No. 13-983

In the Supreme Court of the United States

ANTHONY DOUGLAS ELONIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for transmitting in interstate or foreign commerce "any threat to injure the person of another," in violation of 18 U.S.C. 875(c), requires proof that the defendant subjectively intended his communication to be threatening.

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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, and is available at 2011 WL 5024284.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2013. A petition for rehearing was denied on October 17, 2013 (Pet. App. 61a-62a). On January 6, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 14, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of transmitting in interstate commerce a "threat to injure the person of another," in violation of 18 U.S.C. 875(c).[1] Pet. App. 11a. The district court sentenced him to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a. The court of appeals affirmed. *Id.* at 1a-29a.

1. In May 2010, after his wife moved out of their home with their two young children, petitioner began exhibiting troubling behavior at his workplace, the Dorney Park and Wildwater Kingdom amusement park. Pet. App. 3a. Supervisors sent petitioner home several times after observing petitioner crying with his head down on his desk. *Ibid.* One of the female employees petitioner supervised filed five sexual-harassment complaints against petitioner, including one that alleged petitioner started to undress in front of her at work. *Ibid.* On October 17, 2010, petitioner posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt; the photograph showed petitioner in costume holding a knife to that woman's neck and petitioner added the caption "I wish" under the photograph. *Ibid.* Petitioner was fired the same day. *Ibid.*

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[1] Section 875(c) 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.

18 U.S.C. 875(c).

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

> Moles. Didn't I tell ya'll I had several? Ya'll 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. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

Id. at 3a-4a.[2]

Petitioner also posted statements about his estranged wife. Pet. App. 4a-7a. In one post, he stated: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder." *Id.* at 4a. In response to a posting from petitioner's wife's sister about shopping for Halloween costumes with petitioner's children, petitioner wrote: "Tell [petitioner's son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [petitioner's wife's] head on a stick?" *Ibid.* In October 2010, petitioner posted the following on his Facebook page:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little

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[2] The October 19, 2010 posting about Dorney Park and Wildwater Kindgom was the basis of Count 1 of the indictment, a charge on which petitioner was acquitted. Indictment 1; J. 1.

> cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Ibid.

On November 4, 2010, based on petitioner's Facebook comments, a state court granted petitioner's wife a protection-from-abuse order against petitioner. Pet. App. 4a. Petitioner then posted several additional statements on Facebook expressing an intent to harm his wife. On November 7, petitioner posted the following:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.
>
> I'm just letting you know that it's illegal for me to say that.
>
> It's kind of like a public service.
>
> I'm letting you know so that you don't accidently go out and say something like that

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

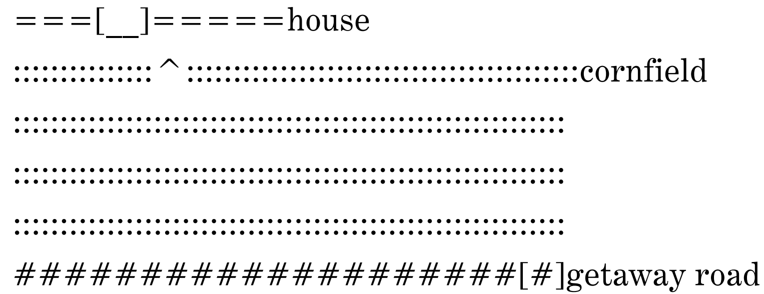
It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal. Yet even more illegal to show an illustrated diagram.



Insanely illegal.

Ridiculously, horribly felonious.

> Cause they will come to my house in the middle of the night and they will lock me up.
>
> Extremely against the law.
>
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Id. at 5a-6a. That statement was one of the bases for Count 2 of the indictment, which charged unlawful threats against petitioner's wife, in violation of 18 U.S.C. 875(c). Indictment 2. Petitioner was convicted on that charge. Pet. App. 10a. Petitioner's wife testified at trial that she took these statements seriously, stating: "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives." *Id.* at 6a (quoting 10/19/11 Trial Tr. 97).

Petitioner continued to post violent messages. On November 15, 2010, petitioner posted the following on his Facebook page:

> Fold up your PFA [protection-from-abuse order] and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place
>
> Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeroes 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

[link: Freedom of Speech, www.wikipedia.org]

Pet. App. 7a. That statement was a basis for Count 2 of the indictment, which charged unlawful threats against petitioner's wife, in violation of 18 U.S.C. 875(c), and for Count 3, which charged unlawful threats to local law enforcement, in violation of 18 U.S.C. 875(c). Indictment 2-3. Petitioner was convicted on both counts. Pet. App. 10a.

On November 16, 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?

Pet. App. 7a. That posting was the basis for Count 4 of the indictment, which charged unlawful threats against elementary school children, in violation of 18 U.S.C. 875(c). Indictment 4. Petitioner was convicted on that count. Pet. App. 10a.

At that point, Federal Bureau of Investigation (FBI) Agent Denise Stevens was monitoring petitioner's public Facebook postings. Pet. App. 7a. Based on

petitioner's postings, Agent Stevens and another FBI agent went to petitioner's house to interview him. *Id.* at 8a. When the agents knocked on his door, petitioner's father answered and told the agents that petitioner was sleeping. *Ibid.* After several minutes, petitioner came to the door wearing a t-shirt and jeans, but no shoes. *Ibid.* Petitioner asked the agents if they were law enforcement officers and asked if he was free to go. *Ibid.* After the agents identified themselves and told petitioner he was free to go, petitioner went inside and closed the door. *Ibid.* Later that day, petitioner posted the following on his Facebook page:

> You know your shit's ridiculous
>
> when you have the FBI knockin' at yo door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down

Touch the detonator in my pocket and we're all goin'

[BOOM!]

Id. at 8a-9a. Those statements were the basis for Count 5 of the indictment, which charged unlawful threats against an FBI agent, in violation of 18 U.S.C. 875(c). Indictment 5. Petitioner was convicted on that count. Pet. App. 10a.

2. On December 8, 2010, petitioner was arrested and charged in a five-count indictment with transmitting in interstate commerce communications containing threats to injure another person, in violation of 18 U.S.C. 875(c). Pet. App. 9a.

Petitioner filed a motion to dismiss the indictment. Pet. App. 9a. He argued that this Court held in *Virginia* v. *Black*, 538 U.S. 343, 347-348 (2003), that statements such as his are protected speech (rather than "true threat[s]") under the First Amendment in the absence of proof that he had a subjective intent to threaten. Pet. App. 9a. The district court denied petitioner's motion. *Id.* at 49a-60a. The court noted that the Third Circuit applies an "objective speaker test," under which a communication is a true threat (and therefore not protected by the First Amendment) if a defendant intentionally made the statement and a reasonable person would foresee that such a statement would be interpreted by those to whom the speaker communicates the statement as a serious expression of an intention to inflict bodily harm. *Id.* at 53a-55a (citing *United States* v. *Kosma*, 951 F.2d 549 (3d Cir. 1991)). The district court concluded that a

reasonable jury could find that petitioner's posts constitute true threats and declined to dismiss the indictment. *Id.* at 55a-56a; see *id.* at 9a-10a.

At trial, petitioner asked the district court to instruct the jury that "the government must prove that he intended to communicate a true threat, rather than some other communication." C.A. App. 45 (emphasis omitted). Instead, the district court's jury instruction included the following:

> To constitute a true threat, the statement must communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. This is distinguished from idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.
>
> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Id. at 546-547. The jury convicted petitioner on Counts 2 through 5. Pet. App. 10a.

Petitioner filed a post-trial motion to dismiss the indictment, for a new trial, and to arrest judgment. See Pet. App. 10a. The district court denied the motion. *Id.* at 30a-48a. The district court sentenced petitioner to 44 months of imprisonment to be followed by three years of supervised release. *Id.* at 10a.

3. The court of appeals affirmed, rejecting petitioner's arguments that the district court erred in refusing to instruct the jury that it must find that petitioner subjectively intended to threaten harm, that the evidence was insufficient to establish a violation of Section 875(c), and that the indictment was invalid because it did not quote the language of the charged threats. Pet. App. 1a-29a.[3]

Relying on circuit precedent, the court of appeals held that the district court correctly declined to give petitioner's proposed subjective-intent jury instruction and instead instructed the jury to apply an objective reasonable-person standard. Pet. App. 11a-21a. The court explained that the First Amendment permits criminal punishment for a communication that qualifies as a "true threat." *Id.* at 11a-13a. The court noted that the "prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 16a (brackets in original) (quoting *Black*, 538 U.S. at 360) (internal quotation marks omitted). The court also explained that applying a reasonable-person standard to assess whether a communication qualifies as a true threat "winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." *Id.* at 20a (quoting *United States* v. *Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), cert. denied, 134 S. Ct. 59 (2013)).

The court of appeals rejected petitioner's argument that this Court's decision in *Black*, *supra*, requires

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[3] Petitioner does not renew his sufficiency challenge or his challenge to the indictment in his petition for a writ of certiorari.

courts to employ a subjective-intent test in determining whether a communication qualifies as a true threat under the First Amendment. Pet. App. 13a-21a. The court of appeals noted that this Court in *Black* had no occasion to consider whether a true threat requires a subjective intent to threaten because the statute at issue in that case (which criminalized cross-burning with the intent of intimidating) "already required a subjective intent to intimidate." *Id.* at 15a; see *id.* at 13a. The court of appeals stated that petitioner's interpretation of the holding in *Black* "is inconsistent with the logic animating the true threats exception." *Id.* at 16a. "The majority of circuits that have considered this question," the court explained, "have not found [this Court's] decision in *Black* to require a subjective intent to threaten." *Id.* at 17a-18a (citing cases). The court of appeals acknowledged and expressed disagreement with the Ninth Circuit's contrary conclusion in *United States* v. *Cassel*, 408 F.3d 622 (2005). Pet. App. 20a-21a.

ARGUMENT

Petitioner contends (Pet. 25-32) that his conviction for transmitting a threatening communication in violation of 18 U.S.C. 875(c) must be reversed because the district court did not instruct the jury that it must find that petitioner subjectively intended to threaten his wife, local law enforcement, elementary school children, or an FBI agent. He argues that such an instruction is required under the First Amendment, as construed in *Virginia* v. *Black*, 538 U.S. 343 (2003). That question does not merit review because the district court correctly instructed the jury that it should determine whether petitioner's communication constituted a true threat under an objective "reasonable

person" standard. Although some disagreement exists among the courts of appeals on the question whether proof of a true threat requires proof of a subjective intent to threaten, review of that question is not warranted because the circuit split is shallow and may resolve itself without this Court's intervention. This Court has repeatedly and recently denied petitions for a writ of certiorari raising the same issue. See, *e.g.*, *Jeffries* v. *United States*, 134 S. Ct. 59 (2013) (No. 12-1185); *Williams* v. *United States*, 133 S. Ct. 1516 (2013) (No. 12-7504); *Mabie* v. *United States*, 133 S. Ct. 107 (2012) (No. 11-9770); *Parr* v. *United States*, 556 U.S. 1181 (2009) (No. 08-757); *Stewart* v. *United States*, 546 U.S. 980 (2005) (No. 05-5541). The same result is appropriate here.[4]

1. Section 875(c) of Title 18 of the United States Code makes it unlawful 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." Because that section targets communication, it "must be interpreted with the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, Section 875(c) reaches only "true 'threat[s],'" rather than "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of true threats. *Id.* at 708. As the Court has explained, true threats are proscribable because they are "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992),

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[4] Another petition for a writ of certiorari that presents the same question is currently pending. *Martinez* v. *United States*, No. 13-8837 (filed Feb. 21, 2014).

including when the speaker does "not actually intend to carry out the threat," *Black*, 538 U.S. at 360.

Petitioner's argument that proof of subjective intent is required by the First Amendment lacks merit. A large majority of the courts of appeals have rejected First Amendment challenges to Section 875(c) and comparable federal statutes prohibiting the making of various types of threats, holding that the statutes at issue prohibit "true threats" and do not require proof that a defendant specifically (and subjectively) intended for the communications at issue to be taken as threats. See, *e.g.*, *United States* v. *Clemens*, 738 F.3d 1, 2-3 (1st Cir. 2013) (18 U.S.C. 875(c)); *United States* v. *Francis*, 164 F.3d 120, 122-123 (2d Cir. 1999) (same); Pet. App. 11a-21a (same); *United States* v. *White*, 670 F.3d 498, 506-512 (4th Cir. 2012) (same); *United States* v. *Myers*, 104 F.3d 76, 80-81 (5th Cir.) (same), cert. denied, 520 U.S. 1218 (1997); *United States* v. *Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (same), cert. denied, 134 S. Ct. 59 (2013); *United States* v. *Stewart*, 411 F.3d 825, 828 (7th Cir.) (same), cert. denied, 546 U.S. 980 (2005); *United States* v. *Mabie*, 663 F.3d 322, 332-333 (8th Cir. 2011) (same), cert. denied, 133 S. Ct. 107 (2012); *United States* v. *Viefhaus*, 168 F.3d 392, 395-396 (10th Cir.) (18 U.S.C. 844(e)), cert. denied, 527 U.S. 1040 (1999); *United States* v. *Alaboud*, 347 F.3d 1293, 1296-1298 (11th Cir. 2003) (18 U.S.C. 875(c)).

That view is correct. The jury instructions here already screened out statements that constituted "idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger." C.A. App. 547. The statements that qualify as true threats thus have a significant, serious character.

Requiring proof of a subjective intent to threaten would undermine one of the central purposes of prohibiting threats. As this Court has noted, in addition to protecting persons from the possibility that threatened violence will occur, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388; see *Black*, 538 U.S. at 360 (quoting same); Pet. App. 16a (quoting *Black* and *R.A.V.*). A statement that a reasonable person would regard as a true threat creates such fear and disruption, regardless of whether the speaker subjectively intended the statement to be innocuous. Cf. *United States* v. *Castagana*, 604 F.3d 1160, 1164 (9th Cir. 2010) ("Even if a perpetrator does not intend that his false information be believed as indicative of terrorist activity, the false information will nevertheless drain substantial resources and cause mental anguish when it is objectively credible.").

2. Petitioner relies (Pet. 26-28) on this Court's decision in *Black*, *supra*, in arguing that a communication qualifies as a "true threat[]" only if the speaker subjectively intends for his communication to be taken as a serious threat. *Black* did not address, much less resolve, the question whether a speaker must have a subjective intent to threaten before his communication will be deemed a "true threat" outside the protection of the First Amendment.

The question in *Black* was whether a Virginia statute banning cross-burnings with an intent to intimidate a person or group of persons violated the First Amendment because it was content-based. 538 U.S. at 347, 360-363. The Court held that the statute was not impermissibly content-based, explaining that it pro-

hibited all cross-burnings with the intent to intimidate, regardless of the motivation for such actions; it therefore regulated a type of violent intimidation that is particularly "likely to inspire fear of bodily harm." *Id.* at 362-363. A plurality of the Court concluded, however, that the statute's presumption that the burning of a cross was "prima facie evidence of an intent to intimidate" rendered the statute unconstitutional, as interpreted by the jury instructions given in Black's case. *Id.* at 363-367 (opinion of O'Connor, J.). Because some cross-burnings may be protected "political speech" rather than intended to intimidate, the plurality reasoned, the statute as interpreted through the jury instructions "create[d] an unacceptable risk of the suppression of ideas." *Id.* at 365 (quoting *Secretary of State of Md.* v. *Joseph H. Munson Co.,* 467 U.S. 947, 965 n.13 (1984)).

It is true that the Court in *Black* observed both that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," 538 U.S. at 359, and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added). But *Black* did not hold that the category of true threats is limited to such statements. Because the Virginia statute at issue required an intent to intimidate, the Court had no occasion to consider whether the fear and disruption brought about by true threats justify a prohibition of such statements when a person knowingly makes statements that a reasonable person would understand as expressing a serious intent to do harm. The court of

appeals' decision here is therefore consistent with this Court's decision in *Black*.

3. a. Petitioner also argues (Pet. 3-4, 19-23) that some courts of appeals have reconsidered whether it is appropriate to employ an objective standard in the wake of this Court's decision in *Black*. But the only circuit to do so is the Ninth Circuit, and different panels of that court have resolved the question differently.

Contrary to petitioner's suggestion (Pet. 23), for example, the Tenth Circuit in *United States* v. *Magleby*, 420 F.3d 1136 (2005), cert. denied, 547 U.S. 1097 (2006), did not indicate that it should abandon the reasonable-speaker test it had adopted before the decision in *Black*. *Id.* at 1141. Although the Tenth Circuit did cite *Black* for the proposition that "[t]he threat must be made 'with the intent of placing the victim in fear of bodily harm or death,'" *id.* at 1139 (quoting *Black*, 538 U.S. at 360), petitioner acknowledges (Pet. 22-23) that that statement was dictum. The question before the Tenth Circuit, on collateral review, was whether the defendant's appellate counsel had rendered ineffective assistance by failing to challenge the jury instructions on the ground that they did not "convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons." *Magelby*, 420 F.3d at 1139. The court's decision did not turn on whether a subjective intent to threaten is required for a "true threat." See *id.* at 1141-1143. Petitioner also correctly acknowledges (Pet. 22-23) that the Seventh Circuit's statement in *United States* v. *Parr*, 545 F.3d 491 (2008), cert. denied, 556 U.S. 1181 (2009), that the issue of subjective intent might be raised by the decision in

Black was dictum as that court declined to "resolve the issue," *id.* at 500.

The Ninth Circuit is the only court of appeals to issue decisions holding that the First Amendment requires proof of subjective intent to threaten harm, but its approach has been inconsistent, both before and after the decision in *Black*. In *United States* v. *Cassel*, 408 F.3d 622 (2005), the Ninth Circuit considered whether 18 U.S.C. 1860, which makes it a crime to "by intimidation * * * hinder[], prevent[], or attempt[] to hinder or prevent, any person from bidding upon or purchasing any tract of" federal land at public sale, required proof that a defendant intended to intimidate his victim. 408 F.3d at 626-627. The court canvassed pre-*Black* circuit decisions addressing whether various federal statutes criminalizing threats required proof of a subjective intent to threaten or intimidate. *Id.* at 628-630. Some Ninth Circuit decisions, the court noted, had held that no such proof was required if a reasonable person would have understood the defendant's statement to be threatening; other decisions had held that a particular statute required proof of a subjective intent to threaten and that such a proof requirement defeated any First Amendment challenge. *Ibid.* (citing *United States* v. *Hanna*, 293 F.3d 1080 (2002); *Planned Parenthood of the Columbia/Willamette, Inc.* v. *American Coal. of Life Activists*, 290 F.3d 1058 (2002) (en banc), cert. denied, 539 U.S. 958 (2003); *United States* v. *Orozco-Santillan*, 903 F.2d 1262 (1990); *United States* v. *Gilbert*, 813 F.2d 1523, cert. denied, 484 U.S. 860 (1987); *Roy* v. *United States*, 416 F.2d 874 (1969)).

The panel in *Cassel* then concluded that this Court in *Black* had announced a rule that "speech may be

deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." 408 F.3d at 633. Less than two months after the decision in *Cassel*, however, the Ninth Circuit reaffirmed its earlier holding that, in order to prove a threat against the President in violation of 18 U.S.C. 871(a), the government need only establish that a reasonable person would view the statement as threatening, albeit in a case that did not involve a First Amendment challenge. *United States* v. *Romo*, 413 F.3d 1044, 1051 & n.6 (2005), cert. denied, 547 U.S. 1048 (2006). The panel in *Romo* explained that the decision in *Cassel* "did not address whether statutes like 18 U.S.C. § 871(a) require intent." 413 F.3d at 1051 n.6. The court later noted that the Ninth "[C]ircuit has thus far avoided deciding whether to use an objective or subjective standard in determining whether there has been a 'true threat,'" and that, since *Black*, it has "analyzed speech under both an objective and a subjective standard." *Fogel* v. *Collins*, 531 F.3d 824, 831 (2008).

More recently, in *United States* v. *Bagdasarian*, 652 F.3d 1113 (2011), the Ninth Circuit considered a prosecution for violating 18 U.S.C. 879(a)(3), which makes it a crime to, *inter alia*, "knowingly and willfully threaten[] to kill, kidnap, or inflict bodily harm upon * * * a major candidate for the office of President." 652 F.3d at 1116. As the panel in *Bagdasarian* noted, the Ninth Circuit had previously held, as a matter of statutory construction, that a conviction for violating Section 879(a)(3) required proof of a subjective intent to threaten. *Id.* at 1117 & n.13 (citing *United States* v. *Gordon*, 974 F.2d 1110, 1117 (9th

Cir. 1992), overruled on other grounds by *Planned Parenthood*, *supra*). Although it was thus clear under circuit precedent that the government was required to prove a subjective intent to threaten in that case, the panel nonetheless sought to "clear[] up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment." *Id*. at 1116-1117. The panel concluded that "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Id.* at 1117. The panel opined that the contrary statement in *Romo* "must be limited to cases in which the defendant challenges compliance only with the objective part of the test and does not contend either that the subjective requirement has not been met, or that the statute has been applied in a manner that is contrary to the Constitution." *Id*. at 1118 n.14.

The Ninth Circuit is therefore the only court of appeals that has held that any statute criminalizing threats requires proof of a subjective intent to threaten and it has done so in the face of contrary prior panel decisions. Given that *Bagdasarian* was issued less than three years ago, and in light of the possibility that the Ninth Circuit will resolve its apparent internal disagreements through the en banc process, review by this Court of that issue would be premature at this time. Although the Ninth Circuit denied the government's en banc petition in *Bagdasarian*, it may reconsider the question in a future case, particularly in light of the decision below and other recent decisions that all reject the argument that *Black* requires a "subjective" intent analysis in all "true threats" cases. See *United States* v. *Martinez*, 736 F.3d 981,

985-988 (11th Cir. 2013), petition for cert. pending, No. 13-8837 (filed Feb. 21, 2014); *Jeffries*, 692 F.3d at 480-481; *United States* v. *Williams*, 690 F.3d 1056, 1062 (8th Cir. 2012), cert. denied, 133 S. Ct. 1516 (2013); *White*, 670 F.3d at 507-512.

b. Petitioner also argues (Pet. 4, 23-25) that review is warranted because eight state courts of last resort conflict with the federal circuit courts that cover those States about whether a subjective-intent element is required by the First Amendment. Petitioner overstates that concern.

Petitioner argues (Pet. 23) that, although the First and Second Circuits use an objective test, the state courts of last resort in Massachusetts, Rhode Island, and Vermont require proof of subjective intent. Petitioner is incorrect. In *O'Brien* v. *Borowski*, 961 N.E.2d 547 (2012), the Supreme Judicial Court of Massachusetts considered a harassment statute that specifically required the complainant to prove that the defendant engaged in three "or more acts of willful and malicious conduct aimed at a specific person committed *with the intent* to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." *Id.* at 552 (emphasis added). Relying on *Black*, the court in *O'Brien* stated that "[t]he intent requirements in the [state statute at issue] plainly satisfy the 'true threat' requirement that the speaker subjectively intend to communicate a threat." *Id.* at 557. As was true with the statute in *Black*, the Massachusetts statute's explicit intent requirement obviated any need to address whether the First Amendment, as construed in *Black*, required a specific intent to threaten. Any suggestion in the state court's opinion

that a specific-intent requirement is necessary under the First Amendment was dictum.

In *State* v. *Grayhurst*, 852 A.2d 491 (2004), the Supreme Court of Rhode Island likewise considered a statute that prohibited extortion in the form of "an oral or a written threat to harm a person or property, * * * accompanied by the intent to compel someone to do something against his or her will." *Id.* at 515 (quotation marks and citation omitted). The Supreme Court of Rhode Island had previously interpreted that statutory language to require proof of a defendant's "subjective intent [to extort with threats] as demonstrated by his or her conduct and by the words he or she used" and declined to "recognize a reasonable person standard as an element [of] the crime of extortion." *State* v. *Price*, 706 A.2d 929, 933 (1998) (cited in *Grayhurst*, 852 A.2d at 515). The court in *Grayhurst* noted this Court's statements in *Black* that communications intended to be taken as threats are not protected by the First Amendment. 852 A.2d at 515 (quoting *Black*, 538 U.S at 359). But, as with *O'Brien*, any suggestion that the category of true threats is limited to communications that a defendant subjectively intends to be threatening would be dictum.

The Supreme Court of Vermont in *State* v. *Miles*, 15 A.3d 596 (2011), considered whether the defendant had violated a probation condition "prohibiting [him] from engaging in 'violent or threatening behavior'" when he "verbally threatened to kill one Bill Brown" when speaking to a mental health nurse. *Id.* at 597. The court relied on the Eighth Circuit's conclusion in *Doe* v. *Pulaski County Special School District*, 306 F.3d 616, 622-624 (2002) (en banc), that "in determining whether statements are true threats of physical

violence unprotected by [the] First Amendment, courts must examine speech in light of [the] entire factual context and consider several factors, including whether [an] objectively reasonable person would view [the] message as [a] serious expression of intent to harm." *Miles*, 15 A.3d at 599. Viewing "the entire context of [the] defendant's statements," the Supreme Court of Vermont held that the defendant's statement did not qualify as "threatening behavior" because the State had not established that Bill Brown was a real person or that the defendant was not delusional when he made the statement. *Id.* at 598-599. That approach does not conflict with the majority approach of the federal courts of appeals. Indeed, the Eighth Circuit's *Doe* decision recognized that at that time "[a]ll the courts to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm." 306 F.3d at 622. The *Miles* court did not state that it was holding otherwise.

In his final attempt to create a certiorari-worthy conflict, petitioner points out (Pet. 23) that all the States in the Ninth Circuit that have expressed a view on the issue agree with the prevailing view in the federal courts of appeals that an objective standard is appropriate. As discussed at pp. 18-21, *supra*, the extent of any conflict between those decisions and the rule applied in the Ninth Circuit is unclear, as different panels of the Ninth Circuit have expressed different views on this question. Any conflict that does exist may well resolve itself and does not warrant this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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