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 UNITED STATES

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QUESTIONS PRESENTED

18 U.S.C. § 875(c) prohibits "transmi[tting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." Eleven circuits have applied an objective standard to determine if a communication contains a "true threat," asking whether a reasonable person, under the circumstances, would have interpreted the communication as a serious expression of an intent to inflict injury. The questions presented are:

1. Whether, as a matter of statutory interpretation, section 875(c) permits a conviction for transmitting a communication that is objectively threatening without also requiring proof of the defendant's subjective intent to threaten.

2. Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), showing that a reasonable person would find the defendant's statements threatening suffices to sustain a conviction for transmitting a true threat.

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JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013. A petition for rehearing was denied on October 17, 2013, Pet. App. 61a. On January 6, 2014, Justice Alito extended the time to file a petition for writ of certiorari until February 14, 2014. The petition for writ of certiorari was filed on February 14, 2014, and was granted on June 16, 2014. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Section 875(c) of Title 18 of the United States Code 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

1. In May 2010, after a seven-year marriage marred by physical and emotional abuse, *see* JA 201, Petitioner Anthony Elonis's wife and two children moved out, *see* JA 147. Over the coming months, as his personal and professional situation deteriorated, Petitioner reacted by putting his family and coworkers in fear for their lives.

The trouble started at work. Petitioner was a supervisor at Dorney Park & Wildwater Kingdom. After his wife moved out, Petitioner began sexually harassing subordinates. *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013). On one occasion, he pushed up against one employee, a female minor, and asked her to stick out her tongue. *Id.* When another female employee, Amber Morrissey, was working late, he entered her office and began to undress. *Id.* In all, Ms. Morrissey filed five sexual harassment reports against Petitioner. *Id.* Petitioner was demoted as a result of his behavior. *See* JA 177.

Rather than change his behavior to save the job he "loved," JA 215, Petitioner found a more efficient way to spread fear. On October 17, 2010, he posted a picture on his Facebook profile that showed him in costume, holding a knife to Ms. Morrissey's neck with the caption "I wish." JA 340. While the photo had been taken over a year ago at the Dorney Park Halloween Haunt, Petitioner decided only then to put it on the Internet. Petitioner had numerous Facebook "friends," including many of his coworkers, who had direct access to his profile. JA 337–38. Ms. Morrissey reported the image to her supervisors, and Petitioner was immediately fired. JA 177.

Two days later, Petitioner posted even more violent content on his Facebook profile. The first, directed at the management company of Dorney Park, states: "Someone once told me that I was a firecracker. Nah. I'm a nuclear bomb and Dorney Park just fucked with the timer." JA 53–56. The Chief of Patrol at Dorney Park, Daniel Hall, was "extremely concerned" and instituted a number of extra measures to protect the park's patrons and employees. JA 121. Petitioner then got hold of private Facebook messages exchanged by two coworkers, Jill Mattlack and Rob Hill, which he downloaded onto his computer. JA 345–47. Ms. Mattlack and Mr. Hill discussed their concerns about Petitioner's "mental status," the security situation at Dorney, and their fear that

Petitioner might "hurt or kill any one else." *Id.* On October 22, in another violent and public statement over Facebook, Petitioner responded to this private communication he had accessed:

> Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the fuckin' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all 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 fuckin scary.

Petitioner's threats against Dorney Park subsided once he set his sights on a new target: his estranged wife, Tara Elonis. He first directed a violent message at his wife in October 2010, stating: "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 made it look like a rape and murder." JA 341. Ms. Elonis had good reason to feel afraid—Toad Creek ran by the first apartment she and Petitioner shared. JA 277. Petitioner relished the effects of his posts: "Revenge is a dish best served cold with a delicious side of psychological torture." JA 355.

At the time, Petitioner was not Facebook "friends" with his wife and did not have direct access to her profile. *See* JA 151. However, he targeted her by making his posts publicly available. He was also "friends" with several of Ms. Elonis's friends and family, which meant that they could regularly see his messages and relay his threatening remarks back to Ms. Elonis. *See* JA 150. Along with these generally disseminated threats, Petitioner communicated directly with his wife by writing Facebook comments to her sister, Morgan Kennedy. JA 342. In one instance, Mr. Elonis wrote to his wife, "You have to excuse me. I'm on a stimulant, a depressant, and a psychoactive. You ain't seen nothing yet. Did Morgan pass on my status updates? lol." *Id*. He goes on: "Tell Riley [their son] he should dress up as Matricide for Halloween. I don't know what his costume would entail though. Maybe your head on a stick? :-P." *Id.*

It was around this time that Petitioner, who had never before displayed an interest in rap music, *see* JA 162, began posting allegedly lyrical threats. These include lines such as "There's one way to love ya but a thousand ways to kill ya," and "I'm not gonna rest until your body is a mess." JA 344. After a month of these remarks, Ms. Elonis filed for a Protection From Abuse order (PFA). At the hearing, which Petitioner attended, Ms. Elonis expressed feeling threatened. *See* JA 149, 255. Based on Petitioner's Facebook posts, the court granted the maximum order of three years protection and suspended Mr. Elonis's custody of his children. JA 150.

Three days later, Petitioner resumed threatening his wife on Facebook. The first threat begins: "Did you know that it's illegal for me to say I want to kill my wife? It's illegal. It's indirect criminal contempt. It's one of the only sentences that I'm not allowed to say. Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife." JA 333. This message was partly modeled off a comedy routine about killing the president. But Petitioner added his own touch: the post goes on to describe shooting Tara Elonis with a mortar launcher and provides a detailed diagram of her home, a cornfield where the shooter could set up, and a getaway road. *Id.* Ms. Elonis said she "felt like [she] was being stalked" and was "extremely afraid for mine and my childrens' and my families' lives." JA 153.

Several days later, Petitioner told his wife over Facebook: "Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet? . . . And if worse comes to worse I've got enough explosives to take care of the State Police and the Sheriff's Department." JA 334. The message linked to an article on the freedom of speech, which Petitioner believed qualified as a disclaimer. Petitioner sometimes offered disclaimers since "[he] knew that what [he] was saying was violent." JA 205. Nevertheless, Ms. Elonis became "extremely afraid for [her] life." JA 156.

The next day, Petitioner dramatically escalated his Facebook threats:

> 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?

JA 335. There are sixteen elementary schools in Bethlehem, Pennsylvania, where Petitioner lived. *See* Bethlehem Area School District, https://www.beth.k12.pa.us/District/OurSchool. This message prompted the FBI, who had been monitoring Petitioner's Facebook activity since the Dorney Park threats, to dispatch Special Agent Denise Stevens to his residence. *Elonis*, 730 F.3d at 326. When she and another agent arrived, Petitioner's father answered the door and went to retrieve Petitioner. Several minutes later, Petitioner emerged wearing jeans, a t-shirt, and no shoes. Petitioner immediately asked whether he was free to go, then went back inside and closed the door. That same day, Petitioner wrote a Facebook message titled "Little Agent Lady":

> You know your shit's ridiculous when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
> [laughter]
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all goin'
> [BOOM!]

JA 336. Agent Stevens, who had been investigating terrorism for fifteen years, JA 48, found the post "very threatening" and "was concerned about [her] family." JA 69. Before Petitioner's statements could become more than threats, he was arrested for violating 18 U.S.C. § 875(c), which prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to injure the person of another." JA 349.

2. The grand jury indicted Petitioner on five counts of transmitting threats to injure (1) patrons and employees of Dorney Park, (2) his wife, (3) local law enforcement, (4) a kindergarten class, and (5) Agent Stevens. JA 3. Petitioner moved to dismiss the indictment on two grounds, both of which the district court denied. *United States v. Elonis*, No. CRIM.A. 11-13, 2011 WL 5024284, at *4 (E.D. Pa. Oct. 20, 2011), *aff'd*, 730 F.3d 321 (3d Cir. 2013). Petitioner claimed his violent posts were not true threats, a question of fact the court left to the jury, *id.* at *3, and that section 875(c) is unconstitutionally vague. The court found this argument meritless, finding that the law, consistent with First Amendment doctrine, restricts only speech that jurors deem a "true threat"—a term that "that is commonly understood" in "every court." *Id.*

Before trial, both sides proposed jury instructions defining a "communication containing a true threat." JA 19, 25. Both agreed that the definition depended on whether a reasonable person would understand the statements as threatening. *Compare* Defense Request Number 6, JA 19–20 ("[A] communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm"), *with* Government Request Number 25, JA 25 ("A statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement would understand it as a serious expression of intent to inflict injury"). Petitioner's proposed instructions specifically referred to *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997), which defines "true threat" as a

> communication [which] in its factual context would lead a reasonable, objective recipient to believe that the publisher of the communication was serious about his threat (regardless of the subjective intent of the speaker to make an actual threat or whether anyone actually felt frightened, intimidated, or coerced by the threat).

Id. at 1506. The ultimate jury instruction reflected this consensus: "To constitute a true threat, the statement must communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." JA 301.

Petitioner requested, however, that the court depart from the law of the Third Circuit—and the authorities on which his other requests relied—and add a subjective intent element to the definition of "true threat." He proposed an instruction that would require the government to demonstrate that the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence." JA 20–21.[1] The court denied this request and charged the jury to apply the "objective speaker test," which tracked Petitioner's other requests:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

JA 301. This standard is applied in most circuits. *See, e.g.*, *United States v. Whiffen*, 121 F.3d 18, 20–21 (1st Cir. 1997); *United States v. Francis*, 164 F.3d 120, 122 (2d Cir. 1999); *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994); *United States v. Myers*, 104 F.3d 76, 80–81 (5th Cir. 1997); *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990); *United States v. Manning*, 923 F.2d 83, 86 (8th Cir. 1991); *United States v. Hart*, 457 F.2d 1087, 1091 (10th Cir. 1972); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983); *Metz v. Dep't of Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). *But see United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011). The remainder of the instructions incorporated much of Petitioner's proposed language. The charge concluded with a reminder to the jury that "[t]he government is not required to prove that the defendant himself intended for the statement to be a true threat." JA 302.

[1] Petitioner claims to have adapted this definition from *Virginia v. Black*, 538 U.S. 343, 344 (2003), though he specifically cites to the Syllabus, which "constitutes no part of the opinion of the Court," *id.* at 343 n.*; *see also United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

The jury found Petitioner guilty on four of five counts, and he was sentenced to forty-four months in prison and three years of supervised release. JA 6–7. Petitioner filed several untimely post-conviction motions. The district court considered the motions on the merits, despite recognizing the danger that such tactics "allow[] the defense to 'sandbag' the government." *United States v. Elonis*, 897 F. Supp. 2d 335, 338 (E.D. Pa. 2012). Among other claims, Petitioner challenged the court's definition of "willfully" in the jury instructions. *Id.* Petitioner had wanted the court to define "willfully" in terms of subjective intent, alleging that the term "must be construed to mean that the Defendant intended to violate the law." *Id.* at 341; *see also* JA 22–23. In an extensive opinion, the court denied all motions. The court noted "[t]he term 'willfully' does not appear in the statute" under which Petitioner was charged. *Id.* at 342. Moreover, Petitioner's motion relied on *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994), in which "[t]he court found that . . . the Government bore no burden of proving that [the defendant] intended his calls to be threatening." *Elonis*, 897 F. Supp. 2d at 341. Because the indictment "allege[d] more than enough facts," *id.* at 340, and "the jury's verdict [was] consistent with the weight of the evidence," *id.* at 342, the court upheld the conviction.

3. The Third Circuit unanimously affirmed. *Elonis*, 730 F.3d at 335. The court rejected Petitioner's argument that *Virginia v. Black*, 538 U.S. 343, 359 (2003), upended the objective standard most circuits apply to true threats. As the Third Circuit recognized, "the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate." *Elonis*, 730 F.3d at 329. The court explained that

> [i]t would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

Id. (internal citations omitted). The court also offered a lengthy analysis of true threat jurisprudence. Echoing a half-century's worth of precedent, it wrote that "'a prohibition on true threats protect[s] individuals from the fear of violence and the disruption that fear engenders," *id.* at 330 (quoting *Black*, 538 U.S. at 360), and that "[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail" to offer that protection, *id.* at 330. The court thus declined to read the limited holding in *Black* as overturning the true threat jurisprudence of the Supreme Court and eleven circuits.

Petitioner filed motions for panel rehearing and rehearing en banc, both of which the Third Circuit denied. JA 12. This Court granted certiorari on June 16, 2014. *Elonis v. United States*, 134 S. Ct. 2819 (2014).

SUMMARY OF ARGUMENT

Petitioner's violent Facebook posts were true threats under section 875(c) and the First Amendment. Given the context of Petitioner's statements, his family, coworkers, and the jury reasonably determined that they communicated a serious expression of an intent to cause injury. Petitioner was well aware of the potential that his words would instill fear and cause disruption. Any unexpressed, subjective intent he might have harbored did nothing to alleviate the impact of the words he chose to communicate. Regardless of Petitioner's alleged intentions, the First Amendment does not license speakers to cause such harm.

Courts have long assessed whether a statement constitutes a true threat by asking how a reasonable person would have interpreted the speech under the circumstances. This objective standard focuses the jury's attention on the effect of the speech, which is the sole basis on which true threats may be proscribed. Petitioner recognizes that this objective inquiry is necessary. But in an attempt to evade the objective conclusion that his statements were threatening, Petitioner

seeks to add another requirement: that the jury find he subjectively intended his words to have their objectively harmful effects. His argument conflicts with the plain text of section 875(c), undermines Congress's effort to protect individuals from the harmful effects of threatening speech, and contradicts the First Amendment and this Court's jurisprudence.

I. When Congress omits an express mens rea requirement in a criminal statute, principles of statutory interpretation demand reading the provision to establish a general intent standard, which requires only proof of an intent to commit the act criminalized by the statute. The general intent requirement of section 875(c) mandates instructing the jury, as the district court did, that Petitioner "transmitted a threat knowingly and intentionally." JA 300. There is no requirement that the jury further find proof of Petitioner's subjective intent to threaten. If Congress had wanted to impose a specific intent requirement, it could have readily borrowed language from analogous provisions that prohibit transmitting threats with "intent to extort," 18 U.S.C. § 875(b), (d), or disclosing personal information with "intent to threaten," 18 U.S.C. § 119(a).

The plain text of section 875(c) contains no implied requirement to prove a defendant's subjective intent to threaten. Dictionaries contemporaneous with the passage of section 875(c) define "threat" primarily with reference to the effects it has on the "mind of the person on whom it operates." *Black's Law Dictionary* 1728 (3d ed. 1933). While certain definitions of "threat" use the word "intention," they do not refer to an "intention to threaten," but rather to an "intention to carry out" the threat, which the Court has expressly held is not a required element of true threats. *Black*, 538 U.S. at 359–60. Finally, ordinary usage of the word "threat" confirms that a communication can be described as threatening without knowledge of the speaker's intent. In line with these principles of statutory interpretation, the Court has construed analogous

prohibitions on harmful speech to require only knowledge of the contents of the transmissions, and not knowledge of their prohibited nature, much less an intent to transmit prohibited material.

Requiring proof of subjective intent also contravenes Congress's interest in protecting individuals from living in fear and harm. Congress expressly dispensed with language that required proof of any specific intent to threaten so that even the "irresponsible" could be convicted for transmitting threatening communications. Congress reached this decision after considering the extensive harms caused by threatening speech. Its conclusions are borne out in the costly and difficult responses undertaken by those whom Petitioner threatened in this case. To create a new burden of proof erodes the protection Congress established.

II. The First Amendment does not require proof of subjective intent to threaten. True threats are a traditional category of unprotected speech because of their harmful effects—fear, disruption, and the specter of violence. These effects do not depend on the message a speaker may have intended his threatening words to convey, or his motive in sending such communications. The objective standard therefore suffices to prove a true threat, as it asks the jury to find whether a given statement would have reasonably been expected to produce such effects. This standard also preserves breathing space for protected expression, since it does not permit a conviction based on an unreasonable reaction to the speech. For these reasons, the analogous categories of unprotected speech, including fighting words, obscenity, defamation, and criminal incitement, also rely on an objective standard.

Rather than causing the silent ground-shift that Petitioner claims, the Court affirmed its established true-threat principles in *Virginia v. Black*. 538 U.S. 343. The Court did not address the intent requirement for all true threats, let alone section 875(c), because the state law at issue already had an intent requirement. Even though the statute contained this intent element, the

Court's analysis centers on objective context, not subjective intent. The Court found Virginia's ban on a particular type of true threat—cross burning with the intent to intimidate—permissible because this speech created the same external harms as all other true threats. *Black* thus confirms that, while a law may require proof of subjective intent, it must include the objective standard.

ARGUMENT

I. PETITIONER WAS PROPERLY CONVICTED UNDER SECTION 875(c) FOR TRANSMITTING COMMUNICATIONS CONTAINING TRUE THREATS

True threats have long been held outside the ambit of First Amendment protection. *See Watts v. United States,* 394 U.S. 705, 708 (1969) (per curiam). Along with libel, obscenity, and fighting words, a true threat is a type of speech that "by [its] very utterance inflict[s] injury" on the recipient. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). While the First Amendment "protects the speech we detest as well as the speech we embrace," *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012), this Court has recognized that "'your right to swing your arms ends just where the other man's nose begins.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (quoting Zechariah Chafee, *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919)).

When Congress enacted 18 U.S.C. § 875(c), it exercised its prerogative to exclude threatening communications from the marketplace of ideas in order to "'protect 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.'" *Virginia v. Black*, 538 U.S. 343, 360 (2003) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). Concerned with the harmful effects of threatening speech, Congress omitted any express or implied requirement of proof of subjective intent to threaten for convictions under section 875(c). The plain text of

the provision, related statutory language, and legislative history confirm that convictions under section 875(c) only require proof that the defendant knowingly and willfully transmitted a communication that a reasonable person would have perceived as a threat.

A. The Plain Text of Section 875(c) Requires Only Proof of a General Intent to Transmit a Threatening Communication

Introducing a subjective-intent element into 18 U.S.C. § 875(c) contradicts Congress's decision to omit such a mens rea requirement from the plain text of the statute. Most courts to consider section 875(c) have concluded that it contains three elements: "(1) a transmission in interstate commerce; (2) a communication containing a threat; and (3) the threat must be a threat to injure the person of another." *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992); *accord United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013); *United States v. Stewart*, 411 F.3d 825, 827 (7th Cir. 2005); *United States v. Brooks*, 46 F.3d 1127, 1129 (4th Cir. 1995). On its face, the provision prohibits a single physical act: transmitting a communication in interstate commerce. *See United States v. White*, 670 F.4d 498, 508 (4th Cir. 2012). The statute also specifies two attendant conditions: the communication must contain a threat, as determined by a jury, and the threat must be of a serious nature. *Nicklas*, 713 F.3d at 439–40 (collecting cases).

In the absence of any express mens rea requirement, fundamental principles of statutory interpretation demand only proof of a general intent to commit the criminal act. *See, e.g.*, *Carter v. United States*, 530 U.S. 255, 268 (2000). In *Carter*, the Court was asked to determine whether a statute that prohibited taking another's property by force or intimidation, 18 U.S.C. § 2113(a) (2012), also required proof of a specific "intent to steal or purloin." 530 U.S. at 267–68. The Court concluded that "the presumption in favor of scienter demands only that we . . . require[] proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime." *Id.* at 268. This presumption requires "a court to read into a statute only that

mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* (quoting *United States v. X–Citement Video, Inc.,* 513 U.S. 64, 70 (1994)); *see also Bates v. United States*, 522 U.S. 23, 29 (1997) (declining to introduce a specific "intent to defraud" requirement in a statute which prohibits misapplying bank funds because the Court "ordinarily resists[s] reading words or elements into a statute that do not appear on its face"); *Staples v. United States*, 511 U.S. 600, 605 (1994) (explaining that silence on the question of mens rea does not dispense with the "conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal").

Under the general intent requirement of section 875(c), the court must instruct the jury, as the district court did in this case, that the jury needs to determine whether Petitioner "transmitted a threat knowingly and intentionally." JA 300. Contrary to Petitioner's suggestion, there is no requirement that the jury go on to consider whether Petitioner had any additional specific intent in transmitting the threats. *See* JA 20. Consistent with *X–Citement Video*, nearly every circuit has concluded that proving a defendant knowingly and willfully communicated the threat, without further proof of specific intent, suffices to separate innocent from wrongful conduct. *See, e.g.*, *White*, 670 F.3d at 508 ("[T]he 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."); *accord Stewart*, 411 F.3d at 827–28 (7th Cir. 2005); *United States v. Whiffen*, 121 F.3d 18, 20–21 (1st Cir. 1997); *United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997); *United States v. Himelwright*, 42 F.3d 777, 782–83 (3d Cir. 1994). *But see United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011).

If Congress had wanted to require proof of specific intent in section 875(c), the surrounding provisions in section 875 demonstrate that it knew how. Both section 875(b), which

prohibits transmitting threats to injure another person "with intent to extort," and section 875(d), which prohibits transmitting threats against the property or reputation of another "with intent to extort," provide clear models for how to establish a specific intent requirement for threats. Likewise, Congress could readily have written the statute to specifically prohibit an "intent to threaten," as it did in the law that prohibits disclosing personal information about individuals who perform certain official duties. *See* 18 U.S.C. § 119(a) (2012) (prohibiting disclosure of "restricted personal information about a covered person . . . with the intent to threaten, intimidate, or incite the commission of a crime of violence against that covered person"). By excluding this language from section 875(c), Congress chose to dispense with any specific intent requirement. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

B. The Phrase "Communication Containing a True Threat" Does Not Require Proof Of a Subjective Intent to Threaten

Attempting to evade the plain text of section 875(c), which codifies a general intent crime, Petitioner suggests that the text contains an implicit burden of proving a defendant's subjective intent to threaten. On appeal, Petitioner concedes that he met the first and third elements of the offense—that the transmission occurred in interstate commerce, via the Internet, and that the statements were threats to injure another person. His remaining contention is that the district court erred by declining to define the second element, a communication containing a threat, to include a subjective intent to threaten.

In his requested jury instructions, Petitioner agrees that a communication containing a true threat under section 875(c) "must be such that a reasonable person [] would take the

statement as a serious expression of an intention to inflict bodily harm." JA 19-20. The jury was appropriately instructed on this objective speaker test. JA 301.[2] The jury was allowed to consider any evidence illuminating the circumstances of the communication, including Petitioner's claims about his own subjective intent, and was further cautioned that a true threat is distinct from exaggerations, jokes, or "outburst[s] of transitory anger." JA 301–02. With this information in mind, the jury convicted Petitioner. Despite this, Petitioner suggests that for a communication to contain a "true threat," the jury must also find proof that he subjectively "intend[ed] for the language to threaten the victim." *Elonis*, 730 F.3d at 329. This suggestion is inconsistent with the plain meaning of "threat" and the weight of precedent.

1. Petitioner suggests that relevant dictionary definitions of the word "threat" include "an intent component," and thus the government must prove a defendant had a subjective intent to threaten. This reading is neither required by the definition of "threat" nor the rules of ordinary meaning on which courts rely when a term is not statutorily defined. *Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

While dictionary definitions of "threat" often use the word "intention," they do not state that threats require a subjective intent to make a recipient feel threatened. The edition of Black's Law Dictionary in circulation at the time the threat statutes were passed first defines "threat" as "A menace; especially, any menace of such a nature and extent as to unsettle the mind of the

[2] Most circuits apply a "reasonable recipient" standard, while a few, including the Third Circuit, apply a "reasonable sender." *See United States v. White* 670 F.3d at 509–10 (4th Cir. 2012) (collecting cases). Several circuits have recognized that this often amounts to a distinction without a difference, as a jury that that is considering how a reasonable sender would behave typically accounts for how a reasonable recipient would interpret the communication. *See United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004); *United States v. Alaboud*, 347 F.3d 1293, 1297–98 & n.3 (11th Cir. 2003).

person on whom it operates." *Black's Law Dictionary* 1728 (3d ed. 1933).[3] A second entry for "threat" refers to "A declaration of one's purpose or intention to work injury to the person, property, or rights of another." *Id*. These definitions emphasize the effect the words have on "the mind of" another. They are primarily concerned with external effects, not subjective intent.

Moreover, the word "intention" cannot be read in isolation to mean "intention to threaten" or "intent to cause fear." Rather, the dictionaries uniformly specify that the intention at issue is the "intention to work injury" to another. *See United States v. Jeffries*, 692 F.3d 473, 483–84 (6th Cir. 2012) (Sutton, J., dubitante) (collecting dictionary definitions). Petitioner might question whether, as a matter of semantics, a true threat can be made without any actual "intent to work injury"—that is, an intention to carry out the threat. But the Court has firmly foreclosed this argument. *See Black*, 538 U.S. at 359–60 (noting that an intent to carry out the threat need not be shown, given the inherent tendency of threatening words to cause fear and disorder).

Rather than resolve a war of dictionaries, however, courts need only rely on dictionaries insofar as they illuminate the ordinary usage of words. *Muscarello v. United States*, 524 U.S. 125, 131 (1998). The ordinary construction of "communication containing a threat" does not require proof of an intent to threaten. For example, an individual who receives an anonymous e-mail describing a plan to fire a mortar launcher at her house can appropriately describe the communication as threatening even if she does not know who sent the letter or if the sender meant it in jest. This feeling would be no less accurate were it to turn out that she was randomly selected for targeting by a computer program and the content of the e-mail was generated by an algorithm. While we would have trouble describing the computer program as intending anything, we would not hesitate to describe the e-mail as a communication that contained a threat.

[3] The term menace is defined as "A threat; the declaration or show of a disposition or determination to inflict an evil or injury." *Black's Law Dictionary* 1177 (3d ed. 1933).

This understanding of a true threat is further compelled because Congress chose to prohibit the noun form, rather than verb form, of "threat." Section 875(c) prohibits transmitting communications containing threats. By contrast, several related statutes prohibit the act of threatening. For instance, 18 U.S.C. § 879 prohibits "knowingly and willfully threaten[ing] to kill, kidnap, or inflict bodily harm." Likewise, 18 U.S.C. § 115 prohibits "threaten[ing] to assault, kidnap, or murder." Rather than link the potential criminal actor directly to the verb "threaten," which might present a stronger case for inferring that the actor must have subjective intent, section 875(c) criminalizes the transmission of communications containing threats. This construction requires no finding of subjective intent, as such communications can still be reasonably interpreted "as a serious expression of an intention to inflict bodily harm" regardless of the speaker's intent. *See Liparota v. United States*, 471 U.S. 419, 435 (1985) (White, J., dissenting) (explaining the "most natural reading" of a criminal statute that contained the word "knowingly" followed by several verbs and nouns was that "'knowingly' modifies only the verbs to which it is attached") (citing *United States v. Yermian*, 468 U.S. 63, 69 n.6 (1984)).

2. Reading a subjective-intent requirement into the term "true threat" not only contradicts nearly every circuit to consider the issue, but is also inconsistent with this Court's guidance on interpreting speech prohibitions. In *Virginia v. Black*, the Court affirmed that states may prohibit true threats as a means of protecting "individuals from the fear of violence," the disruption that fear engenders," and "the possibility that the threatened violence will occur." 538 U.S. at 344. Despite some concerns about the widely adopted interpretation of section 875(c), even the Sixth Circuit panel in *Jeffries* recognized that "[w]hat 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." 692 F.3d at 480.

In addition to "working well" with the goals behind prohibiting true threats, the objective standard accords with historical Supreme Court cases addressing restrictions on speech. Contrary to Petitioner's assertion, speech regulations do not require the defendant to know the speech is legally proscribed, much less intend that it have an impermissible effect. In one of the earliest relevant cases, *Rosen v. United States*, 161 U.S. 29 (1896), the Court considered a statute that prohibited mailing obscene materials. The defendant requested a jury instruction specifying that he must have "kn[own] that the paper or publication referred to in the indictment was obscene" and that he had a "bad purpose" in mailing the publication. *Id.* at 33, 41. The Court rejected this instruction, concluding that it was sufficient for the jury to find that the material in question "was deposited in the mail by one who knew or had notice at the time of its contents . . . although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." *Id.* Requiring additional proof that the defendant believed the material was obscene and specifically intended to violate the law by distributing it would permit the "evils that [C]ongress sought to remedy [to] continue and increase in volume." *Id.*

The Court reaffirmed this approach to speech restrictions in *Hamling v. United States*, 418 U.S. 87 (1974). *Hamling* concerned a statute that prohibited "knowingly" mailing any "obscene, lewd, lascivious, or filthy" material. *Id*. at 111 (quoting 18 U.S.C. § 1461 (1970)). Approving the approach in *Rosen*, the Court wrote: "Our subsequent cases have not retreated from this general rule, as a matter of either statutory or constitutional interpretation, nor have they purported to hold that the prosecution must prove a defendant's knowledge of the legal status of the materials he distributes." *Id.* at 121. Instead, the Court only required proof that the defendant knowingly deposited specific materials into the mail, and then left it to the jury to determine whether the material was objectively of some objectionable character. *Id.* at 129. This

rule applies with equal force outside the domain of obscenity. *See, e.g.*, *Posters 'N' Things v. United States*, 511 U.S. 513, 524–25 (1994) (upholding a conviction under a statute prohibiting the sale of drug paraphernalia where there was proof of knowledge that customers "are likely to use the merchandise with drugs" but no proof that this was the purpose of the sale). While the government must prove Petitioner intentionally transmitted the messages and had knowledge of their content, it is consistent with this Court's precedent to ask the jury to determine whether a reasonable observer would conclude that the communication contained illegal threats.

As in *Rosen* and *Hamling*, Petitioner was both fully aware of the contents of his messages and also intended to transmit them. *See* JA 242 (admitting his intention to "upset" and "antagonize" his estranged wife"). Not only did he know how his communications were likely to be perceived, JA 205 (acknowledging that "[he] knew that what [he] was saying was violent"), he knew how they were actually being perceived, JA 255 (testifying that Petitioner was present at the PFA hearing where his wife expressed feeling threatened). Yet he continued to send them. Precedent does not require further proof of subjective intent. Altering this rule would facilitate the "evils that Congress sought to remedy."

3. Notwithstanding these principles of statutory construction, one circuit since *Virginia v. Black* has added a subjective intent requirement to the traditional definition of "true threat." *See Bagdasarian*, 652 F.3d at 1118. *Bagdasarian*, however, offers little support for Petitioner's argument that section 875(c) requires finding a subjective intent to threaten. The case addressed a conviction under section 879(a), which is distinct in two crucial regards. First, section 879(a) uses the verb form of threat. It prohibits "knowingly and willfully threaten[ing] to kill, kidnap, or inflict bodily harm upon" former presidents and certain related individuals. 18 U.S.C. § 879(a) (2012). Given the default rule that mens rea attaches to the relevant verb in a criminal statute,

there is some rationale for considering a subjective intent to threaten in a statute where the only verb is "to threaten." But this rationale does not support imputing a subjective intent to threaten to section 875(c), where the only verb is "to transmit."

Second, the Ninth Circuit expressly based its conclusion on the statutory phrase "knowingly and willfully," which is not present in section 875(c). The court wrote: "[I]n *Gordon,* we held as a matter of statutory interpretation that Congress 'construe[d] 'knowingly and willfully' [in § 879] as requiring proof of a subjective intent to make a threat,' and thus requires the application of a subjective as well as an objective test." *Bagdasarian*, 652 F.3d at 1122 (quoting *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992)). Setting aside the merits of this holding, *Bagdasarian* does not support Petitioner's argument because the absence of the phrase "knowingly and willfully" in section 875(c) precludes injecting this statute with a subjective intent requirement. In fact, a separate Ninth Circuit panel considering a conviction under section 875(c) affirmed an objective rather than subjective jury instruction in light of the Circuit's "contradictory case law on the issue." *United States v. Sutcliffe*, 505 F.3d 944, 961–62 (9th Cir. 2007); *White*, 670 F.3d at 517 n.* (Duncan, J., concurring) (noting that the Ninth Circuit's "case law has not been consistent post-*Black*").

C. Because Section 875(c) Is Unambiguous, Background Canons of Statutory Interpretation Do Not Require Proof of Subjective Intent

Because the text of the statute is clear, background canons of statutory interpretation do not counsel in favor of introducing a subjective intent requirement into section 875(c). One canon often invoked by criminal defendants is the rule of lenity. *United States v. Bass*, 404 U.S. 336, 347 (1971) (explaining that ambiguity in criminal statutes should be resolved in favor of lenity). A number of considerations, however, circumscribe the use of this rule. First, "the 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Bifulco v. United States*, 447 U.S.

381, 387 (1980) (quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980)). Lenity does not contravene otherwise clear statutory text, as found in section 875(c). Importantly, a text is not "ambiguous for purposes lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990). Second, lenity only applies if the statute remains ambiguous after consulting the other canons of statutory interpretation. *United States v. Shabani,* 513 U.S. 10, 17 (1994). Petitioner cannot claim that a statute is ambiguous by cherry-picking a definition for one statutory term, such as threat, while ignoring other indicia of congressional intent.

The purpose of the rule of lenity is to ensure "that there is fair warning of the boundaries of criminal conduct." *Crandon v. United States*, 494 U.S. 152, 158 (1990). There is no concern that the defendant lacked adequate notice where, as here, he knew that his conduct toed the line between legal and illegal, *see* JA 333, and was aware of relevant judicial decisions supporting the government's interpretation of the statute he violated, *see* JA 331 (referencing an article about a civil true threats case, *Latour v. Riverside Beaver School District*, No. Civ.A. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005), that implements the reasonable-person standard).

Another canon that does not influence the interpretation of section 875(c) is constitutional avoidance. *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon as "a tool for choosing between competing plausible interpretations of a statutory text"). Like the rule of lenity, the canon has no role to play when a statutory provision is unambiguous. *Id*. at 382. Furthermore, this Court has repeatedly admonished that "[t]he canon is not a method of adjudicating constitutional questions by other means." *United States v. Apel*, 134 S. Ct. 1144 (2014); *Martinez*, 543 U.S. at 381–82 (2005). Petitioner ignores this teaching and urges the Court

to alter the scope of a fundamental First Amendment doctrine, even though there are narrower grounds on which to resolve this case.

One narrower ground is the Court's harmless error doctrine. Some errors, like the complete denial of counsel or a biased judge, are so "fundamental" that they "defy analysis by harmless error standards." *Neder v. United States*, 527 U.S. 1, 8 (1999); *Rose v. Clark*, 478 U.S. 570 (1986) (such errors "necessarily render a trial unfair"). But "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). These include the error alleged in this case: "a jury instruction that omits an element of the offense." *Id*. The harmless error standard requires proof "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). Given Petitioner's testimony admitting his intent to "antagonize" and "upset" recipients such as his wife, JA 242, and other objective indicia of this intent, *see, e.g.*, JA 225 (acknowledging that he continued to post violent remarks after learning they made his wife feel threatened), he would still have been convicted had a subjective intent standard applied.

D. Imposing a Subjective Intent Requirement on Section 875(c) Contravenes Congressional Intent to Protect Individuals from Fear and Harm

Demanding proof of subjective intent to sustain convictions under section 875(c) contradicts the legislative purpose behind prohibiting the transmission of threatening communications. While indicia of congressional intent can help clarify various types of statutory provisions, *see In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989), they are particularly important for determining the appropriate mens rea in criminal provisions, *see, e.g.*, *United States v. Balint*, 258 U.S. 250, 251–52 (1922) (holding that determinations about scienter must be guided by Congress's purpose in criminalizing certain behavior); *cf. X-Citement Video*, 513 U.S. at 77 (relying on "persuasive" legislative history to introduce a heightened scienter

requirement even where the plain text does not require it). The legislative history of section 875(c) demonstrates that Congress rejected any requirement of subjective or specific intent in favor of protecting people from threatening speech.

The statutory precursor to section 875(c) first appeared in 1932. Following the kidnapping of the Lindbergh baby, Congress prohibited the transmission of threats with the specific intent to extort something of value. Pub. L. No. 72-274, 47 Stat. 649 (1932). In the years after the enactment, Congress was informed that a large number of threats were made without any specific intention, extortionary or otherwise. S. Rep. No. 349, at 4 (1939) (noting that "a number of threats of a very serious and socially harmful character [are] not covered by the existing law"). A Department of Justice representative testified about needing "to render present law more flexible" to address the "many cases wherein the offenders seem to be irresponsible and even insane." *Threatening Communications: Hearing Before the Comm. on the Post Office and Post Roads,* 76th Cong. 5 (1939) (statement of William W. Barron, Dept. of Justice).

In both the hearings and congressional reports on the proposed bill, Congress focused exclusively on the effects threatening communications have on their recipients. There is no discussion of the subjective intent of the sender, other than the determination to prohibit the "irresponsible and even the insane" from transmitting threats. The bill Congress ultimately passed prohibited the transmission of any communication containing a threat to kidnap or injure another. Pub. L. No. 76-76, 53 Stat. 742 (1939). The language of the bill was nearly identical to the previous prohibition, except for the deletion of the specific-intent language regarding extortion. This omission confirms Congress's intent to create a general prohibition that protected a wide swath of listeners. *See Wilkes v. United States*, 469 U.S. 964, 964–65 (1984) (White, J., dissenting from denial of certiorari) (explaining that six circuits interpret the deletion of "intent

to defraud" from 18 U.S.C. § 912 as proof that "such an intent need not be specifically pleaded and proved").

Requiring proof of subjective intent to threaten, in the face of legislative history indicating Congress's desire to do the opposite, risks making the law less rather than "more flexible." There is a tradeoff between protecting senders' ability to communicate and recipients' desire to live free from fear. But in the domain of threats, fighting words, obscenity, and libel, Congress has repeatedly chosen to preserve the "social interest in order and morality," focusing on the effects of the speech on its recipients rather than the intent hidden behind the harmful speech. *Chaplinsky*, 315 U.S. at 572. This balance is particularly appropriate given that the harm of threatening speech stems from its effects on listeners, not from any unvoiced, subjective intent the speaker might hold. In light of Petitioner's remarks, for instance, the staff at Dorney Park undertook additional security precautions, *see* JA 121, and many others reported living in fear, JA 130. His wife sought and obtained a protective order, *see* JA 149–50, because she reasonably felt "extremely afraid" when Petitioner's threats persisted, JA 156; *see* Patricia Tjaden & Nancy Thoennes, National Institute of Justice and the Centers of Disease Control and Prevention, *Extent Nature and Consequence of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (2000) (noting that one-half of all restraining orders granted to women who were physically abused by intimate partners are eventually violated).

That Petitioner now claims his speech was "therapeutic" is cold comfort for those his words affected. It also does little to ameliorate the actual societal cost of his words. *See* Graeme R. Newman, *Bomb Threats in Schools*, U.S. Dep't of Justice 9 (Aug. 2011), http://www.cops.usdoj.gov/Publications/e061120371_POP_BombThreatsinSchools.pdf (describing that "some 90 percent of bomb threats in schools" turn out to be pranks but that each

incident causes "losses in excess of $250,000"). Shifting the burden of proof to the government, rather than requiring those who send threatening messages to consider the impact of their words, may leave the statute unenforceable and expose people to the harmful effects of true threats. *Giles v. California*, 554 U.S. 353, 387 (2008) (Breyer, J., dissenting) (noting "serious practical evidentiary problems" in requiring proof of the defendant's purpose rather than knowledge of his action and its foreseeable consequences).

II. THE FIRST AMENDMENT DOES NOT PROTECT STATEMENTS THAT A REASONABLE PERSON WOULD FIND THREATENING

True threats are a category of words "which by their very utterance inflict injury." *Chaplinsky*, 315 U.S. at 572. They instill fear, disrupt everyday life, and raise the possibility that violence will occur. *R.A.V.*, 505 U.S. at 388. The effects that these words have on their recipients are "the reasons why threats of violence are outside the First Amendment." *Id.* These effects exist regardless of whether the speaker intended them or not. As a result, subjective intent is not a necessary element in any analogous category of proscribable speech, such as fighting words and obscenity. The objective standard, which asks the jury to determine whether a reasonable person would have understood the words as threatening, guards against the harms that render true threats unprotected speech in the first place. It also prevents the chilling of any protected speech, since it only permits convictions that are based on a reasonable interpretation of the statement in context.

A. This Court Has Established that True Threats Fall Outside the First Amendment Because of Their Harmful Objective Effects

True threats are one of those "historic and traditional categories" of speech that the Constitution permits the government to proscribe. *United States v. Stevens*, 559 U.S. 460, 468 (2010). Like fraud, obscenity, defamation, and fighting words, true threats 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." *Chaplinsky*, 315 U.S. at 572; *see also Black*, 538 U.S. at 358–59. Excluding this speech from the public discourse is as essential to the First Amendment as safeguarding protected speech. *See R.A.V.*, 505 U.S. at 382 (describing how "our society, like other free but civilized societies" has placed restrictions on types of harmful speech "[f]rom 1791 to the present"). Courts have historically relied on the objective standard because it directly addresses the harmful effects of threatening speech while maintaining breathing space for protected speech, and because a subjective intent requirement impedes the goal of protecting victims from fear, disruption, and potential violence.

1. This Court's true threat precedents have repeatedly recognized that the harms that define a true threat—fear, disruption, potential violence—have nothing to do with the subjective intent of the speaker. A threat to shoot schoolchildren will cause panic whether intended to threaten or not. Attuned to this reality, the Court's first articulation of the true threat doctrine, *Watts v. United States*, 394 U.S. 705, is concerned with the external effects of this speech, not the intent behind it. *Watts* held that "whatever the 'willfulness' requirement implies, the statute [outlawing threats against the President] initially requires the Government to prove a true 'threat.'" *Id.* at 708. The "willfulness requirement" here referred to whether the speaker actually intended to carry out the threatened act—a requirement about which the Court had "grave doubts," *id.*, and has since explicitly denounced, *Black*, 538 U.S. at 359–60.

To prove a true threat, *Watts* mandates "tak[ing]" the speech "in context." *Watts*, 349 U.S. at 708. The Court found Mr. Watts, who had vowed to point his rifle at Lyndon Johnson if conscripted for Vietnam, innocent of a true threat against the President based on three objective circumstances. He made the statement "during a political debate;" it was "expressly made

conditional upon an event" that Watts "vowed would never occur;" and "both [he] and the crowd laughed." *Id.* at 707. Focusing on context enables the jury to interpret words with "the demands of the First Amendment clearly in mind," both what it means to protect and to exclude. *Id*.

Since *Watts*, every circuit has affirmed that true threats are an objective concept and found that a reasonable-person standard is essential to determining what constitutes a true threat against public figures and private individuals. The first major case to do so, *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969), recognized that "[i]f a threat is made in a context or under such circumstances wherein it appears that it is a serious threat . . . then the threat would tend to have" its harmful effects, "regardless of whether the person making the threat actually intends [them] and regardless of whether there is any actual danger." The objective standard prevents such harms by proscribing statements that a reasonable person would interpret or foresee being interpreted as threatening. *Cf. Chaplinsky*, 315 U.S. at 573 ("The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight.").

The Court again endorsed the objective standard in its next encounter with true threats, *Rogers v. United States*. 422 U.S. 35 (1975). Indeed, Justice Marshall emphasized *Roy* in his concurring opinion, which is said, incorrectly, to endorse Petitioner's subjective intent standard. The opinion only warns against applying a standard that would convict individuals for innocent or accidental statements—in other words, a standard that would fail to take context into account. *Id.* at 46 (Marhsall, J., concurring). This opinion embraces the prevailing objective standard as essential to defining a true threat, as does the only circuit, the Ninth, which has chosen to add a subjective element to the analysis. *See United States v. Cassel*, 408 F.3d 622, 628–33 (9th Cir. 2005) (describing the "suggested" subjective-intent element as supplementing, rather than replacing, the often "reaffirmed" reasonable-person standard). Even Petitioner admits that the

objective standard is necessary for determining whether a statement is a true threat. *See* JA 19–20 (requesting a jury instruction applying the reasonable-person standard). Petitioner only seeks to make it more difficult to limit objectively threatening speech by requiring additional proof that a speaker had an actual intent to threaten.

2. Courts have also widely adopted the objective standard because, consistent with the demands of the First Amendment, it adequately avoids chilling protected speech. The standard does not allow convictions for statements that a reasonable person would understand as joking, hyperbole, or art, or for statements that might offend an unreasonably thin-skinned recipient. Although the objective standard has been the law in every circuit but one, artists have been free to produce violent lyrics. This is because any attempt to prosecute creative expression "would be thrown out at the threshold" if a reasonable person would not interpret the speech as threatening. *United States v. Williams*, 553 U.S. 285, 305 (2008). Objective standards are similarly common in other constitutional doctrines that balance individual liberty and public safety. The Fourth Amendment warrant requirement contains a "well-recognized exception" that "applies when the exigencies of the situation"—the context—"make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)).

Moreover, statutes that depend on the objective standard to prohibit threatening speech are not overbroad. Statutes may be overbroad only if they bar a substantial amount of constitutionally protected conduct. *See Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). The reasonable person standard, by contrast, only permits the government to proscribe unprotected threatening speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (noting the "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally

unprotected conduct"). Although Petitioner claims that the objective standard risks affecting some protected speech, this Court has recognized that

> there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech . . . . To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Hicks, 539 U.S. at 119–20 (internal citations omitted). Where, as in this case, the law does not attempt to proscribe any protected speech and striking it down would generate significant social harms, it must survive an overbreadth challenge. To label a statute overbroad simply because "the enhanced probability of prosecution" of unprotected speech might "chill[] the expression of protected speech" is as "unprecedented" today as it was when *Black* was decided. *Black*, 538 U.S. at 371 (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part) (internal quotation marks omitted).

3. Requiring proof of subjective intent to threaten is fundamentally incompatible with the rationale for proscribing true threats. The harmful effect of certain words, the sole justification for removing their constitutional protection, is independent of the speaker's unexpressed intent. Thus, the First Amendment has always been concerned with the speech itself—the words as received, not as intended. When the Court incorporated the freedom of speech against the states in *Gitlow v. New York*, 268 U.S. 652 (1925), it upheld a law against advocating criminal anarchy because the words themselves could do harm, even if unintended. The Court explained that "[s]uch utterances, by their very nature, involve danger to the public peace . . . [a]nd the immediate danger is none the less real and substantial, because the effect of a given utterance

cannot be accurately foreseen." *Id.* at 669. The Court elaborated on this principle when it incorporated the free exercise clause:

> [o]ne may . . . be guilty of [a breach of the peace] if he commit acts or make statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended*. . . . Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940) (emphasis added). External effects continue to dictate what speech the state may or may not prohibit. *See, e.g.*, *Alvarez*, 132 S. Ct. at 2550 (declining to add false statements of fact to the categories of unprotected speech, since some false statements may contribute to "open, dynamic, rational discourse").

No one disputes that Petitioner's statements were threatening to those who received them. Petitioner's only argument is that he did not intend for them to be. But this intent meant little to the people around him, who reasonably feared for their lives and undertook costly precautions. *See, e.g.*, JA 124 (testimony of Amber Morrissey who missed work out of fear); JA 150–53 (testimony of Tara Elonis who felt "extremely afraid" and obtained a protective order). And it means little to the First Amendment, which leaves true threats unprotected on the basis of their effects alone. Even assuming that "Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet?" were lyrics intended for "entertainment purposes only," JA 208, Petitioner's statements bear none of the qualities the Court found redeeming in *Watts*. They were not part of a larger debate; they were targeted at coworkers and family members who had already been terrorized by Petitioner, JA 177, 201, and reasonably feared for their lives. They were not conditioned on an event that would never occur; Petitioner had already taken actions, such as undressing in front of Amber Morrissey, which would make any reasonable observer think him capable of carrying out his threats. And nobody, except Petitioner, was laughing. JA 342.

It is axiomatic that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Petitioner would invert Justice Holmes's statement to mean that "free speech protects a man for falsely shouting fire in a theater, unless he also intends to cause panic." In doing so, he argues against this Court's precedents and the history of the First Amendment.

B. Analogous Categories of Proscribable Speech Rely on an Objective Standard to Distinguish Between Protected and Harmful Expression

In order to balance in the interests in maintaining open public discourse and in limiting the harms that certain speech can cause, all other categories of proscribable speech rely on the same objective standard the judge instructed the jury to use in this case. JA 301.

1. The two most analogous categories to true threats are fighting words and obscenity. Neither requires proof of subjective intent. Fighting words, like true threats, are words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572. The standard for determining whether a statement falls into this proscribable category is entirely objective: the jury is asked whether, in context, the words would have the effect of provoking a reasonable person to fight. "Such words, as ordinary men know, are likely to cause a fight" if they are "said without a disarming smile." *Id.* at 573.

Even when a speaker has a clearly provocative intent, like one who walks the corridors of a courthouse wearing a jacket bearing the words "Fuck the Draft," the Court has not taken subjectivity into account. *Cohen v. California*, 403 U.S. 15, 16 (1971). Rather, it reasoned that the phrase did not constitute fighting words because no "ordinary citizen . . . as a matter of common knowledge" would "reasonably have regarded the words on [the] jacket as a direct personal insult." *Id.* at 20. Requiring additional proof of the speaker's hidden subjective intent would contradict the goal behind proscribing fighting words, which "provoke violence . . . even

though no such eventuality be intended." *Cantwell*, 310 U.S. at 309. Thus, the Court has devised a standard that protects free expression until the point where violence will likely result.

Likewise, the Court uses a reasonable-person standard to determine whether, in context, speech qualifies as unlawful obscenity. The three-part standard set out in *Miller v. California*, 413 U.S. 15 (1973), permits the state to proscribe speech or expressive material that "the average person, applying contemporary community standards, would find . . . taken as a whole, appeals to the prurient interest," that "depicts or describes, in a patently offensive way, sexual conduct," and that "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal quotation marks and citations omitted). Each part of the standard is objective. Both prurient interest and patent offensiveness are determined by applying contemporary community standards, *Pope v. Illinois*, 481 U.S. 497, 500 (1987), which are in turn informed by objective indicia of social values, such as local legislation, *cf. Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (stating that the parallel Eighth Amendment concept of evolving standards of communal decency "should be informed by objective factors to the maximum possible extent" (internal quotation marks omitted)). The final "value" inquiry is expressly objective: "[t]he proper inquiry is not whether an ordinary member of any given community would find serious . . . value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." *Pope*, 481 U.S. 500-01. As the Court succinctly stated in its most recent application of *Miller*, obscene speech, like true threats, falls outside the First Amendment because of its "objective effects." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

The reasonable-person test thus protects artistic expression while furthering the important goals for which states have always regulated obscenity and fighting words. So long as a speaker

knows the content of his speech and the content violates well-established objective standards, this Court's First Amendment jurisprudence does not require further proof of subjective intent.

2. Two other categories of proscribable speech—incitement of criminal activity and defamation of public officials—also do not require the subjective-intent standard Petitioner asks this Court to impose. The standard for incitement, laid out in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), enables the government to proscribe speech advocating violence or unlawful acts "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Although "directed to inciting" might be read to import a subjective element, this Court has made clear that it does not. Indeed, *Brandenburg* itself says the analysis turns on the objective context of the speech itself. *Id.* The very sentence that establishes the case's well-known rule is followed by a footnote explaining the Court's reasons for overturning two previous convictions for incitement: "because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action." *Id.* at 447 n.2. As with true threats, the speech's "tendency" is what matters.

The next major incitement case, *Hess v. Indiana*, 414 U.S. 105 (1973), applied the *Brandenburg* rule without regard to subjective intent. The Indiana Supreme Court had affirmed Hess's conviction for a statement that "was intended to incite . . . lawless action." *Id.* at 108 (internal quotation marks omitted). This Court found that "[t]his is not sufficient to permit the State to punish Hess' speech." *Id.* The Court reversed his conviction after applying a type of reasonable-person test. The objective context of the speech, like the fact that it "was not directed to any person," showed that he was not advocating violence "in the normal sense." *Id.* at 108-09.

This analysis comports with the text of *Brandenburg*, which refers to the effects that result from the words—an objective detail—rather than the effects the speaker intended. Since

Hess, this objective standard has continued to help courts distinguish between protected speech acts, like flag burning and boycotting, and speech acts that can reasonably be said to incite crime. *See Texas v. Johnson*, 491 U.S. 397, 409 (1989) (equating "requir[ing] careful consideration of the actual circumstances surrounding [an] expression" with "asking whether the expression 'is directed to inciting or producing imminent lawless action'" (quoting *Brandenburg*, 395 U.S. at 447)); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (relying on contextual evidence, such as "the passionate atmosphere in which the speeches were delivered," to determine whether "they might have been understood as inviting an unlawful form of discipline . . . whether or not improper discipline was specifically intended).

Even defamation, which requires a slightly higher degree of knowledge than other types of proscribable speech, does not impose the standard for which Petitioner argues. The "actual malice" standard set in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), requires only "knowledge" of a statement's falsity or "reckless disregard" for the truth.[4] Crucially, it does not require proof that the speaker harbored a specific intent to harm the reputation of any individual. As the Court later explained, "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

In cases concerning fighting words, obscenity, incitement, and true threats, this Court has repeatedly held that the reasonable-person standard satisfies the First Amendment. This standard effectively balances protected and unprotected speech without resorting to a subjective intent

[4] For reasons not applicable to other categories of proscribed speech, the Court has held that "actual malice" requires knowledge of falsity. Demanding perfect factual accuracy of every printed statement would make running a daily press impossible. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974). The knowledge requirement thus preserves an entire medium of vital and constitutionally protected speech in a way that is not necessary for other media.

inquiry. Statements that convey negative, offensive, even hateful messages are protected; statements that cause objective social harm through disruption, crime, and fear are not. In every case, speakers that choose to spread their messages in public are responsible for respecting the boundary between protected expression and objective harm.

C. *Virginia v. Black* Confirms that the First Amendment Requires Only an Objective Standard for Proscribing True Threats

Virginia v. Black, 538 U.S. 343, affirmed that the First Amendment allowed the state of Virginia to ban cross burning "with the intent of intimidating any person or group," an expressive act that causes the same objectively harmful effects that define all true threats. *Id.* 347–48 (quoting Va. Code Ann. § 18.2-423 (1996)). However, a plurality of the Court found that the provision of the statute that made cross burning "prima facie evidence of an intent to intimidate" was unconstitutional. *Id.* at 364 (plurality opinion). This provision prevented juries from deciding whether the act was intimidating in context, the key element of true-threat analysis. The thirty-seven-page decision spent only one paragraph discussing true threat doctrine and never mentioned section 875(c). Despite that, Petitioner argues *Black* created a new subjective-intent requirement for all true threats, thus working a silent change in First Amendment jurisprudence, redefining "true threat," and rendering the statute Congress wrote essentially unenforceable.

This argument misreads *Black*. First, the Court did not address the intent required to communicate a true threat. Second, to the extent the Court did discuss the components of a true threat, it relied on objective contextual factors rather than subjective intent.

1. *Black* did not have the opportunity or need to create a new intent requirement for all true threats because the Virginia statute already included a specific "intent" provision. *See* Va. Code Ann. § 18.2-423 (1996) ("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 . . . ."). As such, *Black* only dealt with a "type of true threat": intentional intimidation. *Black*, 538 U.S. at 360. History knows many other threats: terroristic threats; threats against government officials; threats of continuing harm; threats of extortion; threats that advance patterns of racketeering activity; and threats created by attempted criminal acts or stalking. *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 Stan. L. Rev. 1337, 1348–55 (2006) (describing six different kinds of threat encountered by courts).

Contrary to Petitioner's suggestion, subjective intent is not the connecting strand between the many types of threat. Some threats require specific intent to affect a target audience, while others do not. *Compare United States v. Enmons*, 410 U.S. 396, 406 (1973) (holding that extortion requires an intent to unlawfully obtain something), *with H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989) (holding that a pattern of racketeering activity requires only two acts that threaten "the *likelihood* of . . . continued criminal activity" (emphasis added)). What unifies these types of threats is the harm they cause society at large, whether through fear and disruption, *Black*, 538 U.S. at 360, or the possibility of violence and continued criminal activity, *Enmons*, 410 U.S. at 400; *H.J. Inc.*, 492 U.S. at 237. *Black* only verified that the category of threats "encompass[es]" a specific subclass of intentional threat—intimidation. *Black*, 358 U.S. at 359. To read *Black* the other way around, as if it had said that all threats must be intentionally intimidating, would remove from the definition of "threat" many types of speech that spark fear, disruption, and potential violence.

Furthermore, the central question in *Black* was not whether proof of subjective intent is constitutionally required in all statutes prohibiting threats. Instead, *Black* addressed whether prohibiting a specific kind of symbolic speech—speech that, depending on the circumstances,

could either be a constitutionally protected ideological expression or a true threat—was unconstitutional. *Id.* at 365. This type of content-based regulation is inherently more suspect under the First Amendment than a law like section 875(c), which prohibits any form of threatening speech without regard to either the content of or the intent behind the threat. The Court found the Virginia prohibition constitutional because it banned a type of threat for the very reason the state could proscribe threats as a whole: the harmful effects of the speech, which exist regardless of the subjective intent behind them. *R.A.V.*, 505 U.S. at 388 (noting that a content-based restriction is permissible when the "content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable"); *Black*, 538 U.S. at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because . . . a State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.").

2. Although *Black* does not address the relevant intent requirement for true threats, its reasoning affirms the objective standard that most courts have applied for at least half a century. The Court determined that cross burning could constitute a true threat by looking at objective indicia of the symbol's violent history. A full half of the majority opinion in Black is dedicated to showing how cross burnings cause the same harms as threats generally. *Black*, 538 U.S. at 355 ("[T]hese threats ha[ve] special force given the long history of Klan violence."); *id.* at 391 (Thomas, J., dissenting) ("In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.").

Subjective intent only entered the analysis because it was the factor Virginia used to distinguish between protected and unprotected cross burning. However, the Court never said the statute only satisfied the Constitution because of the subjective intent requirement. In fact, the

intent requirement risked rendering the statute unconstitutional as a form of viewpoint discrimination. The Court had already struck down a local ordinance against cross burning for the specific intent to "arouse anger . . . on the basis of race, color, creed, religion, or gender," which singled out certain "disfavored topics" for regulation. *R.A.V.*, 505 U.S. at 391. Because the Virginia statute prohibited all intentional intimidation through cross burning, it did not single out particularly disfavored messages, and thus was not unconstitutional. *Black*, 538 U.S. at 363.

But that is far from ruling that the intent provision was constitutionally required. Indeed, the regulation was judged permissible mainly on the basis of the objective standard. The Court grounded the difference between protected and unprotected cross burning on objective context, not subjective intent. *Compare id.* at 354-55 (cataloguing historical burnings paired with violence), *with id.* at 356-57 (finding that "cross burnings have also remained potent symbols of shared group identity" by referencing passages from Klan documents and posters advertising Klan rallies). Of the three defendants, the only one whose conviction the Court found could not stand was Barry Black, who had burned a cross in the clear context of a private group event. *Id.* at 348-49 (describing the rally "which occurred on private property with the permission of the owner" and "between 300 and 350 yards away from the road"). This reasoning implies that the Virginia statute would have looked no different to the First Amendment had it imposed only an objective standard—outlawing "the burning of a cross in a manner that is intimidating." Such a statute would align more closely with the contextual reasoning on which *Black* relies.

The decision by a plurality of the Court to strike down the statute's prima facie evidence provision confirms this conclusion. The provision rendered the act of cross burning prima facie evidence of intent to intimidate. This provision restricted the jury's ability to reason from context about the objective meaning of the speech act, "strip[ing] away the very reason why a State may

ban cross burning with the intent to intimidate." *Id.* at 365. If the cross was burning at a political rally, on a stage, or in a movie, a jury could readily find that a reasonable person would not consider it a true threat.

Taken as a whole, *Black* stands for the "simple proposition" that, while a statute *may* add a subjective intent requirement in order to target a particular type of threat, it *must* include an objective component to allow the twelve members of the jury to decide whether the speech was in fact threatening under a reasonable-person standard. *Id.* at 368 (Stevens, J., concurring). This rule supports maintaining the objective standard of 18 U.S.C. § 875(c), which protects victims from all speech that truly threatens, whether intended to or not. To read *Black* as Petitioner seeks—that because a state statute aimed at a subcategory of true threats may consider subjective intent, the entire category of threats must consider intent as well—would work a perversion into an old doctrine. The fact that a state may protect the victims of one type of true threat does not leave everyone else susceptible to the fear and disruption wrought by the many other types.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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