No. 13-983

In The Supreme Court of the United States

ANTHONY D. ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE RUTHERFORD INSTITUTE,
AMICUS CURIAE IN SUPPORT
OF THE PETITIONER

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QUESTIONS PRESENTED

(1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and

(2) Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free to engage in protected speech activity under the First Amendment without fear of prosecution.

SUMMARY OF THE ARGUMENT

True threats are not protected by the First Amendment because the expectation of violence they

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

carry can severely disrupt the life of the subject of the threat. The subject of a threat can only have this expectation of violence when a threat is credible. If the subject could reasonably find information suggesting that there was no subjective intent to engage in any conduct related to a speaker's statements, a listener should experience no expectation of violence. The subject might still experience fear, discomfort, or unease, but within the bounds of the First Amendment, courts should be loath to punish causes of fear that are not accompanied by any expectation of violence.

Even after an expectation of violence is established, it is not necessarily the case that such a statement is proscribable. For example, threating statements intended as political or artistic speech are afforded a significant degree of First Amendment protection. If subjective intent is a factor excluded from the determination of a true threat, a fact-finder is required to determine an expectation of violence on the basis of fear, which is an impermissible factor for limiting a constitutionally-protected right. In order to protect the First Amendment rights of speakers, courts must ensure that they are criminalizing more than just the unrealized and unrealizable fears of particularly sensitive listeners. A rule that considers only a listener's response to a perceived threat can easily and unjustly tip the scales against an innocent speaker who may have had no ill intent in making their statement. Meanwhile, if proving a speaker's intent is required, a fact-finder must decide a more objective question of fact: whether or not the purported motive is genuine.

Although there are strong arguments in favor of a subjective intent requirement to prove *mens rea*,

we do not make that argument here. *See generally* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y. 283, 314-319 (2001). Instead, we focus on demonstrating that the use of a subjective test in true threat analysis proves to be the most objective measure for determining whether a threat is a constitutionally-proscribable form of intimidation.

ARGUMENT

I. Preventing Intimidation Is a Legitimate Cause for Abrogating First Amendment Rights; Preventing Fear Is Not

> We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., *dissenting*).

Holmes' landmark dissent in *Abrams* demonstrates that only clearly-articulated and imminent harm should justify limiting even speech that we "believe to be fraught with death." First Amendment rights, intended as they are to promote "uninhibited" and "robust" discussion, should only be proscribable upon a showing of significant harm.

"True threats" are excepted from First Amendment protection, but the extent of harm needed to justify this exception has never been completely clear. The exception from protection of true threats arises from the societal interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur", *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Essential to that formulation is the prepositional clause after "fear;" "fear" and "fear of violence" are two very different things. *Id.* A significant amount of protected speech may cause "fear," but remains protected. Pro-Nazi marchers decked out in full regalia marching through a city center heavily Jewish-populated, and hooded KKK members carrying firearms and promising revenge against minorities, might well create a sense of fear in onlookers, but both of these forms of speech remain protected. *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Clearly, fear alone does not give rise to the degree of harm sufficient to abrogate First Amendment rights. The cause of harm that the true threats exception targets is really "the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. 388.

This Court has recently suggested as much. In *Virginia v. Black*, this Court stated that "[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech." *Virginia v. Black*, 538 U.S. 343, 365 (2003). While both cross burnings would undoubtedly cause fear for some, only in the

former case is the cross burning "intimidation" sufficient to constitute prohibited conduct. It should be clear, then, that true threats are only excepted from First Amendment protection due to their capacity to intimidate, not due to their potential to create fear in a recipient listener.

II. A Threat Is Only Intimidating If It Is Credible

"Fear of violence" should only occur if there is a reasonable expectation of violence to be feared. The courts are generally agreed on this principle. Where they differ is on the importance of subjective intent as a factor in determining a reasonable expectation of violence. This amicus suggests that the subjective intent of the speaker should be of prime importance in that determination.

Suppose that, upon receiving a threat, the subject of the threat were certain that the speaker had no intention of carrying it out. In this case, there is no reason to expect violence. When, for instance, the speaker is engaging in a comedy routine or political debate, the text and tone of their threat might, lacking context, evoke fear. But knowing that neither of these speakers intends to carry out their threat, there is no reason to expect violence, and so, crucially, no "fear of violence."

In fact, whenever a threat is received, two bodies of contextual information come with it. The first, the basis of the "objective" test, consists of an analysis of the threat itself to find emotional or rhetorical cues that might trigger fear. This includes connotations of certain words in the statement at issue, the conditional nature of the statement, and

the statement's reception. Such a test operates largely in an information vacuum, failing to consider essential contextual information that might affect how the speech is received.

The second test, the "subjective" test, considers information about the speaker and the context in which the speech was communicated. This might include considering the message in its totality, the medium of its communication, and the capacity and proclivity of the speaker to carry out the message's objective.

To satisfy an "objective" test, a fact-finder need only determine that a reasonable person receiving the threating statement, without considering the second body of information, would be afraid. However, in reality, just by virtue of being a "listener" in a given exchange, every "listener" is exposed to this second body of information that provides the essential context for evaluating a statement. If that information would reasonably change their opinion of the threat, there is no reason to exclude that information, as the "objective" test does.

Moreover, even if the "objective" test is satisfied, and the subject of the threat can be reasonably expected to feel fear, that does not mean that they can reasonably expect violence. It is only the "subjective" test that determines the probability of violence, and therefore only the "subjective" test that can establish an expectation of violence.

Importantly, we do not suggest that the subject of the threat should be expected to perfectly understand the state of mind of the speaker. What we assert is that at least some of the second body of

information is communicated alongside the threat; that information should be used to construct probable intent. After all, if the subject has or could reasonably be expected to get information that suggests that a speaker has no intention of carrying out the threat, there should be no expectation of violence.

For example, if a listener could reasonably discover that the speaker purchased a rifle shortly after threatening to shoot the listener, it would be reasonable to assume that the speaker, now having the means to carry out the threat, could intend to actually do so. Conversely, if the subject could reasonably discover that the threat was part of a comedy sketch routine, or was a flippant statement made in jest, it would be reasonable to assume that the speaker did not intend to carry out the threat. The extent of information that we should expect a listener to know or find out is case-specific, but almost certainly includes the overall purpose of the statement made, the medium of communication, whether the statement is quoting or parodying a popular source, and any known facts about the speaker or the circumstances in which the threatening statement was made.

As proof of concept, the 8th and 9th Circuits have determined that certain facts about the state of mind and intentions of the speaker must be included in the determination of a true threat. In *United States v. Barcley*, 452 F.2d 930, 933 (8th Cir. 1971), the 8th Circuit ruled that "language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening" is not a true threat unless there is "evidence serving to remove that ambiguity." This is because, in the case where the

nonthreatening meaning is intended, there can be no expectation of violence. Of particular note in this case is that the accuser is rightly responsible for proving the speaker's intent.

Similarly, in *United States v. Frederickson*, 601 F.2d 1358 (8th Cir. 1979), the 8th Circuit determined that the statement, "Well, as soon as my toys get here I will eliminate all the pigs from the president on down" was considered "no more than a crude method of expressing antagonism towards the arresting officers and law enforcement figures generally," and therefore not a true threat. Using this standard, Elonis' state of mind – one of merely "expressing antagonism" and not one of a serious intention to follow through with his supposed claims to employ violence – matters.

Additionally, and particularly instructive for Elonis, the 9th Circuit has ruled that "plaintiffs may be unreasonable in fearing severe threats of physical retaliation because they are made via the internet." *Doe v. Kamehameha Sch./Brn. Pauahi*, 625 F.3d 1182, 1190 (9th Cir. 2010). The court has rightfully made such a determination, acknowledging that the very nature of the internet as an open and unrestricted medium for communication, provides fertile ground for overstatement and hyperbole, and that a significant number of statements that would be considered "threatening" in face-to-face interactions, are not taken as seriously when made on the internet. Such an understanding – that threatening statements made on the internet do not necessarily imply any actual intent to carry out a violent act – more accurately represents the reality of the internet as a communication medium.

This is particularly true on a "social networking" medium like Facebook, where people who insult, threaten, exaggerate, pontificate or use other extreme rhetoric are given "likes," and where hyperbole is generally rewarded. Just as a comedian who is applauded for making progressively more threatening statements will continue upping the ante, so too will a Facebook user whose threatening comments are "liked" feel inclined to continue posting increasingly radical rhetoric.

In the cases cited above, a subject who ignores the body of information pertaining to the state of mind of the speaker, in other words a subject who applies the "objective" test, might feel fear even though there is no expectation of violence. First, it would be reasonable, albeit unfair, to always view comments directed at individuals in the worst possible light. Without considering the intentions of the speaker, then, a comment having two plausible meanings could be assumed to be threatening, unjustifiably punishing a speaker for the listener's decision to interpret the speaker's speech a certain way. Moreover, this assumption would prevail even if a cursory review of the intentions of the speaker suggested that the non-threatening meaning was the one intended, and so no expectation of violence existed.

As a second example, in the *Frederickson* case as the 8th Circuit astutely recognized, the probability that a suspect would attack all police officers and the President while in custody was negligible. The arresting officer could not expect violence because upon arrest he would have personally determined that Frederickson had no means to carry out his threat. However, under an

"objective" test, a fact-finder could ignore the lack of an expectation of violence and convict based only on the clear rhetoric of the statement itself. This effectively criminalizes expressions of antagonism, especially towards law enforcement. Only a "subjective" test, considering the intention of the speaker to carry out a violent act, can prevent non-proscribable threats, from being prosecuted.

Third, the subject of an internet threat using an "objective" test could disregard the general lack of seriousness on the internet even if it was communicated in an environment where extreme comments are made for the purpose of arousing controversy, but are generally understood not to be taken seriously. Unless a "subjective" test is applied, and the body of information pertaining to the state of mind of the speaker is included in the analysis, the lack of a reasonable expectation of violence would, in principle, be irrelevant.

III. Politically-Motivated Speech that Intimidates Is Not Necessarily "Threatening" Speech

Due to the nature and intentions of the First Amendment, core political speech "occupies the highest, most protected position" in the hierarchy of constitutionally-protected speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992). ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment"). Just as political messages are strongly protected by the First

Amendment, so too is political hyperbole, even when it includes a threat. *Watts v. United States*, 394 U.S. 705, 708 (1969). Even though Watts arguably threatened the President by saying that "the first man I want to get in my sights is L.B.J.," the fact that his statement was made during a political rally suggested that it was first and foremost a political message, and that the threat was merely use of rhetoric. *Id.* at 706. Once it was established that his message overall was intended as political speech, it was granted significant protection despite its abusive nature. This Court found that "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact," ultimately agreeing that Watts's "only offense here was a kind of very crude offensive method of stating a political opposition to the President." *Id.* at 708 (Internal citation omitted).

Based on this Court's statements in *Watts*, political messages that are "vituperative, abusive, and inexact" are still political messages deserving of First Amendment protections no less than more sterile political speech. Thus, the medium of communication and the setting of the speech – both factors in determining the state of mind of the speaker – are necessary considerations in determining whether or not a message is, taken as a whole, political.

Moreover, this enhanced protection for speech intended as political speech goes further than protecting only speech at political rallies:

> Although the petitioner in the present case was not at a political rally or engaged in formal political discussion,

> the same concern [of criminalizing constitutionally protected political speech] counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity.

Rogers v. United States, 422 U.S. 35, 44 (1975) (Marshall, J., concurring).

Later in his concurrence, Justice Marshall acknowledges that using an "objective" test, especially when it comes to "expression of political enmity," is likely to "have substantial costs in discouraging the 'uninhibited, robust, and wide-open' debate that the First Amendment is intended to protect." *Id.* at 48, *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Finally, and most clearly, even threats that do, in fact, intimidate are sometimes protected by the First Amendment when they are intended to be received as political speech:

> To the extent that the court's judgment rests on the ground that "many" black citizens were 'intimidated' by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment.

NAACP v. Claiborne Hardware, 458 U.S. 886, 921 (1982).

In *Claiborne Hardware*, this Court granted constitutional protection to the statement, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck," when uttered

by boycott supporters to potential store patrons. *Id.* at 928. Thus, when it comes to speech intended as political speech, even intimidating comments are not necessarily proscribable. In determining the standard for conviction, then, the political intentions of the speaker are of prime importance.

IV. The "Subjective" Intent Test Is a More Objective Standard than a Purely "Objective" Test

In addition to ignoring crucial information about the credibility and motivations of a threat, an "objective" test fails to truly be objective. Fact-finders asked to perform an "objective" test must determine whether a reasonable person would feel afraid. This does not mean that they have to determine that there is a reasonable *cause* for the fear; they must only find that fear could occur. Fear can occur for a variety of reasons independent of the threat or the circumstances of its creation. Stereotypes, prejudices, attribution, association, fear conditioning, and paranoia can all contribute to fear, regardless of whether a comment is actually intimidating. Since a fact-finder is meant to represent the opinion of the average member of society, much of the stereotyping, prejudice, attribution, association, fear conditioning or paranoia that is shared by the majority of a population might covertly serve as an illegitimate basis for a finding of fear. Employing a solely "objective" test institutionalizes these potential prejudices, which validates popular fear-based perceptions and criminalize speech not intended to be threatening.

Indeed, in *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997), a jury convicted the defendant for threatening an FBI agent in a voicemail message saying, "The silver bullets are coming." The FBI agent believed the message constituted a death threat, while the defendant argued that he meant "silver bullets" to describe "a clear-cut simple violation of the law." Fulmer had been providing information to the FBI agent about alleged illegal acts and argued that "silver bullets" meant the crucial evidence needed. On this basis, the jury found that the message contained a true threat. Leigh Noffsinger, Notes & Comments, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 Wash. L. Rev. 1209, 1219 (1999).

Fulmer represents the dangers inherent in applying an objective test. In *Fulmer,* the jury applied an "objective" test to find that the FBI agent reasonably felt fear, despite multiple witnesses attesting to Fulmer's prior use of the term "silver bullet" to mean "a clear-cut simple violation of the law." *Fulmer*, 108 F.3d 1486. This supports the notion that juries, influenced by existing prejudices, are often predisposed to seeing ambiguous statements as threatening even when they are not intended to be so. In *Fulmer* the offending comment was intended to *help* the FBI agent by informing him of critical information for his case. Nonetheless, the jury found against Fulmer mostly on the grounds that the FBI agent, the accuser, found the message "scary," and without adequately considering the context of the statements and the speaker's understanding of his own speech. The blind application of an "objective" test to determine the

probability of fear from the perspective of an accuser unfairly favors any accuser who is able to adequately express fear.

Conversely, a "subjective" test relies not on a determination of fear, but on a determination of probable intent. While certain stereotypes might still plague this test, it is generally easier for a jury to determine whether a speaker is truthful about their intentions—a more fact-based inquiry—than for them to determine whether an individual should or would feel fear in a given circumstance – an evaluation of an individual recipient's emotional state. Since the "subjective" test eliminates difficult-to-define emotional reactions from the fact finder's calculus, the "subjective" test is, between the two, a more objective standard.

CONCLUSION

Both credibility and a lack of political motives are needed to constitutionally proscribe intimidating speech that does not threaten imminent lawlessness. Subjective intent is needed to prove credibility and non-political intentions. In addition, a "subjective" intent test is more objective than an "objective" test. As a result, finders of fact should be required to determine subjective intent as proof of a true threat.

Respectfully submitted,

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