13-983

IN THE

Supreme Court of the United States

ANTHONY DOUGLAS ELONIS,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION, THE CATO INSTITUTE, THE CENTER FOR DEMOCRACY & TECHNOLOGY, AND THE NATIONAL COALITION AGAINST CENSORSHIP, IN SUPPORT OF PETITIONER

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Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*,
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Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*,
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Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006) ....*passim*

U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf................... 24

William Blackstone, *Commentaries on the Laws of England* (1769).. 16, 17

Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014)... 24

INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases outlining the scope of the true threat doctrine. *See Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Virginia v. Black*, 538 U.S. 343 (2003). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

The Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, and access to information as informed by the values of democracy and human freedom. It does not purport to speak for Yale University. The Institute's activities are both practical and scholarly, supporting litigation and law reform efforts as well as academic scholarship, conferences, and other events on First Amendment, new media, and related issues. The Institute is committed to robust protections for speech, including hostile, challenging, or unpopular speech, and is particularly concerned with maintaining and expanding protections for speech online.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, their members, and their counsel have paid for the preparation or submission of this brief.

The Cato Institute (Cato) was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the First Amendment is part of the bulwark for liberty that the Framers set out in the Constitution.

The Center for Democracy & Technology (CDT) is a non-profit public interest organization that advocates on free speech and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. CDT represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups that are united in their commitment to freedom of expression. (The positions advocated in this brief do not necessarily reflect the views of all of its member organizations.) Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the

country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation.

STATEMENT OF THE CASE

Petitioner Anthony Elonis was convicted on four of five counts in a federal indictment charging him with making threatening statements in violation of 18 U.S.C. § 875(c). The statements that led to the indictment are spelled out at length in Petitioner's brief, Pet. Br. at 9–16, and the opinions below. Pet. App. 1a–29a, 30a–48a, 49a–60a. All of the statements appeared on a Facebook page that Elonis had created using a pseudonym, and many took the form of rap lyrics. For present purposes, it is sufficient to note that many of the postings expressed violent thoughts and desires involving, among others, Petitioner's estranged wife.

Prior to trial, Elonis moved to dismiss the indictment on the ground that the government had failed to allege that his statements were made with an intent to threaten. The district court rejected his motion, citing Circuit precedent. Pet. App. 51a. At trial, Elonis asked the court to instruct the jury that "the government must prove that he intended to communicate a true threat." J.A. 21. The district court denied that request as well, and instructed the jury instead:

> 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 to take the life of an individual.

J.A. 301. Following his conviction, Elonis filed post-trial motions arguing that the government should have been required to prove subjective intent. J.A. 6.The district court again disagreed and sentenced Elonis to 44 months' imprisonment followed by three years' supervised release. J.A. 314–15.

The court of appeals affirmed, rejecting Elonis's argument that the Third Circuit precedent cited by the district court had been superseded by this Court's subsequent decision in *Virginia v. Black*, 538 U.S. 343 (2003), and disagreeing with Elonis's contention that "*Black* indicates a subjective intent to threaten is required." Pet. App. 16a.

SUMMARY OF ARGUMENT

This case involves a series of disturbing comments expressing Petitioner's violent thoughts and desires involving his estranged wife, among others. Those comments were undeniably crude and offensive. A properly charged jury might or might not have concluded that they also constituted a threat in context. The jury in this case was not properly charged, however. Instead, it was permitted to convict without a finding that Elonis intended his

comments to be understood as a threat. Because the First Amendment requires a showing of subjective intent to threaten as a predicate to criminal liability, Petitioner's conviction must be reversed.

To ensure that public discussion remains "uninhibited, robust, and wide-open," the First Amendment protects speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). That protection does not extend to a speaker who threatens another with death or serious bodily harm. But while the distinction between protected speech and an unprotected "true threat" is easy to state, it can be exceedingly difficult to apply. Words are slippery things, and one person's opprobrium may be another's threat. A statute that proscribes speech without regard to the speaker's intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed. Moreover, where the line between protected and unprotected speech is unclear, a speaker may engage in self-censorship to avoid the potentially serious consequences of misjudging how his words will be received. Statutes criminalizing threats without requiring the government to demonstrate a culpable *mens rea* are thus likely to sweep in speech protected under the First Amendment, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that subjective intent to threaten is an essential element of any constitutionally proscribable true threat.

Establishing subjective intent to threaten as a constitutional *mens rea* requirement for true threats would not require any deviation from this Court's precedents. In both the true threat and incitement contexts, this Court has consistently recognized the importance of subjective intent to incite or threaten as an element of any statute criminalizing pure speech. Most recently, in *Virginia v. Black*, this Court stated 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 (internal quotation marks omitted). Although lower courts have divided over how to interpret *Black*, this Court's plain language and reasoning strongly support the conclusion that *Black* defined true threats to include only those statements made with the intent to threaten. Even if *Black* failed to decisively resolve the issue, however, the First Amendment principles undergirding this Court's decisions strongly caution against the criminalization of speech that was not intended as a threat, even if the speaker negligently failed to anticipate the listener's response.

Finally, the fact that the speech at issue in this case occurred online only underscores the need for a subjective intent requirement. Today, a significant amount of speech on political, social, and other issues occurs online, and is often abbreviated, idiosyncratic, decontextualized, and ambiguous. As such, it is susceptible to multiple interpretations, making a subjective intent requirement particularly necessary to ensure that protected online speech is neither punished nor chilled. As more and more

speech moves onto the Internet, the constitutional protections afforded to online speech will increasingly determine the actual scope of First Amendment freedoms enjoyed by our society. To protect those freedoms, this Court made clear in *Reno v. ACLU*, 521 U.S. 844 (1997), that the Internet enjoys the highest level of First Amendment protection. It should reaffirm that principle here by holding that subjective intent to threaten is an essential element of any true threat prosecution, regardless of whether the challenged statement occurred online or off.

ARGUMENT

I. SUBJECTIVE INTENT TO THREATEN IS AN ESSENTIAL ELEMENT OF ANY TRUE THREAT

A. This Court's Threat Jurisprudence Is Most Plausibly Read As Requiring Proof Of A Subjective Intent To Threaten.

This Court has recognized that there are certain "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," but it has always cautioned that these categories must be "well-defined" and "narrowly limited." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010). In *Watts v. United States*, this Court added "true threats" to the catalogue of constitutionally proscribable speech. 394 U.S. at 707–08. *Watts* concerned a prosecution under 18 U.S.C. § 871(a), which prohibits knowing and willful threats against

the President, for a draft protester's statement at a rally against the Vietnam War that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Observing that contextual factors indicated that the defendant was engaged only in "a kind of very crude offensive method of stating a political opposition to the President," and construing § 871(a) in light of First Amendment principles, the Court concluded that the statute's use of the term "threat" excluded the defendant's political hyperbole.[2]

This Court next addressed the scope of the true threat exception in *Virginia v. Black*. Under the most straightforward reading, *Black* clarified the true threat exception by requiring the government to demonstrate subjective intent to threaten as an essential *mens rea* element of the crime. Unmoored from the constraints of this subjective intent requirement, anti-threat statutes are neither "well-defined" nor "narrowly limited." Rather, they create a significant risk that the government will criminally sanction, and also chill, core First Amendment expression.

Black considered whether a state statute criminalizing cross burning with intent to intimidate,

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[2] Although *Watts* did not provide occasion for the Court to resolve whether intent to threaten is an essential element of a constitutionally proscribed "true threat," it expressed "grave doubts" about the lower court's conclusion that the statute's *mens rea* component required only general intent to utter the charged words. *Id.* at 707–08 (internal quotation marks omitted) (citing *Watts v. United States*, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Skelly Wright, J., dissenting)).

and which included a provision stating that the act of burning a cross itself constituted "prima facie evidence of an intent to intimidate," violated the First Amendment. 538 U.S. at 348. In scrutinizing the statute, the Court reiterated its holding in *Watts* that the First Amendment "permits a state to ban a true threat." *Id.* at 359 (internal quotation marks omitted). It then defined "true threats" as "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." *Id.* The Court explained that "[t]he speaker need not actually intend to carry out the threat," because "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* at 359–60 (quoting *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992)). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat," the Court wrote, "where a speaker directs a threat to a person or group of persons *with the intent of placing the victim in fear* of bodily harm or death." *Id.* at 360 (emphasis added). With this definition in place, the Court held that the Virginia cross burning statute "does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* at 362.

The majority then fractured over the constitutionality of the statute's prima facie evidence provision, which allowed the jury to infer intent to intimidate solely from the act of cross burning. A plurality of Justices viewed the prima facie evidence provision as facially unconstitutional because, in

removing the State's burden to prove the defendant's intent to intimidate, it "strip[ped] away the very reason why a State may ban cross burning with the intent to intimidate" and chilled core First Amendment speech by allowing the State to convict someone who burned a cross for political or artistic reasons. *Id.* at 365. Justice Scalia disagreed that the prima facie evidence provision was facially unconstitutional, but agreed that an as-applied challenge to the prima facie evidence provision could lie where defendants were convicted for burning crosses without the requisite intent to intimidate. *Id.* at 379–80 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Finally, Justice Souter, joined by Justices Kennedy and Ginsburg, argued that the entire statute should be struck down as content discriminatory. *Id.* at 385–86.

In *Black*'s wake, lower courts have divided over whether the decision requires the government to demonstrate subjective intent to threaten as a constitutionally essential element of any true threat prosecution, or whether the Court's ruling was limited to the specific statute before it. Like the Third Circuit in this case, most Circuits to consider the issue have concluded that "*Black* did not work a 'sea change,' tacitly overruling decades of [Circuit] case law by importing a requirement of subjective intent into all threat-prohibiting statutes." *United States v. Martinez*, 736 F.3d 981, 987–88 (11th Cir. 2013).[3] *See also United States v. Jeffries*, 692 F.3d

[3] As Petitioner points out, the requirement of subjective intent has deep historical roots. If anything, recent cases to the

473, 479–80 (6th Cir. 2012) ("*Black* does not work the sea change that Jeffries proposes."), cert. denied, 134 S. Ct. 59 (2013); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) ("We are not convinced that *Black* effected the change that White claims."); *accord United States v. Nicklas*, 713 F.3d 435, 439–40 (8th Cir. 2013) (quoting *Jeffries*); *cf. United States v. Clemens*, 738 F.3d 1, 12 (1st Cir. 2013) (holding, on plain error review, that "[a]bsent further clarification from the Supreme Court, we see no basis to venture further and no basis to depart from our circuit law").

Other courts have disagreed, reasoning that the "clear import" of *Black* "is that only *intentional* threats are criminally punishable consistently with the First Amendment." *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005) (O'Scannlain, J.). *See also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.") (Reinhardt, J.); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (stating that "an entirely objective definition" of true threats may "no longer [be] tenable" after *Black*); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that a constitutionally proscribed true threat "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" (quoting *Black*, 538 U.S. at 360)); *White*, 670 F.3d at 520 (Floyd, J., concurring in part and dissenting in part) ("*Black* . . . makes our

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contrary are themselves a departure from this original understanding. Pet. Br. at 36–39.

purely objective approach to ascertaining true threats no longer tenable.”).

Although courts adhering to the majority view of *Black* have been reluctant to revise their prior precedents in the absence of plain command, the minority view provides the better reading of the decision. First, as mentioned above, *Black* expressly defined true threats as “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 (emphasis added). As the Ninth Circuit has held, “[a] natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.” *Cassel*, 408 F.3d at 631. Some courts have maintained that *Black*’s discussion of specific intent was descriptive rather than normative. According to this theory, the Court included a specific intent element in its true threat definition only because it was there “addressing a *specific intent statute* that requires, as an element of the offense, a specific intent to intimidate.” *White*, 670 F.3d at 517 (Duncan, J., concurring). This interpretation of *Black* is difficult to square with the decision’s language and structure. The Court’s true threat definition makes no reference to a particular statute or set of facts, but rather lays out a general explanation of what the concept of a true threat entails (specific intent to threaten) and does not entail (specific intent to carry out the threat). Moreover, the definition of a true threat occurs in Part III.A of the majority opinion, which defines the general contours of the First Amendment analysis,

rather than Part III.B, which applies that analysis to the statute under consideration.

References to specific intent echo throughout the majority and plurality opinions in *Black*. The majority, for example, described "intimidation" as "a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Black*, 538 U.S. at 360. It makes little sense to impose this intent to threaten requirement for one type of true threat but not others. *See White*, 670 F.3d at 522 (opinion of Floyd, J.). Indeed, "[t]he Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Cassel*, 408 F.3d at 631.

In striking down the prima facie evidence provision as facially unconstitutional, the plurality explained that the provision violates the First Amendment because it "does not distinguish between a cross burning done with the *purpose* of creating anger or resentment and a cross burning done with the *purpose* of threatening or intimidating a victim." *Black*, 538 U.S. at 366 (emphases added). *See also id.* at 367 ("The provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning *is intended to intimidate*. The First Amendment does not permit such a shortcut." (emphasis added)). "If the First

Amendment did not impose a specific intent requirement, 'Virginia's statutory presumption was superfluous to the requirements of the Constitution, and thus incapable of being unconstitutional in the way that the majority understood it." *White*, 670 F.3d at 523 (opinion of Floyd, J.) (quoting Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197, 217).

The other opinions in *Black* similarly reflect a consensus on the Court that intent to threaten is an essential element of any true threat. Justice Scalia, in his partial concurrence, disagreed with the Court's facial invalidation of the statute, but agreed that the jury instructions in Black's case, which stated that "[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent," were constitutionally deficient because they made it "impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—*including* evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross." 538 U.S. at 377, 380 (opinion of Scalia, J.). And Justice Souter, in his partial concurrence, argued that the prima facie evidence provision rendered the entire statute facially unconstitutional because "its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Id.* at 385 (opinion of Souter, J.). *See also id.* at 386 ("What is significant is

that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one."). Thus, eight of the Justices in *Black* "agreed that intent to intimidate is necessary [for true threats] and that the government must prove it in order to secure a conviction." *Cassel*, 408 F.3d at 632 & n.7.

B. First Amendment Principles Favor A Subjective Intent To Threaten Requirement.

Even if *Black* did not already settle the issue, First Amendment principles compel the conclusion that subjective intent to threaten is an essential element of any true threat. Under the purely objective standard for evaluating true threats, a speaker may be "subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). In other words, it is essentially a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Id.* Standing alone, this objective analysis "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have

known others would see it that way." *Jeffries*, 692 F.3d at 484-85 (Sutton, J., concurring *dubitante*).[4]

This Court has frequently noted the importance of intent in criminal law. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." *Morissette v. United States*, 342 U.S. 246, 251–52 (1952). It is a principle with ancient lineage. *See* 4 William Blackstone, *Commentaries on*

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[4] Courts applying a purely objective standard have split over whether to apply a reasonable speaker test or a reasonable listener test. *See United States v. Saunders*, 166 F.3d 907, 913 & n.6 (7th Cir. 1999) (collecting cases). Under the reasonable speaker test, a statement is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (internal quotation marks omitted). The reasonable listener test, by contrast, asks only whether "whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (internal quotation marks omitted). Only the reasonable speaker standard qualifies as a negligence-based standard. The reasonable listener standard is more appropriately characterized as a strict liability standard because it would allow a jury to convict a speaker "for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997). *See also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225, 1246 (2006) ("In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made.").

the Laws of England 21 (1769) ("And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all."); Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881) ("Even a dog distinguishes between being stumbled over and being kicked."). Thus, absent an explicit statutory direction to the contrary (which may raise its own constitutional issues), this Court presumes an intent requirement for criminal laws, *Morrisette*, 342 U.S. at 250, particularly where *mens rea* serves as the "crucial element separating legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) (interpreting the term "knowingly," as used in the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, to require the government to demonstrate that defendants charged with trafficking in child pornography were aware of both the minority of the performers and the sexually explicit nature of the material).

When a criminal prosecution is premised on speech, as here, the general presumption in favor of a subjective intent requirement is reinforced by this country's constitutional tradition of allowing breathing room for the free exchange of ideas. *See Rogers*, 422 U.S. at 44, 47 (opinion of Marshall, J.) (stating that the Court "should be particularly wary of adopting . . . a [negligence] standard for a statute that regulates pure speech," because a purely "objective construction" of true threats "would create a substantial risk that crude, but constitutionally protected, speech might be criminalized" or chilled).

Anyone conversant with public discourse in this country, particularly as expressed on Internet public comment threads, is undoubtedly familiar with Americans' frequent resort to strong and even offensive language. "The language of the political arena," in particular, "is often vituperative, abusive, and inexact," and "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted).[5] Sometimes there will be sufficient contextual detail to make it objectively clear whether a speaker is issuing a true threat or is engaged in some form of protected First Amendment expression. But many times—and particularly in the case of Internet speech, where the context surrounding a particular statement on a message board or comments thread may be exceedingly thin or difficult to ascertain—whether a given statement qualifies as a threat will be in the eye or ear of the beholder. In those circumstances, the purely objective true threat standard provides insufficient breathing for protected First Amendment expression. *Watts*, 394 U.S. at 708.

[5] Although this case does not involve speech advocating a particular political or ideological agenda, the question of whether subjective intent to threaten is required to characterize speech as a true threat outside the First Amendment will likely determine the rule for political and ideological speech as well. As this Court has explained, the determination of whether particular speech lies wholly outside the First Amendment is a categorical one that does not turn on a "simple cost-benefit analysis." *Stevens*, 559 U.S. at 471.

Moreover, because the jury in a true threat case is likely to hold the common prejudices of its place and time, the threat of prosecution under the purely objective standard hangs most heavily over the heads of those advocating unpopular or unconventional ideas. "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). The risk of criminal prosecution is especially great for those holding unpopular or controversial views whose "violent and extreme rhetoric, even if intended simply to convey an idea or express displeasure, is more likely to strike a reasonable person as threatening." *White*, 670 F.3d at 525 (opinion of Floyd, J.); *cf. Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

To avoid that risk, many speakers will self-censor. "The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech." *White*, 670 F.3d at 524 (opinion of Floyd, J.) *See also* 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."). "Put simply, an

objective standard chills speech." Crane, *supra* note 4, at 1273.

This Court has addressed similar First Amendment problems in the incitement context by imposing subjective intent as an essential element of criminal liability. For example, in *Brandenburg v. Ohio*, this Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation [i.e., incitement] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," and stated that any statute failing to recognize these requirements "sweeps within its condemnation speech which our Constitution has immunized from governmental control." 395 U.S. 444, 448 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (concluding that the defendant's speech was not incitement, in part because "there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, imminent disorder").[6] And, in *Claiborne Hardware*, the Court

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[6] The Court has also used this "breathing room" rationale to justify subjective intent requirements for other statutes criminalizing pure speech. In *United States v. Alvarez*, for example, two Members of this Court explicitly recognized that statutes criminalizing false speech should be interpreted as requiring the government to demonstrate that the speaker made the false statements "with knowledge of their falsity and with the intent that they be taken as true," so as to "provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking." 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment).

held that although a boycott organizer's impassioned statements for black citizens to support the boycott "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence," the "emotionally charged rhetoric of [his] speech did not transcend the bounds of protected speech set forth in *Brandenburg*," because there was "no evidence—apart from the speeches themselves—that [he] authorized, ratified, or directly threatened acts of violence." 458 U.S. at 927–29. "To rule otherwise," the Court recognized, "would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 928 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Requiring the government to demonstrate subjective intent to threaten in true threat cases would not substantially hinder its ability to prosecute actually intended threats. As in most criminal prosecutions, where intent is an essential element of the crime, the jury may infer the defendant's *mens rea* from the totality of the evidence, including the statement itself. The subjective intent requirement "simply permit[s] the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat." Crane, *supra* note 4, at 1275. In some cases, the defendant might have a perfectly plausible explanation for her choice of words. *See Fulmer*, 108 F.3d at 1490 (defendant argued that his allegedly threatening statement to an FBI agent—"[t]he silver bullets are coming"—was code for clear-cut evidence of wrongdoing). In others, the defendant might argue that she lacked the requisite mental

capacity to subjectively intend a threat. *See United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988) (conditioning the viability of the defendant's diminished capacity defense on the court's conclusion that 18 U.S.C. §§ 875 and 876 are specific intent statutes); *see generally* Crane, *supra* note 4, at 1236 & nn. 44–47.

Critics of the subjective intent requirement have generally argued that it gives insufficient weight to the harm caused by objectively threatening statements, regardless of whether those statements were intended to threaten. *See, e.g.*, *Jeffries*, 692 F.3d at 480 ("What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech."). To be sure, the government has a legitimate interest in "protecting individuals from the fear of violence" and "from the disruption that fear engenders," as well as "the possibility that the threatened violence will occur." *RAV v. City of St. Paul*, 505 U.S. 377, 388 (1992). In particular, violence against women represents a serious societal problem that needs to be addressed.[7] But the First Amendment constrains the government's ability to advance that interest through means that punish or chill protected expression. That is the risk created by the government's proposed rule in this case, which will not be limited to these facts. "Statements deemed threatening in nature only upon

[7] *See United States v. Morrison*, 529 U.S. 598, 629–630 (2000) (Souter, J., dissenting) (citing statistics regarding violence against women in the U.S.).

'objective' consideration will be deterred [by 18 U.S.C. § 871] only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that 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*, 422 U.S. at 47–48 (opinion of Marshall, J.). Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and the country's constitutional tradition of encouraging the free and uninhibited exchange of ideas.

II. A SUBJECTIVE INTENT REQUIREMENT IS PARTICULARLY IMPORTANT FOR PROTECTING ONLINE SPEECH

For many people throughout the United States—indeed, the world—the Internet has become the predominant means for communication and public discourse. "This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." *Reno*, 521 U.S. at 870. "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.* When this Court decided *Reno* in 1997, the government estimated that "[a]s many as 40 million

people use the Internet." *Id.* (alteration in original) (internal quotation marks omitted). By 2010, "22 percent of the world's population had access to computers[,] with 1 billion Google searches every day, 300 million Internet users reading blogs, and 2 billion videos viewed daily on YouTube." Wikipedia, The Free Encyclopedia, *Internet*, https://en.wikipedia.org/wiki/Internet (last visited Aug. 7, 2014). In the United States, 74.8 percent of all households access the Internet at home in 2012, up from 18.0 percent in 1997, and 45.3 percent of individuals 25 and older were using smartphones. U.S. Census Bureau, *Computer and Internet Trends in America* (Feb 3, 2014), http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf.

Now, more than ever, "[t]he content on the Internet is as diverse as human thought." *Reno*, 521 U.S. at 870 (internal quotation marks and citation omitted). And, just as with offline speech, the types of content available "defy easy classification." *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996). Individuals can communicate with each other and the broader public through all manner of Internet-based media, including email, chat rooms, direct messaging services, newsgroups, videos, blogs, websites, games, social networks such as Facebook, and remote hosting services for shared files. The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are limited only by the human capacity for expression. If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online. As this Court made absolutely clear in *Reno*, there is "no

basis for qualifying the level of First Amendment scrutiny that should be applied" to speech conducted on the Internet. *Reno*, 521 U.S. at 870.

The reasons for imposing a subjective intent to threaten requirement on true threat prosecutions apply with equal, if not greater, force to online speech than they do to offline speech. First, online speakers often have less information about the composition of the audience they are targeting with a communication. A message posted to a publicly accessible website or mailing list is potentially viewable by anyone with an Internet connection anywhere in the world. A speaker may post a statement online with the expectation that a relatively small number of people will see it, without anticipating that it could be read—and understood very differently—by a much broader audience.[8]

Second, online communications can easily become decontextualized by third parties. A speaker might send an email to one person, only to see that person forward the message to dozens of others or post it on a public mailing list. Or a speaker may

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[8] *See e.g.*, Danah Boyd, *It's Complicated: The Social Lives of Networked Teens* 31–32 (2014) ("In speaking to an unknown or invisible audience, it is impossible and unproductive to account for the full range of plausible interpretations [of a statement]. Instead, public speakers consistently imagine a specific subset of potential readers or viewers and focus on how those intended viewers are likely to respond to a particular statement. As a result, the imagined audience defines the social context. In choosing how to present themselves before disconnected and invisible audiences, people must attempt to resolve context collapses or actively define the context in which they're operating.").

post a comment on his own Facebook profile page, intending it to be seen only by those friends he has allowed to view his page, and later find that one of those friends has taken a screen-capture of his comments and posted the image to an entirely different website. These actions, completely beyond the control of the speaker, place the speaker's statements in front of audiences that the speaker had no expectation or intent to reach. Further, such decontextualization circumvents any effort by a speaker to provide additional context, outside the plain words of the statement, that would make the non-threatening intent of the statement clear. Different online communication fora will often develop their own conventions for expressing emotion and sarcasm. *See* Jorge Peña & Jeffrey T. Hancock, *An Analysis of Socioemotional and Task Communication in Online Multiplayer Video Games*, 33 Comm. Res. 92, 98 (2006) ("[Computer-mediated communication] participants tend to express themselves employing collective conventions, such as a shared jargon and argot . . . . CMC conventions can be considered as surrogates for nonverbal communication and can be employed to express emotions, moods, humor, sarcasm, and irony."). Even within a single online environment, such as a multiplayer online game, sub-communities will form and develop their own communication styles. *See* Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*, 1 Games & Culture 338, 357 (2006). Statements made to a close-knit community could easily be misinterpreted when taken out of context or read by a newcomer who is not yet familiar with the conventions or practices of that community. Thus,

use of an objective test for online communication would inevitably chill constitutionally protected speech, as speakers would bear the burden of accurately anticipating the potential reaction of unfamiliar listeners or readers.

A subjective intent requirement addresses this problem by allowing a jury to consider more evidence contextualizing the online comment than could be considered under a purely objective standard, including the defendant's intended audience, other remarks clarifying the challenged statement's meaning, the defendant's motive for making the statement, and so forth. And, just as with offline speech, a requirement that the government demonstrate a speaker's subjective intent to threaten would not unduly impede its ability to prosecute speakers who intentionally threaten others. While a speaker cannot control what happens to her statement after she posts it, there are certainly a number of judgments speakers make each time they engage in online communication. These choices are often relevant to both the objective import of the speaker's words *and* the speaker's subjective intent in posting them. For example, a speaker may decide to send an email or a one-to-one chat message directly to another individual with whom he has a preexisting relationship. Or a speaker may decide to post a message to a personal social media account, access to which is restricted to an audience of his choosing. A speaker may include her message on an issue-specific message board, and the message may be on- or off-topic for that forum. A speaker may also decide to publish her message on a platform that is publicly visible, and may take steps to increase the chances that the message is viewed by a particular

individual or group (for example, posting publicly on Twitter and including a hashtag that is relevant to the topic or including another person's username in the post). Each of these scenarios presents different, situation-specific information about a speaker's choices regarding the scope, reach, and intended audience of her statement—precisely the sort of evidence that could be relevant to a jury's assessment of the speaker's subjective intent.

CONCLUSION

For the foregoing reasons, this Court should hold that subjective intent to threaten is an essential element of any true threat, regardless of whether the relevant statement occurred on the Internet or elsewhere. Accordingly, the judgment below should be reversed.

Respectfully submitted,

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