No.

In the Supreme Court of the United States

ANTHONY D. ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

Whether, consistent with the First Amendment and *Virginia* v. *Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-29a, is reported at 730 F.3d 321. The opinion of the district court denying petitioner's post-trial motions, App., *infra*, 30a-48a, is reported at 897 F. Supp. 2d 335. The opinion of the district court denying petitioner's motion to dismiss, App., *infra*, 49a-60a, is unreported, but available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013, and a timely petition for panel rehearing and rehearing en banc was denied on October 17, 2013. On January 6, 2014, Justice Alito extended the time for filing a petition for a writ of certiorari to February 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

This case concerns an important First Amendment question that is the subject of an acknowledged conflict among federal courts of appeals and state

courts of last resort: whether a person can be convicted of the felony "speech crime" of making a threat only if he subjectively intended to threaten another person, or whether instead he can be convicted if he negligently misjudges how his words will be construed and a "reasonable person" would deem them a threat. Petitioner was convicted of violating 18 U.S.C. § 875(c), which makes it a crime to transmit in interstate commerce "any communication containing * * * any threat to injure the person of another." At trial, the district court rejected petitioner's request for a "subjective intent" instruction and told the jury that it is irrelevant whether a speaker charged with violating Section 875(c) actually intended to threaten anyone. Instead, the court instructed the jury that it was enough that "a reasonable person would foresee that the statement" would be interpreted as a threat. C.A. App. 547.

While the First Amendment does not protect "true threats," *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), the scope of that category of unprotected speech is the subject of widespread confusion. In the absence of guidance from this Court, Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 302 (2001) ("The Supreme Court's minimal guidance has left each circuit to fashion its own test."), most lower courts adopted an "objective" standard, looking to whether a reasonable person would understand a statement to be a threat, see Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1243-1244 (2006). In *Virginia* v. *Black*, 538 U.S. 343 (2003), this Court "[f]or the first time * * *

defined the term 'true threat,'" Crane, 92 Va. L. Rev. at 1226, holding that the term applies to "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citing *Watts*, 394 U.S. at 708) (emphasis added).

The lower courts are sharply divided about the implications of *Black*. The Ninth Circuit and several state supreme courts hold that the objective standard cannot be reconciled with this Court's jurisprudence, and accordingly "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *United States* v. *Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); accord *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (Mass. 2012); *State* v. *Miles*, 15 A.3d 596, 599 (Vt. 2011); *State* v. *Grayhurst*, 852 A.2d 491, 515 (R.I. 2004); see also *State* v. *Pomianek*, 58 A.3d 1205, 1217 (N.J. Super Ct. App. Div. 2013) (stating that construing state bias-intimidation statute not to require "proof of intent with respect to each element of the offense" "would cause the statute to run afoul of the First Amendment principles espoused in *Black*"). The Tenth Circuit has likewise recognized in *dicta* that true threats "[u]nprotected by the Constitution[,] * * * must be made 'with the intent of placing the victim in fear of bodily harm or death.'" *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360). And the Seventh Circuit has written that "an entirely objective definition [of 'true threat']" may "no longer [be] tenable" after *Black*. *United States* v. *Parr*, 545 F.3d

491, 500 (7th Cir. 2008). But other courts, like the court of appeals below, consider themselves constrained to follow pre-*Black* authority. "[A]bsent a clearer statement from the Court, the circuit courts will not change the firmly established precedent of their true threat jurisprudence." Crane, 92 Va. L. Rev. at 1264.

The Third Circuit's decision should not stand. It contributes to a recognized conflict among the courts of appeals and state courts of last resort on whether a subjective intent to threaten is constitutionally required before a person can be convicted of making a threat. Indeed, in *eight* states there is conflict between decisions of the state's high court and the regional federal circuit on that very question, subjecting speakers to uncertainty about the legal standard that applies to their statements. Moreover, the decision below cannot be reconciled with this Court's decision in *Black*. Permitting conviction based on negligence for a crime of pure speech is contrary to basic First Amendment principles. This issue implicates hundreds of convictions under federal law and threat statutes enacted by numerous states. Further review is warranted.

A. Factual Background

This case arises out of posts petitioner made during 2010 on the social media website Facebook. At the time, petitioner was 27 years old; his wife of nearly seven years had left him, taking their two children with her. Petitioner's supervisor at Dorney Park & Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, observed him "with his head down on his desk crying, and he was sent home

on several occasions because he was too upset to work." App., *infra*, 3a. Soon afterwards, petitioner lost his job. Petitioner made a series of posts about his situation, frequently in the form of rap lyrics, using "crude, spontaneous and emotional language expressing frustration." *Id.* at 55a. Although the language was—as with popular rap songs addressing the same themes[1]—sometimes violent, petitioner posted explicit disclaimers in his profile explaining that his posts were "fictitious lyrics," C.A. App. 412, and he was "only exercising [his] constitutional right to freedom of speech." *Id.* at 112. Petitioner explained about his posts, "for me, this is therapeutic. It help[ed] me to deal with the pain." *Id.* at 394.

1. Facebook provides its users with a home page on which the user can post comments, photos, and links to other websites. Facebook users may become "friends" with other users; after a member requests to be "friends" with another user, the requested friend

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[1] At trial, petitioner testified that he was influenced by the rap artist Eminem's songs *Guilty Conscience*, *Kill You*, *Criminal*, and *97 Bonnie and Clyde* as influences. C.A. App. 424. Eminem repeatedly fantasized in songs about killing his ex-wife. *E.g.*, Eminem, *Kill You*, *on* The Marshall Mathers LP (Interscope Records 2000) ("Slut, you think I won't choke no whore/Til the vocal cords don't work in her throat no more?" "Put your hands down bitch, I ain't gonna shoot you/I'ma pull you to this bullet, and put it through you."); Eminem, *97 Bonnie and Clyde*, *on* The Slim Shady LP (Interscope Records 1999) ("Da-da made a nice bed for mommy at the bottom of the lake/Here, you wanna help da-da tie a rope around this rock? (Yeah!) We'll tie it to her footsie, then we'll roll her off the dock." "There goes mama, spwashin' in the wa-ta/No more fightin' wit dad, no more restraining order/No more step-da-da, no more new brother/Blow her kisses bye-bye, tell mama you love her.").

receives an email in which they can elect to accept or reject the friend request. See generally E.A. Vander Veer, *Facebook: The Missing Manual* (2008), *available at* http://goo.gl/UFlK3l. Depending on the user's privacy settings, a Facebook user's home page may be visible only to that user's "friends," or it may be viewable by any Facebook member. A user may also restrict the ability of someone who is not a "friend" to find that user's profile without knowing the user's unique identification number or username.

Posts that a member makes on his or her own Facebook page may automatically appear in their friends' "news feed," a listing of recent postings. In addition, when a member posts a comment on his or her own Facebook page, he or she has the option of "tagging" other Facebook users (including users who are not friends); doing so makes the "tagged" post appear on the "tagged" member's own Facebook page. Unless two users are friends, have a friend in common, or one user has "tagged" the other user, a Facebook member must affirmatively visit the other user's page to view posts written on that Facebook page. See generally *Thompson* v. *Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at *4 n.4 (D. Nev. June 30, 2012).

2. Petitioner had a "public" Facebook profile, meaning that his page was viewable by any member of the public who used appropriate search terms to locate the page, C.A. App. 182, which was listed not in his actual name but under the pseudonym "Tone Dougie," a play on his first and middle names.

Shortly before Halloween in October 2010, petitioner posted on his Facebook page a photograph

of petitioner and a co-worker performing in costume for Dorney Park's 2009 "Halloween Haunt" (a seasonal haunted-house-themed event). App., *infra*, 3a. The photograph showed petitioner in costume holding a toy knife against a co-worker's neck.[2] *Ibid.* Petitioner captioned the photo, "I wish." *Ibid.* There is no evidence that petitioner "tagged" the co-worker, and they were not "friends." C.A. App. 315. Petitioner later explained that he enjoyed performing and "wish[ed]" he had been able to perform in Halloween Haunt again. See *id.* at 435, 444. However, petitioner's supervisor saw the post, interpreted it as a threat, and fired him. App., *infra*, 3a.

Two days after he was fired, petitioner posted a Halloween-themed comment reflecting his belief that his former coworkers were preoccupied with him, and what petitioner believed they were saying about him:

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

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[2] Although the government introduced evidence at trial that the co-worker had made sexual harassment complaints about petitioner, there is no dispute that petitioner was unaware of her complaints at the time. C.A. App. 444.

App., *infra*, 3a-4a. The government introduced no evidence that petitioner "tagged" any former co-worker on that post.

In October 2010, petitioner's sister-in-law posted a Facebook status update that she was shopping for Halloween costumes with petitioner's children. App., *infra*, 4a. Petitioner responded that his son "should dress up as matricide for Halloween," adding, "I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick?" *Ibid.* Petitioner ended the post with an "emoticon" of a face sticking its tongue out, which he understood to be an indication a post is meant in "jest." C.A. App. 299, 410-411.

In November 2010, petitioner's wife obtained a Protection from Abuse ("PFA") order against petitioner. App., *infra*, 5a. Petitioner then posted on his Facebook page a virtually word-for-word adaptation of a satirical sketch by the "Whitest Kids U' Know" comedy troupe that he and his ex-wife had previously watched together, C.A. App. 269-270; in that sketch, a member of the troupe explains that it is illegal for a person to say that he wishes to kill the President, but not illegal to explain that it is illegal to say that one wants to kill the President. Petitioner's post read:

> 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.

I'm not actually saying it.
I'm just letting you know that it's illegal for me to say that.
It's kind of like a public service.
I'm letting you know so that you don't accidently go out and say something like that
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
That's illegal.
Very, very illegal.
But not illegal to say with a mortar launcher.
Because that's its own sentence.
It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.
Perfectly legal.
I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
Insanely illegal.
Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.
===[__] =====house
:::::::::::::::^::::::::::::::::::::::::::::::::::::::cornfield
::
::
::
############################getaway road
Insanely illegal.
Ridiculously, horribly felonious.

> Cause they will come to my house in the middle of the night and they will lock me up.
> Extremely against the law.
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

App., *infra*, 5a-6a. Petitioner included a link to the original video. See Whitest Kids U' Know, *It's Illegal to Say . . .*, https://www.youtube.com/watch?v=QEQOvyGbBtY; see also App., *infra*, 63a-64a (transcript). Petitioner ended the post with the statement, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?" C.A. App. 398. Petitioner was not Facebook friends with his wife and there is no indication he tagged her in that (or any other) post.

In another post he made in November 2010, petitioner mocked his wife's PFA. Petitioner explicitly invoked "true threat jurisprudence," and suggested that imprisoning him for his postings would be tortious and result in a civil settlement.

> Fold up your PFA and put in your pocket
> Is it thick enough to stop a bullet?
> Try to enforce an Order
> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeros to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> And if worse comes to worse

> I've got enough explosives
> to take care of the state police and the sheriff's department

App., *infra*, 7a. Above and beneath this post, petitioner had posted a link to the Wikipedia entry on "freedom of speech," including photographs of the Westboro Baptist Church's controversial signs stating, "Thank God for Dead Miners." See Gov't Exh. 5. See generally *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1213 (2011). A post beneath it praised the ACLU for bringing suit to challenge a nearby school district's decision to prohibit wearing "I [heart] Boobies" bracelets in school, which is currently pending on this Court's docket, see *Easton Area Sch. Dist.* v. *B.H.*, No. 13-672 (U.S. filed Dec. 3, 2013).

On November 16, 2010, petitioner posted the following on his Facebook page:

> 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?

App., *infra*, 7a-8a. The post was made more than two years before the Sandy Hook shootings; one of petitioner's Facebook friends "liked" the post. Gov't Exh. 6. Petitioner testified that his post was a reference to an Eminem song in which the rapper coarsely criticized his ex-wife and fantasized about participat-

ing in the Columbine school shootings.[3] C.A. App. 426.

After learning of petitioner's Facebook posts, FBI Agent Denise Stevens visited petitioner at his house. App., *infra*, 8a. After the visit, petitioner posted a "note" on his Facebook page, a type of composition that requires a reader to click on a link on the member's homepage to be taken to a separate page. The post, which was entitled, "Little Agent Lady," was styled as a rap song, and suggested—contrary to fact—that petitioner had been wearing a bomb during the visit. In it, he describes himself as "just an aspiring rapper," and dismisses as "shit" the agent's belief that he wants to turn "[Lehigh] Valley into Fallujah," joking that if she believed that, he had some "bridge rubble" to sell her. Gov't Exh. 7.

> 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]

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[3] See Eminem, *I'm Back*, *on* The Marshall Mathers LP (Interscope Records 2000):

> I take seven (kids) from (Columbine), stand 'em all in line
> Add an AK-47, a revolver, a nine
> a MAC-11 and it oughta solve the problem of mine
> and that's a whole school of bullies shot up all at one time
> Cause (I'mmmm) Shady, they call me as crazy
> as the world was over this whole Y2K thing.

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!]

Are all the pieces comin' together?
Shit, I'm just a crazy sociopath
that gets off playin' you stupid fucks like a fiddle
And if y'all didn't hear, I'm gonna be famous
Cause I'm just an aspiring rapper who likes the
attention
who happens to be under investigation for
terrorism
cause y'all think I'm ready to turn the Valley into
Fallujah
But I ain't gonna tell you which bridge is gonna
fall
into which river or road
And if you really believe this shit
I'll have some bridge rubble to sell you tomorrow

[BOOM!][BOOM!][BOOM!]

Gov't Exh. 7.

Petitioner did not mail, e-mail, or post this to Agent Stevens, nor did he "tag" her in this (or any

other) post. Aside from the comment on his sister-in-law's status update before issuance of the PFA, petitioner never posted any of his comments at issue anyplace but his own pseudonymous Facebook page, nor did he "tag" anyone in these posts.

B. Procedural History

1. On December 8, 2010, petitioner was arrested and charged with violating 18 U.S.C. § 875(c). App., *infra*, 9a. The grand jury indicted petitioner on five counts: threats to patrons and employees of Dorney Park (Count One); threats to his wife (Count Two); threats to police officers (Count Three); threats involving a kindergarten class (Count Four); and threats to a FBI agent (Count Five). *Ibid.*

Petitioner moved to dismiss the indictment on the ground that the indictment failed to allege that petitioner subjectively intended to threaten, which he argued "was required under the true threat exception to the First Amendment." App., *infra*, 9a. The district court denied the motion. Although the court acknowledged that it "is an interesting question" whether a subjective or objective standard should govern threat prosecutions and that "[c]ourts after *Virginia* v. *Black* are divided as to whether *Black* replaces the objective test with a subjective test," *id.* at 52a-53a, it was constrained under circuit precedent to hold that the objective test governed. Accordingly, it was enough that "a reasonable person could see [petitioner's] posts as threats." *Id.* at 55a.

Petitioner requested that the jury be instructed that "the government must prove that [petitioner] intended to communicate a true threat." C.A. App. 45

(emphasis omitted). The district court denied the request, instead instructing the jury based on an objective standard:

> 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 intent to inflict bodily injury or take the life of an individual.

App., *infra*, 11a.

The jury convicted petitioner on Counts Two through Five of the indictment. App., *infra*, 10a. Petitioner filed post-trial motions to dismiss the indictment with prejudice, for a new trial, to arrest judgment, and for dismissal of charges, based in part on his argument that a subjective standard governs. *Ibid.* The district court denied the motions, concluding in relevant part that "[i]t is not required that the defendant intend to make a threat." App., *infra*, 38a; accord *id.* at 40a. The court sentenced petitioner to 44 months' imprisonment, to be followed by three years of supervised release. *Id.* at 10a.

2. The court of appeals affirmed. App., *infra*, 1a-29a. The court held that *United States* v. *Kosma*, 951 F.2d 549 (3d Cir. 1991), involving the related prohibition on threats against the President, see 18 U.S.C. § 871, was "clear" "precedent" (App., *infra*, 13a) governing prosecutions under Section 875(c), and required only proof that "a reasonable person would foresee that the statement would be

interpreted" as a threat, *id.* at 12a (quoting *Kosma*, 951 F.2d at 557). The court rejected the argument that "*Black* indicates a subjective intent to threaten is required." *Id.* at 16a. The court acknowledged that while other federal courts of appeals had agreed with its understanding, *id.* at 17a-18a, "[t]he Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker * * * 'intend for his language to *threaten* the victim.'" *Id.* at 20a (quoting *United States* v. *Cassel*, 408 F.3d 622, 631 (9th Cir. 2005)). The court of appeals denied rehearing. *Id.* at 61a-62a.

REASONS FOR GRANTING THE PETITION

A. There Is Acknowledged Conflict On Whether The First Amendment Requires Proof Of Subjective Intent To Threaten

As the Third Circuit recognized, the federal courts of appeals are divided over whether the First Amendment's "true threat" exception requires proof that a defendant prosecuted for making a threatening statement subjectively intended to threaten another person. App., *infra*, 20a. State courts of last resort are likewise in conflict. See pp. 18, 20-21, *infra*. This disagreement reflects widespread confusion among courts nationwide about the implications of this Court's decision in *Virginia* v. *Black,* 538 U.S. 343 (2003). The split is mature and entrenched; as virtually every circuit and state court of last resort has weighed in, there is no reason for further delay. Indeed, the need for this Court's review is particularly acute because the state and federal courts in *eight* states take opposing views, so that the breadth of First Amendment protection turns on the

happenstance of which prosecutor brings charges. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve conflict between the Eleventh Circuit and the Florida Supreme Court over which First Amendment standard governed a disputed injunction).

1. In the opinion below, the Third Circuit applied an objective standard to determine when a statement constitutes a "true threat." App., *infra*, 17a. The court held that an utterance is an unprotected "true threat" whenever "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 harm." *Id.* at 21a (internal quotation marks and citation omitted). The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have also adopted an objective standard. See *United States* v. *Martinez*, 736 F.3d 981, 988 (11th Cir. 2013); *United States* v. *Jeffries*, 692 F.3d 473, 479-480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013); *United States* v. *White*, 670 F.3d 498, 508 (4th Cir. 2012); *United States* v. *Mabie*, 663 F.3d 322, 330-332 (8th Cir. 2011), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir. 2005); *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004); *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (lst Cir. 2003); *United States* v. *Sovie*, 122 F.3d 122, 125 (2d Cir. 1997); but see *United States* v. *Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (con-

cluding that "an entirely objective definition [of 'true threat']" may "no longer [be] tenable" after *Black*).[4]

Numerous state courts of last resort likewise apply an objective test. *See Citizen Publ'g Co.* v. *Miller*, 115 P.3d 107, 114 (Ariz. 2005); *Jones* v. *State*, 64 S.W.3d 728, 736 (Ark. 2002); *People* v. *Lowery*, 257 P.3d 72, 74 (Cal. 2011); *People* v. *Baer*, 973 P.2d 1225, 1231 (Colo. 1999); *State* v. *Moulton*, 78 A.3d 55 (Conn. 2013); *Carrell* v. *United States*, 80 A.3d 163, 170 (D.C. 2013); *State* v. *Valdivia*, 24 P.3d 661, 671-672 (Haw. 2001); *State* v. *Soboroff*, 798 N.W.2d 1, 2 (Iowa 2011); *State ex rel. RT*, 781 So. 2d 1239, 1245-1246 (La. 2001); *Hearn* v. *State*, 3 So. 3d 722, 739 (Miss. 2008); *State* v. *Lance*, 721 P.2d 1258, 1266-1267 (Mont. 1986); *State* v. *Curtis*, 748 N.W.2d 709, 712 (N.D. 2008); *State* v. *Moyle*, 705 P.2d 740, 750-751 (Or. 1985) (en banc); *J.S. ex rel. H.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 858 (Pa. 2002); *Austad* v. *Bd. of Pardons and Paroles*, 719 N.W.2d 760, 766 (S.D. 2006); *State* v. *Johnston*, 127 P.3d 707, 710

[4] Courts applying an objective standard themselves "disagre[e] regarding the appropriate vantage point—what a person making the statement should have reasonably foreseen or what a reasonable person receiving the statement would believe." *United States* v. *Clemens*, 738 F.3d 1,10 (1st Cir. 2013) (internal quotation marks omitted); accord *United States* v. *Saunders*, 166 F.3d 907, 913 n.6 (7th Cir. 1999) (noting "disagree[ment] about whether the test should be speaker-based or listener-based") (collecting cases). Courts that "uphold criminal threat convictions based solely on the reaction of the reasonable listener," diverge even further from those that, like the Ninth Circuit, look to the subjective intent of the speaker. *Clemens*, 738 F.3d at 12.

(Wash. 2006); *State* v. *Perkins*, 626 N.W.2d 762, 770 (Wis. 2001).

Some of these courts have embraced an objective definition for practical reasons: it "protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten." *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997); accord App., *infra*, 15a (objective definition better protects from "fear of violence"). Before *Black*, many courts adopted an objective standard because the leading precedent, *Watts* v. *United States*, 394 U.S. 705 (1969) (per curiam), had focused on the speech's context, rather than on the speaker's intent, in determining whether the speech was constitutionally protected. See, *e.g.*, *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (en banc); *Lance*, 721 P.2d at 1266-1267.

Many courts applying an objective standard have adopted (or reaffirmed) the rule post-*Black*. These courts have recognized *Black*'s relevance but have ultimately rejected—or simply ignored—its applicability. Some have construed *Black* narrowly as having overturned the Virginia statute for overbreadth because the statute classified public cross burning as prima facie evidence of an intent to intimidate when it was sometimes protected speech. *E.g.*, *Martinez*, 736 F.3d at 986-987 ("*Black* was primarily a case about the overbreadth of a specific statute—not whether all threats are determined by a subjective or objective analysis in the abstract."); *Jeffries*, 692 F.3d at 479-480; *Mabie*, 663 F.3d at 332; *White*, 670 F.3d at 511.

Many, including the Third Circuit, read *Black* as limited to statutes like the one at issue there, that expressly require subjective intent to threaten, with no bearing on crimes like § 875(c) that do not. App., *infra*, 15a. Some have held that *Black*'s statement that "true threats" "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359, means only that the defendant intentionally uttered the statement, not that he intentionally meant to threaten with it, *White*, 670 F.3d at 509 ("We read the Court's use of the word 'means' in 'means to communicate' to suggest '*intends* to communicate.'"); *Jeffries*, 692 F.3d at 480 (same). Still other courts have recognized *Black*'s relevance but declined to address what, if any, changes the decision worked on the "true threats" doctrine. *United States* v. *Clemens*, 738 F.3d 1, 12 (1st Cir. 2013); *United States* v. *Turner*, 720 F.3d 411, 420 (2d Cir. 2013).

2. In conflict with the decision below, the Ninth Circuit has held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *United States* v. *Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). Under that standard, the speaker "need not actually intend to carry out the threat," *id.* at 631 (internal quotation marks omitted), but must "intend for his language to *threaten* the victim," *ibid.* The supreme courts of Massachusetts, Rhode Island, and Vermont have also adopted this subjective intent standard. *O'Brien* v. *Borowski*, 961 N.E.2d 547, 557 (Mass. 2012) ("The

intent requirements in the act plainly satisfy the 'true threat' requirement that the speaker subjectively intend to communicate a threat.") (citing *Black*, 538 U.S. at 360; *Cassel*, 408 F.3d at 633)); *State* v. *Grayhurst*, 852 A.2d 491, 515 (R.I. 2004) (holding that a "true threat" requires a showing of the speaker's subjective intent to threaten); *State* v. *Miles*, 15 A.3d 596, 599 (Vt. 2011) ("Without a finding that his statement represented an actual intent to put another in fear of harm or to convey a message of actual intent to harm a third party, the statement cannot reasonably be treated as a threat."); see also *State* v. *Pomianek*, 58 A.3d 1205, 1217 (N.J. App. Div. 2013).

Courts adopting a subjective intent standard have held that this Court's decision in *Black* requires it. In *Cassel*, for example, Judge O'Scannlain, joined by Judges Bea and Cowen, concluded that "the clear import of this [Court's] definition" of "true threats" in *Black*—*i.e.*, "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359—"is that only *intentional* threats are criminally punishable consistently with the First Amendment." *Cassel*, 408 F.3d at 631; accord *O'Brien*, 961 N.E.2d at 426; *Grayhurst*, 852 A.2d at 515; *State* v. *Cahill*, 80 A.3d 52, 57 (Vt. 2013). The Ninth Circuit rejected the objective intent standard other circuits employed, explaining that those courts had offered "no explanation of how the prima facie evidence provision in *Black* could offend the First Amendment if intent to intimidate were constitutionally irrelevant." 408 F.3d at 633 n.10; see also *United*

States v. *Stewart*, 420 F.3d 1007, 1017 (9th Cir. 2005) (describing *Black* as "irreconcilable" with an "objective 'true threat' definition").[5]

Other courts have indicated in dicta that only the subjective standard can be squared with *Black*. In *United States* v. *Parr*, for example, the Seventh

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[5] Though the Ninth Circuit later cited pre-*Black* precedent referencing an objective test when reviewing a conviction under 18 U.S.C. § 871 (threats against the President), see *United States* v. *Romo*, 413 F.3d 1044, 1050-1051 (2005), the defendant in that case had not raised a First Amendment challenge to his conviction and the Ninth Circuit limited its holding to the presidential threats statute, *see id.* at 1051 n.6. The Ninth Circuit has since clarified that the subjective intent test is the rule of the circuit. *Bagdasarian*, 652 F.3d at 1117-1118 n.14 ("To the extent that we may have suggested otherwise in a footnote in *Romo,* [failing to apply a subjective intent test] would be inconsistent with *Black* * * *. In all * * * circumstances in which pure speech is prosecuted under a threat statute, we cannot apply exclusively an objective standard, and any subjective test must incorporate the constitutional requirement set forth in *Black*.") (citation omitted).

The Ninth Circuit has consistently applied a subjective intent standard since *Bagdasarian*. See, *e.g., United States* v. *Keyser*, 704 F.3d 631, 638 (2012) (noting, when interpreting 18 U.S.C. § 876(c), that "in order to be subject to criminal liability for a threat, the speaker must subjectively intend to threaten") (citing *Bagdasarian*, 652 F.3d at 1117-1118); *United States* v. *Cook*, No. 12-50128, 2013 WL 5718210, at *1 (Oct. 22, 2013) (citing *Bagdasarian* and applying the subjective intent standard when reviewing a § 875(c) conviction); *United States* v. *Williams*, 492 F. App'x 777, 779 (2012) (citing *Cassel* and applying a subjective intent standard when reviewing a conviction under 18 U.S.C. § 875(b)); *United States* v. *Heizelman*, 472 F. App'x 584, 585 (2012) (citing *Bagdasarian* for proposition that the "subjective test 'must be read into all threat statutes that criminalize pure speech'").

Circuit concluded that although "[i]t is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*[,] it is more likely * * * that an entirely objective definition is no longer tenable." 545 F.3d at 500 (citing *Cassel*, 408 F.3d at 631-633); accord *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("*Black* * * * makes our purely objective approach to ascertaining threats no longer tenable."). Similarly, in *United States* v. *Magleby*, the Tenth Circuit recognized that in order for a communication to rise to the level of a "true threat," as defined by *Black*, it "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" 420 F.3d at 1139 (quoting *Black*, 538 U.S. at 359).

3. Underscoring the urgent need for this Court's review, at least *eight* state courts of last resort have adopted a standard conflicting with that of the regional federal circuit. The First Circuit, for example, applies an objective test, see *Nishnianidze*, 342 F.3d at 16, but both Massachusetts and Rhode Island apply a subjective one, see *O'Brien*, 961 N.E.2d at 557 (Massachusetts); *Grayhurst*, 852 A.2d at 515 (Rhode Island). While the Second Circuit employs an objective test, see *Sovie*, 122 F.3d at 125, Vermont applies a subjective standard, see *Miles*, 15 A.3d at 599. California, Hawaii, Montana, Oregon, and Washington all apply an objective definition of "true threats," in conflict with the Ninth Circuit's subjective intent standard. Compare *Lowery*, 257 P.3d at 74 (California), *Valdivia*, 24 P.3d at 671-672 (Hawaii), *Lance*, 721 P.2d at 1266-1267 (Montana), *Moyle*, 705 P.2d at 750-751 (Oregon), and *Johnston*,

127 P.3d at 710 (Washington), with *Cassel*, 408 F.3d at 633; see also *Pomianek*, 58 A.3d at 1217 (New Jersey; subjective); App., *infra*, 16a (objective).

These state-federal conflicts deprive speakers of notice of the standard that will govern the exercise of their First Amendment rights, and they must then decide whether to speak based on the most restrictive interpretataion to which they are subject. The uncertainty is exacerbated by the broad reach of the federal venue statute, 18 U.S.C. § 3237, which establishes venue not only in the jurisdiction where an alleged threat is *made* but also where it is *read*. See, *e.g.*, *Jeffries*, 692 F.3d at 483 (holding that venue under 18 U.S.C. § 875(c) was proper in the jurisdiction where threats were received); see also *Turner*, 720 F.3d at 418, 435 (New Jersey man charged in Illinois, where the victims received threats; case then transferred to New York).

The uncertainty is particularly pronounced for communications made using the Internet, where statements that are prosecuted are increasingly made. Unlike traditional mail, which is sent to a specific address in a known jurisdiction, e-mail, Facebook messages, and other online communications can be read anywhere, with the applicable legal standard turning on the happenstance of whether the message was read while the recipient was at home, the office, on a business trip, on vacation, or when deployed with the military. And the growing use of joint federal-state investigations increases the risk of opportunistic behavior by law enforcement officials, who would have an incentive to prosecute the case in whichever jurisdiction applied the objective test. A

speaker facing this level of uncertainty may choose the safety of self-censorship. "The threat of sanctions may deter [exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Only this Court's review can establish a national rule that eliminates an intolerably high risk of self-censorship.

B. The Third Circuit's Rule Is Wrong

The First Amendment provides that "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. amend. I. The "bedrock principle underlying the First Amendment * * * is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989); accord *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, the Constitution "demands that content-based restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) (citation omitted).

Broad First Amendment protections are subject to only narrow exceptions "in a few limited areas" where speech or expressive conduct is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 382-383 (quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942)). For example, states may punish speech or conduct that is obscene, libelous,

"fighting words," *Chaplinsky*, 315 U.S. at 572, or that constitutes incitement, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam). In *Watts* v. *United States*, 394 U.S. at 708, this Court carved out a limited exception for "true threats." *Watts* involved a prosecution for threatening the President, see 18 U.S.C. § 871(a), based on a protester's statement, made during a draft-protest rally, that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court concluded that Watts's remark was not a true threat based on its context—it was made at a political rally, was conditioned on an unlikely event (the speaker's induction into the armed forces), and the crowd responded with laughter. *Id.* at 707-708. The Court did not have occasion to address whether intent to threaten might be a required element of demonstrating that a statement was an unprotected "true threat."

1. *Black* Recognized A First Amendment Subjective Intent Requirement For Statutes Criminalizing Threats

The Court returned to the true threats doctrine in *Virginia* v. *Black*, explaining that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citations omitted; emphasis added). The Court continued, "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the

victim in fear of bodily harm or death." *Id.* at 360 (emphasis added).

Those statements were central to the Court's reasoning. *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," 538 U.S. at 347-348 (quoting Va. Code Ann. § 18.2-423 (1996)), and provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." *Ibid.* A plurality of the Court further explained the constitutional necessity of a subjective intent requirement. Justice O'Connor, joined by the Chief Justice and Justices Stevens and Breyer, concluded that the prima facie evidence provision was facially unconstitutional because it "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself," when "a burning cross is not always intended to intimidate." *Id.* at 365. Rather, cross burning can have two different meanings, depending on the speaker's intent: (1) "constitutionally proscribable intimidation" or (2) "core political speech," when used as a statement of ideology or expression of group solidarity. *Id.* at 365-366. But "the prima facie evidence provision * * * ignores all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367.

If "true threats" doctrine did not require a showing of intent to threaten, the Court would have had no basis for invalidating the Virginia statute for its failure to limit its reach to only those cross burnings

undertaken *with a purpose* to threaten or intimidate. The requirement that the speaker intends his speech to be threatening was thus central to the Court's holding. See Leslie Kendrick, *Speech, Intent and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1648 n. 72 (2013) (concluding that in *Black*, "the Supreme Court constitutionalized" the Virginia statute's "specific-intent requirement"); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning,* 2003 Sup. Ct. Rev. 197, 217 ("[I]t is plain that * * * the *Black* majority (and, perhaps, the *Black* dissenters as well) believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate."). Indeed, "each of the other opinions" in *Black*—"with the possible exception of Justice Thomas's dissent," which viewed cross burning as non-expressive conduct undeserving of First Amendment protection—"takes the [plurality's] view of the necessity of an intent element." *Cassel*, 408 F.3d at 632. See generally *Black*, 538 U.S. at 372 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[t]he plurality is correct" that it is "constitutionally problematic" to convict someone for burning a cross when the action is not intended to intimidate).

2. Core First Amendment Principles Require Use Of A Subjective-Intent Standard

Black reflects basic principles of First Amendment law. In safeguarding the free interchange of ideas, the First Amendment's protection does not extend merely to thoughtful, deliberate, well-reasoned

speech. In fact, the vitality of the First Amendment derives from its protection of even speech that is offensive, impulsive, or negligent. Because "erroneous statement is inevitable in free debate," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964), such speech must be protected so that constitutionally protected speech has enough "breathing space to survive." *NAACP* v. *Button*, 371 U.S. at 433.

Employing an objective standard for identifying "true threats" is fundamentally inconsistent with that principle—particularly in a criminal statute. As Justice Marshall explained:

> In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes, see *Morissette* v. *United States*, 342 U.S. 246 (1952); we should be particularly wary of adopting such a standard for a statute that regulates pure speech.

Rogers v. *United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring); accord *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*) ("what an objective test does" is "reduc[e] culpability on the all-important element of [§ 875(c)] to negligence"; doing so is inconsistent with "[b]ackground norms for construing criminal statutes," which "presume that intent is the required mens rea in criminal laws"). Thus, the "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized," particularly when that speech concerns "merely

crude or careless expression of political enmity." *Rogers*, 422 U.S. at 43-44 (Marshall, J., concurring).

The notion that one could commit a "speech crime" *by accident* is chilling: Imprisoning a person for negligently misjudging how others would construe his words is fundamentally inconsistent with basic First Amendment principles and would erode the breathing space that safeguards the free exchange of ideas. To take just one example, in *United States* v. *Fulmer*, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). The agent, unfamiliar with the term "silver bullets" to describe a simple solution for a problem, found the phrase to be "chilling" and "scary." *Ibid.* Despite the testimony of two witnesses that the defendant had repeatedly used the term "silver bullets" to refer to "clear-cut" evidence of wrongdoing, *ibid.*, the court concluded that, using an objective standard, the defendant could be convicted of threatening the agent. *Id.* at 1491-1492. This criminalization of "poorly chosen words," Rothman, 25 Harv. J.L. & Pub. Pol'y at 350, inevitably chills speech, "as individuals would have difficulty discerning what a jury would consider objectively threatening and may rationally err on the side of caution by saying nothing at all." Recent Case, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2012).

For this reason, First Amendment doctrine in many contexts imposes "*mens rea* requirements that provide 'breathing room' * * * by reducing an honest

speaker's fear that he may accidentally incur liability for speaking." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). Thus, for example, public figures alleging defamation with respect to a matter of public interest must demonstrate the speaker acted with "'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. at 276. Similarly, prosecution for incitement requires proof the defendant's "advocacy of the use of force * * * is *directed to* inciting or producing imminent lawless action," *Brandenburg*, 395 U.S. at 447 (emphasis added); permitting conviction absent such proof would "sweep within its condemnation speech which our Constitution has immunized from governmental control." *Ibid.*; accord *Alvarez*, 132 S. Ct. at 2544 (plurality opinion) (concluding that the First Amendment permits restrictions on "advocacy *intended*, and likely, to incite imminent lawless action") (emphasis added). And Members of this Court have concluded that construing prohibitions on false statements to apply only to "statements made with knowledge of their falsity and with the *intent* that they be taken as true * * * diminishes the extent to which the statute endangers First Amendment values" by reducing the risk of "accidentally incur[ring] liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (emphasis added).

Focusing on the speaker's subjective intent protects speech in a second respect. Objective tests tend to focus on the reaction of "a reasonable

recipient of the statement." Rothman, 25 Harv. J.L. & Pub. Pol'y at 288. As this Court has observed, "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). Statements by unpopular speakers are more likely to be deemed threatening than equivalent statements of popular (or powerful) ones, and thus are more likely to result in criminal liability.[6] Cf. *Alvarez*, 132 S. Ct. at 2553 ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members of other political groups who might make similar false claims."). But it is a basic tenet of First Amendment law that "[s]peech cannot be * * * burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty.*, 505 U.S. at 134-135. Use of a subjective intent standard would act as a safeguard against potentially discriminatory enforcement.

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[6] See, *e.g.*, Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm threatens reporter after being asked about fundraising allegations*, N.Y. Daily News, Jan. 23, 2014, http://goo.gl/XW6sys (reporting that a Member of Congress, who is a "former Marine and FBI agent," told a reporter inquiring about campaign finance investigation, "you ever do that again, I'll throw you off this f-----g balcony," "I'll break you in half"). Petitioner's posts certainly involve no more violent imagery than songs by any one of scores of popular rappers, including the Eminem songs about the rapper's ex-wife that inspired several of petitioner's posts.

C. This Case Squarely Presents A Recurring Issue Of Substantial Legal And Practical Importance

The standard governing threat prosecutions is unquestionably an important issue. The Department of Justice has brought hundreds of Section 875(c) prosecutions since *Black* was decided. See U.S. Dep't of Justice, *Bureau of Justice Statistics: Federal Criminal Case Processing Statistics*, http://www.bjs.gov/fjsrc/tsec.cfm (last accessed Jan. 25, 2014). And just since the Third Circuit decision below, two other circuit courts have issued opinions on this precise issue, see *Clemens*, 738 F.3d 1; *Martinez*, 736 F.3d 981, and a third has held argument on it, *United States* v. *Heineman*, No. 13-4043 (10th Cir.). That represents just a fraction of the total number of criminal prosecutions implicating "true threats" doctrine. There are a number of other federal statutes that also implicate the issue, such as 18 U.S.C. § 871 (involving presidential threats). And most, if not all, states have enacted statutes analogous to Section 875(c).[7]

The issue is growing in importance as communication online by email and social media has

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[7] *E.g.*, Ala. Code § 13A-10-15 (West 2013); Ark. Code Ann. § 5-13-301 (West 2013); Cal. Penal Code § 140 (West 2014); Conn. Gen. Stat. Ann. § 53a-183 (West 2014); D.C. Code § 22-407 (West 2013); Fla. Stat. Ann. § 836.10 (West 2013); Haw. Rev. Stat. § 707-716 (West 2013); Iowa Code Ann. § 712.8 (West 2013); Mich. Comp. Laws Ann. § 750.411i (West 2013); Okla. Stat. Ann. tit. 21, § 1378 (West 2013); Va. Code Ann. § 18.2-60 (West 2013); Wash. Rev. Code Ann. § 9.61.160 (West 2013); Wis. Stat. Ann. § 940.203 (West 2013).

become commonplace, even as the norms and expectations for such communication remain unsettled. The inherently impersonal nature of online communication makes such messages inherently susceptible to misinterpretation. "Especially in the context of Internet postings, where the tone and mannerisms of the speaker are unknown, an objective analysis turns almost entirely on the exact words used." Kyle A. Mabe, Note, *Long Live the King:* United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 89 (2013); see also Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. Personality & Soc. Psychol. 925, 933 (2005) ("[g]esture, voice, expression, context," do "more than merely *supplement* linguistic information, [they] alter it completely").[8]

Moreover, modern media allow personal reflections intended for a small audience (or *no* audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speaker intended. Internet-based communication has thus "eroded the shared frame of background context that allowed speakers and hearers to apply context to language,"

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[8] For example, a school district closed for a day because of a "Facebook misunderstanding," after a student's Facebook post mentioned the words "combine" (which was mistaken for "Co*lu*mbine") and "revenge." John Noel, *NY School District Shut Down Over Facebook Misunderstanding*, NBC 4 New York, Mar. 1, 2010, http://goo.gl/F1ac0i.

increasing the significance of courts' refusal to consider a speaker's intent. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. Rev. 43, 72 (2011). It is therefore unsurprising that online statements have proven to be a major basis (perhaps the *leading* basis) for criminal threat prosecutions. *E.g.*, *Bagdasarian*, 652 F.3d 1113 (Yahoo message board posting); *United States* v. *Stock*, No. 11-182, 2012 WL 202761 (W.D. Pa. Jan. 23, 2012) (defendant charged for threatening Craigslist advertisement); Bianca Prieto, *Polk County Man's Rap Song Called Threat to Cops, So He's in Jail for 2 Years*, Orlando Sentinel, Aug. 1, 2009, http://goo.gl/WRGOQ3.

This case presents an ideal opportunity to resolve this important and recurring issue. The issue was squarely presented and thoroughly discussed. The case's procedural history reveals no disputed issues of fact nor any jurisdictional questions that would interfere with this Court's resolution of the question. The issue has been thoroughly analyzed by numerous federal and state courts. The issue is ripe for review, and nothing would be gained from delaying review further.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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