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

REPLY BRIEF FOR THE PETITIONER

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Fl.
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

[Additional Counsel Listed On Inside Cover]

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

MARK T. STANCIL
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

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REPLY BRIEF FOR THE PETITIONER

The government treats two propositions as articles of faith. First, subjective intent *must* be irrelevant to criminal liability because a statement "that appears to be [a] serious [threat] is equally harmful regardless of the speaker's private state of mind." U.S.Br.16. Second, it is acceptable to impose felony liability whenever "a reasonable person would foresee that the statement would be interpreted" as a threat, *id.* at 11 (quoting J.A.301), because "speakers who are aware of the meaning and context of their statements bear the onus to avoid communicating through true threats," *id.* at 49. Both are fundamentally flawed.

Most acts giving rise to criminal liability are "equally harmful regardless of the [defendant's] private state of mind." U.S.Br.16. But our constitutional system nevertheless employs a strong presumption that "an injury can amount to a crime only when inflicted by intention," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952). Even the government concedes that "conventional *mens rea*" analysis requires that "a statute silent on that point" be read to "require that the defendant know the facts that make his conduct illegal." U.S.Br.28. Otherwise, strict criminal liability would be the rule, not the rare exception.

The government also errs in drawing the line for punishment where "a reasonable person would foresee" that his words would cause fear. While the government claims that standard has applied since time immemorial, it actually represents a late-20th-century departure from the traditional American

practice of requiring proof of intent to place in fear. The inherent indeterminacy of basing criminal liability on the reaction of a hypothetical "reasonable person" is alien to our free-speech tradition. Rather, "[e]xacting proof requirements" are necessary before imposing liability because "First Amendment freedoms need breathing space to survive." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); accord, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The prospect that a speaker "may accidentally incur liability for speaking" can have severe chilling effects, see *United States* v. *Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring in the judgment). The government's assurances that "legitimate misunderstanding[s]" will not result in conviction rings hollow in light of real-world experience, see Pet.Br.51 (conviction for ambiguous statement, "[t]he silver bullets are coming"), and the growing number of questionable arrests and detentions under a vague standard that tells law enforcement, "it doesn't matter what [the speaker] thinks," J.A.192; see p.24, *infra*.

The government has not demonstrated that state and federal statutes that require proof of subjective intent fail to protect against fear and disruption.[1] Indeed, one of the government's preferred examples—threats against judges—undermines the government's argument since the relevant federal statute requires proof of specific "intent to impede, intimidate, * * * interfere with[,] * * * [or] retaliate against,"

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[1] *E.g.*, *State* v. *Cahill*, 80 A.3d 52, 55-56 (Vt. 2013); *Donnell* v. *State*, No. A09-828, 2010 WL 772388, at *4 (Minn. Ct. App. Mar. 9, 2010); *State* v. *J.M.*, 28 P.3d 720, 725 (Wash. 2001).

18 U.S.C. §115.[2] Nor would requiring proof of intent pose an obstacle to prosecuting the government's other favorite example: bomb threats, see U.S.Br.15, 16, 25, 29, 32, 38. A person who perpetrates a bomb hoax has the requisite specific intent because he does so for the purpose of causing needless fear and disruption.

The government's argument boils down to this: Congress intended—and the Constitution permits—prosecution of speakers whose purpose was not to cause fear and who even lack knowledge that their speech will cause fear. See 1 Wayne R. LaFave, *Substantive Criminal Law* §5.2(a), at 341 (2d ed. 2003) (explaining traditional view of "specific intent"). That conflicts with basic tenets of criminal law and bedrock First Amendment principles this Court has safeguarded for generations.

A. The Ordinary Meaning Of "Threat" Requires Intent To Cause Fear

The government asserts that whether a statement is a "threat" punishable by 18 U.S.C. §875(c) turns solely on objective "circumstances" surrounding a statement; indeed, it would be "bizarre" (U.S.Br.38 (internal quotation marks omitted)) for felony liability to turn on such an irrelevancy as the speaker's intent. The government insists that this has always been so, *id.* at 43-45; and, consistent with the purposes of threat statutes, it *must* always be so. *Id.* at 16, 18, 35, 39, 42. But the points that the government

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[2] See U.S.Br.25 (citing *United States* v. *D'Amario*, 350 F.3d 348, 352 (3d Cir. 2003)); *id.* at 56 (citing *United States* v. *Turner*, 720 F.3d 411, 413 (2d Cir. 2013), pet. for cert. pending, No. 13-1129 (filed Mar. 24, 2014)).

does not dispute belie its categorical claims, and demonstrate that Congress understood that Section 875(c)'s proscription on "threat[s]" prohibits statements made with intent to cause fear.

1. The earliest American cases unequivocally required that "A threat, in order to violate [the law], * * * *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." *State* v. *Benedict*, 11 Vt. 236, 239 (1839) (emphasis added). "There are, in some of the definitions, references to language tending to provoke a breach of the peace * * * ; but the authorities have very plainly held that this covers nothing that is not *meant* * * * to bring about violence directly." *Ware* v. *Loveridge*, 42 N.W. 997, 998 (Mich. 1889) (emphasis added); *State* v. *Graham*, 121 N.C. 623, 623 (1897) ("intent or design" an "essential element" of "sending a threatening letter") (citing *Rex* v. *Boucher* (1831) 172 Eng. Rep. 826 (K.B.)).

Likewise, in the years following Section 875(c)'s enactment, it was black-letter law "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." 2 Francis Wharton, *Criminal Law & Proc.* §803 (Ronald A. Anderson ed., 12th ed. 1957) (emphasis added); cf. Model Penal Code §211.1 cmt. 1, at 177 (1980) (noting prohibition on "intentionally plac[ing] another in fear"); *id.* §211.3 (prohibiting "threaten[ing] * * * with purpose to terrorize" or

"cause evacuation of a building"). The government ignores these authorities.

The government cites a pre-Revolutionary English threatening-letter statute with "no explicit intent-to-threaten requirement," U.S.Br.44, and a handful of equivocal English decisions construing it. But none of those cases explicitly addressed the relevance of intent, much less held intent irrelevant. *Ibid.* And the government disregards authority explaining that the relevant inquiry was the *intention of the writer*—that the statute was "levelled against such whose *intention* it was, (*by writing* such letters ***) ***, [to] obtain their object *by creating terror* in [the victim's] mind." 1 William Oldnall Russell & Daniel Davis, *A Treatise on Crimes & Misdemeanors* 1845 (1st Am. ed. 1824) (emphasis added)).

The government cites state statutes purportedly patterned after that English law. U.S.Br.45. Even if those laws had been subject to First Amendment limitations, see *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947), the government cites no authorities giving them its favored construction. It was well established that "[t]he intent, both under the unwritten law and under the statutes, must be evil." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* §1201, at 664 (6th ed. 1877); accord 25 *The American & English Encyclopaedia of Law* 1073 (Charles F. Williams ed., 1894) (under threatening-letter statutes, "intent to extort, or to do some other unlawful act ***, must be proved"). Despite the absence of a textual intent requirement, Kentucky's threatening-letter statute prohibited letters "written *** for the purpose of intimidating, alarming, disturbing, or in-

juring another person." *Commonwealth* v. *Morton*, 131 S.W. 506, 508 (Ky. 1910); cf. *Benedict*, 11 Vt. at 238 (construing silent statute to require intent to cause fear). The government's claim that its rule has "historically coexisted" with the First Amendment (U.S.Br.56) is fanciful.

2. This historical context frames Section 875(c)'s use of "threat." The government's effort to redefine "threat" to involve only "*apparent* intent" (*id.* at 25 (emphasis added)) finds no support in the word's definition, which is framed from the perspective of the person who "declar[es] * * * one's intention of inflicting injury," 11 *Oxford English Dictionary* 352 (1st ed. 1933), without mentioning the word "apparent." Indeed, the government cites no dictionary that defines "threat" with reference only to the objective circumstances surrounding a statement.

The government argues those definitions are irrelevant because they involve an "intent to inflict harm" rather than to cause fear. U.S.Br.24. But these definitions contemplate that the statement be communicated *intentionally* for the purpose of causing fear, defining a "threat" as "an expression of intention to hurt, destroy, punish, etc. *as in retaliation or intimidation*," *Webster's New World Dictionary* 1394 (3d college ed. 1988) (emphasis added), or a means to "effecting coercion or duress," *Webster's New Int'l Dictionary* 2633 (2d ed. 1954), and "threaten," as "*try[ing] to influence* (a person) by menaces," *Compact Oxford English Dictionary* 2051 (2d ed. 1989) (emphasis added). *All* these definitions contemplate an intentional effort to cause fear. This conclusion is reinforced by the recurring appearance in the U.S. Code

of "threaten" among words denoting intentional menacing: "coerce, intimidate, [and] threaten." 42 U.S.C. §3617; *id.* §12203(b); see also 5 U.S.C. §6385; 18 U.S.C. §112(b).

3. Section 875(c)'s legislative history confirms this understanding. The government correctly notes that the provision was proposed to eliminate a predecessor provision's intent-to-extort requirement to "render present law more flexible." U.S.Br.26 (quoting *Threatening Communications: Hearing on H.R. 3230 Before the H. Comm. on the Post Office & Post Roads*, 76th Cong. 5 (1939) ("*1939 Hearing*")). But the *only* issue identified with prior law was with "threats due to animosity or spite," and "threat[s] * * * on account of revenge," *1939 Hearing* at 9, 7 (statement of William Barron, Criminal Division, Department of Justice), and the government wanted authority to prosecute "even when [it] could not prove that the motive for the threat was extortion," *id.* at 12; *ibid.* (sole issue "[w]hether the motive of the threat be the acquisition of money or some other personal advantage") (Statement of Rep. Flannery). But the wish to prohibit both "threats made for the purpose of extorting money and threats borne of other (intentional) purposes," did not encompass a wish to abandon historical prerequisites for criminal liability. *United States* v. *Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) (Sutton, J., concurring *dubitante*).[3]

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[3] The government is wrong that Congress considered Section 871's mental state in enacting Section 875(c). The *sole* reference to that provision in the legislative history concerned *sentencing*. *1939 Hearing* 13.

4. Tellingly, the only examples the government can give of statements where intent does not (*seem* to) matter are those involving direct and unequivocal risks to life, such as an anonymous letter stating, "I will kill you." U.S.Br.25. While that statement is undoubtedly a threat, it is not because intent does not matter: It is because the government has framed the hypothetical so that intent is obvious. The government's model for culpability crumbles in the far more common circumstance of ambiguous statements—say, "you will regret doing this," see *Exchange Between Bob Woodward and White House Official in Spotlight,* CNN Politics (Feb. 27, 2013), http://goo.gl/K3QZkR. Under such circumstances, people would ordinarily consider the speaker's intent highly relevant. See Pet.Br.23-24.

A variation on the government's "bomb hoax" example underscores this: Assume two high-school students simultaneously overhear another student telling friends, "The pipes are in my locker. We 'blaze up' at 2:30." Although neither has heard the phrase before, one correctly infers the students plan to smoke marijuana after school, while the second incorrectly suspects something more sinister. Both make "an anonymous call about a pipe bomb in a school [locker]." U.S.Br.25. Because the objective circumstances are identical, under the government's theory, *both* callers are guilty of making a threat, and any difference in treatment would be "bizarre." U.S.Br.38. That makes no sense: The first student (who correctly concluded there was no bomb) intended to create fear and disruption, while the other intended to save lives. "The government may say that" a speaker's intent is irrelevant to whether he has

made a threat, "but no one else would." *Watson* v. *United States*, 552 U.S. 74, 79 (2007).

B. Bedrock Principles Of Statutory Construction Require Proof Of Intent To Cause Fear

Although the government makes much of the fact that Section 875(c) does not use the word "intent," U.S.Br.22-23, it *agrees* that "it is appropriate to infer" a mental state for such an offense. *Id.* at 22, 28. The only question is *which* mental state is appropriate for a five-year felony punishing pure speech.

1. The government concedes that "a statute silent on" *mens rea* must be read to "require that the defendant know the facts that make his conduct illegal." U.S.Br.28 (quoting *Staples* v. *United States*, 511 U.S. 600, 605 (1994)). But the government departs from that principle to claim that it is enough for a speaker to know the "character" of his remarks. U.S.Br.30. A statement is a "threat," under the government's definition, if it causes the victim fear, and that fear is reasonable. U.S.Br.18. A defendant thus does not "know the facts that make his conduct illegal," *Staples*, 511 U.S. at 605, unless he *knows* that *his statements will cause fear*. The government's proposed test falls far short of that.

Under the government-proposed jury instructions, J.A.25, it was enough that "a *reasonable person would foresee* that the statement *would be interpreted* * * * *as a serious expression of an intention* to inflict bodily injury," J.A.301 (emphasis added). That test is doubly flawed, turning not on the defendant's mental state but on that of a "reasonable person," and turning not on *actual knowledge* but on what a reasonable person "would foresee." Even in cases

involving conduct not implicating the First Amendment, this Court has insisted on proof the defendant had *actual knowledge* of what makes the conduct criminal. It is not enough, for example, that a "reasonable person would foresee" that a military-style rifle was capable of automatic fire; the *defendant* must "*know* that his weapon possessed automatic firing capability." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994) (emphasis added) (discussing *Staples*, 511 U.S. at 605). Similarly, the defendant must "*know*[] that [anticompetitive] effects would most likely follow" from aggressive business practices, *U.S. Gypsum*, 438 U.S. at 444 (emphasis added); and must "*kn[o]w* that the [drug paraphernalia] *** [is] likely to be used with illegal drugs." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516, 524 (1994) (emphasis added).[4]

2. The government suggests that requiring proof that the defendant knows anything more than the general "character" of his remarks "cannot be reconciled with" *Hamling* v. *United States*, 418 U.S. 87 (1974). U.S.Br.15. But *Hamling* principally stands for the uncontroversial proposition that defendants need not possess "knowledge of the *legal status* of [obscene] materials" to be guilty. *Id.* at 123-

[4] The government is wrong that "the absence of any [statutory] reference to a subjective intent to threaten makes it inappropriate to read such a specific-intent requirement into the statue." U.S.Br.22-23. When a "general intent [requirement] with respect to the *actus reus*"—that the defendant knows the words he is saying—"would run the risk of punishing" innocent conduct, the "situation[] may call for implying a specific intent requirement." *Carter* v. *United States*, 530 U.S. 255, 269 (2000).

124 (emphasis added); see *X-Citement*, 513 U.S. at 73 n.3. This Court has not applied the government's broad reading of *Hamling*, even in circumstances far more closely related to the conduct there.

The government's current position suggests that it would have been enough in *X-Citement Video* for the defendant to know the "nature and character" of the materials—that they depicted sexual acts involving *young people*. After all, the harm from creating and distributing child pornography occurs regardless whether individual vendors know those portrayed are underaged, U.S.Br.15; knowledge of the performers' youth provides enough "context" to make the defendant "bear the onus to avoid [distribu]ting" child pornography, *id.* at 49; and materials portraying young persons engaged in sex have "slight social value as a step to truth," *id.* at 36. But emphasizing "First Amendment constraints," 513 U.S. at 71, this Court held that defendants must "'know[]' * * * the age of the performers" to warrant punishment, *id.* at 78. Even the *government* advocated an actual knowledge standard, recognizing that, "to know the nature and character of child pornography," under *Hamling*, "one must know that it depicts children." U.S.Br.44, *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (internal quotation marks omitted). The government fails to explain why it is not likewise necessary that a defendant *know* that his statements *will create fear*.

3. The government next argues that because Congress "set[] forth specific-intent requirements explicitly" in Section 875(b) and (d), "it is unlikely to have intended such a requirement in Section 875(c)

without saying so." U.S.Br.23. But as the government concedes, subsections (b) and (d) concern a *different* specific-intent requirement for the aggravated threat offense of acting "with intent to extort." That Congress specified the aggravating offense's *mens rea* hardly implies that the simple offense requires none—particularly when that *mens rea* is the traditional (and self-evident) "intent to threaten." Indeed, that the aggravated offense uses "threat" to imply an intent to place in fear suggests the simple offense employs the same meaning. Moreover, in *Morissette*, this Court inferred a requirement of an "intent to convert" government property in a provision containing no textual intent requirement, 342 U.S. at 271, though the *statute's next sentence* explicitly required proof of "intent to convert [the property] to his use or gain." 18 U.S.C. §641 (1949).

4. The presidential threats statute, 18 U.S.C. §871, provides no support for the government's reading of Section 875(c). Since its enactment shortly before America's entry into World War I, Congress and the courts have viewed the presidential threats statute as "a very different offense," 53 Cong. Rec. 9377 (1916), "since the reasons why threats of violence are outside the First Amendment … have special force when applied to the person of the President." *Virginia* v. *Black*, 538 U.S. 343, 362 (2003) (internal quotation marks omitted). Unlike most threat statutes, Section 871 was designed not to protect the subject of threats from fear, but to prevent incitement of listeners. 53 Cong. Rec. 9377 (1916); *Watts* v. *United States*, 402 F.2d 676, 678-679 (D.C. Cir. 1968), rev'd on other grounds, 394 U.S. 705 (1969). Section 871

has always been understood to be unique among threat statutes, so that traditional "definitions of 'threat' *** are not pertinent." *United States* v. *Stickrath*, 242 F. 151, 155 (S.D. Ohio 1917) (distinguishing *Benedict*); accord *United States* v. *Stobo*, 251 F. 689, 691-692 (D. Del. 1918).

In any event, the government is wrong that by the time of Section 875(c)'s enactment, it was settled that intent was irrelevant under Section 871. Even *Ragansky* v. *United States*, the government's principal authority, cautioned that the defendant there had "not claimed that *** he intended [listeners] to understand" "that he was joking," reflecting that the court deemed intent to threaten relevant. 253 F. 643, 644-645 (7th Cir. 1918). Other contemporaneous decisions indicated intent was relevant, saying the statute prohibited "threatening words *calculated* to inflame or have a sinister influence upon the minds of others." *Stobo*, 251 F. at 695 (emphasis added); accord *United States* v. *Daulong*, 60 F. Supp. 235, 236 (W.D. La. 1945) (same); *United States* v. *Reid*, 49 F. Supp. 313, 318 (W.D. La. 1943) (admitting evidence in Section 871 trial "to show intent *** as to the wilful and serious nature of the statement").

Indeed, courts continued to consider subjective intent relevant in Section 871 prosecutions decades after enactment of Section 875(c). The D.C. Circuit in *Watts* emphasized that the speaker had not "claim[ed] at trial that his words were uttered in jest," and noted that "subjective intent of the speaker, standing alone, *has not been considered dispositive*." 402 F.2d at 681-682 (emphasis added). The Fourth Circuit *continues* to require proof of specific intent to

incite or "disrupt presidential activity." *United States* v. *Patillo*, 438 F.2d 13, 15-16 (4th Cir. 1971) (en banc). *Ragansky* "is hardly the sort of uniform construction that Congress might have endorsed" in enacting Section 875(c). *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 532 (1994).

5. The earliest case the government cites that clearly embraces its position dates to shortly after the Kennedy assassination. U.S.Br.22 (citing *Pierce* v. *United States*, 365 F.2d 292 (10th Cir. 1966) (construing Section 871)). By then, there were *already* numerous decisions holding that "intent to threaten is an essential element of [Section 875(c)]." *United States* v. *LeVison*, 418 F.2d 624, 626 (9th Cir. 1969) (citing *Seeber* v. *United States*, 329 F.2d 572, 577 (9th Cir. 1964)); accord *United States* v. *Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966);[5] Pet.Br.25-26 (collecting authorities). The government's claimed historical consensus is, in fact, a relatively recent development dating to the 1980s and later.

6. The government offers one conclusory paragraph on the difficulty of proving specific intent, U.S.Br.33, but never attempts to show that prosecutors are systematically unable to make that showing. Nor does the government deny that searching the computers and cellphones used for charged communications will likely yield records of

[5] Although the government claims *Dutsch*'s statement was dictum, U.S.Br.34, the Fourth Circuit contemporaneously explained that *Dutsch* held that evidence was properly admitted to prove that "ambiguous words * * * were in fact said with the intent to threaten," *United States* v. *Baldivid*, 465 F.2d 1277, 1284 (1972).

speakers' innermost thoughts relevant to prove intent. See *Riley* v. *California*, 134 S. Ct. 2473, 2490 (2014). Indeed, the government has previously asserted that the objective standard "is already so demanding" as to be functionally indistinguishable from what is required to prove subjective intent. *E.g.*, U.S.Br.19, *United States* v. *Francis*, 164 F.3d 120 (2d Cir. 1999), 1997 WL 33483534. The government proves specific intent hundreds of times every year in trials for drug offenses (*e.g.*, possession of narcotics with intent to distribute them), violent crimes (*e.g.*, murder, assault with intent to kill), and a multitude of fraud offenses. Indeed, *tens of thousands* of defendants do not even contest guilt of specific-intent crimes and simply plead guilty. See *Federal Justice Statistics 2010 Statistical Tables*, U.S. Dep't of Justice (Dec. 2013), http://goo.gl/CnWAVa.

C. The First Amendment Requires Proof Of Subjective Intent To Threaten

One of the most consistent principles of First Amendment jurisprudence has been the need for "[e]xacting proof requirements" before imposing liability for speech. *Telemarketing Assocs.,* 538 U.S. at 620. The government does not even acknowledge this principle, which it reimagines as a narrow tolerance for "[im]perfect fact-checking of certain publicly-focused speech," to avoid delaying important "contributions to the marketplace of ideas." U.S.Br.52. Instead, the government proposes a new and dangerous idea that speakers "bear the onus to avoid communicating through true threats." *Id.* at 49.

The government cites no authority for its novel "burden of speech" argument. For good reason: This Court has consistently held that it is necessary to tolerate "instance[s] of individual distasteful abuse of a privilege" to avoid chilling free speech. *Cohen* v. *California*, 403 U.S. 15, 25 (1971). "[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).

1. The government's few cases fall far short of supporting its negligence standard. The reason *Watts* v. *United States*, 394 U.S. 705, 708 (1969) (per curiam), focused on circumstances rather than intent was because the defendant did not contest the "subjective intent of the speaker." *Watts*, 402 F.2d at 681. Even then, this Court expressed "grave doubts" that the government had proved *mens rea* based only on the speaker's "*apparent* determination" and the fact he had "voluntarily uttered the charged words." 394 U.S. at 708. The two cases that the government cited in *Watts*—*Ragansky* and *Pierce*—are the very ones it cites here. See U.S.Br.22; compare *United States* v. *Patillo*, 431 F.2d 293, 297 (4th Cir. 1970) (suggesting *Ragansky* and *Pierce* were "discredited by *Watts*"), aff'd on reh'g, 438 F.2d 13 (4th Cir. 1971) (en banc). The Court's doubts counsel even more strongly against the government's position outside the context of the presidential threats statute, where the need to prohibit violent threats "ha[s] special force." *Black*, 538 U.S. at 362 (internal quotation marks omitted).

Likewise unavailing is the government's reliance on a "fighting words" case predating *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), by a quarter century. U.S.Br.48 (citing *Cantwell* v. *Connecticut*, 301 U.S. 296, 309 (1940)). Considered in context of subsequent decisions, "an intent requirement is implicit in the elements the state must prove to proscribe speech under the fighting words doctrine.'" Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U. L. Rev. 1, 33 n.211 (2004).

The government fares no better with its traditional port-of-last-resort when justifying speech restrictions—analogy to obscenity. See *United States* v. *Stevens*, 559 U.S. 460, 481-482 (2010) (rejecting analogy); see also *Brown* v. *Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2734 (2011) (same). Obscenity prosecutions usually involve consensual, commercial transactions. Threats, in contrast, involve noncommercial interactions the listener does not welcome. The profit incentive gives speech in obscenity cases a robustness that explains both the lack of a strong *mens rea* requirement in such cases, cf. *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 381 (1977); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61, 65 (1973), and the government's inability to cite threat cases endorsing its strained analogy.

The government speculates that this Court's insistence in incitement cases on proof that the speaker "intended to produce * * * imminent disorder" (*Hess* v. *Indiana*, 414 U.S. 105, 109 (1973) (per curiam)) simply "may refer to the objective manifestation of intent." U.S.Br.50-51. But it cannot reconcile that position with *Claiborne Hardware*'s failure to find incitement

despite statements that "might have been understood as" inciting violence, Pet.Br.40 (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982))), or with the prevailing understanding of that case. *E.g.*, Leslie Kendrick, *Free Speech and Guilty Minds*, 114 Colum. L. Rev. 1255, 1257 & n.3 (2014); Pet.Br.39-40.

2. The government claims that *Virginia* v. *Black*, 538 U.S. 343 (2003), neither addressed nor resolved "whether a speaker must have a subjective intent to threaten before his communication will be deemed a true threat." U.S.Br.41. The government does not deny, however, the central role intent played in each of the opinions supporting the judgment. *Id.* at 40-43. But it emphasizes that parts of the majority's opinion used words of inclusion ("*encompass*" and "*type*") U.S.Br.41, and that the Court's description of the general legislative purpose for banning threats (protection against "fear of violence") accords with its preferred reading. *Id.* at 42.

In the same paragraph of *Black* the government quotes—indeed, the *very next sentence* after stating that threat statutes protect against "fear of violence"—the Court held that "[i]ntimidation in the constitutionally proscribable sense *** is a type of true threat, where a speaker directs a threat *** *with the intent* of placing the victim in fear of bodily harm or death." 538 U.S. at 360 (emphasis added). Unless the government contends that there is a category of *non-intimidating* "true threats," the import of that statement is that for a speaker's words to be "constitutionally proscribable," he must "inten[d] [to]

place[] the victim in fear of bodily harm or death." *Id.* at 360.

Moreover, *every* opinion mentioned the importance of subjective intent in "distinguish[ing] between a cross burning done with the [protected] purpose of creating anger or resentment" and one done with the proscribable "purpose of threatening or intimidating a victim." *Id.* at 366-367 (plurality opinion); Pet.Br.44-45 (relevant excerpts); accord *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 there is no such First Amendment requirement [of intent to intimidate], 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.

The government insists that *Black* focused on intent to intimidate only because without it, "a defendant could be convicted for burning a cross in the context of a movie, a play, or other situation in which a reasonable observer would have understood it not to be threatening." U.S.Br.43. But the plurality cited those examples because "a burning cross is not always *intended* to intimidate," and "contextual factors" are "necessary" to determine "inten[t] to intimidate." 538 U.S. at 365, 366-367 (emphasis added). Tellingly, *Black*'s fifty-plus pages contain not a *single* reference to how a reasonable person would view speech.

D. The Negligence Standard Punishes Protected Speech

The government presents two arguments why its negligence rule accords with First Amendment principles. First, "[a] statement that is threatening to a reasonable person has little legitimate expressive value." U.S.Br.36. Second, jurors' consideration of "context" assures that people will not be convicted "based on a legitimate misunderstanding." U.S.Br.52. Neither argument has merit. While the government strains to make a test based on awareness of words' general "meaning and context" (U.S.Br.15) seem clear and predictable, in practice it would be an indeterminate modern-day "chancellor's foot" rule.

1. It is obvious what facts are relevant under a subjective-intent test—any that tend to establish the defendant's intent to cause fear. By contrast, it is difficult to discern what "facts and circumstances" would be "relevant" (U.S.Br.18) under the government's test, in part because it is even unclear who the reasonable person is: The person to whom the statement is addressed? Bystanders? And if bystanders count, must the speaker know of (or had reason to anticipate) their presence? Such uncertainties compound the inherent unpredictability of the "reasonable person test." Pet.Br.46-47.

The reasonable person test poses particular risks in the context of online speech, where, as here, statements are often reported by self-appointed "monitors" rather than participants in the conversation. See Student Press Law Center Amicus Br.18-19; see p.24, *infra*. Under such circumstances,

there is increased risk that those who report the speech and those who sit in judgment will be unfamiliar with relevant speech conventions. The government offers only unsupported generalities that jurors presumptively set aside preconceptions, U.S.Br.53, but it does not dispute research demonstrating that demographics and background affect jurors' threat perception. Pet.Br.47.

The government's "context" test raises still more questions here. Does the relevant "context" consider that petitioner made *hundreds* of posts, some of which used violent imagery but were obviously joking, or is it enough to consider just those isolated posts that Daniel Hall of the Dorney Park Patrol considered potentially threatening and provided to the FBI—typically without accompanying comments (*i.e.*, "context")? J.A.75-76, 139-140. Does the relevant "context" require considering that *none* of petitioners' "hundreds of [other] Facebook friends" (U.S.Br.2) reported his posts, users continued to "friend" him, and friends "liked" posts underlying his felony conviction? The government's test does not even make clear how much of this "context" the speaker must himself know. Must petitioner know that his wife and the FBI, who were not Facebook friends, were "monitoring" his posts? As part of his "onus" as a speaker, must petitioner assume the risk of unknown readers predisposed to view his posts as sinister?

While the government argues that speakers cannot avoid liability based on their "private and unexpressed intent," U.S.Br.39; *id.* at 16, 21, 25, 35, petitioner unquestionably went to lengths to say that

his posts should not be taken literally. When does a speaker undertaking such efforts—saying, essentially, "the following is not a threat"—satisfy his "onus to avoid communicating through true threats"? Petitioner began using a rapper persona to distance himself from postings; included disclaimers that the posts did not reflect the views "of Anthony Elonis the person," or were "fictitious lyrics" made in "exercising [his] constitutional right to freedom of speech," J.A.344, 331; included statements that it would be wrongful to punish his speech, J.A.333, 334; and even linked commercial works he referenced. J.A.333. Petitioner's posts were sent to "hundreds of Facebook friends" (but not *any* of the parties allegedly threatened), making his posts equivalent to a public reading in a club or cafe. As the government itself suggests, U.S.Br.54-55, "speech that is broadcast to a broad audience is less likely to be a true threat." *United States* v. *Carmichael*, 326 F. Supp. 2d 1267, 1289 (M.D. Ala. 2004) (collecting authorities).

2. While the government asserts that "[a] statement that is threatening to a reasonable person has little legitimate expressive value," U.S.Br.36, it does not deny that "commercial artists" have made valuable contributions using violent language. Nor does it deny the cathartic value of such speech for both speakers and sympathetic listeners. Pet.Br.53; Robin McKie, *Hip-hop therapy is new route to mental wellbeing, say psychiatrists,* The Observer (Oct. 11, 2014), http://goo.gl/YFreXx. The government suggests speakers can be required to "phrase[] [their ideas] in a different way" because "social discourse gains little, if anything, from its expression in the form," of violent language. U.S.Br.36-37. But the

First Amendment does not only protect discourse; it also protects self-expression, and statements containing "nothing of any possible value to society *** are as much entitled to the protection of free speech as the best of literature." *Entm't Merch.*, 131 S. Ct. at 2737 n.4 (internal quotation marks omitted). The government does not deny that forceful, violent, and offensive language has value in communicating intensity of emotion. See *Cohen*, 403 U.S. at 25. And the First Amendment plainly protects speech even when it creates fear. *E.g.*, *Nat'l Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43 (1977) (per curiam).

Although the government contends that it does not advocate a negligence standard, U.S.Br.29, it is hard to know what else to call a rule that bases criminal liability on what "a reasonable person would foresee" a listener would find frightening, J.A.301. The government acknowledges that its rule's application "cannot be predicted with complete certainty." *Id.* at 49. By imposing the "onus" on speakers to avoid crossing a concededly murky line, the government's rule chills protected speech. *Rogers* v. *United States*, 422 U.S. 35, 47-48 (1975) (Marshall, J., concurring).

The only bright line the government appears to offer for its test is *celebrity*. It is hard, otherwise, to explain how it can dismiss Eminem's lyrics as "plainly hyperbole," U.S.Br.54, while petitioner's statements are "clearly threatening," *id.* at 17. The government asserts that statements by commercial artists "do not involve *** remotely analogous" circumstances, *id.* at 55, but cannot explain what

factors are missing. It is not the speaker's "evident emotional disturbance following the breakdown of his relationship with this wife." *Id.* at 55; see, *e.g.*, M.L. Elrick, *Eminem's dirty secrets*, Salon (July 25, 2000), http://goo.gl/CjD20O (noting artist's arrest for confrontation involving estranged wife). Nor is it that the statements are expressed publicly, although petitioner's audience is obviously much smaller.

While the government's rule purports to accommodate established "commercial artists" and authors, U.S.Br.54, the next generation risks felony liability by sharing writings with Facebook friends. The risk is all too real. A 31-year-old musician who habitually posted song lyrics to Facebook was recently detained when he posted lyrics to a song about the Virginia Tech shootings by the band Exodus. Harley Brown, *Man Jailed for Posting Lyrics to Facebook Says "It's Pretty Worrisome"*, Billboard (Sept. 10, 2014), http://goo.gl/z2yUP5. He was charged with a felony carrying a five-year mandatory-minimum sentence for posting words that Exodus could, with the same intent, post with impunity. *That* is a "bizarre result." U.S.Br.38 (internal quotation marks omitted). But it is the logical implication of making a speaker's intent irrelevant to punishment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RONALD H. LEVINE
ABRAHAM J. REIN
POST & SCHELL, P.C.
Four Penn Ctr., 13th Floor
1600 John F. Kennedy Blvd.
Philadelphia, PA 19103
(215) 587-1000

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

JOHN P. ELWOOD
Counsel of Record
RALPH C. MAYRELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

MARK T. STANCIL
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4500

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