No. 12-1185

In the Supreme Court of the United States

FRANKLIN DELANO JEFFRIES, II,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

RALPH E. HARWELL
JONATHAN HARWELL
Harwell & Harwell, P.C.
2131 First Tenn. Plaza
Knoxville, Tenn. 37929
(865) 637-8900

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The government does not deny that the question presented in the petition is a frequently recurring one of the greatest practical importance. It concedes that "disagreement exists among the courts of appeals on th[at] question" (Opp. 9), as those courts themselves repeatedly have acknowledged. And it offers no explanation (at least, none that we can understand) for how the decision below can be reconciled with this Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003). In such circumstances, further review is warranted.[1]

A. The Circuits Are In Conflict On The Question Presented.

1. There can be no doubt that the circuits are in conflict on the question presented; the Ninth Circuit has expressly and repeatedly rejected the constitutional rule advanced by the government and accepted by the Sixth Circuit in this case. In *United States* v. *Cassel*, 408 F.3d 622 (9th Cir. 2005), the Ninth Circuit clarified arguable uncertainty in its pre-*Black* decisions and held that, under *Black*, "only intentional threats are criminally punishable consistent[]

[1] The government's contention that the Court "has repeatedly and recently denied petitions for a writ of certiorari raising the same issue" as this petition (Opp. 9) is misleading; the petitions it cites sought review of decisions that were materially different from the one in this case. See *United States* v. *Parr*, 545 F.3d 491, 497-499 (7th Cir. 2008) (defendant did not challenge jury instruction, which *required* a finding of subjective intent); *United States* v. *Stewart*, 411 F.3d 825 (7th Cir. 2005) (court did not cite or consider *Black*); *United States* v. *Mabie*, 663 F.3d 322 (8th Cir. 2011) (court did not address meaning of "threat" in Section 875(c)).

with the First Amendment." *Id.* at 631. See *id.* at 632 ("eight Justices agreed [in *Black*] that intent to intimidate is necessary and that the government must prove it in order to secure a conviction"); *id.* at 635 (overturning conviction on this ground).

More recently, the Ninth Circuit reaffirmed that rule in the most forceful and unambiguous terms. "[C]learing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment," the court held that, under *Black*, it is "not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1116-1117 (9th Cir. 2011). Instead, "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Id.* at 1117. See *id.* at 1118 (threat statute "necessarily incorporates the constitutional inquiry commanded by *Black*: Did the speaker subjectively intend the speech as a threat?").

Against this background, the government's suggestion that the Court delay review "in light of the possibility that the Ninth Circuit will resolve its apparent internal disagreements through the en banc process" (Opp. 22) invokes magical thinking.[2] There

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[2] The government is incorrect in stating that the Ninth Circuit's approach has been inconsistent "after the decision in *Black*." Opp. 19. *Unites States* v. *Romo*, 413 F.3d 1044, 1051 n.6 (9th Cir. 2005), cert. denied, 547 U.S. 1048 (2006), invoked by the government, expressly premised its post-*Black* holding on the defendant's failure to "raise[] First Amendment issues." See *Bagdasarian*, 652 F.3d at 1117 & n.14. And in stating that, post-*Black*, the Ninth Circuit has "analyzed speech under both an objective and a subjective standard" (*Fogel* v. *Collins*, 531

is no current disagreement on the Ninth Circuit. On the question presented here, the panels in *Cassel* and *Bagdasarian* were unanimous and included the full spectrum of perspectives; *Cassell* was authored by Judge O'Scannlain and *Bagdasarian* by Judge Reinhardt, who was joined in the majority by Chief Judge Kozinski. (The third member of the *Bagdasarian* panel, Judge Wardlaw, "concur[red] fully with the majority's analysis of the law of 'true threats'" but believed that test satisfied on the record in that case. *Bagdasarian*, 652 F.3d at 1124.) It is thus unsurprising that the Ninth Circuit denied the government's en banc petition in *Bagdasarian* with no judge seeking a vote. And as we showed in the petition, many courts and commentators, including the court below in this case, have specifically noted the conflict between the Ninth Circuit and other courts of appeals on the question presented in the petition. Pet. 12-14. If there is to be national uniformity on that important question, it must be provided by this Court.

2. The government is correct that no other court of appeals has squarely held that use of a subjective test is required in cases like this one (Opp. 18-19), and we did not suggest otherwise in the petition. See Pet. 11-12. But we did show that at least two other courts of appeals have concluded, in clear and con-

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F.3d 824, 831 (9th Cir. 2008)), the court meant that it applied both inquiries in the *same* case—not that it had upheld a threat conviction in the absence of subjective intent. See *id.* at 831-832. See also *United States* v. *Stewart*, 420 F.3d 1007, 1018-119 (9th Cir. 2005). It may be added that, long before *Black*, the Ninth Circuit held as a matter of statutory construction that conviction under Section 875(c) requires proof of subjective intent to threaten, a conclusion the court has never questioned. *United States* v. *Twine*, 853 F.2d 676, 680 (9th Cir. 1988). See Pet. 9.

sidered dictum, that, under *Black*, "an entirely objective definition [of threat] is no longer tenable." *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008). The government appears to agree with our reading of these decisions. See Opp. 18-19 & n.3 (quoting *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) ("[t]he threat must be made 'with the intent of placing the victim in fear of bodily harm or death'"); *United States* v. *Pinson*, 542 F.3d 822, 832 (10th Cir. 2008) ("[t]he burden is on the prosecution to show that the defendant understood and meant his words as a threat, and not as a joke"), cert. denied, 555 U.S. 1059 (2008) and 555 U.S. 1195 (2009)). At a minimum, this shows that the Ninth Circuit's rule is neither aberrational nor indefensible.[3]

B. The Decision Below Is Inconsistent With *Black*.

1. The decision below is in conflict with more than the Ninth Circuit's rule; it also cannot be reconciled with this Court's decision in *Black*. There, the Court held unconstitutional a Virginia statute that banned cross-burning with intent to intimidate because the statute treated the burning of a cross as itself constituting "prima facie evidence of an intent to intimidate." 538 U.S. at 363-367 (plurality opinion). As we explained in the petition, this holding neces-

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[3] Although it is true that a majority of the courts to address the issue have not endorsed a subjective-intent test, the government overstates the point; several of the decisions it cites (Opp. 11) as having "rejected First Amendment challenges" either did not decide the question presented here or did not address the First Amendment at all. See *United States* v. *Nishnianidze*, 342 F.3d 6 (1st Cir. 2003); *United States* v. *Davila*, 461 F.3d 298 (2d Cir. 2006); *United States* v. *Alaboud*, 347 F.3d 1293 (11th Cir. 2003).

sarily was premised on the view that a subjective intent to intimidate is required by the First Amendment; otherwise, the statute could not have been rendered unconstitutional by the prima facie evidence proviso. Pet. 29-30.

The government's response to this point is obscure. See Opp. 15-16. Its only argument seems to be that, although the *Black* plurality indicated "that a statement made 'with the intent of placing the victim in fear of bodily harm or death' is a '*type* of true threat,'" "*Black* did not hold that the category of true threats is limited to such statements." Opp. 16 (quoting *Black*, 538 U.S. at 360 (plurality opinion) (emphasis added by the government)).[4] But even if the government's parsing of the Court's language is grammatically possible, the government offers no explanation *why* the Court held the Virginia statute unconstitutional other than the one articulated by the Ninth Circuit—that a subjective intent to threaten or intimidate, which was substantially read out of the Virginia statute by the prima facie evidence rule, is constitutionally required. After all, "[i]f there is no such First Amendment requirement, then Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217. Accordingly, as we also showed in the petition (at 30-31),

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[4] The government does not deny that, as we showed in the petition (at 29 n.10), although this language appears in the plurality opinion, at least eight and possibly all nine Justices took the same position on the necessity of subjective intent.

commentators have consistently read *Black* to require proof of a subjective intent to threaten or intimidate. The government makes no response.[5] In these circumstances, where the holding below is in obvious tension with a constitutional decision of this Court on a matter of considerable practical and doctrinal importance, further review is in order.

2. The government's discussion of the other decisions of this Court addressed in the petition, including *United States* v. *Alvarez*, 132 S. Ct. 2537 (2012), *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (per curiam), and *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), simply misses the point. Opp. 16-17 & n.2. The government is of course correct that these decisions "did not concern threatening speech" (Opp. 16), and therefore did not directly "address (much less resolve) the question here." Opp. 18 n.2. The decisions were not cited in the petition for any such proposition. But the decisions *do* demonstrate that First Amendment doctrine *generally* makes use of mental-state requirements in many contexts to ensure that speakers do not violate the law by accident, and thus to avoid chilling protected speech. See Pet. 31-32. A subjective intent requirement would serve that essential purpose in this case. And here, too, the government makes no response.[6]

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[5] The government does assert that the Court in *Black* "had no occasion to consider" whether a state may prohibit statements that "a reasonable person would understand as expressing a serious intent to do harm." Opp. 16. But this assertion says nothing to explain the Court's holding that the Virginia statute *was* unconstitutional.

[6] The government misunderstands the petition's discussion (at 19-22) of speech on the Internet. We agree that "ordinary First Amendment principles" apply to such speech. Opp. 22. Our

C. The Court Of Appeals Misconstrued Section 875(c).

The government's defense of its construction of Section 875(c) simply ignores the points made by Judge Sutton in his *dubitante* opinion. The government thus has absolutely nothing to say about why Congress put the statute in its current form.

As Judge Sutton explained, the "law made its first appearance in 1932" when "[i]t encompassed threats coupled with an intent to extort something valuable from the target of the threat." Pet. App. 21a. Given this history,

> [f]rom the beginning, the communicated "threat" thus had a subjective element to it. Nothing changed when Congress added a new "threat" prohibition through § 875(c) in 1939. The question was whether the legislature should prohibit nonextortive threats, not whether the statute should cover words that might be perceived as threatening but which the speaker never intended to create that impression. * * * In prohibiting non-extortive threats through the addition of § 875(c), Congress offered no hint that it meant to write subjective conceptions of intent out of the statute.

Pet. App. 21a-22a. Against this background, the government does not even attempt to explain why Congress would have required proof of subjective intent for extortionate threats (as the government concedes

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point is that the anonymous and noncontextual nature of much online speech, as well as the unsettled nature of Internet social norms, highlight the acute need for a subjective inquiry in speech-based prosecutions.

to be the case) but not for threats motivated by "animosity" or "spite." Pet. App. 22a. The government likewise has nothing to say about what Judge Sutton described as the "[b]ackground norms for construing criminal statutes," which require proof of subjective intent and *not* application of a "reasonable listener" test. Pet. App. 22a.

The government fares no better in its attempt to define the word "threat" as omitting any subjective component. Opp. 12-13. As Judge Sutton explained, "[c]onspicuously missing from *any* [dictionary] is an objective definition of a communicated 'threat,' one that asks *only* how a reasonable observer would perceive the words." Pet. App. 21a. In fact, it is implicit in definitions of "threat" like the ones offered by the government—for example, "'the declaration or show of a disposition or determination to inflict an evil or injury upon another'" (Opp. 12-13)—that the speaker *meant* to convey the impression that he or she actually intended to inflict harm. That certainly is the ordinary usage of the word "threat": It is a commonplace that a listener will respond to a menacing statement with the question, "is that a threat?";[7] but that question is nonsensical if, as the government maintains, a "threat" is anything that a reasonable person would understand to be threatening, regardless of the speaker's actual intent. And certainly, given the background norms of construction invoked by Judge Sutton, the rule of lenity, and the principle that criminal laws targeting communication "must

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[7] See, *e.g.*, John Grisham, *The Client* 172 (Random House 1993); Isaac Asimov, *The Robots of Dawn* 214 (Bantam 1983). See also *Is That a Threat?*, Television Tropes & Idioms, http://tinyurl.com/qx7akgh (collecting many examples of this remark in film and television).

be interpreted with the commands of the First Amendment clearly in mind" (*Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam)), any ambiguity here must be resolved against the government.

D. This Case Is An Appropriate Vehicle For Resolution Of The Question Presented.

Finally, the government's suggestion that the jury was in fact properly instructed to look for subjective intent, or that any error below was harmless, is insubstantial.

First, the instruction below is not saved by the language identified by the government as "direct[ing] the jury that it must find that petitioner intended to achieve an end through intimidation." Opp. 10-11. Read in context, the language of the instruction reprinted by the government (Opp. 5-6) leaves no doubt that the jury was instructed to apply only an objective, "reasonable listener" standard.

Although the instruction did include the language "you must determine whether the communication was transmitted for the purpose to effect some change or achieve some goal through intimidation," that language was preceded by a general instruction to determine whether "*a reasonable person would—*" perceive the speech in the manner that followed. The language relied upon by the government also was immediately followed by the statement that, "[i]n evaluating whether a statement is a true threat, you should consider whether in light of the context *a reasonable person would believe* that the statement was made as a serious expression of intent to inflict bodily injury * * *." And the instruction concluded by stating: "The communication must be viewed *from an objective or reasonable person perspective. * * * The*

defendant's subjective intent in making the communication is also irrelevant. Unlike most criminal statutes, [under Section 875(c)] the government does not have to prove [a] defendant's subjective intent." Opp. 5-6 (quoting Gov't C.A. Br. 15) (emphasis added). Hearing this, the jury could have had no doubt that it was being asked to make an objective inquiry rather than one into petitioner's subjective intent.

Indeed, the matter is so clear that the court below, in reprinting the relevant and controlling portion of the jury instruction, altogether omitted the language relied upon by the government here. See Pet. App. 7a-8a. The constitutional and statutory questions advanced by the petition accordingly are squarely presented by this case.

Second, the government is incorrect in contending that the error below was harmless because "[n]o rational juror could have concluded that petitioner did not subjectively intend to threaten Chancellor Moyers." Opp. 23. Portions of petitioner's video, viewed in isolation, doubtless could be taken as threatening. But had petitioner been allowed to offer evidence at trial on his subjective intent, he could have shown (as he did at his detention hearing and in his sentencing memorandum) that, far from creating his video to intimidate, he made the video because

> [a]t one point in his treatment, he was told by a therapist or social worker that he should seek to vent his emotions instead of bottling them up. He was told that one good way to do this was through unscripted songs, which [petitioner] found easier to do than writing his thoughts down with pen and paper.

Sentencing Memorandum 4 n.2 (Dkt. No. 115). See also Order of Detention Pending Trial 4-5 (Dkt. No. 27) ("Mrs. Jeffries stated that one of the Defendant's therapists had advised him to 'vent' orally and in song and to create video journals. * * * [T]he Defendant's sister[] testified that * * * [a] doctor had advised the Defendant to release his anger in his songs as opposed to acting on it.").

A properly instructed jury therefore could well have believed that petitioner made his video as a therapeutic effort to "vent" rather than to intimidate. And that conclusion would have been supported by the facts that, although distribution of petitioner's video was accompanied by a variety of Facebook messages—including not only "Comedy for the courts" but also "Tell the judge" (Pet. App. 17a)—some recipients of the video (such as minor children) *could not* have taken it to the judge, and petitioner in any event removed the video from YouTube and Facebook after 25 hours. Petitioner should have the opportunity to present his case under the proper legal standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

RALPH E. HARWELL
JONATHAN HARWELL
Harwell & Harwell, P.C.
2131 First Tenn. Plaza
Knoxville, Tenn. 37929
(865) 637-8900

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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