No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. 875(c) requires proof of the defendant's subjective intent to threaten.

2. Whether, by virtue of the First Amendment, proof of a defendant's subjective intent to threaten is required for conviction under Section 875(c).

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 13-983

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, peti-

tioner was convicted on four counts of transmitting in interstate commerce a "threat to injure the person of another," in violation of 18 U.S.C. 875(c). Pet. App. 10a. The district court sentenced him to 44 months of imprisonment to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1a-29a.

1. Petitioner's convictions in this case are based on a series of messages he posted to the social-networking website Facebook. Facebook is a free service that allows its users to post messages and images to the Internet. J.A. 51-53. Any pair of users may agree to become Facebook "friends," meaning that they generally will have access to each other's posts and will also see each other's new content as part of a live newsfeed. J.A. 51-53, 87-95, 99-100, 103. Petitioner had hundreds of Facebook friends, J.A. 337-338, including many of his coworkers at the amusement park where he was employed, as well as friends and family members of his wife, J.A. 114-116, 150-151. Petitioner made all the posts at issue in this case public, meaning that they would not only be automatically placed in his friends' newsfeeds and be viewable by those friends, but that they would also be accessible to the public at large. J.A. 99-100, 236-237.

a. In May 2010, after his wife moved out of their home with their two young children, petitioner began exhibiting troubling behavior at the amusement park where he worked. Pet. App. 3a. Supervisors sent petitioner home several times after observing him crying with his head down on his desk. *Ibid.* One of the female employees petitioner supervised filed five sexual-harassment complaints against him, including a complaint alleging that he came into the office where

she was working alone late at night and began to undress in front of her. *Ibid.* Petitioner was subsequently fired after his supervisor saw a photograph that petitioner had posted on Facebook. Pet. App. 3a. The photograph, which was captioned "I wish," showed petitioner at the park's "Halloween Haunt," holding a knife to the throat of the woman who had filed the sexual-harassment complaints against him. *Ibid.*; J.A. 340.

Two days after he was fired, petitioner posted additional violent statements to Facebook. Pet. App. 3a. In one post about his former employer, petitioner stated:

> 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?

J.A. 332; see Pet. App. 3a-4a. This and other posts "raised great concern" with park management, particularly in light of the potential for petitioner to sneak into the park, and park security officers were warned about the situation. J.A. 118-124.

b. Petitioner also made Facebook posts about his estranged wife, contacting his wife's sister to ensure that his wife was reading the posts. Pet. App. 4a-7a. In one post, petitioner stated: "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." J.A. 341. And in response to

a post from his wife's sister about shopping for Halloween costumes with petitioner's children, petitioner wrote: "Tell [petitioner's son] he should dress up as Matricide for Halloween. I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick? :-p." J.A. 342.

In October 2010, petitioner posted the following:

> 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,
>
> Soaked in blood and dying from all the little cuts,
>
> Hurry up and die bitch so I can bust this nut,
>
> All over your corpse from atop your shallow grave,
>
> I used to be a nice guy, then you became a slut,
>
> I guess it's not your fault you liked your daddy raped you,
>
> So hurry up and die, bitch, so I can forgive you

J.A. 344; Pet. App. 4a. Around the same time, petitioner also stated on Facebook: "Revenge is a dish that is best served cold with a delicious side of psychological torture." J.A. 355.

c. Based on petitioner's Facebook posts, his wife sought and received a protection-from-abuse order (essentially, a restraining order) against petitioner from a state court. Pet. App. 4a; J.A. 148-150. The order had a duration of three years (the maximum allowed under state law), and the state court also granted petitioner's wife custody of their children. J.A. 149-150. Petitioner attended the state-court hearing, at which his wife testified. J.A. 149. In her testimony, she explained that she had seen his Face-

book posts and had found them to be threatening. J.A. 149, 255.

Shortly after the hearing, friends and family of petitioner's wife informed her that petitioner was still making Facebook posts "about harming [her]." J.A. 151. She thus continued to monitor his Facebook page in order to protect herself and her family from any actions petitioner might take based on his posts. J.A. 151-152, 157. Just three days after the hearing, petitioner posted the following:

> 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.

J.A. 333; see Pet. App. 5a-6a. The post included a link to a YouTube video of a satirical sketch in which a comedian had performed a routine with a script similar to petitioner's post, but involving the President rather than petitioner's wife. J.A. 333: Pet. App. 63a-64a. The post also stated: "Art is about pushing limits. I'm willing to go to jail for my Constitutional rights. Are you?" J.A. 333. The post—which included an accurate diagram of the house where petitioner's wife and children were staying—made petitioner's wife "fe[el] like I was being stalked" and "fe[el] extremely afraid for mine and my childrens' and my families' lives." J.A. 153; see J.A. 154.

Roughly a week later, petitioner posted the following on his Facebook page:

> Fold up your PFA [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> that was improperly granted in the first place
>
> Me thinks the Judge needs an education on true threat jurisprudence
>
> And prison time'll add zeros to my settlement
>
> Which you won't see a lick
>
> cause 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
>
> [link: Freedom of Speech, www.wikipedia.org]

J.A. 334; Pet. App. 7a. This post caused petitioner's wife to be "extremely afraid for [her] life." J.A. 156; see J.A. 158 ("I was just extremely scared."). She explained that even though she "got the protection order to protect myself and my children," petitioner "was still making the threats for everyone to see." J.A. 156.

d. The next day, petitioner posted on Facebook about shooting a kindergarten class:

> 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?

J.A. 335. This post was seen by Federal Bureau of Investigation (FBI) Special Agent Denise Stevens, who had been warned about petitioner by the amusement park and had been monitoring petitioner's public Facebook posts. Pet. App. 7a-8a. After she saw the kindergarten-shooting post, her supervisor notified the local police department, which in turn notified the superintendent of schools. J.A. 84-85.

Agent Stevens and another FBI agent went to petitioner's house to interview him. Pet. App. 8a. When the agents knocked on his door, petitioner's father answered and told the agents that petitioner was

sleeping. *Ibid.* After several minutes, petitioner came to the door wearing a t-shirt and jeans, but no shoes. *Ibid.* Petitioner asked the agents if they were law-enforcement officers and asked if he was free to go. *Ibid.* After the agents identified themselves and told petitioner he was free to go, petitioner went inside and closed the door. *Ibid.*

Later that day, petitioner posted the following on his Facebook page:

> 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 go-in'

[BOOM!]

J.A. 336. After reading that post, Agent Stevens "was concerned about [her] family because [she] knew that [petitioner] was computer savvy" and might be able to find out where she lived. J.A. 69. She informed her husband of the situation and took extra precautions around her home. *Ibid.*

2. Petitioner was indicted on five counts of interstate communication of threats, in violation of 18 U.S.C. 875(c). Pet. App. 9a; see J.A. 14-17. Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The counts were based on his Facebook posts: Count 1 alleged threats against patrons and employees of the amusement park, J.A. 14-15; Count 2 alleged threats against his wife (both in the post containing the diagram of the house where she was staying and the post asking whether her protection-from-abuse order was "thick enough to stop a bullet"), Pet. App. 5a-7a & n.1; Count 3 alleged threats against local law enforcement (in the post about having "enough explosives to take care of the state police and the sheriff's department"), *id.* at 7a; Count 4 alleged threats against a kindergarten class (in the post about "the most heinous school shooting ever imagined"), *ibid.*; and Count 5 alleged threats against Agent Stevens (in the "Little Agent Lady" post), *id.* at 8a-9a. Petitioner filed a motion to dismiss the indictment, arguing that the First Amendment required the government to prove that he had a subjective intent to threaten in order to convict him for making threats. *Id.* at 9a. The district court denied petitioner's motion, concluding that petitioner's posts constituted

"true threats" that the government could permissibly proscribe. *Id.* at 49a-60a; see *id.* at 9a-10a.

At trial, petitioner claimed that some of his posts were "rap lyrics," *e.g.*, J.A. 204, and noted that some (but not all) made reference to art or free-speech rights, *e.g.*, J.A. 208. Petitioner's wife, however, testified that petitioner had "rarely listened to rap music" and that she "had never seen [him] write rap lyrics during their seven years of marriage." Pet. App. 6a; J.A. 159. She also "explained that the lyric form of the statements did not make her take the threats any less seriously." Pet. App. 6a; J.A. 160. And she observed that statements by petitioner about his willingness to go to jail to vindicate his asserted right to make such posts caused her to take "his threats even more seriously." J.A. 160.

Petitioner asked the district court to instruct the jury that "the government must prove that he intended to communicate a true threat, rather than some other communication." J.A. 21 (emphasis omitted). The court denied that request and instead instructed the jury as follows:

> 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. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.
>
> 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.

J.A. 301.

The district court informed the jury that "[t]he government is not required to prove that the defendant himself intended for the statement to be a true threat." J.A. 302. It subsequently explained, however, that petitioner's "state of mind is relevant in that the test for whether any of the Facebook postings described in the indictment were true threats is an objective test which focuses on what a reasonable person in the position of the defendant as the maker of the statement would expect to be the reaction to the statements." C.A. App. 551 (subsequent portion of final jury instructions relating to certain third-party statements admitted for non-hearsay purposes).

The jury convicted petitioner on Counts 2 through 5 (relating to the threats against his wife, local law enforcement, a kindergarten class, and Agent Stevens) and acquitted him of the charge of threats against the patrons and employees of the amusement park. Pet. App. 10a. The district court denied petitioner's post-trial motions to dismiss the indictment, for a new trial, and to arrest judgment. *Id.* at 10a, 30a-48a. The court sentenced petitioner to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a.

3. The court of appeals affirmed, rejecting petitioner's argument that the district court erred in declining to instruct the jury that it must find that petitioner subjectively intended to threaten harm. Pet. App. 1a-29a. The court of appeals observed that the First Amendment permits criminal punishment for a

communication that qualifies as a "true threat." *Id.* at 11a-13a. The court noted that a "prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 16a (quoting *Virginia* v. *Black*, 538 U.S. 343, 360 (2003)) (brackets in original; internal quotation marks omitted). And the court reasoned that a true-threats test that takes account of "context" and "forces jurors to examine the circumstances in which a statement is made" precludes the possibility of conviction for "protected speech." *Id.* at 20a (quoting *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013)).

The court of appeals rejected petitioner's argument that this Court's decision in *Virginia* v. *Black*, *supra*, requires proof of a subjective intent to threaten in all threat prosecutions. Pet. App. 13a-21a. The court noted that *Black* had no occasion to consider that question, because the statute at issue in that case, which criminalized cross burning with the intent of intimidating, "already required a subjective intent to intimidate." *Id.* at 15a; see *id.* at 13a. The court also explained that petitioner's interpretation of the holding in *Black* "is inconsistent with the logic animating the true threats exception." *Id.* at 16a.

SUMMARY OF ARGUMENT

Petitioner made true threats that violate Section 875(c). He was aware of the meaning and context of his Facebook posts, and those posts communicated a serious expression of an intent to do harm. Even if petitioner subjectively intended his posts to carry a different meaning, those beliefs did nothing to prevent

or mitigate the substantial fear and disruption that his threats caused. The First Amendment does not require that a person be permitted to inflict those harms based on an unreasonable subjective belief that his words do not mean what they say.

I. Section 875(c) embodies the requirement that the government prove that a defendant made a "true 'threat.'" *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam). A true threat does not include statements that would reasonably be understood as jest, hyperbole, or exaggerated vehemence. *Id.* at 706-708. The statute prohibits only those statements that a reasonable person would interpret as a serious expression of an intent to do harm. In that inquiry, the statements must be "[t]aken in context" and interpreted in light of listener reactions. *Id.* at 708. The context also includes a defendant's own understanding of the meaning of his statements, insofar as it is relevant to how a reasonable person would understand them.

Section 875(c) does not make subjective intent to threaten an element of the offense. The text of Section 875(c), unlike the text of neighboring provisions, does not contain any specific-intent requirement, and prior judicial decisions signaled to Congress that no such requirement would be inferred. The statute's inclusion of the word "threat" means that conviction requires a statement that to a reasonable person communicates an intent to do harm. Neither standard dictionary definitions nor any indicia of congressional intent establish that to constitute a threat, the defendant must have intended to carry out the threat or subjectively intended the threat to be perceived as such. Congress specifically focused on the issue of

mens rea in drafting the statute's text, and its omission of an intent-to-threaten element was deliberate.

Section 875(c)'s mens rea requirement is thus one of general intent: the defendant must have knowingly transmitted the communication containing the threat, understanding the meaning of his words in light of the surrounding circumstances and context. A general-intent requirement is appropriate for a statute that is silent on the issue of mens rea, so long as it is sufficient to preclude a conviction based on facts that the defendant could not reasonably have known. That is true here: a defendant must have knowledge of both the statement and the surrounding context, and such a person is aware of the circumstances that make the statement threatening and create the fear and disruption that Congress sought to prevent.

Petitioner's contention that, as a matter of statutory construction, courts must read in a requirement that a defendant subjectively intend that the communication be perceived as a true threat cannot be reconciled with the approach taken in *Hamling* v. *United States*, 418 U.S. 87, 120-121 (1974). There, the Court rejected any requirement that a defendant charged with the knowing mailing of obscene materials had to know that the materials were obscene. Rather, so long as the defendant knew of the "character" of the materials, it was not necessary that he understand that they were obscene. *Ibid.* Here too, it is sufficient that a defendant knew the meaning and context that made his words a true threat, whether or not he subjectively intended them as such. "The evils that Congress sought to remedy would continue and increase in volume," *ibid.*, if a defendant whose bomb threat led to public fears, evacuations, and investiga-

tions were absolved of criminal liability because a jury could not rule out the possibility that he intended the threat to be taken as a joke.

II. The First Amendment does not require an intent-to-threaten element. True threats have traditionally been treated as a category of unprotected speech. Whatever slight expressive value might be seen in phrasing an idea in the form of a true threat, it is categorically outweighed by the compelling governmental interests in "'protect[ing] individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992)). A speaker's subjective intention that his statement not be interpreted as a threat, if not made manifest to a reasonable person with knowledge of the context and circumstances, neither increases the expressive value of the statement nor decreases the statement's propensity to cause disruption and harm. A bomb threat that appears to be serious is equally harmful regardless of the speaker's private state of mind. The definition of a constitutionally proscribable threat thus does not turn on the speaker's unexpressed intent.

In *Watts* v. *United States*, *supra*, the Court analyzed whether a statement was a true threat solely by reference to the content of the statement and the objective circumstances in which it was made. *Virginia* v. *Black*, *supra*, upheld Virginia's cross-burning statute by relying on that provision's intent-to-intimidate element. But the Court did not address a general "true threats" statute like Section 875(c) and did not hold that subjective intent is always required. *Black* itself reaffirmed that the basis for governmen-

tal regulation of true threats is the objective harms they create, and nothing in that rationale supports a general requirement of subjective intent. Since colonial times, legislatures in both England and America have enacted statutes proscribing threatening statements irrespective of the speaker's subjective intent to threaten.

Given the standards for finding a true threat, speculative fears about chilling legitimate nonthreatening speech do not justify a constitutional requirement of a subjective intent to threaten. No such requirement applies in criminal prosecutions involving analogous types of unprotected speech that cause harm, such as fighting words and obscenity. The same approach is appropriate here: proper instructions on the standard for identifying a true threat ensure that a prohibition on such threats will reach only a defined class of clearly threatening statements. Juries are fully capable of distinguishing between metaphorical expression of strong emotions and statements that have the clear sinister meaning of a threat. And no evidence supports the speculation that a reasonable-person test, which has been widely applied in criminal prosecutions across the country for decades, chills protected speech or squelches artistic expression.

ARGUMENT

PETITIONER WAS VALIDLY CONVICTED OF MAKING TRUE THREATS WITHOUT THE NEED TO PROVE A SUBJECTIVE INTENT TO THREATEN

This Court has held that "threats of violence are outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), and that a legislature accordingly may "ban a 'true threat,'" *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (quoting *Watts* v.

United States, 394 U.S. 705, 708 (1969) (per curiam)). "[A] prohibition on true threats," the Court has explained, "'protects individuals from the fear of violence' and 'from the disruption that fear engenders.'" *Id.* at 360 (quoting *R.A.V.*, 505 U.S. at 388). In enacting 18 U.S.C. 875(c), Congress sought to protect individuals from the fear and disruption that would be caused by the communication of true threats of physical injury.

The disruption and fear caused by a communication that contains a true threat does not depend upon the sender's subjective intent in sending the communication. Such harm will occur whenever the communication is threatening—*i.e.*, when a reasonable person with knowledge of the relevant facts and circumstances would interpret the communication as a serious expression of an intent to do harm. Persons who receive the statement must act on its meaning and are placed in fear and forced to take precautions, regardless of whether the speaker may subjectively and unreasonably intend the statement as emotional venting or artistic expression. Accordingly, neither Section 875(c) nor the First Amendment requires proof that a sender who is aware of the meaning, context, and circumstances of his threat subjectively intend it to be perceived as threatening.

I. SUBJECTIVE INTENT TO THREATEN IS NOT AN ELEMENT OF THE OFFENSE DEFINED IN 18 U.S.C. 875(c)

Section 875(c) prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." The statute reaches only true threats, requires only general intent to make

the threatening statement, and contains no implicit subjective intent-to-threaten element.

A. Section 875(c) Prohibits A Narrow Class Of Communications That Contain True Threats

Like other statutes that target threatening communications, Section 875(c) reaches only "true 'threat[s],'"; it does not reach jest, "political hyperbole," or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of serious expressions of an intent to do harm. *Watts*, 394 U.S. at 706-708 (citation omitted).

A statement can be found to be a true threat in a criminal case only if the jury finds beyond a reasonable doubt that a reasonable person "would" understand the statement to convey "a serious expression of an intention to inflict bodily injury or take the life of an individual." J.A. 301-302; see, *e.g.*, *United States* v. *White*, 670 F.3d 498, 507 (4th Cir. 2012) (test focuses on how statement "would" reasonably be interpreted); *United States* v. *Mabie*, 663 F.3d 322, 330 (8th Cir. 2011) (same), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir.) (same), cert. denied, 546 U.S. 980 (2005). The mere possibility that a reasonable person could conceivably have interpreted the statement as a true threat does not suffice for conviction.[1]

---

[1] The instructions in this case framed the inquiry as how "a reasonable person" making the statement "would foresee that the statement would be interpreted by those to whom the maker communicates the statement." J.A. 301. Some courts of appeals articulate the inquiry by reference to a "reasonable recipient" or a "'reasonable person' familiar with all the circumstances," rather than a reasonable speaker. *White*, 670 F.3d at 510 (citing cases). Petitioner does not challenge the district court's specific articula-

The determination of whether a statement constitutes a true threat always takes account of context. *White*, 670 F.3d at 506 (reasonable-person test presumes "familiar[ity] with the context of the communication") (citation omitted); *United States* v. *Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (same); *Stewart*, 411 F.3d at 828 (reasonable-person test looks to "context" and "circumstances") (citation omitted). In *Watts*, for example, the Court held that a statement at political rally, in which a speaker who had received a draft notice stated that, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," in response to which the audience laughed, had not made a true threat against the President, punishable under 18 U.S.C. 871(a) (1964). 394 U.S. at 706-708; see also J.A. 301 (jury instructions here distinguished a true threat "from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger"). Consistent with *Watts*, the jury should, as the district court explained here, consider "the circumstances under which the statement was made," "the context within which the statement was made," "the effect on the listener or reader of the statement," and "whether the statements were conditional, or whether they specified the precise date, time or place for carrying out an alleged threat." J.A. 302.

---

tion of the reasonable-person standard, and courts have regarded the different articulations as "largely academic." *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622-623 (8th Cir. 2002) (en banc); see also *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058, 1075 n.7 (9th Cir. 2002) (en banc) (observing that different articulations "do[] not appear to matter much"), cert. denied, 539 U.S. 958 (2003).

A defendant is always free to explain his intention in making a particular statement, and a jury must weigh the defendant's explanation of his intent in determining how a reasonable person would understand the remarks, in context. See C.A. App. 551. A speaker may be in a good position to shed light on features of the context of his remarks or particular words spoken that explain why they should not be taken seriously. For example, petitioner testified at length, without objection, about his intent in making the statements at issue, pointing to features of Facebook that he regarded as negating their natural meaning. See generally, *e.g.*, J.A. 198-236.[2] What a speaker's unexpressed intent cannot do, however, is convert statements that a reasonable person would understand as threatening, in context, into innocuous statements or merely letting off steam.

B. Subjective Intent To Threaten Is Not A Statutory Element Of A Section 875(c) Offense

Section 875(c) does not contain an express mental element, but background principles of criminal law establish that it requires a mens rea of general intent: the maker of the threat must understand the meaning

---

[2] Petitioner suggests that the government's view of the true-threat test renders it irrelevant to consider the purpose, audience, and immediate or larger context of his Facebook posts. See, *e.g.*, Pet. Br. 46 (quoting government's closing argument), 52-53 (same). That is incorrect. The parties are free to make arguments about the *significance* of those matters in assessing whether statements constitute a true threat—and it is permissible for the government to argue that what the defendant intended does not alter the reality of what he said. But those matters are unquestionably relevant to the ultimate issue of whether the statements, in context, constitute true threats.

of the words he speaks, in context, and must intentionally speak them. See, *e.g.*, *Ragansky* v. *United States*, 253 F. 643, 645 (7th Cir. 1918) (interpreting 18 U.S.C. 871); accord *Pierce* v. *United States*, 365 F.2d 292, 294 (10th Cir. 1966). Sending a threatening communication with such knowledge does not become legal simply based on the defendant's subjective desire that the communication be interpreted as, for example, a purely theoretical "revenge fantas[y]" (Pet. Br. 22), or as a "joke" (*id.* at 51).

1. The text of Section 875(c) does not require proof of a subjective intent to threaten

The analysis of a statute's mens rea requirement, as with any other question of statutory interpretation, "begin[s] by examining the text." *Carter* v. *United States*, 530 U.S. 255, 271 (2000). Here, the text of Section 875(c) does not contain a mens rea element, and it is appropriate to infer a requirement of general intent. See pp. 28-35, *infra*. But the absence of any reference to a subjective intent to threaten makes it inappropriate to read such a specific-intent element into the statute. See *Bates* v. *United States*, 522 U.S. 23, 29 (1997) (declining to read a statute whose text "d[id] not include an 'intent to defraud' state of mind requirement" to require such intent, observing that "we ordinarily resist reading words or elements into a statute that do not appear on its face").

The absence of an explicit intent requirement from the text of Section 875(c) contrasts tellingly with the inclusion of such requirements in other anti-threat prohibitions. As petitioner acknowledges (Br. 33), neighboring subsections of Section 875, which also prohibit certain types of threats, do expressly "include textual specific intent requirements." See 18 U.S.C.

875(b) (proscribing certain threats made "with intent to extort"), 875(d) (similar). Although the specific-intent requirement petitioner would graft onto Section 875(c) (intent to threaten) differs from the specific-intent requirements set forth in the neighboring provisions (intent to extort), "[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." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks, brackets, and citation omitted); see *Bates*, 522 U.S. at 29-30 (same). Given Congress's practice of setting forth specific-intent requirements explicitly in Section 875, it is unlikely to have intended such a requirement in Section 875(c) without saying so.

It is also significant that Congress drafted the original version of what is now Section 875(c) against a statutory backdrop that included a provision prohibiting "knowingly and willfully" making threats against the President. *Threatening Communications: Hearing on H.R. 3230 Before the House Comm. on the Post Office and Post Roads*, 76th Cong., 1st Sess. 13 (1939) (mentioning the presidential-threat statute) (statement of Rep. Sweeney) (*1939 Hearing*). Courts had interpreted that statute not to require proof of a specific intent to threaten, but instead to require only that a speaker "comprehend[] the meaning of his words" and "voluntarily and intentionally utter[] them as the declaration of an *apparent* determination to carry them into execution." *Ragansky*, 253 F. at 645 (emphasis added). In light of Congress's presumptive awareness of that interpretation, see *Lorillard* v.

Pons, 434 U.S. 575, 580 (1978), it would be anomalous to interpret Section 875(c), which does not even explicitly require knowledge or willfulness, to nevertheless require proof of the greater mental state of an intent to threaten.

Petitioner asserts (Br. 22-24) that the word "threat" in Section 875(c) in itself refers only to statements that the speaker subjectively intends to be interpreted as threatening. See also *United States* v. *Jeffries*, 692 F.3d 473, 483-484 (6th Cir. 2012) (Sutton, J., dubitante), cert. denied, 134 S. Ct. 59 (2013). But the dictionary definitions of "threat" or "threaten" that petitioner provides do not support that assertion. A "threat" is defined as "an expression of an intention to inflict loss or harm on another by illegal means," *Webster's New International Dictionary* 2633 (2d ed. 1958), or "[a] communicated intent to inflict harm or loss on another," Pet. Br. 23 (quoting *Black's Law Dictionary* 1519 (8th ed. 2004)). To the extent that these definitions refer to intent, they describe an intent different from the type advocated by petitioner: an intent to carry out an act (the infliction of loss or harm), not an "intent to cause fear" (Pet. Br. 19). Petitioner did not request a jury instruction on the former type of intent; the existence of a requirement to prove such intent is not encompassed within the questions presented, see Pet. Br. i (referring to the "subjective intent to threaten"); and the Court has made clear that such intent is not part of the constitutional definition of a "threat," see *Black*, 538 U.S. at 359-360 (recognizing that a statement can be a "threat" even if the speaker has no intent to carry out the harm that it threatens).

In any event, the definitions point to the character of the communication—the threats must be believable in order to put a person in fear—but do not shed light on the actual intent of the speaker in a prosecution under Section 875(c) for making the threat. The definitions describe the *message* that is "express[ed]" or "communicated." Accordingly, they refer to words that convey an apparent intent to inflict harm, not to a subjective, unexpressed intent of the speaker. The recipient of a letter that says "I will kill you" will describe himself as having "received a threat in the mail," even if the recipient has no idea who the sender was, whether the sender in fact planned to commit murder, or how the sender intended the letter to be interpreted. See Critical Incident Response Group, FBI, *The School Shooter: A Threat Assessment Perspective* 29 (2000) (*School Shooter*) (describing an anonymous call about a pipe bomb in a school as a "High-Level Threat"). Similarly, a letter stating that "[a]s soon as I get off the bus in Providence * * * , I will kill the judges who directed the state police to frame me," *United States* v. *D'Amario*, 350 F.3d 348, 352 (3d Cir. 2003), is a threat, even if the sender secretly means the statement to be construed as an emotional release or a figurative protest against a government conspiracy.

2. Section 875(c)'s origins and purpose confirm that subjective intent to threaten is not required

Before 1939, federal law prohibited the sending of threats in interstate commerce only when the sender intended to extort something of value from the recipient. H.R. Rep. No. 102, 76th Cong., 1st Sess. 1 (1939) (1939 House Report). The Department of Justice urged Congress to supplement the existing statutes in

order, *inter alia*, "to render present law more flexible." *1939 Hearing* 5 (statement of William W. Barron, Criminal Division, Department of Justice). The Department informed Congress that "a number of threats of a very serious and socially harmful character [are] not covered by the existing law for the reason that the sender of the threat did not intend to extort money or other thing of value for himself." 1939 House Report 1; see *id.* at 2 (reproducing Attorney General's letter stating that a "threat may be of a dangerous or vicious character" even if intent to extort is absent).

At a hearing on legislation based on the Department's proposal, Members of Congress expressed concern about, for example, people who send threatening letters to legislators or "a mentally irresponsible fellow who might send a threatening letter to a judge." *1939 Hearing* 7-8 (statements of Reps. Sweeney and Mitchell). Congress addressed the deficiencies in the preexisting statutes by enacting a much broader prohibition of harmful threats. See Act of May 15, 1939, ch. 133, 53 Stat. 742. The new law included Section 875(c)'s predecessor, which prohibited "transmit[ting] in interstate commerce by any means whatsoever any communication containing any threat to kidnap any person or any threat to injure the person of another." § 2, 53 Stat. 744.

Although petitioner asserts (Br. 25) that "Congress gave no hint that it meant to write subjective intent out of the statute," he disregards "the most reliable evidence of [congressional] intent," namely, the "language of the statute[] that [Congress] enact[ed]," *Holloway* v. *United States*, 526 U.S. 1, 6 (1999), which contains no mention of an intent to threaten. And

given that the very reason for the legislation was the undue narrowness of the existing specific-intent requirement for threat prosecutions, Congress's omission of any specific-intent element from the new law is the best evidence of its purpose *not* to require one. Congress was not required to confirm its intention in the legislative history. See *Carter*, 530 U.S. at 270-271; *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

In any event, Congress had ample reason to know that Section 875(c)'s predecessor would be interpreted not to require specific intent to threaten. Referring to another provision of the proposed bill, which prohibited "knowingly" mailing a certain type of threat, a Department of Justice representative testified that "[s]uch a threat, unaccompanied by a provable purpose, should nevertheless be punished." *1939 Hearing* 5-6; see *id.* at 1 (Section 1(b) of proposed bill). It is implausible that Congress could understand that a provision that proscribed "knowingly" mailing a threat did not require a purpose to threaten, yet understand Section 875(c)'s predecessor (which did not even contain the word "knowing") to require an even higher mens rea. See also *1939 Hearing* 22-23 (testimony of Department representative clarifying that Section 3(a) of proposed bill, concerning ransom demands, would require proof that the defendant was "connected with or had knowledge and an intent to help carry out the scheme involved," but not expressly including such a qualification when reciting text of Section 875(c)'s predecessor).

3. Section 875(c) defines a general-intent offense

a. Section 875(c)'s silence on the issue of the required mens rea does not mean that the statute has no mens rea element at all. As petitioner observes (Br. 26-29), "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples* v. *United States*, 511 U.S. 600, 605 (1994) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978)). Accordingly, this Court has applied a "presumption in favor of scienter," under which it has generally "'interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'" *Carter*, 530 U.S. at 267-268 (quoting *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).

The presumption in favor of scienter, however, "requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter*, 530 U.S. at 269 (quoting *X-Citement Video*, 513 U.S. at 72). Typically, that is satisfied simply by "requiring proof of *general intent*—that is, that the defendant possessed knowledge with respect to the *actus reus* of the crime." *Id.* at 268; see *Staples*, 511 U.S. at 605 (explaining that the "conventional *mens rea* element" for a statute silent on that point is one that "would require that the defendant know the facts that make his conduct illegal"); *United States* v. *Bailey*, 444 U.S. 394, 408 (1980) ("[T]he cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction.").

Here, a showing that the defendant acted "knowingly" in transmitting a true threat requires proof that the defendant knew that he transmitted a communication and that he comprehended its contents and context. "[A] foreigner, ignorant of the English language," would not have knowingly made a threat by posting petitioner's communications. *Ragansky,* 253 F. at 645. Nor would a person knowingly transmit a threat by mailing a sealed letter containing a bomb threat without knowing the letter's contents and context. Cf. *1939 Hearing* 20-23 (discussing potential safeguards against liability for common carriers). Petitioner is therefore incorrect that the statute would penalize "simple negligence," Br. 32 (emphasis omitted), such that a defendant could be punished merely because he "*should* [have been] aware" of a particular circumstance. Model Penal Code § 2.02(2)(d) (1985) (emphasis added). Like the mens rea requirements adopted in the cases on which petitioner relies, a general-intent requirement in Section 875(c) precludes conviction based on a fact that was beyond the defendant's awareness. See *X-Citement Video*, 513 U.S. at 73 (knowledge of age of persons depicted in sexually explicit materials); *Staples*, 511 U.S. at 614-615 (knowledge of internal workings of firearm); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 524 (1994) (knowledge that products are likely to be used with illegal drugs); *Liparota* v. *United States*, 471 U.S. 419, 425-427 (1985) (knowledge that manner of food-stamp use was unlawful, where lawfulness could depend on the independent actions of third parties); *United States Gypsum Co.*, 438 U.S. at 444 (knowledge that conduct would likely produce anticompetitive effects); *Morissette* v. *United States*, 342 U.S. 246,

271 (1952) (knowledge that property belonged to someone else).

b. Petitioner's argument for a more exacting mens rea as a matter of implied congressional intent cannot be reconciled with the approach taken by this Court in *Hamling* v. *United States*, 418 U.S. 87 (1974). The defendants in *Hamling* were convicted under a federal statute that prohibited "knowingly" sending "obscene, lewd, lascivious, indecent, filthy or vile" material through the mail. *Id.* at 98 n.8 (quoting 18 U.S.C. 1461 (1970)); see *id.* at 91. This Court affirmed the conviction, approving of the district court's instruction to the jury that the defendants' "belief as to the obscenity or non-obscenity of the materials [was] irrelevant" and that the government needed only to prove that the defendants had knowledge of the mailing and "the character of the materials." *Id.* at 119-120; see *id.* at 119-124, 140. Accordingly, while the determination of whether the materials were obscene turned on a jury's application of community standards, *id.* at 98-103, the prosecution was not required, as either a statutory or constitutional matter, to "prove a defendant's knowledge" that the materials were obscene, *id.* at 121 (emphasis added), let alone his intent that the materials be perceived as obscene. His knowledge of the character of the materials—analogous to the content and context of the true threat at issue here—was enough.

The Court's approval of a general-intent requirement in *Hamling* reflects a general principle of statutory construction. See, *e.g.*, *Posters 'N' Things*, 511 U.S. at 524-525 (relying on *Hamling* in holding that statute proscribing sale of drug paraphernalia did not require proof defendant specifically knew the items

qualified as such). And that approach applies with particular force to rebut petitioner's claim that a requirement to prove subjective intent must be implied here. In *Hamling*, as here, the relevant statute regulated expressive activity. And in *Hamling*, as here, the relevant statute defined the expressive activity by use of terminology ("obscene" or "threat") with a specific legal meaning that a jury would apply to the particular facts. See pp. 48-49, *infra* (discussing Court's obscenity jurisprudence). Notwithstanding the obscenity statute's explicit requirement that the offense be committed "knowingly," the Court declined to hold that the defendant must know that the materials he distributed were legally obscene. Put another way, if the defendant's view differed from that of a reasonable jury, the defendant's actions were still performed with the requisite knowledge to support his conviction.

The Court had sound reason for declining to allow the defendant's beliefs in *Hamling* to control. As the Court explained, "[t]he evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated." 418 U.S. at 120-121 (quoting *Rosen* v. *United States*, 161 U.S. 29, 41-42 (1896)). Similar logic applies equally here. If interpreted to include the mens rea requirement suggested by petitioner, Section 875(c) would not, for example, prohibit mailing anthrax threats to public officials, so long as the sender intended those threats to be interpreted as a hoax. Cf., *e.g.*, *United States* v. *Davila*, 461 F.3d 298, 300 (2d Cir. 2006), cert. denied,

549 U.S. 1266 (2007); *State* v. *Lujan*, 911 P.2d 562, 568 (Ariz. Ct. App. 1995).

Indeed, on petitioner's view, such threats would not be covered *even if* the sender was aware of (but disregarded) the likelihood that the letters would be taken seriously and thereby cause substantial individual fear, a massive official response, and major public disruptions (such as evacuating potential victims, enhancing security, or shuttering government facilities). Recipients of threats, and the authorities charged with protecting them, will react to threats based on the information they have, which will not include the actual subjective intent of the person who communicated the threat. As the FBI's section chief for counterterrorism has explained with respect to bioterrorism threats, the "response to an actual threat or one that is later determined to be not credible, or a hoax, is indistinguishable." James F. Jarboe, Section Chief, Counterterrorism Div., FBI, Statement before the House Judiciary Comm., Subcomm. on Crime (Nov. 7, 2001); see also, *e.g.*, *School Shooter* 6-14 (discussing evaluation, assessment, and investigation of threats against schools); FBI & Department of Homeland Security, *Bomb Threat Guidance* (2013), https://www.llis.dhs.gov/sites/default/files/2013%20BombThreat%20Guidance.pdf (similar for bomb threats); Steve Albrecht, FBI, *Threat Assessment Teams: Workplace & School Violence Prevention* (Feb. 2010), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february-2010/threat-assessment-teams (explaining that threat assessment teams "aim to assess dangerousness, not to predict violence; only perpetrators ultimately know their intentions"). Petitioner's posts, for example, instilled fear not only in petitioner's wife, but also an FBI agent. Congress

could not have intended to immunize defendants whose actions lead to such substantial harms based on their subjective beliefs at odds with reality.

Petitioner's position would also make it more difficult to convict defendants who cause such harms. If Section 875(c) in fact required proof of specific intent, a defendant might avoid conviction by arguing that he was voluntarily intoxicated, or had some other form of diminished capacity that he claims prevented him from forming the requisite intent, when he made the threats. See *United States* v. *Darby*, 37 F.3d 1059, 1064 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995); see also, *e.g.*, *United States* v. *Christian*, 749 F.3d 806, 810-814 (9th Cir. 2014) (permitting diminished-capacity defense to charge involving threats against law-enforcement officials). Or a clever defendant could, for example, style a Facebook post announcing that it will be "gun locker time" if a particular state judge "mess[es] with" him, cf. *State* v. *Side*, 21 P.3d 321 (Wash. Ct. App. 2001), as rap lyrics, in the hopes that a future jury, even if convinced of the objectively threatening nature of the statement, would have reasonable doubt as to whether it might have been intended simply as artistic emotional venting. See *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (stating that "specific intent * * * by its nature, is difficult to demonstrate").

c. Petitioner's additional statutory arguments lack merit. First, petitioner contends (Br. 25-26) that courts of appeals in the 1960s and 1970s interpreted Section 875(c) to require proof of intent. But several of those decisions are unclear about whether the necessary "intent" is specific or general; they are largely unreasoned and address the issue only in passing; and

they merit little weight in determining congressional intent, particularly because, as petitioner himself recognizes (Br. 26), most circuits now interpret Section 875(c) not to require an intent to threaten. See, *e.g.*, *Darby*, 37 F.3d at 1065-1066 (directly considering the issue, holding that intent to threaten is not required, and treating *United States* v. *Dutsch*, 357 F.2d 331 (4th Cir. 1966), on which petitioner relies (Br. 25), as dictum).

Second, petitioner attempts (Br. 32-33) to draw analogies between Section 875(c) and the tort scheme for compensating the infliction of emotional distress. He provides no basis for assuming that Congress had the tort system, which is directed towards compensation of private harms, in mind when it enacted Section 875(c), which protects against not only private harm but also public disruption. And limitations on tort recovery for infliction of emotional distress, which stem in large part from concern about allowing plaintiffs to recover for imagined or exaggerated psychological harms, see *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 546 (1994), have little relevance to the interpretation of a criminal threat prohibition like Section 875(c).

Finally, petitioner's invocation (Br. 30-32) of the canon of constitutional avoidance is unsound. That canon is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005). It is not, however, a tool for crafting a specific-intent requirement unsupported by the text, legislative history, or other statutory-interpretation tools. See *id.*

at 385 ("The canon * * * comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction."). Nor is it a device for substituting views about the First Amendment for the inquiry into what conduct Congress considered wrongful. See *United States* v. *Apel*, 134 S. Ct. 1144, 1153 (2014) ("The canon is not a method of adjudicating constitutional questions by other means.") (citation omitted).

II. THE FIRST AMENDMENT DOES NOT REQUIRE PROOF OF SUBJECTIVE INTENT TO THREATEN

True threats, whether or not subjectively intended as such, lie "outside the First Amendment," *R.A.V.*, 505 U.S. at 388. That is because the harms that true threats inflict—fear and disruption (*ibid.*)—take place regardless of the speaker's unexpressed intention. A rigorous application of true-threat doctrine to persons who understand the meaning and context of their statements creates no serious risk of chilling protected activity, as experience has shown in the great majority of circuits that have long followed the approach taken in this case. The government's authority to "ban a 'true threat,'" *Black*, 538 U.S. at 359 (citation omitted), thus does not and should not depend on the speaker's private state of mind.

A. The Rationales For Treating True Threats As Unprotected Speech Apply Equally To All True Threats, Regardless Of A Speaker's Intent

This Court has repeatedly recognized that "[t]he protections afforded by the First Amendment * * * are not absolute." *Black*, 538 U.S. at 358; see, *e.g.*, *R.A.V.*, 505 U.S. at 382-384; *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942). "'[T]he

freedom of speech' referred to by the First Amendment does not include a freedom to disregard * * * traditional limitations" on certain categories of "'unprotected speech.'" *R.A.V.*, 505 U.S. at 383, 384 n.4; see, *e.g.*, *United States* v. *Stevens*, 559 U.S. 460, 468-469 (2010). "True threats" are one of those categories, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinksy*, 315 U.S. at 571-572; see *Black*, 538 U.S. at 359; see also *R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 707.

A reasonable-person test for true threats follows logically from the reasons that justify classifying true threats as unprotected speech. The Court has recognized that statements falling within the traditional categories of unprotected speech have been deemed "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V.*, 505 U.S. at 383 (quoting *Chaplinksy*, 315 U.S. at 572). In the case of true threats, that categorical balancing leaves no room for the argument that the category should be defined by reference to the speaker's subjective intent.

A statement that is threatening to a reasonable person has little legitimate expressive value. Although statements categorized as unprotected speech cannot be said to "constitute '*no* part of the expression of ideas,' * * * they constitute 'no *essential* part of any exposition of ideas.'" *R.A.V.*, 505 U.S. at 385 (quoting *Chaplinsky*, 315 U.S. at 572). A legitimate contribution to the social discourse gains little, if anything, from its expression in the form of a statement that a reasonable person would understand as a seri-

ous expression of an intent to injure or kill someone. The expression of a serious intent to cause someone physical injury does not invite further debate, cannot be rebutted by the listener, and substitutes the specter of violence for the free exchange of ideas. Any *non*threatening idea that the speaker means to communicate can be phrased in a different way, with little or no loss of communicative value.

Although the First Amendment would not normally impose constraints on how a speaker articulates an idea, the serious harms associated with threatening statements permit legislatures to eliminate such statements as a "mode of speech." *R.A.V.*, 505 U.S. at 386 (quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result)). Thus, to the extent that a threatening statement "can be used to convey an idea," *ibid.*, the traditional classification of threats as unprotected speech reflects a categorical judgment that the speaker's right to express an idea in that way is secondary to the recipient's (and society's) right not to be subjected to the "fear" and "disruption" that the threat will produce, *Black*, 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388). Where the natural effect of speech, as understood by a reasonable listener with knowledge of the circumstances, would lead someone to "fe[el] extremely afraid for mine and my childrens' and my families' lives," J.A. 153, a legislature may permissibly declare it to be off-limits. See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins.").

This categorical judgment applies equally to all statements that a reasonable person would interpret

as a threat, regardless of the subjective intent of the speaker. If two people were to make the same Facebook post under identical circumstances, and the content and context of the post were such that a reasonable person would understand it to communicate a serious intent to cause injury, the considerations that justify governmental regulation would be the same, even if one speaker privately intended the post as a threat while the other privately intended it to be taken as a joke. Because any difference in the speakers' purposes was not communicated to a listener with knowledge of the circumstances, both the expressive value of the speech and the harms invited by the speech would be identical in each case. Yet under a "test focused on the speaker's intent," the post would be treated as "protected speech for one speaker, while leading to criminal penalties for another." *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J.). Such a "bizarre result," *ibid.*, cannot be squared with the reasons why true-threat bans are permitted in the first place. A bomb threat is harmful, and a legitimate subject of criminal regulation, regardless of the speaker's intent. See, *e.g.*, Graeme R. Newman, *Bomb Threats in Schools* 11 (2011) (federal government publication noting that although "90 percent of bomb threats are hoaxes," the "disruption caused by bomb threats is considerable whether the bomb is real or not" because "all such threats are often responded to on the assumption that a real bomb does exist").

Although petitioner does not dispute that the Court has recognized "true threats" as a category of historically unprotected speech, he nevertheless suggests (Br. 57-61) that the Court subject the regulation of

true threats without proof of subjective intent to "the most exacting scrutiny," Br. 58 (quoting *United States* v. *Eichman*, 496 U.S. 310, 318 (1990)), by weighing the strength of governmental interests and scrutinizing the narrowness of the means. That suggestion conflicts with the treatment of true threats as a category of speech that has historically lacked constitutional protection because of the propensity of such statements to create fear and disruption—results that are not ameliorated by a defendant's unexpressed intent. In any event, a restriction on true threats without regard to subjective intent would "serve a compelling state interest and [be] narrowly drawn to achieve that end." *Boos* v. *Barry*, 485 U.S. 312, 321 (1988) (citation omitted). The government has a compelling interest in eliminating fear and disruption, particularly when the government must respond by investigating the speaker and taking steps to protect against possible violent crimes against innocent people. And, as just explained, defining true threats by reference to the speaker's intent would weaken, not strengthen, the fit between the true-threat ban and the compelling interests it serves.

B. Both Precedent and History Demonstrate That True Threats May Be Proscribed Without Requiring Proof Of Subjective Intent To Threaten

The judicial and historical precedents reveal that a legislature's authority to protect its citizens from the fear and disruption caused by true threats does not require the government to establish, beyond a reasonable doubt, the private and unexpressed intent of the speaker.

1. In *Watts* v. *United States*, *supra*, the Court reviewed a conviction under 18 U.S.C. 871(a), which

prohibited "knowingly and willfully . . . [making] any threat" to injure or kill the President. 394 U.S. at 705 (quoting 18 U.S.C. 871(a) (1964)) (brackets in original). Interpreting the statute "with the commands of the First Amendment clearly in mind," the Court held that the statute "requires the Government to prove a true 'threat,'" a category that the Court "distinguished from * * * constitutionally protected speech." *Id.* at 707-708 (internal quotation marks and citation omitted). The Court then analyzed whether the defendant in the case had in fact made a true threat. *Id.* at 708. In concluding that he had not, the Court looked to the statement's "context," its "expressly conditional nature," and "the reaction of the listeners." *Ibid.* The Court did not look to the speaker's subjective intent to threaten.[3]

In *Virginia* v. *Black*, *supra*, the Court held that a Virginia statute banning cross-burnings with "an intent to intimidate a person or group of persons" was not impermissibly content-based. 538 U.S. at 347 (quoting Va. Code Ann. § 18.2-423 (1996)); see *id.* at 360-363. The Court reaffirmed that "the First Amendment * * * permits a State to ban a 'true threat,'" *id.* at 359, and explained that Virginia's prohibition regulated a type of unprotected speech particularly "likely to inspire fear of bodily harm." *Id.* at

---

[3] As petitioner observes (Br. 35-36), the Court did reserve the question "whether or not the 'willfullness' requirement of the statute implied that a defendant must have intended to carry out his 'threat.'" *Watts*, 394 U.S. at 707; see *id.* at 707-708. As a matter of First Amendment law, however, the Court has subsequently clarified that a "speaker need not actually intend to carry out [a] threat" in order for a statement to qualify as a "true threat." *Black*, 538 U.S. at 359-360.

362-363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate," as interpreted by the jury instructions given in Black's case, rendered the statute unconstitutional. *Id.* at 363-367 (plurality opinion). The plurality reasoned that because some cross-burnings may be protected "political speech" rather than "constitutionally proscribable intimidation," the statute as interpreted through the jury instructions "strips away the very reason why a State may ban cross burning with an intent to intimidate." *Id.* at 365.

Contrary to petitioner's suggestion (Br. 43-45), *Black* did not address, much less resolve, the question whether a speaker must have a subjective intent to threaten before his communication will be deemed a true threat. The Court's observation in *Black* 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," 538 U.S. at 359 (emphasis added), and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added), did not state or imply that the category of true threats is limited to such statements. The Court stated only that the category *includes* such statements. And because the Virginia statute at issue banned only a particular type of intimidation (itself only a subset of true threats), and expressly required an intent to intimidate, the Court had no occasion to consider whether a legislature's constitutional authority to ban true threats is defined by a speaker's subjective intent. See, *e.g.*, *Jeffries*, 692 F.3d at 479 (explaining that *Black* "says

nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so"); *id.* at 480-481 (noting agreement of other circuits); but see, *e.g.*, *United States* v. *Heineman*, No. 13-4043, 2014 WL 4548863, at *4-*8 (10th Cir. Sept. 15, 2014) (rejecting that view and noting Ninth Circuit's agreement).

Although *Black* did not address the issue, *Black*'s explanation of the reasons why legislatures may ban true threats supports the conclusion that their authority to do so does not depend on a speaker's subjective intent. The Court identified three governmental interests that "a prohibition on true threats" would serve: protecting individuals "from the possibility that the threatened violence will occur," protecting individuals "from the fear of violence," and protecting individuals "from the disruption that fear engenders." *Black*, 538 U.S. at 360 (quoting *R.A.V.*, 505 U.S. at 388). The Court clarified that a true-threat ban need not promote the first of these interests (protection from the possibility of violence) in order to be constitutional, explaining that a "speaker need not actually intend to carry out [a] threat" in order for the legislature to prohibit it. *Ibid.* And the remaining interests (protection from the fear and disruption that threats cause) do not depend in any way on the speaker's subjective intent. As previously discussed, a statement that a reasonable person would understand as expressing a serious intent to do harm will create fear and disruption whatever the speaker's private state of mind.

Petitioner also errs (Br. 44-45) in inferring the existence of a constitutional subjective-intent requirement from *Black*'s invalidation of the prima-facie-

evidence provision. Virginia law, as interpreted by the jury instructions in Black's case, provided that the act of cross-burning was prima facie evidence that sufficed to support a finding of an intent to intimidate. The plurality reasoned that, because cross-burning *can* have a protected political meaning, a ban on that activity must exclude its protected forms from prosecution, and Virginia's method to achieve that goal was to single out cross-burners who intend to intimidate. See 538 U.S. at 365-366 (plurality opinion); see also *id.* at 385-386 (Souter, J., concurring in the judgment in part and dissenting in part). But because the prima facie evidence provision effectively eliminated the statute's requirement to prove intent, a defendant could be convicted for burning a cross in the context of a movie, a play, or other situation in which a reasonable observer would have understood it not to be threatening. See *id.* at 367 (plurality opinion).

The prohibition of true threats in Section 875(c), however, does not operate as did the Virginia cross-burning statute: it does not target a highly specific activity (like cross-burning) that may be protected or unprotected depending on the circumstances. Rather, it reaches the category of threats, regardless of subject matter, but only when a statement amounts to a "true 'threat.'" *Watts*, 394 U.S. at 708. Accordingly, all of the speech covered by Section 875(c) consists of harmful activity that justifies regulation. Unlike in the Virginia statute in *Black*, proving subjective intent is not necessary to prevent the statute from sweeping in protected political (or artistic) speech.

2. Since the Eighteenth Century, legislatures and courts have proscribed and punished threats without requiring proof of a subjective intent to threaten. In

1754, the English Parliament enacted a statute making it a capital offense to "knowingly send any letter without any name * * * or signed with a fictitious name * * * threatening to kill or murder any of his Majesty's subject or subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money or venison or other valuable thing shall be demanded." 27 Geo. II, c. 15. Conviction under that statute, which included no explicit intent-to-threaten requirement, required only that the letter contained language conveying a threat and that the defendant knew of the contents of the letter.

In *King* v. *Girdwood*, (1776) 168 Eng. Rep. 173 (K.B.), for example, the trial court instructed the jurors that to determine whether the defendant had violated the statute, they should assess "[w]hether they thought the terms of the letter conveyed an actual threat to kill or murder." *Id.* at 173. "[I]f they were of the opinion that it did, and that the [defendant] knew the contents of it, they ought to find him guilty; but * * * if they thought he did not know the contents, or that the words might import any thing less than to kill or murder, they ought to acquit." *Ibid.* On appeal following conviction, the reviewing judges "thought that the case had been properly left to the jury." *Ibid.* Other cases, in analyzing the existence of a threat, similarly focused on the language of the letter at issue, not the state of mind of the sender. See 2 Edward Hyde East, *A Treatise of the Pleas of the Crown* 1116 (1806) (consideration of letter's "necessary construction" and how it "must be understood" in *Jepson & Springett's Case*); *Rex* v. *Boucher* (1831) 172 Eng. Rep. 826, 827 (K.B.) (consideration of whether letter "plainly convey[ed] a threat

to kill and murder," with no argument about subjective intent); *Rex* v. *Tyler* (1835), 168 Eng. Rep. 1330,1331 (K.B.) (consideration of whether "letter threatened" arson).

Between 1795 and 1887, seventeen States and Territorries enacted laws similar to the English prohibition on threatening letters.[4] The relevant statutes typically prohibited letters containing certain types of threats made with intent to extort, as well as letters containing certain other types of threats irrespective of intent. See, *e.g.*, 1795 N.J. Laws 108 (making it a misdemeanor for any person to "knowingly send or deliver any letter in writing, with or without a name subscribed thereto, or signed with a fictitious name, * * * threatening to accuse any person of a crime of an indictable nature by the laws of this state, with intent to extort from him or her any * * * valuable thing, or demanding money, goods or chattels, or other valuable thing; or threatening to maim, wound, kill or murder any person, or to burn his or her house, out-house, barn or other building, or stack or stacks of corn, grain or hay, *though no money, goods or chattels, or other valuable thing be demanded*") (emphases added).

Particularly in light of the similarity between these prohibitions and the 1754 English statute, the courts

---

[4] See 1795 N.J. Laws 108; 1816 Ga. Laws 178; 1816 Mich. Territory Laws 128; 1826 Ill. Laws 145; 1832 Fla. Laws 68; 1838 Iowa Acts 161; Mo. Rev. Stat. ch. 47, § 16, at 396 (1844-1845); 1850 Cal. Stat. 242; 1858 Neb. Laws 64; 1860 Pa. Laws 390; 1863 Idaho Sess. Laws 463; 1864 Mont. Laws 205; 1867 Colo. Sess. Laws 219; 1 J.R. Whitehead, Compiled Laws of Wyoming 267 (1876); 1 John P. Hoyt, The Compiled Laws of the Territory of Arizona 90 (1877); 1885 Nev. Stat. 39; 18 Del. Laws 450 (1887).

in the relevant States presumably looked to English case law—which, as discussed, did not require proof of an intent to threaten—in applying their own anti-threat statutes. See, *e.g.*, *Commonwealth* v. *Burdick*, 2 Pa. 163, 164 (Pa. 1845) (considering English cases persuasive authority in interpreting similar state statute); cf. Stephen Shute, *With and Without Constitutional Restraints*, 1 Buff. Crim. L. Rev. 329, 329-330 (1998) (observing that "during the latter part of the eighteenth century and early part of the nineteenth century, Blackstone's *Commentaries on the Laws of England* (1765-1769) wielded if anything a greater degree of influence in the American courts than they did in the courts of their country of origin"). And domestic case law, while sparse, is consistent with the absence of an intent-to-threaten requirement. See, *e.g.*, *Hansen* v. *State*, 34 S.W. 929 (Tex. Crim. App. 1896) (reasoning that a charge of sending a letter with intent to kill or injure required that "the *letter* clearly contain[] a threat") (emphasis added).

Petitioner accordingly errs in suggesting (Br. 38) that "it has always been understood" that statutes prohibiting the sending of threatening letters require some specific intent. Treatises cited by petitioner do not distinguish clearly between prohibitions on threats with intent to extort, which expressly required proof of intent, and the related, but distinct, prohibitions on threatening letters that contained no such requirement. See 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1201, at 664 & nn.5-6 (6th ed. 1877); 2 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 975, at 546 (1866). Likewise, the one case on which petitioner relies for the proposition that prosecutions under

threatening-letters statutes required proof of intent to threaten, *Norris* v. *State*, 95 Ind. 73 (Ind. 1884), actually involved a prosecution under a blackmailing statute with an express "intent to extort" element, *id.* at 76, not one of the many statutes that prohibited threatening letters without requiring proof of intent.

C. Prohibiting True Threats Without Proof Of Subjective Intent Does Not Unduly Restrict Expression

Petitioner contends (Br. 45-52) that even where a statement is threatening to a reasonable person, legislatures should be precluded from regulating it, as a prophylactic measure to avoid chilling legitimate protected speech. That approach has been rejected in the analogous contexts of fighting words and obscenity, and its speculative premise (that a subjective intent requirement is needed to avoid chilling valuable speech) is flawed.

1. In analogous categories of unprotected speech, proof of subjective intent is not required

a. This Court has not required proof of subjective intent in analogous circumstances involving other unprotected categories of speech. See *United States* v. *Martinez*, 736 F.3d 981, 987 n.3 (11th Cir. 2013) (per curiam) ("[O]bjective standards are not unusual in the free-speech context."), petition for cert. pending, No. 13-8837 (filed Feb. 21, 2014). A legislature can permissibly prohibit "so-called 'fighting words,'" *Cohen* v. *California*, 403 U.S. 15, 20 (1971), without regard to the speaker's state of mind. The Court has defined fighting words as those "personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Ibid.*; see *Chaplinsky*, 315

U.S. at 572 (defining "'fighting' words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

The definition of fighting words turns on how an "ordinary citizen" would react to the language used, not on the speaker's subjective intent. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940) (approving of the "many" decisions holding that someone may be convicted for "a breach of the peace" if he "make[s] statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended*") (emphasis added). As with true threats, allowing subjective intent to control ignores that the harms flow from the speech itself. And the Court has found a test that turns on reasonable understandings of one's words, in context, to be sufficiently protective of speech interests, notwithstanding that even a speaker with no intent to use fighting words will be held responsible for steering clear of such words in expressing his opinions and ideas.

The Court has also applied objective standards to the determination whether speech constitutes unprotected obscenity. Under *Miller* v. *California*, 413 U.S. 15 (1973), a legislature may prohibit materials as obscenity where (1) an "average person, applying contemporary community standards * * * find[s] . . . the work, taken, as a whole, appeals to the prurient interest"; (2) "the work * * * depict[s] or describ[es], in a patently offensive way, sexual conduct specifically defined by the applicable * * * law," and (3) "the work, taken as a whole, * * * lack[s] serious literary, artistic, political or scientific value." *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2744 (2011) (quoting *Miller*, 413 U.S. at

24). All elements of the *Miller* test turn solely on reasonableness or community standards. See *Ashcroft* v. *ACLU*, 535 U.S. 564, 576 n.7 (2002) (opinion of Thomas, J.) ("Although the phrase 'contemporary community standards' appears only in the 'prurient interest' prong of the *Miller* test, this Court has indicated that the 'patently offensive' prong of the test is also a question of fact to be decided by a jury applying contemporary community standards.") (citing *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987)); *id.* at 579 (plurality opinion) (third element requires examination of "whether a reasonable person would find value in the material, taken as a whole") (ellipses and citation omitted); see also *Hamling*, 418 U.S. at 120-124. None of the elements of the test for obscenity is based on the speaker's subjective intent.

Reliance on reasonable understandings and community standards to define obscenity is constitutionally sufficient, so long as the defendant knows the "character and nature" of the material, *Hamling,* 418 U.S. at 123, even though it exposes a speaker to prosecution despite his subjective view that his speech has "serious literary, artistic, political or scientific value" or does not offend community standards. See *id.* at 121 (rejecting constitutional rule under which "the belief of the accused as to what was obscene, lewd, and lascivious" would be controlling). Speakers thus bear the onus to avoid communicating through what a jury will find obscene, just as speakers who are aware of the meaning and context of their statements bear the onus to avoid communicating through true threats.

Petitioner provides no sound reason for distinguishing the two contexts.[5]

b. Petitioner maintains (Br. 39) that the Court "has repeatedly insisted * * * that before a person can be held liable for speech, there must be proof he acted with culpable intent," but fails to address the absence of such requirements in fighting words and obscenity. Instead, he focuses on other types of speech less analogous to threats—primarily, speech inciting others to commit illegal acts, see Pet. Br. 39-41. It is not entirely clear that proof of subjective intent is constitutionally required for incitement. This Court has sometimes described incitement in part by reference to whether particular *words* were "directed," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), or "intended," *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam), to incite imminent lawless action. But those shorthand descriptions may refer to the objec-

---

[5] This Court has also described solicitation of crime as unprotected speech, see *United States* v. *Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), without suggesting that a person who was aware of the meaning and context of his solicitation but did not intend to solicit a crime would be immunized from prosecution. Because solicitation statutes typically require proof of subjective intent, the question whether it is constitutionally required has only rarely arisen. But one case to consider whether a speaker's solicitation of crime was constitutionally protected concluded that there was "sufficient likelihood of his solicitation being interpreted as a call to arms, * * * rather than as a communication of ideas through reasoned public discussion, to remove it from the category of protected speech" and to preclude dismissal of the charges. *People* v. *Rubin*, 96 Cal. App. 3d 968, 980 (Cal. Ct. App. 1979), cert. denied, 449 U.S. 821 (1980).

tive manifestation of intent communicated by the statements. See *White*, 670 F.3d at 511-512 ("[T]he *Brandenburg* test only requires that the speaker use specific words advocating unlawful conduct. It does not require that the speaker have a specific intent to incite unlawful conduct."); see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (noting, without reference to an intent requirement, a "substantial question" whether a speaker whose "strong language" is "followed by acts of violence" may "be held liable for the consequences of that unlawful conduct").

In any event, in the context of incitement, an intent requirement would be a substitute for, rather than a replacement of, a reasonable-person standard. Incitement cannot be defined analogously to true threats by measuring the reactions of a reasonable person aware of the context. Criminal conduct is never a legally "reasonable" reaction. A prophylactic subjective-intent requirement in incitement, where a reasonable-person inquiry cannot work, does not indicate that *both* are required in the distinguishable context of true threats.

Petitioner's reliance (Br. 41-43) on mens rea requirements for certain kinds of false speech is likewise misplaced. Had petitioner made a false statement that injured his wife's reputation—a statement far less harmful than the posts that put her in fear for her life—he could have been found liable in tort under a negligence standard. See *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 773-775 (1986) (observing that a plurality of the Court has held this standard sufficient even for presumed and punitive damages for false speech about a private figure on matter of pri-

vate concern). Decisions of this Court requiring recklessness or knowledge of falsity in certain public contexts are based on considerations absent from the true-threats context. Because complete accuracy is impossible, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964), requiring perfect fact-checking of certain publicly-focused speech would inevitably delay or suppress important and truthful contributions to the marketplace of ideas. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340-341 (1974); see also *Illinois* v. *Telemarketing Assoc.*, 538 U.S. 600, 620 (2003) (protected fundraising). A scienter requirement thus protects valuable speech. But no similar free speech values apply in the context of true threats, where a rigorous reasonable-person standard protects sharp, caustic, or artistic comments, and the making of a true threat inflicts immediate and serious personal and societal harms. Speakers are expected to avoid inflicting those harms, just as they are expected to avoid using fighting words.

2. Speculation about chilling speech does not support an intent-to-threaten requirement

Petitioner asserts (Br. 45-52) that failure to require proof of subjective intent will chill protected speech because it depends too much on the determinations of juries and creates an unacceptably high risk of punishing mere "misunderstandings." A jury properly instructed on the reasonable-person definition of true threats, however, should not convict a defendant based on a legitimate misunderstanding. The requirement of proof beyond a reasonable doubt affords considerable protection in this setting, just as it does in refuting vagueness claims, in the regulation of speech, based on the "mere fact that close cases can

be envisioned." *United States* v. *Williams*, 553 U.S. 285, 305-306 (2008). If the potentially innocuous contextual meaning of the defendant's statement might not be readily apparent to the jurors from their personal experiences (see Pet. Br. 48-49), a defendant is free to introduce evidence on that point, including his own testimony, testimony of others in his community, or even expert testimony. The criminal-justice system traditionally trusts juries to set aside their preconceptions and reach reasoned disinterested conclusions, even when the outcome cannot be predicted with complete certainty before trial. Such trust is no less warranted in this setting than in others.

The record in this case illustrates how a reasonable-person standard for true threats is administrable for both prosecutors and juries. Petitioner contends (Br. 51-52) that treating his post of the photo holding a knife to his coworker's neck as a threat would reflect a serious misunderstanding of his humorous intent. The government, however, did not prosecute petitioner for making that post. See J.A. 272 (government's closing argument stating that Count 1 charged only later posts). And the jury drew careful distinctions between the various posts by acquitting on the posts allegedly threatening the employees and patrons of the amusement park, but convicting on the posts concerning petitioner's wife, law enforcement, local kindergartens, and the FBI agent. Pet. App. 10a.

b. Petitioner suggests (Br. 53-57) that in the absence of an intent-to-threaten requirement, artists will be chilled from producing the sort of "fantasies of the aggrieved" that he asserts have "been a staple of popular culture during most of recorded history." Yet he acknowledges that such art has "arguably * * *

reached its apotheosis in rap music" written and distributed during a period when the federal courts of appeals have almost uniformly applied a reasonable-person standard to threat prosecutions under Section 875(c). Pet. Br. 54-55 & nn. 12-15; see Br. in Opp. 14 (citing cases from a large majority of the circuits adopting that view).

If rap music has thrived in that legal environment, a true-threats standard that does not require proof of subjective intent can hardly be thought to chill the speech that petitioner highlights. The reason that petitioner can confidently cite the rapper Eminem's lyrics as examples of art, rather than threats, is that no reasonable person would understand those lyrics, in the full context in which they were delivered and publicized, to "communicate a serious"—*i.e.*, real—"expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." J.A. 301. As petitioner himself recognizes (Br. 54), such lyrics are plainly "hyperbole." See *Jeffries*, 692 F.3d at 482 ("[T]he method of delivering a threat illuminates context, and a song, a poem, a comedy routine or a music video is the kind of context that may undermine the notion that the threat was real."). Petitioner has not identified even a single example of a threat conviction (or even a prosecution) of speech of that sort.

Petitioner's suggestion (Br. 55-57) that his own speech was indistinguishable from the speech of the various commercial artists he claims to have imitated wholly disregards the very different contexts in which his own statements were made. Petitioner's post asking whether his wife's restraining order was "thick enough to stop a bullet," even if classified as rap, was

threatening in light of petitioner's evident emotional disturbance following the breakdown of his relationship with his wife, Pet. App. 3a; his previous posts threatening to kill his wife in particularly graphic ways, see, *e.g.*, J.A. 344 (post stating that petitioner would not "rest until [his wife's] body is a mess, [s]oaked in blood and dying from all the little cuts"); and his awareness of his wife's request for and receipt of the referenced restraining order based in large part on the fear inspired by those previous posts, Pet. App. 4a; J.A. 149-150, 255. Eminem's lyrics, Bob Dylan's music, and other examples cited by petitioner do not involve factual backdrops even remotely analogous to those deeply disturbing events. By the same token, while a comedian's satire about threatening the President would not reasonably be viewed as a threat, a perversion of that satire that specifically referenced petitioner's wife (and the house where she lived) is threatening, particularly in light of petitioner's stated willingness to "go to jail" for having made the post. J.A. 333.[6]

---

[6] Petitioner cites only one "not hypothetical" (Br. 51) case, *United States* v. *Fulmer*, 108 F.3d 1486 (1st Cir. 1997), to support his theory that a true-threats test will chill protected speech. But that case involved not rap music, personal expression, or political speech, but direct communications to an FBI agent who declined to support a prosecution the defendant favored, prompting the defendant's call to the agent that "[t]he silver bullets are coming." *Id.* at 1490. As the court of appeals noted, the jury was in a position to assess the tone of the defendant's voice and the credibility of witnesses in resolving ambiguities in the statement. *Id.* at 1492. In any event, the defendant was charged with violating 18 U.S.C. 115(a)(1)(B) (1994), which prohibited only threats made with "intent to impede, intimidate, or interfere with" a federal official in the performance of official duties, or with "intent to retaliate

In petitioner's view, no matter how clear it is that a threat would be taken as a serious intention of an intent to do harm, such as "declaring that three Seventh Circuit judges deserved to die for their recent decision that the Second Amendment did not apply to the states," *United States* v. *Turner*, 720 F.3d 411, 413 (2d Cir. 2013), petition for cert. pending, No. 13-1129 (filed Mar. 24, 2014), the defendant is constitutionally entitled to avoid conviction based on his own subjective belief that the communication will not be understood as threatening. A defendant who is familiar with the meaning of the words spoken and their context, however, can constitutionally be held accountable for the immediate and serious harms that true threats inflict. The First Amendment's protection of free speech—which has historically coexisted with a categorical denial of protection to true threats—does not demand otherwise.

---

against" that official "on account of the performance of official duties." See 108 F.3d at 1489. *Fulmer*'s facts thus cannot support petitioner's thesis that a subjective-intent element is the cure-all for an errant threats prosecution. One amicus brief mentions a case in which a teen was charged for making a Facebook comment about his intention to shoot a kindergarten class. See Student Press Law Center Amicus Br. 17-18. He, too, was charged under a statute that requires proof of intent. See Mac McCann, *Facebook 'Threat' Case Unresolved*, Austin Chronicle (Feb. 28, 2014), http://www.austinchronicle.com/news/2014-02-28/facebook-threat-case-unresolved.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

SEPTEMBER 2014