ISSUE

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Can a Facebook Poster Be Punished If a "Friend" Finds It Threatening?

YES: **Donald B. Verrilli, Jr. et al.,** from "Brief for the United States, *Elonis v. United States*" (U.S. Supreme Court, 2014)

NO: **John Elwood et al.,** from "Brief for the Petitioner, *Elonis v. United States*" (U.S. Supreme Court, 2014)

Learning Outcomes

After reading this issue, you will be able to:

- Discuss the contested role of intent in establishing the criminal culpability of a threat.
- Understand how Facebook posts could count as "interstate commerce" in the context of criminal law.
- Understand the legal distinction between true threats and protected speech (such as song lyrics) that could be considered threatening in tone.

ISSUE SUMMARY

YES: Solicitor General Donald B. Verrilli, Jr. argues that if a reasonable person would feel threatened by a Facebook post, it should be considered a true threat culpable under criminal law.

NO: Supreme Court litigator John Elwood argues that in order for a Facebook post to be considered a true threat, the poster must specifically intend that it be read as threatening.

Although the First Amendment prescribes that "Congress shall make no law . . . abridging the freedom of speech," in practice the judges have declared that certain categories of expression are legally unprotected. These categories are often anchored in metaphors, such as "shouting fire in a crowded theater" or "fighting words," which have transcended the language of legal opinions.

One such category of traditionally unprotected speech is "true threats," established inferentially by the Supreme Court in *Watts v. United States*. In 1966, an anti-draft activist named Watts told a group of protestors, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Watts was arrested and charged under a federal law that makes it illegal to threaten the life of the president. The Supreme Court quickly concluded, however, that this statement was "political hyperbole" and that, "taken in context," was not a "true threat," and reversed Watts' conviction.

The Supreme Court was so convinced of its conclusion in *Watts* that it didn't bother to hear arguments or issue a full decision. Instead, its short *per curiam* opinion skips nimbly over the question of what *would* constitute a true threat, including whether intent to carry out the threat—or what the Court in *Watts* calls "willfulness"—is required for a threat to be true. This unanswered question of the role of intent in establishing the truth of a threat has now come again before the Court with a little help of an amusement park employee with a troubling Facebook account.

In May 2010, Anthony Elonis, a 27-year-old employee of the Wildwater Kingdom amusement park in Allentown, Pennsylvania, began posting public, violent updates to his Facebook page. In one post he wrote: "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." Elonis, who had recently been left by his wife of 7 years, contacted his sister-in-law to make sure that his wife had read the post, and she soon filed a restraining order against him. A week later, he posted another public status update that began "Fold up your [restraining order] and put it in your pocket/Is it thick enough to stop a bullet? . . . ."

Elonis soon was fired from his job at the amusement park after he posted a picture of himself holding a knife to the throat of a female employee who had filed five sexual-harassment complaints against him. A few days later, he posted about shooting up a kindergarten classroom, which earned him a visit from an FBI special agent. After the agent left his house, Elonis posted publicly that it "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 the jugular in the arms of her partner . . . ." He was soon indicted, tried, and found guilty of multiple counts of the interstate communication of threats.

Elonis appealed his conviction on First Amendment grounds, arguing that he did not actually intend to threaten anyone or to carry out the acts described in his posts, which he compared to rap lyrics and other forms of violent but protected expression. Indeed, he had specifically characterized some of his posts as lyrics when he posted them, and in several had linked to the Wikipedia entry on the First Amendment. His case was heard by the Supreme Court in December of 2014 and received some notoriety as probably the first time Eminem has ever been quoted from the bench by a Chief Justice.

At issue is the interpretation of 18 U.S. Code § 875(c), a 1939 law that prescribes: "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." While prior legislation had only criminalized extortion through interstate commerce, Congress authored 875(c) specifically with examples such as "a mentally irresponsible fellow who might send a threatening letter to a judge" in mind.

The question at the heart of *Elonis* is this: Who decides what counts as a true threat? At trial, a federal judge instructed the jury that it could find Elonis guilty if an average person would believe his posts were intended as a threat, but Elonis argued that such a standard could find him guilty of a state of mind he had never actually held. Upon agreeing to hear the case, the Supreme Court specifically directed the parties to answer the question of whether 875(c) "requires proof of the defendant's subjective intent to threaten." Put another way: Does the law require the state to prove that Elonis actually intended to threaten his wife, his employee, or the FBI agent, or merely that they (or any reasonable person) would find his posts threatening?

Whatever standard the Court develops to decide *Elonis* could affect millions of ordinary Americans who use Facebook or other social media systems. While most of us will never publish posts as disturbing as Elonis's, we might well post content that, while *intended* as jest or art, could easily be read/misread as threatening with potentially serious consequences. The importance of this case can be inferred from the many *amici* ("friends of the court") who have filed briefs on behalf of each party, sometimes as part of surprising coalitions. Elonis has received support not only from the "usual suspects" of free speech litigation like the American Civil Liberties Union and the National Coalition Against Censorship, but also from the People for the Ethical Treatment of Animals, Citizens for a Pro-Life Society, Student Press Law Center, and Rap Music Scholars project; meanwhile, the United States has received support from the Anti-Defamation League, National Network to End Domestic Violence, and 18 states plus Guam. The shape of these unlikely alliances illustrates the idiom that "politics makes strange bedfellows," and reminds us that the law is also political process. A decision in the case will be handed down by the Supreme Court in May or June 2015.

YES

Donald B. Verrilli, Jr. et al.

Brief for the United States, *Elonis v. United States*

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.

. . . 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. . . .

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.

. . . 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.

. . . 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. . . .

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)

. . . *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. The mere possibility that a reasonable person could conceivably have interpreted the statement as a true threat does not suffice for conviction.[1]

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."

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.

. . . 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 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); 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. . . .

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 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 serious 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. 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. . . .

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

Petitioner asserts 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. 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.

a. 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).

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." . . .

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, . . . 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.[3]

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.

Conclusion

The judgment of the court of appeals should be affirmed.

Donald B. Verrilli, Jr. is the Solicitor General of the United States, and thus responsible for representing the federal government before the Supreme Court. Prior to being appointed Solicitor General, he was Deputy Counsel to the President, and has participated in more than 100 cases before the Supreme Court in both public and private practice. He graduated with a BA from Yale and a JD from Columbia Law School.

Notes

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 articulation 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).
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.
3. 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 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.

John Elwood et al.

NO

Brief for the Petitioner, *Elonis v. United States of America*

Statement

Petitioner stands convicted of violating 18 U.S.C. §875(c), prohibiting the interstate transmission of "any communication containing . . . any threat to injure the person of another," 18 U.S.C. §875(c). During petitioner's trial, it was settled law in the Third Circuit that whether the defendant *intended* to threaten someone was irrelevant: As the government explained, "it doesn't matter what he thinks." All that mattered was whether "the defendant intentionally ma[d]e a statement . . . under such circumstances wherein a reasonable person would foresee that the statement would be interpreted" as a threat. *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991). At the government's urging, the district court rejected petitioner's requests that the question of his intent to threaten be put to the jury.

Under the Third Circuit's objective construction, Section 875(c) implicates two types of speech restrictions that this Court has said pose particular risks to free expression. First, this Court has identified criminal prohibitions on pure speech as "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. 844, 871–872 (1997). The mere "threat of criminal prosecution . . . can inhibit the speaker from making [lawful] statements," thereby chilling "speech that lies at the First Amendment's heart." *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

Second, this Court has held that "negligence . . . is [a] constitutionally insufficient" standard for imposing liability for speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288 (1964). And as Justice Marshall explained, "[i]n essence, the objective [threat] interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Rogers v. United States*, 422 U.S. 35, 47–48 (1975). "Because First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), a standard that punishes a speaker for negligently *failing to foresee* how listeners would perceive his statements, irrespective of his intent in speaking, would deter a broad array of protected expression.

A standard that is disfavored even for civil penalties is intolerable as a basis for imposing criminal punishment on pure speech, "discouraging the 'uninhibited, robust, and wide-open' debate that the First amendment is intended to protect." *Rogers*, 422 U.S. at 47–48 (Marshall, J., concurring). Consistent with that understanding, this Court held in *Virginia v. Black*, 538 U.S. 343 (2003), that constitutionally unprotected "true threats" are "those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence" on someone. *Id.* at 359 (emphasis added). If Section 875(c) imposes criminal liability for negligently failing to anticipate that remarks would be seen as threats, its application to petitioner violated the First Amendment.

But the Court need not reach the constitutionality of the Third Circuit's strained "objective" interpretation of Section 875(c). Straightforward principles of statutory construction compel the conclusion that the provision prohibits only *intentional* threats, consistent with the ordinary meaning of "threat," see p. 23, *infra*, and the presumption that Congress "legislated against the background of our traditional legal concepts which render intent a critical factor," *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978).

Because it is undisputed that the jury was never asked whether petitioner intended to threaten anyone before he was found guilty and sentenced to serve three years and eight months in federal prison for a crime of pure speech, his conviction is invalid. The judgment of the Third Circuit must be reversed. . . .

Summary of Argument

The Third Circuit's negligence standard for criminalizing pure speech conflicts with the plain language of 18 U.S.C. § 875(c). The statutory term "threat" ordinarily means a

communications with intent to cause fear, and its everyday usage confirms that a statement's status as a threat turns on the speaker's intent. The legislative history of Section 875(c), which was derived from an earlier extortion statute, confirms Congress broadened the provision to address intentional threats whether the motive for threatening was to acquire money or other personal advantage, but not to dispense with the intent that the statement be a threat. The earliest court of appeals decisions confirm that "18 U.S.C. § 875(c) requires a showing that a threat was intended." *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966).

. . . Without a subjective intent requirement, Section 875(c) would impose criminal punishment for negligent speech in violation of the First Amendment. The First Amendment's basic command is that the government may not prohibit the expression of an idea simply because society finds it offensive or disagreeable. Content-based speech restrictions are presumed invalid, subject only to narrow and limited historical exceptions, but speech cannot be "exempted from the First Amendment's protection without a[] long-settled tradition of subjecting that speech to regulation." *United States v. Stevens*, 559 U.S. 460, 469 (2010). There is no tradition of regulating speech as threats regardless of the speaker's intent; since the early days of American law, it has been understood that to be punishable, statements "must be intended to put the person threatened in fear of bodily harm." *State v. Benedict*, 11 Vt. 236, 237–238 (1839). Moreover this Court has repeatedly insisted on a showing of culpable intent before a person can be held liable for speech. Thus, this Court has required proof a speaker subjectively intended incitement, defamation commonly requires proof the speaker acted with "actual malice," and proof of intentional misstatements is "[o]f prime importance" to establishing liability for falsehoods. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); see also *United States v. Alvarez*, 132 S. Ct. 2537 (2012). And in *Virginia v. Black*, this Court wrote that constitutionally unprotected "true threats" are "those statements where the speaker *means to communicate* a serious expression of an intent to commit . . . unlawful violence." 538 U.S. 343, 359 (2003).

Imposing criminal liability under a negligence standard would impermissibly chill speech. The vagueness, inconsistency and unpredictability of the "reasonable person" standard deprives speakers of any certainty that their comments are lawful, thereby discouraging speech. By its nature, the negligence standard's focus on third-party reactions discriminates against unfamiliar minority viewpoints. The negligence standard has *already* resulted in criminal convictions for poorly chosen words, and the risk of conviction for "felony misunderstanding" is greater still with online and electronic communications, which eliminate the inflections and expressions that give meaning to words and reduce speakers' ability to detect and correct misimpressions. Moreover, if petitioner's writings were—as he has always maintained— therapeutic efforts to address traumatic events rather than intentional threats, they are protected speech. The negligence standard would impose criminal liability on a vast array of first-person revenge fantasies that have always been staples of popular culture. The negligence standard affords differing degrees of protection to identical words based solely on the identity of the speaker.

The government has not rebutted the presumptive invalidity of the negligence standard. It has never shown that jurisdictions requiring proof of subjective intent systematically fail to protect individuals from threats, and the pervasiveness of electronic communications improve the government's ability to prove subjective intent. Finally, this Court has consistently rejected the idea that speech should be sacrificed for hypothetical benefits to law enforcement.

Argument

I. The Text of Section 875(c) Requires Proof of Subjective Intent to Threaten

. . . This intuitive understanding is confirmed by everyday use. Two of the most common responses to menacing-sounding statements (and indeed, two of the most common uses of forms of the word) are "Is that a threat?" and "Are you threatening me?"[1] Those questions plainly inquire into *the speaker's intent*; they would be unnecessary (indeed, nonsensical) if a statement's status as a threat turned on a reasonable person's perception.

B. Legislative History and Early Case Law Confirm the Need for Specific Intent

1. The history of Section 875 reinforces this commonsense understanding. The first national law addressing the communication of threats was the Patterson Act, enacted in 1932 in response to the Lindbergh baby kidnapping. See Act of July 8, 1932, Pub. L. No. 72–274, 47 Stat. 649, codified at 18 U.S.C. §876. The law was directed exclusively at extortion, and thus textually prohibited only a "demand or request for ransom" "with intent to extort." 47 Stat. 649. "From the beginning, the communicated 'threat' thus had a subjective component to it." 692 F.3d at 484 (Sutton, J., concurring *dubitante*).

Seven years later, at the request of the Justice Department, Congress created a new provision to address cases where defendants were not explicitly extorting something

for themselves, but were seeking something of value for a third party (*e.g.*, threatening an official to coerce release of a third party from prison), or making threats "on account of revenge or spite" or "animosity" without "any motive or purpose to extort money." *Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads*, 76th Cong. 7, 9 (1939). . . .

C. The Negligence Standard Impermissibly Chills Protected Speech

Time and again, this Court has written that criminal prohibitions are "matter[s] of special concern" under the First Amendment because "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. 844, 871–872 (1997); accord *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment). "Because First Amendment freedoms need breathing space to survive, government may regulate [speech] . . . only with narrow specificity," *Button*, 371 U.S. at 433, "extreme care," *Claiborne Hardware*, 458 U.S. at 927, and "exacting proof requirements." Madigan, 538 U.S. at 620.

1. The Negligence Standard Is Indeterminate and Unpredictable

The negligence standard is the polar opposite of regulating with "extreme care." Under it, "it doesn't matter what [the defendant] thinks." J.A.286. Punishment is based not on what the defendant intended to communicate, or even the message he would have foreseen had he not "consciously disregard[ed] a substantial and unjustifiable risk" his statement would be construed as a threat. MPC § 212.5 cmt. 2. Instead, it imposes criminal liability based on jurors' determination, months or years later, that a speaker has negligently misjudged how his audience would view his remarks. . . .

Liability thus turns on the happenstance of the individual jurors selected to serve, which creates additional uncertainty in an increasingly heterogeneous and fractured society. It is telling that of petitioner's nearly three hundred "friends," only one person—Chief Hall of the Dorney Park Patrol, with his "very limited" Facebook knowledge—was moved to report petitioner's posts to law enforcement; nor is there any indication users sought to "report" or "flag" petitioners' posts to Facebook, although that is simple to do. J.A.102, 105. Had jurors been seated like the Facebook user who "liked" petitioner's school-shooting post, evidently understanding it was not meant literally; like the user who thought it was ridiculous that petitioner was fired for the "I wish" caption (or the user who "liked" her comment); and the users who "friended" petitioner throughout this period, *e.g.*, J.A.329, the outcome in this case could have been completely different. The vagueness and indeterminacy of the negligence standard heightens its deterrent effect upon speech. . . .

3. The Negligence Standard Criminalizes Misunderstandings, Which Are Increasingly Likely Using New Communications Media

Because of the limitations of language and differences in how people read others' signals, miscommunication is inescapable, even for face-to-face meetings and telephone calls. The potential for misunderstanding is multiplied when using email, where the communications lack the cues of "[g]esture, voice, expression, context," which do "more than merely supplement" the meaning of words used, but "alter it completely." Justin Kruger et al., *Egocentrism Over E-Mail: Can We Communicate as Well as We Think?*, 89 J. Personality & Soc. Psychol. 925, 933 (2005). The potential for misunderstanding is multiplied "in the context of Internet postings, where the tone and mannerisms of the speaker are unknown," Kyle A. Mabe, Note, *Long Live the King*: United States v. Bagdasarian *and the Subjective-Intent Standard for Presidential "True-Threat" Jurisprudence*, 43 Golden Gate U. L. Rev. 51, 88 (2013), and the speaker may not witness the listener's reaction and thus know to correct misimpressions. . . .

It is not hard to imagine a benign statement being misconstrued as a threat. A statement that the listener "will regret" a course of action is frequently intended to advise the person of a belief the listener will later think better of it, or that it will turn out badly; but the listener could also interpret it as a threat that the speaker will *make* the listener regret it by inflicting harm if that course is pursued. Such misunderstandings are common. See, *e.g.*, *Exchange Between Bob Woodward and White House Official in Spotlight*, CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. There are many sensitive situations—say, a picketer addressing visitors to a health clinic, or a husband texting his wife about plans to move out—where a negligence standard would transform a common misunderstanding into a felony. . . .

D. Absent Intent to Threaten, Petitioner's Posts Were Protected Speech

. . . [U]nder the government's theory, *any* discussion of violent subjects that a jury later ties to an actual person is fairgame for a threat prosecution. . . . The speaker's views are irrelevant, so long as a hypothetical "reasonable person" would view them differently.

That view would subject to prosecution works that have been a staple of Western writing since the curse poems

of antiquity. The fantasies of the aggrieved have been a staple of popular culture during most of recorded history. . . .

First-person revenge fantasies are such a prevalent theme of blues music as to be cliche.[2] Similar sentiments are commonplace in rock[3] and country music.[4] But arguably, they have reached their apotheosis in rap music, which has pushed the boundaries of hyperbole. Marshall Mathers, known as "Eminem," recorded several graphic songs addressing his divorce and resulting custody issues with his daughter. . . .

However hateful or offensive, those songs are entitled to full First Amendment protection. The same protections extend to the efforts of amateurs writing on comparable themes, moved by similar experiences. While private citizens' writings may not rival the output of Bob Dylan, "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Stevens*, 559 U.S. at 479–480 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)); cf. also *State v. Skinner*, No. A-57/58-12, slip op. 35 (N.J. Aug. 4, 2014). . . .

According to the government, it is irrelevant if Facebook users post song lyrics like those above, or post similar compositions of their own for reasons entirely divorced from any wish to place another person in fear: All that matters is whether a jury would determine that an objective observer would perceive the statement as a threat. That view affords differing degrees of protection to identical words based solely on the identity of the speaker. Thus, Eminem can freely record a fantasy about murdering his ex-wife and disposing of her body with his daughter; another person might lawfully post the song lyrics to Facebook recalling a long-ago custody battle; but if a person posts them because he considers the song a brilliant "parody of [singer] Will Smith's unctuous 'Just the Two of Us'" (about Smith's relationship with his son),[5] he has committed a felony if he is in a souring relationship and, unbeknownst to him, a "reasonable" person would consider the words threatening. . . .

In an increasingly pluralistic society, some offensive speech "must be expected in social interaction and tolerated without legal recourse." 2 Restatement (Third) of the Law Torts § 46, at 138. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Free Speech Coalition*, 535 U.S. at 255.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Appendix

Section 875 of Title 18 of the United States Code provides:

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, 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 twenty years, or both.

(c) 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.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

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Notes

1. *E.g., Is that a threat?*, TV Tropes, http://goo.gl/qwzirC (collecting examples).
2. See, *e.g.*, Skip James, *.22–20 Blues* (Paramount 1931) ("My baby gets unruly and she don't wanna do/take my .22–20 and I cut her half in two"); Lightnin' Hopkins, *Shotgun Blues* (Aladdin 1950) ("She done put me out of doors/but I even ain't got no home as it goes/Bring me my shotgun/Oh

Lord, and a pocketful of shells"); Guy Davis, *Long As You Get It Done, on* Legacy (Red House 2004) ("sharpened up my razor/loaded up my gun/ gonna cut you if you stand/gonna shoot you if you run"); Bob Dylan, *Someday Baby, on* Modern Times (Columbia 2006) ("Well, I don't want to brag, but I'm gonna wring your neck/When all else fails I'll make it a matter of self-respect/Someday baby, you ain't gonna worry po' me anymore.")

3. *E.g.*, Guns 'n Roses, *Used to Love Her, on* Lies (Geffen 1988) ("I used to love her but I had to kill her"); Green Day, *Platypus (I Hate You), on* Nimrod (Reprise 1997) ("Red eye, code blue, I'd like to strangle you/and watch your eyes bulge right out of your skull/when you go down head first into the ground/I'll stand above you just to piss on your grave").
4. Miranda Lambert, *Gunpowder and Lead, on* Crazy Ex-Girlfriend (Columbia 2007) ("I'm goin' home, gonna load my shotgun/wait by the door and light a cigarette/he wants a fight, well now he's got one/and he ain't seen me crazy yet"); Dixie Chicks, *Goodbye Earl, on* Fly (Sony 1999) ("Those black eyed peas/They tasted alright to me Earl, you're feelin' weak/Why don't you lay down and sleep, Earl/Ain't it dark, wrapped up in that tarp, Earl").
5. See David Browne, *The Slim Shady LP*, Entertainment Weekly, Mar. 12, 1999, http://goo.gl/Os5c3M.

EXPLORING THE ISSUE

Can a Facebook Poster Be Punished If a "Friend" Finds It Threatening?

Critical Thinking and Reflection

1. If the Supreme Court decides that intent to threaten is a component of a true threat, what impact might that have on victims of domestic violence or other forms of assault?
2. Have you ever posted anything (perhaps as a joke) on Facebook that could be considered threatening by a jury?
3. Do you think different laws should apply to Facebook and other social media sites?

Is There Common Ground?

At the time of this writing, the Supreme Court has not yet issued a decision in *Elonis*, and it remains to be seen how much common ground the Court will be able to create between the parties and their deeply divided *amici*. During the oral argument in this case, the Court occasionally seemed at a loss to make sense of its own past actions: Justice Kennedy remarked from the bench that "I'm not sure that the Court did either the law or the English language much of a good service when it said 'true threat'," while Justice Ginsburg wondered aloud "How does one prove what's in somebody else's mind?" The Court will find a way to resolve this question because that is what the Court does, but it will be interesting to see how they do it.

Another metaphorical meaning of "ground," inspired by perceptual psychology, is that thing that is taken for granted and uncontested, something solid and broad enough that everyone can "stand" on it. In that sense, perhaps the greatest "common ground" to be found in this case is that, although the Facebook platform was the site of the alleged crime, *Elonis* does not read like a traditional "cyberlaw" case, with broad claims about "cyberspace" as a different type of legal place that should be treated differently. Aside from serving as the jurisdictional hook (i.e., Elonis can be charged for the interstate communication of threats because the digital information composing his Facebook posts crossed state lines in transit to Palo Alto and back), neither party argues that there ought to be any exceptional treatment for speech merely because it was communicated online.

As recently as a decade ago it was still common to hear arguments that the Internet was a different "place" where different legal rules ought, even must, apply. In *Elonis*, however, the Court appears inclined to treat speech expressed through Facebook as it would speech expressed through other, "older" media. Whatever the Court does with (or to) the true threat doctrine in *Elonis*, its unassuming treatment of Facebook may signal its willingness to continue to collapse the once-popular distinction between online and offline.

Additional Resources

"Argument Analysis: Taking Ownership of an Internet Rant," www.scotusblog.com/2014/12/argument-analysis-taking-ownership-of-an-internet-rant/

Oral arguments in *Elonis v. US*, www.oyez.org/cases/2010-2019/2014/2014_13_983

Proceedings and Orders of *Elonis v. US*, www.scotusblog.com/case-files/cases/elonis-v-united-states/

Internet References . . .

Drawing the Line Between Therapy and Threats: In Plain English

www.scotusblog.com/2014/11/drawing-a-line-between-therapy-and-threats-in-plain-english/

The Nuances of Threats on Facebook

www.newyorker.com/news/news-desk/nuances-threat-facebook

What Is a True Threat on Facebook?

www.nytimes.com/2014/12/02/opinion/what-is-a-true-threat-on-facebook.html