No. 13-983

In the Supreme Court of the United States

ANTHONY D. 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 PETITIONER

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QUESTIONS PRESENTED

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

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, consistent with the First Amendment and *Virginia* v. *Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten; or whether it is enough to show that a "reasonable person" would regard the statement as threatening.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013, and a timely petition for panel rehearing and rehearing en banc was denied on October 17, 2013. On January 6, 2014, Justice Alito extended the time for filing a petition for a writ of certiorari to February 14, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 16, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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.

Other relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a.

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." J.A.286. 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. Pet. App. 12a (quoting *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) (Marshall, J., concurring); accord *United States* v.

Jeffries, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*) (test "reduces culpability * * * to negligence"), cert. denied, 134 S. Ct. 59 (2013). "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 "legis-

lated 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), so that courts "presume a scienter requirement in the absence of express contrary intent." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994).

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.

A. Factual Background

1. This case arises out of posts petitioner made during October-November 2010 on the social media website Facebook. Facebook provides its users with a home page on which a user can post comments, photos, and links to other websites. Facebook users may become "friends" with other users. See generally E.A. Vander Veer, *Facebook: The Missing Manual* (2008), *available at* http://goo.gl/UFlK3l. Depending on the user's privacy settings, a Facebook user's home page may be viewed only by that user's "friends," or by any Facebook member who searches for that person's screen name.

Posts that a member makes on that member's home page may automatically appear in their friends' "news feed," a listing of a user's friends' recent postings. In addition, when a member posts a comment on that home page, the member has the option of "tagging" other Facebook users (including users who are not friends); doing so makes the "tagged" post ap-

pear on the "tagged" member's page. Unless two users are friends, or one "tags" the other, a Facebook user must affirmatively visit a member's page to view posts written there. See generally *Thompson* v. *Autoliv ASP, Inc.*, No. 2:09-cv-01375-PMP-VCF, 2012 WL 2342928, at *4 n.4 (D. Nev. June 30, 2012).

2. During these events, petitioner was 27 years old. In May 2010, petitioner's wife of nearly seven years left him, taking their two children. Afterward, petitioner's supervisor at Dorney Park and Wildwater Kingdom, an amusement park in Allentown, Pennsylvania, observed him crying at work, "and he was sent home on several occasions because he was too upset to work." Pet. App. 3a.

Petitioner was actively posting on Facebook. Like many Facebook users, petitioner posted on a broad range of subjects that changed rapidly from one post to the next: expressing his sympathy for Elizabeth Edwards' family upon her death, J.A.328; joking with friends, *ibid.*; posting a hyperlink to a music video or a comedy skit he enjoyed, *ibid.*; J.A.344; noting an ACLU First Amendment lawsuit on behalf of a student suspended for rap lyrics he wrote. J.A.331.

Song lyrics were a consistent subject of petitioner's postings. Petitioner began by posting (and continued to post) the lyrics of, and links to, popular songs. See J.A.328. After his wife left, petitioner's listening habits changed: "I was listening to, you know, love songs, getting depressed. * * * I started listening to more violent music and it helped me somehow." J.A.204. Petitioner began posting compositions of his own addressing his circumstances,

which frequently took the form of rap lyrics, using "crude, spontaneous and emotional language expressing frustration." Pet. App. 55a. As petitioner explained to another Facebook user, his postings were "for me. My writing is therapeutic." J.A.329; accord J.A.205 ("[F]or me, this is therapeutic. It help[ed] me deal with the pain."). Although petitioner had a "public" Facebook profile, in mid-October 2010, petitioner changed his username from his actual name to the rap-style pseudonym "Tone Dougie," a play on his first and middle names, to distinguish himself from the postings of his "on-line persona," J.A.249, 265.

Although the language of some posts was—as with popular rap songs addressing the same themes[1]—violent, petitioner posted explicit disclaimers explaining that, for example, his posts were "fictitious lyrics" and was "only exercising [his] constitutional right to freedom of speech," J.A.331, that they were posted for "entertainment purposes only," and "d[id] not reflect the views, values, or beliefs of Anthony Elonis the person." J.A.344. Such posts also frequently included links to the Wikipedia entry on "Freedom of Speech," images related to famous First Amendment cases, links to news stories about the ACLU bringing First Amendment cases, and even reproduced the text of the First Amendment. See, *e.g.*, J.A.334, 331, 329. Some also contained "emoticons"—typographical symbols representing facial expres-

[1] At trial, petitioner testified that he was influenced by the rap artist Eminem's songs *Guilty Conscience*, *Kill You*, *Criminal*, and *97 Bonnie and Clyde*. J.A.225. Eminem fantasized in songs about killing his ex-wife and mother using graphic language. See p. 54, *infra*; J.A.359-370.

sions to "give [the] statement[s] context," typically to indicate that he was "jest[ing]." J.A.218. Petitioner continued to be "friended" by Facebook users during this period, and, when users de-friended him because of his posts, petitioner jokingly marked their departure by writing, "Goodbye Al Qaeda Sympathizers!" J.A.329. Petitioner's posts described the wish to avoid controversy as a "Third Reich mentality" that made Facebook users "'fraid to speak out [about] injustice." J.A.341.

Two recurring themes in petitioner's posts were that "I ain't a legitimate threat," (J.A.349; accord J.A.334 (stating that a judge "needs an education on true threat jurisprudence"); J.A.336 ("I'm just an aspiring rapper")), and that imprisoning him for his posts would be tortious and would subject the authorities to legal liability. J.A.334 ("prison time will add zeros to my settlement"); J.A.351 ("I may be the only man arrested for posting rap lyrics on Facebook. Bring it. I have a feeling I'll be laughing all the way to the bank.").

3. Shortly before Halloween 2010, petitioner posted a photograph of himself and a coworker performing in costume for Dorney Park's 2009 "Halloween Haunt" (a haunted-house-themed event). Pet. App. 3a. The photograph showed petitioner in a mask holding a toy knife against his heavily-made-up coworker's neck,[2] *ibid.* As the coworker explained,

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[2] Although the government introduced evidence at trial that the co-worker had made sexual harassment complaints about petitioner, there is no evidence that petitioner knew of her confidential complaints. J.A.237.

they were "joking around. It was never meant seriously." J.A.176. Petitioner captioned the photo, "I wish." J.A.340. Petitioner did not "tag" the coworker, nor were they "friends." J.A.175. However, Daniel Hall, the "chief of Dorney Park Patrol" (Park security) and a Facebook friend, J.A.116, saw the post, interpreted it as a threat, and fired petitioner. *Ibid.* Two days later, a Facebook user commented that terminating petitioner on that basis was "the gayest piece of shit I've ever heard"; another user "liked" her comment. J.A.340.

The same day, petitioner separately posted a nearly 700-word essay criticizing his termination, saying "[t]here is no way that these two syllables ['I wish'] constitute a real or legitimate threat given the context of this photo," faulting Dorney Park's superficial investigation (observing, "[t]hankfully, opinion is protected speech"), and concluding, "Someone once told me that I was a firecracker. Nah, I'm a nuclear bomb and Dorney Park just fucked with the timer," followed by an emoticon of a face with its tongue sticking out to indicate "jest." J.A.330; see also J.A.218.

Nearly a week later, petitioner posted a Halloween-themed comment reflecting his belief that his former coworkers were preoccupied with him, and what petitioner believed they were saying about him:

> Moles. Didn't I tell y'all I had several? Y'all saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility for a man as mad as me. You see, even without a paycheck I'm still

> the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

J.A.332. That post was later the basis of Count One of the indictment, on which petitioner was acquitted. Br. in Opp. 3 n.2.

In October 2010, petitioner's sister-in-law posted a Facebook status update that she was shopping for Halloween costumes with petitioner's children. J.A.342. After his wife responded, petitioner posted that his son "should dress up as matricide for Halloween," adding, "I don't know what his costume would entail though. Maybe your head on a stick?" *Ibid.* Petitioner ended the post with the tongue-sticking-out emoticon to indicate "jest." J.A.342.

In November 2010, petitioner's wife obtained a protection from abuse ("PFA") order against petitioner. J.A.242. Several days later, petitioner posted on his Facebook page a virtually word-for-word adaptation of the 2007 satirical sketch by the "Whitest Kids U' Know" comedy troupe that he and his wife had watched together. J.A.164. In that sketch, comedian Trevor Moore explained that it is illegal for a person to say that he wishes to kill the President, but not illegal to explain that it is illegal to say that one wants to kill the President. See Pet. App. 63a-64a. Petitioner's post read, in part:

> Hi, I'm Tone Elonis.
> 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 semper tyrannis.

J.A.333. Petitioner ended the post with the statement, "Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?" *Ibid.* Petitioner included a link to a video of the original skit. See Whitest Kids U' Know, *It's Illegal to Say* . . ., http://goo.gl/lDLhN4. Petitioner was not Facebook friends with his wife, nor did he tag her in that post, which was one basis for Count Two of petitioner's indictment.

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

Fold up your PFA and put in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order

> That was improperly granted in the first place
> Me thinks the judge needs an education on true threat jurisprudence
> And prison time will add zeros to my settlement
> Which you won't see a lick
> Because you suck dog dick in front of children
> And if worse comes to worse
> I've got enough explosives
> to take care of the state police and the sheriff's department

Pet. App. 7a. That post was a basis for Counts Two and Three of petitioner's indictment. Above and beneath this post, petitioner posted a link to the Wikipedia entry on "freedom of speech," including photographs of the Westboro Baptist Church's controversial signs stating, "Thank God for Dead Miners." See J.A.334. See generally *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1213 (2011). A post beneath it praised an ACLU lawsuit challenging a nearby school district's decision to prohibit wearing "I [heart] Boobies" bracelets in school. See *Easton Area Sch. Dist.* v. *B.H.*, 134 S. Ct. 1515 (2014).

On November 16, 2010—more than two years before the Sandy Hook shootings—petitioner posted the following on his Facebook page:

> That's it, I've had about enough
> I'm checking out and making a name for myself
> Enough elementary schools in a ten mile radius
> to initiate the most heinous school shooting ever imagined
> And hell hath no fury like a crazy man in a

kindergarten class
The only question is . . . which one?

J.A.335. That post was the basis for Count Four of the indictment. Another Facebook user "liked" the post. *Ibid.* Petitioner testified that his post was a reference to an Eminem song in which the rapper fantasized about participating in the Columbine school shootings.[3] J.A.226. The surrounding posts addressed much different subjects, including a clip from a favorite movie and social commentary adapted from a song by comedian Bo Burnham. J.A.356-358.

In late November 2010, FBI Agent Denise Stevens visited petitioner at his house. J.A.65-66. When petitioner came to the door, he was not patted down. Petitioner asked if he was free to go, and when Stevens told him he was, he responded, "thank you very much," and returned inside; Stevens indicated that petitioner was polite. J.A.73, 82. After the visit, petitioner posted a "note" on his Facebook page, a type of composition that requires a reader to click on a link on the member's homepage to be taken to a separate page. The post, entitled, "Little Agent Lady," was styled as a rap song, and suggested—contrary to fact—that petitioner had been wearing a bomb during the visit. In it, petitioner describes himself as "just

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

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

an aspiring rapper," and dismisses as "shit" the agent's belief that he wants to turn "[Lehigh] Valley into Fallujah," joking that if she believed that, he had some "bridge rubble" to sell her. J.A.336.

> You know your shit's ridiculous
> when you have the FBI knockin' at yo' door
> Little Agent Lady stood so close
> Took all the strength I had not to turn the bitch ghost
> Pull my knife, flick my wrist, and slit her throat
> Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
> And bring yo' SWAT and an explosives expert while you're at it
> Cause little did y'all know, I was strapped wit' a bomb
> Why do you think it took me so long to get dressed with no shoes on?
> I was jus' waitin' for y'all to handcuff me and pat me down
> Touch the detonator in my pocket and we're all Goin'
>
> [BOOM!]
>
> Are all the pieces comin' together?
> Shit, I'm just a crazy sociopath
> that gets off playin' you stupid fucks like a fiddle
> And if y'all didn't hear, I'm gonna be famous
> Cause I'm just an aspiring rapper who likes the attention

> who happens to be under investigation for terrorism
> cause y'all think I'm ready to turn the Valley into Fallujah
> But I ain't gonna tell you which bridge is gonna fall
> into which river or road
> And if you really believe this shit
> I'll have some bridge rubble to sell you tomorrow
>
> [BOOM!][BOOM!][BOOM!]

J.A.336. That post was the basis for Count Five of the indictment. Petitioner did not post this to Agent Stevens, nor did he "tag" her. Aside from the comment on his sister-in-law's status update before issuance of the PFA, petitioner never posted any of his comments at issue anywhere but his own pseudonymous Facebook page, nor did he "tag" anyone in any of his posts.

B. Procedural Background

1. On December 8, 2010, petitioner was arrested and charged with violating 18 U.S.C. § 875(c). J.A.1 A grand jury indicted petitioner on five counts, for making threats to injure: patrons and employees of Dorney Park (Count One); petitioner's wife (Count Two); police officers (Count Three); a kindergarten class (Count Four); and an FBI agent (Count Five). J.A.14-17.

Petitioner moved to dismiss the indictment on the ground that the indictment failed to allege that petitioner subjectively intended to threaten, which he argued was required both by the statute and the First Amendment. Mot. to Dismiss 6, 13, 20. The district

court denied the motion, holding that circuit precedent required only the government "prove the defendant intentionally made the communication, not that he intended to make a threat," Pet. App. 51a; it was likewise constitutionally sufficient if a "reasonable person would foresee the statement would be interpreted" as a threat. Pet. App. 54a (quoting *Kosma*, 951 F.2d at 559).

Petitioner requested that the jury be instructed that "*the government must prove that [petitioner] intended to communicate a true threat*." J.A.21. The district court denied the request, instead instructing the jury based on an objective standard:

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

J.A.301.

2. Most of the fact witnesses the government called to establish how a "reasonable person" would view petitioner's posts had little familiarity with Facebook, no familiarity with rap music, and viewed petitioner's posts in isolation, largely divorced from users' comments and his surrounding posts. The FBI case agent was unaware that petitioner had provided a hyperlink to allow readers of his "It's Illegal" post to view the satire it drew upon, and never watched it, instead basing her interpretation solely on her "lit-

eral reading" of the post. J.A.77-78. She did not remember seeing comments to petitioner's posts. J.A.75-77. She also was unfamiliar with the meaning of the emoticons petitioner used to provide his Facebook posts context. J.A.75. The former coworkers the government called were unfamiliar with rap music and so "took every [post] literally," J.A.182; see also J.A.186 (Amber Morrissey "d[id]n't listen to much rap" and "wouldn't know if [posts] were rap lyrics"), or lacked experience with Facebook and did not read comments left in response to petitioner's posts. J.A.134 (Daniel Hall "wasn't a big Facebook user"); J.A.145 ("my Facebook knowledge is very limited"); J.A.140 ("not looking at the particular comments"). Furthermore, the government exhibits largely cropped posts to isolate them from comments and petitioner's surrounding posts. *E.g.*, J.A.331-332, 334-335.

In its closing argument, the government contended that it was irrelevant whether petitioner made the posts solely because doing so was "therapeutic to [him]" and helped him overcome the trauma of losing his wife, children, and job, because under the objective standard, "it doesn't matter what he thinks": "we don't have to prove he intended the[] [posts] to be threatening." J.A.286-287. The jury convicted petitioner on Counts Two through Five. J.A. 309-310.

Petitioner filed post-trial motions arguing (among other things) that a subjective standard governs. J.A.6. The district court denied the motions, concluding in relevant part that Section 875(c) does "not requir[e] that the defendant intend to make a threat." Pet. App. 38a. The court sentenced petitioner to 44

months' imprisonment, to be followed by three years' supervised release. J.A.314-315.

2. On appeal, petitioner argued (Pet.C.A.Br. 21, 30) that while the district court had relied on *Kosma*, *supra*, involving the prohibition on threats against the President, see 18 U.S.C. § 871, to hold that petitioner's subjective intent was irrelevant, that decision should be reconsidered in light of *Virginia* v. *Black*, 538 U.S. 343 (2003), where this Court held that constitutionally unprotected "true threats" were "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.

The court of appeals affirmed. Pet. App. 1a-29a. The court held that *Kosma* was "clear" "precedent" (Pet. App. 13a) that Section 875(c) required only proof that "a reasonable person would foresee that the statement would be interpreted" as a threat, *id.* at 12a (quoting *Kosma*, 951 F.2d at 557). The court rejected the argument that "*Black* indicates a subjective intent to threaten is required." *Id.* at 16a.

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).

The negligence standard also conflicts with basic principles of statutory interpretation. Because the essence of crime is wrongful intent, this Court presumes that criminal statutes require scienter absent express contrary intent, and has repeatedly read intent requirements into statutes that were silent on the subject. The Court has inferred an intent requirement even when neighboring provisions contain explicit specific intent provisions. A straightforward application of this Court's precedents requires a showing of intent before Section 875(c)'s severe penalties can be imposed to punish pure speech.

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

A. The Plain Meaning Of Section 875(c) Requires Proof Of Specific Intent To Threaten

Section 875(c) makes it a felony, punishable by up to five years of imprisonment, to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). The provision does not define the central

term, "threat." "It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer* v. *U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotation marks omitted).

"Every relevant definition of the noun 'threat' or the verb 'threaten,' whether in existence when Congress passed [Section 875(c)] (1932) or today, includes an intent component." *United States* v. *Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., concurring *dubitante*). *E.g.*, 11 *Oxford English Dictionary* 352 (1st ed. 1933) ("to declare (usually conditionally) one's intention of inflicting injury"); *Webster's New Int'l Dictionary* 2633 (2d ed. 1954) ("*Law*, specif., an expression of an intention to inflict loss or harm on another by illegal means, esp. when effecting coercion or duress"); *Black's Law Dictionary* 1519 (8th ed. 2004) ("A communicated intent to inflict harm or loss on another"). Every common definition embodies the fundamental notion that a "threat" is the expression of the speaker's *intention* to injure; "Conspicuously missing from *any* of these dictionaries is an objective definition of a communicated 'threat,' one that asks *only* how a reasonable observer [or speaker] would perceive these words." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*).

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?"[4] 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).

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[4] *E.g.*, *Is that a threat*?, TV Tropes, http://goo.gl/qwzirC (collecting examples).

Congress thus expanded the statute by adding a provision, now codified at Section 875(c), to include also "threat[s] to kidnap any person or any threat to injure the person." Pub. L. No. 76-76, 53 Stat. 742 (1939). But while Congress intended these amendments to "render present law more flexible," *Threatening Communications*, at 5 (statement of William W. Barron, Criminal Division, Dept. of Justice), Congress gave no hint that it meant to write subjective intent out of the statute. Rather, "what dominated the discussion was the distinction between threats made for the purpose of extorting money and threats borne of other (intentional) purposes," such as revenge, spite, and animosity. *Jeffries*, 692 F.3d at 484 (Sutton, J. concurring *dubitante*). Thus, for example, Members agreed that threats should be actionable "[w]hether the motive of the threat be the acquisition of money or some other personal advantage." *Threatening Communications* at 12.

2. The earliest court of appeals decisions addressing the issue overwhelmingly concluded that "a conviction under 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); accord *United States* v. *LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) ("intent to threaten is an essential element of the crime"); *Seeber* v. *United States*, 329 F.2d 572, 577 (9th Cir. 1964) (noting "vital issue of intent"); *United States* v. *Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974) ("a conviction under 18 U.S.C. § 875(c) requires proof that the threat was made knowingly and intentionally") (citing *LeVison*, *Dutsch*, and *Seeber*); cf. *United States* v. *Kelner*, 534 F.2d 1020, 1023 (2d

Cir. 1976) (describing as "quite proper[]" jury instruction that "a specific intent to communicate a threat to injure" was sufficient for conviction). Some cases *also* required that the words be reasonably construed as a threat, *e.g.*, *Bozeman*, 495 F.2d at 510 (words have a "reasonable tendency to create apprehension"). Over time, without ever overruling those earlier cases, the intent requirement quietly fell by the wayside in many circuits, leaving just the objective test that exists in those courts today. See Pet. App. 15a n.5; but see *United States* v. *Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (reaffirming *LeVison* and *Seeber*); cf. *Jeffries*, 692 F.2d at 486 (Sutton, J., concurring *dubitante*) (suggesting courts simply "g[o]t into grooves") (internal quotation marks omitted).

C. The Third Circuit's Negligence Standard Conflicts With Fundamental Principles Of Statutory Interpretation

1. The "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. *U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. *United States*, 342 U.S. 246, 250 (1952). Thus, for centuries, it has been understood that with

rare exception, "to constitute any crime there must first be a 'vicious will.'" *Id.* at 251 (quoting 4 *Blackstone's Commentaries* 21); accord Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 227 (2d ed. 1858) ("the essence of an offence is the wrongful intent, without which it cannot exist"); Model Penal Code ("MPC") § 2.02 cmt. 2 (1980) ("It was believed to be unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.").

Courts therefore "presum[e] that some form of scienter is to be implied in a criminal statute even if not expressed," *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), and "offenses that require no *mens rea* generally are disfavored," *Staples*, 511 U.S. at 606 (citing *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)). Because "Congress [is] presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor," "[c]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *U.S. Gypsum*, 438 U.S. at 437-438. Thus, this Court will "presume a scienter requirement in the absence of express contrary intent." *X-Citement Video*, 513 U.S. at 71-72; accord *U.S. Gypsum*, 438 U.S. at 437 (presume in "absence of contrary direction"). That presumption "appl[ies] to each of the statutory elements that criminalize otherwise innocent conduct," *X-Citement Video*, 513 U.S. at 72.

Thus, this Court time and again has "interpret[ed] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70. Thus, in *Morissette*, this Court "used the background presumption of evil intent to conclude that the term 'knowingly'" in a theft of government property statute "required that the defendant have knowledge of the facts that made the taking a conversion—i.e., that the property belonged to the United States,"—although the word "knowingly" "in its isolated position [there] suggested that it * * * required only that the defendant intentionally assume dominion over property." *X-Citement Video*, 513 U.S. at 70. In *Liparota*, the Court invoked the presumption to conclude that a statute prohibiting specified "knowing[]" misuses of food stamps required knowledge *both* of the stamps' "use[], transfer[], acqui[sition], alter[ation], or possess[ion]," as well as that the use was "in any manner not authorized by [the statute]." 419 U.S. at 425-427. In other words, it required proof of "knowledge of illegality." *Id.* at 430.

In *Staples*, the Court likewise invoked the presumption to hold that to be guilty of violating a provision prohibiting possession of "a firearm which is not registered," a defendant must know that the weapon possessed the automatic firing capability that made it subject to registration, although the statute was "silent concerning the *mens rea* required for a violation." 511 U.S. at 605; see also 26 U.S.C. § 5861(d). And in *X-Citement Video*, this Court invoked the presumption to hold that a statute prohibiting the "knowing[] transport[ation] or

ship[ment]" of "any visual depiction" if its production "involves the use of a minor engaging in sexually explicit conduct," required proof that the defendant both "knowingly transport[ed] or ship[ped]" the depiction *and* knew those depicted were minors. 513 U.S. at 68, 78. It did so although "the most grammatical reading of the statute" would have required knowledge only of the transportation element of the offense. *Id.* at 70.[5]

2. A straightforward application of this Court's precedents compels the conclusion that conviction of violating Section 875(c) requires proof that the defendant *intended* the charged statement to be a "threat"—"the crucial element separating legal innocence from wrongful conduct." *X-Citement Video*, 513 U.S. at 73. See *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*) ("It is not enough that a defendant knowingly communicates *something* * * *; he must communicate a threat, a word that comes with a state-of-mind component."). That conclusion is underscored by "[t]he severity of the[] sanctions" (*U.S. Gypsum*, 438 U.S. at 442 n.18) imposed by Section 875(c)—five years of imprisonment, compare *ibid.* (noting Sherman Act's *three*-year maximum)—

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[5] Accord *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516, 524 (1994) (invoking presumption to hold that statute prohibiting interstate "sale and transportation * * * [of] drug paraphernalia," with no explicit *mens rea* requirement, requires proof that defendant "knew that the items * * * are likely to be used with illegal drugs"); *U.S. Gypsum*, 438 U.S. at 444 (invoking presumption to hold that antitrust violations require proof that defendant acted "with knowledge that the proscribed effects would most likely follow").

which "suggest[s] that Congress did not intend to eliminate a *mens rea* requirement." *Staples*, 511 U.S. at 618; see also *Morissette*, 342 U.S. at 256 (noting courts less likely to infer an intent requirement where penalties "are relatively small" and reputational effects slight). "The reasonable man rarely takes the stage in criminal law. Yet, when he does, the appearance springs not from some judicially manufactured *deus ex machina* but from an express congressional directive." *Jeffries*, 692 F.3d at 485 (Sutton, J. concurring *dubitante*).

Moreover, this case, unlike its predecessors, involves a prohibition on *pure speech*, and thus necessarily raises grave concerns about suppressing protected speech. "[T]he expectations that individuals may legitimately have" (*Staples*, 511 U.S. at 619) counsels against concluding that negligence is sufficient. "Persons do not harbor settled expectations" that their statements are "subject to stringent public regulation. In fact, First Amendment constraints presuppose the opposite view." *X-Citement*, 513 U.S. at 71. Cf. generally *United States* v. *Bailey*, 444 U.S. 394, 405 (1980) (noting that for certain "classes of crimes," "heightened culpability has been thought to merit special attention"). Moreover, this Court noted in *U.S. Gypsum* that difficulties in line-drawing and the risk of overdeterring socially beneficial behavior compelled the conclusion that "the concepts of recklessness and negligence have no place" in determining the *mens rea* of *antitrust* offenses. The Court's reasoning there applies *a fortiori* to the regulation of speech:

> the behavior proscribed by the [statute] is often difficult to distinguish from the gray zone of socially acceptable * * * conduct. * * * The imposition of criminal liability * * * for engaging in such conduct which only after the fact is determined to violate the statute, * * * without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary * * * conduct lying close to the borderline of impermissible conduct might be shunned by [those] who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

U.S. Gypsum, 438 U.S. at 440-441. A so-called "objective" standard has no place in regulating pure speech. As Justice Marshall explained,

> we should be particularly wary of adopting such a [negligence] standard for a statute that regulates pure speech. * * * . Th[e] degree of deterrence would have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect.

Rogers v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring); accord *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) (noting that "*mens rea* requirements * * * provide 'breathing room' * * * by reducing an honest speaker's fear that he may accidentally incur liability for speaking.").[6] At a minimum, Section 875(c) should be

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[6] Accord *United States* v. *White*, 670 F.3d 498, 524-525 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part);

construed "so as to avoid substantial constitutional questions," *X-Citement Video*, 513 U.S. at 69, and in favor of the defendant where a statute's "text, structure, and history fail to establish that the Government's position is unambiguously correct," *United States v. Granderson*, 511 U.S. 39, 54 (1994).

3. "Further, the use of criminal sanctions [based on an objective standard] would be difficult to square with the generally accepted functions of the criminal law. The criminal sanctions would be used, not to punish conscious and calculated wrongdoing," *U.S. Gypsum*, 438 U.S. at 442, but simple *negligence*. Moreover, it is difficult to "imput[e] * * * to Congress" an intent to "employ criminal sanctions" to punish negligent conduct that is widely understood to be insufficient even to support civil tort liability. Cf. *ibid.* (noting "availability * * * of nonpenal alternatives" to support conclusion that Congress did not intend criminal statute to reach such behavior). The tort of negligent infliction of emotional distress, for example, ordinarily does not permit recovery for emotional harm resulting from a tortfeasor's negligence absent physical impact to the plaintiff or a close relative, or the "immediate risk of physical harm." See *Consol. Rail. Corp.* v. *Gottshall*, 512 U.S. 532, 544-549 (1994). To recover absent actual

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Planned Parenthood of the Columbia/Willamette, Inc. v. *Am. Coal. of Life Activists,* 290 F.3d 1058, 1108 (9th Cir. 2002) (en banc) (Berzon, J., dissenting); Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. & Pub. Pol'y 283, 316 (2001) ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech.").

physical impact or a "near miss" (*ibid.*) generally requires proof the tortfeasor acted *intentionally* (or at least recklessly). See 2 Restatement (Third) of the Law Torts: Liability for Physical & Emotional Harm § 46 (2012). And it is generally understood that intentional infliction of emotional distress requires more than an "insult" or "threats," *e.g.* Restatement (Second) of Torts § 46 cmt. d (1965) (telling person that "if he were there he would break her god damned neck" was a "mere insult[]" and "is not so outrageous or extreme" as to result in tort liability). The availability of this tort remedy—only upon a higher, more speech-protective showing—both underscores the improbability of Congress meaning to impose criminal liability for negligent speech, and makes clear that tort provides an adequate remedy.

4. It is of no moment that two subsections of Section 875 include textual specific intent requirements—that threats to "kidnap" or "injure the person of another" (18 U.S.C. § 875(b)), and to "injure the property or reputation" of another or "to accuse [another] of a crime" (*id.* § 875(d)) must be made with the "intent to extort * * * any money or other thing of value." *Id.* § 875(b), (d). As explained above, see pp. 24-25, *supra*, those provisions' textual specific "intent to extort" requirements reflects the law's original purpose of addressing extortion, and the follow-on effort to address threats was made without an effort to extort something of value. "Congress offered no hint that it meant to write subjective conceptions of intent out of the statute." *Jeffries*, 692 F.3d at 484 (Sutton, J., concurring *dubitante*). The absence of explicit language from Section 875(c) requiring an

intent to extort is sufficient basis for not requiring *that particular* specific intent be shown; it is, however, no basis for dispensing with any requirement of a showing of intent that the statement be a threat.

Indeed, this Court has repeatedly inferred scienter requirements for statutes that were silent on the subject, even when neighboring provisions contained *express* scienter requirements, calling "[t]he difference in wording * * * too slender a reed to support the attempted distinction." *Liparota*, 471 U.S. at 429 (concluding 7 U.S.C. § 2024(b)(1) requires knowledge food stamps are being used in violation of statute, although § 2024(c) explicitly requires action "knowing the s[tamps] to have been received, transferred, or used * * * in violation of [the statute] or the regulations"); *Carter* v. *United States*, 530 U.S. 255, 269-270 (2000) (while neighboring provision included explicit "intent to steal or purloin" justified excluding that specific intent from neighboring provision, nevertheless implying intent requirement in provision silent on the subject).

II. WITHOUT A SUBJECTIVE INTENT *MENS REA*, SECTION 875(c) CRIMINALIZES NEGLIGENT SPEECH AND VIOLATES THE FIRST AMENDMENT

The "bedrock principle underlying the First Amendment * * * is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). Accordingly, the Constitution "demands that content-based

restrictions on speech be presumed invalid, and that the government bear the burden of showing their constitutionality." *Ashcroft* v. *ACLU*, 542 U.S. 656, 660 (2004) (citation omitted). "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas,"—"well-defined and narrowly limited classes of speech, the prevention and punishment of which" have, as a matter of "histor[y] and traditio[n]," been deemed constitutionally permissible. *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). For example, the government may punish speech or conduct that is obscene, defamation, and incitement. *Ibid.* (collecting authorities).

In *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), this Court carved out a limited exception for "true threats" of physical violence. Compare *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982) ("'threat[]' of vilification or social ostracism * * * is constitutionally protected"). *Watts* involved a prosecution for threatening the President, see 18 U.S.C. § 871(a), based on a protester's statement during a rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." 394 U.S. at 706. In a brief *per curiam* opinion, the Court concluded from the remark's context that it was not a true threat—it was made at a political rally, was conditioned on another event (induction into the armed forces), and both the speaker and the crowd responded with laughter. *Id.* at 707-708. The Court explicitly refrained from addressing the required mental state, although it

expressed "grave doubts about" the lower court's holding there that it was enough to voluntarily utter words with the "*apparent* determination to carry them into execution." *Id.* at 707 (internal quotation marks omitted, emphasis in original).

A. History And Tradition Counsel Against Imposing Criminal Liability For Negligent Speech

This Court has held that a "category of speech" cannot be "exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation." *Stevens*, 559 U.S. at 469; *Alvarez*, 132 S. Ct. at 2544 (opinion of Kennedy, J.) ("content-based restrictions" have been permitted "only when confined to the few historic and traditional categories [of expression] long familiar to the bar") (internal quotation marks omitted). There is, however, no established tradition of subjecting speech to criminal liability as a "threat" absent a subjective intent to threaten; to the contrary, history suggests such an intent is a fundamental prerequisite to imposing liability.

1. Threat Prosecutions Traditionally Have Required Proof Of Intent To Threaten Or Other Specific Intent

"It seems to be well settled that the making of threats, in words not written, followed by no result more serious than the terror of the person threatened, [wa]s not an indictable offense at common law." 25 *The American & English Encyclopaedia of Law* 1064 (Charles F. Williams ed., 1894); accord 2 Francis Wharton, *Criminal Law & Proc.* § 803 (Ronald A.

Anderson ed., 12th ed. 1957); MPC § 212.5 cmt. 1. However, states, "by statute * * * sometimes made [it] a crime to threaten another in manner to amount to disturbance of the public peace," 2 Wharton, *Criminal Law* § 803, which typically involved oral threats delivered in the presence of the victim. But "it is usually held, however, that a threat, in order to violate the public peace, * * * *must be intended to put the person threatened in fear of bodily harm* and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness." *Ibid.* (emphasis added). As the Vermont Supreme Court explained in the seminal case of *State* v. *Benedict*, 11 Vt. 236 (1839), "[a] threat, in order to [be punishable], must be * * * accompanied by acts showing a formed intent to execute them, [and] *must be intended to put the person threatened in fear of bodily harm*." *Id.* at 239 (emphasis added); accord *Ware* v. *Loveridge*, 42 N.W. 997, 998 (Mich. 1889) ("the authorities have very plainly held that ["language tending to provoke a breach of the peace"] covers nothing that is not meant and adapted to bring about violence directly"). The *Model Penal Code* commentary confirms that both criminal and civil law provide liability for "one who intentionally placed another in fear of bodily injury." MPC § 211.1 cmt. 1.

In addition, both at common law and by statute, threats have been prosecuted as extortion when used to obtain something of value. 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 1201, at 664 (6th ed. 1877). Implicit in conviction for using threats "to terrify another [person] out of his money," *id.* § 1173, at 650, is the conclusion that the defendant

intended the statement to be a threat. Cf. 25 *Encyclopaedia of Law* 1065 (crime involves "intent to compel [victim] to do an act against his will"). Some states also prohibited "sending threatening letters," in which the threat was part of a criminal scheme to extort property or "do some other unlawful act." *Id.* at 1073. But it has always been understood that such statutes require the specific intent to extort or complete the other offense; if sent "with the view of having merriment at [the victim's] discomfiture on its receipt," there was no crime. *Norris* v. *State*, 95 Ind. 73, 76 (1884) ("Unless such intent [to extort] existed in the mind of the [defendant] at the time of sending the letter, there could be no crime."); accord 2 Bishop, *Criminal Law* § 1201, at 664 ("The intent, both under the unwritten law and under the statutes, must be evil."); see also Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 975, at 545 (1866) (if "the true intent" is not proved at trial, "the proceeding will fail).

As noted above, until the late 20th Century, Section 875(c) was generally construed to require proof of intent to threaten. See pp. 25-26, *supra*. In addition, the *Model Penal Code* threat provision requires proof the defendant acted "with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience." MPC § 211.3; see also *id.* § 212.5 cmt. 2 ("At a minimum, therefore, the actor must perceive and consciously disregard a substantial and unjustifiable risk that his communication constitutes a

threat"). There is simply no established historical tradition of imposing criminal liability based on a speaker's negligent failure to anticipate that it would be perceived as a threat.

2. This Court Has Repeatedly Required Proof Of Prohibited Intent Before Allowing Speech To Be Sanctioned

This Court has repeatedly insisted, in a variety of contexts, that before a person can be held liable for speech, there must be proof he acted with culpable intent. "*[M]ens rea* requirements * * * provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment).

a. One prominent example likewise implicates the state's interests in preventing fear of violence: incitement. Criminal prosecution for incitement "is commonly construed to require * * * [that] the speaker *subjectively intended* incitement." John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries*, 10 Hastings Comm. & Ent. L.J. 969, 972 (1988). Thus, this Court has required proof that the defendant's "advocacy of the use of force * * * is *directed to* inciting or producing imminent lawless action," *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (emphasis added), and held that without "evidence * * * [a speaker's] words were intended to produce, and likely to produce, imminent disorder * * * those words could not be punished." *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curi-

am); *Alvarez*, 132 S. Ct. at 2544 (opinion of Kennedy, J.).

This Court's decision in *Claiborne Hardware* is hard to square with the idea that the perceptions of "reasonable" observers are controlling. There, Mississippi merchants sought damages for an NAACP-organized boycott against the organization and its officers, specifically local officer Charles Evers, who had discouraged boycott violations during speeches to African Americans. Evers had warned that boycott violators would be "disciplined," stating that, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," and that the "Sheriff could not sleep with boycott violators at night." 458 U.S. at 902. The organization publicized the names of boycott violators, and in some instances, violators were subject to violent retaliation, resulting in an "atmosphere of fear." *Id.* at 904 (internal quotation marks omitted).

The Court acknowledged that Evers' remarks "*might have been understood as* * * * intending to create a fear of violence." *Id.* at 927 (emphasis added). Nonetheless, the Court concluded that Evers "did not exceed the bounds of protected speech," *id.* at 929, concluding he could not be liable for incitement unless his advocacy was "directed to inciting or producing imminent lawless action." *Id.* at 928 (quoting *Brandenburg*, 395 U.S. at 447). The Court emphasized that where liability is imposed "in the context of constitutionally protected activity, * * * 'precision of regulation' is demanded," *id.* at 916 (internal quotation marks omitted), because of the "profound national commitment" to free speech, *id.* at 913. The Court

noted the lack of evidence that "any petitioner specifically intended to further an unlawful goal." *Id.* at 925 n.68.

b. Similarly, this Court has held that, to protect First Amendment interests, public figures alleging defamation must demonstrate that the speaker acted with "'actual malice'—that is, with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). The Court reasoned that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" *Sullivan*, 376 U.S. at 271-272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). "[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of" First amendment rights; thus, "a rule of strict liability * * * may lead to intolerable self-censorship." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, a standard of "negligence * * * is constitutionally insufficient." *Sullivan*, 376 U.S. at 288.

"The constitutional guarantees of freedom of expression compel application of the same standard to * * * criminal [libel]" prosecutions, *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), which have "virtual[ly] disappear[ed]" in the United States, *id.* at 69.[7] Reflecting the growing consensus that imposing crimi-

[7] Org. for Sec. & Coop. in Europe, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like to Achieve* 172 (2005) (noting that, during 1992-2004, there were six criminal libel convictions nationwide; three were reversed on constitutional grounds), http://goo.gl/A27xBi.

nal liability based on negligence conflicts with our national commitment to free speech, many states now explicitly require proof of knowing falsity. *E.g.*, Kan. Stat. Ann. §21-6103(a)(1); N.H. Rev. Stat. Ann. §644:11; Utah Code Ann. §76-9-404; Va. Code Ann. §18.2-209.[8]

c. In a variety of other contexts, this Court has reaffirmed the central importance of imposing liability for speech only upon a showing of wrongdoing. Thus, in determining whether a prohibition on fraudulent fundraising calls satisfied First Amendment strictures, this Court considered it "[o]f prime importance" that a person not be subject to civil liability based on "false statement alone," absent proof by "clear and convincing evidence" that the speaker "kn[e]w[] that the representation was false" and "made the representation with the intent to mislead the listener." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). The Court emphasized that "[e]xacting proof requirements of this order * * * have been held to provide sufficient breathing room for protected speech." *Ibid.* And in *United States* v. *Al-*

[8] In the *civil* context, this Court has not required a showing of actual malice for lawsuits involving private citizens and matters of private concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 (1985) (plurality opinion). The Court has not yet had occasion to address the application of criminal libel in such circumstances. But the Court has noted, in the context of defamation on matters of public concern involving private citizens, that the state's interest in "punish[ing] reprehensible conduct and * * * deter[ring] its future occurrence" (there, through punitive damages) is less compelling than its interest in compensating individuals. *Gertz*, 418 U.S. at 349-350. The same, presumably, would be true of criminal prosecutions.

varez, which invalidated a federal statute prohibiting false claims to military decorations, a majority of the Court indicated that limiting a criminal statute's sweep to "knowing or reckless falsehood" was a constitutional prerequisite under the First Amendment. 132 S. Ct. at 2545 (opinion of Kennedy, J.) ("falsity alone may not suffice to bring the speech outside the First Amendment"); *id.* at 2552-2553 (Breyer, J., concurring in the judgment) (construing statute to reach only "statements made with knowledge of their falsity and with the intent that they be taken as true" "diminishes the extent to which the statute endangers First Amendment values, [but] does not eliminate the threat"). As Justice Kennedy noted, "[t]he requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery * * * exists to allow more speech." *Id.* at 2545.

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

The impermissibility of allowing liability for speech without proof of wrongful intent was front and center in *Virginia* v. *Black*, where the Court explained that "'[t]rue threats' encompass those statements where the speaker *means* to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359 (citations omitted; emphasis added). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons *with the intent* of placing the vic-

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

Those statements were central to the Court's reasoning. *Black* involved a Virginia statute that criminalized burning a cross in public "with the intent of intimidating any person," and provided that the public burning of a cross "shall be prima facie evidence of an intent to intimidate." 538 U.S. at 347-348 (quoting Va. Code Ann. § 18.2-423 (1996)). Although cross burning is "widely viewed as a signal of impending terror," *id.* at 391 (Thomas, J., dissenting), because of the "long and pernicious history" of its use for that purpose, *id.* at 363 (opinion of O'Connor, J.), a plurality of the Court explained that a subjective intent requirement was constitutionally necessary to distinguish "constitutionally proscribable intimidation" from protected "core political speech," such as when a cross is burned as a statement of ideology or an expression of group solidarity. *Id.* at 365-366 (opinion of O'Connor, J.). The prima facie evidence provision was facially unconstitutional because it "ignore[d] all the contextual factors that are necessary to decide whether a particular cross burning was intended to intimidate. The First Amendment does not permit such a shortcut." *Id.* at 367. Thus, the prima facie evidence provision "strip[ped] away the very reason a state may ban cross burning with the intent to intimidate." *Id.* at 365.

The other Justices agreed that "a burning cross is not always intended to intimidate, and a nonintimidating cross burning cannot be prohibited." *Id.* at 372 (Scalia, J., joined by Thomas, J., concurring in part, concurring in the judgment in part, and dissent-

ing in part). Accord 538 U.S. at 368 (Stevens, J., concurring) (emphasizing "intent to intimidate" language as a defining trait of a valid regulation of threats); *id.* at 385-386 (Souter, J., joined by Kennedy and Ginsburg, JJ., concurring in part and dissenting in part) (distinguishing between "proscribable and punishable" intent to intimidate and a "permissible" lack of intent to intimidate). The requirement that the speaker intends his speech to be threatening was thus central to the Court's holding. See *United States* v. *Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (O'Scannlain, J.) ("[E]ach of the other opinions [in *Black*], with the possible exception of Justice Thomas's dissent, takes the [plurality's] view of the necessity of an intent element."). If the "true threats" doctrine did not require proof of intent to threaten, then "Virginia's statutory presumption was * * * incapable of being unconstitutional in the way that the majority understood it." Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217.

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. As Justice Marshall observed, "we should be particularly wary of adopting such a standard for a statute that regulates pure speech," which "create[s] a substantial risk that crude, but constitutionally protected speech might be criminalized." *Rogers*, 422 U.S. at 47 (Marshall, J., concurring). Because "individuals w[ill] have difficulty discerning what a jury would consider objectively threatening," they "may rationally err on the side of caution by saying nothing at all." Case Comment, *United States* v. *Jeffries*, 126 Harv. L. Rev. 1138, 1145 (2013).

Uncertainty is inherent in tests based on the reaction of a hypothetical "reasonable person." The "reasonable person" test for negligence has long been criticized as "a vague test," Oliver Wendell Holmes, *The*

Common Law 112 (Little, Brown & Co. 1909) (1881), that yields "biased, inconsistent, and unpredictable verdicts." Brian Kennan, *Evolutionary Biology and Strict Liability for Rape*, 22 Law & Psychol. Rev. 131, 173 (1998); Robert J. Rhee, *Tort Arbitrage*, 60 Fla. L. Rev. 125, 172 (2008) (standard is inherently "uncertain and thus unpredictable"). It invites jurors to substitute their personal attitudes about what behavior is acceptable. See generally Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 Geo. L.J. 633, 654 (2003) ("[J]uror norms give content to the reasonable person standard."). In addition to the widely variable perspectives of individual jurors, demographic factors can shape risk and threat perceptions. Cf. Ian Savage, *Demographic Influences on Risk Perceptions*, 13 Risk Analysis 413, 419 (1993) (identifying "very statistically significant" "variations in risk perceptions explained by demographics," with some groups "feel[ing] greater exposure and fear"), http://goo.gl/WEgHFK.

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 liter-

ally; 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. Cf. *Riley* v. *Nat'l Federation of the Blind*, 487 U.S. 781, 793-794 (1988) ("[s]peakers, however, cannot be made to wait" to "speak with a measure of security" regarding a "reasonableness" standard for fundraising fees); *Reno*, 521 U.S. at 872 (vague regulations "increas[e] deterrent effect" on speech).

2. The Negligence Standard's Focus On Third Party Reactions Institutionalizes Discrimination Against Minority Viewpoints

Focusing on the reaction of a "reasonable person," rather than the speaker's intent, chills speech in another respect—by institutionalizing discrimination against minority viewpoints. "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). Members of unpopular groups, immigrants, minorities—anyone who seems "different" from the jurors who are the arbiters of reasonableness (and who, statistically, are members of majority groups)—are more likely to seem threatening than people who look and speak and *think* like they do. Cf. *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) ("[T]hose who are unpopular may fear that the government will use [the prosecution of false statements] selectively, * * * while ignoring members

of other political groups who might make similar false claims."). Thus, there can be little doubt that a "reasonable person" would have viewed it as a threat if a member of an unpopular group or of an unfamiliar religious minority had said, "you ever do that again, I'll throw you off this f-----g balcony," "I'll break you in half"; had petitioner posted it on Facebook, it would have been the sixth count in his indictment. But when said by a telegenic Member of Congress and former Marine and FBI agent, it is not a matter for law enforcement. See Adam Edelman & Joseph Straw, *New York Rep. Michael Grimm Threatens Reporter After Being Asked About Fundraising Allegations*, N.Y. Daily News, Jan. 28, 2014, http://goo.gl/xjzgvh.

That analysis has it exactly backwards: The First Amendment is designed to protect unpopular viewpoints from suppression by majorities. An objective test explicitly bases the lawfulness of statements on how others—typically members of *majority groups*—view them.

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. Emoticons—typographical representations of facial expressions—were invented for the very purpose of adding context to electronic communications, but they too are subject to misunderstandings. Compare J.A.218 (petitioner believed tongue-sticking-out emoticon indicated "jest"), with J.A.174 (estranged wife considered it an insult).

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.

Another example is more chilling still because it is not hypothetical. In *United States* v. *Fulmer*, an informant who had reported a suspected bankruptcy fraud was convicted of threatening an FBI agent because he left the agent a voicemail saying that the "silver bullets are coming." 108 F.3d 1486, 1490 (1st Cir. 1997). The agent, unfamiliar with the term "silver bullets" to describe a simple solution to an intractable problem, found the phrase to be "chilling" and "scary." *Ibid.* Despite two witnesses' testimony that the defendant used "silver bullets" to refer to "clear-cut" evidence of wrongdoing, *ibid.*, the court concluded that, under the objective standard, the defendant was validly convicted of threatening the agent. *Id.* at 1491-1492. Thus, the negligence standard poses a very real risk of criminalizing "poorly chosen words." Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 Harv. J.L. & Pub. Pol'y 283, 350 (2001).

The record in this case further illustrates the dangers of basing criminal liability on supposedly "objective" interpretations. For example, a coworker posed for a photo with petitioner holding a toy knife to her throat, and clearly understood that, in posing for it, "we were just joking around. It was never meant seriously." J.A.176. Because the photo was itself a joke, it is not hard to imagine that in posting the photo on Facebook with the caption, "I wish," petitioner might simply have meant to continue the joke. While petitioner might have anticipated that such a joke would fall flat or be deemed tasteless, it is not self-evident that a coworker would take a comment to an

acknowledged joke photo "literally," J.A.182, *as a death threat*. It is not hard to see the opportunity for misunderstanding. The objective standard transforms even negligent misunderstandings into felonies.

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

Reviewing the statements petitioner served nearly four years in prison for making underscores the risk that a negligence standard poses to protected expression.

Even the government would not contest that *some* elements of petitioner's posts warranted First Amendment protection; for example, he was entitled to state his belief that the judge who granted the restraining order against him "needs an education on true threat jurisprudence." J.A.334. But under the government's theory, *any* discussion of violent subjects that a jury later ties to an actual person is fair game for a threat prosecution. As the government said revealingly, "it doesn't matter what [the defendant] thinks." J.A.192. Under that view, it is legally irrelevant if "writing is therapeutic," J.A.329, to "deal with the pain," J.A.205, of a wrenching event by sharing it with those who have voluntarily subscribed to receive a speaker's updates. It is likewise irrelevant if the speaker posts under a pseudonym to distance the views expressed from "the person" of the speaker, J.A.344, posts explicit disclaimers that the writing is not to be taken literally, or includes links to free speech sites to make clear that while the posts involve the intentionally controversial expression of

ideas, they are *only* that—the expression of ideas. 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. See Judith Evans Grubbs, *Stigmata Aeterna: A Husband's Curse*, *in* Vertis in Usum: Studies in Honor of Edward Courtney 236-237 (2002). It is unsurprising that such writings are enduring, common, and popular, because they address circumstances that arise frequently, and (cathartic) anger is part of conventional models of grieving. *E.g.*, Jennifer Kromberg, *The 5 Stages of Grieving the End of a Relationship,* Psych. Today, Sept. 11, 2013, http://goo.gl/gxEX3t.

First-person revenge fantasies are such a prevalent theme of blues music as to be cliche.[9] Similar

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[9] 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.")

sentiments are commonplace in rock[10] and country music.[11] 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.

> Don't you get it bitch, no one can hear you
> Now shut the fuck up and get what's coming to you
> You were supposed to love me
> Now bleed bitch, bleed! Bleed bitch, bleed! Bleed![12]
>
> Da-da made a nice bed for mommy at the bottom of the lake

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[10] *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").

[11] 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").

[12] Eminem, *Kim*, *on* The Marshall Mathers LP (Interscope 2000); see also Kevin Gates, *Posed to Be in Love, on* By Any Means (Atlantic 2014) ("Passing by your house/like come outside before it get violent/Lights off, mask on, silent.").

> Here, you wanna help da-da tie a rope around this rock? (Yeah!) We'll tie it to her footsie, then we'll roll her off the dock.
> There goes mama, spwashin' in the wa-ta
> No more fightin' wit dad, no more restraining order
> No more step-da-da, no more new brother
> Blow her kisses bye-bye, tell mama you love her.[13]

Popular music likewise commonly features first-person discussion of revenge against police for perceived excesses[14] and senseless violence resulting from frustration.[15]

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. Cf. J.A.205 ("[T]here's nothing I said [on Facebook] that hasn't been said already."). 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

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[13] Eminem, *97 Bonnie and Clyde*, *on* The Slim Shady LP (Interscope 1999).

[14] Body Count, *Cop Killer*, *on* Body Count (Sire 1992) ("Cop killer, better you than me/cop killer/fuck police brutality/cop killer, I know your momma's grieving/cop killer, but tonight we get even").

[15] Drowning Pool, *Bodies*, *on* Sinner (Wind Up 2001) ("Push me again/this is the end* * */let the bodies hit the floor/let the bodies hit the floor").

(N.J. Aug. 4, 2014) ("one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those [writings]"; amateur writers entitled to same protection as professionals).

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),[16] he has committed a felony if he is in a souring relationship and, unbeknownst to him, a "reasonable" person would consider the words threatening. Indeed, a negligence standard has the perverse effect of making it increasingly dangerous for a speaker to post on a subject the more strongly he feels about it, and thus poses the risk of deterring people from speaking on the subjects most relevant to them.

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[16] See David Browne, *The Slim Shady LP*, Entertainment Weekly, Mar. 12, 1999, http://goo.gl/Os5c3M.

2. Petitioner's felony conviction for posting a take-off on the Whitest Kids' "It's Illegal" comedy sketch best illustrates the breadth of the negligence standard's chilling effect. Petitioner posted a virtually word-for-word adaptation of a famous sketch that itself parodies speech restrictions. The only violence is, as in the original, completely unrealistic, involving restricted military weapons (a "mortar launcher"), and it ends with notice of a (nonexistent) group meeting using a pass-phrase associated with presidential assassination ("Sic semper tyrannis."). To underscore that it was not meant literally, petitioner hyperlinked the original satire (also, presumably, not meant literally) so that any reader could instantly view it; to demonstrate he intended the post as commentary rather than a threat, he ended the post by saying "Art is about pushing the limits. I'm willing to go to jail for my Constitutional rights. Are you?"

The government investigator, testifying to establish the reaction of a "reasonable person," never bothered clicking the link to watch the original sketch. J.A.75. If petitioner did not foresee she would interpret the post not as commentary on his speech restrictions in the wake of his wife's PFA, but as him "flat out sa[ying] he wanted to kill his wife," J.A.78, that is still enough to support a felony conviction. If that is the law, the only safe course is to say nothing at all.

E. The Negligence Standard Does Not Survive Exacting Scrutiny

Section 875(c)'s imposition of severe criminal penalties irrespective of petitioner's intent is "a stark

example of speech suppression" that fundamentally conflicts with the First Amendment. *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002). As a content-based rule, the provision is "presumptively invalid and the government bears the burden to rebut that presumption," *Stevens*, 559 U.S. at 468 (internal quotation marks omitted), by demonstrating that it survives "the most exacting scrutiny." *United States* v. *Eichman*, 496 U.S. 310, 318 (1990). The government has not satisfied that burden.

1. Section 875(c)'s Negligence Standard Is Not The Least Restrictive Means Of Addressing True Threats

Section 875(c)'s negligence standard is unconstitutional because it is "not reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). The government has only given one justification for employing a negligence standard in Section 875(c): "Requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats," namely "protect[ing] individuals from the fear of violence and from the disruption that fear engenders." Br. in Opp. 15 (internal quotation marks omitted). A negligence standard is necessary because fear from a statement thought to be a threat "exists regardless of whether the speaker subjectively intended the statement to be innocuous." *Ibid.*

But the government has never demonstrated that jurisdictions that, by constitutional rule or by state law have required proof of subjective intent have systematically failed to protect their citizens as well as

jurisdictions employing the negligence standard, nor sought to demonstrate that speech-neutral steps such as abuse hotlines or improved policing are powerless to address any difference in the liability standard. There is no record of Congress consciously adopting a negligence standard despite its disadvantages, because there is simply no evidence that Congress purposefully adopted that standard; rather, it appears that some court of appeals emphasized the objective element of proving a threat over the subjective one, see pp. 25-26, *supra*, and successive courts simply followed suit.

Nor has the government demonstrated that it will be unable to make cases under a subjective standard. Indeed, times have never been better for the government to prove subjective intent using the defendant's own records, now that most people carry with them "a digital record of nearly every aspect of their lives—from the mundane to the intimate," *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014), and are continually tapping out their innermost thoughts to be eventually subpoenaed. The government has failed completely to prove that its suppression of speech will alleviate the targeted harm "to a material degree," *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 817 (2000), or that "the Government's chosen restriction on the speech at issue be 'actually necessary to achieve its interest.'" *Alvarez*, 132 S. Ct. at 2549 (internal quotation marks omitted).

2. This Court Has Repeatedly Refused To Sacrifice Speech For Speculative Improvements In Law Enforcement

More fundamentally, this Court has repeatedly rejected the idea that speech should be sacrificed for hypothetical benefits to law enforcement. Time and again, this Court has struck the balance the way the Constitution itself did, by favoring speech. See *Stevens*, 559 U.S. at 470 ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."). This Court has rejected restrictions on speech even where the government maintained that course would "encourage [molesters'] thoughts and impulses" and "result[] [in] child abuse." The Court insisted on a "significantly stronger, more direct connection" before permitting restrictions on speech. *Free Speech Coalition*, 535 U.S. at 254.

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; accord *Snyder* v. *Phelps*, 131 S. Ct. 1207 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt."); *Cohen*, 403 U.S. at 25 (1971) ("[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."). "[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 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973)).

CONCLUSION

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

Respectfully submitted.

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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.