No. 13-983

IN THE

Morris Tyler Moot Court of Appeals at Yale

ANTHONY DOUGLAS ELONIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. As a matter of statutory interpretation, does conviction for threatening under 18 U.S.C. § 875(c) require proof of a defendant's subjective intent to threaten?

2. Does the First Amendment permit the government to criminalize speech as a "threat" under 18 U.S.C. § 875(c) if the speaker had no subjective intent to threaten?

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania on Petitioner's pre-trial motion to dismiss the indictment is available at 2011 WL 5024284. The District Court's opinion on Petitioner's post-trial motion to dismiss the indictment is reported at 897 F. Supp. 2d 335. The opinion of the Court of Appeals for the Third Circuit is reported at 730 F.3d 321.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on September 19, 2013. This Court granted certiorari on June 16, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment of the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

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

The First Amendment's core precept is that anyone may speak freely on any topic — however offensive to others. As a narrow exception to this rule, the state may proscribe speech if it is a "true threat" to do harm. In 2011, Anthony Elonis was tried under 18 U.S.C. § 875(c) for making threatening statements. At trial, the jury was told to use a purely "objective" standard: would a "reasonable person" have found Elonis's speech threatening? By contrast, his subjective intent was deemed irrelevant: whether his words were meant to frighten others, to share art, or to express political views, he would be equally guilty. This case asks if such an objective standard complies with the terms of § 875(c) or the dictates of the Constitution.

I. THE POSTED LYRICS

In May of 2010, Anthony Elonis's marriage dissolved. Tara Elonis, his wife of eight years, left home with the couple's children. J.A. 202. For Mr. Elonis, the loss was personally devastating. *Id.* 203. It also affected his career. Since 1999, Elonis had worked for Dorney Park, a local amusement center. *Id.* 198. In time, he was promoted to a supervisory role. *Id.* 199. After the separation, however, Elonis's work suffered. He took a leave of absence in June, *id.* 111, and when he returned he was distraught, sometimes "crying hysterically" at the office. *Id.* 137. On October 17, Elonis posted a crude joke to a coworker's "Facebook" webpage.[1] *Id*. 55. This post, along with increasingly erratic behavior, led to his eventual termination. *Id*. 211.

In response to these events, Elonis began to write song lyrics, which he posted to his "Facebook" page. Each lyric was a "public post," *id.* 236, accessible by any of Facebook's billion-plus members. Keith Darnay, *Facebook Passes 1 Billion*, Bismarck Trib. (N.D.), Oct. 5, 2012. Non-members could access the posts by completing a short form. J.A. 51. However, the posts were only visible to users who intentionally searched for them. J.A. 100.

As inspiration for his lyrics, Elonis looked to the "extreme rap" genre of artists like "Eminem." *Id.* 204. This genre explores themes like frustration and family strife. *E.g.*, *id.* 361-69. Yet it also features raw and profane imagery, from endorsements of criminal lifestyles to vulgar accounts of gender violence. *E.g.*, *id.* 367-68. Throughout 2010, Elonis made many Facebook posts containing lyrics in this style. Four sets of these lyrics proved especially controversial, and would form the basis for Elonis's eventual prosecution.

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[1] The incident involved a Facebook photograph of Elonis and a co-worker in Halloween costumes. The photograph featured Elonis holding a costume "prop knife" near the co-worker's neck. Elonis then digitally superimposed the words "I wish" at the photograph's margin. J.A 340.

1. The Dorney Park Lyrics: On October 22, Elonis posted lyrics based on Dorney Park's "Halloween Haunt" promotion. The post read:

> Moles, didn't I tell you I had several? You're all saying I had access to keys for all the fucking gates, that I have sinister plans for all my friends and must have taken a couple home. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween Haunt could be so fucking scary?

Id. 35.

These lyrics drew extensive commentary from other Facebook members. *Id.* 139-40. Dorney Park staff eventually contacted local authorities about the post. *Id.* 125.

2. The Tara Elonis Lyrics: Around the same time, Elonis posted several lyrics about his estranged wife. The first post, made in October, began by invoking free speech principles: "If you don't have anything nice to say, don't say anything at all? Fuck that Third Reich philosophy!" *Id.* 341. As if to demonstrate the point, he then offered a graphic verse: "If I only knew then what I know now/ I would have smothered your ass with a pillow/ dumped your body in the back seat/ dropped you off in Toad Creek/ and make it look like a rape and murder." *Id*.

This language echoes common tropes in Elonis's chosen "extreme rap" genre. *E.g.*, *id.* 362-63. Later that month, Elonis posted a second, similar set of lyrics:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Id. 344.

This second post was accompanied by a disclaimer stating that "all content posted to and by this account is strictly for entertainment purposes only and does not represent the views, beliefs, or values held by Anthony Elonis, the person." *Id.*

Tara Elonis, however, found these posts deeply upsetting. On November 4, she applied for and received a civil protective order against Mr. Elonis from the county court. *Id.* 82.

Three days later, Elonis posted a parody of a YouTube comedy video. The original, entitled "It's Illegal to Say," satirizes laws that restrict free speech. May 2, 2007, www.youtube.com/watch?v=QEQOvyGbBtY. In the clip, a faux "expert" intones:

> Did you know that it's illegal to say that "I want to kill the President of the United States of America?" It's illegal, it's a federal offense, it's one of the only sentences that you're not allowed to say . . . I'm not actually saying it. I'm just letting you know that it's illegal to say that. It's kind of like a public service . . . Yet even more illegal to show an illustrated diagram . . .

Id. The video then showed a childish sketch of Washington's Rockefeller-Hewitt building, ostensibly the "best place to fire a mortar launcher" at the Presidential bedroom. *Id.*

Elonis posted the video's full transcript, but replaced references to "President" with references to "wife." *Id.* 153, 333. As the original featured a diagram of Washington buildings, Elonis posted a crude map of the house where Ms. Elonis was then staying. *Id.* Elonis closed by stating: "[a]rt is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" *Id.* The post then offered a web link connecting readers to the original YouTube clip. *Id*.

Elonis made another post on November 15. *Id.* 155. Here, Mr. Elonis posted lyrics on the civil protective order, the county judge's "true threat jurisprudence," and local law enforcement:

> Fold up your [civil protective order] and put it in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Methinks the Judge needs an education on true threat jurisprudence
> You won't see a lick, because you suck dog dick in front of children.
> And if worse comes to worse, I've got enough explosives to take care
> of the state police and the sheriff s department . . . .

Id. 334.

The post closed with two references to speech rights: (1) a web link to the Wikipedia entry for "Free Speech," and (2) a photograph of a Westboro Baptist Church slogan that this Court deemed to be protected speech in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

3. The School Building Lyrics: On November 16, Elonis posted additional lyrics, stating:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten-mile radius
> To initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a kindergarten class
> The only question is . . . which one?

Id. 356.

These lyrics are jarring and offensive. However, such imagery is a common motif in the "extreme rap" genre. *E.g.*, Eminem, *I'm Back*, *on* The Marshall Mathers LP (Interscope Records 2000.[2] Once again, the lyrics were preceded by critiques of government restriction on speech: "I said art is dead[,] Berks [County] is rolling in dough/ While our founding fathers roll in their graves . . ." J.A. 356. This post also featured links to the Wikipedia entry for "Free Speech" and to the slogans of the Westboro Baptist Church. *Id.*

4. The FBI Lyrics: On November 30, two FBI officers went to the house where Elonis was staying to question him about his Facebook posts. J.A. 65. Elonis's father answered the door and asked his son to join him. J.A. 72. Elonis came outside and asked if he was required to talk with the agents. *Id.* 81. When he learned he was not, he declined to talk and went back inside. *Id.* 82. Later that day, Elonis posted the following lyrics:

> You know your shit is ridiculous when you have the FBI knocking at your door.
> Little agent lady stood so close. Took all the strength I had not to turn the bitch

[2] ("I take seven kids from Columbine, stand 'em all in line/ Add an AK-47, a revolver, a nine/ a Mac-11 and it oughta solve the problem of mine/ and that's a whole school of bullies shot up all at one time.")

> ghost, pull my knife, flick my wrist, and slit her throat. Leave her bleeding from her jugular in the arms of her partner. So then next time you knock you best be serving a warrant, and bring your S.W.A.T. and explosive expert while you're at it, because little did ya'll know I was strapped with a bomb. Why do you think it took me so long to get dressed with no shoes on? I was just waiting for ya'll to handcuff me and pat me down, touch the detonator in my pocket, and we'll all be goin'.

Id. 336.

In the next verse, Elonis sought to portray these lyrics as satire, writing "if you really believe this shit, I'll have some bridge rubble to sell you tomorrow . . . ." *Id.*

Elonis was arrested soon after making this post. He was charged with making threats against (1) Dorney Park (2) Ms. Elonis (3) local law enforcement (4) area schools and (5) the FBI. *Id.* 14-17. A trial was scheduled for late 2011.

II. TRIAL AND PROCEEDINGS BELOW

Before his trial, Elonis moved to dismiss the indictment against him. *Id.* 4. He argued that 18 U.S.C. § 875(c) was unconstitutional because it allowed conviction without a finding of subjective intent to threaten. *United States v. Elonis*, 2011 WL 5024284, at *2 (E.D. Pa. Oct. 20, 2011) *aff'd*, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014). The District Court rejected his motion. *Id.* at *3-4. Elonis's statements would thus be tried by a purely "objective" standard: would a "reasonable person" have found the posts threatening.

To meet this standard, the prosecution offered considerable testimony on how readers viewed Elonis's posts. For example, Ms. Elonis stated the posts made her "extremely afraid," J.A. 153, a sentiment shared by former coworkers, *e.g.*, *id.* 181, and law officers. *Id.* 64-65.

However, despite this objective standard, both sides hotly disputed Elonis's subjective intent. The prosecution claimed Elonis was moved by angry desires to harm, claiming:

> We don't have to prove he intended [his posts] to be threatening, *but I would submit to you, despite the fact we don't have to prove it, that is evident in this case, that he intended it,* he was mad at the world, mad at his wife, mad at law enforcement, mad at Dorney Park, he was mad, and he was lashing out to hurt them, and he was hurting them effectively . . . .

Id. 287-88 (emphasis added).

Elonis rejected this account, stating "I'd never hurt my wife, I'd never hurt a child, I'd never hurt anyone . . ." *Id.* 205. Instead, he offered three alternative motivations for the postings:

First, Elonis claimed that he wrote his lyrics as a form of personal catharsis. At trial, he testified his writing was "therapeutic," enabling him to "deal with the pain." *Id.* Accordingly, his Facebook page proclaimed "I'm doing this for me. My writing is therapeutic." *Id.* 329.

Second, Elonis argued his lyrics were intended as an artistic expression. Indeed, Elonis called himself an "aspiring rapper," *id.* 336, other Facebook users read his posts as "lyrics," *id.* 328, 341, and his language used the style of popular "extreme rap" artists. *Id.* 359-70.

Finally, Elonis claimed that he intended his lyrics as political protests against government speech restrictions. This view is amply supported by Elonis's constant invocation of free speech doctrines and ideals. *E.g.*, *id.* 333 ("Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?"); *see also id.* 329, 331, 334, 341, 348-349, 351-52, 356.

It is unclear what subjective intent the jury would have ultimately ascribed to Elonis. Yet under the objective standard, they were barred from asking the question: *whatever* Elonis's actual intention might have been, he would be equally guilty.[3] Applying this objective standard, the jury convicted Elonis on four of the five counts against him.[4] J.A. 310-11.

[3] A point the prosecution repeated eleven times in its closing arguments. J.A. 270, 274-76, 278-282, 285-287, 297.

[4] Elonis was acquitted on the charge regarding his Dorney Park lyrics. J.A. 310.

After the trial, Elonis moved to dismiss all charges, again claiming his conviction violated the First Amendment.[5] This motion was rejected. *United States v. Elonis*, 897 F. Supp. 2d 335, 342 (E.D. Pa. 2012) *aff'd*, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014).

On appeal, the Third Circuit noted a split among the courts. The Ninth Circuit held the First Amendment required "a finding of intent to threaten" before speech could be criminalized as threatening; other courts, like the Sixth Circuit, had reached an opposite conclusion. *United States v. Elonis*, 730 F.3d 321, 331 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014). Ultimately, the Third Circuit chose the latter approach and affirmed the lower court. *Id.* at 332.

SUMMARY OF THE ARGUMENT

I. As a matter of statutory interpretation, conviction under 18 U.S.C. § 875(c) requires proof of a defendant's subjective intent to threaten. Text, history, and this Court's background principles of criminal statutory construction make this plain.

Section 875(c)'s text, the starting point for this Court's analysis, is clear. The statute penalizes anyone who "transmits in interstate or foreign commerce any communication containing any *threat* to kidnap any person or any *threat* to injure the person of another, . . ." 18 U.S.C. § 875(c) (emphasis added). Ordinary and common law definitions of "threat" contain subjective intent components: one cannot make a "threat" without *intending to threaten*. This was true when Congress enacted § 875(c)'s first statutory predecessor in 1932. It remains true today. Section 875(c) thus requires proof of a defendant's subjective intent to threaten.

Section 875(c)'s legislative history reinforces this conclusion. The statute's first two predecessors, passed in 1932 and 1934, included subjective intent requirements. In 1939,

[5] Specifically, Elonis moved to dismiss the charges against him with prejudice under Federal Rule of Criminal Procedure 12(b)(3), or, in the alternative, to receive a new trial under Rule 33(a), an arrested judgment under Rule 34(b), or the dismissal of charges under Rule 29(c). J.A. 7.

Congress augmented these laws with a new, general ban on threats – a provision that would become § 875(c). The debate over this 1939 statute makes plain that Congress *did not* write subjective intent out of the statute – and certainly did not write an objective threat standard into it. Instead, Congress intended conviction under § 875(c) to require proof of a defendant's subjective intent to threaten.

Background principles of criminal statutory construction further support this reading of § 875(c) in two ways. First, this Court presumes that if criminal statutes are silent as to their *mens rea* requirement, they must be read to require at least "knowledge." This presumption applies to the element separating legal from illegal conduct: here, the term "threat." Applying this presumption to § 875(c) makes plain that a defendant must *know* he is transmitting a *threat* to violate § 875(c). In other words, he must subjectively intend to threaten. Second, even if this Court found § 875(c) to be ambiguous, the rule of lenity would require this Court to read § 875(c) to require subjective intent to threaten.

II. The First Amendment also requires that § 875(c) include a subjective intent requirement. Without such a requirement, § 875(c) punishes speech that "reasonable people" find threatening. This "objective standard" thus criminalizes "unintended threats": speech misread as threatening but meant for other purposes, like protest or art. This outcome is unconstitutional.

In general, the government cannot punish speech for its "ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Only "limited classes" of speech fall beyond this protection. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942). Some claim unintended threats fit into one such category — that they are constitutionally proscribable "true threats." However, in *Virginia v. Black*, 538 U.S. 343 (2003), this Court held that unintended threats cannot be "true threats." The Court defined "true threats"

as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." *Id.* at 359. The "natural" reading of this sentence is that "true threats" require a speaker to "intend[] for his language to *threaten* the victim" *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005). Yet even if this statement were ambiguous, the opinion's broader context reveals that only a subjective reading is viable.

Even apart from *Black*, First Amendment principles also exclude unintended threats from the "true threat" category. Categorization as "unprotected" is only appropriate for speech whose "expressive content" is "worthless . . . to society." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 400 (1992) (White, J., concurring in judgment). But unintended threats are not "worthless." To the contrary, such speech often embodies core political, artistic, and personal expression. And even if unintended threats were themselves "worthless" speech, placing them in the "true threat" category would unduly chill other legitimate expression. The objective standard makes speakers responsible for how listeners might misperceive their statements. This deters speakers from engaging in wholly legitimate expression. To avoid this chill, the First Amendment requires that unintended threats be treated not as "true threats," but as fully protected speech.

Because unintended threats are protected expression, they may only be criminalized if doing so serves a compelling state interest that cannot be met less intrusively. *Burson v. Freeman*, 504 U.S. 191, 195 (1992). The objective standard fails this test. It does not satisfy the state's interest in preventing violence, because unintended threats do not cause violence. Nor, as logic and experience show, does it serve the state's interest in deterring *intentional* threats. It does not even satisfy the state's interest in reducing fear caused by *unintended* threats, for the objective standard is not "narrowly tailored" to meet this aim, and less restrictive alternative measures, such as civil penalties, are available. Most importantly, the reduction of unintended fear is not,

by itself, compelling enough to outweigh core speech rights. Therefore, § 875(c) must be read to require subjective intent, or the statute must fall as fatally overbroad.

ARGUMENT

I. AS A MATTER OF STATUTORY INTERPRETATION, CONVICTION UNDER 18 U.S.C. § 875(C) REQUIRES PROOF OF A DEFENDANT'S SUBJECTIVE INTENT TO THREATEN.

A. The text of 18 U.S.C. § 875(c) makes plain that conviction of threatening requires proof that a defendant subjectively intended to threaten.

The text of 18 U.S.C. § 875(c) is clear: it penalizes anyone who "transmits in interstate or foreign commerce any communication containing any *threat* to kidnap any person or any *threat* to injure the person of another . . . ." 18 U.S.C. § 875(c) (emphasis added). The statute's crucial term is "threat." "Threat" – in ordinary usage and at common law – contains a subjective intent component. One cannot make a threat without *intending to threaten* someone. This was true when Congress enacted § 875(c)'s statutory predecessor in 1932. It remains true today. And it means conviction under § 875(c) requires proof of a defendant's subjective intent to threaten.

1. The ordinary meaning of "threat" contains a subjective intent requirement.

To construe the term "threat" in § 875(c), this Court must first begin by "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Milner v. Dep't of Navy,* 131 S. Ct. 1259, 1264 (2011) (citation omitted). This "ordinary" or "plain" meaning rule is especially important here because § 875 does not define "threat." *See Smith v. United States*, 508 U.S. 223, 228 (1993). And if "the words of a statute are unambiguous . . . this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted).

The text of § 875(c) is unambiguous: "[e]very relevant definition of the noun 'threat' . . . includes an intent component." *United States v. Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012)

(Sutton, J., dubitante), *cert. denied*, 134 S. Ct. 59 (2013).[6] Moreover, this intent component is *subjective*: it focuses on the intentions and motives of the person threatening.

When Congress enacted § 875(c)'s first predecessor in 1932, dictionaries universally defined "threat" to contain a subjective intent component. *See, e.g.*, *The Concise Oxford English Dictionary* 1277 (2d ed. 1929) (defining "threat" as a "[d]eclaration of intention to punish or hurt"); *The Little Oxford Dictionary of Current English* 526 (1930) (same); *see also* 11 *The Oxford English Dictionary* 353 (1933) (defining "threaten" as "to declare (usually conditionally) one's intention of inflicting injury upon"). Nothing changed in the following decades, when § 875(c) was codified in Title 18 of the United States Code. *E.g.*, *Webster's New Collegiate Dictionary* 885 (1951) ("The expression of an intention to inflict evil or injury on another . . . ."). Today, "threat" still has a subjective intent component. *See, e.g.*, *New Oxford American Dictionary* 1806 (3d ed. 2010) ("[S]tatement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done . . . .").

The "intent" in such definitions is plainly the threatener's. Any other reading would require: (1) inserting words into accepted definitions of "threat" ("an expression of *a third party's* intention," or "declaration of *someone's* intention to punish") or (2) "wrenching the expectations raised by normal English usage." *Lopez v. Gonzales*, 549 U.S. 47, 48 (2006). This Court should do neither. Settled definitions of "threat" make clear that "[o]ne may cause another to 'feel threatened' through an act of mere jest or even negligence (an objective inquiry), but one cannot

[6] Two circuits have addressed the statutory construction of § 875(c): the Sixth Circuit, in Judge Sutton's dubitante opinion in *Jeffries*; and the Tenth Circuit, in a concurrence by Judge Baldock in *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014) (Baldock, J., concurring in judgment). Both reached the same conclusion – § 875(c)'s text and history, along with this Court's principles of criminal statutory construction, make plain that conviction of threatening requires proof of a defendant's subjective intent to threaten. *Heineman*, 767 F.3d at 987 (Baldock, J., concurring in judgment); *Jeffries*, 692 F.3d at 486 (Sutton, J., dubitante).

'threaten' another without intending to do so (a subjective inquiry)." *United States v. Heineman*, 767 F.3d 970, 986 (10th Cir. 2014) (Baldock, J., concurring in judgment).

By 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." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). Subjective intent inheres in the word "threat"; an objective standard for intent does not.

Accordingly, conviction under § 875(c) requires proof of a defendant's subjective intent to threaten. Any other construction of § 875(c) does violence to its text.

2. Common law definitions of "threat" also contain a subjective intent requirement.

Threats have been criminalized at common law for centuries. *See* 3 William Blackstone, *Commentaries on the Laws of England* 120 (Wayne Morrison, ed., 2001). Accordingly, "threat" has an established common law meaning. And when Congress enacted § 875(c)'s first predecessor in 1932, this common law definition clearly required subjective intent to threaten.

It is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994). Under this principle, "words undefined in a statute are to be interpreted and applied according to their common-law meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012). If a word has conflicting ordinary and common law meanings, this Court must choose which competing interpretation to adopt. *Taylor v. United States*, 495 U.S. 575, 595 (1990). But this case poses no such conflict: common law definitions of "threat" align perfectly with its ordinary meaning: both require subjective intent.

When Congress enacted § 875(c)'s first statutory predecessor in 1932, courts routinely defined "threat" as including a subjective intent component. *E.g.*, *United States v. French*, 243

F. 785, 786-87 (S.D. Fla. 1917) ("No particular words are necessary to constitute a threat, but these words must be intended for the person threatened"); *McKenzie v. State*, 204 N.W. 60, 60 (Neb. 1925) ("'Threat' in criminal law is menace or declaration of one's purpose or intention to work injury to person, property, or rights of another, with a view of restraining such person's freedom of action . . . .").

Legal dictionaries in existence when § 875(c) was first drafted likewise defined "threat" with a subjective intent component. *E.g.*, *Black's Law Dictionary* 1154 (2d ed. 1910) ("[A] declaration of one's purpose or intention to work injury to the person, property, or rights of another."). This is still the case today. *E.g.*, *Black's Law Dictionary* 1708 (10th ed. 2014) ("A communicated intent to inflict harm or loss on another or on another's property . . . .").

In sum, "threat," as defined at common law, has contained a subjective intent component for the entirety of § 875(c)'s history. Case law and legal dictionaries confirm what the ordinary meaning of "threat" makes plain. Every relevant definition of "threat" – at every time relevant to this case – contained a subjective intent component.

Section 875(c)'s text is unambiguous. Ordinary and common law definitions of "threat" contain clear subjective intent requirements. Conviction under § 875(c) thus requires proof of a defendant's subjective intent to threaten.

B. 18 U.S.C. § 875(c)'s legislative history makes clear that it contains a subjective intent requirement.

18 U.S.C. § 875(c)'s text is not ambiguous. But "authoritative legislative history can be useful, even when . . . meaning can be discerned from the statute's language, to reinforce or to confirm a court's sense of the text." Robert A. Katzmann, *Judging Statutes* 35 (2014). Section 875(c)'s legislative history confirms what its text makes plain: that conviction for threatening requires proof of a defendant's subjective intent to threaten.

The drafters and supporters of § 875(c) *never* intended conviction under it to turn on an objective, "reasonableness" test. To the contrary, legislative history demonstrates that Congress added a *subjective intent* requirement to all three of § 875(c)'s predecessors: Public Law 72-274 (the "1932 Act"), Public Law 73-231 (the "1934 Act"), and Public Law 76-76 (the "1939 Act").

The 1932 Act only criminalized extortionate threats transmitted by mail. Act of July 8, 1932, ch. 464, Pub. L. No. 72-274. It contained an express requirement of extortionate intent. *Id.* So, too, did the 1934 Act, which criminalized extortion by "telephone, telegraph, radio, oral message, or otherwise." Act of May 18, 1934, ch. 300, Pub. L. No. 73-231. The 1939 Act included both a provision criminalizing extortive threats and a general threat provision, which criminalized non-extortive threats. Act of May 15, 1939, ch. 133, Pub. L. No. 76-76, 53 Stat. 744 (codified as amended at 18 U.S.C. § 875). Only the extortive threat prohibition contained the word "intent." *Id.* § 2(b). But the 1939 Act's legislative history demonstrates that Congress *never* wrote subjective intent out of the general, non-extortive threat provision. And this history also demonstrates that Congress never wrote an objective threat standard into it.

Throughout § 875(c)'s legislative history, "Congress offered no hint that it meant to write subjective conceptions of intent out of the statute." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). Section 875(c)'s history makes plain that it has always contained a subjective intent requirement.

1. Section 875(c)'s predecessors required proof of a defendant's intent to extort.

Section 875(c) began as an anti-extortion statute with a clear intent requirement. Originally, federal authorities prosecuted interstate extortion through a general fraud statute. Act of March 4, 1909, ch. 321, § 215, Pub. L. No. 60-350, 35 Stat. 1088, 1130 (codified as amended at 18 U.S.C. § 1341). But in 1926, this Court ruled in *Fasulo v. United States*, 272 U.S. 620 (1926),

that the statute did not reach "use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm." *Id.* at 625. In 1932, members of the House – spurred by *Fasulo* and the Lindbergh baby kidnaping – vigorously advocated H.R. 96, a bill criminalizing interstate extortionate threats. *See* H.R Rep. No. 72-692, at 1 (1932).

Congressional reports on H.R. 96 never discussed "objectively threatening" communications. Instead, Congress was concerned with "curb[ing] the growing practice of using the mails for sending to *intended victims* demands for money and dire threats of confinement or death . . . unless the demands were promptly met." S. Rep. No. 72-498, at 1 (1932) (emphasis added).

To meet this concern, on July 8, 1932, Congress enacted the 1932 Act – § 875(c)'s first statutory predecessor. That statute contained an express intent requirement:

> That whoever, with *intent to extort* from any person any money or other thing of value, shall knowingly deposit or cause to be deposited in any post office or station thereof . . . any written or printed letter or other communication . . . containing any threat . . . shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Pub. L. No. 72-274, § 1 (emphasis added). Conviction under the 1932 Act clearly required proof of a defendant's "*intent* to extort." *Id.* (emphasis added). "From the beginning, the communicated 'threat' thus had a subjective component to it." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante).

Congress then passed a new threat bill – the 1934 Act – to supplement the 1932 Act's scope. The 1934 Act banned "extortion by means of telephone, telegraph, radio, oral message, or otherwise." Pub L. No. 73-231. Like the 1932 Act, the 1934 Act contained an extortionate intent requirement: conviction required proof that a defendant acted "with intent to extort." *Id.* None of its drafters contemplated that this Act would define threatening messages by an "objective" standard. *See* S. Rep. No. 73-533, at 1 (1934); H.R Rep. No. 73-1456, at 1 (1934).

2. Congress passed a new statute in 1939 that criminalized both extortive and non-extortive threats, but it did not intend to remove subjective intent from the statute.

In 1939, Congress passed a new threat statute: the 1939 Act. This Act codified a new version of the earlier bans on extortionate threats, providing that

> [W]hoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, shall transmit . . . any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined not more than $5,000 or imprisoned not more than twenty years or both.

Pub. L. No. 76-76, § 2(a). The 1939 Act also included a new prohibition on non-extortive threats that was later substantially codified as § 875(c):

> Whoever shall transmit in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id. § 2(b).

This latter provision, unlike the extortionate threat provision, did not contain the word "intent." But no one involved in drafting the 1939 Act believed this difference removed the subjective intent requirement from the new, non-extortionate threat prohibition. To the contrary, the bill's supporters believed that "it [was] plainly shown in the language that the one who violated this section must have been connected with or had *knowledge and an intent to help carry out* the scheme involved." *Hearing Before the H. Comm. on the Post Office and Post Roads*, 76 Cong. 7, at 23 (1939) (statement of William W. Barron, Criminal Div., Dep't of Justice) (emphasis added). Conviction under this new, non-extortive threat provision required proof that a defendant *intended to threaten* someone.

Indeed, discussions of subjective intent dominated the Congressional debate over the 1939 Act. As early as 1936, the Department of Justice recognized "that the element of intent to extort

money or other thing of value [was often] absent in cases involving the sending of threats through the mails or in interstate commerce, *although the threat may be of a dangerous or vicious character*." *Id.* at 3 (Letter from Attorney Gen. Homer Cummings to Rep. William B. Bankhead, dated May 6, 1936) (emphasis added). The intent behind these threats was "perfectly clear": criminals were intentionally sending "threat[s] to kidnap or to do personal injury or injury to a reputation . . . but thorough investigation and study [by law enforcement would] fail to develop any motive or purpose to extort money." *Id.* at 7 (1939) (statement of William W. Barron, Criminal Div., Dep't of Justice). Though such criminals were not after money, they were still transmitting threats "borne of other (intentional) purposes." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). But under the 1932 and 1934 Acts, "it [was] no offense to send a threat through the mails or in interstate commerce unless the sender of such threat intend[ed] to extort money, or other thing of value." H.R. Rep. 76-102, at 1 (1939).

Congress's aim in drafting the 1939 Act was clear: it wanted to preserve the existing prohibition on extortionate threats while ensuring that "a threat, when not accompanied by demand for money or something else of value, be unmistakably made an offense." *Hearing Before the H. Comm. on the Post Office and Post Roads*, 76 Cong. 7, at 9 (1939) (statement of William W. Barron, Criminal Div., Dep't of Justice). To do so, Congress took a two-prong approach in which the 1939 Act:

1. Preserved the 1934 Act's "punishment of . . . $5,000 maximum fine and 20 years' imprisonment where the threat of kidnaping or injury to the person [was] for the purpose of extorting."

2. Added a new "punishment of not more than $1,000 fine, or imprisonment for not more than 5 years, where the threat is to injure the person or to kidnap without the purpose of extorting."

Id. at 4. The language in these provisions was *nearly identical*. Both barred threats of "injury to the person" or "kidnaping." *Id.* Neither meant to remove a subjective intent requirement from the 1939 Act.

The 1939 Act's penalty structure further confirms that Congress did not seek to remove subjective intent from the non-extortive threat provision. Under the 1939 Act, non-extortive threats were punished more lightly than extortive threats. But this was *only* because the former did not involve "a demand for money." *Id.* at 6. Such non-extortive threats, for example, "might be on account of revenge or spite" – plainly, borne from a subjective intent to threaten. *Id.* at 7. Extortionate intent – "a demand for money" – functioned as a penalty enhancement, not as the only form of subjective intent in the bill. *Id.* at 6-7.

The 1939 Act's legislative history makes no mention of objective tests for threatening communications. *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). It offers no evidence that any of the bill's supporters equated non-extortive threats with an objective standard. Instead, its history shows that Congress never sought to graft an objective intent requirement onto the existing threat statute.

In 1939, Congress debated "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." *Id.* Congress – at every stage of the bill's legislative history – intended conviction for interstate threatening to require proof of a defendant's *subjective intent* to threaten. And with the exception of a clerical recodification in 1948,[7] § 875(c) remains today in substantially the same form.

[7] In 1948, Congress codified Public Law 76-76 into 18 U.S.C. § 875 without substantively changing it. *See* H.R. Rep. 80-304, at A73, A415 (1947).

Nothing in § 875(c)'s legislative history suggests Congress sought to remove a subjective intent requirement from it. By its terms – from 1932 through today – conviction for threatening under § 875(c) has *always* required proof of a defendant's subjective intent to threaten.

C. Background principles of criminal statutory construction confirm that conviction under § 875(c) requires proof of a defendant's subjective intent to threaten.

Finally, apart from § 875(c)'s text and history, two of this Court's core principles of criminal statutory construction demand a subjective intent requirement.

First, this Court adopts a presumption of *mens rea* when interpreting criminal statutes like § 875(c). *E.g.*, *Staples v. United States*, 511 U.S. 600, 605-06 (1994). This presumption, as the Court has often emphasized, "should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Applying this presumption to § 875(c) makes plain that, at minimum, a defendant must *know* he is transmitting a *threat* to violate the statute. Nothing in 18 U.S.C. § 875(c)'s history suggests that this presumption is inapplicable to it.

Second, if this Court determines that § 875(c) is ambiguous, the rule of lenity demands that it be read in favor of defendants. Under such a reading, conviction under 18 U.S.C. § 875(c) would still require proof of a defendant's subjective intent to threaten.

1. Under this Court's presumption of mens rea, conviction of threatening under § 875(c) requires proof of a defendant's subjective intent to threaten.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Accordingly, "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978)). Consistent with that rule, this

Court has adopted, "at least with regard to crimes having their origin in the common law . . . an interpretative presumption that *mens rea* is required." *Gypsum*, 438 U.S. at 437. And this "presumption . . . should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video*, 513 U.S. at 72.

Although "*mens rea* is not a unitary concept," *United States v. Freed*, 401 U.S. 601, 613 (1971) (Brennan, J., concurring), this Court has consistently presumed that – *at minimum* – conviction under a criminal statute requires proof that a defendant *knew* he was engaging in criminal conduct.[8] *See, e.g.*, *Staples*, 511 U.S. at 619; *X-Citement Video*, 513 U.S. at 78; *Liparota v. United States*, 471 U.S. 419, 433 (1985). Accordingly, "[t]his Court . . . has on a number of occasions read a [knowledge] component into an offense even when the statutory definition did not in terms so provide." *Gypsum*, 438 U.S. at 437. And knowledge is a form of subjective intent: *knowingly* committing a crime is equivalent to *intentionally* committing it. *See, e.g.*, *X-Citement Video*, 513 U.S. at 72 (equating knowledge of wrongdoing with "scienter"); *United States v. Bailey*, 444 U.S. 394, 403-05 (1980) (noting that knowledge is a form of intent); *see also* Karen Rosenfield, Note, *Redefining the Question: Applying A Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 Cardozo L. Rev. 1837, 1863-64 (2008) (concluding that knowledge is the appropriate subjective intent requirement for § 875(c)).

Applying this *mens rea* presumption confirms that conviction under § 875(c) requires proof of a defendant's subjective intent to threaten. This presumption applies even though the statute does not use the words "knowingly" or "knowledge." *See, e.g.*, *Staples*, 511 U.S. at 605-06

[8] This Court never presumes that perfect or total knowledge is required. A defendant need not know every consequence of his criminal actions. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994); *Gypsum*, 438 U.S. at 444. Nor must a defendant know which law he broke. *Morissette*, 342 U.S. at 270-71 (1952). But a defendant must know the facts that brought his conduct within the ambit of a criminal statute. *See, e.g.*, *id.*

(conviction under National Firearms Act requires proof that defendant knew he possessed a gun prohibited by statute, although statute does not contain words "knowingly" or "knowledge").

Section 875(c)'s crucial element is the word "threat": that word "separate[es] legal innocence from wrongful conduct" in § 875(c). *X-Citement Video*, 513 U.S. at 73; *see also Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). "It is not enough that a defendant knowingly communicates *something* in interstate commerce; he must communicate a threat . . . ." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). In turn, this Court's *mens rea* presumption extends not only to the word "transmits" in 18 U.S.C. § 875(c), but to the word "threat" as well. *See X-Citement Video*, 513 U.S. at 73. A defendant must *know* that he is transmitting a *threat* in order to violate § 875(c). This is equivalent to subjectively intending to threaten. *See, e.g.*, *Bailey*, 444 U.S. at 403-05.

An objective standard does only half the work that this Court's *mens rea* presumption demands. It reads "knowledge" into § 875(c), but does not apply it to the statute's key element: "threat." *See, e.g.*, *Elonis*, 730 F.3d at 332. It "permit[s] 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." *Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante). And it renders subjective intent – a bedrock of this Court's criminal statutory construction jurisprudence – a "transient notion." *Morissette*, 342 U.S. at 250. Such a reading cannot stand.

"[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 606. Section 875(c)'s legislative history discloses no such intent. Thus, this Court's presumption of *mens rea* plainly applies to § 875(c) and confirms that it contains a subjective intent requirement.

That Congress included the word "intent" in 18 U.S.C. §§ 875(b) and (d) is insufficient evidence that it wanted to remove a subjective intent requirement from § 875(c). *See Dennis v.*

United States, 341 U.S. 494, 499-500 (1951) ("It would require a far greater indication or congressional desire that intent not be made an element of the crime than the use of . . . 'knowingly or willfully' in [one provision], or the omission of exact language in [another]."). This is particularly true because the word "intent" in Sections 875(b) and (d) is coupled with the modifying phrase "to extort." 18 U.S.C. §§ 875(b), (d). As the statute's legislative history makes plain, Congress sought to criminalize two types of threats – extortive and non-extortive threats – *both* of which contain a subjective intent requirement. *Hearing Before the H. Comm. on the Post Office and Post Roads*, 76 Cong. 7, at 23 (1939) (statement of William W. Barron, Criminal Div., Dep't of Justice).

When Congress wants to insert an objective reasonableness requirement into a threat statute, it does so unambiguously. *See, e.g.*, 18 U.S.C. § 831(a)(6) (penalizing anyone who "knowingly threatens to use nuclear material . . . under circumstances in which *the threat may reasonably be understood as an expression of serious purposes*) (emphasis added); U.S.S.G. § 2B3.1 cmt. 6 (defining "[a] threat of death" as "conduct that would *instill in a reasonable person* . . . a fear of death") (emphasis added). Section 875(c) contains no such language. It provides no indication that Congress intended to supplant subjective intent with an objective reasonableness requirement. Instead, "Congress just used the word 'threat,' indicating that one cannot make a prohibited menacing communication without meaning to do so." *Jeffries*, 692 F.3d at 473 (Sutton, J., dubitante).

This Court's presumption of *mens rea* plainly applies to § 875(c). Conviction under § 875(c) therefore requires proof that a defendant transmitted a communication that *he knew contained a threat*. It requires proof of a defendant's subjective intent to threaten.

2. If this Court determines that § 875(c) is ambiguous, the rule of lenity demands that it be read to require proof of a defendant's subjective intent to threaten.

Section 875(c)'s text and history make plain that conviction under it requires proof of a defendant's subjective intent to threaten. Applying this Court's presumption of *mens rea* to § 875(c) reinforces this conclusion. But if, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute," then the rule of lenity should guide its reading of § 875(c). *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (quoting *Smith*, 508 U.S. at 239). And under this principle, conviction under § 875(c) should require proof of a defendant's subjective intent to threaten.

The rule of lenity mandates that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). Under this rule, "when choice has to be made between two readings of what conduct Congress has made a crime," *id.* at 347 (citation omitted), "the tie must go to the defendant." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

Here, lenity commands that this Court read § 875(c) to require proof of subjective intent to threaten. An "objectively threatening" standard "reduces culpability on the all-important element of the crime" – threat – "to negligence." *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante). Lenity requires more – at minimum, a standard that weighs the subjective motivations of a defendant accused of threatening. Requiring proof of a defendant's subjective intent to threaten does just that.

II. THE FIRST AMENDMENT REQUIRES THAT 18 U.S.C. § 875(C) INCLUDE A SUBJECTIVE INTENT REQUIREMENT.

If § 875(c) does not contain a subjective intent requirement, then speech may be criminalized whenever a "reasonable person" finds it threatening. This objective standard punishes "unintended threats": speech misperceived as a threat but actually meant for other purposes, like political protest or art. The First Amendment does not permit this outcome.

In general, our government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Only a few "limited classes" of speech – like "defamation" and "obscenity" – fall outside this protection. *Chaplinsky,* 315 U.S. at 571-72. Only one such category is relevant to this case: "true threats" to do harm. *Watts v. United States,* 394 U.S. 705, 708 (1969). Yet this Court has clearly stated that unintended threats are *not* "true threats." Instead, they are fully protected speech and can be only be punished if doing so serves a compelling state interest that cannot be met less intrusively. An objective threat standard fails this test. Thus, § 875(c) must be read to require subjective intent, or the statute must fall.

A. *Virginia v. Black* limits "true threats" to statements made with subjective intent to threaten.

In *Virginia v. Black*, this Court clearly stated that unintended threats fall outside the "true threat" category. *Black* involved three defendants who challenged their convictions under a Virginia cross burning statute. The statute had two provisions:

> 1. It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place . . . .
>
> 2. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Black, 538 U.S. at 348 (quoting Va. Code Ann. § 18.2-423 (West)).

The Court upheld the first provision, which banned cross burning "with the intent of intimidating." *Id.* at 363. In doing so, it defined the unprotected "true threat" category:

> "True 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*. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." 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 359-60 (citations omitted) (emphasis added).[9]

The passage's key sentence defines "true threats" as statements "where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual." *Id.* (emphasis added). Some courts read this as endorsing an objective standard for "true threats." On this count, the phrase "means to communicate" only requires that a defendant "*knowingly* say[] the *words*." *Jeffries*, 692 F.3d at 480. So long as a speaker communicated voluntarily (as opposed to, say, under duress), a "true threat" exists if "objective" listeners would perceive the message as expressing "an intent to commit an act of unlawful

[9] Because this passage uses the term "encompass" instead of "define," one commentator has suggested that it is not a "definition" at all. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 53 (2011). While creative, this reading is foreclosed by the context of the immediately preceding paragraphs. *See Black*, 538 U.S. at 359 (defining the "fighting words" and "incitement" categories before presenting the "true threat" category.). Accordingly, no court seems to read this passage as anything other than a definition of the "true threat" category. *See, e.g.*, *Heineman*, 767 F.3d at 976 (analyzing this passage as a definition of the "true threat" category)*; United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (same); *Elonis*, 730 F.3d at 329 (same); *Jeffries*, 692 F.3d at 480 (same); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) (same).

violence." Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1257 (2006).

A more persuasive reading, however, is that the phrase "the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence" requires both that (1) a speaker "means" to "communicate" *and* (2) he "means" the communication as an "intent to commit an act of unlawful violence" — in other words, that he "intend for his language to *threaten* the victim." *Cassel*, 408 F.3d at 631. This is the sentence's "natural reading." *Id.* And even if the sentence were ambiguous, context reveals that only a subjective reading is viable.

The first key insight comes right after the "definition sentence." The opinion reads:

> "True 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. *The speaker need not actually intend to carry out the threat.*

Black, 538 U.S. at 359-60 (citation omitted) (emphasis added).

If the *Black* Court defined "true threats" to require subjective intent, then this next sentence explains what *type* of subjective intent is needed: a speaker need only intend to *threaten* — not to act on the threat. This is logical. Yet if the *Black* Court defined "true threat" to include an "objective" standard, this sentence would be empty surplus: *of course* the speaker needn't "intend to carry out the threat," because *any* subjective "intent" would already be irrelevant.

Further insight comes from the broader structure of this "definition paragraph." It reads:

> "True 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. . . . 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 359-60 (emphasis added).

If "true threats" require subjective intent, the paragraph's structure is: (1) all "true threats" require "intent of placing the victim in fear" and (2) "intimidation" is a type of "true threat." This makes sense. However, if the *Black* Court meant to suggest an objective standard, this structure is puzzling. On one hand, "intimidation" threats are only "constitutionally proscribable" if made with the "intent of placing the victim in fear." If such subjective intent is absent, "intimidation" cannot be a "true threat." Yet at the same time, a class of "nonintimidation" threats could be "true threats" *without* a subjective intent requirement. What could explain this distinction? After all, threats involving "death" would seem to justify a *lower* intent standard than other types of "true threat." *Heineman*, 767 F.3d at 981. Yet nothing in *Black* "so much as hints" at this answer, making such a reading untenable. *Id.*

Finally, and most significantly, this Court's ruling on the statute's "prima facie" provision is only tenable if "true threats" require subjective intent. The "prima facie" provision stated that the "act" of cross burning was itself "prima facie evidence of an intent to intimidate." *Black*, 538 U.S. at 348 (quoting Va. Code Ann. § 18.2-423 (West)). Eight Justices found this provision constitutionally defective.[10] Four Justices found it defective because it made courts unable to "distinguish between a cross burning done with the [protected] *purpose* of creating anger or resentment and a cross burning done with the [unprotected] *purpose* of threatening or intimidating a victim." *Id.* at 366 (plurality opinion) (emphasis added). Justice Scalia found it defective because "it means that some individuals who engage in *protected speech* may, *because of the prima-facie-evidence provision*, be subject to conviction." *Id.* at 372-73 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis added). Justice Souter, joined by two colleagues, found it defective because its "effect is to skew jury

[10] The ninth, Justice Thomas, would have upheld the provision. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

deliberations toward conviction in cases where the *evidence of intent to intimidate is relatively weak* and arguably *consistent with a solely ideological* reason . . . ." *Id.* at 385 (Souter, J., dissenting) (emphasis added).

If *Black* did not require subjective intent, then these rejections of the prima facie provision are nonsensical. After all, "[w]hy would the First Amendment care how a jury goes about finding an element that is a matter of indifference to the Amendment?" *Heineman*, 767 F.3d at 980.

Black's core holding thus makes plain that an unintended threat cannot be a "true threat."[11] Instead, such speech must be considered fully protected expression.

B. First Amendment principles limit "true threats" to statements made with subjective intent to threaten.

Even if *Black* did not control, First Amendment principles would still exclude unintended threats from the "true threat" category. "True threats" join "obscenity" and "fighting words" as one of the "narrowly limited" categories beyond First Amendment protection. *Chaplinsky*, 315 U.S. at 571. This "categorical" approach breaks from the "bedrock principle" that expression cannot be punished for its content. *Texas v. Johnson,* 491 U.S. 397, 414 (1989). As such, only speech whose "expressive content" is "worthless or of *de minimis* value to society" may be categorized as unprotected. *R.A.V.*, 505 U.S. at 400 (White, J., concurring in judgment); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942). And even "worthless" speech

[11] The *Black* Court's enunciation of the subjective intent requirement did break from prevailing circuit doctrine. *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012). Yet a ruling "disagreeing with a clear majority of the [c]ircuits is not at all a rare phenomenon." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 621 (2001) (internal quotation omitted). Nor is one done without fanfare. *Compare McNally v. United States*, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting) (noting that the majority broke from "[e]very [circuit] court" that had previously considered the case's question), *with id.* at 352-361 (1987) (majority opinion) (making no mention of this fact). Accordingly, the pre-*Black* state of circuit precedent is not relevant to interpreting the *Black* opinion.

should not be "categorized" if doing so chills other, legitimate expression. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Unintended threats are not "worthless" speech. Instead, they often have great expressive value. "People often use violent phrases or symbols to convey ideas or displeasure, not just to threaten. They employ such speech for its emotive appeal, not just its cognitive force." *United States v. White*, 670 F.3d 498, 524 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part). And even if such speech *were* worthless, criminalizing it chills other protected expression. Unintended threats must be seen not as unprotected "true threats" but as fully protected speech.

1. The objective threat standard criminalizes valuable speech.

Some claim the objective standard protects all valuable expression, assuming unintended threats are valueless speech. *E.g.*, *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013). This assumption is incorrect; the objective approach punishes core political, artistic, and personal expression.

The objective standard punishes core political speech. Political speech – speech contributing to "uninhibited, robust, and wide-open" civic debate – merits the strongest First Amendment protections. *Sullivan*, 376 U.S. at 270. To serve its "high purpose," however, such speech must often "induce[] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). If "political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 244 F.3d 1007, 1019 (9th Cir. 2001), *on reh'g en banc as amended* (July 10, 2002), 290 F.3d 1058 (9th Cir. 2002). This truth is well-supported by our history: "extreme rhetoric" has "marked many political movements," from the pamphlets of Patriot rebels to the calls of abolitionists to the

protests of modern activists. *Id.* at 1014. Recognizing this, the First Amendment guards political speech even when it is "vituperative, abusive, and inexact." *Watts*, 394 U.S. at 708.

Yet precisely because their speech must often be provocative, passionate political speakers risk being mistaken as "threatening." *Compare Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), *as amended* (July 10, 2002) (en banc) (finding pro-life posters to be "true threat" under an objective standard), *with id.* at 1102, 1106 (Berzon, J., dissenting) (stating posters were "public presentations on a matter of current moral and political importance" and recommending a "subjective intent requirement for alleged threats delivered in the course of public protest"). This risk is especially high for speakers advocating positions beyond the mainstream, for

> Under a purely objective test, speakers whose ideas or views occupy the fringes of our society have more to fear, for their violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening. They are the ones more likely to abstain from participating fully in the marketplace of ideas and political discourse.

White, 670 F.3d at 525 (Floyd, J., concurring in part and dissenting in part) (citation omitted). When speakers back unorthodox causes, from "antiwar" to "animal rights" to the fringe "environmental movement," mainstream listeners naturally imbue their words with a "tinge of menace," leading harsh rhetoric to be misheard as threat. *Planned Parenthood*, 244 F.3d at 1014.

This risk is still more acute in times of crisis – whether terror attack, school shooting, warfare, or otherwise. In such times, "robust" and "wide-open" debate is most needed. *Sullivan*, 376 U.S. at 270. Yet amid such traumas, even "reasonable people" can misread political critiques as threats. *See* Lauren Gilbert, *Mocking George: Political Satire As "True Threat" in the Age of Global Terrorism*, 58 U. Miami L. Rev. 843 (2004); *see also* Andrew P. Stanner,

Note, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. Rev. 385, 394 (2006) (describing dangers of objective threat standard applied to art made "against the backdrop" of school shootings). The loss of rights in times of crisis is not new. *See* Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004). But an objective standard only deepens this pathology, endangering vital expression.

The objective standard also criminalizes core artistic speech. The First Amendment protects "musical and dramatic works" as strongly as political discourse. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). "[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 818 (2000). In turn, much of our most worthwhile art invokes themes of violence, fear and cruelty. "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001). Accordingly, "deeds of bloodshed, lust or crime . . . [are] as much entitled to the protection of free speech as the best of literature." *Winters v. New York*, 333 U.S. 507, 511, 527 (1948) (citation omitted).

Under the objective standard, art intended to invoke such themes can be misunderstood and criminalized as threatening. *E.g.*, *Jeffries*, 692 F.3d at 477 (analyzing music video under the objective threat standard); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004) (analyzing artwork under the objective threat standard). Once again, the risk falls heaviest on artists outside the mainstream, for they are most likely to be misunderstood as threatening. "Extreme rap" is a paradigm case. For devotees, such music is "the voice of a disenfranchised people," a vital art form. Christine Reyna et al., *Blame It on Hip-Hop: Anti-Rap Attitudes as a*

Proxy for Prejudice, 12 Grp. Processes and Intergroup Relations 361, 362 (2009). To mainstream listeners, however, it is often dismissed as vile "glorif[ication] of the criminal lifestyle." *Id.* Accordingly, "reasonable" listeners – and jurors – unfamiliar with the art form are apt to misinterpret it as a dangerous threat. *See State v. Skinner*, 95 A.3d 236, 251-52 (N.J. 2014) (barring introduction of defendant's rap music as unduly prejudicial). In such circumstances, even "reasonable" people become likely to "impose liability on the basis of the jurors' tastes or views," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988), unacceptably penalizing core artistic expression.

Finally, the objective standard criminalizes core personal expression. Speech misinterpreted as threatening can often serve vital ends of catharsis. *E.g.*, J.A. 205. In this role, seemingly "worthless" utterances "enable citizens to vent their frustrations in nonviolent ways." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011). This is surely a valuable function. Yet under the objective standard, such "therapeutic" venting can be freely punished. *Jeffries*, 692 F.3d at 475.

In sum, far from wholly "worthless" speech, unintended threats can have core expressive value. Such speech should not be placed in the unprotected "true threat" category.

2. The objective threat standard chills valuable speech.

Even if unintended threats were "worthless" speech, placing them in the "true threat" category would create an intolerable chill on other legitimate speech. The objective standard charges a speaker with the "responsibility for the effect of his statements on his listeners." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J, concurring). Such a listener-dependent standard "offers no security for free discussion. In these conditions it blankets with uncertainty what[] may be said. It compels the speaker to hedge and trim." *Thomas v. Collins*,

323 U.S. 516, 535 (1945). Given the risk that speech will be misunderstood, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Branding unintended threats as "true threats" thus

> [C]hill[s] speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability. Even though the Supreme Court has stated that protected . . . speech "is often vituperative, abusive, and inexact," speakers wishing to take advantage of these protected rhetorical means may be fearful of doing so . . . .

Planned Parenthood, 290 F.3d at 1108 (Berzon, J., dissenting) (citation omitted).

This chilling is especially severe where, as in this case, Internet communications are at issue. The Internet is an extraordinary venue for free expression, offering "content . . . as diverse as human thought." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 852 (1997) (citation omitted). Accordingly, "the Internet deserves the highest protection from governmental intrusion." *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). Yet this very expressive diversity creates a high risk of miscommunication. When one posts online, her words may be seen by any community – geographic, cultural, or generational – in the nation. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring in part and concurring in judgment). Internet discourse also takes place amid rapid linguistic evolution, with online subgroups constantly coining new idioms and styles. *See* David Crystal, *Language and the Internet* (2d ed. 2006). Speakers and listeners thus often lack the shared context needed to interpret each other's messages – or to distinguish innocent speech from

genuine threats. Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 Tex. Tech L. Rev. 147, 148-49 (2011).

The objective standard makes online speakers bear all such "miscommunication risk." It gives "the most puritan" users a "heckler's Internet veto" over speech they misunderstand. *Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring in part and concurring in judgment). The upshot is that online speakers must give "a wide berth to any comment that might be construed as threatening in nature," lest some online community, somewhere, misread the message. *Rogers*, 422 U.S. at 47 (Marshall, J, concurring). Such a standard surely chills the Internet's role "as the most participatory form of mass speech yet developed." *Reno*, 929 F. Supp. at 883.

Even if unintended threats were of "*de minimis*" value, criminalizing them chills legitimate speech – on the Internet and elsewhere. In analogous cases, our law requires that even "worthless speech" be excluded from the "unprotected" categories. False business statements are of "*de minimis*" value, but they cannot be labeled "fraud" if doing so imperils legitimate advocacy. *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 602 (2003). Speech "likely to incite" violence is of "*de minimis*" value, but it cannot be labeled "incitement" if doing so imperils legitimate protest. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). False statements about politicians are of "*de minimis*" value, but they cannot be labeled "defamation" if doing so imperils legitimate journalism. *Sullivan*, 376 U.S. at 272. And to ensure such inappropriate "categorization" does not occur, our law looks to a crucial safeguard: conditioning "categorization" on a speaker's *subjective intent*. *Madigan*, 538 U.S. at 602 (finding that it is of "prime importance" that fraud statutes have subjective intent requirements); *Brandenburg*, 395 U.S. at 447 (conditioning "incitement" on speaker's intent being "directed to" violence);

Sullivan, 376 U.S. at 272 (conditioning "defamation" on finding of speaker's subjective "actual malice").

Just so here. Even if unintended threats were "worthless" speech, deeming them "true threats" chills legitimate expression. Such statements must thus be treated as fully protected expression.

C. The objective threat standard cannot survive strict scrutiny.

Unintended threats fall outside of any narrow category where speech may be freely proscribed. Instead, such speech is fully protected under the First Amendment, and may only be criminalized if doing so serves a compelling state interest that cannot be met less intrusively. *Burson*, 504 U.S. at 195. This is the exacting standard of "strict scrutiny."

For the objective threat standard, three state interests might satisfy this test: (1) deterring actual violence, (2) reducing fear caused by intended threats, and (3) reducing fear caused by unintended threats. *R.A.V.*, 505 U.S. at 388. Yet under strict scrutiny analysis, none of these interests justifies the objective standard's restrictions on protected speech. The objective standard thus fails strict scrutiny.

1. The objective threat standard does not reduce actual violence.

One interest served by anti-threat statutes is protection from real violence. *Id*. This interest is surely compelling. By definition, however, unintended threats do not risk real violence. *See New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006) (recognizing unintended threats do not implicate anti-violence interests). Thus this interest is not advanced by the objective standards punishment of unintended threats.

2. The objective threat standard does not reduce fear caused by intentional threats.

A second possible interest is shielding citizens from "the fear of violence" and "the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388. In most cases, this fear stems from

statements subjectively intended to threaten. The state has a key interest in deterring intentional threats. *Watts,* 394 U.S. at 708. Yet the objective standard does not serve this purpose.

Some claim a subjective standard "allow[s] carefully crafted statements by speakers who actually intend to threaten to go unpunished." Jordan Strauss, *Context Is Everything: Towards A More Flexible Rule for Evaluating True Threats Under the First Amendment*, 32 Sw. U. L. Rev. 231, 263 (2003). If so, this standard would "make prosecution of these [subjectively intended] threats significantly more difficult," undermining policy interests. *Elonis*, 730 F.3d at 328.

This concern is unfounded. Instead, "in the vast majority of cases, if a statement seems clearly threatening, it will be difficult for the defendant to plausibly explain how his communication was not intended to be threatening." Crane, *supra* at 1273. Our law reflects this. Federal threat statutes often require subjective intent. *E.g.*, 18 U.S.C. § 115(a)(1)(A)(B) (crime to threaten government official "with intent to impede" their duties). All fifty states employ threat, stalking or harassment statutes that require subjective intent. *E.g.*, Cal. Penal Code § 422(a) (West) (Punishing one who "threatens . . . with the specific intent that the statement . . . is to be taken as a threat").[12] Notably, none of these jurisdictions has reported any major hindrance

[12] *See also* Ala. Code § 13A-6-90; Alaska Stat. Ann. § 11.41.220(a)(2) (West); Ariz. Rev. Stat. Ann. § 13-2916; Ark. Code Ann. § 5-13-301 (West); Colo. Rev. Stat. Ann. § 18-9-111 (West); Conn. Gen. Stat. Ann. § 53a-183(a)(2-3) (West); 11 Del. C. § 3532 [tit 11]; Fla. Stat. Ann. § 914.23 (West); Ga. Code Ann. § 16-5-90 (West); HI R CR JURY Instr. 12.15; Idaho Code Ann. § 18-6710 (West); 720 Ill. Comp. Stat. Ann. 5/12-6; Ind. Code Ann. § 35-45-2-1 (West); Iowa Code Ann. § 708.7 (West); Kan. Stat. Ann. § 21-6315 (West); Ky. Rev. Stat. Ann. § 508.150(1)(B) (West); La. Rev. Stat. Ann. 14:122; Me. Rev. Stat. tit. 17-A, § 506-A; Md. Code Ann., Crim. Law § 9-303 (West); Mass. Gen. Laws Ann. 265 § 43(a)(2) (West); Mich. Comp. Laws Ann. § 750.213 (West); Minn. Stat. Ann. § 609.498(c) (West); Miss. Code. Ann. § 97-9-121 (West); Mo. Ann. Stat. § 565.090.1(6) (West); Mont. Code Ann. § 45-5-203; Neb. Rev. Stat. § 28-311.03; Nev. Rev. Stat. Ann. § 199.240 (West); N.H. Rev. Stat. Ann. § 631:4(I)(b-d); N.J. Stat. Ann. § 2C:28-5(a)(5)b; N.M. Stat. Ann. § 30-24-3A(2-3) (West); N.Y. Penal Law § 490.20 (McKinney); N.C. Gen. Stat. Ann. § 14-50.19 (West); N.D. Cent. Code Ann. § 12.1-17-07 (West); Ohio Rev. Code Ann. § 2921.05 (West); Okla. Stat. Ann. tit. 21, § 1304 (West); Or. Rev. Stat. Ann. § 163.190 (West); Pa. Stat. Ann. § 18 Pa.C.S.A. § 2709 (West); R.I. Gen. Laws Ann.

to prosecuting threats under these statutes. Fears of "significantly more difficult" threat prosecutions simply have not materialized. *Elonis*, 730 F.3d at 328.

When core expression is at stake, the Government must "*demonstrate*, and not just assert" that speech restrictions serve compelling interests. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). In the case of deterring intended threats, the objective standard fails this test.

3. The deterrence of unintended threats cannot justify the objective threat standard.

A final possible potential interest served by the objective standard is reducing fear-causing unintended threats. *R.A.V.*, 505 U.S. at 388. The fear such threats create is surely pernicious. Yet the objective standard is not narrowly tailored to mitigate such fear. Even if it were, the state's interest in preventing such unintended fear does not justify core speech restrictions.

An objective standard will not effectively deter unintended threats, for if a speaker does not know her words are threatening, it is unclear how she would know to avoid such words. *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). Yet an objective standard does have one deterrent effect: as outlined *supra*, it deters *protected* speech. Thus, as a means of preventing unintended threats, the objective standard is far from the "narrow tailoring" that strict scrutiny demands.

This failure is underscored by the availability of less restrictive alternative measures. For instance, civil remedies like protective orders, injunctions, and money damages can deter frightening conduct or make it less frightening. *E.g.*, Pa. Stat. Ann. § 23 Pa.C.S.A. § 6101 et seq. (Protection from Abuse Act) (West) (providing for civil protection orders); Jud. Council of Cal. Civ. Jury Instructions ("CACI") No. 1620 (providing monetary damages for negligent infliction

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§ 11-32-5 (West); S.C. Code Ann. § 16-17-430(A)(2); S.D. Codified Laws § 22-19A-1(2); Tenn. Code Ann. § 39-17-305 (West); Tex. Penal Code Ann. § 22.07 (West); Utah Code Ann. § 76-5-107 (West); Vt. Stat. Ann. tit. 13, § 1027 (West); Va. Code Ann. § 18.2-152.7:1 (West); Wash. Rev. Code Ann. § 9A.46.120 (West); W. Va. Code Ann. § 61-5A-5 (West); Wis. Stat. Ann. § 947.012 (West); Wyo. Stat. Ann. § 6-2-402 (West).

of emotional distress). Such measures are far less invasive than criminal sanctions, the "most serious deprivation[]" our law applies. *Wolff v. McDonnell*, 418 U.S. 539, 567 (1974) (citation omitted).[13] Alternatively, private communication providers like Facebook are free to block such (unintentionally) frightening communications altogether. Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 Miss. L.J. 1263, 1282 (2011).

Yet even if the objective standard were narrowly tailored to reduce unintended fear, this interest could not justify limiting core expression. Protected speech may not be restricted for causing "anger, alarm or resentment." *R.A.V.*, 505 U.S. at 414. Nor may it be restricted for "inflict[ing] great pain." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (citation omitted). Nor may it be restricted for advocating terrifying violence. *Brandenburg*, 395 U.S. at 448 (citation omitted). Nor may it be restricted for words "understood as . . . intending to create a fear of violence." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

The lesson of our doctrine is hard, but it is clear: "fear of serious injury cannot alone justify suppression of free speech." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J. concurring). Instead, when protected expression is at stake, and when a speaker does not mean to instill fear, "concern for the effect on the listener must yield." *Heineman*, 767 F.3d at 981-82.

D. Section 875(c) must be read to require subjective intent, or it must fall as overbroad.

The objective standard cannot be justified by the categorical approach. Nor can it survive strict scrutiny. Therefore, the objective standard is constitutionally intolerable. Section 875(c) must thus be read to require subjective intent, or it must fall as fatally overbroad.

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[13] Of course, even civil sanctions may substantially chill speech, and in doing so run afoul of the First Amendment. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). At a minimum, however, such alternatives are less invasive than criminal punishment.

If at all possible, § 875(c) must be read to avoid "serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Section 875(c) should be read to include a subjective intent requirement, and this case should be remanded for further proceedings.

Yet if such a reading is untenable, then § 875(c) must fall as overbroad. When free speech is at stake, an otherwise-valid criminal law cannot stand if it "criminalizes a substantial amount of protected expressive activity." *United States v. Williams*, 553 U.S. 285, 297 (2008). This doctrine stems from the vast "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Freedman v. State of Md.*, 380 U.S. 51, 56 (1965) (citation omitted).

Without a subjective intent requirement, § 875(c) is fatally overbroad. It is surely right to punish intentional threats. Yet in also penalizing unintended threats, the objective standard punishes political, artistic and personal expression as harshly as worthless cruelty. In doing so, it surely "criminalizes a substantial amount of protected expressive activity." *Williams*, 553 U.S. at 297. Our Constitution forbids this result. Therefore, the statute must fall.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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