moreover, the messages were relevant to that feature of the crime. At a minimum, the messages tend to show that a reasonable receiver would perceive the video as intended to reach the judge and influence his decision in Jeffries' upcoming hearing.

Jeffries persists that the only relevant messages were those that reached or could have reached Chancellor Moyers or Amanda Long (the woman who viewed the video and brought it to Moyers' attention). Br. 45. As Jeffries sees it, Chancellor Moyers was the recipient of the video, and only his perspective matters. *See Alkhabaz*, 104 F.3d at 1496. But § 875(c) does not require a threat to be communicated to its target. It prohibits a "communication containing any threat" regardless of whether the threat reaches the target. *See id.* at 1495-96. Each of Jeffries' Facebook links represents a communication. Although Chancellor Moyers was the only target of Jeffries' threat, he was not the only receiver of the communication: All of the Facebook friends to whom Jeffries sent the video were recipients. The messages accompanying each link were available to these recipients, and they provide relevant context for determining whether, objectively speaking, a recipient would perceive the video as a threat. The district

court did not abuse its discretion by allowing the jury to consider all of the messages as part of all of the contexts in which Jeffries made these communications. *See* Fed. R. Evid. 403.

Other YouTube videos. Jeffries adds that the district court should have allowed him to show the jury other videos he posted on Facebook. Br. 49. But he posted the other videos weeks prior to the one at issue, and their content was unrelated to the hearing with Chancellor Moyers, eliminating the possibility of error, abuse of discretion or otherwise, in excluding them.

The key video was captioned "Coors Beer Sucks." Although these clips might have entertained the jury and illustrated Jeffries' "sometimes peculiar sense of humor," Br. 50, they were not part of the targeted communication's context for purposes of determining whether a recipient of the Chancellor Moyers video would perceive it as a threat. The court thus properly excluded this video and several others—"Fastest Pin in Wrestling History," "PT Belt Part One," "Funniest Video on YouTube (The Big Chair)," "Auditions for Fathers," R.99-2—as irrelevant. *See* Fed. R. Evid. 402.

Venue. Jeffries claims venue was not proper in the Eastern District of Tennessee because he recorded and uploaded the video in the Western District. But Jeffries transmitted his video "from, through, or into" the Eastern District, just as the venue statute demands. 18 U.S.C. § 3237(a). Through at least two Facebook links, he transmitted the video to recipients in the Eastern District: Jeffries' sister and the news station WBIR Channel 10.

For these reasons, we affirm.

DUBITANTE

SUTTON, Circuit Judge, dubitante. Sixth Circuit precedent compels this interpretation of § 875(c), one that requires the government to prove only that a reasonable observer would construe the communicated words as a threat, not that the defendant meant the words to be a threat as well. The First Amendment, as construed by *Virginia* v. *Black*, 538 U.S. 343 (2003), does not require a different interpretation. I write separately because I wonder whether our initial decisions in this area (and those of other courts) have read the statute the right way from the outset.

The statute prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to . . . injure the person of another." 18 U.S.C. § 875(c). The key phrase is "threat . . . to injure the person of another." The key word is "threat."

Every relevant definition of the noun "threat" or the verb "threaten," whether in existence when Congress passed the law (1932) or today, includes an intent component. "[T]o declare (usually conditionally) one's intention of inflicting injury upon" a person, says one dictionary. 11 Oxford English Dictionary 352 (1st ed. 1933). "[A]n expression of an intention to inflict loss or harm on another by illegal means, esp. when effecting coercion or duress of the person threatened," says another. Webster's New Int'l Dictionary 2633 (2d ed. 1955). "A communicated intent

to inflict harm or loss on another," says still another. Black's Law Dictionary 1489 (7th ed. 1999). And so on: "An expression of an intention to inflict pain, injury, evil, or punishment." American Heritage Dictionary of the English Language 1801 (4th ed. 2000). And on: "An expression of intention to inflict something harmful." Webster's New College Dictionary 1149 (1995). And on: "[A] declaration of an intention or determination to inflict punishment, injury, etc., in retaliation for, or conditionally upon, some action or course." Random House Unabridged Dictionary 1975 (2d ed. 1987).

Conspicuously missing from *any* of these dictionaries is an objective definition of a communicated "threat," one that asks *only* how a reasonable observer would perceive the words. If words matter, I am hard pressed to understand why these definitions do not resolve today's case. The definitions, all of them, show that subjective intent is part and parcel of the meaning of a communicated "threat" to injure another.

The history of § 875 reinforces this conclusion. The law made its first appearance in 1932, starting out only as a prohibition on extortion. It encompassed threats coupled with an intent to extort something valuable from the target of the threat. Pub. L. No. 72-274 (1932) (prohibiting a "threat" communicated "with intent to extort . . . money or other thing of value"). From the beginning, the communicated "threat" thus had a subjective component to it. Nothing changed when Congress added a new "threat" prohibition through § 875(c) in 1939. The question was whether the legislature should prohibit nonextortive threats, not whether the statute should cover words that might be perceived as threatening

but which the speaker never intended to create that perception. *See* Pub. L. No. 76-76 (1939). In debates about the bill, the notion of intention-free threats never came up; what dominated the discussion was the distinction between threats made for the purpose of extorting money and threats borne of other (intentional) purposes: "animosity," "spite" or "revenge." *Threatening Communications: Hearing Before the Comm. on the Post Office and Post Roads*, 76th Cong. 7, 9 (1939) (statement of William W. Barron, Dept. of Justice). In prohibiting non-extortive threats through the addition of § 875(c), Congress offered no hint that it meant to write subjective conceptions of intent out of the statute.

Background norms for construing criminal statutes point in the same direction. Courts presume that intent is the required mens rea in criminal laws, *Morissette* v. *United States*, 342 U.S. 246, 250 (1952), a presumption that applies at a minimum to the "crucial element separating legal innocence from wrongful conduct," *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). The crucial element of § 875(c)—what divides innocence from crime—is a threat. It is not enough that a defendant knowingly communicates *something* in interstate commerce; he must communicate a threat, a word that comes with a state-of-mind component. Allowing prosecutors to convict without proof of intent reduces culpability on the all-important element of the crime to negligence. That after all is what an objective test does: It asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way. The reasonable man rarely

takes the stage in criminal law. Yet, when he does, the appearance springs not from some judicially manufactured *deus ex machina* but from an express congressional directive. *Id*; *see U.S.S.G. § 2 B3.1* cmt. n.6 (defining "threat of death" only as "conduct that would instill in a reasonable person . . . a fear of death"). No such directive exists here. To the contrary: In enacting § 875(c), Congress just used the word "threat," indicating that one cannot make a prohibited menacing communication without meaning to do so.

What, then, explains, all of this contrary authority? I am not sure. None of the cases addressing this issue cites, much less quotes, any dictionary definitions of "threat." Nor do any of them mention the history of the statute, its roots in extortion or its purpose. To the extent the cases mention the presumption in favor of a mens rea for a criminal statute, they say only that this customary feature of criminal laws is answered by the requirement that the threat be knowingly communicated, not that it be subjectively threatening, even though the threat is the defining feature of the crime.

Instead of heeding these conventional indicators of meaning, some of the cases, including our own, have framed the inquiry as one of general versus specific intent, equating general intent with an objective definition of "threat." "If the statute contains a general intent requirement," we have said, "the standard used to determine whether or not the communication contained an actual threat is an objective standard . . . . If the statute contains a specific intent requirement, the standard is a subjective standard." *DeAndino*, 958 F.2d at 148. I am not sure where *DeAndino* found the rule that general intent is syn-

onymous with an objective definition of threat. However useful this concept may be in deciphering laws in other areas, perhaps even in criminal cases from time to time, the distinction does not entitle courts to alter the meaning of "threat."

Other cases, many of the recent ones, have looked at this issue through the prism of free-speech principles and the *Black* decision. But the bright lights of the First Amendment may have done more to distract than inform. Ever since the *Watts* decision in 1969, it has been clear as a matter of constitutional avoidance that threat prohibitions like this one cover only "real" threats, threats in other words that a reasonable observer would take as true and real. *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam). That is all well and good, as it makes sense to interpose this objective requirement on the criminalization of speech. But that consideration offers no basis for alchemizing the normal meaning of threat into an objective-intent question *alone*. What should happen instead is this: The statute should require first what the words say (a subjectively intended threat) and second what constitutional avoidance principles demand (an objectively real threat).

Nor is it the least bit unusual to adopt a legal standard that contains objective and subjective components. *See, e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994) (laying out objective and subjective components of an Eighth Amendment prison claim); *Hadjimehdigholi* v. *I.N.S.*, 49 F.3d 642, 646 (10th Cir. 1995) ("The well-founded fear of persecution standard [for refugee status] is comprised of both a subjective and an objective component."); *United States* v. *Spinelli*, 848 F.2d 26, 28 (2d Cir. 1988) ("[T]he proper standard for determining whether ex-

igent circumstances warranted noncompliance with the knock-and-announce statute comprises both subjective and objective components."); *Vikase Companies, Inc.* v. *World PAC Inter'l AG*, 710 F. Supp. 2d 754, 756 (N.D. Ill. 2010) ("The test for bad faith comprises both objective and subjective components.").

When some law-making bodies "get into grooves," Judge Learned Hand used to say, "God save" the poor soul tasked with "get[ting] them out." Hand, *The Spirit of Liberty* 241-42 (2d ed. 1954). That may be Franklin Delano Jeffries' fate—and ours. The Department of Justice, defense lawyers and future courts may wish to confirm that the current, nearly uniform standard for applying § 875(c) is the correct one. I am inclined to think it is not.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)
v.	) No. 3:10-CR-100
	) (Phillips)
FRANKLIN DELANO JEFFRIES, II	)

MEMORANDUM AND ORDER

This matter is before the Court on Franklin Delano Jeffries, II's ("Mr. Jeffries") Motion for Judgment of Acquittal or New Trial [Doc. 104]. On July 21, 2010, Mr. Jeffries was indicted for violating 18 U.S.C. § 875(c). [Original Indictment, Doc. 2]. Specifically, Mr. Jeffries was charged with knowingly transmitting in interstate commerce a communication–a video–which contained a threat to injure and kill Knox County Chancellor Michael W. Moyers ("Chancellor Moyers"). Mr. Jeffries uploaded the video on or about July 9, 2010, on the Internet websites "YouTube" and "Facebook." During this time, Mr. Jeffries was involved in a custody dispute over his teenage daughter. Chancellor Moyers served as the judge overseeing this matter.

On November 16, 2010, the Government filed a Superseding Indictment [Doc. 33][1]. On March 29,

[1] The Superseding Indictment [Doc. 33] charges Mr. Jeffries with uploading a video on the Internet websites "YouTube" *and*

2011, the jury trial in this case began. At the close of the Government's case-in-chief, Mr. Jeffries moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The motion was based on two grounds. First, Mr. Jeffries argued that the Government failed to establish proper venue. Second, Mr. Jeffries argued that the Government failed to establish sufficient evidence to support a conviction. The Court rejected both arguments.

On March 31, 2011, the jury returned a guilty verdict on the sole count of the Superseding Indictment [Doc. 33]. On April 14, 2011, Mr. Jeffries filed a Motion for Judgment of Acquittal or New Trial [Doc. 104]. First, Mr. Jeffries argues that he did not waive his venue challenge, even though he did not raise it until trial. [*Id.*]. Second, assuming that he did not waive his venue challenge, Mr. Jeffries argues that the Government failed to establish venue by a preponderance of the evidence. [*Id.*]. Third, Mr. Jeffries argues that the evidence was insufficient to support his conviction. [Id.]. As for the third argument, Mr. Jeffries challenges the sufficiency of the evidence under Rule 29 ("Judgment of Acquittal") and Rule 33 ("New Trial") of the Federal Rules of Criminal Procedure. [*Id.*].

On April 28, 2011, the Government filed its Response to Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc. 110]. First, the Government argues that Mr. Jeffries waived his venue challenge by not raising it prior to trial. [*Id.*]. Alternatively, the Government argues that even if Mr. Jeffries did not waive his venue challenge, it estab-

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"Facebook." The Original Indictment [Doc. 2] did not mention Facebook.

lished venue by a preponderance of the evidence. [*Id.*]. Second, the Government argues that the evidence was sufficient to support Mr. Jeffries's conviction. [*Id.*]. On May 5, 2011, Mr. Jeffries filed a reply in support of his motion. [Doc. 111].

For the following reasons, Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc. 104] is **DENIED**. First, the Court finds that Mr. Jeffries waived his venue challenge by not raising it prior to trial. Alternatively, the Court finds that even if Mr. Jeffries did not waive his venue challenge, the Government established venue by a preponderance of the evidence. Second, the Court finds that the evidence was sufficient to support Mr. Jeffries's conviction.

I. BACKGROUND

On or about July 9, 2010, Mr. Jeffries uploaded a video on the Internet website "YouTube.com" ("YouTube"), which is a "highly popular online video sharing service."[2] Mr. Jeffries uploaded the video while he was in Clarksville, Tennessee, which is located in the Middle District of Tennessee. The video is titled "Daughter's Love" (the "Video"), and is seven minutes and forty-three seconds in length. During most of the Video, Mr. Jeffries sings and plays a guitar. However, he also interrupts the song with short tirades.

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[2] *Tir* v. *YouTube*, Inc., 562 F.3d 1212, 1213 (9th Cir. 2009). For additional background on YouTube, *see generally Viacom Int'l, Inc.* v. *YouTube, Inc.*, 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010) ("Defendant YouTube, owned by defendant Google, operates a website at http://www.youtube.com onto which users may upload video files free of charge. Uploaded files are copied and formatted by YouTube's computer systems, and then made available on YouTube.").

The Video focuses on Mr. Jeffries's custody dispute, his alienation with the legal system, and the need to take action against judges (including the use of violence, such as car bombs). The Video also contains several threats against Chancellor Moyers, along with demands related to the custody dispute. To understand the content of the Video, one first needs to understand the context in which it was made.

For the past thirteen years, Mr. Jeffries has been involved in a custody dispute with his ex-wife, Tarah Poss ("Ms. Poss"), who has primary custody of his teenage daughter, Allison. When the Video was uploaded on YouTube, Chancellor Moyers was the judge overseeing the custody dispute. In November 2009, Mr. Jeffries filed a petition for visitation rights. In January 2010, Chancellor Moyers entered an order stating that he would review Mr. Jeffries's request in six months. A hearing was then scheduled for July 14, 2010, during which time Chancellor Moyers would address Mr. Jeffries's visitation rights. Specifically, Chancellor Moyers would determine if Mr. Jeffries was entitled to additional time with his daughter, less time, or the status quo. This was dependent upon several factors, including Mr. Jeffries's behavior towards his daughter (such as his use of profanity). Chancellor Moyers also wanted to determine if Mr. Jeffries had relocated to Knoxville, Tennessee (he was living in Clarksville, Tennessee at the time). While the Video never mentions Chancellor Moyers by name, it clearly was addressed to him.[3]

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[3] Most obvious, the Video begins with Mr. Jeffries saying "This song's for you, judge," and closes with the words, "Do the right thing July 14th." Clearly, this is a reference to the hearing

On or about July 9, 2010, Mr. Jeffries uploaded the Video on YouTube. This was only a few days before the hearing scheduled for July 14, 2010. After uploading the Video on Youtube, Mr. Jeffries uploaded (or "posted") a link of the Video on "Facebook,"[4]

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scheduled for July 14, 2010, which was set by Chancellor Moyers.

Mr. Jeffries also states during the Video, "Don't tell me I can't fucking cuss." During trial, Chancellor Moyers explained that he was concerned with Mr. Jeffries's use of profanity around Allison. Chancellor Moyers had previously entered an order stating that Mr. Jeffries needed to refrain from cussing around his daughter. Mr. Jeffries's statement clearly refers to this court order.

Along with the numerous references to the custody dispute, the July 14th hearing, and "judge," it's clear that the threats and demands in the Video were directed to Chancellor Moyers. While Mr. Jeffries did not send the Video to Chancellor Moyers, the subject matter of the Video and his requests–namely, to increase his visitation rights–clearly demonstrate that the Video was directed to Chancellor Moyers.

[4] "Facebook developed and operates what is now one of the most popular social networking websites. The Facebook website allows users to create user profiles, join networks and 'friend' other users, which creates online communities with shared interests and connections." *Facebook, Inc.* v. *Power Ventures, Inc.*, No. C 08-5780 JF (RS), 2009 WL 1299698, at *1 (N.D. Cal. May 11, 2009) (internal citation omitted). When one receives a post (or message) on his or her Facebook account, it can be viewed by that individual's Facebook "friends," or anyone on Facebook if certain certain privacy settings have not been activated. *See generally Lane* v. *Facebook, Inc.*, No. C 08-3845 RS, 2009 WL 3458198, at *1 n. 1 (N.D. Cal. Oct. 23, 2009) ("Generally, under the [Beacon] program, if a member of Facebook visited one of the participating websites, it could then transmit information regarding the member's activities on the website to Facebook. In turn, Facebook could post the information on the member's Facebook 'wall' and distribute it to the 'newsfeeds' of the member's Facebook 'friends.'").

the popular Internet social networking site. First, Mr. Jeffries posted a link of the Video on the "Wall" of his "profile" (or user page).[5] Second, Mr. Jeffries sent messages to at least twenty-nine other persons (or entities[4]) on Facebook. The messages included two parts: (1) a link to the Video on YouTube; and (2) a short statement about the Video. For example, Mr. Jeffries sent messages stating "tell the Judge I am crazy" and "Tell the Judge." Some of the messages were sent to persons in the Eastern District of Tennessee.

During trial, Molly Newman ("Ms. Newman"), an employee at Facebook, testified that Mr. Jeffries sent messages to at least twenty-nine other persons or entities on Facebook. Ms. Newman works for Facebook's "Law Enforcement Response Team," and is responsible for responding to legal requests. Ms. Newman explained that Facebook assigns user identification numbers ("Facebook ID Number") unique to each account holder. Ms. Newman identified Mr. Jeffries's Facebook ID Number, and then traced the messages to his account. Ms. Newman also compiled

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[5] As one court has explained, "[e]ach computer connected to the Internet is assigned a unique numerical address, otherwise known as an Internet protocol or IP address, to identify itself and facilitate the orderly flow of electronic traffic." *Peterson* v. *Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 728 (4th Cir. 2007). *See also United States* v. *Perrine*, 518 F.3d 1196, 1199 n.2 (10th Cir. 2008) ("The IP, or Internet Protocol, address is unique to a specific computer. Only one computer would be assigned a particular IP address.") (quotations omitted).

[4] Mr. Jeffries sent a message (including a link of the Video) to the Facebook page of a local news station located in the Eastern District of Tennessee.

an "Internet Protocol" (or "IP") log of Mr. Jeffries's activity on Facebook.[5]

Jason Passwaters ("Mr. Passwaters"), a contractor for the Federal Bureau of Investigation ("FBI"), also testified about Mr. Jeffries's activity on Facebook. Mr. Passwaters is a digital forensic analyst assigned to an investigative analysis unit in the FBI. Mr. Passwaters created a chart listing the messages that Mr. Jeffries sent on Facebook. Mr. Passwaters traced the messages by Mr. Jeffries's Facebook ID Number and his IP address. Mr. Passwaters also identified the recipients of the messages, when the messages were sent, and the content of the messages. Each message contained a link to the Video.

Having provided some context, it is now time to examine the content of the Video. The Video opens with a title screen and then fades in on Mr. Jeffries. He is sitting in a chair and holding a guitar. Mr. Jeffries then points at the camera and says, "This song's for you, judge." He then begins to sing (while playing the guitar):

I had enough of this abuse from you/
It has been going on for 13 years/
I have been to war and killed a man/
I don't care if I go to jail for ten thousand years/
Cause this is my daughter we're talking about/
And when I come to court, this better be the last time/
I'm not kidding at all, I'm making this video public/

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[5] Mr. Jeffries posted a link of the Video, along with a short message, on the "Walls" of other Facebook users. For an explanation of what constitutes a "Wall," or how information is shared on Facebook, see Mr. Jeffries's Motion in Limine to Exclude Facebook Messages, Doc. 85, at 2-4.

If I have to kill a judge or a lawyer or a woman, I don't care/
Cause this is my daughter we're talking about/
I'm getting tired of abuse and the parent alienation.

Mr. Jeffries then stops singing and says, "You know it's abuse." Following this short break, he continues singing. At no point does he smile or laugh:

I love you/
Daughters are the beautiful things in my life/
It keeps me going and keeps me alive everyday/
So take my child and I'll take your life/
I'm not kidding, judge, you better listen to me/
I killed a man downrange in war/
I have nothing against you, but I'm tellin' you this better be the last court date/
Because I'm gettin' tired of missin' out on my daughter's love/
And that's the name of the song by the way 'Daughter's Love'/
And I'm getting tired of you sickos/
Thinking it's the right thing for the children/
You think it's the best interest of the child/
But look at my daughter/
From her mother's abuse she's mentally and physically abused her/
And I'm getting tired of this bull–
So I promise you, judge, I will kill a man/
This time better be the last time I end up in court/
'Cause, damn, this world is getting tired/
When you don't have your daughter to love on or have a big hug/
'Cause she's so mentally abused and psychologically gone/
She can't even hold her own dad/

Because her mom has abused by parent alienation her.

And this shit needs to stop because you're gonna lose your job/
And I guarantee you, if you don't stop, I'll kill you/
'Cause I am gonna make a point either way you look at it somebody's gotta pay/
And I'm telling you right now live on the Internet/
So put me in jail and make a big scene/
Everybody needs to know the truth/
'Cause this shit's been going on for 13 years and now my daughter's screwed up/
'Cause the judge and the lawyers need money/
They don't really care about the best interest of the child/
So I'm gonna fuck somebody up, and I'm going back to war in my head/
So July 14th is the last time I'm goin' to court.

Mr. Jeffries then stops singing. He points at the camera and says in a very serious tone, "Believe that. Believe that, or I'll come after you after court. Believe that." He then continues singing:

I love my daughter/
And nobody's going take her away from me/
Cause I got four years left to make her into an adult/
I got four years left until she's eighteen/
So stop this shit because I'm getting tired of you/
And I don't care if everybody sees this Internet site/
Because it is the truth and it's war/
Stop abusing the children and let 'em see their dads/
'Cause I love you, Allison.

At this point, Mr. Jeffries stops singing and says:

> I really do love you. I want to hold you and hug you, and I want the abuse to stop. That's why I started 'Traumatized Foundation.org.' Traumatized Foundation.org. Because of children being left behind, being abused by judges, the courts. They're being abused by lawyers. The best interest ain't of the child anymore. The judges and the lawyers are abusing 'em. [Pointing at camera]. Let's get them out of office. Vote 'em out of office. If fathers don't have rights or women don't have their rights or equal visitation, get their ass out of office. 'Cause you don't deserve to be a judge and you don't deserve to live. You don't deserve to live in my book. And you're gonna get some crazy guy like me [pointing at himself while saying this] after your ass. And I hope I encourage other dads to go out there and put bombs in their goddamn cars. [Pointing stops]. Blow 'em up. Because it's chil-, children we're talking about.

Once again, Mr. Jeffries begins playing the guitar and sings:

I care about her/
And I'm willing to go to prison/
But somebody's gonna listen to me/
Because this is a new war.

At this point, the singing is over. Mr. Jeffries looks at the camera and says:

> This ain't Iraq or Afghanistan. This is goddamn America. This is my goddamn daughter. There I cussed. Don't tell me I can't fucking cuss.

In one last tirade, Mr. Jeffries moves his face close to the camera and says:

> Stupid fucking, BOOM! [mimicking a car bomb]. There went your fucking car. I can shoot you. I can kill you. I can fuck you. Be my friend. Do something right. Serve my daughter. [Pause]. Yeah, look at that, that's the evil. You better keep me on God's side. Do the right thing July 14th.

The Video then fades to black.

II. STANDARD OF REVIEW

A. Motion for Judgment of Acquittal [Rule 29]

As the Court of Appeals for the Sixth Circuit has stated, "[a] Rule 29 motion is a challenge to the sufficiency of the evidence." *United States* v. *Kuehne*, 547 F.3d 667, 696 (6th Cir. 2008) (quotations and citation omitted). The "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt*." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis added).

The court must view the evidence and resolve all reasonable inferences in favor of the Government. *See United States* v. *Pollard*, 778 F.2d 1177, 1180 (6th Cir. 1985) (recognizing that courts "must draw reasonable inferences from the evidence in the government's favor"). A court may find "that a conviction is supported by sufficient evidence even though the circumstantial evidence does not remove every reasonable hypothesis except that of guilt." *United*

States v. *Jones*, 102 F.3d 804, 807 (6th Cir. 1996) (internal quotation marks omitted).

B. Motion for New Trial [Rule 33]

Under Rule 33(a) of the Federal Rules of Criminal Procedure, a court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). *See, e.g.*, *United States* v. *Seago*, 930 F.2d 482, 488 (6th Cir. 1991). As the Court of Appeals for the Sixth Circuit has stated, a Rule 33 motion "may be premised upon the argument that the jury's verdict was against the *manifest weight of the evidence*." *United States* v. *Hughes*, 505 F.3d 578, 592 (6th Cir. 2007) (emphasis added).

When considering a Rule 33 motion based upon the weight of the evidence, courts may "consider the credibility of the witnesses and the weight of the evidence to insure that there is not a miscarriage of justice. It has often been said that the trial judge sits as a thirteenth juror." *United States* v. *Turner*, 22 F. App'x 404, 411 (6th Cir. 2001) (quotations and citation omitted). This is different than a Rule 29 motion, in which courts may not consider the credibility of witnesses.[6] *See United States* v. *Hartman*, 213 F.

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[6] This is because the Court must resolve all credibility determinations in favor of the Government in a Rule 29 motion challenging the sufficiency of the evidence. *See United States* v. *Pollard*, 778 F.2d 1177, 1180 (6th Cir. 1985) (recognizing that courts "must draw reasonable inferences from the evidence in the government's favor" in ruling upon a Rule 29 motion); *United States* v. *Maliszewski*, 161 F.3d 992, 1006 (6th Cir. 1998) *cert. denied*, 543 U.S. 910 (2004) (holding that the appellant's "attack on the credibility of prosecution witnesses gets her nowhere" on appeal because the court "draw[s] all available inferences and resolve[s] all issues of credibility in favor of the jury's verdict," in the context of a Rule 29 motion challenging the suf-

App'x 396, 401 (6th Cir. 2007) ("Unlike in a sufficiency [Rule 29 motion challenging the sufficiency of the evidence], we may 'consider the credibility of the witnesses and the weight of the evidence to insure that there is not a miscarriage of justice.'") (quoting *United States* v. *Solorio*, 337 F. 3d 580, 589 n. 6 (6th Cir. 2003)).

While the Court may sit as a "thirteenth juror"– and therefore assess the credibility of witnesses– such motions are not favored. *See, e.g.*, *Hughes*, 505 F.3d at 592. In fact, these motions should only be granted "in the extraordinary circumstances where the evidence preponderates heavily against the verdict." *Id*. This standard "is a great obstacle to overcome, and presents the appellant in a criminal case with a very heavy burden." *Id*.

III. ANALYSIS

A. Mr. Jeffries Waived his Venue Challenge By Not Raising Prior to Trial

At the close of the Government's case-in-chief, Mr. Jeffries moved for judgment of acquittal. As part of that motion, Mr. Jeffries argued that the Government failed to establish venue by a preponderance of the evidence. In response, the Government argued that Mr. Jeffries waived his venue challenge by failing to raise it prior to trial. Soon after, however, the Government agreed to submit the venue issue to the jury. After hearing oral argument on the issue, the Court provided the following jury instruction:

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ficiency of the evidence); *United States* v. *Manns*, 277 F. App'x 551, 557 (6th Cir. 2008) ("Credibility challenges, however, speak to the quality of the government's evidence and not to the sufficiency of the evidence.") (citations omitted).

> In addition to determining whether the Government has proven the elements of the offense beyond a reasonable doubt, you must also determine whether venue is proper. Venue is proper if you find that the offense began, continued, or was completed within the Eastern District of Tennessee. The government must establish venue by preponderance of the evidence. This means that the government has to produce evidence which considered in the light of all the facts, that what the government claims is more likely true than not.
>
> In making this determination, you may consider any direct or circumstantial evidence that was admitted at trial. For example, you may consider the site of the Defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact finding.

Ultimately, the jury decided that venue was proper in the Eastern District of Tennessee.

The truth is, however, Mr. Jeffries waived his venue challenge by not raising it prior to trial. As a general rule, motions challenging venue must be made prior to trial. *See United States* v. *Grenoble*, 413 F.3d 569, 573 (6th Cir. 2005) (recognizing that "objections to defects in venue are usually waived if not asserted before trial") (citation omitted). As Rule 12(b)(3) of the Federal Rules of Criminal Procedure makes clear, defendants must raise prior to trial any "motion alleging a defect in instituting the prosecution." Fed. R. Crim. P. 12(b)(3). Notably, the Court of Appeals for the Sixth Circuit has held that "venue-

selection challenges . . . implicate Rule 12(b)(3)," and therefore must generally be raised prior to trial. *United States* v. *Auston*, 355 F. App'x 919, 923, (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1558 (2010).

There is one exception to this general rule. *See Grenoble* 413 F.3d at 573. As the Court of Appeals has stated, "[a]lthough objections to defects in venue are usually waived if not asserted before trial, where the defect is not '*apparent on the face of the indictment,' and the defendant does not have notice of the defect through other means*, a conclusion of waiver is not appropriate." *Id.* (emphasis added) (citations omitted). As another court has explained, "when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the government rests its case, the objection is timely if made at the close of the evidence." *United States* v. *Black Cloud*, 590 F.2d 270, 272 (8th Cir. 1979). Mr. Jeffries failed to show that the exception applies in this case.

As an initial matter, the Court finds that the alleged defect was not "apparent on the face of the indictment." *Grenoble* 413 F.3d at 573. On November 16, 2010, the Government filed a Superseding Indictment [Doc. 33] charging the following:

> [O]n or before July 9, 2010, in the Eastern District of Tennessee, the defendant, FRANKLIN DELANO JEFFRIES II, knowingly did transmit in interstate commerce a communication, namely a video of himself posted on the public internet websites YouTube and Facebook, to Knox County Chancellor Michael W. Moyers, and the communication specifically contained a threat to injure and kill Knox County Chan-

> cellor Michael W. Moyers, in violation of Title 18, United States Code, Section 875(c).

[Superseding Indictment, Doc. 33]. A venue defect is not "facially apparent on the indictment" if the indictment "alleges facts that would, if established, sustain venue . . ." *United States* v. *Adams*, 803 F.2d 722, at *8 (6th Cir. 1986) (unpublished table decision). In the present case, the Superseding Indictment [Doc. 33] charged that Mr. Jeffries transmitted the Video in the Eastern District of Tennessee. Consequently, the Superseding Indictment [Doc. 33] "allege[d] facts that would, if established, sustain venue." *Adams*, 803 F.2d 722, at *8.

While the alleged defect was not "facially apparent on the indictment," Mr. Jeffries had notice "through other means"–and prior to trial–to challenge venue. In an unpublished decision, the Court of Appeals for the Sixth Circuit held that "the inquiry should not center on whether the indictment was defective on its face but rather on the question of *whether the defendant had notice of the defect before trial*." *Adams*, 803 F.2d 722, at *9 (emphasis added). Although *Adams* is not binding[7], the Court finds its reasoning instructive.

In *United States* v. *Adams*, the defendant moved for judgment of acquittal at the close of the government's case-in-chief. *Id*.., at *8. The defendant was prosecuted in the Eastern District of Michigan for possessing with the intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1). *Id*. Like the present

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[7] *See, e.g.*, *Thompson* v. *N.Am. Stainless, LP*, 567 F.3d 804, 809 n.2 (6th Cir. 2009) (en banc) (recognizing that while unpublished decisions are not precedentially binding, they "may be considered for their persuasive value").

case, the defendant argued that the government failed to establish venue. *Id*. Specifically, the defendant claimed that he was unaware that "the government was proceeding in Michigan on the basis of the heroin [he] had possessed in Ohio." *Id*. In response, the government argued that the defendant waived his venue challenge by not raising it prior to trial. *Id*. As the defendant argued:

> Adams [the defendant] argues, however, that his failure to raise the venue defect before trial should not be considered a waiver because the venue defect was not apparent on the face of the indictment. He asserts that a waiver may be inferred from inaction only if the indictment is defective on its face. It is defective on its face if it alleges facts which, if proven, would not sustain venue in the district where the defendant is to be tried–for example, an indictment issued for a trial in Michigan alleging that Adams possessed the heroin in Cleveland. Adams argues that if the indictment alleges facts that would, if established, sustain venue, a motion to dismiss for improper venue may be raised at any time up to the close of the government's case.

Id., at *9 (citations omitted). The indictment was facially valid in *Adams* because it alleged that "Adams possessed heroin . . . in the Eastern District of Michigan." *Id*. In other words, the indictment "alleged facts which, if proven, would have sustained venue in Michigan." *Id*., at *8.

The *Adams* Court then addressed whether the defendant had "notice of the defect before trial." *Id*., at *9. Because defense counsel had personal knowledge–prior to trial–of events related to the

government's basis for venue, the court held that the defendant waived his venue challenge. *Id*. Specifically, defense counsel "conceded *that he knew well before trial* that the government was proceeding on the basis of Adams' possession of the heroin in Cleveland. He therefore had a duty to raise the issue prior to trial under Rule 12 rather than permit the Court to proceed to trial." *Id*. (emphasis added).

Mr. Jeffries argues that he did not waive his venue challenge because the Superseding Indictment [Doc. 33] was "sufficient on its face as to prosecution brought in this district." [Mr. Jeffries's Memorandum in Support of his Motion for Judgment of Acquittal or New Trial, Doc. 105, at 9]. This, however, is not the ultimate question. The exception only applies if two requirements are met: (1) the indictment must be facially sufficient to support an allegation of venue; and (2) the defendant must not otherwise have knowledge about the alleged defect prior to trial. *Grenoble* 413 F.3d at 573. Mr. Jeffries does not address the second requirement.[8]

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[8] As evidenced by Mr. Jeffries's most recent filing, he continues to ignore the second requirement of the *Grenoble* exception: "Here, as noted above, there was abundant precedent favoring the position of the defendant–that where the indictment itself makes a facially valid allegation of venue, *all a defendant need do is raise the issue of venue at the Rule 29 stage* if the Government has not proven venue to a preponderance." [Mr. Jeffries's Reply in Support of his Motion for Judgment of Acquittal or New Trial, Doc. 111, at 6-7 n.5] [emphasis added]. However, as the Court of Appeals for the Sixth Circuit made clear in *Grenoble*–a published decision–two requirements must be met:"[a]lthough objections to defects in venue are usually waived if not asserted before trial, where the defect is not 'a*pparent on the face of the indictment,' and the defendant does not have notice of the defect through other means*, a conclusion of

Like the defendant in Adams, Mr. Jeffries's venue challenge is based on information that he knew prior to trial. When the Video was uploaded on YouTube, and the messages were sent on Facebook, Mr. Jeffries was in Clarksville, Tennessee, which is located in the Middle District of Tennessee. Some of the messages (including links of the Video) were sent to persons in the Eastern District of Tennessee. Mr. Jeffries argues that none of the "charged conduct" occurred in the Eastern District of Tennessee, and therefore venue is not proper in that District. [Mr. Jeffries's Memorandum of Law in Support of his Motion for Judgment of Acquittal or New Trial, Doc. 105, at 10]. Specifically, Mr. Jeffries argues that the messages sent on Facebook were not part of the "charged conduct," and therefore could not provide a basis for venue in the Eastern District of Tennessee. [Id.].

Prior to trial, Mr. Jeffries filed a Motion for Bill of Particulars [Doc. 80], requesting that the Government identify which messages sent on Facebook were part of the "charged conduct." While United States

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waiver is not appropriate." 413 F.3d at 573 (emphasis added) (citations omitted). Mr. Jeffries does not address the second requirement.

If the Court accepted Mr. Jeffries's argument–that venue challenges are not waived if the indictment is facially valid–that would defeat Rule 12's requirement that "motion[s] alleging a defect in instituting the prosecution" be raised prior to trial. Fed. R. Crim. P. 12(b)(3). If the majority of indictments allege facially sufficient grounds for venue, how would courts enforce Rule 12's requirement that venue challenges be raised prior to trial? They couldn't. And that's why there is a second requirement: the defendant must not otherwise have knowledge about the alleged defect prior to trial. *See Grenoble*, 413 F.3d at 573.

Magistrate Judge C. Clifford Shirley denied the motion [Doc. 81], that does not change the fact that Mr. Jeffries was aware that the Government might rely on the messages as a basis for venue. Regardless of which messages[9] were part of the "charged conduct," Mr. Jeffries was aware of their existence. After all, Mr. Jeffries was the person who sent them. Because the messages sent on Facebook were mentioned in the Superseding Indictment [Doc. 33], and because Mr. Jeffries knew that some of the messages were sent to persons in the Eastern District of Tennessee, it was reasonable to assume that the Government might rely on some of the messages as a basis for venue. It certainly was not a surprise.

Like the defendant in *Adams*, Mr. Jeffries's venue challenge is based on information that he knew before trial– i.e., his presence in the Middle District of Tennessee, and the fact that he sent messages on Facebook to persons in the Eastern District of Tennessee. He did not need a Bill of Particulars to learn about this.

Having determined that Mr. Jeffries had "notice of the [alleged] defect through other means" prior to trial, *Grenoble*, 413 F.3d at 573, the Court finds that Mr. Jeffries waived his venue challenge by not raising it prior to trial. Accordingly, Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc. 104] is

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[9] As the Court will explain later in the Memorandum and Order, the transmission of the Video–through links sent on Facebook–was part of the "charged conduct." See Part III.B. The transmission of the messages sent along with the links of the Video–such as "Tell the Judge I'm crazy"–were part of the "context" of the Video, but not the "charged conduct." *Id*. Mr. Jeffries fails to recognize this important distinction.

DENIED to the extent that he challenges venue.

B. Even if Mr. Jeffries Did Not Waive his Venue Challenge, the Government Established Venue by a Preponderance of the Evidence

Assuming that Mr. Jeffries did not waive his venue challenge, the Court finds that the Government established venue by a preponderance of the evidence. When an offense is committed in more than one district–as in the present case–venue may be found in more than one district.[10] Under the multi-

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[10] The Court of Appeals for the Sixth Circuit has not decided whether the multi-district venue statute, 18 U.S.C. § 3237(a), applies to prosecutions for a violation of 18 U.S.C. § 875(c). However, the Court of Appeals has held that the multi-district venue statute applies to prosecutions for a violation of a similar statute, 18 U.S.C. § 875(a). *United States* v. *Brika*, 416 F.3d 514 (6th Cir. 2005) (vacating sentence and remanding for resentencing in compliance with *United States* v. *Booker*, 543 U.S. 220 (2005)). That statute makes it an offense to "transmit[] in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person . . ." 18 U.S.C. § 875(a).

In *Brika*, the defendant was convicted of using a telephone to extort money in exchange for the release of a kidnapped person. *Id*. at 517-18. The defendant was prosecuted in the Southern District of Ohio. *Id*. While the victim was visiting Morocco, he was kidnapped and held over a week. *Id*. The defendant was in Morocco at this time, but left for the United States on the second day of captivity. *Id*.

After returning to Milwaukee, Wisconsin, the defendant made phone calls to the victim's family demanding a ransom. *Id*. The phone calls were made to the victim's family in Columbus, Ohio. *Id*. Ultimately, the defendant was captured by FBI agents. *Id*.

district venue statute, 18 U.S.C. § 3237(a), "any offense against the United States begun in one district and completed in another, or *committed in more than one district*, may be inquired of and prosecuted in any district in which such offense was *begun, continued, or completed*." 18 U.S.C. § 3237(a) (emphasis added). *See also United States* v. *Johnson*, 323 U.S. 273, 275 (1944) (noting that venue for the prosecution of "continuing offenses" is proper in any district "through which force propelled by an offender operates").

Ultimately, the Government must establish–by a preponderance of the evidence–that the offense was "begun, continued, or completed" in the Eastern District of Tennessee. *United States* v. *Thomas*, 74 F.3d 701, 709 (6th Cir. 1996) (citations omitted). Because

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During trial, the defendant argued that venue was not proper in the Southern District of Ohio. *Id*. at 527. The district court rejected the argument, and the Court of Appeals affirmed. *Id*. at 527-28. Specifically, the Court of Appeals held that venue was proper under both 18 U.S.C. § 3237(a) and the "substantial contacts" test. *Id*. As the court explained: "The second factor of the substantial contacts test requires consideration of the 'elements and nature of the crime.' The elements of Brika's [the defendant] crime include the making of a phone call across state or national boundaries. *Thus, by definition, the crime is one that could not have been committed solely in the Southern District of Ohio, so the multidistrict venue statute, 18 U.S.C. § 3237, applies*." *Id*. at 529 (emphasis added).

Likewise, the offense in the present case, 18 U.S.C. § 875(c), could not be completed in one district. After all, the offense requires that the defendant "*transmit[] in interstate or foreign commerce* any threat to kidnap any person or any threat to injure the person of another . . ." 18 U.S.C. § 875(c) (emphasis added). Based upon the court's analysis in *Brika*, 416 F.3d at 527-28, venue in the present case is governed by the multidistrict statute, 18 U.S.C. § 3237(a).

venue may be established in multiple districts, the Court must apply a "substantial contacts" test to determine whether venue is proper (as a practical consideration) in the Eastern District of Tennessee.[6] *See United States* v. *Williams*, 788 F.2d 1213, 1215 (6th Cir. 1996). The "substantial contacts" test considers several factors, including "the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact finding . . ." *Thomas*, 74 F.3d at 709 (citation and quotations omitted).

As an initial matter, the Court recognizes that venue is proper "only in the district *where the conduct comprising the essential elements of the offense occurred*." *United States* v. *Wood*, 364 F.3d 704, 709 (6th Cir. 2004) (emphasis added). Accordingly, the Court must first define the "essential elements of the offense." *Id*. To establish a conviction under 18 U.S.C. § 875(c), the Government must prove three elements beyond a reasonable doubt: "(1) a transmission in interstate [or foreign] commerce; (2) a com-

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[6] In deciding whether the Government has established venue for a "continuing" offense, the Court applies a two-step analysis. As one court has explained:

> The framework . . . is to first determine on a count-by-count basis if each count in the indictment is one that is a continuous crime. If it is, then venue is proper for that count in any district where the crime alleged therein began, continued, or ended. 18 U.S.C. § 3237(a). In deciding which district should try the case, a court should next apply the [substantial contacts] factor[s].

United States v. *Mikel*, 163 F. Supp. 2d 720, 733 (E.D. Mich. 2001) (quotations and citation omitted).

munication containing a [true] threat; and (3) the threat must be a threat to injure [or kidnap] the person of another." *United States* v. *DeAndino*, 958 F.2d 146, 147 (6th Cir. 1992). To satisfy the "true threat" element, the Government must prove two subelements beyond a reasonable doubt. First, the Government must establish that a reasonable person would view the Video as "a serious expression of an intention to inflict bodily harm." *United States* v. *Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997). Second, the Government must establish that the Video was conveyed "to effect some change or achieve some goal through the use of intimidation." *Id.*

In deciding these questions, the jury had to examine the content of the Video, and the context in which it was made. In doing so, the jury had to view the evidence from an objective perspective. *Id.* at 1496. As the Court of Appeals made clear in *Alkhabaz*, "[i]t is important to note that *we are not expressing a subjective standard*." *Id.* (emphasis added). This objective standard applies to both the *mens rea* and *actus reus* elements of the offense. *Id.* Ultimately, the jury had to examine the Video, in light of its content and context, and determine whether a reasonable person would view the Video as a "true threat" to inflict bodily injury, and done to effect some change or achieve some goal (through the use of intimidation). *Id.* Because the Court of Appeals has established an objective test, the alleged victim's perception (or subjective feelings) of the communication are irrelevant. *Id.* Likewise, the defendant's subjective intent is irrelevant. *Id.*

Mr. Jeffries's venue challenge is based on two arguments. First, Mr. Jeffries argues that the "offense was begun, continued, and completed all in the Mid-

dle District of Tennessee." [Mr. Jeffries's Memorandum of Law in Support of the Motion for Judgment of Acquittal or New Trial, Doc. 105, at 12]. Specifically, Mr. Jeffries argues that because he never left the Middle District of Tennessee on or about July 9, 2010, the "charged conduct" did not occur in the Eastern District of Tennessee. This, of course, is not the relevant question. The issue is not whether Mr. Jeffries physically left the Middle District of Tennessee. The issue is whether the Government established that Mr. Jeffries transmitted the Video - that is, committed part of the "charged conduct" - in the Eastern District of Tennessee. While the offense did not begin in the Eastern District of Tennessee, it certainly "continued" into this District.

In a pretrial Memorandum and Order, the Court defined the "charged conduct" as the transmission of the Video on YouTube and Facebook. [Memorandum and Order, Doc. 94, at 3]. Mr. Jeffries argues that transmission of the Video - through links sent on Facebook - was not part of the "charged conduct," and therefore could not provide a basis for venue. In doing so, he has misunderstood the Court's prior ruling.

In a pretrial Memorandum and Order, the Court ruled that the "Facebook Messages are not part of the 'charged conduct' in the Superseding Indictment. The Superseding Indictment expressly defines the 'charged conduct' or 'communication' as the Video." [Memorandum and Order, Doc. 94, at 3]. As the Court explained:

> Defendant is correct that the Facebook Messages are not part of the 'charged conduct' in the Superseding Indictment. The Superseding Indictment expressly defines the 'charged

> conduct' or 'communication' as the Video. While the Superseding Indictment does not explicitly mention the Facebook Messages, they are at least part of the 'context' in which the 'communications' were made. *Notably, the Facebook Messages were sent contemporaneously with the Video links*. As the Government correctly explains, '[t]he sending of the message with the YouTube video is analogous to writing an email and attaching a photo to the email, both of which are sent together when the writer sends the email.' Because the Facebook Messages are part of the 'context' in which the 'communication' was sent, they are relevant.

[*Id*.] [emphasis added] [internal citation omitted]. For whatever reason, Mr. Jeffries believes that the transmission of the Video - through links sent on Facebook - was not part of the "charged conduct":

> In the context of this case, though, it was not until the close of the Government's evidence that it was clear that venue could not be established. To be sure, the defendant knew throughout the pendency of the case that all of the relevant actions he took in making or distributing the video occurred in Clarksville. However, he also knew that some people connected with the case, including Chancellor Moyers and others to whom he sent Facebook messages, resided in the Eastern District. Because of this, prior to trial, it was theoretically possible that venue could have been predicated on either (1) *the messages he sent via Facebook to people in the Eastern District* or (2) the transmission of his video

> through the Eastern District on its way to the YouTube or Facebook servers. *During the course of pretrial proceedings, as the result of motions filed by the defendant, it emerged that the first of these was not a viable basis for venue, as those messages were not part of the charged offense*. . . .

[Mr. Jeffries's Reply Brief in Support of the Motion for Judgment of Acquittal or New Trial, Doc. 111, at 4]. Notably, the Court has never held that the transmission of the Video - through links sent on Facebook - was not part of the "charged conduct." In fact, the Court held the opposite.

In the pretrial Memorandum and Order [Doc. 94], the Court held that the messages sent with the links of the Video on Facebook were not part of the "charged conduct." [*Id.*, at 1-5]. The Court did, however, distinguish between links of the Video–which contained a "communication," and therefore their transmission became part of the "charged conduct"–and the messages attached to the links, which were part of the "context" of the Video (but not the actual "charged conduct").[12] [*Id.*]. Mr. Jeffries ignores this important distinction.

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[12] While the Facebook messages were relevant (they were part of the "context" of the Video), the Court excluded any message that would have resulted in substantial prejudice or confusion. [Memorandum and Order, Doc. 94, at 4-5]. Specifically, the Court excluded any message that "indicate[d] a subjective intent to harm or coerce Chancellor Moyers . . ." [*Id.*, at 4]. For example, some of the messages sent on Facebook stated "Tell the Judge I am Crazy" or "GIVE THIS TO THE JUDGE." [*Id.*, at 4-5]. Those statements–which indicated Mr. Jeffries's subjective intent–would have confused the jury into thinking that the defendant's subjective intent was at issue. As the Court of Ap-

As a second argument, Mr. Jeffries asserts that the Video was not transmitted in the Eastern District of Tennessee. As a reminder, Mr. Jeffries uploaded the Video from his home in Clarksville, Tennessee, which is located in the Middle District of Tennessee. Mr. Jeffries uploaded the Video on YouTube and Facebook, which have Internet servers[13] located in California. Mr. Jeffries argues that even though he sent links of the Video to persons in the Eastern District of Tennessee, the Video was not transmitted in the District. [Mr. Jeffries's Memorandum of Law in Support of the Motion for Judgment of Acquittal or New Trial, Doc. 105, at 13]. In support, Mr. Jeffries emphasizes that the Court previously held that receipt of the Video was not an element of the offense.

In a pretrial Memorandum and Order, the Court held that "it is irrelevant whether the alleged victim–or anyone for that matter–watched the Video." [Memorandum and Order, Doc. 94, at 3]. Granted, the receipt of the Video is irrelevant, in the sense that others' reactions or perceptions of the Video are irrelevant.[14] However, the *transmission* of the Video–

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peals for the Sixth Circuit has made clear, the jury must apply an objective standard in deciding whether 18 U.S.C. § 875(c) has been violated. *Alkhabaz*, 104 F.3d at 1496. Accordingly, the subjective intent and perceptions of the defendant and alleged victim are irrelevant. *Id*.

[13] As one court has explained, "a server or 'host' is a necessary middleman that stores the creator's electronic content and transmits it to the recipient." *United States* v. *McCoy*, 678 F. Supp. 1336, 1345 (M.D. Ga. 2009).

[14] This is because the jury must view the communication from an objective perspective. *Alkhabaz*, 104 F.3d at 1496. Consequently, the perceptions of other persons–including the defend-

through links sent on Facebook–is relevant. The fact that other persons *received* links of the Video demonstrates that Mr. Jeffries *transmitted* the Video. After uploading the Video on his personal Facebook page, Mr. Jeffries took the additional step of sending links to at least twenty-nine other persons (or entities) on Facebook, some of whom resided in the Eastern District of Tennessee. The important point is not that other persons viewed the Video, or shared their reactions. The point is that Mr. Jeffries *transmitted* the Video–through links sent on Facebook–to persons in the Eastern District of Tennessee. This means that part of the "charged conduct"–the transmission of the Video–occurred in this District. This is enough to establish venue for purposes of 18 U.S.C. § 3237(a).

The fact that there was an intermediary between Mr. Jeffries and those persons–Facebook and its servers–does not change the fact that he transmitted the Video to persons in the Eastern District of Tennessee. To accept Mr. Jeffries's argument–that he only transmitted the Video to Facebook's and YouTube's servers in California–would defy common sense. An application of the "substantial contacts" test makes this especially clear.[15]

The first factor of the "substantial contacts" test–"the site of the defendant's act"–certainly supports venue in the Eastern District of Tennessee. *Wil-*

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ant and alleged victim–may not be considered in determining whether 18 U.S.C. § 875(c) has been violated. *Id.*

[15] As previously stated, the "substantial contacts" test is not a requirement for finding venue under the multi-district venue statute, 18 U.S.C. § 3237. Rather, it is test used to determine what forum is most appropriate when venue may be established in several districts. *Williams*, 788 F.2d at 1215. Its factors are based on practical considerations. *Id.*

liams, 788 F.2d at 1215. In *United States* v. *Thomas*, the defendants were charged with obscenity crimes related to an Internet bulletin board. 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996). The defendants managed the website from California, and were ultimately prosecuted in the Western District of Tennessee. *Id*. at 705-07. To gain access to the website, a subscriber had to submit a signed application form and pay a fee. *Id*. at 705. After a federal postal inspector submitted the form and fee, the defendants authorized the postal inspector–who resided in the Western District of Tennessee–to access the website. *Id*. The postal inspector was able to then view obscene images. *Id*.

Ultimately, the defendants were convicted of violating 18 U.S.C. § 1465, which makes it a crime to "knowingly use[] a facility or means of interstate commerce for the purpose of distributing obscene materials." *Id*. at 709. The defendants were convicted in the Western District of Tennessee. *Id*. They challenged their conviction, *inter alia*, on venue grounds. *Id*.

The Court of Appeals for the Sixth Circuit affirmed the convictions, finding that venue was proper in the Western District of Tennessee. To begin, the court recognized that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district in which the material is sent." *Id*. (citation and quotations omitted). In support, the court recognized that the defendants "knew of, approved, and had conversed with [a bulletin board] member in that judicial district [the Western District of Tennessee] who had his [the defendants'] permission to access and copy [the images]

that *ultimately ended up there*." *Id.* at 710 (emphasis added).

As previously stated, 18 U.S.C. § 1465 makes it a crime to *distribute* obscene material in interstate commerce. *Id.* at 409. The court found that venue was proper in the Western District of Tennessee because the images were made available to a person in that District. *Id.* at 410. The court did not focus on what servers the images passed through. *See id.* at 409-10. Rather, the court emphasized that the postal inspector *received* the obscene material in the Western District of Tennessee. *Id.*

Likewise, in the present case, 18 U.S.C. § 875(c) makes it an offense to transmit material–a "communication" containing a "true threat"–in interstate commerce. *See Alkhabaz*, 104 F.3d at 1495. Like the defendants in *Thomas*, Mr. Jeffries transmitted material–in this case, a video–into interstate commerce. The fact that the Video passed through YouTube's and Facebook's servers does not mean that the Video did not also reach the Eastern District of Tennessee. The receipt of the Video by persons in the Eastern District of Tennessee–which demonstrates that the Video was transmitted in this District–is enough to establish venue.

The second factor of the "substantial contacts" test–the "elements and nature of the crime"–also supports venue in the Eastern District of Tennessee. The following case, *United States* v. *Brika*, is particularly instructive. 416 F.3d 514 (6th Cir. 2005) (vacating sentence and remanding for resentencing in compliance with *United States* v. *Booker*, 543 U.S. 200 (2005)). In *Brika*, the defendant was convicted of violating 18 U.S.C. § 875(a), which makes it a crime to "transmit in interstate or foreign commerce any

communication containing any demand or request for a ransom or reward for the release of any kidnapped person." 18 U.S.C. § 875(a). After a victim was kidnaped in Morocco, the defendant and other kidnapers made ransom phone calls to the victim's family. *Brika*, 416 F.3d at 527-28. The victim's family was in Columbus, Ohio, and the defendant was in Milwaukee, Wisconsin when he made the telephone calls. *Id.* The defendant was ultimately prosecuted in the Southern District of Ohio. *Id.*

During trial, the defendant argued that venue was not proper in the Southern District of Ohio. *Id.* The district court rejected the defendant's argument, and the Court of Appeals for the Sixth Circuit affirmed. *Id.* Specifically, the Court of Appeals emphasized that the telephone calls were directed to–and received by–persons in Columbus, Ohio. *Id.* It was the transmission of the telephone calls across state lines that made venue proper in Ohio. *Id.* As the Court of Appeals explained:

> The second factor of the substantial contacts test requires consideration of the 'elements and nature of the crime.' The elements of Brika's crime include the making of a phone call across state or national boundaries. Thus, by definition, the crime is one that could not have been committed solely in the Southern District of Ohio, so the multi-district venue statute, 18 U.S.C. § 3237(a) applies.

Id. at 528.

Like the statute in *Brika*, 18 U.S.C. § 875(c) requires a transmission in interstate or foreign commerce. 18 U.S.C. § 875(c). Thus, by its very defini-

tion, venue will always be proper in more than one district. Moreover, like the statute in *Brika*, 18 U.S.C. § 875(a), the *transmission* of a communication in interstate commerce–in this case, a video–is the "charged conduct" of the offense. During trial, the Government established that Mr. Jeffries transmitted the Video across multiple districts, including the Eastern District of Tennessee. Specifically, the Government established that Mr. Jeffries sent links of the Video to persons in the Eastern District of Tennessee.

The third factor of the "substantial contacts" test–the "locus of the effect of the criminal conduct"–also supports venue in the Eastern District of Tennessee. *Williams*, 788 F.2d at 1216-17 (instructing courts to determine where the "detrimental effects" were "most strongly felt" in making this determination). The Court of Appeals's decision in *Brika* makes this especially clear. 416 F.3d at 528. In *Brika*, the court held that this factor supported venue in the Southern District of Ohio because the "'locus of the effect of the criminal conduct' is to be found *more in the district in which the call is received than in the district in which it is placed . . .*" *Id.* (emphasis added).

In the present case, the "locus of the effect of the criminal conduct" is stronger in the Eastern District of Tennessee (where the Video was received by persons) than in the Middle District of Tennessee (where the Video was initially uploaded and sent). Like *Brika*, the detrimental effects were "found more in the district in which the [Video] was received than in the district in which it is placed . . ." Not surprisingly, the locus of the threatening conduct–or "detrimental effects"—were most strongly felt in the

Eastern District of Tennessee. That is where the victim, Chancellor Moyers, resides, and where he viewed the Video.[16] In addition, the custody hearing scheduled for July 14, 2010, was going to occur in the Eastern District of Tennessee. Finally, Mr. Jeffries sent links of the Video on Facebook to at least twenty-nine other persons (or entities), many of whom resided in the Eastern District of Tennessee.

Finally, the fourth factor of the "substantial contacts" test–the "suitability of each district for accurate fact finding"–also supports venue in the Eastern District of Tennessee. *Williams*, 788 F.2d at 1215. During trial, the central question was whether the Video contained a "true threat." In making this determination, the jury had to consider the content of the Video, and the context in which it was sent. Most of the evidence related to "context" centered on the custody dispute involving Mr. Jeffries's daughter. Because the custody dispute was being litigated in the Knox County Chancery Court, the Eastern District of Tennessee is a suitable district for prosecution. In addition, many of the witnesses who testified during trial reside in the Eastern District of Tennessee. This includes Chancellor Moyers, the target of the Video. Accordingly, the Court finds that this factor also supports venue in the Eastern District of Tennessee.

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[16] One point worth making clear: it is not necessary that the alleged victim receive the communication or view it, in order to sustain a conviction under 18 U.S.C. § 875(c). *Alkhabaz*, 104 F.3d at 1496. However, such facts–the receipt of the communication by the alleged victim–are certainly relevant to the third factor of the "substantial contacts" test.

The ultimate question is whether the Government proved–by a preponderance of the evidence–that the offense was "begun, continued, or completed" within the Eastern District of Tennessee. 18 U.S.C. § 3237(a). While the offense did not begin in the Eastern District of Tennessee, the transmission of the Video to persons in the Eastern District of Tennessee—sent by links of the Video on Facebook–certainly "continued" the offense. The fact that other persons *received* links of the Video demonstrates that Mr. Jeffries *transmitted* the Video. The important point is not that other persons viewed the Video, or shared their reactions. The point is that Mr. Jeffries *transmitted* the Video–through links sent on Facebook–to persons in the Eastern District of Tennessee. This means that part of the "charged conduct"–the transmission of the Video–occurred in this District. Consequently, the Government has satisfied the requirements of 18 U.S.C. § 3237(a) by showing that part of the "charged conduct" (transmission of the Video) "continued" in the Eastern District of Tennessee. In addition, having applied the "substantial contacts" test, *Williams*, 788 F.2d at 1215, the Court finds that venue was proper–as a practical matter–in the Eastern District of Tennessee.

Accordingly, Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc. 104] is **DENIED, to the extent that he challenges venue.**

C. The Evidence Was Sufficient to Support Mr. Jeffries's Conviction

1. Summary of Elements

To establish a conviction under Section 875(c), the Government must prove three elements beyond a reasonable doubt: "(1) a transmission in interstate

[or foreign] commerce; (2) a communication containing a [true] threat; and (3) the threat must be a threat to injure [or kidnap] the person of another." *DeAndino*, 958 F.2d at 147. To satisfy the "true threat" element, the Government must prove two sub-elements beyond a reasonable doubt. First, the Government must establish that a reasonable person would view the Video as "a serious expression of an intention to inflict bodily harm." *Alkhabaz*, 104 F.3d at 1495. Second, the Government must establish that the Video was conveyed "to effect some change or achieve some goal through intimidation." *Id.* For example, the second inquiry would be satisfied if the communication was made to extort another person of personal property. *See id.* (citing examples of extortionate or coercive behavior).

In deciding these questions, the jury had to examine the content of the Video, and the context in which it was made. In doing so, the jury had to view the evidence from an objective perspective. *Id.* at 1496. As the Court of Appeals made clear in *Alkhabaz*, "[i]t is important to note that *we are not expressing a subjective standard*." *Id.* (emphasis added). This objective standard applies to both the *mens rea* and *actus reus* elements of the offense. *Id.* Ultimately, the jury had to examine the Video, in light of its content and context, and determine whether a reasonable person would view the Video as a "true threat" to inflict bodily injury, and done to effect some change or achieve some goal (through the use of intimidation). *Id.* Because the Court of Appeals has established an objective test, the alleged victim's perception (or subjective feelings) of the communication are irrelevant. *Id.* Likewise, the defendant's subjective intent is irrelevant. *Id.*

2. A Reasonable Juror Could Find that the Video Was Transmitted in Interstate Commerce

As an initial matter, the Court recognizes that several courts of appeal recognize the Internet as an instrumentality or channel of interstate commerce. *See United States* v. *Sutcliffe*, 505 F.3d 944, 953 (9th Cir. 2007) (recognizing that "the Internet is an instrumentality and channel of interstate commence"); *United States* v. *Trotter*, 478 F.3d 918, 921 (8th Cir. 2007) (per curiam) (recognizing the same); *United States* v. *MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006) (recognizing the same); *United States* v. *Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("Congress clearly has the power to regulate the internet, as it does other instrumentalities and channels of commerce . . ."). In the context of 875(c) violations, several courts have held that the interstate requirement was satisfied when the communication was sent over the Internet. In *United States* v. *Voneida*, a student at Penn State University uploaded pictures and statements on his "MySpace"[17] page about the shootings on the campus of Virginia Tech. 337 F. App'x 246 (3d Cir. 2009). The defendant uploaded the

[17] For a background on MySpace, *see generally Doe* v. *MySpace*, Inc., 528 F.3d 413, 415 (5th Cir. 2008) ("MySpace.com is a Web-based social network. Online social networking is the practice of using a Web site or other interactive computer service to expand one's business or social network. Social networking on MySpace.com begins with a member's creation of an online profile that serves as a medium for personal expression, and can contain such items as photographs, videos, and other information about the member that he or she chooses to share with other MySpace.com users. Members have complete discretion regarding the amount and type of information that is included in a personal profile.").

statements only two days after the shootings, and included the following: "Someday: I'll make the Virginia Tech incident look like a trip to an amusement park." *Id.* After the statements were uploaded, a college student at Indiana University of Pennsylvania (also located in Pennsylvania) viewed the statements on the MySpace page, and contacted the police. *Id.*

Ultimately, the defendant was convicted of violating 18 U.S.C. § 875(c). *Id.* On appeal, the defendant argued that there was insufficient evidence to support his conviction. *Id.* at 249. The court of appeals rejected the defendant's argument, finding that a reasonable juror could find that all of the elements were established. *Id.* With regard to the interstate commerce element, the court wrote:

> Section 875(c) requires that the communication be transmitted in interstate commerce. For other MySpace users to view the statements posted to various parts of [the defendant's] MySpace page, the postings had to pass through the main internet server, located in California. . . . Given these facts, we conclude that a rational jury could have determined that the offending statements met this element of the statute.

Id.

Like *Voneida*, when Mr. Jeffries uploaded the Video on YouTube, it had to pass through Internet servers out of state. During trial, Mr. Passwaters, a contractor for the FBI, testified that when the Video was uploaded on YouTube, it transmitted from Mr. Jeffries's computer in Tennessee to YouTube's server in California. For this reason, the Court finds that a reasonable juror could find that the Video was

transmitted through interstate commerce. *See also United States* v. *Napa*, 370 F. App'x 402, 404 (4th Cir. 2010) (finding that emails sent within the same state still passed through interstate commerce for purposes of a 875(c) conviction); *United States Kammersell*, 196 F.3d 1137, 1139 (10th Cir. 1999) (finding that a bomb threat communicated through the Internet from a Utah resident to another Utah resident was sufficient to sustain federal jurisdiction under 875(c) because the message sent by the defendant was routed to an Internet server in Virginia before being rerouted to the recipient's computer in Utah).

3. A Reasonable Juror Could Find that the Video Contained a "True Threat"

While the First Amendment "affords protection to symbolic or expressive conduct as well as to actual speech," *Virginia* v. *Black*, 538 U.S. 343, 358 (2003) (citations omitted), the protections "afforded by the First Amendment . . . are not absolute . . .[and] the government may regulate certain categories of expression consistent with the Constitution." *Id.* (citing *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.")). As the Supreme Court has explained, the First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.*V. v. *City of St. Paul*, 505 U.S. 377, 382-83 (1992) (quoting *Chaplinsky*, 315 U.S. at 572). This includes "true threats," which the

Supreme Court first addressed in *Watts* v. *United States*, 394 U.S. 705, 708 (1969). The Supreme Court later 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 to a particular individual or group of individuals." *Black*, 538 U.S. at 359-60. As the Supreme Court recognized in *Watts*, "political hyperbole" is not a " true threat." 394 U.S. at 708. Rather, the prohibition on "true threats" protects "individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Black*, 538 U.S. at 360 (quotations and citation omitted).

In determining whether the Video contains a "true threat," the Court is mindful of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, an that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). As the Supreme Court has recognized, "[t]he language of the political arena . . . is often vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708 (citation omitted). *See also Black*, 538 U.S. at 358 ("The hallmark of the protection of free speech is to allow free trade in ideas–even ideas that the overwhelming majority of people might find distasteful or discomforting.") (citation and quotations omitted).

Keeping in mind these basic tenets, the Court must decide whether a reasonable person, having knowledge of the context in which the Video was sent (i.e. the relationship between Mr. Jeffries and Chan-

cellor Moyers, the background of the custody dispute), and having viewed its content, would view the Video as a serious expression of intention to inflict bodily harm. *See Alkhabaz*, 104 F.3d at 1495. The fact that Chancellor Moyers *even* watched the video is irrelevant. The issue is not whether the alleged victim perceived the communication as a "true threat." The issue is whether a reasonable juror–viewing the evidence in the light most favorable to the Government–would view the communication as a "true threat," having considered the content of the communication, and the context in which it was sent. *Id*. The Court must decide this issue from an objective perspective. *Id*.

Mr. Jeffries offers several arguments why the Video does not contain a "true threat." [Mr. Jeffries's Memorandum of Law in Support of the Motion for Judgment of Acquittal or New Trial, Doc. 105, at 14-16]. First, he argues that the statements made in the Video–including the threats of violence–were made in the context of a custody dispute, and therefore he was simply "venting" his frustration with the legal system. The fact that Mr. Jeffries made statements in this context does not mean that they are protected. Consider what he said during the Video:

- Mr. Jeffries claims that he does "not care if [he] go[es] to jail for ten thousand years," that he is "willing to go to prison," and that someone should "put [him] in jail and make a big scene"
- Repeats several times that the hearing on July 14, 2010 "better be the last time"

- Threatens Chancellor Moyers that if he "takes [his] child," then he will "take [his] life"
- Claims that he killed a man during war, and then says "I'm tellin' you [directed to Chancellor Moyers] this better be the last court date"
- Warns Chancellor Moyers, "I promise you, judge I will kill a man," and then follows by saying, "This better be the last time I end up in court"
- "Guarantees" to kill Chancellor Moyers unless he "stops" [presumably, rules in his favor in the custody dispute]
- Points at the camera and says he will "come after" Chancellor Moyers following the hearing on July 14, 2010
- Encourages "other dads to go out there and put bombs" in the cars of judges to "blow 'em up." He then makes a car bomb noise "BOOM!" and says "There went your fucking car"
- The Video ends with Mr. Jeffries threatening to "shoot," "kill," and "fuck" Chancellor Moyers unless he does "the right thing July 14th"

While Mr. Jeffries also discusses "parent alienation," his love for his daughter, his frustration with the legal system, and his military service, the majority of his language is aggressive, violent, and lacks any indication that he is joking. In fact, Mr. Jeffries states during the beginning of the Video that he is not joking:

> *"I'm not kidding at all, I'm making this video public/*
>
> *If I have to kill a judge or a lawyer or a woman, I don't care/*

Notably, Mr. Jeffries does not smile or laugh at any point during the Video. Moreover, the fact that he says on multiple occasions that he is not "joking" provides even more support that he intended to inflict bodily harm on Chancellor Moyers. Mr. Jeffries repeats several times that the hearing on July 14, 2010, better be "the last time," threatens to attack or kill Chancellor Moyers on multiple occasions, encourages other dads to put car bombs in judges' cars, shows that he considered the consequences of his actions by mentioning possible jail time, and references killing men during war. Clearly, a reasonable juror–viewing the Video from an objective perspective, and considering Mr. Jeffries's relationship with Chancellor Moyers–could find that the statements indicated a serious expression of an intention to inflict bodily harm.

Second, Mr. Jeffries argues that he did not "reasonably intend[] for the video to be seen by [Chancellor] Moyers." [Mr. Jeffries's Memorandum in Support of the Motion for Judgment of Acquittal or New Trial, Doc. 105, at 15]. This is similar to an argument that Mr. Jeffries raised prior to trial, and which the Court rejected as a basis for dismissing the Indictment. [*See* Mr. Jeffries's Memorandum of Law in Support of the Motion to Dismiss the Indictment, Doc. 23, at 11-16]. Mr. Jeffries compared the likelihood of Chancellor Moyers viewing the Video on YouTube–which includes thousands of videos at any time–with the likelihood of someone receiving a message in a bottle that was thrown into the ocean. [*Id.*].

In the context of the Motion to Dismiss [Doc. 22], the Court held that the likelihood of Chancellor Moyers viewing the Video was not a basis for dismissing the Indictment. [Order Adopting Report and Recommendation Denying Mr. Jeffries's Motion to Dismiss, Doc. 25].

As the Court previously stated, it is not necessary for the Government to prove that the victim received the "communication" (in this case, the Video). The offense was complete once the Video was transmitted in interstate commerce. This includes uploading the Video on YouTube, and sending links of the Video on Facebook. Putting aside the fact that Chancellor Moyers actually viewed the Video, the likelihood that he would view the Video (judged at the time Mr. Jeffries uploaded and sent links of the Video) has little bearing on whether it contained a "true threat." Rather, the threatening language of the Video–including threats of violence and demands for action–coupled with the fact that Mr. Jeffries sent the Video to at least twenty-nine other persons (or entities), demonstrates that a reasonable juror could find that the Video contained a "true threat."

As a final argument, Mr. Jeffries claims that he did not intend to intimidate Chancellor Moyers because he removed the Video from YouTube approximately one day after uploading it. This argument, however, ignores the fact that the offense was complete when Mr. Jeffries uploaded the Video on YouTube, and sent links of the Video on Facebook. Anything that happened afterwards–including removing the Video on YouTube–is absolutely irrelevant.

Having considered the content of the Video, and the context in which it was made, the Court finds

that a reasonable juror could find that the Video contained a "true threat." *Alkhabaz*, 104 F.3d at 1495.

4. A Reasonable Juror Could Find that the Video Was Made to Effect Change or Achieve Some Purpose, and Was Done Through the Use of Intimidation

Turning to the last element, Mr. Jeffries argues that the Video was not done to effect change or achieve some purpose. [Mr. Jeffries's Motion for Judgment of Acquittal or New Trial, Doc. 105, at 16]. In particular, Mr. Jeffries attempts to downplay the significance of the July 14th custody hearing. [*Id.*]. Mr. Jeffries argues that "Chancellor Moyers was not on the verge of deciding who would have sole custody of the child, and in fact Jeffries had been relatively pleased with Chancellor Moyers' previous rulings . . ." [*Id.*]. This directly contradicts Chancellor Moyers's trial testimony.

The purpose of the July 14th hearing was to determine if Mr. Jeffries was entitled to additional time with his daughter, less time, or the status quo. This was dependent upon several factors, including Mr. Jeffries's behavior towards his daughter (such as his use of profanity). Chancellor Moyers also wanted to determine if Mr. Jeffries had relocated to Knoxville (he was living in Clarksville, Tennessee at the time). As Chancellor Moyers explained, there were several important decisions to be made at the July 14th hearing.

However, even assuming that the July 14th hearing was not important, this has no impact on the Court's analysis. Regardless of the hearing's importance, Mr. Jeffries demanded that Chancellor Moyers take action. For example, during the end of

the Video, Mr. Jeffries says "do the right thing on July 14th," presumably demanding that Chancellor Moyers rule in his favor on the visitation issue.

In addition, it is clear that Mr. Jeffries used threats–or "intimidation"–to try to achieve this goal. In the Video, Mr. Jeffries repeatedly warns that the July 14th hearing better be "the last time," and threatens to attack or kill Chancellor Moyers unless he "does the right thing July 14th." Threats of violence–such as "If I have to kill a judge or lawyer or a woman"–are clearly a form of "intimidation." Even though he is not named in the Video, the statements were clearly directed towards Chancellor Moyers. The overall context of the Video, including Mr. Jeffries's opening statement that "[t]his song's for you, judge," and closing command to "[d]o the right thing July 14," indicate as much

Based on the foregoing, the Court finds that a reasonable juror could find that the Video was made to effect some change or achieve some purpose–i.e., gain custody or visitation rights–and was done through the use of intimidation (threats of violence). Accordingly, the Court finds that a rational trier of fact could have found that the Government proved the essential elements of the crime beyond a reasonable doubt. Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc. 104] is therefore **DENIED, to the extent that he challenges the sufficiency of the evidence pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.**

IV. CONCLUSION

Based on the foregoing, Mr. Jeffries's Motion for Judgment of Acquittal or New Trial [Doc.104] is **DENIED**.

IT IS SO ORDERED.

ENTER:

s/ Thomas W. Phillips
United States District Judge

APPENDIX C

No. 11-5722

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
Oct 31, 2012
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
v.) ORDER
FRANKLIN DELANO JEFFRIES, II,)
Defendant-Appellant.)

BEFORE: SUTTON and GRIFFIN, Circuit Judges; and DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

* Hon. David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.

mission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

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Deborah Hunt, Clerk